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

% *Date of Decision: 14th December, 2022*

+ W.P.(C) 14533/2022

ALL INDIA NIC S&T OFFICERS
ASSOCIATION

..... Petitioner

Through: Mr. P.S. Datta, Senior
Advocate with Mr. Tarun Kumar Pandey
and Ms. Anvesha Saha, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Rakesh Kumar, Central
Government Standing Counsel with
Mr. Sunil, Advocate and Mr. Chetanya Puri,
Government Pleader.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. Present writ petition has been filed seeking a writ of mandamus directing the Respondents to rescind or recall paragraph 5 (xiv) of Notification dated 19.09.2016 under the subject 'Personnel Policy for Group 'A' S & T Officers of Ministry of Electronics and Information Technology and its Organization', to the extent it uses the expression 'prior to the issue of this policy Notification', as unconstitutional, being violative of Article 14 of the Constitution of India. Mandamus is also sought directing the Respondents to rescind and recall the Circular dated 10.12.2021, issued by Respondent No.1/ Ministry of Electronics and Information Technology. In a nutshell, the grievance ventilated in the writ petition is against the discrimination created between those officers, who are promoted as Scientist-B prior to the cut-off date of 19.09.2016 in the policy and those promoted after, which has allegedly impacted further promotions.

2. Factual expose to the extent relevant and as averred in the writ petition are that Petitioner is an Association comprising of about 3500 members posted in various Districts of different States of India in various posts/categories under Respondent No. 1. National Informatics Centre ('NIC') was established in 1976, with the key mandate to work as technology partner of the Government, design and develop IT systems, provide ICT infrastructure to the Government and explore and advise on the use of emerging technologies. Petitioner is an All India NIC S&T Officers' Association, registered under the Registration of Societies Act, 1860.

3. The subject matter of challenge in the writ petition pertains to an O.M. dated 19.09.2016, issued by Respondent No.1 under the subject 'Personnel Policy for Group 'A' S&T Officers of Ministry of Electronics and Information Technology and its Organization'. The policy relates to promotion of Group 'A' S&T Officers to different posts from Scientist-B to Scientist-G, appertaining to different Pay Bands and Grade Pay, subject to minimum residency period. Paragraph 5 lays down the assessment and promotion process and paragraphs 2, 3 and 4 provide the criteria and conditions of promotions at different levels. What is, however, the bone of contention between the parties to the *lis* is clause (xiv) of paragraph 5 which is as follows:

"(xiv) This policy is applicable only to those S&T officers who are initially appointed on Group A S&T posts. In addition to it, officers initially appointed on Below Group A S&T Posts and subsequently promoted as Group A S&T officer as per the provisions of Below Group A S&T Personnel Policy, prior to issue of this policy notification, shall also be covered under this policy."

4. The grievance put forth by the Petitioner is that the stipulation 'prior to the issue of this policy notification', completely blocks promotion to those officers who are posted as Scientist-B in the Group

‘A’ S&T Officers’ category to the post of Scientist-C and upwards. Pithily put, according to the Petitioner the policy is discriminatory and makes an irrational, unintelligible differentia between one set of officers, who were promoted to the post of Scientist-B, prior to 19.09.2016 and the other set of officers who were promoted post the said date, for the purpose of promotion to Scientist-C, notwithstanding the fact that both the set of officers possess same qualifications, assessment performance and residency experience. The heartburn arises from the fact that the O.M. dated 19.09.2016, while providing for promotion to those officers who were promoted to the Scientist-B from below Group ‘A’ S&T post to Scientist-C and upwards, stops promotion for all times to come in respect of those Scientist-B officers who were appointed to the said post on promotion from below Group ‘A’ service after 19.09.2016. This is, according to the Petitioner, a clear violation of Article 14 of Constitution of India and highly discriminatory.

5. At the outset, a preliminary objection is taken by the Respondents to the maintainability of the present petition on the ground that the only remedy available to the Petitioner is to seek redressal of its grievance before the Central Administrative Tribunal (hereinafter referred to as the ‘Tribunal’), in the first instance. It is urged that by virtue of Section 14(1) read with Section 3(q) of the Administrative Tribunals Act, 1985 (hereinafter referred to as the ‘Act’), only the Tribunal has jurisdiction in respect of ‘service matters’ and this Court lacks the jurisdiction to entertain the present petition. It is further submitted that Petitioner is conscious of the fact that its remedy lies before the Tribunal as 47 employees working in Respondent No. 1 have already approached the Tribunal by filing **O.A. No. 1391/2022, titled ‘Anil Kumar Yenni & Ors. v. Union of India &**

Anr.’, claiming reliefs pertaining to their promotion involving a challenge to the O.M. dated 19.09.2016.

