

Versus

1. State of Maharashtra,)
Through the Principal Secretary,)
Revenue and Forest Department,)
Mantralaya, Madam Cama Road,)
Hutatma Rajguru Square,)
Nariman Point, Mumbai 400 032)
 2. State of Maharashtra,)
Through the Principal Secretary,)
Social Justice & Special Assistance)
Department, 1st floor, Annex Building))
Mantralaya, Madam Cama Road,)
Hutatma Rajguru Chowk,)
Nariman Point, Mumbai 400 032)
-Respondents.**

Shri Kranti L.C with Kaustubh Gidh, learned advocate for the Applicants.

Ms Swati Manchekar, learned Chief Presenting Officer for the Respondents.

CORAM : Justice Mridula Bhatkar (Chairperson)
Mrs Medha Gadgil (Member) (A)

RESERVED ON : 26.10.2023

PRONOUNCED ON : 29.11.2023

PER : Justice Mridula Bhatkar (Chairperson)

J U D G M E N T

1. The issue involved in these Original Applications is same, so they are heard together and disposed of by this common order.

2. The applicants pray that the Respondents be directed to provide the option of third Gender and the Respondents be further directed to provide reservation to these applicants as transgenders in Government employments.

3. All the applicants are transgenders, i.e., from LGBT category. Applicants in O.A 1121/2022, Arya Pujari and in O.A 401/2023, Vinayak Kashid have applied for the post of Police Constable and Applicant in O.A 928/2023, Yashwant Bhise has applied for the post of Talathi

4. In O.A 1121/2022 by interim order dated 14.11.2022 and thereafter by order dated 25.11.2022, the Respondents were directed to open the third option in the recruitment process. The Hon'ble Bombay High Court in W.P 15033/2022 by order dated 9.12.2022 did not disturb the said order and directed the Government to frame appropriate rules in the form of Statutory mandate contained in Rule 11(2) of the Transgender Persons (Protection of Rights) Rules, 2020, which were framed pursuant to Transgender Persons (Protection of Rights) Act, 2019, (hereinafter referred to as the Transgenders Act) as expeditiously as possible. The Government issued G.R dated 3.3.2023 identifying the third gender and providing option to transgenders in public employment. The State of Maharashtra & M.P.S.C both allowed the transgenders to apply under the third option of transgender, other than male and female. This is how one of the grievances of the applicants is redressed. The issue remained is only in respect of providing reservation to transgenders as a separate class in SEBC or any other category. .

5. The issue of providing reservations to transgenders is not res-integra. In the case of **National Legal Services Authority (supra)**, the Supreme Court observed that it is a foundation of the rights of the transgenders. The Hon'ble Supreme Court held in the concluding paragraph of the Judgment held that:-

“135.1 Hijras, eunuchs, 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 the 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.*"

6. Learned counsel for the applicants Kranti L.C, who is well versed in law on this issue placed the facts and figures of the transgender community and relied on the judgment of the Hon'ble High Court of Madras in the case of K. Prithika Yashini (Transgender) Vs. The Chairman, Tamil Nadu Uniformed Services Recruitment Board, W.P No. 15046/2015, decided on 3.11.2015. In **K. Prithika Yashini's case (supra)**, the Petitioner, born as a male came out and declared as a female named as K. Prithika Yashini. The applicant had to leave her house for want of non-acceptance from her family to her new identity. She appeared for the examination after securing the interim orders from the Court on 21.5.2015 to participate in the written examination. She secured 28.50 marks, while the cut-off marks for MBC Women was 42.00 marks. So she was not called for physical test. However, once again she obtained favourable order in her favour and appeared for the physical test. It was found that the petitioner qualified the horizontal reservation minimum bench mark of OC Women of Ministerial quota, which is 25.50 against which the petitioner had obtained 28.50 marks. On account of the interim order, she was allowed to participate in the physical test. Though she qualified in the physical measurement test, but in the physical endurance test she was stated to have been disqualified qua 100 meters running. She qualified in the long jump and cricket ball

throw. The Petitioner completed the distance of 100 meters in 18.61 seconds as against the bench mark of 17.50 seconds. Thus, there was a delay of 1.11 seconds. She was allowed to appear for the viva-voce. The Hon'ble High Court held that the discrimination suffered by the transgenders would be difficult for any of the other two genders to realize.

