

MANU/AP/0085/2022

Equivalent/Neutral Citation: 2022(3)ALT32, 2022:APHC:1371

IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

Writ Petition No. 16770 of 2019

Decided On: 21.01.2022

Matam Gangabhavani **Vs.** State of Andhra Pradesh and Ors.

Hon'ble Judges/Coram:

M. Satyanarayana Murthy, J.

Counsels:

For Appellant/Petitioner/Plaintiff: M. Solomon Raju, Advocate

For Respondents/Defendant: Addl Advocate General-II

Case Category:

SERVICE MATTERS - RECRUITMENT/TRANSFER/COMPASSIONATE APPOINTMENT

Case Note:

Service - Reservation -Whether petitioner entitled to claim reservation either horizontal or vertical reservation, based on socially and educational backwardness or based on gender identity? - Held, no reservation provided to transgender However, as per the direction issued by Hon'ble Apex Court, both Centre and State Governments required to take steps to treat them as Socially and Educationally backward Classes of citizens - Direction issued by Hon'ble Supreme Court is only to extent of taking steps to treat transgenders as socially and educationally backward classes of citizens, but not for creating reserving particular percentage of posts to transgenders - No steps taken by State Government for creating reservation to transgenders on basis of their social and educational backwardness (vertical reservation) - But, based on subsisting rules of reservation in State services, notification impugned in writ petition issued - When Notification issued strictly adhering to subsisting rules, notification cannot be declared as illegal and arbitrary - Even to construe that second respondent violated direction issued by Hon'ble Apex Court in National Legal Services Authority case - Direction only to take steps for providing reservation to transgenders based on their social and educational backwardness - Though, it appears to be in nature of directions, State under obligation to implement it, they did not take any steps till date - After National Legal Services Authority case Transgender Persons (Protection of Rights) Act, 2019 enacted by Central Government and Rules framed thereunder - But, none of these Acts provided any reservation to transgenders, except providing access to employment - In absence of any steps taken by State, failure of its instrumentalities to provide reservation to transgenders does not make notification impugned in this writ petition invalid - No ground to declare notification impugned in this writ petition as illegal or arbitrary - In view of judgment in National Legal Services Authority case to take steps to provide reservation to transgenders, more particularly, no steps taken till date - At best, such failure may attract contempt being filed before competent court, but this Court cannot declare such Notification as illegal and

arbitrary, on basis of such contention - No ground to grant above relief, while rejecting contention of petitioner - Hence, appeal dismissed. [75]

ORDER

M. Satyanarayana Murthy, J.

1. One Matam Gangabhavani, claiming to be transgender filed this writ petition under Article 226 of the Constitution of India, to declare Notification vide Rc. No. 216/R&T/Rect.1/2018 dated 01.11.2018, as it did not make any provision for reservation of appointment of transgender persons as illegal, arbitrary, violative of Articles 14, 15, 19, 21 of the Constitution of India, contrary to the law declared by the Hon'ble Apex Court in Hon'ble Supreme Court of India in National Legal Services Authority v. Union of India and others MANU/SC/0309/2014 : 2014 (5) SCC 438 and consequently issue a direction to the respondents to make appropriate provision for transgender persons and further direct the respondents to appoint the petitioner in Post Code No. 11 - Stipendiary Cadet Trainee Sub-Inspector of Police in the Police Department in the vacant post, kept apart for the petitioner in terms of the order of the Court in W.P. No. 1575 of 2019 dated 13.02.2018.

2. The petitioner was male by birth, underwent Sexual Reassignment Surgery in the year 2003. After the judgment of the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), the petitioner changed gender identity from male to transgender in Aadhar, PAN, Voter ID, Passport in the year 2017. The petitioner also received official certificate as transgender from the Government of Andhra Pradesh. The petitioner came across Notification bearing Rc. No. 216/R&T/Rect.1/2018 dated 01.11.2018 for recruitment to the post of Post Code No. 11 - Stipendiary Cadet Trainee Sub Inspector of Police in Police Department. Though the petitioner was keen on appearing for the said examination through official portal, she realized that there are only two categories provided for the disclosure of gender namely 'Male' and 'Female'. This act of non-inclusion of the transgender is violative of the direction of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and others (referred supra). Further, due to nonavailability of an option to register as transgender, the petitioner was forced to mention identity as female while registering for the examination as per the said notification and the same was accepted and provided with Registration No. 1012386. The petitioner appeared for the first round of recruitment process i.e. Preliminary Written Test held on 16.12.2018 and scored 28% in Paper-I and 21% in Paper-II, thereby, the petitioner was declared 'not qualified' for the next round of recruitment process. The petitioner is a member of BC community, the qualifying score for both papers is 35% respectively.

3. It is contended that the notification issued by the second respondent suffers from inherent flaw and it is contrary to the judgment of the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), where certain directions were issued for providing reservations to transgenders. Contrary to the law, the second respondent did not provide any column for disclosure of transgender identity and reservation for transgenders in the notification. The specific column regarding gender identity is only for identification of male or female, but there is no column for transgenders. Though, there is reservation for various categories of castes, no reservation is provided for transgenders category. Despite it, transgenders are most disadvantaged class and cannot compete with male or female genders.

4. The petitioner contended that, she was born 25 years ago, when acceptance levels of

transgenders in the society was not as it is today and transgenders could not attend even educational institutions where male/female gender children attend. The petitioner filed O.A. No. 23 of 2019 before Andhra Pradesh Administrative Tribunal challenging the Notification dated 01.11.2019. O.A. No. 23 of 2019 was dismissed by the Tribunal on the following grounds:

- a) That the recruitment as per the notification is being proceeded with respect to men and women vacancies only;
- b) The notification is not a general notification for applications from all gender and that the notification is gender specific;
- c) When the notification for recruitment is gender specific, a transgender person is not entitled to compete for the said post along with men and women.
- d) The reliefs claimed in O.A. No. 23 of 2019 relate to decisions to be taken by the Government concerned in the Constitution of India as well as specific laws relating to recruitment and appointment to public post.

5. Aggrieved by the order in O.A. No. 23 of 2019 dated 29.01.2019, the petitioner filed W.P. No. 1575 of 2019 before the Division Bench of this Court. This Court allowed the writ petition, setting aside the orders in O.A. No. 23 of 2019 and remitted the matter to the Tribunal. Due to abolition of Tribunal, the petitioner filed the present writ petition and sought the relief as claimed.

6. The main contention of the petitioner is that, the second respondent failed to comply with the directions issued by the Apex Court in *National Legal Services Authority v. Union of India and others* (referred supra).

