

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 3293 OF 2017

Lalit Kumar Salve Ch/o.	}	
Madhukar Salve, Lalita	}	
Kumari Salve d/o. Madhukar	}	
Salve	}	Petitioner
versus		
Director General of Police	}	
and Ors.	}	Respondents

Dr. Syed Ejaj Abbas Naqvi for the petitioner.

Ms. P. H. Kantharia-Government Pleader
with Ms. Deepali Patankar-Honorary
Assistant to Government Pleader for the
respondents.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATED :- NOVEMBER 30, 2017

P.C. :-

1. By this petition under Article 226 of the Constitution of India, the petitioner prays for the following reliefs:-

“(b) That this Hon’ble court in its jurisdiction under Article 226 of the Constitution of India be pleased to issue the direction to Respondent No. 1 & 2 to carry out their duty towards Petitioner without any hindrance as per rules and norms mentioned in Maharashtra Constable Recruitment Rules 2006.

(c) May please to pass the order terming the letter dated 20/11/17 issued by the Respondent no. 2 as ultra vires and direct the Respondent No. 2 to grant the petitioner one month medical leave for her SRS (sexual reassignment

surgery) for living a dignified and respectful life and stay the letter dated 20/11/17 (along with letter 18/11/17 of IG Aurangabad) i.e. EXHIBIT-“G”.

(d) That the Respondent No. 2 be directed to allow the Petitioner to use her/his new identity as male afterwards of SRS.

(e)

(f) That Hon'ble court be please to direct the Respondent no. one to incur all the expenses for the sexual reassignment surgery (SRS) and the subsequent medication and bill of hormonal supplements gender status as female after suggested sexual reassignment surgery.”

2. At the outset, Ms. Kantharia learned Government Pleader appearing for the respondents on private notice has raised a preliminary objection to the maintainability of this writ petition under Article 226 of the Constitution of India as this is a service matter. The petitioner must exhaust the alternate and equally efficacious remedy of approaching the Maharashtra Administrative Tribunal.

3. We, therefore, are required to pass a brief order on this preliminary objection.

4. The petitioner, in para 1 of this petition, says that she is an adult and she terms herself as once a female. She says that she has developed transsexual gender symptoms since last two to three years. These are some features, which are highlighted by her and she would, at the same time, state that the respondents

before this court, namely, the Director General of Police, Superintendent of Police, Beed, Maharashtra, the Chief Secretary of the State to whom she is presently reporting as a part and parcel of the State police force have not sanctioned what she terms as a leave applied for by her. On 17th September, 2017, the petitioner, through her advocate, made an application stating that she is presently posted as a Constable/member of the police force, but reporting to the Superintendent of Police, Beed. She has stated that she noticed some imbalance in her body particularly hormonal and after taking advise and medical opinion, she is required to undergo a plastic surgery, namely, Sexual Reassignment Surgery (SRS). According to her, the experts at Sir. J. J. Hospital, Mumbai have advised her to undergo this surgery. She has described her present state and condition and therefore, she says that for this surgery to be undergone and thereafter for complete recovery, she should be sanctioned the permissible leave.

5. On this application, the Superintendent of Police, Beed sought advise and opinion of his superior, namely, the Director General of Police, State of Maharashtra. He specifically sought an opinion on the point that because he is in receipt of an application seeking sanction to leave for undergoing the above

process/surgery, whether the provisions dealing with leave in the service rules enable him to sanction such a leave or not. This application at page 58 is accompanied by an affidavit of the petitioner, in which the petitioner specifically says that she is serving as a police constable in Majalgaon Police Station (Buckle No. 722) and she desires to change her gender and for which, she wants to undergo an operation.

6. At page 60, is the advise/opinion in writing from the Director General of Police, but communicated by the Special Inspector General of Police (Establishment). In this communication, which is in Marathi, it is stated that there is a Government order dated 16th May, 2016 and under which the terms and conditions of service of the members of the police force are set out. In the service rules, in Rule 4(1)(a) and (b), there is a distinction made as far as gender is concerned. Then, there is a reference made by him to the Government Resolution issued by the Department of Women and Child Welfare that there should be a reservation to the extent of 30% for women in the police force.

7. As far as the petitioner is concerned, she was recruited in this quota in 2009. She had been directed to undergo the requisite physical tests. Thereafter, she has been recruited against this quota sanctioned for females. As far as the rules are

concerned, there is no provision dealing with change of gender. Therefore, as per the applicable rules and policies, the State Government cannot permit her to avail of leave to undergo the surgery.

8. After this advise, the Superintendent of Police, the immediate superior of the petitioner, informed that the application seeking leave so as to undergo this surgery cannot be granted and that application is rejected.

9. Ms. Kantharia learned Government Pleader, therefore, would submit that the petitioner being a part and parcel of the police force and which force clearly falls within the definition of the civil post as set out in section 15(1) of the Administrative Tribunals Act, 1985, any matter concerning recruitment to any civil service of the State or to any civil post under the State or all service matters concerning a person not being a person mentioned in clause (c) of sub-section (1) of section 15, she must approach the Maharashtra Administrative Tribunal. Our attention is invited to section 3 clause (q) of this Act, which defines the term “service matters”. That provision reads as under:-

“(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.”

