

MANU/WB/1699/2016

IN THE HIGH COURT OF CALCUTTA

W.P. 30295 (W) of 2015

Decided On: 28.01.2016

Chanchal Bhattacharyya **Vs.** State of West Bengal and Ors.

Hon'ble Judges/Coram:

Dipankar Datta, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Kartick Bhattacharya

For Respondents/Defendant: Abhratosh Majumder, Ld. Govt. Pldr., Subhabrata Datta, Sankar Prasad Dalapati and Santanu Kumar Mitra

DECISION

Dipankar Datta, J.

1. A girl child was born in the wedlock of the petitioner and his wife on 28th October, 1991. She was named 'Tamali'. Tamali was admitted in United Missionary Girls' High School, Kolkata from where she took and passed the Madhyamik Pariksha, 2007 conducted by the West Bengal Board of Secondary Education (hereafter the 'Board'). Thereafter, Tamali took the Higher Secondary Examination, 2009 conducted by the West Bengal Council of Higher Secondary Education (hereafter the 'Council') from the same school and qualified in such examination.

2. It is pleaded in the writ petition that although Tamali was born a girl, since childhood she behaved like a boy child and was comfortable in dresses worn by a boy. Day by day, the propensity to act like a male increased and Tamali started thinking herself to be a boy rather than a girl.

3. Since Tamali was suffering from gender identity disorder, she had consulted several reputed doctors and upon obtaining their opinion, underwent 'Sex Reassignment Surgery' (hereafter 'SRS') in February, 2014. On successful surgical operation, the sex of Tamali changed from female to male and he was named 'Tamal'. An affidavit sworn before the learned Judicial Magistrate, Sealdah has been made part of this writ petition, whereby Tamali changed her name to Tamal and declared that 'Tamal Bhattacharyya' and 'Tamali Bhattacharyya' is one and the same person.

4. After such surgical operation, the petitioner had approached the Administrator of the Board as well as the President of the Council for effecting change of name and gender of his child in the admit cards, registration certificates and mark sheets that had been issued by the Board and the Council in the name of Tamali Bhattacharyya. Although the President of the Council did not make any order, the Administrator of the Board by an order dated 13th October, 2015 has rejected the prayer of the petitioner holding, inter alia, as follows :-

"Moreover entire recording in all those testimonials were made by W.B.B.S.E. as per applications of the girl student - Tamali Bhattacharyya and approved by the school authority. But as per above judgement of Hon'ble Apex Court that

present Tamal Bhattacharyya may change his status as Male in Voter's Card and Ration Card and Passport and that has been done by him but as per said Judgement the present applicant's status shall be "Third Gender" everywhere.

In view of the above legal position and material fact it can legally be held that the present prayer of the father of Tamal Bhattacharyya (Previously of Tamali Bhattacharyya Sex - Female) cannot be legally entertained as such the prayer is legally not tenable and legally not recognized and thus it is rejected."

5. The order of the Administrator of the Board dated 13th October, 2015 refusing the prayer of the petitioner as well as inaction of the President of the Council in making any order, is under challenge in this writ petition.

6. Mr. Bhattacharya, learned advocate appearing for the petitioner has placed reliance on the decision of the Supreme Court reported in MANU/SC/0309/2014 : 2014:INSC:275 : (2014) 5 SCC 438 : National Legal Services Authority Vs. Union of India & Ors. as well as the decisions of the Madras High Court dated 20th August, 2014 in W.P. (MD) 10882 of 2014 & M.P. (MD) No. 1 of 2014 [S. Swapna (Transgender) Vs. The State of Tamil Nadu & Ors.] and W.P. 7210 of 2015 [K. Prithika Yashini (Transgender) P. Kalai Arasan Vs. The State of Tamil Nadu & Ors.] to contend that the Administrator of the Board erred in the exercise of his jurisdiction in not granting the prayer of the petitioner.

7. Mr. Mitra, learned advocate appearing for the Board contended that the order of the Administrator does not suffer from any infirmity, in the absence of any statutory provision mandating the Administrator to effect corrections as prayed for by the petitioner.

8. The Bench had requested Mr. Majumder, learned Government Pleader to enter appearance on behalf of the State, respondent 1 and to assist the Bench in passing an appropriate order. He has very fairly submitted that although there is no statutory provision which would empower the Administrator of the Board or the President of the Council to effect changes in the relevant records, as prayed for by the petitioner, useful guidance could be derived from the discussions found in the decision in 'National Legal Services Authority' (supra). He has extensively taken the Bench to the relevant paragraphs of the said decision and has ultimately argued on the basis of the contents of paragraphs 111 and 112 thereof that it is the constitutional right of a person to get recognition either as a male or a female after SRS and in such circumstances, the Bench may pass appropriate order on the Administrator of the Board as well as the President of the Council to grant the prayer of the petitioner for effecting necessary changes in the relevant records.

