

MANU/RH/1466/2017

Equivalent/Neutral Citation: 2017 (4) WLN 554 (Raj.)

IN THE HIGH COURT OF RAJASTHAN

S.B. Civil Writ Petition No. 14006/2016

Decided On: 13.11.2017

Ganga Kumari **Vs.** State of Rajasthan and Ors.

Hon'ble Judges/Coram:

Dinesh Mehta, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Rituraj Singh and Teja Ram Choudhary

For Respondents/Defendant: Anil Bissa, Addl. Govt. Counsel

JUDGMENT

Dinesh Mehta, J.

1. The case at hand calls for attention, intervention and exercise of plenary powers vested in it, by virtue of Article 226 of the Constitution of India. The case lying in a narrow compass, has a larger socio-cultural concern and even larger canvas.

2. The petitioner known as 'Ganga Kumari', has been claiming herself to be a person belonging to feminine gender. The petitioner having acquired requisite educational qualification, vied for the post of Constable in the Constable Recruitment - 2013, advertised vide notification dated 14.07.2013. The petitioner after clearing the written examination successfully underwent Physical Efficiency Test and Physical Standard Test. Her documents and credentials too were found in order; for which her name was shown in the select list published on 13.02.2015, at Sl. No. 148 for the District Jalore.

3. When the petitioner was called for medical test, it transpired that the petitioner is a 'Hermaphrodite' - commonly known as 'unisex' of 'transgender'. Such being the medical report, the respondents took their hand off and instead of permitting her to join, they pushed her file in dormancy. The petitioner claims to have roamed from pillar to post in anxiety to serve the police department; for which she sent scores of representations also, but all in vein,

4. Faced with such situation, she has knocked at the doors of this Court, invoking its extra ordinary jurisdiction for the following reliefs : -

"(i) by an appropriate writ, direction or order, the respondents may kindly be directed to grant appointment to the petitioner on the Constable in the category of OBC Female in pursuance of select list dated 13.02.2015 forthwith.

(ii) or in the alternative, the respondents may kindly be directed to grant appointment to the petitioner on the post of Constable treating her to be third gender, i.e., Transgender.

(iii) Cost of this writ petition may kindly be awarded in favour of the petitioner.

(iv) Any other appropriate direction or order which this Hon'ble Court deems fit in the facts and circumstances of the case may kindly be granted."

5. Mr. Rituraj Singh, learned counsel for the petitioner vehemently ventilating the cause of the petitioner submitted that she has been discriminated and has not been permitted to join the duties for the reasons, which are neither relevant nor sustainable. He submitted that inaction on the part of the respondents in not permitting the petitioner to serve the police force despite due selection, amounts to rejection of her candidature, which is per-se violative of Articles 14, 16 and 21 of the Constitution of India, despite being oppressive and vindictive.

6. While showing deep concern about the predicament of the petitioner, who is otherwise looked down by the society and treated with disgrace, learned counsel submitted that the rights of transgenders have enticed attention and concern of Hon'ble Supreme Court and at the instance of National Legal Services Authority, it has issued various directions vide its judgment dated 15.04.2014, in the case of National Legal Service Authority v. Union of India & Ors., reported in MANU/SC/0309/2014 : AIR 2014 SC 1863. Counsel for the petitioner navigated the Court through various observations made by Hon'ble Supreme Court to drive home his point that the petitioner despite being a transgender, has a fundamental right to be protected against the inequality or discrimination.

7. Mr. Anil Bissa, learned counsel for the respondents while showing concern and compassion for the petitioner, exhibited the helplessness of the respondent - State; as the third category of gender, other than male and female has not been recognized by the State so far.

8. On the basis of the reply filed by him, Mr. Bissa submitted that the Department of Home, Government of Rajasthan, vide its letter dated 17.03.2017 has apprised that a Bill in relation to third gender (Transgender) is pending before the Parliament and after passing of the same, needful will be done. The crux of his submission has been that the appointment to the petitioner will be/can be given only after promulgation/enforcement of appropriate law in relation to transgender or third gender.

9. Before beginning with the legal issue involved in the instant case, it would be apt to understand the meaning of 'hermaphrodite', which means an individual in whom reproductive organs of both sexes are present. In common parlance, they are called Transgenders' or 'Eunuch'. There are other local terminologies and identities in different parts of India, having specific socio-cultural and religion connotations such as 'Hijras, jogtas, kihnars, sakhi' etc.

