

MANU/TN/1651/2022

IN THE HIGH COURT OF MADRAS

W.P. Nos. 15316, 15376 of 2020, W.P. 32618, 15911, 16549, 15920, 1163 and 33320
of 2019

Decided On: 02.03.2022

Saratha **Vs.** The Member Secretary, Tamil Nadu Uniformed Services Recruitment Board
and Ors.

Hon'ble Judges/Coram:

M.S. Ramesh, J.

Counsel:

For Appellant/Petitioner/Plaintiff: Jayna Kothari, Sr. Adv. for C. Prabhu

For Respondents/Defendant: P. Kumaresan, AAG assisted by C. Selvaraj, AGP

Case Category:

SERVICE MATTERS

Case Note:

Service - Third Genders/Transgenders (TGs) - Disqualification of - Present petitioners, who are Third Genders/Transgenders (TGs) seeks reservations, relaxations and concessions for purpose of considering their candidatures in recruitment process to Grade-II Police Constables conducted by TNUSRB - Whether relief as sought for by petitioner should be granted - Held, procedure adopted in recruitment process stands vitiated - Failure to provide for special reservation for TGs of both male and female categories - Deprivation of concessions/relaxations in physical tests - Disqualification of petitioners herein from recruitment process for posts of Grade-II Police Constables conducted by TNUSRB for years 2017-2018, 2019 and 2020, are quashed - Member Secretary of TNUSRB directed to treat all petitioners herein, as having qualified in initial selection process - This shall include written examination and forthwith subject them to physical measurement tests, endurance tests and physical efficiency tests, in accordance with relaxed norms applicable for Women candidates - Government to provide specified percentage of special reservation for TGs in matters of future public employments - Petition allowed. [42], [45]

ORDER

M.S. Ramesh, J.

1. Heard the learned counsel for the parties.

2. The grievances of the petitioners herein, who are the "Third Genders/Transgenders" (TGs) in all these Writ Petitions, are that the concessions and relaxations extended to them in the 2017-18, 2019 and 2020 Common Recruitment Processes for the posts of Grade-II Police Constables and the like, conducted by the Tamil Nadu Uniform Services Recruitment Board (TNUSRB), are inadequate and inconsistent with the orders passed by the Hon'ble Supreme Court and this Court, which amounts to hostile discrimination. All these petitioners seek for reservations, relaxations and concessions for the purpose

of considering their candidatures in the recruitment process.

3. In order to appreciate the claims made in these Writ Petitions, it would be significant to refer to the underlying chronicle of the facts, on which the claims are founded.

4. The rights of the TGs predominantly culminated from a decision of the Hon'ble Supreme Court in the case of National Legal Services Authority (NALSA) V. Union of India and Others reported in MANU/SC/0309/2014 : 2014 (5) SCC 438. The Hon'ble Supreme Court, while observing that our society seldom realize or cares to realize the trauma, agony and pain, which the members of the TG Community undergo, expressed its anguish and consequently had recognized and declared two of their important Constitutional rights, namely, the right of a person to get the recognition as "Male" or "Female" after "Sex Reassignment Surgery" (SRS), which was not only his/her/their gender characteristic but has become his/her/their physical form AND the right of the TG to be identified and categorized as "Third Gender", for safeguarding and enforcing their Constitutional rights.

5. Having declared these rights, the Hon'ble Apex Court had set out certain directions to the Centre and the State Governments, in the following manner:-

"135. We, therefore, declare:

135.1. Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the 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. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.

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

135.8. 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. 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 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."

6. The NALSA's case (supra) came to be decided by the Hon'ble Supreme Court on 15.04.2014. However, in disregard to these declarations of the Constitutional rights of TGs and the consequential directions, a notification for direct recruitment was published by the TNUSRB on 08.02.2015 and one aggrieved TG namely, Ms. K. Prithika Yashini had filed a Writ Petition before this Court against TNUSRB in W.P. No. 15046 of 2015 [K. Prithika Yashini (TG) V. The Chairman, Tamil Nadu Uniformed Services Recruitment Board, Chennai], seeking for recruitment to the post of Sub-Inspector of Police. The Hon'ble Division Bench in its order dated 03.11.2015, took note of the fact that the directions in NALSA's case (supra) was not complied with by TNUSRB, which resulted in rejection of the candidature of the petitioner therein. After taking into consideration of the plea of the TGs in general and K. Prithika Yashini's case (supra) in particular, held that she would be entitled for appointment to the post of Sub-Inspector of Police. In accordance with the order, Ms. K. Prithika Yashini became the first TG to be appointed as a Sub-Inspector of Police.