9. The decision in 'National Legal Services Authority' (supra) has been perused.

10. The two learned Judges comprising the Bench have authored separate opinions. The learned presiding judge of the Bench in paragraph 2 of the decision has noted the claim that was under consideration. Paragraph 2 of the decision is set out below :-

"Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also take in persons who do not identify with their sex assigned at birth, which include hijras/eunuchs who, in this writ petition, describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomical appearance and

psychologically, they are not women, though they are like women with no female reproduction organ and no menstruation. Since hijras do not have reproduction capacities as either men or women, they are neither men or women and claim to be an institutional "third gender" Among hijras, there are emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites). TG also includes persons who intend to undergo sex reassignment surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of opposite gender i.e. transvestites. Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex: male and female."

11. Since the child of the petitioner is not a transgender, the observations as well as the law laid down in 'National Legal Services Authority' (supra) may not *stricto sensu* apply to an individual who upon undergoing SRS, has his sex converted from male to female or female to male.

12. However, it is revealed from paragraph 85 of the concurring judgement of the companion learned judge that the petitions before the Court essentially raised an issue of gender identity and had two facets, viz.

"a) Whether a person who is born as a male with predominantly female orientation (or vice versa), has a right to get himself to be recognised as a female as per his choice more so, when such a person after having undergone operational procedure, changes his/her sex as well;

b) Whether transgender (TGs), who are neither males nor females, have a right too to be identified and categorised as a "third gender"?"

13. Paragraph 86 being relevant too, is quoted below :-

"86. We would hasten to add that it is the second issue with which we are primarily concerned in these petitions though in the process of discussion, the first issue which is somewhat interrelated, has also popped up."

14. The learned Judge upon threadbare discussion of the points that were canvassed ultimately concluded as follows in respect of facet (a) :-

"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."

15. The decisions of the Madras High Court relied on by Mr. Bhattacharya have also been perused. Since the writ petitions were at the instance of transgenders and not by any individual upon reassignment of sex after undergoing SRS, such decisions do not have any application on facts and in the circumstances of the present case.

16. Reverting to the decision in National Legal Services Authority (supra), the issue of change of sex after undergoing SRS was not directly in issue in the petition before the Court and, therefore, any observation in relation thereto may not have the binding force of a precedent; nonetheless, this Bench is not precluded from making appropriate direction on this writ petition considering the observations of the Court in relation to recognition of the constitutional right of a person to have his sex changed in tune with accepted medical procedures and to give due recognition to gender identity based on the reassigned sex after undergoing SRS.

17. However, to the mind of this Bench, relief claimed in the writ petition ought to be appropriately moulded to serve the ends of justice. Tamal in his future life has to rely on the testimonials issued in the name of Tamali and the situation calls for proper direction being passed to preempt any inconvenience to him arising out of testimonials issued in the name of a girl candidate. At the same time, it cannot be overlooked that Tamali studied till Class XII in a girls' school and substitution of the name of Tamali by Tamal and change of sex in the testimonials would cause him more harm than good, for, his testimonials would always be viewed with suspicion (how could a boy study in a girls' school?).

18. The President of the Board has referred to the decision in 'National Legal Services Authority' (supra), but the grounds based whereon he declined to grant relief to the petitioner do not appear to be acceptable.

19. The Court in 'National Legal Services Authority' (supra) had observed that absence of any statutory regime would not stand as an impediment, legal or otherwise in giving due recognition to the gender identity, yet, absence of law has been assigned to be a disability to grant relief to the petitioner. None has argued that 'Tamal' and 'Tamali' is not one and the same individual. Once there is no dispute on this score, the President of the Board ought to have given recognition to the choice exercised by the child of the petitioner in tune with his constitutional right by directing his subordinates to make necessary endorsements on the relevant certificates to such effect i.e. Tamal and Tamali is the same person based on reassigned sex after undergoing SRS, so as to enable the child of the petitioner obtain all facilities/benefits flowing from such certificates.

20. The order of the Administrator of the Board stands set aside. He shall proceed to ensure that appropriate endorsements in all the certificates in the light of the aforesaid observations are made as early as possible but not later than 4(four) weeks from date of receipt of a copy of this judgment and order.

21. The President of the Council shall in like manner, proceed to consider the prayer of the petitioner and ensure that necessary endorsements on the certificates that were issued in favour of Tamali earlier are made within the time frame indicated above.

22. The writ petition stands allowed to the extent mentioned above, without any order as to costs.

23. Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

