

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

W.P. No. 6052 of 2019 (PIL)

Grace Banu Ganesan

...Petitioner

-vs-

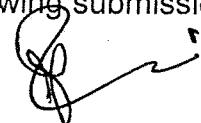
State of Tamil Nadu & Ors.

...Respondents

AFFIDAVIT IN REJOINDER OF THE PETITIONER


I, Grace Banu Ganesan, D/o M. Ganesan, aged about 29 years, residing at 7/4, Annamalai Mesthri Street, Ayyavoo Colony, Aminjikarai, Chennai – 600 029, do hereby solemnly affirm and sincerely state as follows:

1. I submit that the present public interest litigation has been filed seeking implementation of the decision in *NALSA v. Union of India* on providing reservations to transgender persons in educational institutions and public employment in a horizontal manner. In this regard, the present petition prays that this Hon'ble Court direct the Respondents to frame and implement a horizontal reservations policy for transgender and intersex persons in educational institutions, including in schools and higher education, and public employment and further direct the Respondents to issue identity cards to transgender and intersex persons in accordance with the principle of self-identification of gender identity without any requirement of undergoing medical examination, and ensure that the Respondent No. 6 has adequate representation from the transgender and intersex community.
2. The Respondent No. 1 has filed a Status Affidavit setting out the details of the various welfare measures and schemes being undertaken by it to integrate transgender and intersex persons in the mainstream. I submit that I have received and perused a copy of this affidavit and make the following submissions in rejoinder.



3. At the outset, I submit that the said Status Report does not provide any details of the schemes that have been initiated for the benefit of transgender persons. The said Status Report ought to have provided information on the following aspects of the G.O.s produced:

- (i) While the grant amount for employment loan for transgender persons was enhanced to Rs. 50,000 vide G.O. (2D) No. 69, Social Welfare & NMP (SW8-2) Department dated 26.09.2018, clear details of (a) how many transgender persons were provided with a loan with the old amount of Rs. 20,000 (b) thereafter with the enhanced amount of Rs. 50,000 and (c) the details of the businesses initiated by the awardees of the business loan have not been provided.
- (ii) No details of the precise number of transgender persons above the age of 40 years who have been provided with pension of Rs. 1,000 as per G.O. (Ms) No. 235, Social Welfare and Nutritious Meal Programme (SW-8) Department dated 02.08.2012 has been provided.
- (iii) As per G.O. (Ms.) No. 38 Social Welfare and Nutritious Meal Programme (SW-8) Department dated 15.04.2008 whereby the Transgender Welfare Board was first instituted, the Transgender Welfare Board is required to meet once in 3 months. No details on the frequency of the meetings as well as the minutes and decisions taken during these meetings have been provided.
- (iv) Further, vide the same G.O. dated 15.04.2008, it is mentioned that transgender persons are being provided with free sex-reconstruction surgery (SRS). However, the details of this scheme along with the qualifications of the doctors authorised to undertake SRS surgery on transgender persons has not been provided anywhere in the Status Report or the supporting documents.
- (v) The G.O. (Ms.) 152 Social Welfare and Nutritious Meal Programme (SW-8) Department dated 24.10.2008 which provides that the District and State Level committee shall comprise of a clinical psychologist / psychiatrist, do not provide that the said clinical psychologist / psychiatrist shall be



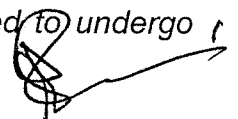
specialists on issues relating to transgender persons i.e. no specialised qualifications are required for the members on the District and State Level Screening Committee despite the fact that they are in charge of reviewing and approving applications of transgender persons for issuance of the identity cards.