7. Ms. K. Prithika Yashini's case (supra) woke up the State Government to pass a series of orders, granting reservations, relaxations and concessions for the TGs:-

i) G.O.(Ms) No. 28, Backward Classes, Most Backward Classes & Minorities Welfare (BCC) Department, dated 06.04.2015 ordered for inclusion of TGs in the list of Most Backward Classes (MBC) for public appointments.

ii) Through G.O.(Ms) No. 71, Social Welfare and Nutritious Meal Program, dated 06.11.2015, the category "Third Gender" was ordered to be included along with Male/Female categories, wherever gender identity was required.

iii) Amendment was brought to the Special Rules of the Tamil Nadu Police Subordinate Services through G.O.(Ms) No. 567, Home (Police-VI) Department, dated 02.08.2016, whereby Rule 14 (A) was inserted, bringing a TG candidate, who applies as a Third Gender in the vacancies reserved for Women Candidate and General Category. The amendment further provided for an option to a TG to appear as Male or Female, by selecting either of the gender category at the time of application and the physical tests were ordered to be determined according to the category of their option. This apart, for TGs who opt to apply as a Third Gender, the physical tests prescribed for "Female candidates" would apply to them;

iv) G.O.(Ms) No. 90, Social Welfare and Nutritious Meal Program Department, dated 22.12.2017, the determination of the Community of the TGs was considered as per the Community Certificate held by such TGs and for those

who do not possess Community Certificate were ordered to be treated under the classification of Most Backward Classes. Insofar as the reservation in employment is concerned, the Government ordered for 30% reservation for the TGs, who identify themselves as Female, as well as 70% reservation for the General Category and those who identify themselves as Male or Third Gender, may be considered for 70% reservation (both Men and Women).

v) G.O.(Ms) No. 245, Home (Police-III) Department, dated 29.06.2020, age relaxation was extended to the Third Gender candidates on par with the Scheduled Caste and Scheduled Tribe candidates.

8. In Ms. Aradhana's case (Petitioner in W.P. No. 1163 of 2018), this Court had passed an interim order on 25.01.2018 and directed TNUSRB to entertain her application regardless of her age, against which order, an appeal was preferred by the Board in W.A. No. 330 of 2018. The Hon'ble Division Bench placed reliance on NALSA's case (supra) and strongly recommended for reservations in age permissible to destitute widows and the like, as well as to every concession and relaxation of conditions in public employments for the TGs. These observations were made in the following manner:-

"5. ... From the submission of Ms. Narmadha Sampath, learned Additional Advocate General-VIII, we gather that it is following observation in paragraph 67 of the judgment of Hon'ble Supreme Court in National Legal Services Authority-Vs-Union of India and others [MANU/SC/0309/2014 : (2014) 5 SCC 438] which has led Government of the State to include transgenders in the list of Most Backward Classes (MBC) in G.O.(Ms). No. 28, Backward Classes, Most Backward Classes and Minorities Welfare (BCC) Department, dated 06.04.2015. We reproduce paragraph 67 in the aforesaid judgment:-

"TGs have been systematically denied the rights under Article 15(2), that is, not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services."

Similarly G.O.(Ms). No. 567, Home (Police VI) Department, dated 02.08.2016 states that a transgender candidate, who applies as Third Gender, shall be eligible for appointment in the vacancies also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is

bound to take affirmative action to give them due representation in public services." Similarly G.O.(Ms). No. 567, Home (Police VI) Department, dated 02.08.2016 states that a transgender candidate, who applies as Third Gender, shall be eligible for appointment in the vacancies reserved for women candidates as well as vacancies under the general category. This is presented as a concession shown to transgenders and has missed the observation in the order of Hon'ble Supreme Court in National Legal Services Authority-Vs.-Union of India [MANU/SC/0309/2014 : (2014) 5 SCC 438] in paragraph 135, particularly 135(3), which reads thus:-

"13.3. 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".

6. A wholesome reading of the judgment of the Apex Court in National Legal Services Authority-Vs.-Union of India [MANU/SC/0309/2014 : (2014) 5 SCC 438] reveals that after the abject neglect and gay abandon of the Third sex over the centuries finally has dawned upon the world community. Through the judgment, the Supreme Court has impressed upon the Nation the need to undo the wrong silently suffered by the Third Gender of the human race, which has for far too long been oppressed, suppressed and left depressed. If the judgment of the Hon'ble Supreme Court is seen in such light and if the intent behind the same is to be carried forward, then we see absolutely no reason why reservations in age permissible to destitute widows and Ex-Servicemen and the like should not be extended also to transgenders. This observation would be applicable in equal measure to each and every concession, relaxation of conditions made in any form of public employment. In other words, the aim of Government should be up-liftment of the Third gender in every manner possible. We, strongly would recommend the adoption of such a course and earnestly hope that this State be the forerunner in placing those who have too long been tread upon as the least among us, as the first among equals."