10. The precise contention of Ms. Kantharia is that on the application seeking leave made by the petitioner an advise or opinion was sought by her superior from the State Police Headquarters and particularly its Establishment Wing. The Establishment Wing may have informed the Superintendent of Police that there is no provision in the rules, which would enable a member of the police force to avail of leave to undergo a sex change surgery and that was essentially the issue before the superiors. They have responded to the petitioner's application seeking leave to undergo this surgery. After the advise and opinion, the superior informed that the leave as prayed cannot be sanctioned. Ms. Kantharia would, therefore, submit that this issue is squarely governed by the definition of the term “service matters” and hence, falling within the purview of the powers

conferred in the State Administrative Tribunal, namely, the Maharashtra Administrative Tribunal under sub-section (1) of section 15 of the Administrative Tribunals Act, 1985. It is in these circumstances that she would submit that the petitioner must be directed to approach the tribunal first and in the event the tribunal is unable to grant any relief, interim or final, it is always open to the petitioner to invoke this court's supervisory jurisdiction.

11. Additionally, learned Government Pleader submits that in the event the petitioner is aggrieved and dissatisfied by the two communications at pages 60 and 61 of the paper book, which have been issued during the course of dealing with her application seeking leave to undergo the SRS, she can raise all such issues, including that her right to live with dignity and right to life and liberty guaranteed by Article 21 of the Constitution of India was illegally interfered with by such communications. Therefore, merely because there is no provision in the rules or that the rules do not take care of such a situation and just because it is a disciplined force does not mean that its member cannot seek leave or cannot seek permission to undergo such a surgery from the superiors. If the superiors' action violates these rights, then, she can very well raise such issues before the tribunal.

Thus, Ms. Kantharia would submit that whether there is any rule and/or absence thereof and whether the specific rule contravenes the above constitutional mandate are all issues which are incidental to her assertion that the conditions of service would permit her to avail of either medical or similar such leave as of right. In these circumstances, when she is a part and parcel of the police force, she can very well approach the tribunal. The tribunal is not prohibited in law from considering even a challenge to the constitutional validity of the rules.

12. In dealing with these preliminary objections, the petitioner's advocate would submit that the petitioner projects larger and wider issues. It may be that the petitioner is a member of the State police force. It may be that while discharging such duty she suffered the hormonal imbalance. By seeking medical opinion so as to correct this imbalance and equally her mental condition on account of the same, she was advised to undergo a surgery. If that surgery results in change of sex or gender, that is an inevitable consequence. That does not mean a member of the police force is prohibited or can be prohibited by her superiors to undergo such a surgery. It is that larger question which is projected. It may arise during seeking a leave, but that is incidental and we must, therefore, as a constitutional court or as

a guardian of the constitutional rights of citizens, should not throwout this petition on the preliminary objection.

13. In support thereof, the learned counsel relies upon a judgment of the Hon'ble Supreme Court of India in the case of *National Legal Services Authority vs. Union of India and Ors.*¹. The counsel also relies upon the view taken by a learned Single Judge of the Madras High Court in the case of *K. Gowtham Subramaniam vs. The Controller of Examination Anna University and Ors.*². Finally, our attention is invited to an order passed by a Division Bench of this court on 7th May, 2012 in the case of *Bidhan Baruah @ Swati Baruah vs. Supti Ranjan Barua and Ors.*³.

14. After having heard both sides only on this preliminary objection, we are of the opinion that the undisputed facts are thus: Firstly, that the petitioner sought appointment against the quota reserved for females in the Maharashtra Police Force or the civil post under the State. It is not disputed before us that the term civil post, as contemplated by section 15 of the Administrative Tribunals Act, 1985, would take within its import the services rendered by a member of the police force. They are rendered

1 (2014) 5 SCC 438

2 2017(5) All MR 78

3 Writ Petition (L) No. 1092 of 2012

undisputedly in connection with the affairs of the State. Section 15 of the Administrative Tribunals Act, 1985 reads as under:-

“15. Jurisdiction, powers and authority of State Administrative Tribunals. - (1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before the day by all Courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;

(b) all service matters concerning a person [not being a person referred to in clause (c) of this sub-section or a member, person or civilian referred to in clause (b) of sub-section (1) of section 14] appointed to any civil service of the State or any civil post under the state and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any corporation or society owned or controlled by the State Government.

(c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in clause (b), being a person whose services have been placed by any such local or other authority or corporation or society or other body as is controlled or owned by the State Government, at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities and corporations or societies controlled or owned by the State government:

Provided that if the State Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations or societies.

