**IN THE SUPREME COURT OF INDIA**

## **CIVIL ORIGINAL JURISDICTION**

## **I.A. No. \_\_\_\_\_\_\_\_\_\_\_\_ OF 2019**

IN

## **WRIT PETITION (CIVIL) No. 819 OF 2019**

**IN THE MATTER OF:**

|  |  |  |
| --- | --- | --- |
| Bhavika Pore | … | Petitioner |
|  | Versus |  |
| Union of India & Anr. | … | Respondent |

**AND IN THE MATTER OF**:

|  |  |
| --- | --- |
| Swathi Bidhan Baruah | Applicant |

**APPLICATION FOR INTERVENTION**

PAPER BOOK

(FOR INDEX PLEASE SEE INSIDE)

**ADVOCATE FOR THE PETITIONER:**

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| Bhavika Pore | … | Petitioner |
|  | Versus |  |
| Union of India | … | Respondent |

**AND IN THE MATTER OF**:

|  |  |
| --- | --- |
| Swathi Bidhan Barua  R/O: Pandu Cabin, near Rly BG – Office.  Pin: 781012, Dist: Kamrup (Metro)  Guwahati (Assam) | Applicant |

**APPLICATION FOR INTERVENTION**

|  |  |
| --- | --- |
| TO,  THE HON'BLE CHIEF JUSTICE AND  HIS COMPANION JUSTICES OF THE  HON'BLE SUPREME COURT |  |
|  | THE HUMBLE APPLICATION OF THE APPLICANT ABOVENAMED |

**MOST RESPECTFULLY SHEWETH**:

1. That the Applicant has filed the present application seeking to intervene in the Writ Petition (Civil) No. 819 of 2019. It is submitted that the said Writ Petition prays for a writ of mandamus directing the Respondents to specify Human Rights Courts for each district across India in accordance with Section 30 of the Protection of Human Rights Act, 1993 (hereinafter referred to as ‘the Act’). Further, the Writ Petition also prays for a Writ of Mandamus to appoint Special Public Prosecutors in each Human Rights Court in accordance with Section 31 of the Act.
2. The Applicant is a well-known transgender rights activist based in Gauhati and the founder of the All Assam Transgender Association. Additionally, she is an advocate, practising in the Gauhati High Court. The Applicant is the first transgender person appointed as a judge (Conciliator cum member) at the Lok Adalat in Guwahati, Assam. She is also a member of the Core committee on Transgender Persons, constituted by the State of Assam, comprising of senior officers and persons who have knowledge in the subject to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the State Government to ameliorate their problems (hereinafter referred to as ‘Core Committee’).

(A true copy of the Times of India article titled *“Assam to get its first transgender judge”* dated 13.07.2018 recognising the Applicants work has been annexed herewith and marked as **Annexure A/1**)

(A true copy of the newslaundry.com article titled “*The transgender community has been used for tokenism’: Assam’s first transgender judge Swati Bidhan Baruah”*, dated 26.07.2018 is annexed herewith as **Annexure A/2**)

(A true copy of thelogicalindian.com article titled “*Will Help Create Awareness About Discrimination Against Transgenders,’ Says First Trans Judge from Assam”* dated 15.07.2018 is annexed herewith as **Annexure A/3**).

1. That the Applicant has been working tirelessly for the rights of transgender persons in the North-East of India, including in Assam. In furtherance of the same, the Applicant founded the All Assam Transgender Association on 25.12.2015 with the aim of providing free legal counselling to transgender persons and taking up the issue of enforcement and protection of rights of transgender and intersex persons. The organisation has been involved in the following activities:
2. Advocacy efforts with the Transgender community to make them aware of their legal rights;
3. Organizing rallies aimed at raising public awareness on issues affecting Transgender individuals; and
4. Taking part in improving the literacy levels of Transgender individuals in Assam.

(A true cope of The Telegraph article titled “*Assam backs third gender”* dated 23.03.2019 recognising the work of The All Assam Transgender Association is annexed herewith as **Annexure A/4**)

1. That the Applicant been fighting for the enforcement of the fundamental and constitutional rights of transgender persons. In 2017, she filed a public interest litigation bearing the title ***Swati Bidhan Baruah* v. *The State of Assam and Ors.* *PIL No. 15 of 2017*** in the Hon’ble Gauhati High Court, seeking to implement the directions given by this Hon’ble Court in ***National Legal Services Authority* v. *Union of India (Civ.) 400 of 2012*** (hereinafter referred to as ‘***NALSA’***). The Hon’ble High Court in this petition passed an order dated 22.05.2018 directing the establishment of a Core Committee to draft a report and provide recommendations for the enforcement of the rights of transgender persons within three months. Additionally, the High Court directed the State Government to implement the recommendations provided by the core committee within six months. A draft State Policy on Transgender Persons for Assam was also prepared, and the Applicant played a substantial role in assisting the State Government of Assam in the drafting of this Policy.