9. In this background, three notifications by the TNUSRB for common recruitment for the posts of Gr-II Police Constables, Gr-II Jail Warders and Firemen (Men) were published during the year 2017-18, 2019 and 2020, which are the subject matters in these Writ Petitions. The privileges extended to the TGs in these notifications are as follows:-

a) In the first notification in the year 2017-18, vide Advertisement No. 217 dated 28.12.2017, there were no separate reservations for the TGs. Though the candidates were permitted to apply under the Third Gender, they were informed that in cases where the TG candidates opts a "Male Category", they would be subjected to the physical tests under the norms applicable for "Men" and for TGs candidates, who opts for "Women Category," will be subjected for physical tests under the norms applicable for "Women" candidates. In case, a candidate applies under "Third Gender" category, they would be subjected to physical tests applicable for women. No other relaxation or preferences were extended to them in this notification.

b) In the second notification for the year 2019, vide Advertisement No. 1 of 2019 dated 06.03.2019, 2465 vacancies out of 8826 were earmarked for Women/TGs. This apart, the norms of the physical tests for TGs were the same

as that of 2017-18 notification.

c) In the third notification for the year 2020, dated 29.06.2020, vide Advertisement No. 1 of 2020, dated 17.09.2020, 3099 vacancies out of 10,906 total vacancies were earmarked for Women/TGs. Apart from the other concessions extended in the 2017-18 & 2019 notifications, the upper age limit for the TGs was increased to 29 years, on par with the SC/ST candidates. No other relaxations, reservations or concessions were extended to them.

10. Ms. Jayna Kothari, learned Senior counsel appearing for some of the petitioners submitted that after the judgment of the Hon'ble Supreme Court in NALSA's case and the Hon'ble Division Bench in Aradhana's case, TNUSRB ought to have implemented these orders in its true spirit and provided for reservations, apart from other relaxations and concessions, on par with the destitute widow candidates. It is also her submission that, age relaxation is only for the purpose of applying and cannot be considered as a 'reservation'.

11. Mr. R. Sankarasubbu and Ms. Reshmi Christy, learned counsels for the petitioners in W.P. No. 1163 & 33320 of 2019 respectively, placed arguments on similar lines.

12. Mr. P. Kumaresan, learned Additional Advocate General submitted that the judgment in NALSA and Aradhana cases' (supra) were complied with through G.O.(Ms) No. 245, Home (Police-III) Department dated 29.06.2020, whereby the proposals of the Director General of Police, was accepted by the Government and apart from certain privileges having been already extended to the Third Gender, the directions of the Hon'ble Division Bench in Aradhana's case (supra) was complied with and accordingly, the Third Gender candidates were granted age relaxation similar to the age relaxation provided to Scheduled Caste/Scheduled Tribe candidates for the recruitment through TNUSRB. According to him, all the petitioners herein, who are TGs, had applied under the "Male Category" and were therefore evaluated under the norms applicable for the Male/general category candidates. On such evaluation, none of the TGs had reached the minimum cut off marks in the written examination and therefore they cannot claim appointment as a matter of right.

Failure to provide reservation:-

13. In the context of the facts of this case, the term "reservation" is distinct from the terms "concession" and "relaxation". While concession and relaxation are privileges extended to achieve "equality of opportunities" for a candidate to participate in a recruitment process, the term "reservation" is an accrued right of appointment among a specified number of reserved vacancies for the socially and economically backward candidates, to enable them to be adequately represented in the services of the State. This is the underlying object of the fundamental right to "equality of opportunities in public employment", as embodied under Article 16(1) of the Constitution of India. Dr. Ambedkar in his speech delivered in the Constituent Assembly, emphatically declared that reservation should be confined to a minority of seats, lest the very concept of equality would be destroyed. The object was to safeguard two things, namely, the principles of equality of opportunity and at the same time to satisfy the demand of community, which do not have adequate representation in the State. This underlying principle formed the foundation in NALSA and Aradhana cases (supra).

14. To a question, as to whether Article 16(4) of the Constitution of India is exhaustive of the concepts of reservation in favour of backward classes, that arose in Indra Sawhney Etc. Vs. Union of India & Others reported in MANU/SC/0104/1993 : 1993 AIF

SC 477, the Nine Judges Bench examined the meaning and expression of "reservation" and held it to be the highest form of a special provision that includes the exemptions, concessions and relaxations. The relevant portion of the order reads as follows:-

"58. The question then arises whether Clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts." The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335."

