
Sonali Bodraj Moon Vs Chief Secretary

Civil Writ Petition No. 10884 of 2015

Court: BOMBAY HIGH COURT

Date of Decision: Oct. 24, 2016

Acts Referred:

Administrative Tribunals Act, 1985 - Section 15, Section 2(q)#Constitution of India, 1950 - Article 226, Article 227

Citation: (2017) 1 ALLMR 676

Hon'ble Judges: Anoop V. Mohta and G.S. Kulkarni, JJ.

Bench: Division Bench

Advocate: Mr. A.A. Kumbhakoni Sr. Advocate a/w Mr. V.R. Gaikwad, Advocate, for the Petitioner in W.P. No. 4049/2015; Mr. Prakash Ambedkar a/w Mr. P.D. Bagade, Advocate, for the Petitioners in W.P. Nos. 10884/2015, 3785/2016, 3786/2016 and 8880/2016; Mr. A.A. Karand

Final Decision: Disposed Off

Judgement

G.S. Kulkarni, J.â€”These batch of petitions raise common issues namely recruitment and selection under the State service. Some of the petitions

assail State Government circulars issued in relation to the services under the State Government (State Public Services) on the ground that these

circulars are unconstitutional and contrary to the law laid down by the Apex Court on the issue of vertical and horizontal reservation.

2. The respondent-State has appeared and has raised an objection to the maintainability of these writ petitions on the ground that the petitioners, as

are seeking reliefs, in relation to State services, the petitioners are required to approach the Maharashtra Administrative Tribunals under the

provisions of section 15 of the Administrative Tribunals Act, 1985. (for short "the Act"). The respondent-State supports this submission relying on

the decision of the Supreme Court in the case of L. Chandra Kumar v. Union of India 1997 (3) Supreme Court Cases 261.

3. The above objection as urged on behalf of the respondent-State is opposed by the petitioners on two grounds. Firstly, that the Administrative

Tribunals in some similar cases has held a consistent view, which according to the petitioner is against the contention of the petitioners as is also

contrary to the decisions of the Apex Court. It is therefore, urged that in any case these cases would reach the High Court after the Tribunal

decides the same, and thus, it would be appropriate that these petitions be entertained without the petitioner being called upon to approach the

Administrative Tribunal. The second contention is that the position in law on the issues as raised in these petitions is clear in view of the decisions of

the Supreme Court as also followed in some of the decisions of the Division Bench of this Court thus, the scope of adjudication of these petitions

would be narrow and therefore, the petitions be heard and decided by this Court without requiring the petitioner to approach the Tribunal. The

State has disputed these contentions and would urge that each of these cases is required to be heard on its merits by the Administrative Tribunal.

4. We have perused the prayers as made in these writ petitions. Admittedly, the petitioners are seeking reliefs against the State Government and

have urged issues pertaining to recruitment under the State Government. The posts in question in these petitions inter alia are Sales Tax Inspectors,

Police Sub-Inspectors etc which are admittedly civil posts under the State :

5. Section 15 of the Act provides for jurisdiction, powers and authority of the State Administrative Tribunals to say that the Administrative Tribunal

for a State shall exercise on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day, by all

Courts (except the Supreme Court) in relation to inter alia recruitment and matters concerning recruitment to any civil service of the State or to any

civil post under the State as also all service matters concerning a person.

6. Further under section 2 (q) which specifically defines ""service matters"" which reads as under :

2 (q) ""Service matters"" in relation to a person means all matters relating to the conditions of his service in connection with the affairs of the union or

of any State or of any local or other authority within the territory of India or under the control of the Government of India or as the case may be of

any Corporation (or society) owned or controlled by the Government, as respects :

(i) remuneration, (including allowances) pension and other retirement benefits,

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) leave of any kind;

(iv) disciplinary matters; or

(v) any other matter whatsoever;

7. The above provisions of the Administrative Tribunal Act clearly demonstrate that the issues inter alia pertaining to recruitment and matters

concerning recruitment to any other service under the State or any other civil post under the State would necessarily fall within the jurisdiction of

the Tribunal.