6. It was submitted that the grounds discernible from the writ petition for approaching this Court, by-passing the remedy of approaching the Tribunal are that the petitioner seeks enforcement of Fundamental Rights enshrined in Article 14 of the Constitution of India of its aggrieved members and questions the arbitrariness in issuing the Office Memorandum dated 19.09.2016 and Circular dated 10.12.2021, besides stating that no disputed questions of fact are involved. Writ petition is also predicated on an understanding of the Petitioner that since a challenge is laid to the Office Memorandum, only a writ Court has the jurisdiction to quash the same. It is contended that none of these grounds are tenable in law permitting the Petitioner to file a writ petition in this Court, in view of the judgment of the Constitution Bench of the Supreme Court in ***L. Chandra Kumar v. Union of India and Others, (1997) 3 SCC 261***, wherein it is held that with respect to service matters of employees amenable to Tribunal’s jurisdiction the Forum in the first instance, for redressal of the grievances will be the Tribunal and therefore the concept of alternative remedy is inapplicable.

7. Learned Senior Counsel for the Petitioner, *per contra*, vehemently opposed the preliminary objection and contended that the impugned O.M. and Circular carve out an exception and discriminate between two sets of officers, one who were promoted as Scientist-B from Group ‘A’ S&T prior to 19.09.2016 and those who were promoted as Scientist-B after 19.09.2016, for the purpose of their promotion to Scientist-C. Petitioner is thus invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India seeking a judicial review of impugned action with a prayer to direct

the Respondents to recall the O.M. and Circular, which violate Article 14 of the Constitution. Moreover, writ petition does not involve any disputed question of fact. It is settled law that existence of an alternate remedy is not a bar for this Court to exercise the writ jurisdiction under Article 226, which can never be ousted, being a part of the basic structure of the Constitution.

8. It was also contended that challenge is laid to the *vires* of O.M. dated 19.09.2016 and Circular dated 10.12.2021, on ground of arbitrariness, which is anti-thesis to natural justice and this Court alone is competent to examine and quash them, if found discriminatory.

9. Next argument of the Petitioner was that approaching the Tribunal is not an efficacious remedy, more so, in the current situation, where on account of the Pandemic Covid-19, there is an increase in the pendency leading to a huge congestion of cases in the Tribunal, awaiting decision. Petitioner is seeking an urgent relief and it may not be possible for the Tribunal to dispose of the matter with expedition in the wake of huge pendency.

10. Last plank of the argument was predicated on a practical difficulty in approaching the Tribunal. It was submitted that out of about 2,800 officers at the level of Scientist-B, about 2,483 have been promoted as Scientist-C during 2017-19, leaving a balance of 317 officers, who have been deprived of their promotions, despite possessing same qualifications and experience. These 317 aggrieved officers are posted at different places, across the length and breadth of the country and if they were to approach the Regional Benches at different places it may lead to uncertainty and delay as well as lack of uniformity in judgments by different Benches of the Tribunal.

11. To substantiate all the aforesaid submissions, learned Senior Counsel relied on the judgment of the Supreme Court in ***State of Uttar Pradesh v. Mohammad Noor, AIR 1958 SC 86***, where a Five-Judges Constitution Bench observed that it is open to the High Court to entertain a writ petition in face of an alternate remedy as a rule of policy, convenience and discretion rather than rule of law. Existence of another legal remedy is *per se* a bar to the issue of writ certiorari, however, in a proper case it may be the duty of a Superior Court to issue the writ to correct errors of inferior Court or Tribunal instead of relegating the Petitioner to the alternate remedies. The said decision was quoted with approval in another Five Judge Constitution Bench in ***A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani & Anr., AIR 1961 SC 1506***. In another Constitution Bench decision in ***Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District Calcutta and Another, AIR 1961 SC 372***, it was laid down that though writ of prohibition or certiorari will not issue against an Executive Authority, High Courts have the power to issue in a fit case, an order prohibiting an Executive Authority from acting without jurisdiction and where such action of the Authority, acting without jurisdiction, subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, High Court will issue appropriate orders to prevent such consequences. The cut-off date in the impugned order in the present case is one such consequence causing hardship to the officers and requires immediate interference by this Court.

