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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 04.11.2020

Pronounced on: 24.11.2020

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W.P.(C) 8316/2020 & CM 26965/2020

AKSHAY KUMAR & ORS.

..... Petitioners

Through: Ms. Swathi Sukumar, Mr. Naveen
Nagarjuna, Mr. Shivam Patanjali
and Ms. Tarini Sahai, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Rajesh Gogna, CGSC with
Mr. Akshay, Mr. Karan Chhibber
and Mr. Vedansh Anand,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

1. Petitioners herein are working as Patent Examiners and Assistant Controllers of Patents in the Patent Offices at Mumbai, Chennai, Delhi and Kolkata under Respondent No.6/Controller General of Patents, Designs and Trade Marks and have filed the present petition for issuance of a writ of mandamus to the Respondents to implement the Modified

Flexible Complementing Scheme (hereinafter referred to as “MFCS”) dated 10.09.2010.

2. As per the case set out in the petition and to the extent relevant to the present issue, Ministry of Finance constituted the Third Central Pay Commission in April, 1970, which amongst other recommendations to the Ministry of Finance, recommended a Flexible Complementing Scheme for providing in-situ promotions for Scientists of certain categories in Scientific Organizations, within a prescribed period, from lower grade to higher grade, subject to the procedure prescribed. Ministry of Science & Technology issued an OM dated 28.05.1986 introducing FCS in Scientific Organizations. Department of Industrial Development, now known as Department for Promotion of Industry & Internal Trade issued an OM dated 20.10.1986 to DST for categorization of Office of Controller General of Patents & Designs (except the Trade Marks Registry, Bombay) as Scientific and Technical Institution. Pursuant to the power delegated to the Secretary, MS, the DST approved certain Institutions to be recognized as Scientific & Technical Institutions. As per the Petitioner, the DOE issued an OM on 21.09.1988 wherein further Institutions were included in the list of Scientific & Technical Institutions and the Office of Controller General of Patents & Designs, except Trade Marks Registry, found a mention.

3. Pursuant to the recommendations of the Fifth CPC, the earlier OM dated 28.05.1986 issued by the DST was amended by DOPT vide OM dated 09.11.1998, suggesting number of modifications to the existing FCS. An Expert Committee of DST in its meeting held on 29.03.2001 considered the proposal of Ministry of Commerce & Industry for

recognition of Patent Office as Scientific & Technical Institution and introduction of FCS in the said office at the level of Scientists 'F' in conformity with the OM dated 09.11.1998. Consequent thereto, DST issued an OM dated 20.04.2001.

4. In the meanwhile, some patent examiners filed an OA bearing No.1069/2000 before the Central Administrative Tribunal (hereinafter referred to as 'Tribunal'), Principal Bench, for extension of FCS and other benefits. The application was disposed of by the Tribunal on 02.08.2001 directing the Respondents therein to move the before the Ministry and finalize the action with regard to extension of FCS to the applicants within 6 months. Relying on the said order, Calcutta Bench of the Tribunal also disposed of a pending OA No.549/94, on 23.04.2002, directing the Respondents therein to extend the FCS to the applicants. Petitioners herein aver that despite the said directions, FCS was not extended to the applicants therein.

5. Petitioners further aver that in or about 2003, DIPP forwarded a proposal to the DOE to recognize the Patent Office as a Scientific and Technical Institution, but the DOE conveyed that a fresh look requires to be taken at the issue. This led to the applicants in OA 1069/2000 filing a contempt petition No.205/2003. The same was dismissed on 29.04.2003 by the Tribunal observing that in case the applicants had any grievance with respect to the letter dated 08.08.2003, they could challenge the same in accordance with law.

6. The DOPT issued an OM dated 10.09.2010 in respect of MFCS for Scientists based on recommendations of the 6th CPC, introducing a Revised Comprehensive Scheme for all concerned Ministries and

Departments thereunder. Respondent No.6 forwarded a proposal dated 06.03.2012 to DIPP for introduction of FCS for Group 'A' Officers in the Patent Office. DOPT, however, advised DIPP that since the FCS Guidelines had been issued after the 6th CPC, recommendations of the DST, be sought afresh. DIPP issued an OM dated 14.01.2013 to the DST for categorization of the Patent Office as per the Guidelines of the DOPT OM dated 10.09.2010. Thereafter, according to the Petitioners, correspondence ensued between different departments and even the Standing Committee for Recognition of Patent Office as Scientific Organization, recommended in favour of declaring the Patent Office as a Scientific Organization. According to the Petitioners, DOPT has through various modes approved implementation of MFCS to the Patent Office, but to no avail.

7. In 2013 a writ petition was filed in this Court being W.P.(C) 3742/2013, wherein the Court directed that efforts should be made to ensure that FCS is implemented at the earliest in consultation with the concerned departments. Petitioners have given a detailed narrative of the various Inter-Ministerial communications, recommendations, internal notings between 2014 to 2020, with a view to highlight that despite the fact that the Patent Office was recognized as a Scientific and Technical Organization by the DST and in spite of the orders of the Tribunal in earlier OAs and of this Court in the writ petition in 2013, including the recommendations of the Standing Committee, MFCS has not been implemented with respect to the Patent Office, though nearly 3 decades have gone by.

8. The inaction on the part of the Respondents in not implementing the MFCS and consequent stagnation of the Petitioners, triggered the filing of the present petition, seeking directions for implementation of the MFCS, more particularly in view of the recent OM of the DOPT dated 16.04.2020, whereby comprehensive and uniform Guidelines relating to promotion of Scientists have been formulated. Relevant para of the OM is as under:

“Subject:- Review of Modified Flexible Complementing Scheme (MFCS) - reg.

As the Scientific Ministries Departments are aware, a Committee under former Secretary, Department of Bio-Technology, Prof. K. Vijay Raghavan, was constituted to review the Modified Flexible Complimentary Scheme (MFCS). A proposal based on the recommendations of this Committee was considered by the Committee of Secretaries (CoS), constituted to frame comprehensive and uniform guidelines relating to promotion of scientists in Scientific Ministries and Departments, in its meeting held on 20th February, 2020.

2. The CoS has inter-alia recommended as under:

(i) Ministries/Departments may carefully rework the Output Indicators so as to simplify and streamline them. Qualitative dimensions may also be captured so that excellence of a Scientist is brought out and only the deserving Scientists get promoted.

