

BEFORE THE HON'BLE HIGH COURT OF KARNATAKA AT BANGALORE

W.P. NO. 8511 / 2020

I.A. No. ____ / 2020

BETWEEN

SANGAMA by its Director and Anr.

PETITIONER

AND

STATE OF KARNATAKA & Ors.

RESPONDENTS

AND

Jeeva

A Registered Public Charitable Trust

Having its Office at:

#12, 1st Cross, 4th Main, Shreyas Colony,

J.P. Nagar, 7th Phase, Bangalore - 560078

Represented by its Executive Trustee

Ms. Uma @ Umesh P.

IMPLEADING APPLICANT

APPLICATION FOR IMPLEADMENT / INTERVENTION UNDER ARTICLE 226
OF THE PETITION READ WITH ORDER 1 RULE 10 (2) READ WITH SECTION
151 OF THE CODE OF CIVIL PROCEDURE, 1908

The Impleading Applicant / Intervenor most respectfully submits as follows:

1. The present Writ Petition has been filed by the Petitioner seeking relief in the recruitment for filling up vacancies of a total of 2672 posts including 2420 vacancies to the post of Special Reserve Constable Force and 252 Bandsmen posts as per Notification No. 15/Recruitment-4/2019-2020 dated (Men & Women) issued by Respondent No. 3. The impugned notification calls for filling up of the afore stated vacancies, specifies only 'Men' and 'Women' as the genders which can apply for the vacancies. It is submitted that throughout the impugned notification the age, weight, and

other specifications are given pertaining separately only to 'Men' and 'Women', in total disregard of transgender persons. The Petition seeks to pray for inclusion of a transgender categories at par with other two gender categories mentioned, and to frame a scheme for reservation for the transgender community in the recruitment to post of Special Reserve Constable Force as well as Bandsmen.

2. In this regard, the Applicant being an organization working extensively on rights of transgender persons and that works for the transgender community in Karnataka seeks to implead / intervene in the present proceedings before this Hon'ble Court.
3. The Applicant organisation is a registered public charitable trust working for the right of transgender persons and represented by its Authorized Representative Umesh P. The Applicant organisation "Jeeva" is working extensively by creating a platform for sexual minorities to participate equally in society, build a sustainable livelihood, and attain quality of life, self-esteem, and dignity for the transgender community in Bangalore and other parts of Karnataka. The Applicant strives to build a society where all people can live in peace and express themselves freely irrespective of their gender identity or sexual orientation. As a community led organizations, Jeeva brings together working-class sexual minorities of different orientations in its intervention and reflects their aspirations. Its Objectives are to improve mental health status of sexual minorities by providing counselling, using ART therapy, improving the knowledge and skills of social workers, developing links and referrals to various governments, advocating and expanding mental health services to sexual minorities, facilitate conversations between sexual minorities and others in society. It aims to work for the inclusion of sexual minorities in all aspects of life and livelihood- through policy changes, expanding livelihood options, promoting financial planning, training's and mentoring to start

their own enterprise, advocating with the government and private sector for employment opportunities and social welfare measures for sexual minorities. It also seeks to amplify the voice of sexual minorities through community media by facilitating the production of print and audio – visual materials (training and other support) and sensitizing mainstream media on issues of sexual minorities, setting up and running community radio stations, and facilitating sexual minorities in getting employed in the mainstream media. The Applicant has been part of previous petitions before this Hon'ble Court challenging the constitutional validity of Section 36A in the Karnataka Police Act, 1963.

(A copy of a news report in NewsClick titled 'Transgender Communities in Karnataka Protest Against BJP Minister Slur' dated 20.09.2019 is annexed herein and is marked as ANNEXURE – A)

4. The Applicant has filed the present Application seeking that horizontal reservations to be provided to transgender persons in public employment and to provide assistance in the complex legal issues that arise with regard to reservation for transgender persons and how they impact the trans community.
5. It is submitted that the decision in *NALSA v. Union of India (2014) 5 SCC 438* (NALSA) of the Hon'ble Supreme Court was a watershed moment for transgender rights. The Hon'ble Supreme Court recognised the discrimination faced by transgender persons and held that the right to life under Article 21 of the constitution includes the right to self-determine one's gender identity and that no one should be discriminated on the basis of their gender identity which can be male, female or transgender. Further, noting the centuries of discrimination faced by the transgender community, the Hon'ble Supreme Court directed that steps and measures are required to be taken by the Centre and State Governments to

integrate the transgender community into society. Supreme Court held that:

“We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.”