15. In *Jitendra Kumar Singh & Another Vs. State of U.P. and Others* reported in MANU/SC/0032/2010 : 2010 (3) SCC 119, a distinction was made between reservations and concessions and while holding that reservations are a mode to achieve equality of opportunity, the concessions and relaxations place the candidates on par with the general category candidates. This aspect was addressed in the following manner:-

"48. In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the general category candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list.

49. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates on a par with general category candidates. It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates."

16. *Vikas Sankhala and Others Vs. Vikas Kumar Agarwal* reported in MANU/SC/1318/2016 : 2017 (1) SCC 350, emphasized the duties of the State to remedy the effects of societal discrimination. The relevant portion of the order reads as

follows:-

"70. It hardly needs to be emphasized that the State has a legitimate and substantial interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination. It is a duty cast upon the State, by the Constitution, to remedy the effects of "societal discrimination". The provision for relaxation in TET pass marks has to be looked into from this angle which is in tune with the constitutional philosophy. After all it only ensures that such candidates belonging to reserved category become eligible for appointment as primary teachers. On the other hand, when it comes to selection process such reserved category candidates have to compete with general category candidates wherein due regard for merit is given. Therefore, only those candidates belonging to reserved category who are found meritorious in selection are ultimately appointed. We are of the opinion that in this manner the two constitutional goals, that of rendering quality education on the one hand and providing "equality of opportunity" to the unprivileged class on the other hand, are adequately met and rightly balanced."

17. In the present case, the first aspect that arises for consideration is as to whether the TNUSRB had implemented the directions in NALSA, as well as in Aradhana cases' (supra), to its true intent and spirit?

18. After the judgment in NALSA was pronounced on 15.04.2014, the notification for the year 2015 was published on 08.02.2015 and the directions in NALSA was totally ignored. This led the Hon'ble Division Bench of this Court in K. Prithika Yashini's case (supra) to express its anguish on the failure of TNUSRB to adhere to the directions in NALSA and consequently, enabled the candidate therein for appointment to the posts of Sub-Inspector.

19. When the notification of the year 2017-18 was published, there were no reservations for TGs among the total vacancies. In the notifications for the year 2019 and 2020, the reservation for TGs was clubbed along with the reservation for Women candidates, but no separate reservation was extended to the TGs.

20. In NALSA's case (supra), the Hon'ble Supreme Court was conscious of the fact that the gender identity of TGs in matters of public appointments and admission in Educational Institutions were absent and this prompted the Court to declare the Constitutional rights of these TGs to get recognition as Male or Female after SRS, which were both their gender characteristics, as well as their physical form. Likewise, it was held that the TGs should be treated as 'Third Gender' for the purpose of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. With such findings, the Court went on to direct the Centre and State Governments to take steps to treat the TGs as "socially and economically backward classes of citizens" and extend all kinds of "reservations" in educational institutions and in "public appointments".

21. Thus, there was a specific direction to the State Government to provide all kinds of reservations to the TGs in public appointments. Accordingly, G.O.(Ms) No. 28 dated 06.04.2015, came to be passed in which the TGs were included in the list of Most Backward Classes for the purpose of reservation of seats in educational institutions and for appointments under the State. However, G.O.(Ms) No. 90 dated 22.12.2017, deviated from the directions in NALSA and in the guise of providing reservation in employment, adopted an indigenous strategy to distort such directions, in the following manner:-

"Reservation in Employment:-

i) The Third Gender candidates who identify themselves as "Female" by self-declaration supported by the certificate (ID card) issued by the Tamil Nadu Third Gender Welfare Board (TNTGWB) may be considered against both 30% reservation for women as well as 70% reservation for the General Category (both Men & Women).

ii) The Third Gender candidates, who identify themselves as "Male" or "Third Gender", may be considered against the 70% reservation for General category (both Men & Women) as the case may be.

The above concessions may be granted subject to production of certificate identifying them as Third Gender or Third Gender (Male) or Third Gender (Female) issued by the Tamil Nadu Third Gender Welfare Board (TNTGWB), as the case may be."