7. In *K. Prithikayashini (transgender) v. Chairman, Tamil Nadu Uniformed Services Recruitment Board MANU/TN/4017/2015 : (2015) 8 MLJ 734*, directed the respondents that, by the next recruitment process is carried out, the respondent would have to take corrective measures for including the third gender as a category. Further, it is also stated that the social impact of such recruitment cannot be lost sight of, which would benefit the strength to the case of transgenders. The petitioner must reach the finishing line and not be stopped and disqualified in the middle. It is contended that, the Tribunal erred in not considering the observations made in *K. Prithikayashini (transgender) v. Chairman, Tamil Nadu Uniformed Services Recruitment Board* (referred supra), which facilitates just social standing of a person from a third gender.

8. In *Swapna v. The Chief Secretary*¹, the Division Bench of the Madras High Court directed the State Government to look into the question of a post or percentage based reservation in educational institutions and public employment for transgender persons in furtherance to NALSA judgment.

9. It is contended that the Tribunal is erred in making an observation that the said notification is gender specific and that, as the petitioner is a transgender person, is not entitled to compete with the given post as per the said Notification.

10. It is contended that, the petitioner worked with different departments in Government of Andhra Pradesh during different periods as Village Accountant of Velugu Department at Yadiki Primary Health Centre and presently working as Research Assistant at National Institute of Rural Development & Panchayat Raj. But, the petitioner was denied an opportunity for selection in pursuance of the notification. Hence, the action of

the second respondent in not providing reservation is contrary to the directions issued by the Apex Court in National Legal Services Authority v. Union of India and others (referred supra) and sought a direction as stated above.

11. The second respondent - Chairman, State Level Police Recruitment Board, Andhra Pradesh, Mangalagiri filed detailed counter affidavit on behalf of the first respondent, admitting the facts narrated in the affidavit filed by the writ petitioner, while contending that the Tribunal in its judgment dated 29.01.2019, while quoting the judgment of the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), concluded that the principle cannot be applied relating to particular recruitment notification to the public services and dismissed O.A. No. 23 of 2019. The respondents also admitted about filing of W.P. No. 1575 of 2019 and setting-aside the order passed by the Tribunal in O.A. No. 23 of 2019, while remanding the matter to the Tribunal.

12. It is specifically submitted that the office of the second respondent herein has addressed letter to the first respondent stating that there is no provision in the recruitment rules for consideration of case of transgender person in the matter of recruitment and requested to take policy decision in the matter of employment, keeping in view of the said recruitment rules and judgment of the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), the High Court issued an interim direction on 18.11.2019 in W.P. No. 16770 of 2019 directing to keep one post reserve unfilled under Code No. 11, SCT SI (Civil) until further orders. After issuing provisional selection list of the candidates on 22.07.2019, High Court passed interim order on 18.11.2019 in W.P. No. 16770 of 2019. It is contended that the State Level Police Recruitment Board followed the procedural norms for issuance of provisional selection list before the issue of orders of High Court in the matter and no vacancies are available as on 18.11.2019, the petitioner has not approached in time to seek appropriate relief from the High Court. Hence, the petitioner invoked the jurisdiction of the Court at belated stage.

13. The Government vide Memo No. 830231/Legal-II/A1/2020 dated 29.09.2020 informed that vide G.O. Ms. No. 20 WCDA & SC (Prog.2) dated 30.12.2017, Government approved 'Transgender Policy' in order to include Transgender in society, provide social protection to the Transgender and provide them with proper educational facilities, health facilities and basic amenities such as water supply, sanitation, housing facilities and provision of employment. Further, the Transgender Persons (Protection of Rights) Act, 2019 states that, the appropriate Government shall take steps to secure full and effective participation of Transgender persons and their inclusion in society. Hence, there is no reservation. However, the Transgenders are eligible to apply and get selected on merit. Currently there is no reservation for Transgenders in Government appointments. The Government further informed the Chairman, State Level Police Recruitment Board, Mangalagiri that there is no objection if the Police Recruitment Board decides to appoint a meritorious, eligible Transgender person against a Woman or Men vacancy as appropriate, in Police Recruitment, as per Rules in force and requested to dismiss the writ petition.

14. The petitioner filed reply to the counter affidavit, reiterating the contentions urged in the affidavit, while contending that, till date the respondents did not establish Grievance Redressal Mechanism as required under Section 11 of the Transgender Persons (Protection of Rights) Act, 2019. Section 9 of the Act comes into play and prohibits discrimination in respect of the petitioner employment and that, in the present notification, there are no transgenders to compete with the petitioners and in all possibility, the petitioner is only candidate who applied and was permitted to appear to

written test and physical test also, the petitioner was not allowed. Thus, the selection process of the petitioner is pending and requested this Court to protect the petitioner's interest, directing the respondents to reserve one post Code No. 11, Stipendiary Cadre Trainee (SCT) Sub-Inspector of Police (Civil).

15. It is also contended that, the respondents did not implement G.O. Ms. No. 20 Department for Women, Children, Differently Abled & Senior Citizens (Prog. II) dated 30.12.2017 and did not comply with the directions of the Apex Court issued in National Legal Services Authority v. Union of India and others (referred supra). This itself is sufficient to conclude that the respondents did not act in conformity with the law laid down by the Apex Court and therefore, the Notification dated 01.11.2018 is illegal, arbitrary and requested to grant relief as claimed.

16. During hearing, Sri M. Solomon Raju, learned counsel for the petitioner raised serious contentions about the rights of transgenders or transsexuals, based on various judgments which will be discussed at appropriate stage, more particularly, demonstrated about the negligence of the State to implement the directions issued by the Apex Court in NALSA judgment and failure to provide reservation to transgenders or transsexuals is utter violation of the directions of the Apex Court. Hence, failure to provide necessary column in the application form for disclosing identity of transgenders or transsexuals to identify the sex, while providing column for male and female is clear deviation of the guidelines issued by the Apex Court in NALSA judgment. It is further contended that, though reservation is directed to be provided, it is not specific whether the reservation is based on social reservation or based on physical appearance. But, it is for the State to provide other social and educationally backward class reservations or otherwise frame guidelines by constituting necessary committees on the rights of transgenders and transsexuals to claim reservation in the public employment. Finally, it is contended that, when the petitioner was the sole transgender appeared for the examination, though identifying the petitioner as female, the petitioner must be selected by providing reservation in Stipendiary Cadet Trainee Sub-Inspector and issue a direction to implement "The Transgender Persons (Protection of Rights) Act, 2019" and provide reservation to the transgenders and transsexuals in all public employment.

17. Sri Vivekananda, Learned Special Government Pleader for Respondent No. 2 contended that, the Government is ready to implement the directions issued by this Court in accordance with law. It is contended that the petitioner was male by birth and converted into transfemale, therefore, by birth the petitioner was not entitled to claim the benefit, but subsequent to transformation from male to transfemale, the petitioner cannot be claim such reservations in the public employment as per the judgment of the Apex Court in NALSA case. Moreover, the petitioner cannot be selected being a sole transfemale appeared in the selection process in Stipendiary Cadet Trainee Sub-Inspector, since the petitioner did not secure minimum marks prescribed under different categories in the notification, as minimum marks were not prescribed based on gender identity. Hence, unless the petitioner secures the minimum qualifying mark in the selection process, the petitioner is not entitled to claim selection after permitting to undergo physical test i.e. second round in the process of selection.

