

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2017

CORAM :
THE HONOURABLE MR.JUSTICE N.KIRUBAKARANW.P.No.26628 of 2017

and

W.M.P.Nos.28349 and 28350 of 2017

S.Tharika Banu (Transwomen)

... Petitioner

Vs

1.The Secretary to Government,
Health and Family Welfare Department,
St. George Fort,
Chennai - 600 009.

2.The Director of Medical Education,
The Directorate of Medical Education,
Kilpauk, Chennai - 600 010.

3.The Secretary,
(Selection Committee)
Directorate of Indian Medicine and Homeopathy
AAGHIM Campus, Chennai - 600 106.

4.The Government of Tamil Nadu
Rep. by its Secretary,
Social Welfare and Nutritious Meal Programme Department,
Fort St.George, Chennai - 600 009.

5.The Chief Secretary,
Government of Tamilnadu,
Fort St. George, Chennai - 600 009. ... Respondents

(R4 & R5 are Suo Motu impleaded as per order dated 16.11.2017 in W.P.No.26628/2017)

Prayer:

Writ petition is filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari and Mandamus, calling for the records on the file the 3rd respondent special category merit list for UG course in Indian Medicine and Homeopathy 2017-18, dated 6-10-2017 and quash the same as illegal and contrary to the Judgment rendered by Hon'ble Supreme Court in National Legal Service Authority-vs-Union of India and others, 2014(5) SCC 438 and further direct the 3rd respondent to allot one seat in Bachelor of Sidha Medicine and Surgery for UG course in Indian Medicine and Homeopathy for the academic year 2017-18.

For Petitioner : Mr.K.V.Sajeev Kumar

For Respondents : Mr.T.M.Pappiah, (for R1 to R5)
Special Government Pleader.

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“Shikhandi” who is said to have played a role in killing Bishmacharya during Kurukshethra war is an epic character transgender in Mahabharatha, which itself would show that it is not as

if for the first time, the third gender has been part of the society. Therefore, the existence of “Hijras” “Eunuchs” or in tamil “Thirunangai” “Aravani” has been recognized even during the epic period. However, the stigma, harassment, mockery and other problems being faced by them have not been looked into and addressed properly. Therefore, the Hon'ble Supreme Court of India in **National Legal Services Authority Vs. Union of India and others reported in 2014 (5) SCC 438** by judgment dated 15.04.2014 gave series of directions, conferring certain benefits including classification as third gender. The operative portion of the judgment is extracted as follows:

“135. We, therefore, declare:

135.1. *Hijras, enuchs, apart from binary genders, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by 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. The Centre and State Governments are directed to operate separate HIV serosurveillance centres since hijras/transgender face several sexual health issues.

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

135.8. The 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. The 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 the 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”

Though the judgment was passed on 15.04.2014, so far both the Central and State Governments have not effectively taken any steps to comply with the directions issued by the Hon'ble Supreme Court. The bill “*The Transgender Persons (Protection of Rights) Bill, 2016*” has been introduced and it has been referred to parliamentary standing committee for examination and report. If the directions given by the Supreme Court had been complied within time, the petitioner would not have been knocking the doors of this Court for relief.

2. The petitioner was born as male and named as S.Patchaikili. The petitioner belongs to SC community by birth. As a male, he completed

higher secondary course, during the academic year 2016-17 and obtained 537 marks out of 1200 marks. The contention of the petitioner is that though the petitioner was born as male, due to chromosomal aberration, S.Patchaikili started identifying himself more as a female than male. After realising the identification of the petitioner as female, even the parents of the petitioner did not accept, due to social stigma and therefore, the petitioner left the house. With the help of third party, the petitioner underwent sexual reassignment surgery on 30.09.2015 and has been leading a life as a female. After sexual reassignment surgery, the petitioner changed the name from S.Patchaikili to S.Tharika banu, which has also been notified in the Tamil Nadu Government Gazette publication on 06.07.2016. Thereafter only, the petitioner completed Higher Secondary course, during the academic year 2016-2017 by joining P.K.G.G. Higher Secondary School, Ambattur, Chennai, after getting transfer certificate from the school, which is located in her native town.