12. In ***Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, (1987) 4 SCC 525***, an order of the Vice Chancellor of the State University was found to be without jurisdiction and even though alternate remedy was available

under Section 68 of the U.P. State Universities' Act 1973, the Supreme Court reversed the decision of the Allahabad High Court, holding that existence of alternative remedy is not an absolute bar to maintainability of a writ petition. Reliance was placed on the decision of the Supreme Court in ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others, (1998) 8 SCC 1***, where the Supreme Court held that despite the availability of alternate remedy, High Court may still exercise writ jurisdiction in three contingencies: (a) where writ petition seeks enforcement of any Fundamental Right; (b) where there is failure of principles of natural justice; and (c) where the orders or proceedings under challenge are wholly without jurisdiction or vires of a statutory provision is challenged. Reliance was also placed on the judgments of the Supreme Court in ***U.P. State Spinning Co. Ltd. v. R.S. Pandey and Another, (2005) 8 SCC 264***, ***L.K. Verma v. HMT Ltd. and Another, (2006) 2 SCC 269***, ***Assistant Commissioner of State Tax and Others v. Commercial Steel Limited, 2021 SCC OnLine SC 884*** and ***M/s. Magadh Sugar & Energy Ltd. v. The State of Bihar & Ors., 2021 SCC OnLine SC 801*** to canvass that the petition is maintainable, even though there exists an alternate efficacious remedy. Last but not the least reliance was also placed on the judgment of the Supreme Court in ***T.K. Rangarajan v. Government of T.N. and Others, (2003) 6 SCC 581***, where more than 2,000 employees of the Tamil Nadu Government went on strike for raising certain demands and were terminated. The action was challenged before the Madras High Court in writ petitions under Article 226/227 of the Constitution of India. The learned Single Judge granted an interim order, which was challenged by the State Government before the Division Bench, which set aside the order holding that without exhausting the alternate remedy of approaching

the Tribunal, writ petitions were not maintainable. The aggrieved employees approached the Supreme Court and it was held by the Supreme Court that there cannot be any doubt that the judgment of the larger Bench in *L. Chandra Kumar (supra)* is binding on the Court, however, in a case where thousands of employees are directed to approach the Administrative Tribunal, the Tribunal would not be in a position to render justice to the cause. Therefore, because of the very very exceptional circumstance there was no justifiable reason for the High Court not to entertain the petitions on the ground of alternative remedy provided under the Statute.

13. I have heard the learned Senior Counsel for the Petitioner and learned counsels for the Respondents.

14. From the arguments canvassed by the respective parties to the *lis*, the following questions arise for consideration before this Court:

(A) Whether members of the Petitioner Association are holders of ‘Civil Post’ and thus amenable to the jurisdiction of the Tribunal under Section 14(1) of the Act individually or collectively as an Association ?

(B) Whether the writ petition can be entertained by this Court under Article 226 of the Constitution of India, bypassing the remedy of the Tribunal, if the answer to question (A) is in the affirmative?

15. Section 14 of the Act deals with jurisdiction, powers and authority of the Tribunal and is extracted hereunder, for ready reference:

*“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 ***) 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 [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 [or society] or other body, at the disposal of the Central Government for such appointment.

[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.]”

16. Plain reading of Section 14(1)(b)(ii) of the Act shows that Tribunal shall exercise all jurisdiction, power and authority in relation to all service matters concerning *inter alia* a person appointed to any ‘civil post’ under the Union. ‘Service matters’ has been defined under Section 3(q) of the Act as follows:

“3. Definitions.-

....

(q) “service matters”, in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may be, of any corporation [or society] owned or controlled by the Government, as respects—

- (i) remuneration (including allowances), pension and other retirement benefits;
- (ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;
- (iii) leave of any kind;
- (iv) disciplinary matters; or
- (v) any other matter whatsoever;”

17. Therefore, once a person is holder of a civil post under the Union and his grievance relates to a service matter, he is clearly amenable to the jurisdiction of the Tribunal.

18. The questions that beg answers at this stage are if the members of the Petitioner-Association are holders of civil post and whether the grievances ventilated in the present petition fall under the definition of ‘service matters’. Answers to both the questions are in the affirmative as Petitioner does not dispute that members of the Petitioner-Association are holders of civil posts or that the disputes raised are service matters. Be that as it may, for the sake of completeness, I may refer to the judgment of the Supreme Court in case of ***State of Assam and Others v. Shri Kanak Chandra Dutta, AIR 1967 SC 884***, wherein the Supreme Court delineated the parameters of a ‘civil post’ and the relevant passage from the judgment is 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."

19. It is also useful to refer to the judgment of the Supreme Court in ***State of Gujarat and Another v. Raman Lal Keshav Lal Soni and Others, (1983) 2 SCC 33***, relevant para of which is as follows:

"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....."