(ii) Ministries/Departments may ensure that all promotions under MFCS are held timely so that the issue of granting retrospective promotion does not arise.

(iii) Number of posts required at HAG/HAG+ level may be worked out individually at the Ministry/ Department level looking at the organizational structure and their specific

requirements. Cadre review exercise may accordingly be undertaken.

2. All Scientific Ministries/Departments are accordingly requested to take necessary action as per the above recommendations of the CoS and furnish an Action Taken Report to this Department by 31.05.2020.”

9. Mr. Gogna learned Central Government Standing Counsel appearing for the Respondents at the outset took a preliminary objection to the maintainability of the present petition on the ground that the only remedy available to the Petitioners to seek implementation of the MFCS is by approaching the Tribunal, in the first instance. It is argued that by virtue of the provisions of Section 14(1) of the Administrative Tribunal Act, 1985 (hereinafter referred to as the ‘Act’) the Petitioners being holders of a ‘Civil Post’ are amenable to the jurisdiction of the Tribunal in relation to a dispute arising out of ‘Service Matter’.

10. It is contended that the Petitioners are Patent Examiners and Assistant Controllers of Patents and Designs respectively and are working under the Controller General of Patents, Designs and Trade Marks. Business of the Government is governed by the Government of India (Allocation of Business) Rules, 1961. The Rules, as amended, upto 14.08.2020 stipulate that the Department of Commerce and the Department for Promotion of Industrial and Internal Trade are a part of the Ministry of Commerce and Industries and Clause V of the Rules deals with Intellectual Property. Trade and Merchandise Marks Act, 1958 and the Patents Act, 1970 on a bare reading show that Patent office figures in Section 4 of the Trade Marks Act and as per Sub-section (2) of Section 4,

all appointments in the said office are made by the Central Government. For all purposes, Petitioners are employees of the Central Government and are directly covered under the provisions of Section 14(1) of the Act as holders of civil posts.

11. It is further contended that the Petitioners are conscious of the fact that their remedy lies in approaching the Tribunal and this is evident from the fact that even earlier OAs were filed before the Tribunal by some Examiners, as detailed extensively in the writ petition itself. From filing of the OAs in 1994 and again in 2000, till date the status of the Petitioners as holders of civil posts, is unaltered.

12. Mr. Gogna further argues that in the writ petition it is averred that despite various orders and directions, Respondents did not extend the FCS to the Petitioners and several years of litigation by their counterparts has yielded no results, thus, approaching the Tribunal is not an effective and efficacious remedy available to the Petitioners. Petitioners have also averred in para 9 of the Petition that the Petitioners have no alternative or equally efficacious remedy and writ is the only effective remedy available to them. However, this ground cannot be a justification enough to directly file a petition in this Court, in view of the judgement of the Constitution Bench of the Supreme Court in ***L. Chandra Kumar vs. Union of India (1997) 3 SCC 261***. Supreme Court has in the said judgement clearly held that with respect to service matters, for employees amenable to the jurisdiction of the Tribunals, the Tribunals alone will function as a Court of first instance and petitions cannot be filed by directly approaching the High Court, overlooking the jurisdiction of the Tribunals. It is argued that approaching the Tribunal is not an alternate remedy but the only remedy

and therefore it cannot be argued by the Petitioners that the remedy is not efficacious or effective.

13. Mr. Gogna also places reliance on the judgement of this Court in ***Prabhat Ranjan Deo vs. Union Public Service Commission & Ors.*** decided on 13.07.2020 in W.P.(C) 3334/2019. In the said case, the writ petition was filed in this Court by the Petitioner allocated to the Indian Police Service, seeking empanelment as DGP by the State Government of Haryana. Relying on the judgement in ***L. Chandra Kumar (supra)***, the Court decided against the Petitioner on the maintainability of the petition holding that the remedy of the Petitioner was to approach the Tribunal as a Court of first instance.

14. Learned counsel for the Petitioners, per contra, vehemently opposes the preliminary objection raised by the Respondents. Broadly understood the arguments canvassed by the learned counsel are twofold and alternative to each other. The first argument is predicated on Sections 77 and 73(3) of the Patents Act, 1970. It is argued that the Petitioners are not holders of a civil post, as envisaged in Section 14 (1) of the Act and are therefore not amenable to the jurisdiction of the Tribunal. Petitioner Nos. 1 to 15 are Assistant Controllers of Patents and Designs while Petitioner No. 16 is an Examiner in the Indian Patent office, under Respondent No. 6. Assistant Controllers perform the functions of a quasi-judicial nature and have powers akin to a Civil Court under Section 77 of the Patents Act, 1970. Examiners discharge functions under the superintendence and directions of the Controller, by virtue of provisions of Section 73(3) of the Patents Act, 1970. Attention of the Court is drawn

to the provisions of Section 77 of the Patents Act, 1970, which are as follows:

“77. Controller to have certain powers of a civil court.—

(1) Subject to any rules made in this behalf, the Controller in any proceedings before him under this Act shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) awarding costs;

(f) reviewing his own decision on application made within the prescribed time and in the prescribed manner;

(g) setting aside an order passed ex- parte on application made within the prescribed time and in the prescribed manner;

(h) any other matter which may be prescribed.

(2) Any order for costs awarded by the Controller in exercise of the powers conferred upon him under sub-section (1) shall be executable as a decree of a civil court.”

15. Elaborating the argument, it is contended that various Courts have repeatedly held that Controllers perform quasi-judicial functions and reference in this regard is made to the judgements in ***Indian Network for People living with HIV/AIDS & Ors. vs. Union of India (UOI) & Ors.***

2009 (39) PTC 468 (Mad)(DB) and Nokia Corporation, A Corporation organized and existing under the Laws of Finland vs. Deputy Controller of Patents and Designs, 2011 (46) PTC 70 (Mad). Heavy reliance is placed by the counsel for the Petitioners on the judgement of a Division Bench of this Court in **Union of India vs. Shiv Charan Sharma** decided on 26.04.2007 in W.P.(C) 15754/2006, to argue that in the said case the Court while dealing with the appointment of Presiding Officer of a Tribunal constituted under the Control of National Highways (Land & Traffic) Act, 2002, held that the Tribunal had no jurisdiction to entertain the OA. Functions of the National Highways Tribunal are quasi-judicial in nature and therefore the post of Presiding Officer of the National Highways Tribunal cannot be equated with a civil post. Taking support from the said judgement it is argued that in the present case, the Petitioners admittedly perform quasi-judicial functions and are thus not covered under 14(1) of the Act. Further, there is no Notification under Section 14(2) of the Act, notifying Respondent No. 6 as an Organization covered under the Act. In these circumstances the only remedy available to the Petitioners is to file a writ petition in this Court.

