

MANU/UP/2654/2023

**IN THE HIGH COURT OF ALLAHABAD**

Writ-A No. 7796 of 2023

**Decided On:** 18.08.2023

Neha Singh **Vs.** State of U.P. and Ors.

**Hon'ble Judges/Coram:**

*Ajit Kumar, J.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Ram Janam Shahi and Pramod Kumar Yadav*

*For Respondents/Defendant: C.S.C.*

**ORDER**

**Ajit Kumar, J.**

**1.** Heard Sri Atul Kumar, learned Advocate holding brief of Sri P.K.Yadav, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State respondents.

**2.** The petitioner who is presently working as Woman Constable in U.P. Police, as per assessment made by her of characteristics of her own personality, she find in herself all the traits of a male personality and has always an urge to develop nearness with females as opposed to her physical characteristics of a male. She claims to have a feeling of a male in herself trapped in a female body. Accordingly, she claims to be suffering from Gender Dysphoria. This has been so diagnosed also by an authorized medical practitioner who runs mind clinic at New Delhi after conducting psychological test of her. The petitioner is admittedly an unmarried women. In the circumstances, she is desirous of undergoing Sex Reassignment Surgery (SRS) to get herself ultimately identified and personalized as a male with true male physical character.

**3.** She traces out this fundamental right of her from the judgment of the Supreme Court in the case of National Legal Services Authority v. Union of India and Others, MANU/SC/0309/2014 : 2014 5 SCC 438, in which the Court dealt with the issue of Transgender's rights and right of third gender bringing under its umbrella all such persons in true perspective of the provisions contained under Chapter III of the Constitution of India relating to fundamental rights.

**4.** The Court held that gender identity to be integral to the dignity of an individual and is at the core of personal "autonomy" and "self determination" the Court thus used word and expression "third gender" over and above binary-genders under our constitution and the laws. Referring to Article 14,15,16,19 and 21 as contained in part III of the Constitution, the Court held that the provisions are also applicable to transgenders as well. The use of word/ expression 'person', 'citizen', 'sex' under those articles are "gender neutral" and so evidently refer to human beings. The Court thus held that gender identity 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. The Court finally concluded that any discrimination on the ground of sex or gender identity in terms of ' exclusion', 'restriction' or preference' or any other act in society that has the

effect of giving a treatment that renders citizen who are third gender as discriminated against, deserve protection and emphasized for safeguarding their constitutional rights.

**5.** Elaborating further the rights of citizen to have a gender of his or her choice the Court addressed the core issue when for any genital defect it may be difficult for such a person innate perception may be that of a female and so the actions and behavior too even though a person was born as a male and could even be vice versa. The Court proceeded further to refer to the scientific and psychological studies wherein behavioral science explorations showed mismatch in anatomical structure and psychological aspect of human nature, conduct and mindset. The Court observed that medical science has leaped forward to such an extent that even physiological appearance of a person can be changed through surgical procedures from male to female and vice versa.

**6.** The Court discussed above on the principle of 'right of choice' as a germane to the fundamental rights of liberty and to live with dignity in his/her own dignified way as a human. The Court stressed that respect for human rights is the root for human development and realization of full potential of each individual. So in a country or nation where basic human rights value, it must concern every aspect of it. For an individual, his dignity remains intact if his/her values of life is respected. For a person naturally including a third gender, what matters is that society has a space for him to have a dignified living. A person's anatomical structure if is coming in that person's way to live a happy and dignified life, State is held to be duty bound to give such a person adequate opportunity to have a personality of choice, a right well guaranteed under the constitution. Citing two instances where males got transformed physically into female as was published in some magazine "Eye" of the Sunday Indian Express (March-15, 2014), the Court stressed upon resolving issue of identity crisis so that it may not become a life long trauma for an individual. But the Court put a note of caution also that to take a decision to undergo SRS procedure requires strong mental state of affairs and is not an overnight process. The Court appreciated the statement of that person who had undergone SRS as was published in the article "I am a person who likes to laugh. Till my Surgery, behind every smile of mine, there was a struggle. Now its about time that I laughed for react." The struggle to be identified as a girl in a dignified way was over as she said. She never felt trapped any more and was ready to give her maximum to the society. She had a freedom to live life in its fullness, a dream come true.

**7.** The Court upheld constitutional right of such individual to get recognition as male or female. Vide paragraph nos. 105 and 106 the Court upheld these rights to get the recognition as male or female hereunder:

"105. 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 reassign sex after undergoing SRS.