10. It will be useful to sail through various Constitutional provisions, to first elucidate as to whether the petitioner, who is sex neutral can claim her purported rights to be human rights or entrenched fundamental rights, guaranteed or insulated by the Constitution?

The journey begins from the Preamble.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN/SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, Social, economic and political

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this 26.11.1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Article 5. Citizenship at the commencement of the Constitution.-At the commencement of this Constitution, every person who has his domicile in the territory of India and;

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

Article 14. Equality before law.-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 16. Equality of opportunity in matters of public employment. (1).....

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

11. It would also be apt to refer to the meaning of the term 'Person', which means "a human being as distinguished from an animal or thing".

12. The dictionary meaning of word 'Hermaphrodite' as defined in Oxford Dictionary (Deluxe Edition) is : A noun 1. A human being or animal combining characteristics of both sexes. A person or thing combining two opposite qualities or functions; 2. An animal having normally both male and female sexual organs, as many snails and earthworms. 3 A flower in which both stamens and pistils are present; a plant having such flowers. B. adjective. 1 Combining the characteristics of or consisting of both sexes; combining two opposite qualities.

13. Unquestionably transgenders are human beings, irrespective of their gender identity; as such they are person and by virtue of Article 5 of the Constitution, they are citizens.

14. Now there cannot be any cleavage of opinion that the Constitution of this Great Country is meant for all the persons, which means all living beings or human race. The petitioner being transgender or 'Hermaphrodite' is also a citizen of India as discussed above and hence Part-III of the Constitution equally Conveys fundamental rights to her and the same are protected.

15. The action on the part of the respondents in not giving appointment to the petitioner, merely because of fortuitous circumstance of being born with indeterminate sex, and called as transgender - or unisex, cannot be scooped out of the protective

umbrella of fundamental rights. The concern shown by Hon'ble Supreme Court and observations made in the judgment aforesaid (MANU/SC/0309/2014 : AIR 2014 SC 1863), out of which some excerpts are quoted below leave no room for ambiguity that a person like the petitioner cannot be denied right of appointment, which is protected and guaranteed by Articles 16(2) and 21 of the Constitution. Denial of appointment and refusal to provide place of posting to the petitioner is clearly contrary to Articles 14 & 16 of the Constitution.

"54. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word person and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression person and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

62. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

74. Article 21, as already indicated, protects ones right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of personal autonomy and self-determination. Hijras/Eunuchs, therefore, have to be considered as Third Gender, over and above binary genders under our Constitution and the laws.

76. Article 14 has used the expression person and the Article 15 has used the expression citizen and sex so also Article 16. Article 19 has also used the expression citizen. Article 21 has used the expression person. All these expressions, which are gender neutral evidently refer to human-being. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of ones personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen

can be discriminated on the ground of gender identity, including those who identify as third gender.

77. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community. 110 (c) The TGs are also citizens of this country. They also have equal right to achieve their full potential as human beings. For this purpose, not only they are entitled to proper education, social assimilation, access to public and other places but employment opportunities as well. The discussion above while dealing with the first issue, therefore, equally applied to this issue as well."

16. Adverting to the facts obtaining in the present case, it is to be noted that the petitioner had competed in the process of recruitment as a female candidate; she has presented herself as a female candidate. As held by the Apex Court, it is a right of a person to claim his/her sex according to his/her wishes.

17. In the present case, the petitioner has claimed herself to be a female and merely because she has been found to be a unisex - Hermaphrodite, it cannot be said that the petitioner's claim regarding gender was incorrect, as she has been found to be having characters of both the sexes. As a matter of fact the petitioner's claim in relation to her gender is correct, as she has been claiming herself to be a female and she has a right to decide, which gender she belongs to. (Re: National Legal Services Authority (supra)).

18. Until and unless the sex claimed by him or her is found, to be contrary to the assertion made, his/her candidature cannot be rejected.

19. In view of above, the writ petition is allowed. The respondents are directed to issue order of appointment to the petitioner and permit her to join duties within a period of six weeks from today. On failure of the respondents to permit the petitioner to join duties by 31.12.2017, from 01.01.2018, she shall be entitled to all the emoluments such as salary, deafness allowance etc. as is payable to the similarly situated recruits. Petitioner shall also be entitled for notional benefits from the date, when the candidate immediately lower to her in merit has joined.

20. Needless to observe that the respondents may carry out petitioner's documents verification before issuing order of appointment to her. If the petitioner's documents are found in order, she shall be forthwith appointed.

