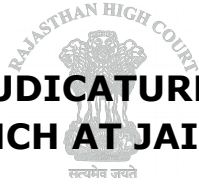




[2023/RJJP/011257]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Civil Writ Petition No. 14044/2021

Chinder Pal Singh

----Petitioner

Versus

1. The Chief Secretary, Govt. Of Rajasthan, Govt. Secretariat, Jaipur.
2. The Principal Secretary, Secondary Education Department, Govt. Of Rajasthan, Govt. Secretariat, Jaipur (Raj.)
3. The Director Secondary Education, Bikaner (Raj.)
4. The Joint Director, Secondary Education Jaipur Division, District Jaipur (Raj.)
5. District Education Officer (Secondary Education), Jaipur (Raj.)

----Respondents

For Petitioner(s) : Mr. Arvind Sharma
Ms. Mamta Agarwal

For Respondent(s) : Mr. S. Zakawat Ali, Addl. G.C.

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Reserved on : **17/05/2023**
Pronounced on : **25/05/2023**

Judgment

Reportable

(1) The issue involved in this petition is "Whether a person who is born as a female with predominantly male orientation or vice versa has a right to get oneself to be recognised as a member of the gender of one's choice, when the person has undergone surgical procedures for change of physical gender attributes?." The right of a human being to choose his/her sex or gender



identity is integral to his or her personality and is one of the most basic aspects of self determination, dignity and freedom. It is in the above background that the issue involved in this petition is required to be considered.

(2) The petitioner took birth as a female gender and she completed her studies as a female student and after completion of her studies she got appointment on the post of Physical Training Instructor, Grade Three (for short 'PTI Gr.-III) under General Female Category vide order dated 12.07.2013 and in the service record her status has been mentioned as 'Female'. Though the petitioner took birth as female child and she was assigned female gender at the time of her birth, but she was suffering from Gender Identity Disorder, hence at the age of 32 years she consulted a Psychiatrist who conducted her psychological evaluation and on the basis of detailed clinical examination it was opined that the petitioner has no indication of any psychiatric disorder and she was suffering only with Gender Identity Disorder and she was found fit for 'Sex Reassignment Surgery" vide Annexure-4. Thereafter the petitioner underwent Gender Reassignment Surgery (Female to Male) with Phalloplasty - Penis Prosthesis in the year 2014-2017 at Kokilaben Dhirubhai Ambani Hospital at Andheri (West) Mumbai and after undergoing the surgery, the petitioner became male from female. After this surgery, the petitioner recovered completely and became a Male with functional shaft and was on hormone therapy. The consultant Urologist Doctor issued a Certificate vide Annexure-5 in this regard on 09.08.2018. After getting the status of male gender, the



petitioner changed his name in the Official Gazette of India on 08.09.2018 and his name was changed from Chinder Pal Kaur to Chinder Pal Singh. Thereafter the name of petitioner was changed as Chinder Pal Singh even in his Aadhar Card No. 935164446293.

(3) The petitioner submitted an application on 22.09.2018 in the office of Principal of the School for change of his name and gender in his service record. The Principal referred the matter to the Joint Director, Secondary Education, for necessary action on 01.10.2018. But even after passing of more than three years the name and gender of the petitioner has not been changed in his service record. Under these circumstances, the petitioner has knocked the doors of this court by way of filing this petition with the following prayers :-

"It is, therefore humbly prayed that Your Lordship may graciously be pleased to accept and allow this writ petition and by an appropriate writ, order or direction :-

- I. Issue an appropriate writ, order or direction, the respondents may kindly be directed to change name and gender in service record/Book and to get enter name of petitioner family member as beneficiary.
- II Issue an appropriate writ, order or direction, the respondents may kindly be directed to change of name and gender as Ms Chinder Pal Kaur to Chinder Pal Singh and gender from Female to Male in service record/Book.
- III Issue an appropriate writ, order or direction, the respondents may kindly be directed to decide the representation dated 22.09.2018 after considering his genuine prayer of change the name and gender of the petitioner.
- IV Any other appropriate order, which may be found just and proper in the facts and circumstances of the case, be passed in favour of the petitioner.
- V Cost of the writ petition may also be awarded in favour of the petitioner."



(4) Counsel for the petitioner submitted that with the development of medical science, the petitioner has underwent the gender reassignment surgery and he has become Male after changing his gender and he has performed marriage and out of the wedlock two issues have born. Counsel submits that unless the name and gender of the petitioner is changed in his service record, it would be difficult for him and his family to get the benefits of his service. Counsel submits that in the given circumstances it is necessary upon the respondents to make these requisite changes in the service record of the petitioner.

(5) Per contra, counsel for the respondents submits that the petitioner got appointment as a Female candidate and her name and gender was recorded on the basis of the identity furnished by her and if she has changed her gender after undergoing any surgery, then she should get a declaration in this regard from the Civil Court. Counsel submits that until and unless such declaration is issued by a Civil Court, the name and gender of petitioner cannot be changed in her service record.