**106.** 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.

**8.** vide para 12 of the Court puts states and the Union to frame appropriate legislation and issued a number of directions reproduced hereunder:

129. We, therefore, declare:

*(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.*

***(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.***

***(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.***

*(4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.*

*(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.*

*(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.*

*(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.*

*(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.*

*(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."*

(emphasis added)

**9.** It is submitted by learned counsel for the petitioner that assailing the right to get SRS done, the petitioner has applied for necessary sanction vide application dated 11th March, 2023 made to the Director General of Police, U.P. Lucknow but no decision has been taken in that regard till date.

**10.** Learned counsel for the petitioner submits that in view of direction issued by the Supreme Court respondents are not justified in withholding the application of the petitioner because even in absence of any statutory provisions, authorities are bound to obey the command issued by the Supreme Court. He submits that in the above regard, Central Government has also framed an Act, namely, Transgender Persons (Protection of

Rights) Act, 2019.

**11.** He has drawn the attention of the Court toward Section 15 of the Central Act (supra) that deals with health care facilities including Sex Reassignment Surgery and hormonal therapy. The relevant provisions of Section 15 of the Transgender Persons (Protection of Rights) Act, 2019 are reproduced hereunder:

*"15. Healthcare facilities.-The appropriate Government shall take the following measures in relation to transgender persons, namely:-*

*(a) to set up separate human immunodeficiency virus Sero-surveillance Centres to conduct sero-surveillance for such persons in accordance with the guidelines issued by the National AIDS Control Organisation in this behalf;*

***(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy; (c) before and after sex reassignment surgery and hormonal therapy counselling;***

*(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;*

*(e) review of medical curriculum and research for doctors to address their specific health issues;*

*(f) to facilitate access to transgender persons in hospitals and other healthcare institutions and centres;*

*(g) provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons."*

(emphasis added)

**12.** Learned counsel for the petitioner has also relied upon division bench order dated 4th July, 2018 of Bombay High Court in the case of Myra Grace Bandikalla (formerly known as Mr. Swaroop Rajarao Bandikalla) v. Airport Authority of India and Others (Writ Petition (L) No. 1976 of 2018), wherein application made by a third gender was granted for the purpose of facilitating her visit Bangkok for getting SRS done. In that case also petitioner was suffering from gender dysphoria and was accordingly desirous of SRS. The Court quoted paragraphs 105 and 106 of Supreme Court judgment (supra) and passed interim order, keeping the petition pending.

**13.** Learned counsel has further placed reliance upon the judgment of the Rajasthan High Court in the case of Chinder Pal Singh v. The Chief Secretary, Government of Rajasthan, Government Secretariat, Jaipur and others (S.B. Civil Writ Petition No. 14044 of 2021 decided on 25.5.2023) in which also a female gender wanted to undergo SRS to get her gender identity changed from female to male, may be in that case for certain gender identity disorder. In that case, application stood granted for the purpose of SRS taking it and to the provisions contained under the Central Act.

**14.** One should not have any doubt that if a person suffers from gender dysphoria and except for physical structure, her feeling and also the traits of opposite sex so much so

that such a person takes a complete misalignment of her personality with physical body, such a person does possess a constitutionally recognized right to get his/her gender changed through surgical intervention. If we, in the modern society do not acknowledge this vested right in a person, we would be only encouraging gender identity disorder syndrome. At times such a problem may be fatal as such a person may suffer from disorder, anxiety, depression, negative self image, dislike of one's sexual anatomy. If psychological interventions to alleviate such distress as above fail, surgical intervention should become a must and should be encouraged.

**15.** In view of above, therefore, I do not find any justification for the Director General of Police to withhold the application of the petitioner .

**16.** Upon pointed query being made to the learned Standing Counsel as to whether State Government has also framed any rules or not in the light of directions issued by the Supreme Court in the case of National Legal Services Authority (supra), learned Standing Counsel seeks time to obtain instructions in the matter.

**17.** Let an appropriate affidavit be filed on behalf of the State Government as to whether it has also framed any such Act in compliance of directions issued by the Supreme Court and if that be so, the same may also be brought on record. However, it is provided at the same time that any such Act or Rule if has not been framed till date, the State Government will ensure to frame such Act at par with the Central legislation that has been referred to hereinabove and file a comprehensive affidavit in that regard as to what steps have been taken so far, by the next date fixed.

**18.** Put up this matter on 21st September, 2023 in the list of top ten cases.

**19.** In the meanwhile, Director General of Police, namely, second respondent is directed to dispose of pending application of the petitioner strictly in the light of the judgments referred to hereinabove and file affidavit of compliance annexing therewith copy of the order. It will remain open for the authority to ask for such material and documents so as to form a view that such an application really deserves consideration, must be based upon cogent material.

**20.** Registrar, Compliance, shall send a copy of this order to the Chief Secretary, Government of Uttar Pradesh immediately for ensuring compliance.

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