The Government Order had totally lost sight of the findings and directions in NALSA's case (supra), for providing "all kinds of reservations to the TGs for public appointments". This mischief resulted in tagging the TGs, who identify themselves as "females", along with the 30% vacancies earmarked for Women in the notifications issued from 2019 onwards. Effectively, the scope of appointment for the TGs were diluted, when they were combined with the reservation for Women. Though this reservation may be said to be in compliance of the powers of the State to provide reservation under Article 16(4), such reservation cannot interfere or override Article 16(1), which provides for equality of opportunity in matters of public employment for all the citizens under the State. In State of Punjab Vs. Hira Lal and others reported in MANU/SC/0066/1970 : 1970 (3) SCC 567, this ratio is highlighted by holding that the exception provided under Article 16(4), cannot render Article 16(1) meaningless. The relevant portion of the order reads as follows:-

"8. The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Art. 16(4) should not make the rule embodied in Art. 16(1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive to Art. 16(1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The length of the leap to be provided depends upon the gap to be covered. As observed by the majority in Rangachari's case(supra):

"The condition precedent for the exercise of the powers conferred by Art. 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the

services as well. In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the State may well take the view that a certain percentage of selection posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively."

22. To worsen things, the TGs who identified themselves as "Male" or "Third Gender" were made to compete along with the general candidates (both Men and Women) in the remaining 70% reservation. In other words, these TGs did not have the benefit of any form of reservation, though they possessed the required "Third Gender" certificate.

23. In Aradhana's case (supra), the Hon'ble Division Bench had reiterated the observations, findings and directions in NALSA's case (supra) and while elucidating the intent behind such directions, observed that the reservations in age permissible to destitute widows and Ex-Service men and the like, should be extended to TGs. It was further stressed that such privileges should be made applicable in equal measure to each and every concession and relaxation of conditions made in any form in public employment.

24. The Government, while passing G.O.(Ms) No. 245, dated 29.06.2020, had referred to the directions in NALSA and Aradhana cases' (supra) and by relaxing the upper age limit for the TGs on par with SC/ST candidates, claimed compliance of the directions in Aradhana's case (supra). Such a claim is a misconception of the intent behind the findings and directions in both NALSA, as well as in Aradhana cases' (supra).

25. In paragraph 135.3 of NALSA, the directions issued were of twofold. Firstly, the State Government was directed to take steps to treat the TGs as "socially and educationally backward classes of citizens". Secondly, the State Government was directed to extend "all kinds of reservations in public appointments". While inclusion of the TGs in the list of Most Backward Classes for public appointments through G.O.(Ms) No. 28 dated 06.04.2015, could be termed as a compliance of the first direction, the decision to combine the TGs along with 30% vacancies reserved for Women candidates, without extending a special reservation for the TGs, is not only violative of the second direction in NALSA, but may also amount to disobedience of such a direction to extend reservations to them. Further, the relaxation of upper age limit in applying for the posts cannot be termed to be a 'reservation' at all, but rather, a relaxation to enable them to apply for the posts. This proposition was emphasized in Jitendra Kumar Singh's case (supra) in the following manner:-

"75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to

appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition."

26. In Aradhana's case, the Hon'ble Division Bench referred to the intent behind the directions in NALSA and held that the reservations in age permissible to destitute widows and ex-service men should be extended to TGs, as well as each and every concession and relaxation of conditions made in any form of public employment. The respondents had originally relaxed the upper age limit to 26 years, on par with the Most Backward Classes candidates and recently, in G.O.(Ms) No. 245 dated 29.06.2020, had further relaxed the upper age limit to 29 years, on par with the Scheduled Caste/Scheduled Tribes. There is no logical or rationale explanation to such a decision.

27. The upper age limit for the destitute widows has been fixed at 35 years and there could be a rationale explanation to such a fixation, since the likelihood of a woman becoming a widow may occur in her 30's. So also, the relaxation of the upper age limit for the ex-servicemen at 45 years, may have a reasonable justification to such persons, who had served the armed forces for a specific period of engagement and thereafter retired/released from such services. When these may be the criteria to relax the upper age limit for the destitute widows and ex-servicemen, the respondents seem to have lost sight of similar situations, which may preclude a person to openly declare his/her/their status at an early age.

28. While a person realizes his/her/their physiological and mental change of being the opposite or third gender, usually in their teen ages, their acceptance and declaration to be a "TG" occurs much later, particularly, among a conservative traditional Indian Society, which attaches an intangible stigma to such TGs. Acceptance of a person as TG is now a mandatory requirement for the purpose of applying for the posts in view of the pre-requisite of a TG identity card. In this background, the findings in Aradhana's case, that the reservation in age permissible to destitute widows, should be adopted for the TGs, gains significance.