8. The position in law as regards the jurisdiction of the Administrative Tribunals to entertain applications in regard to such service disputes is well-

settled in view of the Constitution Bench Judgment of the Supreme Court in L. Chandra Kumar v. Union of India 1997 3 Supreme Court

Cases 261. The Supreme Court has clearly held that it will not be open to the litigants to directly approach the High Court even in cases where

they question the vires of statutory legislation (except where the "legislation" which creates the particular Tribunal is challenged) by overlooking the

jurisdiction of the Tribunal concerned. It would be relevant to note the observations of the Apex Court in para 99 of the decision which reads thus :

99. "In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude

the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of

the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same

extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32

of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals

may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under

Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and

rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the

concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they

have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires

of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the

concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

(Emphasis supplied)

9. We may also usefully refer to the decision of the Division Bench of this Court in the case of Vijay Ghogare & Ors. v. The State of Maharashtra & ors in Writ Petition No. 8452 of 2004 dated 18 June 2013 (Mohit S. Shah, C.J. and M.S. Sanklecha, J) wherein petitioners

who had directly approached this Court under Article 226 of the Constitution assailing the Constitutional validity of the Maharashtra State Public

Services (Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis) Nomadic Tribes, Special Backward Category

and Other Backward Classes) Act, 2001 were held to be not maintainable in view of the settled position in law in L. Chandrakumar (supra).

Notably this order was passed after the petitions were admitted. This order had attained finality in view of the dismissal by the Supreme Court a

Special Leave Petition preferred against it. The Court made the following extensive observations in paras 6,7,8,9,10,11,14,15,16 and 17 which

reads thus:

6. ""We may now examine the manner in which these constitutional provisions have been sought to be implemented, the problems that have

consequently arisen, and the manner in which Courts have sought to resolve them. Such an analysis will have to consider the working of the two

provisions separately.

Article 323 A

7. In pursuance of the power conferred upon it by Clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative

Tribunals Act, 1985 (Act 13 of 1985) [hereinafter referred to as ""the Act""]. The Statement of Objects and Reasons of the Act indicates that it was

in the express terms of Article 323A of the Constitution and was being enacted because a large number of cases relating to service matters were

pending before various Courts; it was expected that ""the setting up of such Administrative Tribunals to deal exclusively with service matters would

go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but

would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances.

8. Pursuant to the provisions of the Act, the Central Administrative Tribunal, with five Benches, was established on November 1, 1985. However,

even before the Tribunal had been established, several writ petitions had been filed in various High Courts as well as this Court challenging the

constitutional validity of Article 323A of the Constitution as also the provisions of the Act; the principal violation complained of being the exclusion

of the jurisdiction of this Court under Article 32 of the Constitution and of that of the High Courts under Article 226 of the Constitution. Through

an interim order dated October 31, 1985, reported as S.P. Sampath Kumar v. Union of India, (1985) 4 SCC 458, this Court directed the

carrying out of certain measures with a view to ensuring the functioning of the Tribunal along constitutionally sound principles. Pursuant to an

undertaking given to this Court at the interim stage by the erstwhile Attorney General, An amending Act (Act 19 of 1986) was enacted to bring

about the changes prescribed in the aforesaid interim order.

9. When Sampath Kumar's case was finally heard, these changes had already been incorporated in the body and text of the Act. The Court took

the view that most of the original grounds of challenge which included a challenge to the constitutional validity of Article 323A did not survive and

restricted its focus to testing only the constitutional validity of the provision of the Act. In its final decision, the Court held that though judicial review

is a basic feature of the constitution, the vesting of the power of judicial review in an alternative institutional mechanism, after taking it away from

the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real

substitute for the High Court. Using this theory of effective alternative institutional mechanisms as its foundation, the Court proceeded to analyse the

provisions of the Act in order to ascertain whether they passed constitutional muster. The Court came to the conclusion that the Act, as it stood at

that time, did not measure up to the requirements of an effective substitute and, to that end, suggested several amendments to the provisions

governing the form and content of the Tribunal. The suggested amendments were given the force of law by an amending Act (Act 51 of 1987) after

the conclusion of the case and the Act has since remained unaltered.

10. We may now analyse the scheme and the salient features of the Act as it stands at the present time, inclusive as it is of the changes suggested in

Sampath Kumar's case. The Act contains 37 Sections which are housed in five Chapters. Chapter I ("Preliminary") contains three Sections;

Section 3 is the definition clause.

11. Chapter II ("Establishment of Tribunals and Benches thereof") contains Sections 4 to 13. Section 4 empowers the Central Government to

establish : (1) a Central Administrative Tribunal with Benches at separate places; (2) an Administrative Tribunal for a State which makes a request

in this behalf; and (3) a Joint Administrative Tribunal for two or more States which enter into an agreement for the purpose. Section 5 states that

each Tribunal shall consist of a chairman and such number of Vice-Chairmen and Judicial and Administrative Members as may be deemed

necessary by the appropriate Government. Subsection (2) of Section 5 requires every Bench to ordinarily consist of one Judicial Member and one

Administrative Member. Subsection (6) of Section 5, which enables the Tribunal to function through Single Member Benches is the focus of some

controversy, as will subsequently emerge, and is fully extracted as under:

Section 5(6) Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other

Member authorised by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction powers and

authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or

special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such

a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the chairman or, as the case

may be, referred to him for transfer to such Bench as the Chairman may deem fit.

