

DISTRICT : South 24 parganas.

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

W.P. No. (W) of 2017

Subject Matter relating to :

Public Interest Litigation under GROUP:

HEAD: of the

LIST:

CAUSE TITLE

Arnab Nandi

.....PETITIONER

Versus

STATE OF WEST BENGAL and others

....RESPONDENTS

ADVOCATE ON RECORD :

Debayan Sen

Advocate

Bar Association Room No.11

High Court, Calcutta

(A)

DISTRICT : South 24 parganas

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	with a copy of the print out of the One-Time Online Registration as available from the website namely www.pscwbonline.gov.in/apps/home/ on 08/11/2017 are marked collectively as “P-1”. of the Respondent No. 4 herein and as accessed on 08/11/2017		
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(B)

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LIST OF DATES

- 15th April 2014 - The Hon'ble Supreme Court in 'National Legal Services Authority versus Union of India and others' recognizes the rights of transgender persons to equality, freedom and dignity under Article 14, 19 and 21 of the Constitution of India.
- April, 2015 - Constitution of the West Bengal Transgender Welfare Development Board in July 2015 vide notification, 1726 I SW I 4S - 54 I MOS/ WCDSW / 14 dated 17.04.2015.
- 7th April 2017 - An application under the Right to Information was filed with a view to inquire what steps Public Service Commission, West Bengal has taken to provide equality of opportunity for transgender applicants.
- 27th June 2017, - The response to the Application dated 7.4.2017 under RTI Act from the Public Service Commission, West Bengal.

(C)

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POINTS OF LAW

- I. Whether the judgment delivered by the Hon'ble Supreme Court in 'National Legal Services Authority versus Union of India and others' as reported in 2014 Volume 5 Supreme Court Cases 438 (hereinafter referred to as the "NALSA judgment") and the directions issued therein which recognizes the right to equality, dignity and freedom of transgender persons has been neglected or failed to be abided by the Respondents Authorities?
- II. Whether the respondent authorities has failed to enforce the directions passed by the Hon'ble Supreme Court in the 'NALSA judgment' ?
- III. Whether denying the transgender persons reasonable access to examinations by not providing any suitable gender option for them in online registration form is directly violates to the Articles 14, 15 and 16 of the Constitution of India?
- IV. Whether the failure/neglect on the part of the Respondent authorities to abide by the direction of the Hon'ble Supreme Court for the advancement of transgender persons under the 'socially and educationally backward' classes by especially making provision by giving them due representation in public employment is directly violates to the Article 15(4) and Article 16(4) of the Constitution of India?

DISTRICT: South 24 parganas.

IN THE HIGH COURT AT CALCUTTA
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APPELLATE SIDE

WRIT PETITION NO: (W) OF 2017

IN THE MATTER OF:

An application under Article 226 of the
Constitution of India;

AND

IN THE MATTER OF:

Writ/ writs of / in the nature of Mandamus
and/or Certiorari and/or Prohibition and/or
Order or Orders, and/or Direction or
Directions of like nature;

AND

IN THE MATTER OF:

Infringement of Fundamental Rights
guaranteed under Articles 14, 15, 16, 19
and 21 of the Constitution of India;

AND

IN THE MATTER OF :-

Failure to include 'third gender' option on
the application forms of all public service,

departmental and all examinations conducted in the State of West Bengal thus denying transgender persons equal opportunity.

AND

IN THE MATTER OF

Failure in implementation of the directions passed by the Supreme Court in 'NALSA judgment' (Writ Petition (Civil) No. 400 of 2012) pertaining to reservations for the transgender population by treating them as 'socially and economically backward classes of citizen'.

AND

IN THE MATTER OF:

Arnab Nandi,

son of Late Suchibrata Nandi,

resident of 160A, Kankulia Road, Ground Floor, Kolkata- 700029, Post Office- Sarat Bose Road, Police Station- Lake, District- South 24 parganas.

.....Petitioner

-VERSUS-

1. State of West Bengal service through the Chief Secretary, Government of West Bengal, having its office at 325 Sarat Chatterjee Road, "Nabanna", Shibpur, Howrah- 711102.

