

MANU/KE/0636/2024

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

Writ Appeal No. 654 of 2021

Decided On: 22.02.2024

National Cadet Corps and Ors. **Vs.** Hina Haneefa and Ors.

Hon'ble Judges/Coram:

Amit Rawal and C.S. Sudha, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: N.S. Daya Sindhu Shree Hari, Adv.

For Respondents/Defendant: Thomas Abraham, SC, K.J. Glaxon, Raghul Sudheesh, J. Lakshmi, Sanish Sasi Raj, Advs. and T.K. Vipindas, Sr. Government Pleader

JUDGMENT

C.S. Sudha, J.

1. This intra court appeal has been filed by respondents 4 to 7 in W.P.(C)No. 23404/2020 against the judgment dated 15/03/2021 by which the writ petition was allowed. The respondents herein are the petitioners and respondents 1 to 3 respectively in the writ petition. The parties and the documents will be referred to as described in the writ petition.

2. According to the first respondent, she is a transwoman who secured admission for B.A. History course in the third respondent college under the special category of transgender. The petitioner was assigned male gender at the time of birth. At the age of 21 the petitioner on 22/10/2018 underwent sex reassignment surgery from male to female at Vela Hospitals Pvt. Ltd., Coimbatore. The petitioner had also undergone another surgery as part of the sex reassignment on 27/05/2019 at Renai Medicity, Kochi. Earlier the petitioner's name was 'Muhammed Ashif Ali N.' and after the sex reassignment surgery, the name has been changed to 'Hina Haneefa'. Pursuant to the surgery, the Social Justice Department issued Ext.P3 transgender identity card dated 08/02/2019 to the petitioner. The petitioner applied for enrolment in the National Cadet Corps (NCC) at the college. However, her application was not favourably considered.

2.1. As per Section 6 of the National Cadet Corps Act, 1948 (the Act), the enrolment criteria is limited to male and female students and do not refer to transgender students. The petitioner's request was not favourably considered despite the second respondent University formulating a policy to help students belonging to the transgender community to pursue their education without any social discrimination. The refusal of the authorities concerned to admit the petitioner to NCC is against the law laid down by the Apex Court in National Legal Services Authority (NLSA) v. Union of India, MANU/SC/0309/2014 : 2014:INSC:275 : AIR 2014 SC 1863 and the provisions of the Transgender Persons (Protection of Rights) Act, 2019 (the Transgender Act). As the provisions of the Act are discriminatory as far as the transgender persons are concerned, the writ seeking a direction in the nature of mandamus for declaring Section 6 of the Act as illegal and ultra vires of Articles 14, 15 and 21 of the Constitution of

India to the extent it excluded transgender community from enrollment in the NCC ; a writ of mandamus directing respondents 4 and 7 to amend the enrollment criteria in the Act to include transgender community in NCC and also a direction to respondents 3 to 6 to take necessary steps for enrolment of the petitioner in the NCC.

3. Respondents 4 to 7 filed counter affidavit contending that the NCC authorities are empowered to enrol only those students as NCC cadets who meet the eligibility criteria as stipulated in Section 6 of the Act, that is, male and female students only. The petitioner secured admission in the college identifying and claiming to be a transgender and declaring that the petitioner belongs to the transgender category (female). Therefore, the petitioner cannot now turn around and claim to be enrolled as a cadet in the Girls Division, enrolment for which is open only to female gender. The petitioner has exhausted the right to self-perceived gender identity by choosing the gender as "Female" and thereafter took admission under the transgender category (female). She now falls under the third gender category, that is "transgender (female)" and not in the 'female' sex category, as is being claimed by her. As per Section 6(2) of the Act any female student can offer herself for enrolment as a cadet in the Girls Division. Therefore for getting the benefit of Section 6(2) of the Act, the candidate has to be enrolled under the female category in the College. As per the existing policy, there is provision to enroll only boys and girls cadets in the NCC. The facilities, training module and other curriculum provided in the NCC to both the divisions are different.

3.1. Further, it is the prerogative of the Central Government to constitute a new division for the third gender. Before constituting such a new division, the Government and authorities concerned have to conduct a major exercise in terms of reviewing the infrastructure facilities, modules and facilities that are binding to such divisions. Any induction of a candidate who does not belong to either the male or female gender without due deliberations by the authorities concerned, would have far reaching ramifications. The issue of raising a new division for the third gender being a policy decision is required to be resolved through different hierarchical and inter departmental consultations. One of the primary aim of NCC is to groom the cadets for a future in the Armed Forces. Presently there is no provision for entry of transgenders in the Indian Armed Forces. In case the petitioner is permitted to join the NCC, it would entail the petitioner to appear for the Service Selection Board through NCC 'C' certificate scheme. Presently the petitioner is ineligible to join the Armed Forces. None of the provisions of the Transgenders Act are violative of the provisions of the Constitution as alleged by the petitioner.

4. The learned Single Judge allowed the writ petition holding thus-

"14. In view of the specific provisions in the 2019 Act by which a transgender person has a right to be recognized not only as a transgender but also a right to self perceived gender identity, I am of the opinion that the petitioner who has opted for the female gender and has undergone sex reassignment surgeries for aiding her self perception as a member of the said gender would definitely be entitled to enrollment in the NCC unit reckoning her as a transgender and further as a member of her self perceived gender, that is, the female gender. The fact that the provisions of the NCC Act do not recognize the third gender or that detailed guidelines are required to be drawn up for the integration of persons of the third gender into the Armed Forces or the National Cadet Corps cannot, according to me, be a justification for denying admission to the petitioner to the NCC unit on the basis of the Identity Card obtained by her.

