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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 3rd March, 2021**

\+ **W.P.(C) 5032/2020 & CM APPL 18129/2020**

UNION OF INDIA ..... **Petitioner**

Through: Mr. Ravi Prakash, CGSC, Mr. Farman Ali & Mr. Aditya Hooda, Advocates.

Versus

ARCHANA WADHWA & ORS. ..... **Respondents**

Through: Mr. Rajeev Sharma & Ms. Nandita Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MR. JUSTICE AMIT BANSAL

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 26th September, 2019 of the Central Administrative Tribunal (CAT), Principal Bench, in OA no. 1888/2018 preferred by the 16 respondents, all Members (Judicial) of Customs, Excise & Service Tax Appellate Tribunal (CESTAT).

2. The said OA was preferred, pleading that (i) all the Members (Technical) and Members (Judicial) of CESTAT are appointed, after going through a selection process conducted by a Selection Committee headed by a Sitting Judge of the Supreme Court; (ii) the retirement age of each member, whether Technical or Judicial, is 62 years; (iii) the Members

(Technical) as well as Members (Judicial) hold a civil post and accordingly the Central Civil Services Rules are applicable to them; (iv) the respondents were appointed in different years, from 1996 to 2016 and were having a pay scale of Rs. 2,05,600-2,24,400; (v) after promulgation of the Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and other Conditions of Members) Rules, 2017, made in exercise of powers under Section 184 of the Finance Act, 2017, all the members of CESTAT appointed subsequent to the promulgation of 2017 Rules were being paid salary of Rs. 2,25,000/- (fixed), along with allowances as admissible to Central Government post carrying the same pay; (vi) the appointees, post 2017 Rules, are appointed for a limited period of five years or till attaining the age of 62 years (vii) post 2017 Rules, 5 technical members and 6 judicial members of CESTAT have been appointed; (viii) the respondents, despite being senior to the appointees post 2017 Rules, were drawing lesser salary than the fresh appointees post 2017 Rules; and, (ix) though a representation dated 1st August, 2017 had been made to eliminate the said disparity but had not been considered.

3. CAT, vide the impugned order, has allowed the OA aforesaid of the respondents, reasoning that (i) the conditions of service of the President, Vice President and the Members of CESTAT were governed by the CESTAT Members (Recruitment and Conditions of Service) Rules 1987; (ii) the Government intended to bring about a semblance of uniformity, and provisions in this behalf were made in the Finance Act, 2017 and Chapter 'S' containing Sections 183 and 184 was introduced; (iii) the said Sections 183 and 184 were as under:-

"183. Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:

Provided that the provisions of section 184 shall not apply to the Chairperson, Vice- Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day.

184. (1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:

Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained *such age as specified in the rules made by the Central Government which shall not exceed,—*

(a) in the case of Chairperson, Chairman or President, the age of seventy years;

(b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:

(2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment.";

(iii) Section 184 empowers the Central Government to frame Rules which were to apply to the Chairman, Vice-Chairman and Members of different Tribunals; (iv) once such rules are framed, they would, in a way, replace the respective rules governing the concerned tribunal; (v) Section 183 was protective in nature in the sense that Chairman, Vice-Chairman and Members who are already in office, shall not get affected on account of change of conditions which may be stipulated under the Rules referable to Section 184; (vi) the 2017 Rules were framed vide notification dated 1st June, 2017 and Rule 11 therein provided for the salary of Rs. 2,25,000/- (fixed) plus other allowances and benefits, and Members being appointed post promulgation of the said Rules, were drawing the said salary and allowances; (vii) payment of less salary to the Members who were appointed earlier, compared to those who were appointed later, could not be supported or sustained in law; (viii) the 2017 Rules did not provide any such clarification; (ix) whether one applied the principle of a senior drawing lesser pay compared to that of his junior or two different sets of Rules being operated in the context of payment of salary, the existing set of affairs could not be countenanced; (x) the exception carved out under Section 183 was in the form of protection in the context of the newly stipulated qualifications or age of superannuation and could not be treated as a basis to deny existing Members, the benefit of the salary provided under the 2017 Rules.