18. Sri Vivekananda, Learned Special Government Pleader also reportedly agreed to implement various directions issued by the Supreme Court and the provisions of The Transgender Persons (Protection of Rights) Act, 2019, so also the directions if any issued by this Court in accordance with law, while requesting to dismiss the writ petition.

19. Considering rival contentions, perusing the material available on record, the points need to be answered are as follows:

1. Whether the petitioner is entitled to claim reservation either horizontal or vertical reservation, based on socially and educational backwardness or based on gender identity. If so, whether the petitioner be selected as Stipendiary Cadet Trainee Sub-Inspector though the petitioner did not secure minimum mark prescribed in the notification based on reservations if any?

2. Whether the State - respondents failed to follow the directions issued by the Apex Court in NALSA judgment. If so, whether the Notification bearing Rc. No. 216/R&T/Rect. 1/2018 dated 01.11.2018 be declared as illegal and arbitrary? Whether this Court can issue a direction, while exercising power under Article 226 of the Constitution of India to provide reservations to transgenders/transsexuals?

POINT Nos. 1 & 2:

20. As both points are interconnected, I find that it is expedient to decide both the points by common discussion.

21. It is an undisputed fact that the petitioner was male by birth, as admitted in the second paragraph of the affidavit. Subsequently, underwent Sex Reassignment Surgery or Gender Reassignment Surgery in the year 2003. However, after the judgment of NALSA, the petitioner changed her identity from male to transgender in Aadhar, PAN in the year 2017. Thus, the petitioner was treated as male till 2017, but changed her identity as transgender only in the year 2017. The notification impugned in the writ petition was issued on 01.11.2018 i.e. subsequent to change of her gender identity from male to transgender in the year 2017. The State is unconscious of the directions issued by NALSA and failed to provide a specific column meant for gender identity for transgender in the proforma of application in the Notification dated 01.11.2018 and did not provide any reservation to transgenders, as they are socially and educationally backward and not in a position to compete with ordinary men and women.

22. The petitioner is claiming to be a transgender. The word 'transgender person' is defined under Section 2(k) of The Transgender Persons (Protection of Rights) Act, 2019 (for short 'the Act') as follows:

"(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."

23. The petitioner though born as male by birth, he underwent Sex Reassignment Surgery and became a transwoman, fall within the definition of transgender as defined under Section 2(k) of the Act.

24. In Mrs. S. Sushma & another v. Director General of Police, State of Tamil Nadu², the learned single had made an attempt to define the words and expressions viz Sex, Gender, Sexual Orientation/attraction, Sexual Behaviour, Sexual Identity, Heterosexuality, Homosexuality, Gay, Lesbian, Bisexuality, Bisexuals, Transgender, Trans woman/Transfeminine, Trans man/Transmasculine, Transexual,

LGBT or Queer, Pansexuality, Gay Pride, Pride Parade, Coming Out, Cross-dressers, Gender Dysphoria, Gender Transition, Sex Reassignment Surgery. In the judgment, the word 'transgender' is defined as Transgender refers to individuals whose sense of their own gender (i.e. gender identity) differs from their sex assigned at birth. For example, it could refer to individuals assigned male at birth, who identify themselves as women or as not men, or to individuals assigned female at birth, who identify themselves as men or as not-women. A transgender person may or may not desire gender-affirmation surgery (formerly sex-reassignment surgery) or other procedures, and could have any sexual orientation.

25. When compared to the meaning of transgender referred above with the definition of 'transgender' in the Act, there is slight difference. The definition of transgender in the Act is wider than the meaning explained by the Madras High Court in *Mrs. S. Sushma & another v. Director General of Police, State of Tamil Nadu* (referred supra). The term 'transsexual' refers to individuals who have opted, or plan to opt, through gender affirmation surgery (formerly sex reassignment surgery) or other procedures, to align their external sexual characteristics with their gender identity. Transsexual(ity) is primarily a medical term.

26. Though the petitioner underwent Sex Reassignment Surgery, as admitted by her, she would fall within the definition of transgender as defined under Section 2(k) of the Act, as such there is no dispute with regard to her identity as transgender. Even the respondent-State also did not dispute her identity, but contended that, as the petitioner herself disclosed her identity as female in the application, she was treated as female for the purpose of recruitment. Thus, the petitioner is undoubtedly a transgender. She also produced certificate issued by competent authority for her identity to claim that she is a transgender. Therefore, the petitioner is a transgender and hence the Court has to examine the issue treating the petitioner as a transfemale/transgender for the limited purpose of deciding the present petition only.

27. The main endeavour of the petitioner is that, she is entitled to claim reservation under socially and educationally backward classes. In view of the enactments or rules existing as on date, only men and women are recognized by almost all States including Central Government. The transgender was not identified for the purpose of creating reservation. Constitution of India is also silent as to providing reservation, social justice to third gender, but only limited to men and women.

28. The Preamble of the Constitution guarantees, social, economic and political JUSTICE to all Citizens of India; LIBERTY of thought, expression, belief, faith and worship; and also guarantees EQUALITY of status and opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

29. At the same time, the word 'Citizenship' under Article 5 of the Constitution of India, made it clear that, 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.

30. Thus, the word 'Citizen' is wider term and according to Article 5, every person who was born in the Indian Territory became the citizen of India. Therefore, the transgenders who were born in the territory of India are the citizens of Indian Territory, entitled to equal opportunity.

31. Article 14 of the Constitution of India prohibits discrimination of persons from one another while providing equality before law or equal protection of laws within the territory of India. Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions: property systems, public organizations. There are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality: "formal equality" and "proportional equality". There is a difference between formal equality and egalitarian equality. "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the legal framework of liberal democracy. Proportional equality is equality "in fact" whereas formal equality is equality "in law". Egalitarian equality is proportional equality. (vide M. Nagaraj v. Union of India MANU/SC/4560/2006 : (2006) 8 SCC 212).

32. The petitioner is a transgender and she is entitled for proportional equality. The State is expected to take affirmative action in favour of disadvantaged section of the society, as the transgenders are cursed by everyone in the society; living in distressed condition and most of them are living by begging or engaging in menial work and they are being put to harassment in different ways, both physically, mentally and sexually by different persons. Therefore, transgender are most disadvantaged persons in the society. More so, their number is minimum in the State, but they are not being provided proportional equality in the employment and they are totally neglected by the State without providing even a column in the application form for gender identity of transgender, thereby, it amounts to denial of an opportunity in employment treating them unequals with men and women.