15. In the instant case, taking note of the pleadings and the materials on record, I am of the opinion that the petitioner is entitled to enrollment in the NCC senior girls' division and the rejection of the request of the petitioner for such enrollment is completely unsustainable.

16. In the above view of the matter, this writ petition is allowed. The petitioner will be permitted to participate in the selection process on the basis of her application, taking note of Ext.P3 issued to her and if she is successful in the selection, she will be enrolled in the NCC unit of the University college. Needful shall be done with regard to the application of the petitioner for enrollment in the NCC unit within a period of one month from the date of receipt of a copy of this judgment.

17. There will be a further direction to the respondents to amend the enrollment criteria prescribed under Section 6 of the NCC Act, 1948 to include transgender community and to provide guidelines for enrolling transgender persons also in the NCC. Appropriate steps shall be taken by the competent among the respondents without delay, at any rate, within six months from the date of receipt of a copy of this judgment."

Aggrieved, respondents 4 to 7 have come up in appeal.

5. It was argued by the learned Central Government Standing Counsel that a mandamus could not have been issued directing the Government to amend Section 6 of the Act. The reliefs granted have wide ramifications for the reasons stated in the counter affidavit dated 26/11/2020 as well as in the statement dated 18/01/2020 filed on behalf of respondents 4 to 7. As it is a policy decision that has to be taken by the Central Government, the relief of mandamus directing the Government to amend the Act ought not to have been granted, goes the argument. Per contra it was submitted by the learned counsel for the petitioner that in the light of the provisions of the Transgenders Act and the law laid down by the Apex Court in NLSA (Supra) the petitioner is certainly entitled to the reliefs prayed for and that the impugned judgment calls for no interference.

6. Heard both sides.

7. Sections 2(d), 2(k) and 4 to 7 of the Transgenders Act reads-

"(d) "inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students;

xxx xxx xxx

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

4. (1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.

(2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.

5. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

PROVIDED that in the case of a minor child, such application shall be made by a parent or guardian of such child.

6. (1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.

(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).

(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person."

7. (1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.

(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

PROVIDED that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act."

8. Therefore, as per sub-section (2) of Section 4 of the aforesaid Act, a person recognised as transgender under sub-section (1) has the right to self-perceived gender identity. As per sub-section (2) to Section 7 a person who has undergone sex reassignment surgery has the right to be issued a certificate indicating change in gender. By virtue of sub-section (3), a person issued with such a certificate of identity, is entitled to change the first name in the birth certificate and in all other official documents relating to the identity of such person. The case of the petitioner herein that she had undergone sex reassignment surgery to change her gender from male to female, as evidenced by Ext.P1 certificate, is not disputed. In Ext.P2 affidavit the petitioner has affirmed and declared that she had been subjected to sex reassignment

surgery and that she now belongs to the female gender. Ext.P3 identity card issued by the Social Justice Department has shown the gender of the petitioner as 'female'. It is true that presently there is no provision in the Act to enrol transgenders or persons belonging to the third gender in the NCC. Section 6(2) of the Act says that any student of the female sex of any University or School may offer herself for enrolment as a cadet in the girls division. In the light of Ext.P3, when the petitioner has been given the identity of a female, she is certainly entitled to be enrolled in the NCC under Section 6(2) of the Act; in the light of the aforesaid provisions of the Transgenders Act and also in the light of the dictum laid down by the Apex Court in NLSA (Supra).

9. Be that as it may, the question now to be considered is could a mandamus be given directing respondents 4 to 7 to amend the Act? The learned Central Government Standing Counsel answers the question with an emphatic 'No'. The law on the point is no longer res integra in the light of several decisions of the Apex Court and to name a few-M/s. Narinder Chand Hen Raj v. Lt. Governor, Administrator, Union Territory, H.P., MANU/SC/0620/1971 : 1971:INSC:270 : AIR 1971 SC 2399 ; A.K.Roy v. Union of India, MANU/SC/0051/1981 : 1982 AIR SC 710 ; Supreme Court Employees' Welfare Association v. Union of India, MANU/SC/0582/1989 : 1989:INSC:210 : (1989)4 SCC 187 and State of J&K v. A.R.Zakki, MANU/SC/0293/1992 : 1991:INSC:324 : AIR 1991 SC 1546. It has been held that no Constitutional Court can issue a mandate to a legislature to enact a particular law or a law on a particular subject in a particular manner. The Court may, at best, record its opinion or recommendation on the necessity of either amending the existing law or coming out with a new law.

In the result, the appeal is partly allowed. The relief granted to the petitioner permitting her to participate in the selection process on the basis of her application as a student belonging to the female gender and in the event of her succeeding in the selection process, to be enrolled in the NCC unit of the fourth respondent college is confirmed. The relief of mandamus issued directing respondents 4 to 7 to amend the enrollment criteria prescribed in Section 6 of the Act to include transgenders, is set aside. We are hopeful and confident that the Central Government would rise to the occasion in the light of the dictum of the Apex Court in National Legal Services Authority (Supra) and the provisions of the Transgenders Act and take steps expeditiously to include the third gender also within the scope of Section 6 of the Act.

Interlocutory applications, if any pending, shall stand closed.

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