4. I submit that the Respondent No. 1 has stated that as per G.O. (Ms) No. 38 Social Welfare and Nutritious Meal Programme (SW-8) Department dated 15.04.2008, the Tamil Nadu Transgender Welfare Board was constituted as a separate board which will provide necessary schemes and policies for transgender persons. This Board was constituted with 11 Official members of different departments and 8 Non-Official members as per the said G.O. As per the new G.O. (Ms) No. 74 SW&NMP (SW 8(2)) Department dated 06.11.2017, the number of Non-Official members was increased to 12, all of whom are transgender persons. However, the Non-Official members on the committee do not have any decision making or voting powers in the said Board and their role has not been clarified. Further, the Transgender Welfare Board does not have any representation of transgender men.
5. I further submit that under the said Transgender Welfare Board, the Respondent No. 1 has constituted separate committees at the State and District Level to identify and certify transgender persons as third gender as per G.O. (Ms.) No. 152, dated 24.10.2008, whereby the State Level and District Level Committees are to identify and verify transgender persons and solve problems/difficulties faced with respect to the issuance of identification certificates. However, I submit that the said committees are not functioning as per the mandate of the Hon'ble Supreme Court in *NALSA v. Union of India* [(2014) 5 SCC 438] whereby the Hon'ble Court has held that no medical procedure or examination should be made as a pre-condition to permitting self-identification of gender identity. The State and District Committees of the Transgender Welfare Board are not issuing Identity cards to transgender persons, without a full body physical examination where persons have to disrobe entirely before all the members, to see if they

have undergone sex re-assignment surgery. Such a physical examination is humiliating, violates our dignity and completely in violation of the principles of *NALSA*. I submit that when I applied for a transgender identity card for myself, I was made to undergo a full body medical examination in 2011 by the State Level Screening Committee before a transgender identification card was issued to me.

6. However, in complete contravention of this direction in *NALSA* and in the absence of any clear guidelines, the State of Tamil Nadu is continuing to insist on transgender persons undergoing a screening test before an identity card is issued by the Transgender Welfare Board. In fact, vide letter dated 21.02.2019 issued by the District Welfare Officer, Thoothukudi, requesting that screening test be conducted for all transgender persons who have not yet obtained their identity card. The form required to be filled up as part of this screening test records information on surgeries and medical procedures undergone and necessarily requires a full body examination of the transgender applicant, which is in violation of their fundamental right to life and privacy under Article 21 and contrary to the directions of the Hon'ble Supreme Court in *NALSA*.
7. In fact, the District and State Level Screening Committee constituted under G.O. (Ms.) 152 Social Welfare and Nutritious Meal Programme (SW-8) Department dated 24.10.2008 provides that the committee shall comprise of a clinical psychologist / psychiatrist, which shows that the State of Tamil Nadu continues to consider transgender identity as a mental illness. This is also clear from the form to be filled up for the screening test requires the psychiatrist to fill in their medical opinion when gender identity is in fact not a medical condition or disorder, as has been held by the Hon'ble Supreme Court in *NALSA*.
8. I submit that in *NALSA*, the Hon'ble Supreme Court had held that:

"Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, signify and freedom and no one shall be forced to undergo



medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”

Therefore, the Hon'ble Court has held that no medical procedures of any form is required before a person self-identifies their gender identity and as such, any such procedure which is in place in the State and District Level Committees which issue transgender identification cards is completely in contravention of the order of the Hon'ble apex court.

9. I submit that the respondent State Government states that as per the G.O. (Ms) No. 235 dated 02.08.2012, 3125 transgender persons have been given identification cards issued by the Transgender Welfare Board and as per the Status Report, as on date 5073 cards have been issued in total. However, the Government Order is silent on the procedure to be followed while issuing the card and the State and District Level Committees have also not laid down any clear procedure and guidelines to issue transgender identification cards, and have not prescribed the necessary documents. As a result, the procedure before these committees is ad hoc and results in the violation of the fundamental rights of transgender persons.

10. I submit that vide an application dated 11.03.2019 under the Right to Information Act, 2005, the following questions were asked of the Respondent No. 1:

“1. Kindly provide me with a copy of the Government Order or Notification which explains the procedures and documents required for granting of an Identity Card for a Transgender Person.

2. Kindly provide me with copy of document which prescribes the procedure for Transgender Person who want to identify as male or female or transgender.

3. Kindly provide me with copy of the Government Order or Notification, which prescribes procedure or states which documents are required for gazette notification for name change and change of gender identity for a Transgender Person.



4. Are medical documents for showing sex change required to be submitted if a transgender person is seeking change of his or her name and gender identity?

5. Kindly provide me with copy of the Government Order or Notification, which provides details of the present members of the Tamil Nadu Transgender Welfare Board."

However, vide response dated 02.04.2019 to the said application, the Respondent No. 1 only provided the documents with respect to questions 1 and 5 and stated that there is no document which prescribes the procedure for a transgender person who wishes to identify as male or female or transgender. As a result, the State and District Level Committees regularly insist on proof of having undergone medical surgeries and procedures, and undertake a full body examination of applicants, as they have done in my case, in violation of the right to life and dignity of transgender persons under Article 21 of the Constitution of India, 1950 and the decision of the Hon'ble Supreme Court in *NALSA*.