16. Without prejudice to the above argument, it is contended, in the alternative, that even assuming the Tribunal has jurisdiction, this Court as a Constitutional Court under Article 226 of the Constitution of India has the power and jurisdiction to entertain the present petition. High Court's power of judicial review is a part of basic structure of the Indian Constitution and there can never be an ouster of the said jurisdiction. To support the argument, learned counsel relies on para 77 of the judgement in **L. Chandra Kumar (supra)** where the Court held that the powers of

judicial review vested in the Supreme Court and High Courts under Articles 32 and 226 of the Constitution, respectively, enabling legislative actions to be subjected to the scrutiny of superior Courts, are integral to the Constitutional scheme. Therefore, assuming that the Tribunal is an alternative remedy available to the Petitioner, this Court can and should exercise jurisdiction under Articles 226 and 227 of the Constitution of India and entertain the petition. Reliance is also placed on a judgement of a Coordinate Bench of this Court in ***Akul Bhargava & Ors. vs. Union Public Service Commission & Ors.*** 2020 SCC OnLine Del 1376 for the said proposition, more particularly para 51, which is as follows:

“51. A perusal of the above judgments would show that there is unanimity in the view that High Courts have power to exercise jurisdiction, even if there is an alternative remedy inter alia, on several grounds:

- (i) If there is a violation of the Principles of Natural Justice;*
- (ii) If there are unprecedented or extraordinary circumstances that warrant exercise of jurisdiction under Art.226;*
- (iii) The need to render substantial justice;*
- (iv) If the act complained against is patently erroneous or perverse;*
- (v) If there is demonstrable lack of jurisdiction or perversity;*
- (vi) If relegating the parties to CAT would not render substantial justice.*
- (vii) The exercise of power under Art. 226 is discretionary and depends on the question whether circumstances warrant;”*

17. In the brief note given by the counsel for the Petitioners, during the course of hearing, Petitioners have sought to bring out various facts,

which in their perception are extraordinary/unprecedented and call upon this Court to exercise jurisdiction. To encapsulate, the factors are two earlier orders of the Tribunal in OA 1069/2000 and in OA 549/1994 as well as of this Court passed on 09.10.2014 in W.P.(C) 3742/2013, directing the Respondents to ensure implementation of the FCS officers in the Patents office as well as recommendations of various Committees constituted for examining the said issue and the several OMs issued in this regard. Reference is made to OM dated 11.11.1987 issued by DoST conveying approval of categorisation of the Patents Office as S&T Institution as well as OM dated 22.02.1988 by which the Department of Industrial Development incorporated the Office of Controller General of Patents and Designs (except Trade Mark Registry) in the list of S&T Institutions.

18. Learned counsel for the Petitioners vehemently and articulately contends that despite several directions and recommendations there has been complete inaction by the Respondents for over 3 decades and nearly 612 Examiners and 248 Controllers are stagnating and suffering and relegating the Petitioners to the remedy of approaching the Tribunal would be ineffective and inefficacious. Petitioners are being severely discriminated vis-à-vis employees of the 5 other similarly placed organisations, who have been granted the MFCS and whose details have been furnished in the petition. There is violation of fundamental rights of the Petitioners under Article 14 of the Constitution of India and this alone is a good reason to entertain the present petition.

19. Mr. Gogna learned counsel for the Respondents, arguing in rejoinder, reiterates the submissions made in support of the preliminary

objection. Additionally, it is argued that the Petitioners during the course of arguments have taken up a new stand in total contrast to the averments in the writ petition for approaching this Court. It is contended that while filing the petition the stand was that the remedy before the Tribunal is ineffective and not efficacious, but now it is sought to be contended that the Petitioners are not amenable to the jurisdiction of the Tribunal under Section 14(1) of the Act, as they are not holders of a civil post. Petitioners also argued that there is no Notification under Section 14(2) of the Act, notifying Respondent No. 6 as an organization covered under the Act and therefore on both counts, Petitioners cannot be subjected to the jurisdiction of the Tribunal.

20. Mr. Gogna contends that firstly, Petitioners cannot be permitted to take a new stand, which is not pleaded and is rather contrary to the pleadings in the writ petition. Secondly, it is wrong to argue that in the absence of a Notification under Section 14(2) of the Act the Petitioners cannot approach the Tribunal. Being holders of civil posts, Petitioners are covered under Section 14(1) of the Act and no Notification is required to separately notify Respondent No. 6, under Section 14(2) of the Act. Perusal of Sub-Section (2) of Section 14 shows that the Central Government may by Notification apply the provisions of Sub-Section (3) to the local or other Authorities within the territory of India or under the control of the Government of India or the Corporations and Societies owned and governed by the Government of India. The two provisions are distinct and cover different fields. When an Authority, not covered under 14(1) is notified under 14(2), all the employees automatically become subject to jurisdiction of the Tribunal.

21. I have heard the learned counsels for the parties and examined their rival contentions.

22. The issues that arise for consideration before this Court are as follows:

- a. Whether the Petitioners are holders of ‘Civil Posts’ and thus amenable to the jurisdiction of the Tribunal under Section 14(1) of the Act?
- b. If the Petitioners are not covered under Section 14(1) of the Act, is there a Notification under Section 14(2) of the Act notifying the Controller General of Patents, Designs and Trade Marks, thereby subjecting the Petitioners to the jurisdiction of the Tribunal?
- c. Whether the writ can be entertained by this Court under Article 226 of the Constitution of India bypassing the remedy of the Tribunal, if the answer to questions (a) or (b) above, is in the affirmative?

23. In order to answer the first question, Court would be required to examine what is a ‘Civil Post’. Supreme Court in the case of ***State of Assam v. Kanak Chandra Dutta***, AIR 1967 SC 884 delineated the parameters of a ‘Civil Post’ as follows:

“9. The question is whether a Mauzadar is a person holding a civil post under the State within Article 311 of the Constitution. There is no formal definition of “post” and “civil post”. The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Article 310 from a post connected with

defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note to of Article 311. In Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes to Articles 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.”