7. Learned counsel further relied on the following judgments:-

- (1) Judgment of High Court of Madras in S. Tamilselvi Vs. The Secretary to Government, Health & Family Welfare, Chennai & Ors, W.P No. 26506/2022 and W.M.P Nos 25572 & 25574/2022.
- (2) Judgment of High Court of Madras in Saratha Vs. Member Secretary, Tamil Nadu Uniformed Services Recruitment Board & Ors, W.P Nos 15316 and 15376/2022 & Ors.

8. In the case of **S. Tamilselvi (supra)**, the Petitioner claimed to be a transwoman, wanted to appear for the Post Basic (Nursing) Course for the academic year 2022-23. The Madras High Court directed the Respondents to treat the Petitioner as transgender and place her in a special category of transgenders for the purpose of admission to the course and the said Writ Petition was allowed.

9. In the case of **Saratha, (supra)**, the Petitioner pursuant to the advertisement dated 17.9.2020, applied for the post of Grade-II Police Constable. The disqualification was quashed and set aside and the recommendation was made to provide special reservation for transgenders in future public employment and also provide relaxation in the physical measurement, endurance test and physical efficiency test at par with the concessions extended to Women candidates and other socially and economically backward classes.

10. Learned C.P.O vehemently opposed the issue of reservation mainly on the ground that when there is no provision of reservation in the Transgenders Act, it is not possible for the State Government to provide the reservation to the Transgenders. She has submitted that at present in State of Maharashtra Vertical reservation is 62% and Horizontal reservation is 72%. Learned C.P.O has submitted that in the year 1965 the reservation given to S.C was 13%, S.T-7% and DTNT-4% and OBC-10%. Subsequently, it was increased by inclusion of different castes on account of their entitlement to reservation. The State of Maharashtra after the enactment of Transgender Act of 2019 has taken important steps towards the welfare and protection of the interest of transgender community. She relied on the G.R dated 14.3.2023 under which Government resolved to form a Committee of preparing the report and giving recommendations in respect of transgender pursuant to the decision of Hon'ble Supreme Court in the case of **NALSA (supra)** and also the directions given by this Tribunal in the present Original Application. Learned C.P.O has submitted that the said Committee of 14 Members was constituted and after its research has submitted the report and it is now pending for the approval of the Government.

11. Learned C.P.O has also relied on the affidavit in reply dated 11.8.2023 filed by Shri Ravindra Gorve, Deputy Secretary in the office of Secretary, Social Justice and Special Assistance Department, Mantralaya, Mumbai. She has submitted that the State Government in the case of reservation follows the policy of the Central Government and as on today no reservation is provided to transgenders by the Central Government so it is not given by the State Government. On instructions, she pointed out by end of 18.7.2023, total 2181 Certificates were issued to the transgender in respect of gender identity. However, in the health camps 3275

transgender persons were benefited. As per 2011 censuses 4,87,803 transgenders are identified in India.

12. Considering the submissions made by the learned C.P.O and so also after going through para 17 of the affidavit in reply filed by Mr Ravindra Gorve, it appears that the State Government does not want to further cross the reservation limit. Para 17 is reproduced below:-

“17. It is submitted that providing reservation is mainly a prerogative of Parliament for the purpose of bringing the poor and marginalized society in the mainstream. Presently, the State Government relies on the Centre to include or exclude any community for granting reservation. The State submits its proposal to the Hon’ble President who will have the exclusive authority to notify the list by deciding whether or not to extend the benefits of reservations. The benefits of reservation in matters of direct recruitment in State Government services and in admission to State Government Higher Educational Institutions are as follows:- Scheduled Castes (SC)-13%, Scheduled Tribes (ST)-7%, Vimukta Jati-3%, Nomadic Tribes (B, C, D)-8%, Special Backward Classes (SBC)-2%, Other Backward Classes (OBC)-19% & Economically Weaker Section (EWS)-10% resulting into total reservation being 62%. In this regard it is respectfully submitted that the benefits of any of the reservation including the above 7 reservations can be availed by the marginalized and eligible population of the country including transgender persons.”

Thus, the prayer of giving separate reservation to the transgenders is rejected by the State.