(A true copy of the order dated 22.05.2018 by the Hon’ble High Court at Gauhati in PIL No. 15 of 2017 is annexed herewith as **Annexure A/5**)

(A true copy of the draft policy dated 02.03.2019 is annexed herewith as **Annexure A/6**)

1. That the Applicant has also filed an Intervention Application in the case of ***Assam Public Works* v. *Union of India W.P. (Civil) 274 of 2009*** which is pending before this Hon’ble Court, wherein she, through her organisation the All Assam Transgender Association, argued that transgender persons in Assam are disproportionately affected by the National Register of Citizens (NRC) as their names are often excluded for the lack of sufficient documents, thereby violating their rights under Article 14 and 21 of the Constitution.

(A true copy of the Intervention Application in WP(C) 274 of 2009 is annexed herewith as **Annexure A/7**)

(A true copy of the newslaundry.com article titled *“#NRCAssam: No state for transgender persons?”* dated 15.08.2019 highlighting the Applicants activism regarding the NRC is annexed herewith as **Annexure A/8)**

1. That in 2018, the Applicant initiated another Public Interest Litigation bearing the title ***Swati Bidhan Baruah* v. *The State of Assam and Ors. PIL No. 74/2018*** at the Hon’ble Gauhati High Court challenging the non-inclusion of transgender persons in the Central government’s “Ayushmaan Bharat Health Insurance Scheme”. The Court in the aforementioned petition vide order dated 25.03.2019, directed the respondent to detail the steps taken and proposals for the future to ensure the protection of the rights of transgender persons.

(A copy of the Order dated 25.03.2019 by the Hon’ble High Court at Gauhati in PIL No. 74 of 2018 is annexed herewith as **Annexure A/9**)

1. That having been actively involved in the transgender rights movement in specific, and the human rights movement in general, in addition to having been a judge at the Lok Adalat – well versed with the relevant law on the matter – the Applicant seeks to intervene in the present Writ Petition.
2. That the present petition seeks to enforce Section 30 of the Protection of Human Rights Act, 1993 through the specification of Human rights courts all over the country for *the purpose of providing speedy trial of offences arising out of violation of human rights* and as per section 31 *to specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.*
3. That as posited by the Act, for the efficient protection of human rights, the introduction of Human Rights Courts and the appointment of Special public prosecutors is essential. This need is especially pronounced in the case of persons from the transgender community who are routinely discriminated against and face violations of their basic human and constitutional rights. As noted by this Hon’ble Court in ***NALSA****,* Justice J.S. Radhakrishnan stated as follows:

**“**Some of the common and reported problem that transgenders most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places, et al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption. In spite of the adoption of the Universal Declaration of Human Rights (UDHR) in the year 1948, the inherent dignity, equality, respect and rights of all human beings throughout the world, the transgenders are denied basic human rights.” (Para 118)

A similar concern was also raised by Justice Deepak Misra in ***Navtej Johar* v. *Union of India and Ors. W.P. (Civil) No. 572 of 2016***(hereinafter referred to as ***Navtej Johar***) He held:

“Bigoted and homophobic attitudes dehumanize transgenders by denying them their dignity, personhood and above all, their basic human rights. It is important to realize that identity and sexual orientation cannot be silenced by oppression. Liberty, as the linchpin of our constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected.” (Para 248)

1. That the mistreatment noted in the above paragraphs is even more pronounced in the state of Assam where transgender persons (whose total number comes to about 20,000) are routinely treated as untouchables. Notwithstanding the same, the State of Assam has done little for the welfare of transgender persons and protection of their fundamental and constitutional rights. Keeping in mind the same, the need for introducing Human Rights Courts is imperative for persons from the transgender community, more so, for those from Assam and the North-East.
2. That Section 30 of the Act enables States to specify Human Rights courts tasked with the obligation of conducting trials regarding human rights violations. Human rights is defined in Section 2(d) of the Act as – “*the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;”*
3. That “human dignity” in this regard has been defined by this Hon’ble Court on numerous instances. In ***Justice K.S. Puttaswamy v. Union of India, WP (Civ.) No. 494/2012,*** Justice Nariman, upholding the observations in ***NALSA***, stated:

“… the core value of the nation being democratic… would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed…” (para 82). Per Justice Nariman, the right to personal choice was inextricably linked to Human dignity and autonomy, because “… the dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices.” (Para 85)

1. That the rights of transgender persons fall squarely within the rights guaranteeing Human dignity as noted by Hon’ble court in ***NALSA***. In this regard, Justice Radhakrishnan stated:

“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, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.” (Para 20).