24. Useful it would be in this context to refer to another judgment of the Supreme Court in ***State of Gujarat v. Raman Lal Keshav Lal Soni***, (1983) 2 SCC 33 where the Court while considering whether the members of Gujarat Panchayat Service are Government Servants, laid down various parameters. Para 27 of the judgment is as under:

“27. We have to first consider the question whether the members of the Gujarat Panchayat Service are government servants. Earlier we have already said enough to indicate our view that they are government servants. We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person

may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not.....”

25. Reading of these judgements of the Supreme Court leads me to conclude that there is no formal definition of the words ‘Civil Post’. A Civil Post is broadly understood to mean post not connected with the defence side of the Administration i.e. an employment in a civil capacity under the Union or the State. As observed by the Supreme Court, a person holding a post under the State is a person serving or employed under the State and there is a relationship of master and servant between the State and holder of the post. The existence of the relationship is indicated by the right of the State to select and appoint as well as the right to suspend and dismiss.

26. The issue whether the Petitioners are holders of Civil Post need not detain this Court for the following reason. Some of the Examiners of Patents and Designs had admittedly approached the Tribunal by filing OA 1069/2000, seeking the following reliefs:

“(i) Directions to be issued to the respondents to effect the financial progression of the applicants in Group ‘A’ service to next higher grades after the stages of 5.9th and 14th year i.e. three assured promotions in the career from the initial recruitment scale of Rs. 8000 13500/- with all consequential benefits of arrears interest at 12% per annum and as would accrue in future.

(ii) the impugned order dated 09.08.1999 to the extent it denies the benefit of recommendations of Vth Pay Commission at par with other Groups quashed and set aside and be so modified and substituted and/or directed to be so modified/substituted/framed/accepted by authorities jointly and/or severally, so that the applicants get the financial benefit of three assured promotions in the Career and of any other and extent benefit prescribed in the Recruitment Rules, that extent impugned letter be set aside.”

27. The Tribunal noted in para 3 of order dated 02.08.2001 that the Applicants are Engineer Graduates or Post Graduates and were recruited as Examiners of Patents and Designs on selection by the UPSC in a General Central Service Group ‘A’ in Junior Time Scale. After hearing the parties therein, the Tribunal entertained the OA and passed the following direction:

“8. In the view of the matter, the application partially succeeds and is accordingly disposed of. The respondents are directed to move the Ministry and finalise action with regard to the extension of Flexible Complementing Scheme, to the applicants as well, within six months from the date of receipt of a copy of this order. No costs.”

28. The observation made in para 7 is also relevant and is as under:

“7. We have carefully considered the matter. The undisputed facts in this case are that the applicants who

are directly recruited through the UPSC as Scientific Personnel and found to be stagnating for as long as 15 years and above in the JTS though technically they are considered to be eligible for promotion in the 5th or 6th years of service. The 5th Pay Commission had introduced the ACP Scheme for alleviating the stagnation of staff in all Groups, but the Government while accepting the same, modified recommendations of the Pay Commission and held that officers of Gp B, C & D are entitled for financial upgradation on completion of 12 years and 24 years the Cadre but did not extend the Same to Group A officers. This has definitely led to anomalous situation in the applicants organization where Gp 'C' officers have the benefit of two upgradations taking their pay to senior scale in GP 'A' grade while those like the applicants have stagnated in Group 'A' at JTS for long period, drawing less pay and allowances. It is also on record that the respondents organization is itself aware of the situation and has proposed extension of Flexible Complement Scheme to Gp A officers as well and the said proposal is under examination in the Deptt. of Science Technology. In view of the fact that the Flexible Complement scheme is not specifically denied to Gp A officers and as Gp 'A' officers of respondents organization, who are declared scientific Personnel had been stagnating for long time, it is high time that the said scheme is extended to the applicant to alleviate their misery. At the same time we are not expressing any opinion of the extension of the ACP scheme to all Group 'A' Officers, as the same is for the Govt to decide on a policy."

29. Similar OA had been filed earlier before the Calcutta Bench of the Tribunal being OA 549/1994. The relief sought in the said OA is as under:

"This O.A. has been filed by 31 applicants who are working as Examiners in the Office of Controller General

of Patents, Designs and Trade Marks at different places in the country. They have filed this O.A. for directing the respondents to implement the Flexible Complementing Scheme and give all benefits including promotions to the applicants with consequential benefits as admissible under the Rule.”

30. The Tribunal in para 6 passed the following directions, after taking note of the order passed in OA 1069/2000 by the Principal Bench of the Tribunal:

“6. In view of submissions of Ld. Counsels of both the parties, we are of the view that the order dated 2.8.2001 in O.A.1069/2000 passed by the Principal Bench is applicable in the present O.A. we, therefore, direct the respondents that the Flexible Complementing Scheme may be extended to the present applicants also within the period stipulated by the Principal Bench. We are keeping all other points except extension of Flexible Complementing Scheme open and if the applicants are aggrieved about the same, they are at liberty to approach the appropriate forum. Thus, application stands disposed off.”

31. It is thus beyond debate that the Applicants in those OAs, who were Examiners of Patents and Designs, had consciously approached the Tribunal, knowing that they were holders of a Civil Post and amenable to the jurisdiction of the Tribunal. The Tribunal, needless to state, had entertained the OAs and passed directions only because it had jurisdiction over the Applicants therein. It is nobody's case that the orders passed by the Tribunal were without jurisdiction. Petitioners herein, according to their own case are identically placed and state that despite directions of the Tribunal, benefit of MFCS has not been given to them. In fact, to

support the contention that the writ is maintainable, one of the alleged extraordinary circumstances cited by the Petitioners is that despite the directions of the Tribunal the Respondents have taken no action. Once some of the Examiners belonging to the same class as the Petitioners have approached the Tribunal, it is hardly open to the Petitioners to even contest that they are not holders of Civil Posts and/or not amenable to the jurisdiction of the Tribunal.

32. While this factor is enough to reject the contention of the Petitioners that they are not amenable to the jurisdiction of the Tribunal, yet, for the sake of completeness, since an ingenious argument to this effect has been made by counsel for the Petitioners, I consider it fit to deal with the same on its merit.

33. It is an undisputed fact that the Petitioners were appointed through selection by the UPSC and were allocated to the General Central Service Group 'A' in the Junior Time Scale. Respondents in the written note of arguments have clearly brought out that the Petitioners were appointed by virtue of provisions of Section 4 of the Trade and Merchandise Marks Act, 1958. Section 4 reads as follows :-

“4. Registrar of Trademarks.