13. In fact, the Tribunal has very less scope to decide the prayer regarding reservation to transgenders. The Hon’ble Supreme Court in the case of **National Legal Services Authority (supra)**, in the year 2014, gave specific directions to the Union of India and the States about acknowledging the separate identity of transgenders and giving them reservation in Socially Educationally Backward

Classes. In the Transgender Act, 2019, the Central Government has taken progressive step and made the law for transgenders for protection of their separate identity and their rights. Though, this Act is outcome of the directions given by the Hon'ble Supreme Court in **National Legal Services Authority (supra)**, as referred in the SOP of the Act, so far as reservation to transgender in S.E.B.C is concerned, the Act is silent. The Constitution has well defined the areas of function of all the three Wings of the Democracy, i.e., the Legislature, the Judiciary and the Executive. In number of cases, the Hon'ble Supreme Court has made clear that in a Democracy like us to make law is the responsibility and province of the Legislature who represents the people and their will as the sovereignty vests with the people. The Courts, hence do not step in the area of law making, but interpret the law and sometime in view of the object of the Act elevate the silences in the laws to the voices. Such instances are quoted before us by learned Counsel Mr Kranti during the discussion on this issue. The Hon'ble Supreme Court has taken initiative to meet the new challenges and needs in the Society. The law making process often moves like a python and it becomes difficult for the Society to resolve the issues, which have cropped up in Society specifically on account of very speedy science and technological developments.

14. The law is an instrument of social engineering. It creates mandate regulating the social pattern and human behaviour leading to equality and harmony in the Society. The Courts are for the justice and cannot ignore any problem in the Society when placed before it. Under such circumstances, though Courts are not the law makers while interpreting the law that legally permissible solution is to be applied to meet the ends of justice.

15. In Maharashtra 19% reservation under the nomenclature of OBC is provided to Socially and Educationally Backward Class. Central OBC list of Maharashtra shows 261 castes, though 346 Castes are included in O.B.C in the State of Maharashtra as per the State List. So entire Vertical reservation including E.W.S whatever given is now reached to 62% reservation.

15. Learned Advocate Kranti L.C pointed out that other States like Tamil Nadu, Chattisgarh, Karnataka, Jharkhand and Bihar, have given benefit of reservations to transgenders. 1% horizontal reservation is provided by State of Karnataka for transgenders. Out of 5 States, 4 States have given reservation for transgenders in SEBC.

16. We rely on the Interim order of **Supreme Court dated 8.9.2022 in Shanavi Ponnusamy Vs. Ministry of Civil Aviation & Anr.**

Para 8: Bearing the provisions of the 2019 Act and NALSA judgment (supra) in mind, it is necessary for the Central Government, in consultation with the National Council to devise a policy framework in terms of which reasonable accommodation can be provided for transgender persons in seeking recourse to avenues of employment in establishments covered by the provisions of the 2019 Act. The enactment by Parliament embarks a watershed in the evolution of the rights of transgender persons. The provisions of 2019 Act need to be implemented in letter and spirit by formulating appropriate policies. The Union Government must take the lead in this behalf and provide clear guidance and enforceable standards to all other entities, including those of the Union Government, State Governments and establishments governed by the 2019 Act.”

17. **Ministry of Social Justice and Empowerment. Transgender Persons (Protection of Rights) Rules, 2020.**

“Rule 11. Provisions for non-discrimination.

(1) The appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organization or establishment including in the areas of education, employment, healthcare, public transportation, participation in public life, sports, leisure and recreation and opportunity to hold public or private office.

(2) The appropriate Government shall within two years from the date of coming into force of these rules, formulate a comprehensive policy on the measures and procedures necessary to protect transgender persons in accordance with the provisions of the Act.”

18. Writ Petition No. 15033 of 2022 filed before the Hon’ble High Court, Bombay, State of Maharashtra Vs. Arya Vijay Pujari.

“13. Secondly, we direct the State Government to frame appropriate rules in the light of the statutory mandate contained in rule 11(2) of the 2020 Rules as expeditiously as possible but positively by 28th February, 2023.

19. Learned C.P.O submitted that the Government will take decision on the said report of the Committee.

20. In **NALSA Judgment** - The Court held that transgenders fall within the purview of the Indian Constitution and thus are fully entitled to the rights guaranteed therein.

- Article 14 guarantees equality to “any person” which means man, woman, and transgender, and as such, they are also guaranteed equal protection of the law.
- They have equal rights in employment, health care, education, and civil rights.
- Discrimination on the grounds of sexual orientation and gender identity represents inequality before the law and unequal protection of the law and violates Article 14.
- The Court further added that transgender individuals have freedom of expression under Article 19 whereby

they can talk, dress, act, and behave in a manner they like.

- They also have a right to live a life of dignity under Article 21.