Further, noting the failure on the part of the State to protect the human dignity of the transgender community, the court argued:

“For them (Transgender Persons), furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society’s vast majority. Endeavour to live a life with dignity is even worse.” (Para 108).

1. That notwithstanding the recognition of the rights to life and dignity of the transgender community, violations continue till this date. In a Report titled – ‘Study on Human Rights of Transgender as a third Gender’, prepared by the Kerala Development Society (KDS) for the National Human Rights Commission (NHRC) and published in 2017, it is found that persons from the Transgender community face discrimination on multiple grounds which include access to housing, employment and healthcare, the right to marry, right to education, right to political participation, and general social discrimination. The report further states that these issues in their current form remain unaddressed. Notwithstanding this Hon’ble courts decision in ***NALSA,*** the discrimination faced by transgender persons remains rampant and proper redressal mechanism is needed.

(The report titled ‘Study on Human Rights of Transgender as a third Gender’ prepared by the KDS for the NHRC is annexed herewith as **Annexure A/10**)

1. That the continued violation of human rights for persons from the transgender community can be largely attributed to the non-existence of institutions designed specifically for guaranteeing their rights. This issue is doubly problematic for low-income transgender persons or those from SC/ST communities or those with disabilities whose access to justice is further limited on account of the additional discrimination they face due to caste, disability and poverty. It is in light of the same that the specification of Human Rights Courts in every district is essential for the enforcement of rights.

1. That, recognising this need, this Hon’ble Court in ***Dilip K. Basu* v. *State of West Bengal Crl. MP No. 16086 of 1997*** stated:

“The least which the State Governments can and ought to do is to take up the matter with the Chief Justices of the High Courts of their respective States and examine the feasibility of specifying Human Rights Courts in each district within the contemplation of Section 30 of the Act.” (Para 30)

The Court in the aforementioned case while clarifying the interpretation of the word ‘may’ in Section 21 of the Act – which directs State Governments to establish State Human Rights Commissions – held that the even though Section 21 explicitly uses the term ‘may’ instead of ‘shall’, the Section shall be deemed to create an mandatory obligation upon the state government to establish State Human Rights Commissions. In this regard, Justice T.S. Thakur relied on the judgement of this Hon’ble Court in ***Bachahan Devi* v. *Negar Nigam, Gorakhpur 18 (2008) 12 SCC 372*** wherein the court held:

“The ultimate rule in constructing auxiliary verbs like ‘may’ and ‘shall’ is to discover the legislative intent; and the use of the words ‘may’ and ‘shall’ is not decisive of its discretion or mandates”. (Para 21)

Thereafter, noting the intention behind the establishment of the State Human Rights Commissions as being the *–* ‘promotion and the protection of Human Rights are the State level’,(Para 19) this Hon’ble Court held:

“… the power of the State Governments under Section 21 to set up the State Human Rights Commissions in their respective areas/territories is not a power simpliciter but a power coupled with the duty to exercise such power especially when it is not the case of anyone of the defaulting States that there is no violation of human rights in their territorial limits.” and that considering the proliferation of human rights violations in most States, “the contention that no such Commissions are required in those State as there are no human rights violations of any kind whatsoever, cannot be supported.”(Para 20).

1. The Applicant submits that considering the intention behind the specification of Human Rights Courts under Section 30 is the same as the intention behind the establishment of the State Human Rights Commissions, (i.e. ‘promotion and the protection of Human Rights are the State level’) the term ‘may’ in section 30 of the Act ought to be read as ‘shall’, in a manner similar to the Section 21 of the Act.

1. That the need to read Section 30 as a mandatory provision is bolstered by this Hon’ble Court’s decision in ***Imtiyaz Ahmad v. State of Uttar Pradesh 19 (2012) 2 SCC 688*** where the court declared that access to justice is a fundamental right guaranteed under Article 21 of the Constitution. A similar argument is also presented in ***NALSA*** specifically with respect to persons from the Transgender community. In this respect, Justice Sikri stated:

“There is a recognition to the hard reality that without protection of human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is not only to decide the dispute before the Court, but to uphold the rule of law and ensure access to justice to the marginalised section of the society. It cannot be denied that TGs belong to the underprivileged class which is a marginalised section.” (Para 124)

The Applicant submits that the non-existence of designated Human Rights Courts as prescribed under Section 30 of the Act leads to a failure of access to justice thereby precluding the Right under Article 21 of the Constitution.