2. Department of Women and Child Welfare and Social Welfare, Government of West Bengal, service through the Principal Secretary, having its office at Bikash Bhavan, 10th Floor, Salt Lake, Kolkata- 700091.

3. West Bengal Transgender Welfare Development Board, service through the Chairperson, having its office at Jalasampad Bhavan, Ground Floor, Sector III, Salt Lake, Kolkata- 700091.

4. West Bengal Public Service Commission service through the Chairman, having its office at 161-A, S.P Mukherjee Road, Kolkata- 700026.

.....Respondents

To,

The Hon'ble Jyotirmay Bhattacharya, Acting Chief Justice And His Companion Justices of the said Hon'ble Court.

The humble petition of the petitioner above named:-

MOST RESPECTFULLY SHEWETH:

1. Your petitioner states that the present petition has been filed to bring to notice of this Hon'ble Court that despite more than three years having passed since the judgment delivered by the Hon'ble Supreme Court in 'National Legal Services Authority vs Union of India and others' as reported in 2014 volume 5 Supreme Court Cases page 438 (hereinafter referred to as 'NALSA judgment') which recognizes the rights of transgender persons to equality, freedom and dignity guaranteed under Article 14, 19 and 21 of the

Constitution of India. The people living in the 'Third Gender' category are continuing to be overlooked in the State of West Bengal.

2. Your petitioners state that the people living as the 'Third Gender' are denied access to basic facilities and opportunities in the arena of public service recruitment in governmental department examinations. Your petitioners further state that in 'NALSA judgment' (supra) the Hon'ble Supreme Court has directed, "... 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." However, very little effort has been undertaken till date by the Government of West Bengal.

3. Your petitioner states that the petitioner is a practicing advocate of this Hon'ble Court and is a public spirited citizen who is moved by the plight of the members of the transgender community and has no personal interest in the matter.

4. Your petitioner states that the present writ petition in the form of a public interest litigation is seeking to canvass an issue of general public importance which affects the public at large, especially a significant population of the State of West Bengal who come under the 'Third Gender' category all over the State of West Bengal in relation to the non-conformity by the respondent authorities as per the direction of the Hon'ble Supreme Court delivered in 'NALSA judgment'. The judgement of the Supreme Court of India which gives the possibility of the people from the 'Third Gender' category to access equal opportunities in the fields of public employment and education and accordingly, the respondent authorities herein who notifies and issues direction for preparation of the said opportunities and/or are the duty bearers and as such they are necessary and proper parties to the instant petition.

5. Your petitioner states that the respondent authorities enumerated in the cause title of the present petition are the wings of the Government of West Bengal and bear the responsibility of ensuring the protection of the Fundamental Rights of the people. The petitioner further states that the said respondent authorities are under the statutory obligation to look into the interests of all the people in the State of West Bengal without any discrimination and ensure their well-being thereby upholding the objects and principles as envisaged by the founding fathers in the Constitution of India.

6. Your petitioner submits that on April 15, 2014, the Hon'ble Supreme Court pronounced a landmark judgment being the 'NALSA judgment' (supra), which recognized the right to equality, dignity and freedom of transgender persons. The Supreme Court recognized that Fundamental Rights, especially under Article 14, 15, 16, 19 and 21 are available to them in the same manner as they are to the binary gender categories of females and males. Further, it also recognized the right of those persons to self-determine their gender identity even without a sex-reassignment surgery or procedure. In other words, the Hon'ble Supreme Court declared that insisting on Sex Reassignment Surgery (SRS) as a condition for changing one's gender is not only immoral but also illegal. The following directions were passed in the said judgment:-

“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 Serosurveillance 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.

7. Your petitioners submits that the State of West Bengal has constituted the West Bengal Transgender Welfare Development Board, being the Respondent No. 3 herein, under the aegis of the Respondent No. 2 in July 2015 vide notification, 1726 I SW I 4S - 54 I MOS/ WCDSW / 14 dated 17.04.2015. This board was constituted to ensure that the benefit of all developmental scheme are made available to the transgender community. Your petitioner further submits that, recognizing the need for a coordinated response in tackling the marginalized and vulnerable status of the transgender population, especially in the arenas of education and employment, a State Coordination Committee of the West Bengal Transgender Development Board has also been formed to coordinate the activities for the

welfare of transgender persons among various state government departments vide the same, above mentioned notification.

