

(2010) 02 J&K CK 0016

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 190 of 2010 and CMP No. 234 of 2010

Shaheen (Mrs.)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-02-2010

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 227, 32, 323A

Citation : (2010) 2 JKJ 508

Hon'ble Judges : Mohd. Yaqoob Mir, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mohd. Yaqoob Mir, J.—The grievance of the Petitioner is against the order dated 2.2.2010 passed by Respondent No. 2 where-under

penalty of reduction to a lower stage in the time scale of pay by one stage for a period not exceeding one year without cumulative effect and not

adversely affecting pension, has been imposed against the Petitioner.

2. Petitioner admittedly a Central Government employee, the dispute pertains to the service matter, therefore, question for consideration is as to

whether this petition can be entertained when matter falls within the jurisdiction of Central Administrative Tribunal (hereinafter for short referred to

as ""the CAT"").

3. Learned Counsel would contend that in view of the Full Bench judgment of this Court rendered in Kuldeep Khoda and Ors. v. Masood Ahmad

Choudhary and Ors. 1994 JKLR 25, Article 323A being not applicable to the State of J&K, therefore, the jurisdiction of the High Court is not

ousted, Tribunal will be an additional or alternative forum and not an exclusive

forum.

4. It is further added that the Constitutional judgment rendered in L. Chandra Kumar Vs. Union of India and others, , has also protected the

jurisdiction of the High Courts. Furthermore reliance has also been placed on the judgment Kendriya Vidyalaya Sangathan and Anr. v. Subash

Sharma etc. AIR 2002 SCW 1105.

5. Petitioner admittedly is a Central Government employee. Article 328-A and Article 323A for the establishment of various Tribunals was

introduced in the Constitution by the Constitution (42nd Amendment) Act, 1976. Under Article 323A of the Constitution, Central Administrative

Tribunal Act, 1985 was established. Article 323A(2)(d) excludes the jurisdiction of all Courts, except that of the Supreme Court under Article

136, with respect to the dispute or complaints referred to in Clause (1).

6. After the Central Administrative Tribunal Act, 1985 was established, the writ petition titled Kuldeep Khoda and Ors. v. Masood Ahmad

Choudhary and Ors. came to be filed before this Court. Maintainability of the petition was objected on the count that the Administrative Tribunal

Act, 1985 has been constituted for adjudicating the disputes relating to service matters etc. of the employees of Central Government; therefore,

petition should have been filed before the CAT.

7. The Full Bench of this Court concluded that the provisions of Article 323A which were introduced by the Constitution (42nd Amendment) Act,

1976 would not apply to this State. So far as this State is concerned, Chapter XIV-A of the Constitution should not be treated to have been

introduced. The Central Administrative Tribunal Act, 1985 enacted by the Parliament in exercise of its power under Article 323A will therefore,

not apply to the State and the jurisdiction of this Court in entertaining the petitions in respect of disputes and complaints relating to the Central

Government employees is not ousted.

8. Finally what has been concluded is recorded in para 38 and 39 of the judgment which are quoted herein below:

38. We have already indicated that the Administrative Tribunal Act, 1985 though extends to whole of India, would still not affect the constitutional

jurisdiction of this Court in entertaining the writ petitions concerning the service matters of the employees of the central government. Applicability of

the Act is different than the destruction of the Constitutional jurisdiction of this Court by the Act. While the employees of the central government etc. posted in the State of Jammu and Kashmir may have been provided a forum for quick and early disposal of their grievances in respect of service matters, they still retain the choice to approach this Court u/s 103 of the State constitution by filling a writ petition and praying for an appropriate writ, order or direction for the redressal of their grievances. The Tribunal in these circumstances will be an additional or alternative forum and not an exclusive forum. 39. Availability of an alternative remedy does not oust the jurisdiction of High Court available under Article 226 of the constitution of India and Section 103 of the State Constitution. It is in the discretion of the High Court to refuse to exercise its constitutional jurisdiction in entertaining a petition in respect of the matter for which an alternative remedy may be available elsewhere. 9. In the judgment reported in L. Chandra Kumar Vs. Union of India and others, , clause 2(d) of Article 323A and clause 3(d) of Article 323B to the extent it excluded jurisdiction of the High Court and the Supreme court under Article 226, 227 and 32 of the Constitution, were declared unconstitutional. It shall be quite relevant to quote para 99 of the judgment: 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 Tribunals falls. The Tribunals will, nevertheless, continue to act

the 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.