(1) The Central Government may, by notification in the Official Gazette, appoint a person to be known as the Controller-General of Patents, Designs and Trademarks, who shall be the Registrar of Trademarks] for the purposes of this Act.

(2) The Central Government may appoint such other officers with such designations as it thinks fit for the purpose of discharging, under the superintendence and direction of the Registrar, such functions of the Registrar under this Act as he may from time to time authorize them to discharge.”

34. An appointment letter with respect to one of the Petitioners has also been placed on record which highlights that the appointment is made in the name of the President of India and to the post of Examiner of Patents and Designs in the office of Controller General of Patents, Designs and Trademarks under the Ministry of Commerce and Industry. Section 4 as extracted above is a pointer in support of the argument of the Respondents that the appointment of the Petitioners is by the Central Government by a Notification in the Official Gazette and to a Civil Post. The concept of Government Servant and a person holding a civil post has been elaborately discussed by the Supreme Court in the case ***Union Public Service Commission v. Girish Jayanti Lal Vaghela and Ors., (2006) 2 SCC 482***, while dealing with Rule 2(h) of the CCS (CCA) Rules and the relevant passages from the said judgment are as follows :-

“8. Rule 2(h) of the Central Civil Services (Classification, Control and Appeal) Rules, define a government servant and it reads as under:

“2. (h) ‘Government servant’ means a person who—

(i) is a member of a service or holds a civil post under the Union, and includes any such person on foreign service or whose services are temporarily placed at the disposal of a State Government, or a local or other authority;

(ii) is a member of a service or holds a civil post under a State Government and whose services are temporarily placed at the disposal of the Central Government;

(iii) is in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government;”

9. It will be noticed that under sub-rule (i), a person who is a member of service or holds a civil post under the Union is a government servant. Similarly, under sub-rule (ii), a person who is a member of a service or holds a civil post under the State Government is a government servant. Therefore, it is a holder of a civil post whether under the Union or State Government, who will be a government servant for the purposes of the Central Civil Services (Classification, Control and Appeal) Rules. We are not concerned here with sub-rule (iii) whereunder a person in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government gets the status of a government servant.

10. There are several decisions of this Court wherein the concept of civil post has been explained and the first decision on the point is *State of Assam v. Kanak Chandra Dutta* [(1967) 1 SCR 679 : AIR 1967 SC 884]. In this case the respondent who was a Mauzadar in the Assam Valley was dismissed from service in disregard of the provisions of Article 311(2). It was held (at SCR p. 683 G) that “having regard to the existing system of his recruitment, employment and functions”, he was “a servant and a holder of a civil post under the State”, and therefore entitled to the protection of Article 311(2). This Court observed: (SCR pp. 682 G-683 B)

“A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes to Articles 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person [said to be] holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by

the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.”

11. The question as to who can be said to be holder of civil post under the Government was examined by a Constitution Bench in State of Gujarat v. Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : AIR 1984 SC 161] and after review of several earlier decisions the Bench recorded its conclusions as under: (SCC p. 49, para 27).

“We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not.”

35. In this context I may also usefully allude to the Recruitment Rules governing the Petitioners called “The Controller-General of Patents, Designs and Trademark Group ‘A’ Recruitment Rules, 2007”. The post of Assistant Controller of Patent is clearly a Group ‘A’ post as evident from the Rules and the relevant part of the Rules is as follows :-

1	2	3	4	5
3. Assistant Controller of Patents and Designs	33* (2007) *Subject to variation depending upon the workload.	General Central Service, Group 'A', Gazetted Non- Ministerial.	Rs. 10,000- 325- 15,200	Selection

36. The Rules are undoubtedly made in exercise of power conferred by Proviso to Article 309 of the Constitution of India, which is as follows :-

“309. Recruitment and conditions of service of persons serving the Union or a State Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.”

37. It is thus clear that the Petitioners herein are holders of ‘Civil Posts’. The ancillary issue then arises if the Petitioners are covered under Section 14(1) of the Act. In order to address this issue, one would need to examine the provisions of Section 14 of the Act, which are as under:

*“14. Jurisdiction, powers and authority of the Central Administrative Tribunal.— (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal 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 ³ ***) in relation to—*

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning—

(i) a member of any All-India Service; or

*(ii) 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 or any civil post under the Union; or***

(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence services or a post connected with defence, and pertaining to the service of such member, person or civilian, 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 of any corporation ⁴ [or society] owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority

or any corporation ⁴ [or society] or other body, at the disposal of the Central Government for such appointment.

⁵[Explanation.—For the removal of doubts, it is hereby declared that references to “Union” in this sub-section shall be construed as including references also to a Union territory.]

(2) The Central 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 within the territory of India or under the control of the Government of India and to corporations ⁴ [or societies] owned or controlled by Government, not being a local or other authority or corporation ¹ [or society] controlled or owned by a State Government:

Provided that if the Central 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 ¹ [or societies].

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal 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 ¹ [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court ^{2 ***}) 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 ¹ [or society];
and

(b) all service matters concerning a person [other than a person referred to in clause (a)]

or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation¹ [or society] and pertaining to the service of such person in connection with such affairs.”

38. A bare reading of Section 14(1)(b)(ii) shows that the Tribunal shall exercise all the jurisdiction, powers and authority in relation to all service matters concerning a person appointed to any Civil Post under the Union. Thus, once the person is holder of a Civil Post under the Union, he is directly amenable to the jurisdiction of the Tribunal with respect to a dispute arising out of and concerning his service matters under Section 14(1)(b)(ii) of the Act. I have already held in the earlier part of the judgement that the Petitioners herein are the holders of Civil Posts and thus by virtue of the provisions of Section 14(1)(b)(ii) of the Act, the remedy available to the Petitioners is to approach the Tribunal, as there is no dispute to the fact that the issues raised are in the realm of ‘Service Matters’.