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3. The third respondent issued prospectus for the year 2017-18 for the course of BSMS/BAMS/BNYS/BUMS/BHMS and the petitioner applied for the course BSMS (Bachelor of Siddha Medicine and Surgery). Since,

the petitioner successfully passed +2 examination, she is entitled to a seat in the above said course under transgender category. Though the Hon'ble Supreme Court as well as first bench of this Court directed the respondents to provide a separate column for transgender, apart from male and female, the respondents have not provided separate column for them in the prospectus. The petitioner's application No.5588 under the communal category of SC and transgender was not considered and merit list dated 06.10.2017 was published, in which the petitioner's name does not find place. Therefore, the petitioner has come before this Court, challenging the very merit list for UG course in Indian Medicine and Homeopathy for the academic year 2017-18, dated 06.10.2017.

4. When the matter came up for admission, this Court by an interim order dated 11.10.2017 directed the respondents to reserve one seat in BSMS for the petitioner. Pursuant to the order, one seat has not been filled up.

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5. A counter affidavit has been filed giving the details of the steps taken by the State Government for the welfare of the transgenders.

However, in paragraph 7, it has been stated that the Government in consultation with all the stakeholders has decided to issue guidelines on the “determination of community” and “reservation in employment” in respect of the third gender in order to streamline the procedures to be followed by the recruiting agencies like TNPSC, TRB, USRB, MRB, etc., and Employment Exchanges in sponsoring/recruiting/selecting the third Gender candidates for appointment in Government Service. The concurrences of the concerned departments have also been obtained on the proposed guidelines and the proposal is at the final stage. The orders would be issued shortly, after obtaining orders from the authorities at appropriate level. Paragraph 7 is usefully extracted as follows:

7. The Government have examined the above points raised by the Tamil Nadu Public Service Commission in consultation with the other related departments viz., Adi Dravidar and Tribal Welfare, Backward Classes, Most Backward Classes and Monitories Welfare, Labour and Employment, Law, Personnel and Administrative Reforms. After a thorough examination, the Government has decided to issue guidelines on the “Determination of the Community” and “Reservation in Employment” in respect of the Third Gender in order to streamline the procedures to be followed by the recruiting agencies like

Tamil Nadu Public Service Commission, Teachers Recruitment Board, Uniformed Service Recruitment Board, Medical Recruitment Board, etc., and Employment Exchange offices/appointing authorities, in sponsoring/recruiting/selecting the Third Gender candidates for appointment in Government Service. The concurrences of the concerned departments have also been obtained on the proposed guidelines. The proposal is under final stage and orders will be issued in this regard shortly, after obtaining orders from the authorities at appropriate level.

In paragraph 9 of the said counter affidavit it has been stated as follows:

9. It is respectfully submitted that the efforts already taken by the Government for grant of reservation to the Third Gender persons cannot be considered as inadequate from the constitutional, legal, socio-cultural, economic and educational perspective for uplifting the community over a period. The views of the Tamil Nadu Backward Classes Commission as endorsed by the Backward Classes, Most Backward Classes and Monitories Welfare Department at para 8 supra seem to be rational and acceptable especially the non-feasibility of administration of 0.007% quota to the third gender in

proportion to their estimated population of about 5518 as against 7.2 crore of total population of the State. As such the prayer of the petitioner to create a separate class for the Third Gender in the field of Education and Employment is not acceptable as per law.

Thus, it is stated that the views of the Tamil Nadu Backward Classes Commission as endorsed by the Backward Classes, Most Backward Classes and Minority Welfare Departments and the Government is of the opinion that there is no feasibility for giving 0.007% quota to the third gender in proportion to their estimated population of about 5518 as against 7.2 crore of total population of the State. Therefore, the contention that it is impossible to create separate class for third gender in the field of education and employment is not acceptable.

6. Heard the learned counsel for the petitioner and

Mr.T.M.Pappiah, learned Special Government Pleader appearing for the respondents.