1. That the abovementioned obligation regarding the promotion of access to justice is further strengthened by Article 39A of Constitution which obliges the State to ‘*Secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.’* Though the abovementioned provision is not enforceable on account of Article 37 of the Constitution, it must be referred to imbue meaning to the ‘access to justice’ requirement read into Article 21 of the Constitution. In light of the same, the Applicant submits that the Respondent is obliged to specify Human Rights Courts under Section 30 of the Act as the same would ensure the enforcement of the Respondent obligation to promote and protect Human Rights and to ensure access to justice.

1. That Section 31 of the Act mandates the appointment or specification of a Special Public Prosecutor in every Human Rights Court, who is tasked with conducting cases in Human Rights Courts. The Applicant submits that with the Specification of Human Rights courts under Section 30, the Respondent is obliged to the appoint or specify Special Public Prosecutors in accordance with Section 31 of the Act.
2. That in addition to the obligations under Sections 30 and 31 of the Act, and Article 21 of the Constitution of India, the Respondent is also obligated to specify Human Rights Courts and appoint Special Public Prosecutors in accordance with its International Law obligations.

1. That the rights and obligations under the Act are inextricably linked to the Respondents’ international law obligations. In this regard, Section 2(d) defines ‘Human Rights’ as including those rights relating to life, liberty, equality and dignity of the individual embodied in the International Covenants and enforceable by the Court in India. The Act further defines International Covenants as the *“International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on the 16th December 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.”* Furthermore, the Act also takes it upon itself to enact or recommend measures for the implementation of treaties and other legal instruments. In light of the same, the Applicant submits the specification of Human Rights Courts is essential for the enforcement of the Respondent’s International Human Rights Obligations.
2. That the Respondent has ratified and is signatory to various International Human Rights instruments including the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Regarding the enforcement of human rights, Article 2(3) of the ICCPR states:

***“Article 2(3) - Each State Party to the present Covenant undertakes:***

***(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;***

***(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;***

***(c) To ensure that the competent authorities shall enforce such remedies when granted.”***

(A copy of the International Covenant on Civil and Political Rights is annexed herewith as **Annexure A/11**)

1. That without an effective enforcement mechanism, the rights enshrined in the abovementioned agreements and treaties remain ineffective.
2. That in addition to the statutory recognition of the abovementioned agreements and treaties, this Hon’ble court has invoked numerous international treaties and standards. In ***NALSA***, while considering a whole host of international standard and comparative law, Justice Radhakrishnan, stated:

“The principles discussed hereinbefore on TGs (Transgenders) and the international conventions, including Yogyakarta Principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, which as sufficient legal and historical justification in our country.” (Para 60)

1. That the Yogyakarta Principles and the Yogyakarta plus 10 principles which were relied upon by this Hon’ble Court in ***NALSA*** and ***Navtej Johar*** prescribe the following obligations upon States –

***“Principle 33 (G) - Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of sexual orientation, gender identity, gender expression and sex characteristics;***

***Principle 34 (E) - Ensure access to effective remedies for violations of human rights, including those caused by non-State actors, that result in poverty and exclusion, and that adversely affect persons on the grounds of sexual orientation, gender identity, gender expression and sex characteristics.”***

It is submitted that to fulfil the abovementioned requirements, which are not contrary to the provisions of the Indian Constitution, the specification of Human Rights Court and the appointment or specification of Special Public Persecutors is essential.

(A copy of the Yogyakarta plus 10 principles are annexed herewith as **Annexure A/12**)

1. That in view of the facts and circumstances narrated herein above, it is respectfully submitted that the applicant herein may kindly be allowed to intervene in the above-mentioned Writ Petition.
2. That it is therefore submitted that it would be in the interest of justice if the Applicant is permitted to intervene in the present Writ Petition and assist this Hon’ble Court on the questions of law raised. That the interest of justice would be served, if the present application is allowed and the prayers made herein below are granted by this Hon’ble Court. That no prejudice would be caused to the parties to the Writ Petition, if the Applicant herein is impleaded in the matter.

**PRAYER**

It is therefore most respectfully prayed that this Hon’ble Court may be pleased to:

1. Allow the present application for intervention and allow the Applicant herein as an intervenor in Writ Petition (Civil) No. 819 of 2019; and
2. Pass such other and further order/s as this Hon’ble Court may deem fit and proper;

**AND FOR THIS ACT OF KINDNESS, THE APPLICANT SHALL AS IN DUTY BOUND, FOREVER PRAY.**

|  |  |
| --- | --- |
| **DRAWN By:** | **FILED BY:** |
| Rohit Sarma |  |
| Advocate |  |

**SETTLED BY:**

Jayna Kothari,

Senior Advocate

**Drawn On**:

**Filed On**:

NEW DELHI