39. The argument of the counsel for the Petitioners that there is no Notification under Section 14(2) of the Act, applying the provisions of Sub-section (3) to Respondent No. 6 and thus the Petitioners are outside the purview of the Act, only deserves to be rejected. From a reading of Sub-section (2) and (3) of Section 14 of the Act, it is evident that the necessity of notifying the applicability of Sub-section (3) to the Authorities specified therein arises only once the Authority to which the person belongs is outside the purview of Section 14(1) of the Act. In the present case, the Petitioners are holders of Civil Posts and are employees

in the Patents Office which is under the Department for Promotion of Industry and Internal Trade, which is a Department directly under the Ministry of Commerce and Industry i.e. the Central Government. There is no requirement under Section 14 of the Act to separately notify the Departments which are under the control of the Ministries under the Government of India. Relevant part of the Government of India (Allocation of Business) Rules, 1961 is as follows:

“Ministry of Commerce and Industry (Vanijya aur Udyog Mantralaya)

- (i) Department of Commerce (Vanijya Vibhag)*
- (ii) Department for Promotion of Industry and Internal Trade (Udyog Samvardhan aur Antarik Vyapar Vibhag).”*

40. Even otherwise the contention of the Petitioners cannot be accepted. Section 14(2) of the Act, as is evident, does not deal with an individual holding a civil post but is in the context of applicability of the Act to local or other Authorities under the control of the Government of India and to Corporations and Societies owned and controlled by the Government. This implies that once a Notification is issued under 14(2) bringing a particular Authority under the purview of the Act, all its employees get automatically covered under the Act. Needless to state that the intent of the Legislature in enacting Section 14(2) is to cover a field distinct and different from that of Section 14(1).

41. Learned counsel for the Petitioners had relied upon a judgement of a Division Bench of this Court in *Union of India vs. Shiv Charan Sharma (supra)* to contend that since the Petitioners perform quasi-judicial functions, they cannot be said to be holders of a ‘Civil Post’. In the said case, the Court was dealing with the post of Presiding Officer of

the National Highways Tribunal and the question that arose before the Court was if in the absence of a Notification of the National Highways Tribunal under Section 14(2) of the Act, could the Tribunal exercise jurisdiction with respect to appointment of the Presiding Officer of the Tribunal. The Tribunal in the said case had held that the post of Presiding Officer was a Civil Post within the meaning of Section 14(1) of the Act. While examining the judgement of the Tribunal, the Division Bench examined Section 14 of the Act as well as the provisions of the National Highways Act, more particularly, those relating to the appointment and removal of the Presiding Officer as well as the National Highways Tribunal (Procedure for Appointment as Presiding Officer of the Tribunal) Rules, 2003. The Rules envisage the appointment by a Selection Committee comprised of a Judge of the Supreme Court as a Chairman and Secretary to the Government of India in the Ministry of Road Transport and Highways and a Secretary in the Ministry of Law and Justice, as Members. The Selection Committee recommends a panel for appointment and the Central Government thereafter makes the appointment from the List. Having perused the mechanism of appointment the Division Bench noted in para 16 that the Selection Process of the candidate is not by the Government of India or by the UPSC, which is generally responsible for selection of candidates for appointment to various Civil Posts.

42. The present case is clearly distinguishable as admittedly the Petitioners were selected through the UPSC to General Central Civil Service Group 'A' and appointed to the Junior Time Scale. At the cost of repetition, the Examiners, identically situated and appointed, had rightly

approached the Tribunal in the litigation mentioned above. Petitioners cannot thus rely on the judgement in *Shiv Charan Sharma (supra)* to claim that merely because they are performing quasi-judicial functions, they should be treated as persons who are not holders of Civil Posts. Relevant part of the judgement is as under:

“16. The Selection Committee is comprised of a Judge of Supreme Court of India as nominated by the Chief Justice of India as a Chairman, Secretary to the Government of India in the Ministry of Road Transport and Highways and a Secretary of Government of India in the Ministry of Law and Justice as Members. The Selection Committee has been given the power to devise its own procedure for selecting a candidate for appointment as Presiding Officer. The Selection Committee recommends persons for appointment as Presiding Officer from amongst the persons on the list of candidates prepared by the Ministry of Road Transport and Highways after inviting applications. The Central government is required to make a list of persons on the basis of the recommendations of the Selection Committee for appointment as a Presiding Officer. This list is to be valid for a period of two years and appointment of a Presiding Officer has to be made from the list so prepared. In other words the Central Government on recommendations of the Committee chaired by a Judge of the Supreme Court is to appoint a Presiding Officer from the selection list prepared by the Selection Committee. Hence even the selection process of the candidate for appointment as presiding officer of the Tribunal is not made by the Government of India or by the UPSC which is generally responsible for selection of candidates for appointment to various civil posts but by the Selection Committee chaired by a Judge of the Supreme Court of India.”

43. The said argument cannot be sustained even otherwise as the nature of function will not be a determinative factor to decide if the person is a holder of civil post. There are many Government servants holding a civil post who discharge quasi judicial functions and are “Government servants” amenable to the jurisdiction of the Tribunal. As an illustration many Authorities perform quasi judicial functions under the provisions of Industrial Dispute Act, 1947, Payment of Bonus Act, 1965, Employees Provident Fund and Miscellaneous Provisions Act, 1952, Payment of Gratuity Act, 1972, Customs Act, 1962, Income Tax Act, 1961, etc. and yet are not denuded of their status as holders of ‘Civil Post’.

44. The first question is therefore answered against the Petitioners and it is held that Petitioners are holders of ‘Civil Posts’ under Section 14(1) of the Act and thus amenable to the jurisdiction of the Tribunal. For the same reason, the second question is also answered against the Petitioners.

45. The next issue that arises is if the present petition is maintainable even when the Petitioners have a remedy to approach the Tribunal under Section 14(1) of the Act. Counsel for the Petitioners strenuously argued that the power of a High Court of judicial review is a part of the basic structure of the Constitution and as held by the Supreme Court in ***L. Chandra Kumar (supra)*** it cannot be ousted being integral to the Constitutional scheme. Emphasis was laid on the judgement of a Coordinate Bench in ***Akul Bhargawa (supra)*** to contend that under unprecedented or extraordinary circumstances, High Courts have the power to exercise jurisdiction, even if an alternative remedy exists. Several factors as detailed above were cited in support of the argument

that the circumstances in the present case are unprecedented and extraordinary.

46. To examine the said contention, I may refer to the judgement by the Constitutional Bench of the Supreme Court in **L. Chandra Kumar** (*supra*). To begin with I may quote the questions of law that were framed by the Court for consideration as under:

“(1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323-A or by sub-clause (d) of clause (3) of Article 323-B of the Constitution, to totally exclude the jurisdiction of ‘all courts’, except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323-A or with regard to all or any of the matters specified in clause (2) of Article 323-B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?”

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?”