33. Though Article 14 of the Constitution of India prohibits discrimination of any person with others, while providing equal opportunity in employment, the State is limiting such prohibition only to men and women, though the language employed in various provisions of the Constitution reflects to 'a person', but not men and women or third gender. Failure to provide sufficient opportunity to third gender, as the word 'person' includes transgender also, since the word 'person' is a wider term which includes men, women and third gender also.

34. The word 'any person' means -

1. Any person, natural or artificial - whether he is a citizen or an alien - is entitled to the protection of Article 14.

2. The use of the word "any person" in Article 14 in the context of legislation in general or executive action affecting group rights is construed to mean persons who are similarly situated. The classification of such persons for the purposes of testing the differential treatment, of course, be intelligible and reasonable - reasonableness being determined with reference to the object for which the action is taken. (vide T.M.A. Pai Foundation v. State of Karnataka MANU/SC/0905/2002 : (2002) 8 SCC 481, 655 (para 346))

35. Only a person who is aggrieved by the alleged discrimination, can challenge the validity of a law on the ground of violation of Article 14. Again the word 'person' assumes importance, since transgender is also a person, though a third gender is not recognized by the State till passing of the Act. As on date, there is no reasonable classification of men, women and transgender for denial of an opportunity in employment to transgenders, though they are socially and educationally disadvantaged persons in the society. Therefore, such discrimination of transgender from men and women can be said to be arbitrariness, being opposed to reasonableness, is an antithesis to law. There cannot, however, be any exact definition of arbitrariness neither can there be any strait-jacket formula evolved therefore, since the same is dependent on the varying facts and circumstances of each case. Arbitrariness is an antithesis of rule of law, equality, fair play and justice. (vide Lakshmi Precision Screws Limited v. Ram Bhagat MANU/SC/0672/2002 : (2002) 6 SCC 552, 561 (para 16)). Therefore, the arbitrary action is described as one that is irrational and not based on sound reason or as one that is unreasonable. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution. In the absence of any classification of transgender from men and women thereby denial of opportunity is nothing but an antithesis of rule of law and equality. Hence, failure to provide sufficient opportunity in the employment by providing a specific column for identity of third gender in all employment notifications, treating them as equals with men and women and failure to provide employment to them, though they are eligible is nothing but arbitrariness in the State's action.

36. Article 15 prohibits discrimination of any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. For better appreciation of facts, I find that it is apposite to extract Article 15, accordingly it is extracted hereunder:

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

37. On close analysis of Article 15, it prohibits discrimination of citizens of Indian

Territory only on the basis of religion, race, caste, sex or place of birth or any of them. But, still, Clause (3) of Article 15 identified only women and children for making special provision and not to the transgender or trans woman or binary gender. Unless Clause (3) of Article 15 is appropriately amended, it is difficult to issue any direction to the State to make special provision for transgenders. Similarly Clause (4) of Article 15 permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Though Clause (4) of Article 14 permits making special provision to socially and educationally backward classes for admission into educational institutions, the State did not take any steps to recognize their transgender to provide any special provision to them till passing the Act and taken a policy decision by the State of Andhra Pradesh, known as 'Transgender Policy' vide G.O. Ms. No. 20 Department for Women, Children, Differently Aabled & Senior Citizens (Prog. II) dated 30.12.2017. Though the Transgender Persons (Protection of Rights) Act, 2019 is passed, as on date, not being effectively implemented.

38. In almost all the decisions rendered by the Courts, prior to NALSA Judgment by the Hon'ble Apex Court, third gender was not recognized, but the Courts dealt with discrimination of men and women or based on social status i.e. caste. Discrimination of transgender against men and women only on the ground of sex would be violative of Article 15(1). Third gender was not taken into consideration by the Courts till NALSA judgment, while discriminating the transgenders from men and women.

39. Article 16 deals with equality of opportunity for all citizens in matters of public employment. As the question raised by this petitioner is relating to employment i.e. providing employment to the transgender by creating reservations as socially and educationally backward classes who are living in distressed condition, it is appropriate to extract Article 16 of the Constitution of India for deciding the issue effectively and it is extracted hereunder:

"16. Equality of opportunity in matters of public employment

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

(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 or, any employment or office under the State

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular

denomination."

40. Article 16 guarantees equality of opportunity to all citizens in the matters of appointment to any office or of any other employment, under the State. Clauses (3) to (5), however, lay down several exceptions to the above rule of equal opportunity. These are:

(i) Though any citizen of India, irrespective of his residence, is eligible for any office or employment under the Government of India [(Clause (2))], residence may be laid down as a condition for particular classes of employment under a State or any local authority therein, by an Act of Parliament in that behalf [Cl. (3)].

(ii) The State (as defined in Art. 12) may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State [Cl. (4)].

(iii) Offices connected with religious or denominational institutions may be reserved for members professing any particular religion or belonging to a particular denomination [Cl. (5)].

41. Article 16 is applicable in cases of appointments in public employment only. Clause (4) only permits reservation for 'backward classes of citizens' who are not, in the opinion of the State, adequately represented in the services of the State. It does not permit reservation for any person who does not belong to the category of 'backward classes', nor does it enable the State to reserve posts on communal lines. A distribution of offices amongst communities according to a fixed ratio or quota' or a provision for direct recruitment of persons 'to remove community disparity' infringes Clauses (1) and (2) of Article 16. Thus, the discrimination in equal opportunity of employment to citizens is recognized by Article 16 under Clauses (1) and (2) prohibits discrimination on the basis of religion, race, caste, sex, descent, place of birth, residence etc. But, the word 'sex' is not defined, it relates to the biological make up of a person. Sex refers to the biological and physiological characteristics that define humans as female or male and Transfemale or Transmale. These sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, but these characteristics tend to differentiate humans as females or males and transgender

42. A person, an animal or a flower that has both male and female sexual organs and characteristics is referred as hermaphrodite (which is now a derogatory term). The biological make up is assessed from (a) body parts (b) sex organs. Thus, discrimination based on biological mechanism or body parts or sex organs is prohibited. When every citizen is entitled to equal opportunity of employment, the transgender being Citizen of India are also entitled to claim benefit on par with others who belong to different communities.

43. Though the Constitution provides reservation based on sex and social and educational backwardness in the appointments and admission into educational institutions as per Articles 15 & 16, but, the third gender is not recognized in the Constitution. Similarly, other laws including the General Clauses Act, 1977, did not recognize the third gender. Section 13(1) of the General Clauses Act, 1977, says that, in all Acts and Regulations unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females. Similarly, Section 34 of Andhra Pradesh General Clauses Act, 1891, defined the word "Gender" importing the masculine gender shall include females. Even if the principles under the

General Clauses Act, 1977 and Andhra Pradesh General Clauses Act, 1891 are applied, it excludes the third gender, as both the Acts refer to male and female only, but not third gender.