29. Thus, in the light of the above observations, I am of the view that the relaxation of the upper age limit for the purpose of applying to the posts, cannot be termed as a "reservation", as held in Jitendra Kumar Singh's case (supra). So also, clubbing of the TGs along with the 30% reservation for Women, without an exclusive reservation for the TGs, is also not a reservation, as intended and directed in NALSA and Aradhana cases' (supra). Hence, these inadequate privileges, claimed as reservation by the TNUSRB, is a transgression by misconception, infringing their fundamental rights guaranteed under Article 16(1).

Failure to provide relaxations/concessions to the TGs-Men or Third Gender in the physical tests:-

30. In the recruitment notifications of TNUSRB, various relaxations/concessions have been extended to the Women/TGs. These include relaxations in height measurement, endurance tests and physical efficiency tests. Though these appears to be concessions granted to the TGs, the notification restricts these concessions to such TGs, who recognize themselves as "Male" or "Third Gender". This was never the intent of NALSA. In para 135.2 of NALSA, it was declared that the TGs have a right to decide their self identified gender and the Central and State Governments were accordingly directed to grant legal recognition of their gender identity such as "Male" or "Female" or "Third Gender". Merely because the TNUSRB had extended the option to the TGs, who choose their self identified gender, they had no right to deprive their fundamental right of equal opportunity in employment, vis-À-vis the Women and the TGs, who identify themselves as Women. The object behind NALSA's declaration of the TGs' right to decide their self identified gender was to give them a recognition of their identity in various legislations and thereby extend equal protection of law, as well as to avoid discrimination. These objects are reflected in the order of NALSA in the following manner:-

"50. Social exclusion and discrimination on the ground of gender stating that one does not conform to the binary gender (male/female) does prevail in India. Discussion on gender identity including self-identification of gender of male/female or as transgender mostly focuses on those persons who are assigned male sex at birth, whether one talks of hijra transgender, woman or male or male to female transgender persons, while concern voiced by those who are identified as female to male transsexual persons often not properly addressed. Female to male unlike hijra/transgender persons are not quite visible in public unlike hijra/transgender persons. Many of them, however, do experience violence and discrimination because of their sexual orientation or gender identity.

...

66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

67. TGs have been systematically denied the rights under Article 15(2), that is, not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic,

social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

68. Articles 15(2) to (4) and Article 16(4) read with the directive principles of State policy and various international instruments to which India is a party, call for social equality, which TGs could realise, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

...

80. Article 21, as already indicated, protects one's 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.

81. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognise the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett Principle of "biological test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "psychological test" instead of "biological test". Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like Nrega, 2005, etc. Non-recognition of the identity of hijras/transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

82. Article 14 has used the expression "person" and 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 beings. 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 one's 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.

83. 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.

...

111. If a person has changed his/her sex in tune with his/her gender characteristics and perception, which has become possible because of the advancement in medical science, and when that is permitted by/in medical ethics with no legal embargo, we do not find any impediment, legal or otherwise, in giving due recognition to the gender identity based on the reassigned sex after undergoing SRS.

112. For these reasons, we are of the opinion that even in the absence of any statutory regime in this country, a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well."

31. The aforesaid extract is self explanatory. Thus, depriving the TGs, who recognize themselves as "Male" for the relaxations in the physical tests, is opposed to the object behind NALSA in upholding their right to decide their self identified gender, as well as violative of Articles 14 and 16(1) and therefore unconstitutional.

Status of the privileges extended to TGs by TNUSRB:-

32. As stated earlier, the decision of TNUSRB to combine the reservation for the TGs, who identify themselves in the female category, along with the 30% vacancies for Women, is opposed to the findings and directions in NALSA. Likewise, the denial of any reservation for the TGs, who identify themselves in the male category, was also not the intent behind the findings in NALSA, as well as in Aradhana's case (supra). Moreover, clubbing of reservations of the Women and TGs together is opposed to Article 16(1), since it denies the right of opportunity to the TGs in matters of public employment and therefore unconstitutional. Above all, the TGs who had opted for Men category, have been totally denied of any reservation, which infringes their right under Articles 14 and 16(1). On a overall comprehension of the manner in which TNUSRB had granted a few privileges to these TGs and reservation for a few TGs who opted as female category, this Court is of the view that the claim of the respondents that they have complied with the directions in NALSA and Aradhana is not only irrational, unreasonable, arbitrary and unfair, but also unconstitutional.

33. In para 77 of Tata Cellular Vs. Union of India reported in MANU/SC/0002/1996 : 1994 (6) SCC 651, the Hon'ble Supreme Court defined "illegality" to mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. In the instant cases, the TNUSRB had neither understood the object of Articles 14, 16(1) and 16(4), nor the intent of the directions in NALSA and therefore their actions in this regard, are illegal.