8. Your petitioner submits that despite the formation of such a body at the state level, in West Bengal, even basic changes which would enable equality of opportunity for the members of the transgender community have not been provided for. The said Board, being the Respondent No. 3 herein, has miserably failed to perform its function and has thereby failed in its purpose.
9. Your petitioner states that the Respondent No. 4 conducts a host of public service examinations in the State of West Bengal. A tentative list of the examinations to be conducted in 2017 are provided in the Annual Examination Calendar, 2017 released by the Respondent No. 4. For applying each of these examinations, a One-Time Online Registration with the Respondent No 4 is essential. However, this One-Time Registration form contains only two options for gender, 'male' and 'female'. This prevents transgender applicants from applying regardless of whether they have the necessary educational qualifications.

A print out of the Annual Examination Calendar, 2017 as released by Respondent No. 4 along-with the copy of the print out of the One-Time Online Registration as available on the website of the Respondent No. 4 herein and as accessed from the website namely www.pscwbonline.gov.in/apps/home/ on 08/11/2017 are marked collectively as "P-1".

10. Your petitioner submits that an application under the Right to Information was filed with a view to inquire what steps Respondent No. 4 has taken to provide equality of opportunity for transgender applicants on 07.04.2017. On 27.6.2017, the RTI applicant received a response to the Application from Respondent No. 4 which provided a list of all the examinations it had the authority to conduct since 01.04.2014 till 01.04.2017. With regard to the question of whether Respondent No. 4 allowed 'Third Gender' category candidates to apply for the examinations conducted by it, the response received was that it did allow such candidates to apply for the West Bengal

(Exe.) Examinations from 2017 as a 'special case'. The response did not include any reference to any departmental guidelines or notification regarding the same. It is also not clear why the transgender persons will be treated as 'special case' when the direction of the Hon'ble Supreme Court is clear regarding granting them the same rights as any other citizen under Part III of the Constitution of India. Therefore, it is submitted, that such an option for 'Third Gender' candidates to apply for such examinations appears to be governed by ad-hoc procedures.

11. Your petitioner further submits that the One-Time Registration Form, mandatory for on-line applications does not reflect the 'Third Gender' option till date. Therefore, in reality, such candidates are still unable to apply for any examination conducted by Respondent No. 4. Further, in response to the query on whether any provision on reservation is available for those belonging to the 'Third Gender' category, Respondent No. 4 answered in the negative. Therefore, currently, no such affirmative action exists.

A copy of the RTI Application along with the copy of the reply No _____ received from Respondent No. 4 dated 27.06.2017 are annexed hereto and marked "P-2" collectively.

12. Your petitioner states that all public service examinations conducted by Respondent No.4 should be open to all eligible candidates regardless of sex or gender identity. By not including 'Third Gender' as a gender option in the registration form, the respondent authorities have denied equality of opportunity in violation of Article 14 of the Constitution of India.
13. Your petitioner states that Article 15 and Article 16 prohibits discrimination on the basis of sex and denying transgender persons reasonable access to such an examination by not providing for any suitable gender option for them in the One time Registration form on Respondent No. 4's website is a blatant form of prohibited discrimination since gender includes male, female and Transgender persons.