44. Though, transgender is a person recognized in the epics, the lawmakers, including the Constitutional framers did not take note of their existence and treatment of transgenders on par with others.

45. "Shikhandi" who is said to have played a major role in killing Bishmacharya during Kurukshethra war is an epic character transgender in Mahabharatha, which itself would show that it is not as if for the first time, the third gender has been part of the society. Therefore, the existence of "Hijras" or "Eunuchs" has been recognized even during the epic period. However, the stigma, harassment, mockery and other problems being faced by them have not been looked into and addressed properly. Therefore, the Hon'ble Supreme Court of India in National Legal Services Authority v. Union of India and others (referred supra) issued series of directions, conferring certain benefits including classification as third gender. The operative portion of the judgment is extracted as follows:

"135. We, therefore, declare:

135.1. Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2. Transgender persons right to decide their self identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

135.3. 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.

135.4. The Centre and State Governments are directed to operate separate HIV sero surveillance centres since hijras/transgender face several sexual health issues.

135.5. The Centre and State Governments should seriously address the problems being faced by hijras/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

135.6. The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

135.7. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The Centre and State Governments should take steps to create

public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

135.9. The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

136. We are informed an expert committee has already been constituted to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with the recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this judgment and implemented within six months"

46. But, the directions issued by the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and others (referred supra) are not being implemented by the State and its instrumentalities.

47. The policy of protective discrimination is an endeavor to achieve social justice in India. It aims at granting special privileges to the socially backward and underprivileged section of the society, most commonly the scheduled castes, scheduled tribes, other backward classes, and women. These are the sections of people who often face racial or caste-based discrimination through centuries by the privileged classes on account of their differences based on sex, religion, place of birth, race, and most prominently based on the institution called the caste system. Efforts had been made by the founding fathers of the Constitution to address the malady through affirmative action. These actions are justifiably enshrined in the Constitution of India as "Protective Discrimination". In India, the Constitution through its various provisions guarantees the rights of the downtrodden and underprivileged by way of reservations or quota in educational institutions, employment, and parliamentary privileges as well as command the legislatures to legislate special provisions for their overall advancement. Article 14 of the Constitution does not speak of mere formal equality but embodies real and substantive equality. The essence of equality as a facet of the Constitutional tenets adopted to strike out inequalities arising on account of vast social and economic disparities among the citizens and is thus consequently an indispensable element of social and economic justice. However, absolute equality is impossible. The right to equality under part III of the Constitution therefore is not absolute and is subject to reasonable exceptions. Equality does not essentially mean that all laws should be universal and general in application neither all laws can be applicable in all circumstances. Explaining the concept of equality, the Supreme Court in "Marri Chandra Sekhar Rao v. Dean, Seth G.S. Medical College MANU/SC/0457/1990 : 1990 (3) SCC 130", observed that, equality must be a living reality for the people. Those who are unequal in status and opportunity cannot be treated by identical standards. Article 14 permits reasonable classification between potential underprivileged and privileged sections of citizens based on definite schemes but strikes out class legislation. Reasonable classification explains that classification or segregation must not be artificial, evasive, and arbitrary. Such classifications must be based on the rule of intelligible differentia which differentiates between different classes or group of persons from those left out of the group. Most importantly, there must be rational nexus between the differentia and the object sought to be achieved. (Vide: K. Thimmappa v. Chairman, Central Board of Directors, SBI MANU/SC/0799/2000 : AIR 2001 SC 467")

48. When the issue is examined in the Human Rights perspective, the petitioner being a

transgender is entitled for protection of her human rights from the State. The Yogyakarta Principles of 2007 & 2017 are revolutionary as the first international comprehensive enumeration of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Life (LGBTQI) + specific universal human rights standards. Endorsed by the courts of Nepal, India & Brazil, they also find routine mention regional and international human rights reports but are yet to be formally accepted by the United Nations. Similarly, the United Nations has passed several resolutions that recognize that transgender persons should be guaranteed the right to recognition along with the full range of rights and freedoms by the State, that they suffer aggravated forms of violence and are targets of extrajudicial killings because of their gender identity, and require special protections against torture. However, the above resolutions and principles remain just that i.e. declarations and statements of a commitment to addressing LGBTQI + rights in general but holding little statutory or authoritative value. The International Human Rights Conventions that do create obligations for States make no explicit mention of LGBTQI + persons and these identities have been subsequently interpreted into the original texts by the United Nations Human Rights Council through General Comments. While this increases the scope of protections offered by the Conventions, the evolution of jurisprudence is extremely slow and creates limited, specific obligations.

49. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination and gives equal protection to all persons before the law has been interpreted to include transgender persons under the category of "sex". Article 9 of the International Covenant on Civil and Political Rights has interpreted that the right to liberty is available to "everyone" which includes all persons of LGBTQ identity. Article 12 of the International Covenant on Economic, Social and Cultural Rights has been interpreted to recognize the right to health of transgender persons as a vulnerable group that requires positive State protections. Similarly, the Committee on the Anti-Torture Convention requires special measures to protect transgender persons from torture under Article 2, as well as provide effective redressal mechanisms for transgender victims of torture under Article 14 of the Convention. Most of these interpretations were made in response to petitions made under the (optional) Individual Complaint Mechanism of the respective human rights treaties or a voluntary reference to trans issues. The International Covenant on Economic, Social and Cultural Rights Committee has reinforced transgender rights but consistently cites the lack of comprehensive studies and information to make any conclusive recommendations.

50. Albeit progressive, these obligations are also not broad enough to cover the systematic discrimination faced by transgender persons in access to justice, healthcare, employment, housing, travel, and education or offer comprehensive protection from gender-based violence, police abuse or physical and psychological torture. In 2017, the United Nations High Commissioner for Human Rights (OHCHR) released a statement insisting that LGBTQI+ persons are protected under the UN Charter, Universal Declaration on Human Rights and did not require the creation of new specific obligations. Nevertheless, putting the fate of LGBTQI+ rights at the mercy of a notoriously inaccessible and slow treaty interpretation system denies sexual and gender minorities the unequivocal recognition of their rights and dignity. It consequently robs them of their voice in the international law-making process, being consistently dismissed with the question: but are LGBTQI rights human rights under international law.

51. From the above proposition of law laid down by the Apex Court in number of decisions, it is established that Articles 14, 15 and 16 forms part of the same scheme of equality enshrined under the Constitution and any enabling provision made in favour of

weaker section under Articles 15 and 16 must be in consonance with the principles of equality under Article 14. The limit upon the reservation is an empathetic approach of protecting the equality principles. It aims at the formation of an egalitarian order, free from exploitation, the fundamental equality of humans and to provide support to the weaker sections of the society and where from there is a disparity to make them equal by providing protective discrimination.