The Transgenders Act, 2019

21. The Central Government pursuant to the directions given by the Hon'ble Supreme Court in the case of **NALSA (supra)**, on 15.4.2018, tabled the bill of The Transgender Persons before the Parliament and after receiving the assent of the President on 5.12.2019, it was gazette on the same day. Thus, it took 4 ½ years for the Central Government to implement the directions of the Hon'ble Supreme Court. However, it is a welcoming step of the Union of India to acknowledge the rights of the transgender persons and also to frame policy regarding their welfare. In the statement of objects and reasons of the Transgenders Act 2019, there is a reference of the Bill of 2019 as it aims at the following goals:-

“4. The Transgender Persons (Protection of Rights) Bill, 2019 seeks to-

- (a) define the expression “transgender person”;
- (b) prohibit discrimination against transgender persons;
- (c) confer right upon transgender persons to be recognized as such, and a right to self-perceived gender identity;
- (d) make provisions for issue of certificate of identity to transgender persons;
- (e) provide that no establishment shall discriminate against transgender persons in matters relating to employment, recruitment, promotion and other related issues;
- (f) provide for grievance redressal mechanism in each establishment;
- (g) establish a National Council for Transgender Persons;
- (h) provide punishment for contraventions of the provisions of the proposed legislation.”

In Transgender Persons (Protection of Rights) Act, 2019, 23 Sections are capsuled in IX Chapters. Chapter II is about Prohibition against Discrimination. Chapter III is about recognition of identity of transgender persons. The welfare measures to be taken by appropriate Government are stated in Chapter IV. Section 8 with 5 sub-sections, states the legislative intent in respect of the welfare measures to be taken by the Government. It is necessary to reproduce the said section.

Section 8. Obligation of appropriate Government.—(1) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.

(2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.

(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatizing and non-discriminatory.

(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.

(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

Transgender Persons (Protection of Rights) Rules, 2020, is a bunch of 14 Rules. Out of which 9 Rules are pertaining to the issuance of the Certificate of Identity of a transgender person. Rule 10 is about welfare means, education, social security and health of transgender by appropriate Government. Rule 11 lays down provisions for non-discrimination. Rule 12 speaks about equal opportunity in employment.

22. Chapter V of Transgender Act speaks about the Obligation of the Establishment and other Persons. The Section 9 states that establishment shall not discriminate against any transgender person in any manner relating to employment including recruitment, promotion and other related issues.

“Section 9. Non-discrimination in employment – No establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.”

23. The main bone of contention of the State while opposing reservation to transgenders is based on the silence of the law makers on this point in the Transgender Act, 2019. It is vehemently pointed out that no reservation is provided in the Act, and therefore, the State Government cannot provide reservation for transgenders. The State Government follows the policy of the Central Government on this issue as it is a Central Legislation. Thus, to provide separate reservation to transgender is just not possible.

24. Learned counsel Kranti L.C while highlighting contradictory stand taken by Respondent-State has pointed out that the Central Government, does not provide reservation for Denotified or Nomadic Tribe in Government service, but the State of Maharashtra does. Learned counsel has submitted that the Maratha community was earlier given reservation in SEBC, unlike the Central Government. So is the case of giving reservation to Orphans. The submissions made by the learned counsel in respect of providing more reservation than the Central Government are correct and can be understood from the chart of reservation reproduced below.

25. As per para 135.3 of the judgment of the Hon'ble Supreme Court in the case **NALSA (supra)**, wherein the Hon'ble Supreme Court has directed the Central Government and the State to take steps in extending them all kinds of reservation in education and public employment and they are to be treated as Socially and Economically Backward Class citizens (SEBC). Thus, it means that vertical reservation is to be provided to them as a separate class in SEBC category. In Maharashtra Socially and Economically Backward Class is named as Other Backward Class and this O.B.C today consists of 346 castes and for them State of Maharashtra has provided 19% reservation. The structure of Vertical and Horizontal reservation in State of Maharashtra as supplied by the Respondents is as follows:-

VERTICAL

Sr No	Vertical Reservation	Percentage
1.	Scheduled Castes	13%
2.	Scheduled Tribes	7%
3.	Vimukta Jatis (A)	3%
4.	Nomadic Tribes (B)	2.5%
5.	Nomadic Tribes (C)	3.5%
6.	Nomadic Tribes (D)	2%
7.	Special Backward Class	2%
8.	Other Backward Classes	19%
9.	Economically Backward Class	10%
	Total	62%
	Open Category	38%

HORIZONTAL

Sr No	Horizontal Reservation	Percentage
1.	Females	30%
2.	Ex-Servicemen only (C & D)	15%
3.	Divyang	4%
4.	Sportsmen	5%
5.	Project Affected (only C & D)	5%
6.	Earthquake Effectuated (only C & D)	2%
7.	Graduate Part Time Employee (C & D)	10%
8.	Orphan	1%
9.		
	Total	72%

Earlier in 1965 only 30% was given. Subsequently, it went on increasing till 52% and now it is 62%.