21. The harassment and agony meted out to the petitioner, by dint of sheer inaction or recklessness is immeasurable. This Court does not deem it appropriate to confine the same, by imposing the monetary cost.

22. Cost is, thus, made easy.

23. As a parting remark, this Court would like to observe something about the medical test/examination, which has come to its notice during the course of hearing the matter.

Mr. Bissa, has shown rather heavily relied upon petitioner's sex determination report, for which, she had ostensibly given her consent. On perusal of the same, this Court is impelled to delve upon the reasonableness and requirement of sex determination under

the cloak of Medical Test.

24. It is often found that the appointing authority or concerned authorities require a candidate/applicant to mention about his sex (लिंग). In considered opinion of this Court, an enquiry about 'sex' of a person and then its determination by way of medical examination etc. intrudes the person's right of privacy enveloped under Article 21 of the Constitution.

25. According to this Court, until and unless the nature of the job so requires, the appointing authority and employer cannot ask about the 'sex' of a person and in place thereof, the requisite column should be "gender" and in Hindi version, it should be "पुरुष/महिला" in place of लिंग. The reasons for the same are set out here infra : -

One has to understand the subtle difference between 'gender' and 'sex'. Though there is no apparent Hindi translation for the term 'gender' and the term 'ling' (लिंग) is generally used for both the English terms 'gender' and 'sex'.

26. Sex refers to biological status as male or female. It includes physical attributes such as sex chromosomes, gonads, sex hormones, internal reproductive structures, and external genitalia. Gender is a term that is often used to refer the ways that people act, interact, or feel about themselves, which are associated with boys/men and girls/women. While aspects of biological sex are the same across different cultures/aspects of gender may not be.

"Gender identity" refers to a person's internal, deeply felt sense of being either man or woman, or something other or a mixed feeling. Because gender identity is internal and personally defined, it is not visible to others. In contrast, a person's "gender expression" is external and socially perceived. Gender expression refers to all the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.

27. The contemporary term "transgender" arose in the mid- 1990s from the grassroots community of gender-different people. In contemporary usage, transgender has become an "umbrella" term that is used to describe a wide range of identities and experiences, including but not limited to transsexual people: male and female cross-dressers (sometimes referred to as "transvestites," 'drag queens" or "drag kings"); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotype gender norms "

28. Hon'ble Supreme Court in the case of National Legal Services Authority (supra) has held that a candidate should be left free to choose his gender with which he/she identifies himself/herself. As such, if a person has been claiming himself/herself to be belonging to a particular gender, the respondents are bound to accept the same until and unless such candidate seeks to take advantage of a particular gender. If a candidate's external characteristics and behavioral pattern is in conformity with the declaration; and the nature of job does not require him to be of a specific gender, sex determination of a candidate cannot be resorted to.

29. If a candidate states, his/her gender, his credentials and physical parameters are to be considered in accordance with his/her claim; of course in consonance with his other credentials or documents, the same has to be accepted albeit being mindful of the

external characteristics and behaviour. Gender determination can be done only if the nature of work, so requires, such as Female Constable, Auxiliary Nurse Midwifery etc. and there is apparent inconsistency in his declaration/claim.

30. In the present case, the petitioner has applied for the post of Constable as a female candidate; she has cleared the Physical Standard Test on the parameters fixed for a female candidate. In such situation, as the documents are in tune with her gender declaration and no doubt has been expressed about her external characteristics and gender behaviour, petitioner's candidature ought to have been considered as 'female' while giving appointment and there should be no impediment in offering appointment to her. The posts advertised were 'gender neutral' or non-specific, therefore, the petitioner was entitled for appointment as a Constable. Sex of a person may have some relevance while providing posting at a sensitive place, which requires a person of a specific gender, looking to the nature of the duties, he/she is required to discharge.

31. In view of above, it is held that the sex determination of the petitioner, which she had to undergo in a bid to get an employment was arbitrary and violative of right of privacy guaranteed by Article 21 of the Constitution of India.

32. Sex determination can be ordered only if a candidates' general behaviour, external characteristic or society's perception about such candidate is contrary to the declaration he/she has made. A copy of this order be sent to the Chief Secretary of the State of Rajasthan to be circulated to Rajasthan Public Service Commission, Raj. Subordinate Ministerial Staff Selection Board and all other departments so that in all recruitment applications/forms issued henceforth, in place of term "Sex", the term "Gender" be used, while in Hindi version of the form, in place of term "लिंग", term "पुरुष/महिला" be used.

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