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7. So far, the transgender has not been recognized by the

Government. Though they are leading a very stigmatic life in our society, as stated above, from the days of Mahabharatham, those unfortunate persons, due to some physical abnormality and due to the act of genes, suffer from transforming into transgender and could not identify themselves with regular gender namely, male and female. Their interest should be protected. It is not as if there are only one or two persons in the society, but there are about 5518 transgenders living in Tamil Nadu as stated by the State Government. Further, this Court is not aware as to whether regular survey/census has been conducted and all the transgenders have been identified. If no regular survey has been conducted to identify transgenders in the State of Tamil Nadu, it is appropriate for the State Government to conduct a survey/census with regard to transgenders and their place of living, so that if any benefit scheme is extended by the Government, the same could reach them.

8. As far as the facts of the instant case are concerned, there is no dispute with regard to the passing of Higher Secondary Examination by the petitioner. As evident from Higher Secondary mark sheet dated 12.05.2017, the petitioner had secured 537 marks out of 1200 marks.

The petitioner's community certificate dated 11.06.2004 states that the petitioner belongs to Hindu Pallan, which is classified as SC community.

9. The contention of Mr.T.M.Pappiah, learned Special Government Pleader is that for entitlement of seat in BSMS, the candidate should have obtained 50% aggregate marks in the third part subjects, with Physics, Chemistry, Biology or Botany and Zoology taken together whereas the petitioner obtained 45.25% namely 362 out of 800 in the basic subjects and therefore, the petitioner is not entitled to any seat. The said contention appears to be correct in normal circumstances. However, for the first time in history, a transgender has knocked the doors of this Court seeking to consider her candidature for admission in BSMS course. Even as per the contention put forth by the Government, the population of transgender is 5518 in Tamil Nadu. In schools, a few transgender students are educated and it is a welcome change that they have come forward to get higher education. Instead of living normal stigmatic life as a transgender and in spite of undergoing various insults and even assaults, harassments in the hands of some unruly elements, when they come forward to get education, the same has to be

encouraged and based on technicalities, the transgender persons coming forward to join educational institutions should not be driven out.

10. The legal status of “Transgender Persons” emanates from the judgment of the Hon’ble Supreme Court in **National Legal Services Authority Vs. Union of India and others** reported in **2014 (5) SCC 438**.

Before the said judgment, the transgenders did not have any recognition even as human being as they have been undergoing insults, assaults, harassments both psychologically and physiologically. Their pain, agony and suffering have not been felt by others and their plight have not been recognized by any of the parties. It is only the Court which has taken care of the transgenders and gave appropriate directions in the year 2014.

11. Therefore, the petitioner's claim for admission to the BSMS course cannot be denied stating that the petitioner has not obtained the minimum marks of 50%. The 50% of minimum marks holds good only for “males” and “females”. In the prospectus, it has not been spoken about transwoman or transgender. Therefore, leniency should be shown to the

transgender person, who is longing for an admission into the Siddha College. Therefore, 50% of minimum marks applicable to the male and female students cannot be made applicable to the transgenders. The respondents are guilty of not implementing the order of the Hon'ble Supreme Court and this Court, by providing a separate reservation for them.

12. In the instant case, one seat was already reserved by an interim order passed by this Court on 11.10.2017. It is not as if many transgender persons have applied for seats. Only on very rare occasions, this kind of claims would be made and that has to be considered with compassion and benevolence. At the risk of repetition, this Court declares that the petitioner is entitled to a seat in BSMS. The minimum mark of 50% prescribed for admission into BSMS is only applicable to male and female genders and not for third gender. The course commenced from 01.11.2017 and therefore, to avoid lapsing of the said seat, it is appropriate to direct the respondents 1 to 3 to admit the petitioner/transgender into the course, immediately within one week from the date of receipt of a copy of this order, which the petitioner is

entitled to, failing which the respondents shall appear before this Court on 11.12.2017. Though the prayer sought for by the petitioner is for issuance of a Writ of Certiorarified Mandamus, calling for the records on the file the 3rd respondent special category merit list for UG course in Indian Medicine and Homeopathy 2017-18, dated 6-10-2017 and quash the same as illegal and contrary to the Judgment rendered by Hon'ble Supreme Court in National Legal Service Authority-vs-Union of India and others, 2014(5) SCC 438 and further direct the 3rd respondent to allot one seat in Bachelor of Siddha Medicine and Surgery for UG course in Indian Medicine and Homeopathy for the academic year 2017-18, taking into consideration the entire facts in toto and also the undertaking given by the State Government in paragraph 7 of the counter affidavit, by moulding the prayer, this Court gives the directions as stated in paragraph 14.