अ. क्र.	शासन निर्णय क्रमांक व दिनांक	प्रवर्गनिहाय आरक्षणाची टक्केवारी
१.	बीसीसी-१०६४-III, दि. १.४.१९६५	Scheduled Castes and

		Schedules Castes converts to Buddhism - 13%
		Scheduled Tribes including those living outside the specified areas - 7%
		Denotified Tribes and Nomadic Tribes - 4%
		Other Backward Communities - 10%
२.	बीसीसी-१०९२/१६९२/प्र.क्र.१५४/सोळा, दि. ४.८.१९९२	विमुक्त व भटक्या जाती/जमाती प्रवर्गासाठी ४% वरून ६% आरक्षण
३.	बीसीसी-१०९३/२१६७/सीआर-१४१/९३/१६-ब, दि. २३.३.१९९४	विमुक्त जाती (१४ व तत्सम जाती) - ३ % भटक्या जमाती (जानेवारी १९९० पूर्वीच्या २८ व तत्सम जमाती) - २.५ % भटक्या जमाती (धनगर व तत्सम जमाती) - ३.५ % भटक्या जमाती (वंजारी व तत्सम जमाती) - २ % इतर मागासवर्गीयांकरीता -- १९%
४	बीसीसी-१०९४/प्र.क्र.६८/९४/१६-ब, दि. १५.६.१९९५	विशेष मागास प्रवर्गासाठी २ % आरक्षण विहित करण्यात आले.
५	बीसीसी-१०९४/प्र.क्र.२/९४/१६-ब, दि. २९.३.१९९७	अनुसूचित जाती - १३ % अनुसूचित जमाती - ७ % विमुक्त जाती (अ) - ३ % भटक्या जमाती (ब) - २.५ % भटक्या जमाती (क)- ३.५ % भटक्या जमाती (ड)- २ % विशेष मागास प्रवर्ग - २ % इतर मागास वर्ग - २ % सर्वसाधारण - ४८ %
६	बीसीसी-२०१८/प्र.क्र.५८१ ए/२०१८/१६-ब, दि. ५.१२.१९९८	अनुसूचित जाती - १३ % अनुसूचित जमाती - ७ % विमुक्त जाती (अ) - ३ % भटक्या जमाती (ब) - २.५ % भटक्या जमाती (क)- ३.५ % भटक्या जमाती (ड)- २ % विशेष मागास प्रवर्ग - २ % इतर मागास वर्ग - १९ % समाजिक आणि शैक्षणिक मागास वर्ग- १६ % खुला - ३२ %
७	बीसीसी-२०१९/प्र.क्र.११८ ए/२०१९/१६-ब, दि. १६.२.२०१९	अनुसूचित जाती - १३ % अनुसूचित जमाती - ७ % विमुक्त जाती (अ) - ३ % भटक्या जमाती (ब) - २.५ % भटक्या जमाती (क)- ३.५ % भटक्या जमाती (ड)- २ % विशेष मागास प्रवर्ग - २ % इतर मागास वर्ग - १९ % समाजिक आणि शैक्षणिक मागास वर्ग- १६ %

		आर्थिकदृष्ट्या दुर्बल घटक - १० %
		खुला - २२ %
८	बीसीसी-२०१८/प्र.क्र.५८१ ए/१६-ब, दि. ४.७.२०१९	अनुसूचित जाती - १३ %
		अनुसूचित जमाती - ७ %
		विमुक्त जाती (अ) - ३ %
		भटक्या जमाती (ब) - २.५ %
		भटक्या जमाती (क)- ३.५ %
		भटक्या जमाती (ड)- २ %
		विशेष मागास प्रवर्ग - २ %
		इतर मागास वर्ग - १९ %
		समाजिक आणि शैक्षणिक मागास वर्ग- १३ %
		आर्थिकदृष्ट्या दुर्बल घटक - १० %
		खुला - २५ %
९	बीसीसी-२०२१/प्र.क्र.३८७/१६-ब(ए), दि. ६.७.२०२१	अनुसूचित जाती - १३ %
		अनुसूचित जमाती - ७ %
		विमुक्त जाती (अ) - ३ %
		भटक्या जमाती (ब) - २.५ %
		भटक्या जमाती (क)- ३.५ %
		भटक्या जमाती (ड)- २ %
		विशेष मागास प्रवर्ग - २ %
		इतर मागास वर्ग - १९ %
		आर्थिकदृष्ट्या दुर्बल घटक - १० %
		अराखीव - ३८ %