14. Section 8 prescribes the terms of office of the personnel of the Tribunal as being for a duration of five years from the date of entering into

office; there is also provision for reappointment for another term of five years. The maximum age limit permissible for the Chairman and the Vice-

Chairman is 65 years and for that of any other Member is 62 years. Section 10 stipulates that the salaries, terms and conditions of all Members of

the Tribunal are to be determined by the central Government; such terms are, however, not to be varied to the disadvantage of any Member after

his appointment.

15. Chapter III ("Jurisdiction, powers and authority of Tribunals") consists of Sections 14 to 18. Sections 14, 15 and 16 deal with the jurisdiction,

powers and authority of the Central Administrative Tribunal, the State Administrative Tribunals and the Joint Administrative Tribunals respectively.

These provisions make it clear that except for the jurisdiction of this Court, the Tribunals under the Act will possess the jurisdiction and powers of

every other Court in the country in respect of all service related matters. Section 17 provides that the Tribunals under the Act will have the same

powers in respect of contempt as are enjoyed by the High Courts.

16. Chapter IV ("Procedure") comprises Section 19 to 27. Section 21 specifies strict limitation periods and does not vest the Tribunals under the

Act with the power to condone delay.

17. Chapter V ("Miscellaneous"), the final Chapter of the Act, comprising Sections 28 to 37, vests the Tribunals under the Act with ancillary

powers to aid them in the effective adjudication of disputes. Section 28, the "exclusions of Jurisdiction" clause reads as follows:

28. Exclusion of Jurisdiction of courts. On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act

by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any

Service or persons appointed to any Service or post, no court except

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for

the time being in force, Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters

concerning such recruitment or such service matters.

10. Learned counsel for the petitioner in support of his submissions has placed reliance on the decision of the Division bench of this Court in Sunil

Rajaram Ghosalkar v. State of Maharashtra. 2002 (5) Bom.C.R.189 to contend that in a similar situation when the Tribunal had already

decided the issues and had formed a particular view, the Division Bench of this Court in the said case held that it was not proper to direct the

petitioners therein to the alternate remedy before the Tribunal. The Division Bench held that as the view of the Tribunal in regard to the

issue/question was already known in the particular circumstances entertained the writ petitions directly. In our opinion, reliance on behalf of the

petitioner on this decision is not well-founded. This is for two reasons. The order of the Division Bench came to be passed in peculiar facts of the

case and secondly and most importantly for the reason that the said decision does not take into consideration the explicit mandate of the law laid

down by the Supreme Court in L.Chandra Kumar (supra).

11. We are at a preadmission stage in these batch of petitions. In the light of the above clear position in law, we are of the opinion that the

petitioners could not have approached this Court directly and need to approach the Maharashtra Administrative Tribunal for redressal of their

grievances as urged in these petitions. We thus propose to pass similar directions as in the case of Vijay Ghogare (supra). We accordingly, pass

the following order :

(i) Instead of requiring the writ petitioners to file fresh Original Application before the Maharashtra Administrative Tribunal, these Writ Petitions are

returned to the petitioners for presentation before the Maharashtra Administrative Tribunal and it is accordingly directed that the papers of these

writ petitions along with the original records be returned to the counsel for presenting the same before the Maharashtra Administrative Tribunal

within two weeks from today.

(ii) For all purposes, the Maharashtra Administrative Tribunal shall treat these Writ Petitions as transferred Original Applications. of course, the

writ petitioners will be at liberty to make incidental amendments to this Writ Petitions to state that the writ petitions are presented before the

Maharashtra Administrative Tribunal as Original Applications ;

(iii) In view of the fact that these Petition are being transferred, no objection on account of limitation and/or delay in filing the applications would be

entertained by the Maharashtra Administrative Tribunal. As a matter of abundant caution, we condone the delay if any in filing the petitions before

the Maharashtra Administrative Tribunal ;

(iv) The Petitioners would be at liberty to request the Maharashtra Administrative Tribunal to seek early hearing.

Writ Petitions are accordingly disposed of in the above terms. No order as to costs.