13. Transgenders are shunned by their families. Harassment, assault, violence, especially sexual violence, denial of basic civil rights, unfair treatment, disrespect, denial of access to public places are part of their life. They are being looked down by the society as “sinners”. Due to

unfair treatment of the society, they are socially excluded struggling without any dignity and right. Therefore, helping hands should be extended by all especially by the Government. This Court hopes that this order would be a first step to throw open doors of educational institutions for the entry of “Transgenders” for their social empowerment, employment status, dignity, right etc., which have been denied to them till date, violating the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India.

14. In fine,

- (1) The respondents 1 to 3 are directed to admit the petitioner/transgender into the course BSMS within one week from the date of receipt of a copy of this order, failing which the respondents shall appear before this Court on 11.12.2017.
- (2) The State Government is directed to issue guidelines on the “Determination of the Community” and “Reservation in employment” in respect of the third gender, in order to streamline the procedures to be followed by the

Governmental agencies in selecting the third gender candidates for appointment in Government services as undertaken in paragraph 7 of the counter affidavit filed by the State, within a period of four months from the date of receipt of a copy of this order.

15. The writ petition is disposed of with the above directions.

Consequently, connected miscellaneous petitions are closed. No costs.

For reporting compliance of first direction, call on 11.12.2017.

For reporting compliance of second direction, call on 07.04.2018.

29.11.2017

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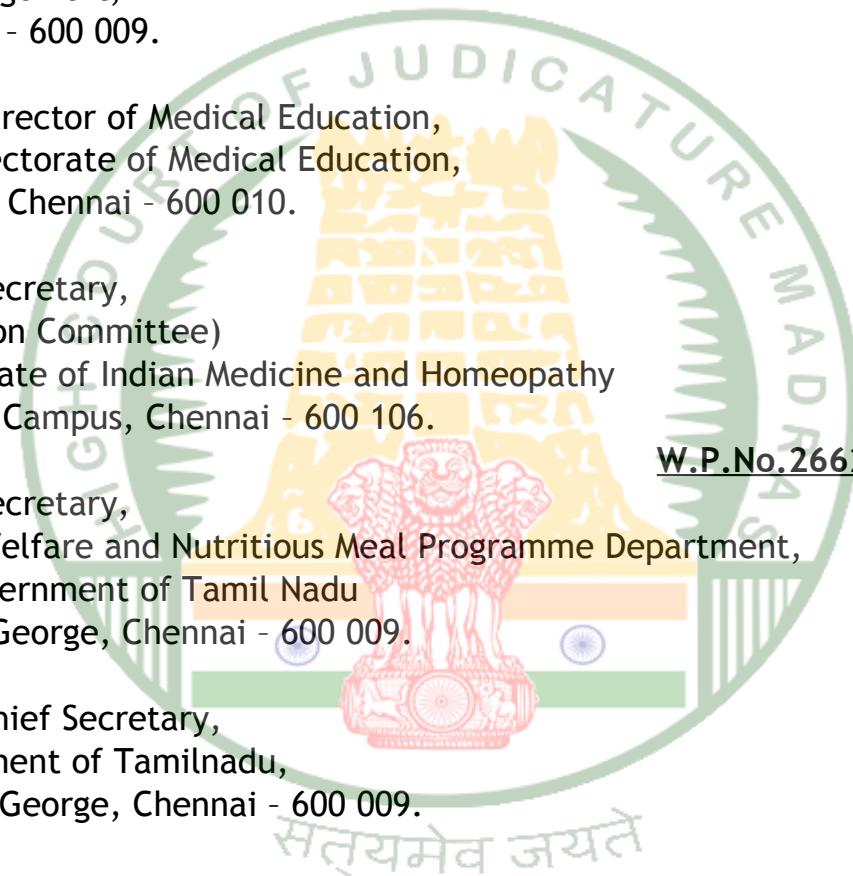
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