34. Further, clubbing all the reservations for the TGs-Women and Women candidates and denying any reservation for the TGs, who are in the Men category, is an unrestrained use of authority by the respondents, which is not based on any reason, but rather a random decision, which could be termed as "arbitrary" or "unfair". In para 18 of Ugar Sugar Works Ltd., V. Delhi Administration & Others reported in MANU/SC/0189/2001 : 2001 (3) SCC 635, such arbitrary and unreasonable exercise of power was held to be unconstitutional. Above all, deprivation of reservation to TG-Male category and combining the TG-Females with the vacancies for Females under the

pretence of "reservation for TGs", infringes Articles 14 and 16(1) and hence unconstitutional.

Scope of Judicial Review in Policy Decision:-

35. In the following line of decisions, the Hon'ble Supreme Court has laid down the dictum that the Constitutional Courts will not normally interfere with the administrative powers or policy decisions of the State and will not determine whether such decision or policy is fair or not. However, when these decisions or policies are unconstitutional, irrational, unreasonable or unfair, the Courts would be well within their powers to correct such decisions. It has been time and again reiterated that judicial review would be concerned with reviewing the decision making process and not the merits of the decisions.

36. In Hira Lal's case (supra), the scope for judicial review was applied to the extent of reservation to be made, though it was a States' decision. This ratio was adopted and reiterated in Indra Sawhney's case (supra), whereby it was held that when the reservations made under Article 16(4) make the rule in Article 16(1) meaningless, the decision of the State would be open to judicial review.

37. In Tata Cellular's case (supra), it was held that when an administrative decision was illegal, irrational or unfair, it would be open for judicial review. The relevant portions of the order reads as follows:-

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

...

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

...

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The

extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind* MANU/UKHL/0008/1991 : (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

38. In *Delhi Science Forum and Others Vs. Union of India and Another* reported in MANU/SC/0360/1996 : 1996 (2) SCC 405, it was held that when an administrative decision is found to have been taken in bad faith or irrational or irrelevant consideration or violates the procedure adopted, such decisions would be open for judicial scrutiny. Such a ratio was held in the following manner:-

"13. ... But the question is as to whether it can be held that till such rules are framed Central Government cannot exercise the power which has been specifically vested in it by first proviso to Section 4(1) of the Act? Even in the absence of rules the power to grant licence on such conditions and for such considerations can be exercised by the Central Government but then such power should be exercised on well-settled principles and norms which can satisfy the test of Article 14 of the Constitution. If necessary for the purpose of satisfying as to whether the grant of the licence has been made strictly in terms of the proviso complying and fulfilling the conditions prescribed, which can be held not only reasonable, rational, but also in the public interest can be examined by courts. It need not be impressed that an authority which has been empowered to attach such conditions, as it thinks fit, must have regard to the relevant considerations and has to disregard the irrelevant ones. The authority has to genuinely examine the applications on their individual merit and not to promote a purpose alien to the spirit of the Act. In this background, the courts have applied the test of a reasonable man i.e. the decision should not be taken or discretion should not be exercised in a manner, as no reasonable man could have ever exercised. Many administrative decisions including decisions relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds: (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations; (iii) decision has been taken without following the prescribed procedure which is imperative in nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority, which can be held to be State within meaning of Article 12 of the Constitution, courts have to address while examining the grievance of any

petitioner as to whether the decision has been vitiated on one ground or the other. It is well-settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in the mind of the court, but by satisfying the court that the authority or the body which had been vested with the power to take decision has adopted a procedure which does not satisfy the test of Article 14 of the Constitution or which is against the provisions of the statute in question or has acted with oblique motive or has failed in its function to examine each claim on its own merit on relevant considerations. Under the changed scenarios and circumstances prevailing in the society, courts are not following the rule of judicial self-restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far as the commercial contracts are concerned. Parliament has adopted and resolved a national policy towards liberalisation and opening of the national gates for foreign investors. The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same."

39. The same proposition was stressed in Ugar Sugar Works Ltd., case (supra) in the following manner:-

"18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional."

40. By adopting the ratio in the aforesaid decisions of the Hon'ble Supreme Court to the facts of the present case, it is seen that the decision of TNUSRB to combine the TGs, who had opted for female category, along with the vacancies reserved for Women deprives equality to them which is violative of Articles 14 and 16(1) of the Constitution of India. Likewise, when NALSA specifically directed the Central and State Governments to provide reservation for the TGs in matters of public appointments, the conduct of TNUSRB in depriving the TGs, who are in the male category of any kind of reservations in the vacancies, is also opposed to Articles 14 and 16(1). Thus, the manner in which the respondents had violated the equality of opportunity to the TGs in the impugned notification, is unconstitutional, arbitrary and unfair. If that be so, such an illegal action would be open for judicial review by this Court exercising its powers under Article 226 of the Constitution of India.