(3) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall also exercise, on and from the date with effect from which the provisions of

this sub-section apply to any local or other authority or corporation or society, all the jurisdiction, powers and authority exercisable immediately before that date by all Courts (except the Supreme Court) in relation to-

- (a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and
 - (b) all service matters concerning a person [other than a person referred to in clause (b) of sub-section (1) of section 14] appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs.
- (4) For the removal of doubts, it is hereby declared that the jurisdiction, powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable."

15. A perusal of section 15 would indicate that save as otherwise expressly provided in the Administrative Tribunals Act, 1985, 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 in relation to recruitment and matters concerning recruitment to any civil service of the State or to any civil post under the State. Thus, these are the words of wide import. All service matters concerning a person not being a person referred to in clause (c) of sub-section (1) of section 14 appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the state

Government or of any corporation or society owned or controlled by the State Government, therefore, would squarely fall within the jurisdiction, powers and authority of State Administrative Tribunal.

16. Pertinently, before us, the learned counsel appearing for the petitioner does not dispute the position that the petitioner holds a post or is a member of a service referred to in clauses (a) and (b) of sub-section (1) of section 15 and is not falling in the exceptions carved out by this provision. Thus, she is not a member of any All-India Service or a person not being a member of an All-India Service or a person referred to in clause (c) appointed to any civil service of the Union of India or any civil post under the Union etc. Further, he does not dispute the existence of the alternate and equally efficacious remedy of approaching the Maharashtra Administrative Tribunal. In the sense, the issue projected or raised in the petition concerns sanction of a leave and which matter squarely falls within the definition of the term “service matters” defined in clause (q) of section 3 of the Act. All that the learned counsel urges is that we must by-pass the tribunal bearing in mind the importance of the question raised and that is right to live with dignity. It is that right which is projected and today, the State is denying it by not allowing the

petitioner to undergo the surgery as advised by medical practitioners and experts in medical science. It is that which enables her to seek enforcement of the right to live with dignity, which is part and parcel of her right to life. The State machinery and particularly the police force and the superiors therein are taking away that right and that is projected in the petition. That raises issues or matters of great importance, may be arising out of the application or concerning her application seeking sanction to leave, which she desires to avail of. The petitioner seeks leave to undergo this surgery and which would require her to be away from the service. She would be away for a definite period. That period may be treated as leave. That is why the court should not take a narrow or restricted view of this matter but should consider it from an angle or point of the constitutional right and particularly right to live with dignity.

17. We do not think that the Maharashtra Administrative Tribunal would be so unsympathetic or unmindful of this issue if at all it arises during the course of dealing with the petitioner's grievance. Today, we find that the petitioner has a grievance and that is denial of leave. That leave is refused to her allegedly because the service rules do not contemplate sanction of such leave to undergo a surgery of the aforesaid nature. There is no

provision in the rules enabling the authority to sanction leave as sought for by the petitioner. Further, the service rules themselves may not deal with the situation where a member of the disciplined force seeks permission to undergo a sex change or a surgery of the aforesaid nature. To our mind, these are matters arising during the course of the duties or the discharge of service of the petitioner as a member of the State Police Force. The members of this force have been routinely approaching this tribunal and seeking redressal of their grievances, particularly relating to their service matters. We have never seen the tribunal ignoring broader challenges and during the course of dealing with them, the tribunal has also examined the issue of legality and validity of service rules and it is empowered by law to do so. If the argument is that there is no provision in service rules to deal with such issues and they arise during the course of dealing with service matters, then, we have no doubt in our mind that the tribunal will consider the challenge or the issues in an overall manner and after hearing both sides, it will be able to pass such orders as are required to be passed in the interest of justice. In the event the tribunal refuses to take note of or due and appropriate cognizance of the grievance of the petitioner, none prohibits the petitioner from invoking this court's supervisory jurisdiction and to correct the errors of law apparent on the face

of the record or perversity, if any, in the tribunal's view and final orders. We, therefore, do not think that the tribunal is in any way precluded in dealing with the larger issue and particularly when the matter is in relation to the services rendered by the petitioner and her right to avail of or seek leave. If the admissible leave is allegedly denied, then, during the course of considering that challenge, all these matters can be gone into, if necessary. In the event they are raised, they would be dealt with. Today, we do not know whether they would be raised or otherwise. All reliefs can or may be granted without considering any larger challenge. Today, we cannot sit and speculate as to how the tribunal will deal with the above service matter.

18. While upholding the preliminary objection and clarifying that we have expressed no opinion on the merits of the controversy, we dispose of the writ petition on the ground that the petitioner has an alternate equally efficacious remedy of approaching the Maharashtra Administrative Tribunal and that tribunal can effectively deal with the grievances stated above.

19. Before concluding, we invite the attention of the petitioner to the following pertinent observations of the Hon'ble Supreme Court in the case of *L. Chandra Kumar vs. Union of India*⁴. The Hon'ble Supreme Court in paras 89 to 95 held as under:-

⁴ AIR 1997 SC 1125

“89. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that

frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227 of the Constitution. In R.K. Jain's case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of

these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

94. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

95. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such

disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases.”

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)