14. Your petitioner states that Article 15(4) and Article 16(4) impose a special obligation on the State for the advancement of the socially and educationally backward and backward classes of citizens respectively. In the 'NALSA judgment' the Hon'ble Supreme Court recognized this obligation and directed that affirmative action for the advancement of transgender persons under the 'socially and educationally backward' classes be provided by the State especially in order to give them due representation in public employment and education. In this case, despite passing of more than three years since the 'NALSA judgment', not only does no policy of affirmative action exist, even the basic means of being able to apply for such public service examinations have been denied to them by not providing the 'Third Gender' option on online one- time registration form.
15. Your petitioner states that the Hon'ble High Court at Calcutta in the case of Atri Kar v. Union of India and Ors, [Writ Petition. Number 6151(W) of 2017] passed an order dated 16.03.2017 allowing the petitioner therein to apply for recruitment to the Respondent State Bank of India as a transgender person. This Hon'ble court held: "A transgender cannot be discriminated on the basis of sex. The selection process undertaken by the State Bank of India does not allow a transgender to apply as such as the gender column of the on-line application form provides for two options which does not include a transgender. Such a on-line application form is an active discrimination against a transgender and is violative of Article 15 of the Constitution of India." Your petitioners crave leave to refer to the said judgment at the time of hearing, if necessary.
16. Your petitioner states that in Ram Singh v. Union of India, as reported in 2015 volume 4 Supreme Court Cases page 697, the Hon'ble Supreme Court recognized that in order to define 'backwardness', one must move away from its caste centric definition and recognize different social groups which would require affirmative action. The recognition of third gender as a socially and educationally backward class in this regard was therefore a significant development.

17. Your petitioner states that the failure on the part of the Respondent authorities to introduce a policy thereby treating the transgender citizens as socially and educationally backward class and to extend all kind of reservation in educational institution and for public appointment is in clear violation of the direction of the Hon'ble Supreme Court in the 'NALSA judgment' (supra).
18. Your petitioner states that the Hon'ble High Court of Madras in K. Prithika Yashini (Transgender) v. Chairman, Tamil Nadu Uniform Services Recruitment Board as reported in (2015) volume 8 Madras Law Journal page 734, it was held that "We are sure that by the time the next recruitment process is carried out, the respondent would have taken corrective measures for including the third gender as a category and concluded by saying, " We are, thus, of the view that the petitioner is entitled to be recruited to the post of Sub-Inspector and for declaration of her result with the hope that she would carry out the duties with dedication and commitment to advance the cause of other transgenders....." and thus upheld the appointment of a trans woman applicant to the post of sub-inspector by relaxing the strict norms for entry
19. Your petitioner submits that without having a 'Third Gender' option on all application forms for public service examinations, many transgender applicants are precluded from applying for such examinations thus denying them at the very outset, equality of opportunity. In addition, no affirmative action for transgender applicants, despite their recognition as a socially and educationally backward class denies them substantive equality.
20. Being aggrieved by and/or dissatisfied with the said inaction and discrimination and non-compliance of the directions passed by the 'NALSA judgment' by the respondent authorities, the petitioner begs to move this Hon'ble Court under Article 226 of the Constitution Of India on the following amongst other:-

GROUNDS

- I. For that the failure and/or negligence on the part of the Respondent Authorities to abide by and enforce the directions passed by the Hon'ble Supreme Court in the 'NALSA judgment' is contrary to law.
- II. For that all public service examinations conducted by Respondent No.4 should be open to all eligible candidates regardless of sex or gender identity. By not including 'Third Gender' as a gender option in the registration form denies equality of opportunity and is an arbitrary violation of Article 14 of the Constitution of India.
- III. For that Article 15 and Article 16 of the Constitution of India prohibits discrimination on the basis of sex and denying transgender persons reasonable access to such examinations by not providing for any suitable gender option for them in the One-time Registration form on Respondent No. 4's website is a blatant form of prohibited discrimination.
- IV. For that Article 15(4) and Article 16(4) imposes a special obligation on the State for the advancement of the socially and educationally backward and backward classes respectively. In 'NALSA judgment' the Hon'ble Supreme Court recognized this obligation and directed that affirmative action for the advancement of transgender persons under the 'socially and educationally backward' classes be provided by the State especially in order to give them due representation in public employment. Despite three years since the directions passed by the Hon'ble Supreme Court in 'NALSA judgment', not only does no policy of affirmative action exist, even the basic means of being able to apply for such public service examinations have been denied to the transgender persons by not providing the 'Third Gender' option on forms.
- V. For that the Respondent authorities have failed to appreciate that in order to define 'backwardness', one must move away from its caste centric definition and recognize different social groups which would require affirmative action.