41. The observations and findings recorded in this order are summed up as follows:-

i) The relaxations in the upper age limit for the TGs, cannot be termed to be a

"reservation", but rather a relaxation enabling them to fall within the zone of consideration and place them on par with the general category;

ii) When NALSA had specifically directed the State Governments to provide for reservation in public employment, clubbing the TGs who applied under the female category, along with the reservation for women candidates, infringes their fundamental right of equality before law and their right of equality of opportunity in public employments, as guaranteed under Article 14 and 16(1) of the Constitution of India and is therefore unconstitutional;

iii) The failure to provide any kind of reservation for the TGs in the male category and placing them on par with the general category candidates, is violative of Articles 14 and 16(1) and is not only unconstitutional, but is also illegal since it defies the direction to provide reservation in public employment, as ordered in NALSA;

iv) Deprivation of the relaxations and concessions offered to female candidates in the physical measurement tests, endurance tests and physical efficiency tests to the TGs, who recognise themselves as "Male" or "Third Gender", is arbitrary and unreasonable, apart from infringing their fundamental right under Article 16(1).

v) Since the selection process itself is found to be unconstitutional, illegal, irrational and unreasonable, the selection process, insofar as it pertains to the failure to provide reservations and concessions for the TGs are concerned, would be amenable for judicial review by this Court.

42. Thus, the claim of the learned Additional Advocate General that the TGs were provided with reservation of 30% and were granted relaxation and concession in age limits is a compliance of the directions in NALSA and Aradhana cases (supra), is deplorable. Consequently, the procedure adopted in the recruitment process stands vitiated, insofar as it relates to the failure to provide for a special reservation for the TGs of both male and female categories and deprivation of the concessions/relaxations in the physical tests. Thus, in exercise of the powers vested in this Court under Article 226 of the Constitution of India, the disqualification of all the petitioners herein, are liable to be set aside.

43. It is needless to point out that, had the TNUSRB complied with the directions in NALSA to its true intent, all the petitioners herein would have been qualified for appointments, subject to the physical tests to be conducted. In this regard, the claim of the learned Additional Advocate General that all the petitioners herein did not qualify in the written examination is unacceptable, since all the petitioners herein have been treated on par with the general category candidates, which act is illegal on account of the reasons stated above. The learned Senior counsel appearing for the petitioners indicated that the State of Karnataka had extended 1% reservation for the TGs in the matters of public employment. If that be so, I do not find any impediment for the Government of Tamil Nadu to adopt a specified percentage of reservation for the TGs of this State also.

44. Before concluding this order, I would like to place my appreciation to my Research Law Assistant Ms. Esha Tibrewal, for her contribution with the research work.

45. In the light of the above observations, the following orders are passed:-

i) The disqualification of the petitioners herein from the recruitment process for the posts of Grade-II Police Constables conducted by the TNUSRB for the years 2017-18, 2019 & 2020, are quashed;

ii) The Member Secretary of TNUSRB is directed to treat all the petitioners herein, as having qualified in the initial selection process, including the written examination and forthwith subject them to physical measurement tests, endurance tests and physical efficiency tests, in accordance with the relaxed norms applicable for Women candidates, for the purpose of appointing them as Grade-II Police Constables and complete such a process, within a period of eight weeks from the date of receipt of a copy of this order;

iii) In the light of the findings and directions in NALSA, Aradhana, as well as in the present case, this Court strongly recommends to the Government of Tamil Nadu for providing a specified percentage of special reservation for the TGs in matters of future public employments, apart from other relaxations and concessions extended to the socially and economically backward classes;

iv) This Court strongly recommends to the Government of Tamil Nadu for providing relaxations in the physical measurement tests, endurance tests and physical efficiency tests for the TGs, who identify themselves as "Male" or "Third Gender", on par with the concessions extended to Women candidates and other socially and economically backward classes; and

v) While granting any reservations, concessions and relaxations to the TGs, the Government of Tamil Nadu shall take into account the ratio adopted for granting similar privileges to the other socially and economically backward classes and adopt a similar method for determining these privileges for the TGs.

46. With the above observations and directions, all the Writ Petitions stands allowed. Consequently, the connected Miscellaneous Petitions is/are closed, if any. There shall be no orders as to costs.

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