10. It has been clearly ruled that Tribunals will continue to act like courts of first instance in respect of areas of law for which they have been constituted. It will, therefore, not be open for the litigants to directly approach the High Courts by overlooking the jurisdiction of concerned Tribunal.

11. The contention of the learned Counsel is that the Hon'ble Apex Court has struck down above referred clauses of Article 323A and 323B which excluded the jurisdiction of the High Courts and Supreme Court but still in terms of the Full Bench judgment of this Court rendered in Kuldeep Khuda's case Article 323A as a whole is not applicable to the State of J&K.

12. This contention of the learned Counsel is no more required to be answered in view of the law laid down in Kendriya Vidyalaya's case reported in AIR 2002 SCW 1105. Hon'ble Apex Court in the reported judgment has noticed the position of the Full Bench judgment of this Court and also the law as has been laid down in the Constitutional judgment rendered in L. Chandra Kumar's case. It shall be quite apt to quote para 8 of the said judgment:

8. In view of the above legal provision, we hold that the Act applies to all categories of Central Government servants and others posted to work in the State of Jammu and Kashmir as well. We are, therefore, of the opinion that the contention of Mr. B.D. Sharma, learned Counsel for the Respondent has no force. We may add here that the Full Bench of the High Court in Kuldeep Khud (Supra) has also taken the view that the Act extends to the whole of India which includes the State of Jammu and Kashmir.

13. It has also been noticed that the Constitutional Bench of the Apex Court has clearly held that the Tribunals set up under the Act shall continue to act as the Courts of first instance in respect of the areas of law for which they

have been constituted and it will not be open to the litigants to directly approach the High Court. It has also been concluded that the High Court erred in law in directly entertaining the writ petition concerning service matters of the employees of Kendriya Vidyalaya as these matters come under the jurisdiction of the Administrative Tribunal. The High Court has committed an error by declining to transfer the petitions to the Central Administrative Tribunal, Consequently order has been set aside and the case has been ordered to be transferred to the Central Administrative Tribunal, Chandigarh Bench.

14. The judgment was written by Hon'ble Justice S.N. Phukan and Hon'ble Justice P. Venkatarama Reddi, concurring with the conclusions has added that this Court (Supreme Court), in L. Chandra Kumar's case, deemed it expedient to impose certain restraints on the entertainment of the petitions under Article 226 and 227 and laid down that the Tribunal will continue to act as the Court of first instance in respect of the matters falling within its jurisdiction and it was not open to the aggrieved persons to directly approach the High Court by overlooking jurisdiction of the Tribunal concerned. What has been further added is recorded in para 19, same is quoted herein below:

19. I must say that the decision in Chandra Kumar's case is a product of judicial craftsmanship and a landmark in the development of constitutional law in our republic. Even if this judgment does not ipso facto apply to the J&K State Constitution, there is no apparent reason why the ratio of this judgment should not be applied to the exercise of jurisdiction by J&K High Court under Ss. 103 and 104 of J&K Constitution. The wholesome principle evolved by this Court in Chandra Kumar, could be extended to Ss. 103 & 104 as well; otherwise it would lead to an anomalous result of the Central Government servants/employees of Central Government Controlled Corporations, etc. working in J&K being left with the option of bypassing the Tribunal, without falling in line with their counterparts working elsewhere.

15. The ratio of the Constitutional judgment has to be applied, therefore, in view of the judgment rendered in Kendriya Yidyalaya's case (AIR 2002 SCW 1105) referred to hereinabove, it shall not be proper to entertain this petition but since it has been filed in this Court, same is ordered

to be transferred to the Central Administrative Tribunal, Chandigarh Bench for being taken in its circuit bench in the State of J&K.

16. In case of urgency it shall also be open to the Petitioner at the first instance if she so chooses to appear before the Tribunal at Chandigarh so as

to seek necessary orders as shall be warranted.

17. Registrar Judicial, in view of the position of law as stated above, shall ensure that such like petitions which fall under the jurisdiction of the CAT

are not entertained.

Disposed of as above.