- VI. For that the recognition of 'Third Gender' by the Hon'ble Supreme Court as a socially and educationally backward class in this regard was therefore a significant development. However, due to the non-action and/or negligence on the part of the Respondent authorities such directions have failed to achieve its desired results.
- VII. For that without having a 'third gender' option on all application forms for public service examinations, many transgender applicants are precluded from applying for such examinations thus denying them at the very outset, equality of opportunity. In addition, no affirmative action for transgender applicants, despite their recognition of a socially and educationally backward class denies them substantive equality.
- VIII. For that the non-action and/or negligence on the part of the Respondent authorities as aforesaid is violative of the Constitutional mandate of supremacy of the directions of the Hon'ble Supreme Court which are binding under Article 141 and 142 of the Constitution of India.

21 . Your petitioner states that cause of action has thus arisen within the territorial jurisdiction of this Hon'ble Court and this Hon'ble High Court has the jurisdiction to entertain the instant public interest litigation which deals with the substantive rights of the transgender citizens as flowing from the judgment of the Hon'ble Supreme Court.

22. Your petitioner states that the respondent authorities are public authorities and their powers and functions are circumscribed by the law and are incumbent on the part of the respondents to act in conformity with law.

23. Your petitioner states that they have paid the requisite court fees on this petition.

24. Your petitioner states that the petitioner has no other alternative and/or efficacious remedy but to approach this Hon'ble Court for the reliefs prayed for herein and if the same are granted they shall be complete.

25. Your petitioner states that the petitioner have not filed any petition in this Court or any other High Court or before the Supreme Court of India in respect of the subject matter of this petition.

26. That this application is bonafide and made in the interest of justice.

In light of the above facts and circumstances it is humbly prayed before Your Lordships of this Hon'ble Court that Your Lordships will be graciously pleased to pass the following:

A. That a direction be issued to Respondent no. 4 to include in the application form of all public service examinations conducted by it in a time bound manner, the 'Third Gender' option to provide equal opportunity to transgender applicants and consider their application other male and female candidates.

B. For a direction be issued to all Respondents to coordinate and formulate a policy in a time bound manner to give effect to the direction of the Apex Court on reservation as a socially and

educationally backward class of citizens to 'Third Gender' category by conforming with the 'NALSA judgment' so as to enable them to gain access to educational institutions and public appointments so as to ensure substantive equality.

C. For the issuance of a Writ of Mandamus or a writ or order or direction in the nature of Mandamus or any other appropriate writ or order or direction directing the Respondent no. 4 to include in the application form of all public service examinations conducted by it in a time bound manner, the 'Third Gender' option to provide equal opportunity to transgender applicants and consider their application other male and female candidates.

D. For the issuance of a Writ of Mandamus or a writ or order or direction in the nature of Mandamus or any other appropriate writ or order or direction thereby directing all Respondents to coordinate and formulate a policy in a time bound manner to give effect to the direction of the Apex Court on reservation as a socially and educationally backward class of citizens to 'Third Gender' category by conforming with the 'NALSA

judgment' so as to enable them to gain access to educational institutions and public appointments so as to ensure substantive equality.

E. Rule NISI regarding prayers (A) to (D) as aforesaid;

F. Costs;

G. For such further and other orders as the court may deem fit in the circumstances of the present case may require.

And for this act of kindness, your petitioner, as in duty bound, shall ever pray.

AFFIDAVIT

I , Arnab Nandi, son of Late Suchibrata Nandi, resident of 160A, Kankulia Road, Ground Floor, Kolkata- 700029, Post Office- Sarat Bose Road, Police Station- Lake, District- South 24 parganas, do hereby solemnly affirm and say as follows:-

1. That I am the petitioner in the instant case and as such I am well acquainted with the facts and circumstances of the said case.
2. That the statements made in the paragraphs 2 to 5,8 ,10 to 14 and 19 are true to my knowledge and those made in the paragraphs 1,4,6,7,9,15 to 18 are matters of record , which I verily and believe to be true and the rest are my humble submissions before this Hon'ble Court.

Prepared in my office

Advocate

The Deponent is known to me

Clerk to

Mr.

Advocate

Solemnly affirmed before me,

this day of , 2017

I certify that all annexures are legible,

Advocate

COMMISSIONER.

DISTRICT : South 24 parganas.
IN THE HIGH COURT AT CALCUTTA
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