Thus, it is evident that in Maharashtra vertical reservation has crossed cap of 50%, which is laid down by the Hon'ble Supreme Court in the case of **Indra Sawhney & Ors Vs. Union of India & Ors, AIR 1993 SC 477.**

26. Unlike the 4% reservation is provided under Section 34 in THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016, no separate reservation is provided in the Transgenders Act 2019. It appears that the Legislature in view of the said cap of 50% in **Indra Sawhney's** has not provided reservation to transgenders in SEBC category. However, the Legislature has made very progressive provisions in Section 8 of the said Act. Section 8 makes it obligatory for the Central as well as the State Government to secure full and effective participation of transgender persons and their inclusion in the Society. The terms used in Section 8 is

‘effective participation’ and ‘inclusion’ in the Society. It means there should be active inclusion and not passive. Such active inclusion is possible only by applying principle of ‘positive discrimination’. The mere identification and acknowledgment of their existence in the Society is not sufficient inclusion but to facilitate their appointments in Government and Public sector is inclusion in true sense. The Legislature with visionary approach has used the umbrella terminology ‘effective participation’ and ‘inclusion’ in Section 8 and is akin to Article 21 of the Constitution of India enabling the appropriate Government to make various provisions and keep the welfare avenues feasible for the transgenders to live with dignity.

27. “Not a single transgender is employed in Government service in State of Maharashtra”!. On instructions this answer was given by the learned C.P.O to our query to know what is the percentage of employment of transgenders in Government service. As on today in State of Maharashtra approximately 5.5 lakh Government servants are working on various posts in various Departments. But not a single transgender who has come out of closet has got a job in the Government sector. This fact itself speaks in volume. The transgenders are humans, are citizens of our great Country are waiting for their inclusion in the main stream. We have historical, mythological and cultural instances of eunuchs and their participation in political, social or cultural fields. The Hon’ble Supreme Court in the case of **NALSA (supra)** has discussed this aspect elaborately and compassionately and has given directions to the Central Government.

28. We appreciate the difficulty faced by the State in view of the table of status of reservation demonstrating percentagewise vertical and horizontal reservation produced before us. It won’t be out of

place to refer to relevant para 684 of the judgment in the case of **Indra Sawhney (supra)**, wherein the Hon'ble Supreme Court has in unequivocal terms has restricted the reservation under Article 16(4) and stated that it should in no case exceed 50%. We reproduce para 684 and clause (4) of concluding paragraph No. 700 of the said judgment as under:-

684. No provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality. Benign discrimination or protection cannot under any constitutional system itself become principle clause. Equality is the rule. Protection is the exception. Exception cannot exhaust the rule itself. True no restriction was placed on size of reservation. But reason was the consensus understanding that it was for minority of seats. That apart the reservation under Article 16(4) cannot be taken in isolation. Article 16(1) and Article 16(4) being part of same objective and goal, any policy of reservation must constitutionally withstand the test of inter action between the two. In this perspective reservation cannot be except for, 'minority of seats'. Our founding fathers were aware that such policies were bound to have political overtones. Various considerations may result in influencing the political decision. That is why their validity in the constitutional framework was left to the courts. Observations by Dr. Ambedkar in Constituent Assembly Debates are quite pertinent, If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. Since this Court has consistently held that the reservation under Articles 15(4) and 16(4) should not exceed 50% and the States and the Union have by and large accepted this as correct it should be held as constitutional prohibition and any reservation beyond 50% would liable to be struck down.

Therefore, (i) Reservation under Article 16(4) should in no case exceed 50%;

(ii) No reservation can be made for any class other than backward class either under Article 16(1) or 16(4).

(iii) Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive.”

“700(4) Reservation being extreme form of protective measure or affirmative action it should be confined to minority of seats. Even though the Constitution does not lay down any specific bar but the constitutional philosophy being against proportional equality the principle of balancing equality ordain reservation, of any manner, not to exceed 50%.”

The class of transgenders as considered by the Hon'ble Supreme Court in the case of **NALSA (supra)** are to be treated under Article 15(4) as Socially and Economically Backward Class of citizens.