52. On analysis of the law, it is clear that various international and other regional conventions, including Yogyakarta Principles of 2007 & 2017, transgender rights are recognized by India along with other countries and expressed their willing to protect the rights of transgender, but it remains on paper and no progress had taken place. Therefore, it is the duty of the State to protect the rights of transgenders under the international covenants. But, so far no action was taken till passing the judgment by the Apex Court in National Legal Services Authority v. Union of India and others (referred supra).

53. Admittedly, the petitioner identified as female, since no column is provided for disclosing the identity of the petitioner as transgender in the proforma of the application published by the Police Recruitment Board - respondent herein. It only provides two columns i.e. male and female, but not third gender. Thus, the petitioner was forced to disclose her identity as female under those circumstances and despite the direction issued by the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), the respondents violated the directions issued by the Apex Court in the judgments referred supra. However, it is an undisputed fact that the petitioner is a transgender, as discussed in the earlier paragraphs.

54. One of the contentions of the petitioner is that, when the petitioner is a transgender and the Hon'ble Supreme Court issued guidelines in National Legal Services Authority v. Union of India and others (referred supra) to take steps to provide reservations to transgenders in employment directing the Centre and State Governments to take steps to treat the transgenders 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. Thus, the direction is only to take steps to provide all kinds of reservation in case of admission in educational institutions and in public appointments, treating them as Socially and Educationally backward Classes of citizens. But, social reservations are vertical, whereas, reservations based on gender are horizontal. If, the reservations are provided treating this petitioner as socially and educationally backward, the present reservations if taken together, it exceeds more than 50%. In India, the extent of reservation to be made is primarily a matter for the State to decide, subject, of course, to judicial review of equality in Article 16(1) or Article 335 meaningless. Thus, the reservation of more than 50 per cent of the vacancies as they arise in any year or a 'carry forward' rule which has the same effect, will be outside the protection of Article 16(4). The normal rule is that the reservation under Article 16(4) should not exceed 50 per cent of the appointments or posts to be made in a particular year. Taking consideration of the fact situation prevailing in the State on the reservations, it is for the State to take appropriate action in terms of the directions issued by the Hon'ble Apex Court in Para 135.3 of National Legal Services Authority v. Union of India and others (referred supra).

55. In K. Pritika Yashini v. The Chairman, Tamil Nadu Uniformed Services Recruitment Board³, a minor relaxation is given to the transgender woman who has qualified in all the tests. But, the same has no application to the present facts of the case, for the reason that the petitioner did not qualify herself even in the preliminary examination,

having secured 28% in Paper-I and 21% in Paper-II.

56. In the above judgment, the Court held that the petitioner should be considered for the purpose of Sub-Inspector while highlighting the discrimination faced by the transgender community which can limit opportunities for employment. It also noted the significance of public employment opportunities for transgender persons, not only for their individual benefit but for the community representation.

57. In *J. Arun Kumar v. Inspector General*⁴, the Madras High Court considered the right of transgender woman, who was refused to get her marriage registered. In the facts of the case, the petitioner was a transwoman, whose marriage is sought to be registered, but the authorities refused to register the same. Hence, the Court held that, it amounts to discrimination of transgenders in violation of Articles 14, 19, 21 and 25 of the Constitution of India. Right to marry under Article 21 of the Constitution of India has been affirmed for transgender persons by holding that 'bride' under Section 5 of Hindu Marriage Act would cover transgender who is identified as women and directed the Registrar to register the marriage of the petitioner.

58. The intellectual levels of men, women and transgender may vary to a little extent. But, the Rules did not permit appointment of transgender without securing minimum qualifying mark. If, for any reason, the petitioner secured marks and got through the preliminary examination and if there is any variation in the physical tests, the principle laid down in the above judgments can be applied. Therefore, it is difficult to apply the same principle to the present facts of the case, relaxing more than 50% marks in the preliminary examination and issue a direction to the respondents. Therefore, the principle in *K. Pritika Yashini v. The Chairman, Tamil Nadu Uniformed Services Recruitment Board* (referred supra), has no direct application to the present case, except to the extent of discriminating a transgender from men and woman.

59. In *H.K. Annapoornam v. The Secretary to Government, Government of Tamil Nadu*⁵, the Madras High Court decided the issue of denying appointment to a transgender to the post of constable and directed to consider her candidature, as she was qualified in all the tests without discriminating transgender from men and women; but the Court did not lay down any specific law.

60. In *G. Veera Yadav v. The Chief Secretary, Government of Bihar*⁶, the issue before the Patna High Court was that, six transgender persons were not supplied food grain only for the reason that they were not possessing ration cards even during the tough times of Covid-19 pandemic was under consideration in Patna High Court. The High Court observed that the policies of Centre and state shall be implemented and no member of the transgender community shall be deprived of his/her ration only on account of such status or not possessing the ration card. As such, both the judgments i.e. *H.K. Annapoornam v. The Secretary to Government, Government of Tamil Nadu* and *G. Veera Yadav v. The Chief Secretary, Government of Bihar* (referred supra) have no direct application to the present facts of the case, except to the extent of alleged discrimination.

61. In *B. Navtej Singh Johar v. Union of India* MANU/SC/0947/2018 : AIR 2018 SC 4321, the Supreme Court while deciding a serious issue regarding constitutional validity of Section 357 of Indian Penal Code, i.e. criminalizing homosexual acts as 'unnatural offence', the Court held that, criminalising consensual sexual acts of adults in private is violative of Articles 14, 15, 19 and 21 of the Constitution of India.

62. In *S. Subramaniam Balaji v. Government of Tamil Nadu* MANU/SC/0668/2013 : (2013) 9 SCC 659, the case relates to distribution of free gifts by the political parties (popularly known as 'freebies') during Assembly Elections 2006 in Tamil Nadu. The political party announced a scheme of free distribution of colour television sets to each and every household which did not possess the same, if the said party/its alliance were elected to power. This scheme was challenged by the appellant herein on the ground that the expenditure to be incurred by the State Government for its implementation out of the State Exchequer is unauthorized, impermissible and ultra vires of the Constitutional mandate. The Apex Court opined that, in case there are any transgender residing in the Village Panchayat, who are otherwise eligible as per the criteria, they will also be considered to be eligible for the scheme.

63. Therefore, the principles laid down in the above judgments highlighted the discrimination of men and women from transgenders. But, here, the question is with regard to reservation. In fact, in Para 135.3 mentioned in NALSA judgment, the Apex Court directed both the Central and State Governments to take steps to provide reservations treating the transgenders a socially and educational backward classes. But the question is, if the reservation is based on social and educational backwardness, it must be a vertical reservation. If, such vertical reservation is provided, which is exceeding 50% ceiling limit, it is the maximum limit of reservation. If it is horizontal reservation based on gender among the socially and educationally backward classes, then, there will not be any difficulty to implement such reservations.