6. The direction of the Hon'ble Supreme Court to provide reservations for transgender persons has not been properly followed and implemented by the Respondent State Government. In 2017, the Respondents issued a Karnataka State Policy on Transgender Persons which specifies that positive discrimination measures and reservations be undertaken and provided for transgender persons in Government, Private, MNC and self-employment sector but does not specify how it will be implemented. (A copy of the Karnataka State Policy on Transgender, 2017 is annexed herein and is marked as ANNEXURE – B)

- I. The Need for Horizontal Reservations for Transgender Persons and not under OBC category

7. It is submitted that the Respondent State Government filed an affidavit in the present petition stating that the Karnataka State Government has already initiated necessary procedure to bring suitable amendment to the relevant Government Order to consider providing suitable reservation to Transgender persons and a proposal has been made to consider transgender persons under one of the categories of Other Backward Classes (“OBC”) for the purpose of recruitment. This is to be done by the examination of request to be included as a Backward Class as per the Karnataka State Commission for Backward Classes Act, 1995.

8. It is most respectfully submitted that reservations for transgender persons ought not to be provided under the OBC category but should be provided as 'horizontal reservation' as a separate special category like the reservation provided for women and persons with disabilities, which can then be interlocked with other social categories of vertical reservation of SC/ST/OBC etc. The present proposal of the Respondent State government to include transgender persons within the OBC category would not allow the following:

- (i) SC and ST transgender persons or transgender persons from other backward classes would not be able to seek the benefit of reservation under those categories, and would just come within the OBC category;
- (ii) If a transgender person is already from an OBC category, they will not get any additional benefit from such reservation;
- (iii) Within the OBC category, the chances of transgender persons getting any posts would be very slim, as they would have to compete with other members of the OBC category.

9. It is submitted that therefore, instead of providing reservation to transgender persons by including them under the OBC category, which is a form of vertical reservation, the reservation should be horizontal as a separate category for transgender and intersex persons on the basis of gender identity.

10. It is submitted that in *Indra Sawhney v. Union of India, (1992) Supp. (3) SCC 217*, the Hon'ble Supreme Court of India held that reservations may be either vertical or horizontal. Vertical reservations are social reservations given under Article 16(4) in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes, while horizontal reservations are special reservations, which cut across vertical reservations. Such horizontal reservations, for instance, are provided to

persons with disabilities under Article 16(1). After *Indra Sawhney*, in *Anil Kumar Gupta v. State of Uttar Pradesh*, (1995) 5 SCC 173 and *Rajesh Kumar Daria v. Rajasthan Public Services Commission & Ors.* (2007) 8 SCC 785, the Hon'ble Supreme Court of India has reiterated that there are two kinds of reservations, being vertical reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes under Article 16(4) and horizontal reservations various groups such as ex-army personnel, displaced persons, women under Article 15(3) and persons with disability under Article 16(1). Horizontal reservations are interlocking and cut across vertical reservations whereby reservations under a horizontal category are provided within an existing category of vertical reservations. Hence, transgender persons should also be provided horizontal reservations under a 'transgender' category.

11. It is submitted that because horizontal reservations cut across vertical reservations, it allows for reservations not just on the basis of one identity i.e. gender but enables reservations to be provided where a person has more than one significant identity such as transgender status and SC / ST or OBC. Therefore, horizontal reservations enable reservations to be provided to transgender persons under their respective caste category and therefore, takes into account the distinctions that may exist in one community or group based on different caste status. Further, horizontal reservations ensure that only persons under the same caste category are only required compete with each other for seats in public employment. Thus, reservations for transgender and intersex persons should be provided horizontally under the respective Scheduled Caste, Scheduled Tribes, Other Backward Class and Open Competition categories.