(6) Heard and considered the submissions made at the bar and perused the material available on the record.

(7) The petitioner identifies himself as a Male due to his sexual orientation and has gone a psychological treatment and gender reassignment surgery. Now he is fighting battle for his recognition as 'Male' and change of his name and gender in his service record. But the respondents are rigid not to make these changes in his service record.



(8) Gender identity is the most fundamental aspect of life which refers to a person's intrinsic value of being a Male or Female. There are times when human body is not formed with all of its proper attributes, therefore genital anatomy problems may arise and many of them do not choose to undergo gender reassignment surgery to change their gender. Everyone is entitled to enjoy all human rights which are a basic necessity to survive, without discrimination on the basis of sexual orientation or gender identity.

(9) According to the *Rigveda*, in Hindu mythology, three types of genders have been considered - the Male, that is the 'Purush', the Female that is the 'Prakriti' and the third gender that is the 'Tritiya Prakriti'. In the recent times the modern Indian society have considered them as the third gender otherwise there was no such identity given to them legally. Still, all is not well, and the third gender people are struggling to constitute a part of the civil society.

(10) Right to equality is guaranteed by our Constitution of India which is our basic Fundamental Right which we inherit since we become a part of our mother's womb. Everybody on this planet has a right to be treated with respect and dignity, be it a Male or a Female or any other gender. Till the past, we used to consider Male and Female as two biological sex but the developed science has proved that there are more genders than just cisgender.

(11) The Apex Court in the case of National Legal Services Authority v. Union of India (2014) 5 SCC 438, has considered the



issue of recognition of self-perceived gender identity and had specifically held that the transgender persons are also entitled to basic human rights including right to life with human dignity and right to privacy and freedom of expression. It has been held that right of a person to self-perceived gender identity is a part of his/her fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India and a person cannot be discriminated on the basis of sexual orientation or gender identity different from that assigned at the time of birth.

(12) Dealing with this issue, the Hon'ble Apex Court discussed the issue involved in this petition as under :-

"21. Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre- and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

22. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and



their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

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Article 14 and Transgenders

61. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word "person" and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression "person" and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

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82. Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

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113. At the outset, it may be clarified that the term "transgender" is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor "transgender". Etymologically, the term "transgender" is derived from two words, namely, "trans" and "gender". Former is a Latin word which means





“across” or “beyond”. The grammatical meaning of “transgender”, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression “transgender”.

114. It is to be emphasized that Transgender in India have assumed distinct and separate class/category which is not prevalent in other parts of the World except in some neighbouring countries. In this country, the TG community comprise of hijras, eunuch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. In Indian community transgender are referred as hijra or the third gendered people. There exists wide range of transgender-related identities, cultures, or experience - including hijras, Aravanis, Kothis, Jogtas/Jogappas, and Shiv-Shakthis (Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or “not men”. Aravanis: Hijras in Tamil Nadu identify as “Aravani”. Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of “femininity”. Jogtas/Jogappas: They are those who are dedicated to serve as servant of Goddess Renukha Devi whose temples are present in Maharashtra and Karnataka. Sometimes, Jogti hijras are used to denote such male-to-female transgender persons who are devotees of Goddess Renukha and are also from the Hijra community. Shiv-Shakthis: They are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression). The way they behave and act differs from the normative gender role of a men and women. For them, furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society's vast majority. Endeavour to live a life with dignity is even worse. Obviously transvestites, the hijra beg from merchants who quickly, under threat of obscene abuse, respond to the silent demands of such detested individuals. On occasion, especially festival days, they press their claims with boisterous and ribald singing and dancing.(A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol. 21, No. 2 (1987), pp. 371-87).”

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133. Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the





background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as "Reflective Equilibrium". The method of Reflective Equilibrium was first introduced by Nelson Goodman in *Fact, Fiction and Forecast* (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of "Justice as Fairness". In his *A Theory of Justice*, Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ("considered judgments"), which he assumes most members of democratic societies would accept. "Justice as fairness [...] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition." Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception of justice is called "justice as fairness". When we combine Rawls' notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of the aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

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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."

(13) On the basis of the directions issued by the Hon'ble Apex Court in para 135.2 of the above judgment, the Central Government has enacted 'The Transgender Persons (Protection of Rights) Act, 2019' (for short 'Act of 2019') and Rules of 2020 have also been framed thereunder. The relevant provisions of the Act of 2019 are being reproduced below. Section 2(k) of the Act defines the term 'Transgender Person' as under :-



"2(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* ."

(14) Section 3 of the Act of 2019 prohibits discrimination against any transgender person on the grounds mentioned in the said section which includes :-

"(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;"

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(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;

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(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."