64. In similar circumstances, in *Jeeva Intervention in Sangama v. State*⁷, the Karnataka High Court based on the judgment of the Supreme Court in *National Legal Services Authority v. Union of India* (referred supra), the Court directed the Centre and State to provide reservations based on gender identity, but not on social and educational backwardness. So, the reservation is only a horizontal reservation. But, this principle is contrary to the judgment of the Apex Court in *National Legal Services Authority v. Union of India* (referred supra). The Karnataka High Court also noted the principle laid down in *Anil Kumar Gupta v. State of Uttar Pradesh* MANU/SC/0747/1995 : (1995) 5 SCC 173 regarding horizontal and vertical reservations. Therefore, on the basis of gender identity, the High Court of Karnataka directed to provide appropriate reservation to transgenders and observed that reservation is to be provided based on gender identity. The Karnataka State already passed Karnataka Civil Services (General Recruitment) (Amendment) Rules, 2021 and after an obligatory period inviting objections, the Amendment was notified on 06.07.2021 and this Amendment provides 1% horizontal reservation for transgender persons under sub-rule (1D) of Rule 9.

65. In *Swapna and others v. The Chief Secretary, Government of Tamil Nadu*⁸ the Division Bench of Madras High Court directed the respondents to look into the issue based on the judgment of the Apex Court in *National Legal Services Authority v. Union of India* (referred supra) in consultation with all relevant departments and a decision be taken within six months from the date of the judgment. In the facts of the above judgment, transgenders claimed reservation as most backward classes and minorities. Since the direction of the Apex Court was not implemented, the Division Bench issued such directions. In the above judgment, the Court directed to implement horizontal reservation to transgenders based on gender. But, the judgment of the Apex Court in *National Legal Services Authority v. Union of India* (referred supra) is in its unambiguous terms, directed both the Centre and State Governments to take steps, treating the transgenders as socially and educationally backward communities and provide reservation i.e. vertical reservation. Though, Karnataka High Court granted

horizontal reservation only to avoid the legal blocks in implementation of such direction, the Supreme Court did not visualize the bar contained in the upper limit of reservations in Centre and State Governments. However, it is difficult for me to come to any different conclusion than the direction issued by the Apex Court in National Legal Services Authority v. Union of India (referred supra). Therefore, I find that, in view of the judgment of the Apex Court in National Legal Services Authority v. Union of India (referred supra), the State is under obligation to provide only vertical reservations, but the percentage of reservations is not specified in the judgment. Therefore, it is appropriate to issue direction to the State to undertake study on the problems faced by transgenders, while holding that the reservation as directed by the Supreme Court is only vertical and making provision for horizontal reservation based on sex or gender is contrary to the principles laid down by the Apex Court in the judgment of the Apex Court in National Legal Services Authority v. Union of India (referred supra) ex facie. Therefore, I am unable to agree with the principle laid down by the Karnataka High Court and Madras High Courts in the judgments referred supra to provide horizontal reservations to transgenders, in strict adherence to the directions issued by the Apex Court in National Legal Services Authority v. Union of India (referred supra). In case, the State failed to take steps to provide reservations to transgenders, it amounts to violation of the direction issued by the Apex Court, knowing the consequences, thereby, it may attract contempt. When once a direction was issued, it is for the State to take appropriate action and implement the same. But, so far, except framing transgender policy, nothing is provided except providing reservations for Socially and to extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

66. The State Government issued Transgender Policy vide G.O. Ms. No. 20 Department for Women, Children, Differently Abled & Senior Citizens (Prog. II) dated 30.12.2017. Memo. No. 830231/Legal. II/A1/2020 dated 29.09.2020 Home(Legal. II) Department, Government of Andhra Pradesh was addressed to the Chairman, State Level Police Recruitment Board, A.P. Mangalagiri by the Principal Secretary to the Government clarified as follows:

3. However, the Transgenders are eligible to apply and get selected on merit. Currently there is no Reservation for Transgender in Government appointments.

4. The Chairman, State Level Police Recruitment Board, A.P., Mangalagiri is therefore requested that there is no objection, if the Police Recruitment Board decides to appoint a meritorious, eligible Transgender person against a Woman vacancy or Man vacancy as appropriate, in Police recruitment, as per rules in force.

67. Though clarification was issued by the Principal Secretary to Government, Home (Legal. II) Department vide Memo. No. 830231/Legal. II/A1/2020 dated 29.09.2020, for appointment of meritorious, eligible transgender person either against a woman vacancy or man vacancy, based on merit, since there are no reservations for transgenders, Memo dated 29.09.2020 would not extend any such benefit to the transgender persons in terms of the judgment of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and others (referred supra). Therefore, it is explicitly clear that the State failed to provide reservations, as directed by the Hon'ble Apex Court to transgenders in public employment.

68. After the advent of the judgment in National Legal Services Authority v. Union of India and others (referred supra), the Central Government passed The Transgender

Persons (Protection of Rights) Act, 2019. Chapter II of the Act deals with prohibition against discrimination. Section 3 prohibits discrimination against transgender person on any of the following grounds, namely:-

- "(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;
- (b) the unfair treatment in, or in relation to, employment or occupation;
- (c) the denial of, or termination from, employment or occupation;
- (d) the denial or discontinuation of, or unfair treatment in, healthcare services;
- (e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;
- (f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;
- (g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;
- (h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
- (i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."

69. At the same time, Chapter IV of the Act No. 40 of 2019 deals with Welfare Measures by Government and obligation of appropriate Government. Section 9 prohibits discrimination against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues. Therefore, the State is under obligation to implement Act No. 40 of 2019 and provide access to public employment in any government establishment. The Central Government framed The Transgender Persons (Protection of Rights) Rules, 2020 in pursuance of Act No. 40 of 2019. But, Act No. 40 of 2019 is silent regarding provision for reservation in public employment or any government establishments to transgender persons, despite the direction issued by the Apex Court in National Legal Services Authority v. Union of India and others (referred supra).

70. As discussed above, it is the State Policy to provide reservation to all citizens either social reservation or reservation based on sex or otherwise. Here, the petitioner is claiming reservation based on sex, but whereas, the Apex Court in National Legal Services Authority v. Union of India and others (referred supra), issued a direction to treat transgenders as socially and educationally backward classes and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. Social status of an individual is different from sex. Though the word 'person' is used in Article 16, most of the provisions dealt with men, women and reservations based on social status. Therefore, the provisions of Act No. 40 of 2019 are not totally in consonance with the judgment of the Apex Court in National Legal Services Authority v. Union of India and others (referred supra). However, the issue before this Court is limited. In any view of the matter, when Act No. 40 of 2019 is silent

about providing reservation to transgenders, this Court cannot issue any direction to provide reservation to this petitioner based on sex or social status, more so, when a direction was issued by the Apex Court to extend all kinds of reservation in cases of admission in educational institutions and for public appointments. The direction issued by the Apex Court is suffice to provide reservation in cases of admission in educational institutions and for public appointments and this Court need not issue any direction to the State to provide reservations to transgender. However, it is appropriate to direct the State to study the representation of transgenders for public employment, their number in the State, benefits extended to them without discriminating from men and women and provide necessary reservations if they are not represented adequately in the public employment and the State is bound to follow the directions issued by the Hon'ble Apex Court in National Legal Services Authority v. Union of India and others (referred supra).