47. The Supreme Court thereafter set out the legal and historical background to the case and extracted Articles 323-A and 323-B in Part XIV-A of the Constitution inserted through Section 46 of the Constitution (42nd Amendment) Act, 1976 with effect from 01.03.1977. Article 323-A

with which the present petition concerns provides for constitution of the Administrative Tribunals with respect to recruitment and conditions of service of persons appointed to Public Services and posts in connection with the affairs of the Union etc. and is as under:

“323-A. Administrative tribunals.—(1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts 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 of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1);”

48. The Supreme Court then examined Article 323-A of the Constitution of India and noted the Statement of Objects and Reasons of the Act as follows:

“7. In pursuance of the power conferred upon it by clause (1) of Article 323-A 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 323-A 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”.

49. In para 9 the Supreme Court refers to the judgement by the Five Judge Constitution Bench in ***S.P. Sampath Kumar v. Union of India 1985 4 SCC 458***, wherein the Court had taken the view in a challenge to the Constitutional validity of Article 323-A, that though judicial review is a basic feature of the Constitution, the vesting of the said power in an alternative Institutional mechanism would not do violence to the basic structure, so long as it is ensured that the mechanism is effective and will be an effective and a real substitute for the High Court. Relevant para is as follows:

“9. When Sampath Kumar 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 323-A — did not survive and restricted its focus to testing only the constitutional validity of the provisions 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.”

50. The Court after examining the provisions of the Act applied itself to analyzing one of the decisions impugned before it by the Full Bench of the Andhra Pradesh High Court in ***Sakinala Hari Nath v. State of A.P., (1994) 1 APLJ 1 (FB)***, wherein Article 323-A (2)(d) was held to be unconstitutional to the extent it empowers the Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution. The Andhra Pradesh High Court held that under the Constitutional scheme, Supreme Court and High Courts are the sole repositories of the power of judicial review. Such a power, including the power to pronounce on the validity of Statutes, actions taken by individuals and State has only been entrusted to the Constitutional Courts. The High Court analyzing the decision in ***Sampath Kumar (supra)*** observed that the theory of Alternative Institutional Mechanism was in defiance of the proposition laid down in ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225***, that Constitutional Courts alone are competent to exercise power of judicial review to pronounce upon constitutional validity, statutory

provisions and Rules. In this background, the High Court of Andhra Pradesh held that service matters involving constitutionality of Rules or provisions should not be left to be decided by statutorily created adjudicatory bodies.

51. The Supreme Court while examining the said observations, observed as follows:

“51. The underlying theme of the impugned judgment of the A.P. High Court rendered by M.N. Rao, J. is that the power of judicial review is one of the basic features of our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the constitutional courts, i.e., the High Courts and the Supreme Court. In this regard, the position in American Constitutional law in respect of courts created under Article III of the Constitution of the United States has been analysed to state that the functions of Article III Courts (constitutional courts) cannot be performed by other legislative courts established by the Congress in exercise of its legislative power. The following decisions of the US Supreme Court have been cited for support: National Mutual Insurance Co. of the Distt. of Columbia v. Tidewater Transfer Co. [93 L Ed 1556 : 337 US 582 (1948)] , Thomas S. Williams v. United States [77 L Ed 1372 : 289 US 553 (1932)] , Cooper v. Aaron [3 L Ed 2d 5 : 358 US 1 (1958)] , Northern Pipeline Construction Co. v. Marathon Pipeline Co. and United States [73 L Ed 2d 598 : 458 US 50 (1982)] .

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54. ...However, what must be emphasised is the fact that Article III itself contemplates the conferment of such judicial power by the US Congress upon inferior courts so long as the independence of the Judges is ensured in terms of Section 1 of Article III. The proposition which emerges from this analysis is that in the United States, though the

concept of judicial power has been accorded great constitutional protection, there is no blanket prohibition on the conferment of judicial power upon courts other than the US Supreme Court.”

(Emphasis supplied)

52. The Supreme Court thereafter addressed itself to the question as to what constitutes the basic structure of the Constitution, to express its opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 respectively, is a part of the basic structure of the Constitution of India. Relying on the observations of the Supreme Court in ***Keshawananda Bharati (supra)***, wherein the doctrine of basic structure was evolved and in the case of ***Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1*** Court observed as follows:

*“78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. [See Chapter VII, “The Judiciary and the Social Revolution” in Granville Austin, *The Indian Constitution : Cornerstone of a Nation*, Oxford University Press, 1972; the chapter includes exhaustive references to the relevant preparatory works and debates in the Constituent Assembly.] These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power*

to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective

jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.”

53. Having so held, what followed as an observation of the Supreme Court is significant and crucial to the present case. The Court thereafter held that though the subordinate Judiciary or the Tribunals created under ordinary Legislations, cannot exercise the power of judicial review of Legislative action to the exclusion of the Supreme Court and High Courts, there is no Constitutional prohibition against their performing a supplemental, as opposed to substitutional role in this respect. That such a situation is contemplated within the Constitutional scheme becomes evident by reading Clause (3) of Article 32 of the Constitution. The Court further went on to hold that if the power under Article 32 of the Constitution which has been described as the ‘heart’ and ‘soul’ of the Constitution can be additionally conferred upon any other Court, there is no reason why the same situation cannot subsist in respect of jurisdiction conferred upon the High Court. Importantly it was held that so long as the jurisdiction of the High Court under Article 226/227 is retained, there is no reason why the power to test the validity of Legislations cannot be conferred upon Administrative Tribunals, created under the Act or those under Article 323-B of the Constitution. Relevant paras are as under:

“80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition

against their performing a supplemental — as opposed to a substitutional — role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution which reads as under:

“32. Remedies for enforcement of rights conferred by this Part.—

*(1) ****

*(2) ****

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).”

(emphasis supplied)

81. If the power under Article 32 of the Constitution, which has been described as the “heart” and “soul” of the Constitution, can be additionally conferred upon “any other court”, there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.”