(14.1) Chapter III Section 4 of the Act of 2019 deals with the provisions of Recognition of identity of transgender person. Sections 5 to 7 deals with the procedure of issuance of certificate of identity to these persons. The relevant para of Sections 4 to 7 are reproduced as under :-

"4. Recognition of identity of transgender person.—(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 subsection (1) shall have a right to self-perceived gender identity.

5. Application for certificate of identity.—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. Issue of certificate of identity.—(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. Change in gender.—(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.”

(14.2) Similarly, Chapters IV and V of the Act of 2019 deals with Welfare Measures and Obligation of Government authority to effectively implement the provisions of this Act. Sections 8 to 11 are reproduced as under :-

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-stigmatising 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.





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.

10. Obligations of establishments.—Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed.

11. Grievance redressal mechanism. — Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.”

(15) Section 7 of the Act of 2019 provides that in case after issuance of a certificate under Section 6(1) the transgender person undergoes surgery to change gender, such person may make an application, along with a certificate issued to that effect by the Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate in the prescribed manner. On such an application being made, the District Magistrate on being satisfied, is required to issue a certificate indicating change in gender and such change would entitle a person to get the required changes made in the birth certificate and other official documents relating to their identity. The very purpose of bringing in force the Act of 2019 is to provide equality and respect to the transgender persons. The Act of 2019 is a social beneficial legislation and therefore, this Act cannot be given an interpretation which would defeat the very purpose for which the same is brought in force. It has to be interpreted in a manner that solemn purpose for which it was legislated, is achieved. The purpose is to give recognition to transgender persons as they perceived themselves and, in case, they undergo a gender



reassignment procedure, to provide them appropriate changed certificates and identity documents. Section 7 is required to be interpreted in a manner that the transgender persons who are issued a certificate under Section 6 or persons like petitioner who had undergone the gender reassignment procedure prior to coming into force of the Act of 2019, both are entitled to apply before the District Magistrate for issuance of a certificate indicating change in gender. Only on the basis of such a certificate issued by the District Magistrate under Section 7 of the Act, the transgender person can apply for change in their birth certificate and other official documents relating to their identity. Denying such a right to person who had already undergone the gender reassignment procedure, would frustrate the very purpose of the Act, as large number of persons would be left out discriminated in the society.

(16) Perusal of the provisions of the Act of 2019 clearly indicates that this Act recognizes the rights of transgender persons to a life with dignity and prohibits discrimination against them. The object of this enactment is to give effect to the rights guaranteed to such persons under Articles 14, 15, 19 and 21 of the Constitution of India.

(17) In view of the specific provision of the Act of 2019 by which a transgender person has a right to be recognized not only as a transgender but also a right of self-perceived gender identity, this court is of the opinion that the petitioner who has opted for the Male gender and has undergone sex reassignment surgeries for aiding his self-perception as a member of the said gender,





would definitely be recognized as a Male gender and he is entitled to get the change and correction of his name and gender in his service record.

(18) It is worthy to note here that after gender reassignment surgery, the petitioner has changed his gender and has become a Male and performed marriage and from the wedlock, two sons have born. Now it is very difficult for the petitioner to clear his status and identity in the society. If the identity of petitioner is not corrected in his service record, it would be difficult for the wife and children of the petitioner to get service benefits of the petitioner.

(19) Looking to the provisions contained under Section 7 of the Act of 2019, the petitioner is directed to submit an application before the District Magistrate having jurisdiction. The District Magistrate shall follow the procedure contained under the Act of 2019 and the Rules of 2020 made thereunder to get the fact of the gender reassignment verified and on being satisfied, issue the required certificate to the petitioner. Such procedure shall be completed by the District Magistrate within a period of sixty days from the date petitioner applies before him along with the certified copy of this order. On the basis of the certificate issued by the District Magistrate, petitioner shall be at liberty to approach the authorities concerned i.e. the respondents, who shall take immediate steps to change the name and gender of petitioner in his service record. Such exercise shall be completed within a period of one month from the date the petitioner approaches the



respondents along with the certified copy of this order and the certificate issued to him by the District Magistrate.

(20) Before parting with the order, the Chief Secretary of the State is directed to instruct all the District Magistrates of the State to implement the provisions of the Act of 2019 effectively and positively and establish a separate Grievance Redressal Mechanism Forum in each Districts of the State to deal with the complaints relating to violation of the provisions of this Act and provide all benefits of the provisions of this Act to the transgender persons. The Chief Secretary is expected to do the needful exercise for effective implementation of the provisions contained under this Act within three months of receipt of copy of this order and submit the compliance report to this Court on or before 04.09.2023.

(21) Office is directed to send a copy of this order to the Chief Secretary for necessary action and compliance of this order.

(22) With the aforesaid directions, this writ petition stands disposed of.

(23) Stay application and all application(s), pending if any, also stands disposed of.

(24) No order as to costs.

(25) List this matter on 04.09.2023 to check the compliance of this order.

(ANOOP KUMAR DHAND), J.

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