30. Article 16 guarantees equality of opportunity in the matters of public employment. Thus, equal opportunities should be provided to all the citizens in employment or appointment to any office in the State.

Article 16(2) prohibits discrimination in public employment on the basis of religion, race, caste, sex etc. The Transgenders Act has taken care of facilitating or making available employment opportunities.

31. Let us advert to Section 3 of the Act, which is in tuned with said object as it states that no person or establishment shall discriminate against transgender persons on any of the grounds which are enumerated in sub clauses (a) to (i). Sub-clause (c) states 'denial of, or termination from, employment or occupation'.

32. The Transgenders are people in minority. Majority forms the Government, but majority cannot suppress or ignore the rights of marginalized section. The caliber and morality of the Democracy is

tested on these yardsticks. Not only in India but in Western countries also sex is a taboo. The women of the world had to struggle for generations to have today's position and yet to go ahead in respect of getting equal opportunity and equal treatment in the society. The case of transgenders is worse than the women. Learned counsel Kranti has demonstrated how transgenders are ridiculed or subjected to misplaced abnormal curiosity, hence social movements of this class are very much restricted. Therefore, mere acknowledgement of their separate identity is not enough to provide them opportunity in public employment. The State is bound by the provisions in the Transgenders Act of 2019. Therefore, the stand taken by the Respondent-State that they cannot provide reservation more than 62%, though is consistent with the law about 50% cap laid down by the Hon'ble Supreme Court in the case of **Indra Sawhney (supra)**, the Transgenders Act itself has opened the other doors of inclusion and participation of transgenders in the public employment. Combine reading of Sections 3 & 8 of the Transgenders Act makes it clear that the State not only has the power, but also it is obligatory on the part of the State to prepare the welfare schemes or to invent different methods and modes to provide the opportunity to transgenders of public employment. The Act is very liberal and laudable in view of the provisions made in Sections 3 & 8 of the Act. It offers the progressive dynamics so also equally sensitive approach by the Government and the Executives of the State. The State of Maharashtra has been proved to be very progressive in its thought and culture. Therefore, it is desirable on the part of the Government to take necessary measures to enable these transgender applicants to get job in the Government sector.

33. Under Articles 15 & 16 discrimination is prohibited on the ground of sex. The Central and State Government have always

applied and allowed positive discrimination for upliftment of the downtrodden. To get in public employment is a handicapped race for the transgenders. Though they are not physically disabled and are able bodied persons, their activities, actions, growth is paralyzed due to the negative approach of the Society, family in all the schools, colleges in all places at all the levels.

Similarly, we found there is a hidden apprehension that if at all any reservation is given to the transgenders in public sector then that will be abused and there will be tendency of more people coming out of closet falsely as transgenders and go for surgery. This fear is absolutely misplaced. Getting in Government job depends on number of factors like education, fitness, vacancies etc.

34. On this background we consider the prayer of the present applicants. Total 14956 posts of Police Constables were advertised on 6.11.2022. Out of that 145 posts of Police Constables in District Satara were declared. For which 56 transgenders applied and out of 56, only one of the applicants' cleared examination and physical test yet unable to reach the cut-off and have not been considered. It is worth to note the details of the applicants, which are given below:-

Details of Applicant - Arya Vijay Pujari

Sr No.	Particular	Details
1.	Name	Arya Vijay Pujari
2.	Date of Birth	April 25 th , 1999
3.	Age	24 years
4.	Educational Qualification	Pursuing B.A (Bachelor of Arts)
5.	Caste	OBC
6.	Post applied	Police Constable
7.	Applied for District	Satara

Details of Applicant - Vinayak Bhagwan Kashid

Sr No.	Particular	Details
1.	Name	Vinayak B. Kashid
2.	Date of Birth	September 11, 1991
3.	Age	32 years
4.	Educational Qualification	1. Diploma in Electrical Engineering. 2. Bachelor in Electrical Engineering. 3. Master in Technology (Electrical Power System)
5.	Caste	OBC
6.	Post applied	Police Constable
7.	Applied for District	Satara

Details of Applicant - Yashwant Vitthal Bhise & Ors

Sr No.	Particular	Details
1.	Name	Yashwant Vitthal Bhise & Ors
2.	Date of Birth	April 12 th 1987
3.	Age	36 years
4.	Educational Qualification	1. Bachelor in Commerce. 2. Government Diploma in Cooperation & Accountancy.
5.	Caste	Open
6.	Post applied	Talathi
7.	Applied for District	Sangli

