

MANU/SCOR/99343/2022

IN THE SUPREME COURT OF INDIA

Writ Petition Civil No. 1033 of 2017

Date of Order: 08.09.2022

Shanavi Ponnusamy **Vs.** Ministry of Civil Aviation & Anr.

Hon'ble Judges/Coram:

Dr. D.Y. Chandrachud and Hima Kohli, JJ.

ORDER

1. The gist of the case is that the petitioner, a transgender woman, had sought employment as a member of the cabin crew in Air India, pursuant to an advertisement dated 10 July 2017. The advertisement was for recruitment in the 'female category'. No special category for transgender persons was provided. After clearing the Preliminary Medical Examination tests, the petitioner appeared for the Group Dynamic¹ and Personality Assessment Test² on 18 August 2017. The GD and PAT for the post of female trainee cabin crew, evaluated the candidates on subjective parameters, including overall personality, self- confidence, service aptitude, and communication/sociability. The petitioner was not selected. Mr K V Viswanathan, senior counsel, states that the rejection of the petitioner was due to the inability of the Petitioner to score the minimum qualifying marks in the GD and PAT (relevant to the SC category).

2. The petitioner instituted the Writ Petition under Article 32 of the Constitution seeking, 1 "GD" 2 "PAT" inter alia, a direction to the respondents to consider the candidature of the petitioner for the post of cabin crew in Air India.

3. In National Legal Services Authority v. Union of India,³ this court recognized the fundamental rights of the transgender population, including the right to self-determination of one's gender as an extension of Article 21 of the Constitution. The Court held that incidental to their fundamental right to live with dignity under Article 21, is the right of equal access to all facilities to achieve full potential as human beings, including proper education, social assimilation, access to public spaces and employment opportunities. On the issue of discrimination faced by transgender persons in matters relating to employment, this Court observed: "65. Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office under the State. Article 16(2) of the Constitution of India reads as follows: "16. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State." Article 16 not only prohibits discrimination on the ground of sex in public employment, but also imposes a duty on the State to ensure that all citizens are treated equally in matters relating to employment and appointment by the State.

66. [....]

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 3 (2014) 5 SCC 438 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." (emphasis supplied)

4. The Transgender Persons (Protection of Rights) Act 2019 was brought into force on 10 January 2020 for protecting the rights of transgender persons and for their welfare and connected matters.

5. Section 2(b) defines an 'establishment' as "any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government", or as "any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution". Section 3(b) stipulates that no person or establishment shall discriminate against a transgender person, inter alia, by giving unfair treatment in, or in relation to, employment or an occupation. Clause (c) of Section 3 prohibits the denial of or termination from employment or an occupation. In terms of Section 8, an obligation is cast upon the appropriate government to secure full and effective participation of transgender persons and their inclusion in society. Section 9 prohibits discrimination in employment and provides that no establishment shall discriminate against any transgender person in any manner relating to employment including, but not limited to, recruitment, promotion and other related issues. Section 10 of the "2019 Act" requires every establishment to comply with the provisions of the 2019 Act and provide requisite facilities. Section 16 has provided for the constitution of a National Council for Transgender Persons⁵, whose functions are spelt out in Section 17. Grants are provided by the Central Government to the National Council under Section 19.

6. These proceedings under Article 32 of the Constitution highlight the importance of extending the benefit of the provisions of the 2019 Act to transgender persons, particularly in the context of employment both in the public and private sector. Though the immediate contours of the case relate to the civil aviation industry, the issues raised cover a broader spectrum. The issues which have been raised in the petition transcend just the claim of the petitioner for employment in Air India in pursuance of the above advertisement. The petition raises wider issues in regard to the formulation of appropriate policies by the government, and the implementation of the provisions of the 2019 Act by all establishments to give effect to the guarantee of non-discrimination embodied in Sections 3 and 9. Besides, obligations have been cast on the appropriate government under Section 8(1) and on all establishments under Section 10.

7. Transgender persons routinely face multiple forms of oppression, social exclusion and discrimination, especially in the field of healthcare, employment and education. Gender diverse persons, including transgender persons, continue to face barriers in accessing equal employment opportunities, especially in the formal sector, due to the operation of gender stereotypes. Gender stereotypes in the workplace disproportionately impact transgender persons for not subscribing to societal norms about appropriate 'feminine' and 'masculine' appearances and mannerisms.

8. Bearing the provisions of the 2019 Act and NALSA judgment

(supra) in mind, it is necessary for the Central Government, in consultation with the National Council, to devise 5 "National Council" a policy framework in terms of which reasonable accommodation can be provided for transgender persons in seeking recourse to avenues of employment in establishments covered by the provisions of the 2019 Act. The enactment by Parliament embarks a watershed in the evolution of the rights of transgender persons. The provisions of the 2019 Act need to be implemented in letter and spirit by formulating appropriate policies. The Union Government must take the lead in this behalf and provide clear guidance and enforceable standards to all other entities, including, those of the Union Government, State Governments and establishments governed by the 2019 Act.

9. The National Council under Section 16 has been constituted by a notification dated 21 August 2020. The Union Government shall adopt suitable measures after collaborating with the National Council and place a policy on the record before the next date of listing.

The policy shall cover, but shall not be confined to the civil aviation industry. The Union Government in the Ministry of Social Justice and Empowerment and Department of Personnel and Training, shall consult all stake holders.

10. List the petition on 6 December 2022.

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