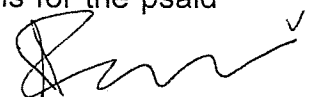
11. I further submit that even though at present reservations are being provided to transgender persons in accordance with G.O. (Ms) No. 90 SW 8(2) dated 22.12.2017, transgender persons are not able to take advantage of such reservations for the following reasons:

- (i) Reservations being provided are vertical in nature and transgender persons who have a community certificate can claim reservations available for that community and in the absence of a community certificate, will be considered as falling under the Most Backward Classes. Further, transgender persons who identify as women or third gender can claim the 30% reservations available for women, while transgender persons who identify as male can only claim the general reservations available to the Most Backward Classes category. A similar approach has been adopted under G.O. (Ms) No. 127 Labour and Employment (T) Department dated 27.10.2014 whereby transgender persons who have obtained an identity card from the Transgender Welfare Board can register



their gender as 'Third Gender' with the employment exchange officer and such persons would be considered under the 'woman' category and vacancy will be reserved in the category of 'woman' and reservations may also be provided under the General category (men and women). As such, this creates a distinction between transgender persons who identify as female/third gender and provides them reservation under the women category while it denies transgender persons who identify as male any reservations in public employment on the basis of their gender.

- (ii) While the Respondent No. 1 has, vide G.O. (Ms) No. 71 dated 06.11.2015 recognised that transgender persons can self-identify their gender as male, female or third gender, the Respondent No. 1 ought not to create a distinction within the transgender category where only those transgender persons who identify as female/third gender can get reservations under the 'women' category while transgender persons who identify as male can seek reservations under their caste category or submit their applications to educational institutions and public employment under the general category.
- (iii) Despite such reservations, transgender persons are not being granted concessions which will enable them to take advantage of such reservations, such as relaxation of the upper age limit to be eligible to apply for public employment. The only relaxation provided is as provided for the MBC category, which is much lower than the benefits and relaxation provided to SC / ST and other categories. Transgender persons are not being provided with sufficient relaxation of age in application for public employment, which creates further obstacles for transgender and intersex persons in accessing education and public employment opportunities.
- (iv) In fact, the State of Tamil Nadu ought to also provide details of the transgender persons who have been employed in the State Government and related services so far. In particular, it ought to clarify total the number of transgender persons who have applied for different posts in the State Government, appeared for the relevant written examinations for the psaid



posts and the number of transgender persons who have cleared such written examinations and been successfully appointed.

- (v) I submit that while the Respondents have undertaken different welfare schemes and measures for the advancement of transgender persons and their integration in mainstream society, the obstacles faced by transgender persons in accessing education and public employment in the State of Tamil Nadu can be addressed and removed only if a clear policy is framed which provides for horizontal reservations for transgender and intersex persons under a transgender / women category and further extend all concessions and relaxations as extended to other vulnerable groups of persons such as Scheduled Castes, Scheduled Tribes, Destitute Widows and Ex-Servicemen and such reservations and concessions are made available to transgender and intersex persons without insisting on any medical surgeries or procedures and without conducting any full-body examinations, which is in violation of Article 21 and the decision of the Hon'ble Supreme Court in *NALSA*.

12. Therefore, I request that this Hon'ble Court be pleased to grant the prayers as prayed for in the Petition and direct the Respondent No. 1 to frame a clear and comprehensive policy on reservations for transgender and intersex persons and the process of issuing identification cards to transgender and intersex persons.

Solemnly affirmed at Chennai

On this ____ day of August 2019

And signed his name in my presence



Before me.

S. Aswini
1960/16.

(S. ASWINI)

Advocate: Chennai

93/59, MRC Nagar,
Chennai - 28

BEFORE THE HIGH COURT OF
JUDICATURE AT MADRAS
(SPECIAL ORIGINAL JURISDICTION)

W.P.NO. 6052 OF 2019

Garce Banu Ganesan

... Petitioner

Versus

State of Tamil Nadu & Others

... Respondents

REJOINDER

Sholka Narayanan (Ms/2105/2016)
Deekshitha Ganesan (Mah/4411/2016)

COUNSEL FOR PETITIONER