श्रीमती आर्या पुजारी यांनी पोलीस अधीक्षक, सातारा येथे पोलीस शिपाई पदासाठी अर्ज सादर केला होता. त्यामध्ये त्यांना शारीरिक चाचणी व लेखी परीक्षेबाबतची माहिती खालीलप्रमाणे आहे :-

अ. क्र	नाव	जेंडर	प्रवर्ग	समांतर आरक्षण	शारीरिक चाचणीत प्राप्त गुण	लेखी परीक्षेत प्राप्त गुण	एकूण गुण	अंतिम निवडयादीमध्ये समाविष्ट झाले किंवा नाही	OBC प्रवर्गाचे मेरीट
1	आर्या विजय पुजारी	Transgender	OBC	General	३९	६३	१०२	नाही	OBC- General १३४ OBC- Female १२४

श्री. विनायक काशिद यांनी पोलीस आयुक्त, पुणे शहर येथे पोलीस शिपाई पदासाठी अर्ज सादर केला होता. त्यामध्ये त्यांना शारीरिक चाचणी व लेखी परीक्षेबाबतची माहिती खालीलप्रमाणे आहे :-

अ. क्र	नाव	जेंडर	प्रवर्ग	समांतर आरक्षण	शारीरिक चाचणीत प्राप्त गुण	लेखी परीक्षेत प्राप्त गुण	एकूण गुण	अंतिम निवडयादीमध्ये समाविष्ट झाले किंवा नाही	अनाथ व OBC प्रवर्गाचे मेरीट
1	विनायक काशिद	Transgender-Female	OBC	Orphan	३५	५४	८९	नाही	शा.नि. (०६.०४.२०२३) संस्थाबाहेर ११७ मेरीट क्लोज OBC-१२६ General OBC-११२ Female

Applicant Mr Yashwant Vitthal Bhise, applied for the post of Talathi and appeared for the examination, but the result of the same is not declared.

35. We think it is necessary to give the illustrations of making policy decision with positive discrimination which is expected by the Respondent-State in view of Sections 3 & 8 of the Act.

For example:-

1) To fix separate lower benchmark for transgenders as a class in Preliminary and Main Examination.

and/or

2) To give grace marks to reach the cut-off marks

and/or

3) To give more chances to appear for the examination by giving age relaxation.

and/or

4) To offer concession in educational qualification and experience.

36. The argument of the State Government that the applicants were allowed to compete as a transgender in public employment and they can compete in open category or their respective reserved categories is not an approach consistent with the object of the Transgenders Act. Only by acknowledging the third gender, the Government has not made adequate opportunity available to the transgenders. More steps are required to be taken by the Respondent-State for effective participation and meaningful inclusion of the transgenders in the mainstream.

37. We rely on the decision in the case of **K. Prithika Yashini Vs. The Chairman, Tamil Nadu Uniformed Services Recruitment Board, W.P 15046/2015** as pointed out by the learned counsel Kranti L.C.

“14. There is stated to be no other transgender as a candidate in the selection for recruitment as Sub-Inspector, an aspect conceded by the learned Additional Advocate General. Thus, even if one person is recruited under this category, it would be the petitioner. The counter-affidavit of the respondent shows that there are two other transgenders serving as police constables and the petitioner would be really the third one. The social impact of such recruitment cannot be lost sight of, which would give strength to the case of the transgender. The petitioner must reach the finishing line and not be stopped and disqualified in the middle.”

38. In view of the above, we pass the following order:-

- (a) The prayer of the applicants in giving directions to the Respondents to grant reservation to the applicants transgenders in view of The Transgenders Act, 2019 cannot be entertained.
- (b) However, considering the directions given in the judgment of **NALSA (supra)** by the Hon'ble Supreme Court and provisions of Sections 3 & 8 of the Transgenders Act and the

relevant rules the applicants are to be given the necessary grace marks to reach the cut-off marks.

OR

The applicants who have reached upto 50% of the total marks are to be considered for the concerned posts.

- (c) If any applicant is aged barred then the Respondent-State to give age relaxation to the applicant who has reached upto 45% marks in order to provide one more opportunity.
- (d) We direct the Respondent-State to implement this order within six weeks from the date of this order.

Sd/-
(Medha Gadgil)
Member (A)

Sd/-
(Mridula Bhatkar, J.)
Chairperson

Place : Mumbai
Date : 29.11.2023
Dictation taken by : A.K. Nair.