12. It is submitted that reservations for transgender and intersex persons should be provided horizontally as a separate category under the 'gender identity' or 'woman' category. In *NALSA v. Union of India*, the Hon'ble

Supreme Court held that gender identity is an attribute of sex under Articles 15 and 16 and further that transgender persons have a right to self-identify their gender identity. Further, the Hon'ble Court noted that transgender persons are discriminated on the basis of their gender identity. Therefore, reservations for transgender and intersex persons should also be provided on the basis of their gender identity in a horizontal manner, similar to the manner in which horizontal reservations are provided for women on the basis of sex.

13. It is submitted that in Tamil Nadu, the state government included transgender persons within the backward classes category known as Most Backward Classes ("MBC") which is equivalent to the OBC category in Karnataka. However, the Madras High Court has in several judgements directed that instead of including transgender persons within the MBC, post based reservation (or horizontal reservation) in each vertical category be provided instead for transgender persons. These judgements are as follows:

- (i) In ***Swapna & Ors. v. Chief Secretary, W.P. No. 31091 of 2013***, the Hon'ble Madras High Court specifically held that reservations be provided to transgender persons in education and employment on a percentage or post basis where atleast one post be made available for transgender persons in the different categories of SC, ST, MBC etc. Such horizontal reservation in each vertical / social category would ensure that transgender persons in each category would atleast get some posts.

(A copy of the judgement in ***Swapna v. Chief Secretary, W.P. No. 31091 of 2013*** is annexed herein and is marked as ANNEXURE –

C)

- (ii) In ***Tharika Banu v. The Secretary to Government & Ors. W.P. No. 26628 of 2017***, after considering the fact that the State government had included transgender persons within the MBC

category, the Madras High Court directed the government to issue guidelines on reservations in employment.

(A copy of the judgement in *Tharika Banu v. Secretary to Government, W.P. No. 26628 of 2017*, is annexed herein and is marked as ANNEXURE – D)

- (iii) In *K. Prithika Yashini (Transgender) v. Chairman, Tamil Nadu Uniformed Services Recruitment Board (2015) 8 MLJ 734*, the Madras High Court directed the government to include 'transgender' as a separate category.

(A copy of the judgement in *Prithika Yashini v. Chairman, (2015) 8 MLJ 734* is annexed herein and is marked as ANNEXURE – E)

- (iv) In *The Chairman v. Aradhana W.A. No. 330 of 2018*, even though transgender persons were included under MBC, the Madras High Court held that there was no reason why relaxation in age provided to destitute widows and ex-servicemen and the like should not be extended also to transgender persons. The court directed all concessions and relaxation of conditions for transgender persons because the aim of the Government should be the upliftment of transgender persons in every manner possible.

(A copy of the judgment in *Chairman v. Aradhana, W.A. No. 330 of 2018*, is annexed herein and is marked as ANNEXURE – F)

14. It is submitted that reservations in favour of categories like Scheduled Castes (SC), Scheduled Tribes (ST) and other backward classes (OBCs) under Article 16(4) are held to be "social reservations", constituting vertical categories. Reservations in favour of women, persons with disabilities, freedom fighters, project displaced persons were "special reservations", and are treated as horizontal categories that would cut across vertical reservations. In other words, a special reservation is provided within an existing category of social reservation. This is also a form of recognising the intersection of multiple identities and resulting vulnerabilities. Quotas

for horizontal reservations cut across the quotas for vertical reservations in a manner that is called inter-locking reservations. For example, if 3% of the vacancies are reserved in favour of women, the persons selected against this quota will be placed in the appropriate vertical quota category, namely SC, ST, OBC or the open competition (OC) category.