71. Since the directions issued by the Apex Court to treat the transgenders 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. Hence, I need not record any findings as to the nature of reservations.

72. One of the major contention of the petitioner is that, in view of the judgment of the Hon'ble Apex Court in National Legal Services Authority v. Union of India and others (referred supra), the petitioner is entitled to claim reservation, as the petitioner is the only transgender person applied for selection as Stipendiary Cadet Trainee Sub-Inspector of Police and secured 28% in Paper-I and 21% in Paper-II in the Preliminary Written Test.

73. Notification vide Rc. No. 216/R&T/Rect.1/2018 dated 01.11.2018 was issued by State Level Police Recruitment Board, Andhra Pradesh, Mangalagiri, Andhra Pradesh for the post of Stipendiary Cadet Trainee Sub-Inspector of Police in Police Department. The recruitment is governed by the provisions of Andhra Pradesh Police (Stipendiary Cadet Trainee) Rules issued by the Government of Andhra Pradesh vide G.O. Ms. No. 315 Home (Police-C) dated 13.10.1999. The Rules are silent as to reservations to transgenders, but fixed minimum marks to qualify for the physical efficiency test. But, the notification for recruitment was issued in terms of the Rules by providing minimum qualifying marks for both men and women, OC, BC, SC & ST. As per selection procedure/scheme under Clause 17, the selection procedure is at preliminary written test. Candidates shall be required to appear for Preliminary Written Test in two papers (each three hours duration) which will be qualifying. The minimum marks to be secured by the candidates in order to qualify in the Preliminary Written Test in both the papers is 40% for OCs; 35% for BCs; and 30% for SCs/STs/Ex-servicemen. If a candidate fails to secure qualifying marks even in one paper, he will be disqualified. Total marks for these two papers will not be counted for the purpose of qualification. Thus, as per the Rules framed for recruitment of Stipendiary Cadet Trainee Sub-Inspector, minimum mark is prescribed and in the absence of any reservation to the transgenders provided in the Rules and in Act No. 40 of 2019, the petitioner secured 28% in Paper-I and 21% in Paper-II in the Preliminary Written Test, is ineligible for being selected, though the petitioner is the only candidate who appeared for examination in Paper-I and Paper-II in Preliminary Written Test. As the marks were fixed not on minimum marks, as prescribed in the notification and Rules, but not based on sex, only on social status, so as to enable the transgenders to represent adequately in the Police Department as Stipendiary Cadet Trainee for their adequate representation in the public employment. Therefore, it is difficult to issue a direction in favour of the respondents for selection of the petitioner as Stipendiary Cadet Trainee Sub-Inspector, since she is the only candidate at present who appeared for the examination and secured 28% in Paper-I and 21% in Paper-II in

the Preliminary Written Test. Since the minimum marks were not fixed based on gender, but based on social status, more particularly, their backwardness and inadequacy of their representation in the public employment. Hence, I find it difficult to issue a direction as sought by the petitioner to select her as Stipendiary Cadet Trainee Sub-Inspector.

74. One of the claims made before this Court is that, the Notification bearing Rc. No. 216/R&T/Rect.1/2018 dated 01.11.2018 issued by the second respondent is contrary to the directions issued by the Hon'ble Apex Court in National Legal Services Authority v. Union of India and others (referred supra), thereby, it is to be declared as illegal and arbitrary, since no reservation is provided to transgenders for the post of Stipendiary Cadet Trainee Sub-Inspector.

75. No doubt, no reservation is provided to transgenders/transmale/transfemale, but direction was issued by the Hon'ble Apex Court in National Legal Services Authority v. Union of India and others (referred supra) to both 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. Therefore, the direction issued by the Hon'ble Supreme Court is only to the extent of taking steps to treat transgenders as socially and educationally backward classes of citizens, but not for creating reserving particular percentage of posts to transgenders. Therefore, as on date, no steps were taken by the State Government for creating reservation to transgenders on the basis of their social and educational backwardness (vertical reservation), but, based on the subsisting rules of reservation in the State services, the notification impugned in the writ petition was issued. When the Notification was issued strictly adhering to the subsisting rules, the notification cannot be declared as illegal and arbitrary. Even to construe that the second respondent violated the direction issued by the Hon'ble Apex Court in National Legal Services Authority v. Union of India (referred supra), the direction is only to take steps for providing reservation to transgenders based on their social and educational backwardness. Though, it appears to be in the nature of directions, the State is under the obligation to implement it, they did not take any steps till date. After the judgment of Hon'ble Apex Court in National Legal Services Authority v. Union of India (referred supra), the Transgender Persons (Protection of Rights) Act, 2019 was enacted by the Central Government and Rules were framed thereunder, but, none of these Acts provided any reservation to transgenders, except providing access to employment. Therefore, in the absence of any steps taken by the State, failure of its instrumentalities to provide reservation to transgenders does not make the notification impugned in this writ petition invalid. Hence, I find no ground to declare the notification impugned in this writ petition as illegal or arbitrary, in view of the judgment of the Apex Court in National Legal Services Authority v. Union of India (referred supra) to take steps to provide reservation to transgenders, more particularly, no steps were taken till date. At best, such failure may attract contempt being filed before the competent court, but this Court cannot declare such Notification as illegal and arbitrary, on the basis of such contention. Hence, I find no ground to grant the above relief, while rejecting the contention of this petitioner. Accordingly, Point Nos. 1 & 2 are answered.

76. In the result, writ petition is dismissed. However, the State Government is directed to undertake study on the problems being faced by transgenders, as directed by the Apex Court in National Legal Services Authority v. Union of India (referred supra), and implement the direction strictly within three months from the date of the order. No costs.

77. Consequently, miscellaneous applications pending if any, shall stand closed.

¹W.P. No. 31091 of 2013 dated 05.07.2016

²W.P. No. 7284 of 2021 dated 23.12.2021

³W.P. No. 15046 of 2015

⁴WP(MD) No. 4125 of 2019 and WMP(MD) No. 3220 of 2019 dated 22.04.2019

⁵W.A(MD) No. 792 of 2016 and C.M.P(MD) No. 4797 of 2016 dated 05.07.2016

⁶Civil Writ Jurisdiction Case No. 5627 of 2020 14.12.2020

⁷W.P. No. 8511 of 2020 dated 11.06.2020

⁸W.P. No. 31091 of 2013 dated 05.07.2016

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