4. Accordingly, it was directed that the respondents shall be entitled to the salary and allowances as per the 2017 Rules, with effect from the month of November, 2019 onwards.

5. The contention of the counsel for the petitioner is, that CAT did not consider (a) sub-section (7) added to Section 129 of the Customs Act 1962 (Customs Act), vide the same Finance Act 2017 and which Section 129(7) reads as under:-

> *"(7) Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the President, Vice-President or other Members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), shall be governed by the provisions of section 184 of that Act:*

Provided that the President. Vice-President and Member appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), shall continue to be governed by the provisions of this Act, and the rules made thereunder as if the provisions of section 184 of the Finance Act, 2017 had not come into force."; and,

(b) the proviso to Section 183 of the Finance Act, 2017. It is contended, that therefrom it follows that the pre 2017 appointees were/are to be continued to be governed by the 1987 Rules. It is further contended that no challenge whatsoever was made to the said statutory provisions and in the face of the said statutory provisions, the principle of equal pay for equal work could not have been applied.

6. Else, the counsel for the petitioner has informed that vide ***Rojer Mathew Vs. South Indian Bank Ltd.*** (2020) 6 SCC 1 and ***Madras Bar Association v. Union of India and Anr.*** (2020) 6 SCC 247, the 2017 Rules, benefit whereof has been given by CAT, in the impugned order, to the respondents, have been set aside in entirety.

7. The counsel for the respondents has drawn our attention to the directions issued in the concluding paragraph 238 of the dicta in ***Rojer Mathew*** supra and to the interim relief in paragraph 239, where it has been directed as under:-

> *"However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new members."*

8. The contention of the counsel for the respondents is that if the respondents, under the impugned order of CAT were to be given the benefit of the 2017 Rules, they would under the aforesaid direction in ***Rojer Mathew*** supra, continue to draw the said benefits.

9. Though the counsel for the respondents is correct in his contention aforesaid but it is not as if the order of CAT whereunder the said benefits had been directed to be given to the respondents, had/has attained finality. The same was subject matter of the judicial review in this petition and in which exercise of power of judicial review, merit is found in the contention that CAT, in the impugned order has not noticed Section 129(7) of the Customs Act which permits of no ambiguity. In accordance therewith, the respondents, who are pre 2017 appointees, are to be continued to be governed by the 1987 Rules and not by the 2017 Rules. The respondents cannot pick beneficial provisions from both the Rules. They cannot claim security of tenure till the age of superannuation, under the 1987 Rules and at the same time claim emoluments under the 2017 Rules. They forget that post 2017 appointees have a maximum tenure of five years only.

10. Without a challenge being made to Section 129(7) of the Customs Act and/or the same being struck down, the principle of equal pay for equal work, though otherwise appears to be justified, could not have been applied in contravention of the statute. However for application of the said principle also, a comparative study of all the terms and conditions of appointment have to be made and which has also not been done in the impugned order.

11. We also entertain doubt as to correctness of the observation of CAT qua proviso to Section 183 of the Finance Act, 2017, of the same being merely protective of the rights of the pre-existing members. However in view of the subsequent developments aforesaid, the need to go into the same is not felt.

12. Section 129(7) of the Customs Act having admittedly not been noticed by CAT in the impugned order, the same is *per incuriam* to that extent and cannot be sustained.

13. The counsel for the respondents now states that he is still to examine the position, post dicta in ***Rojer Mathew*** supra and ***Madras Bar Association*** supra, as well as under the Finance Bill, 2021 and Rules, and seeks adjournment.

14. The need to adjourn is not felt. If the respondents have any other right, they shall be entitled to agitate the same in accordance with law.

15. Resultantly, the petition is allowed and the impugned order dated 26th September, 2019 of CAT is set aside.

RAJIV SAHAI ENDLAW, J.

AMIT BANSAL, J.

MARCH 03, 2021
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