54. The Supreme Court then referred to the reasons, which according to the Court, were pressing reasons to preserve the conferment of powers on the Tribunals and these are discernible from paras 82 to 84 of the judgement, which are extracted hereinunder, for ready reference:

“82. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation before the High Courts has exploded in an unprecedented manner. The decision in Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82] was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82] adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in Sampath Kumar case [(1987) 1 SCC 124 : (1987) 2 ATC 82] . In his leading judgment, Ranganath Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency

in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in Kamal Kanti Dutta v. Union of India [(1980) 4 SCC 38 : 1980 SCC (L&S) 485] where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

84. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to half a century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as “the LCI”) or similar high-level committees appointed by the Central Government, and are particularly noteworthy. [Report of the High Court Arrears Committee 1949; LCI, 14th Report on Reform of Judicial Administration (1958); LCI, 27th Report on Code of Civil Procedure, 1908 (1964); LCI, 41st Report on Code of Criminal Procedure, 1898 (1969); LCI, 54th Report of Code of Civil Procedure, 1908 (1973); LCI, 57th Report on Structure and Jurisdiction of the Higher Judiciary (1974); Report of High Court Arrears Committee, 1972; LCI, 79th Report on Delay and Arrears in High Courts and other Appellate Courts (1979); LCI, 99th Report on Oral Arguments and Written Arguments in the Higher Courts (1984); Satish Chandra Committee Report 1986; LCI, 124th Report on the High Court Arrears — A Fresh Look (1988); Report of the Arrears Committee (1989-90).]”

55. Having observed on the powers of judicial review of the High Court under Articles 226/227 of the Constitution as well as the need to have Administrative Tribunals for adjudication of service matters as an alternative mechanism, the Supreme Court further went on to elaborate what I may state directly concerns and touches upon the issue of maintainability of this petition in the context of overlooking the remedy of approaching the Tribunal. Suffice would it be in this context to quote paras 90 to 94 of the judgement, which are as follows :

“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 Articles 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 Articles 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 the Tribunals under Article 227 of the Constitution. In R.K. Jain case [(1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464] , after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal 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 aforesaid contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B 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 set-up, 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 High Court concerned 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 Tribunal concerned.

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 overruling so as not to disturb the procedure in relation to decisions already rendered.”

56. Having so observed, the Supreme Court finally held that Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B to the extent they exclude the jurisdiction of the High Courts and the Supreme Court are unconstitutional. In para 99, the Court reaffirmed that the said jurisdiction is a part of the inviolable basic structure of the 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 Article 32 of the Constitution. The Court also reaffirmed and this is significant that the Tribunals will nevertheless continue to act as Courts of first instance and more importantly, I may note, it was observed that it will not be open for litigants to directly approach the High Courts

overlooking the jurisdiction of the Tribunal concerned. Para 99 is as follows:

*“99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, 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 323-A and 323-B 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 a 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 323-A and Article 323-B 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 Tribunal concerned 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 Tribunal concerned.** Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.”*

57. The principles that can be broadly culled out from a reading of these passages are :

- (a) Powers of judicial review of the High Courts under Articles 226/227 cannot wholly be excluded;
- (b) Tribunals are competent to hear matters where the vires of Statutory provisions and Subordinate Legislations are questioned. However, in discharging this duty, they cannot act as substitutes for the Supreme Court and the High Courts, which have under the Constitutional set up specifically been 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.
- (c) Tribunal shall not entertain any question regarding vires of the Parent Statute under which it is created on the principle that being a creature of an Act it cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly.
- (d) The Tribunals shall continue to act as the Courts of first instance in respect of the areas of law for which they had been constituted. It is not open for litigants to directly approach the High Courts even in cases where they question the vires of Statutory provisions and Legislations, by overlooking the jurisdiction of the Tribunal.

58. Having perused the above judgement of the Constitutional Bench, the inexorable and inevitable conclusion that can be drawn is that where the person is covered under the provisions of Section 14 of the Act, Tribunal is the Court of first instance, with respect to service matters.

Supreme Court clearly ruled that power of the High Court is a part of the inviolable basic structure of the Constitution, but having so observed, the Supreme Court has qualified it by observing that for the areas for which the Tribunals are created, High Court cannot be approached directly and Division Bench of the High Court would exercise power of judicial review over the decisions of the jurisdictional Tribunal.

59. That jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be excluded, is beyond any debate. The question, however is, if the circumstances warrant exercise of the jurisdiction, keeping in background that the Tribunal constituted under Article 323-A of the Constitution, is a Court of first instance for the areas of law for which it is created. As the precedents show, whenever High Courts have interfered and entertained writs directly the circumstances have been extenuating and unprecedented, as in the case of ***T.K. Rangarajan v. Government of Tamil Nadu and Ors. (2003) 6 SCC 581***. Here the Supreme Court while dealing with an appeal from the judgement of Division Bench of Madras High Court, whereby the writ petition was dismissed on the ground that the Petitioners ought to have exhausted the alternative remedy of approaching CAT, observed that the Court was dealing with a situation which involved large scale termination of Government employees, from service. In a case like this, if thousands of employees are directed to approach the Administrative Tribunal, the Tribunal would not be in a position to render justice to the cause. The present case, in my view, does not meet the said threshold, to permit the Petitioners to bypass the remedy of approaching the Tribunal. Alleged inaction of the Government over a prolonged period of time in giving

benefits under promotion/financial upgradation schemes and/or the alleged ineffectiveness of the orders of the Tribunal, set up as grounds to entertain petitions, if accepted, without a caveat of existence of special and unprecedented circumstances, would lead to most litigants approaching the High Courts directly, as a matter of course. In most service matters pertaining to Time Bound Promotions or Financial Upgradation Schemes, the grievances are founded on inaction of the Employer, over a passage of time. Entertaining the petitions on the touchstone of this anvil, would violate the spirit of the judgement in ***L. Chandra Kumar (supra)***, wherein as noted above, one of the reasons to create the Tribunals was to filter cases to High Court, so that the back logs which had reached colossal levels were cleared and pendency reduced. In my view, Petitioners have not made out a case of such exceptional circumstances so as to entertain the petition, overlooking the jurisdiction of the Tribunal. The claims are for grant of benefits under the MCFS and are required to be agitated before the Tribunal, at the first instance.

60. In view of the binding dicta of the Constitutional Bench of the Supreme Court in ***L. Chandra Kumar (supra)*** and the facts of the present case, the judgment in ***Akul Bhargawa (supra)***, relied upon by the Petitioners, cannot inure to their advantage and the present petition cannot be entertained.

61. The writ petition alongwith the pending application is dismissed as not maintainable, giving liberty, however, to the Petitioners to approach the Central Administrative Tribunal, if so advised.

62. It is made clear that this Court has not expressed any opinion on the merits of the case.

JYOTI SINGH, J

NOVEMBER 24th, 2020

sr/rd/yg/yo