15. It is submitted that the Supreme Court has held that while Article 16(4) is exhaustive on vertical reservations for 'backward class of citizens', it is not exhaustive on the scope of reservations under the Constitution. Article 16(1) which guarantees "... equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State" permits horizontal reservations for other classes of persons. Persons found eligible by the State for reservation under Article 16(1) would be placed against the relevant quota / category identified under Article 16(4) forming an intersectional grid. Thus, SC or ST women would be placed in the horizontal category of 'women' and would also fall under the vertical category of SC or ST. The Supreme Court has held that reservations for women under Article 15(3) and for other special groups such as persons with disabilities in public employment are a form of special reservation or horizontal reservation. This would be a practical and effective way to implement reservations for transgender persons, as has been done for women under Articles 15(3) and 16(1).

16. It is submitted that the horizontal reservations should be provided which should be compartmentalized as held in *Anil Kumar Gupta v. State of Uttar Pradesh, (1995) 5 SCC 173*. This would mean that transgender and intersex candidates should be selected on the basis of merit lists under the categories of SC, ST, OBC and OC to which they belong. For example, if a transgender candidate belongs to the SC category, they will be assessed by the merit lists prepared within the SC transgender category, thus ensuring fair competition to all the candidates.

17. Hence it is submitted that providing for inclusion of transgender persons under OBC category, as it is currently being proposed in the State of Karnataka, would not be a sufficient scheme for providing reservation for transgender and intersex persons as it would not account for the recognition of the caste status of transgender and intersex persons, if they are SC or ST, OBC or general category, as it places all transgender and intersex persons under the same OBC category. This would deprive transgender and intersex persons of the benefits that they would also be entitled to on the basis of their caste status as they would have to choose between reservations that are available to them on the basis of their caste status or on the basis of their gender identity.

II. **Reservation for transgender persons should also provide for concessions in age, cut-off marks and physical criteria, as provided to other reserved categories**

18. It is submitted that it is not sufficient to only provide the reservation and posts for transgender persons. The reservation policy should also include that all concessions and relaxations such as relaxation in age limits, cut-off marks and physical requirements and examinations will be provided to transgender persons. For example in Tamil Nadu, the Hon'ble Madras High Court has directed that all concessions and relaxations as provided to destitute widows and ex-servicemen should be provided to transgender persons. Only if all these relaxations are provided to transgender persons, will they be provided equal opportunity in public employment.

III. **Reservation should be provided for Transgender persons in public employment, public education, allotment of housing sites and schemes.**

19. It is submitted that the reservation policy of the Respondent State government should not be limited to reservation in public employment, but should include reservation and concessions for transgender persons in

public education which should include both at lower levels and higher education including university education, reservation and concessions in housing schemes including allotment of housing sites and allotment of agricultural land or allotment of land at concessional rates for housing, shelter, occupation, business or recreation centres, reservation in poverty alleviation schemes and development programs, and also reservation of seats in Grama Panchayats, Urban Local Bodies including Town Municipalities, City Municipal councils and municipal corporations. This has been highlighted by the Hon'ble Supreme Court in NALSA and would be required for the full and equal representation and participation of transgender persons in society.

20. It is submitted that the Applicant seeks to place these legal issues on record and assist this Hon'ble Court on the question of reservation for the transgender community in employment and education. It is reiterated that the Applicant has the requisite experience and resources to do so.

21. It is submitted that no harm, loss or injury would be caused to the Parties to the instant petition if the Applicant Organisation is permitted to come on record and place all relevant facts and materials which are necessary for the proper adjudication of the issues raised in the present Writ Petition.

PRAYER

Wherefore in light of the above facts and circumstances, it is prayed that this Hon'ble Court be pleased to:

A. Allow this application and permit the Applicant Organisation to implead / intervene in the present petition as a Respondent:

Jeeva

A Registered Public Charitable Trust

Having its Office at:

#12, 1st Cross, 4th Main, Shreyas Colony,

J.P. Nagar, 7th Phase, Bangalore - 560078

Represented by its Executive Trustee Ms. Uma @ Umesh P.

B.Pass any such further orders as this Hon'ble Court deems fit in the interest of justice and equity.

Place: Bangalore

Date:

Counsel for the Applicants

Rohan Kothari

Address for Service:

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35 Primrose Road

Bangalore-560025