20. From the conspectus of the aforesaid judgments, the inevitable conclusion is that the expression 'civil post' is not formally defined and is broadly understood to mean a post not connected with the Defence side of the administration. It bears repetition to state that learned Senior Counsel for the Petitioner had not disputed that members of the Petitioner-Association are holders of civil posts and this is fortified by the fact, as rightly pointed out by learned counsel for the Respondents, that 47 employees under Respondent No.1 have already approached the Tribunal by filing ***O.A. No. 1391/2022, titled***

'Anil Kumar Yenni & Ors. v. Union of India & Anr', raising disputes pertaining to their non-promotion in reference to the O.M. dated 19.09.2016. Therefore, beyond a scintilla of doubt, members of the Petitioner are amenable to the jurisdiction of the Tribunal. In fact, Rule 4(5)(b) permits even the Association to file an Original Application before the Tribunal.

21. The next issue that requires consideration and really speaking is the main plank of the argument of the Petitioner, is that the writ petition can be entertained even if the Petitioner has a remedy of approaching the Tribunal under Section 14(1) of the Act since power of judicial review conferred on the High Court is a part of the basic structure of the Constitution and can never be ousted and present case is a fit case, for exercising the same, where in view of the urgent relief sought, the alternative remedy before the Tribunal is not efficacious.

22. To examine the contention, I may allude to the judgment of the Constitution Bench of the Supreme Court in *L. Chandra Kumar* (*supra*) and at the outset profitably extract 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?”

23. Thereafter, the Supreme Court set out the historical backdrop to

the case referring to Article 323-A and 323-B in Part XIV-A of the Constitution of India inserted through Section 46 of the Constitution (42nd Amendment), Act, 1976. Article 323-A which deals with constitution of the Administrative Tribunals, is as follows:

“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);”

24. Pertinently, the Supreme Court also took note of the statement of Objects and Reasons of the Act, which is reproduced as under:

“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”.

25. The Supreme Court then referred to the judgment of the Five-Judge Constitution Bench in ***S.P. Sampath Kumar v. Union of India*** 1985 4 SCC 458, wherein the Supreme Court had taken the view that though judicial review is the basic feature of the Constitution, vesting

of the said power in an alternative Institutional mechanism will not violate the basic structure, so long as the mechanism is effective and a real substitute for the High Court. The Supreme Court also applied itself to analyse one of the decisions impugned before it, rendered by Full Bench of the Andhra Pradesh High Court in ***Sakinala Hari Nath v. State of A.P., (1994) 1 APLJ 1 (FB)***, where Article 323-A(2b) was held to be unconstitutional to the extent it empowered the Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution of India.

26. Examining the observations of the Andhra Pradesh High Court, the Supreme Court 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)

27. In order to answer the question as to whether the power of judicial review vested in the High Courts and in the Supreme Court

W.P.(C) 14533/2022

Page 14 of 25

under Articles 226/227 and 32, respectively, is a part of the basic structure of Constitution, the Supreme Court posed itself the question as to what constitutes the ‘Basic Structure’ and relying on the observations in *Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*, wherein the Doctrine of Basic Structure was evolved, as well on the judgment in the case of *Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1*, the Supreme 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.”*

28. After an in-depth analysis of the issue, the Supreme Court made significant observations, which are relevant and crucial in deciding the controversy involved in the present case, pertaining to the maintainability of the writ petition before this Court. The Supreme Court held that though subordinate judiciary or tribunals created under ordinary Legislations cannot exercise 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. Clause (3) of Article 32 makes it clear that such a situation is envisaged and contemplated within the Constitutional Scheme. The Supreme Court also held that if the power under Article 32 of the Constitution, which is being 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 Courts. It is significant to note another observation of the Court that so long as jurisdiction of the High Court under Article 226/227 is retained, there is no reason why power to test the validity of the Legislations cannot be conferred upon Administrative Tribunals. Relevant para of the judgment is as follows:

“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.”

29. In paras 82 to 84, the Supreme Court emphasised the pressing need to preserve the conferment of powers on the Tribunals and I may extract the said paras hereunder, 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).J”

30. The observations of the Supreme Court in paras 90 to 94, in my view, are a complete answer to the arguments raised by the Petitioner before this Court. Paras 90 to 94 are as under:

“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.”*

31. Therefore, it is palpably clear from the aforementioned observations of the Supreme Court that the jurisdiction of the High Court under Article 226/227 of the Constitution is no doubt a part of the inviolable basic structure of the Constitution and cannot be ousted, other Courts and Tribunals may perform supplemental role in discharging the said powers. Significantly, it was also held that Tribunals will continue to act as Courts of first instance and it would not be open for litigants to directly approach the High Courts overlooking the jurisdiction of the concerned Tribunal. These observations are in para 99 of the judgment, as under:

*“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.”

32. The principles that can be broadly culled out from the observations of the Supreme Court can be aptly encapsulated as follows:

- (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.

33. Therefore, the inexplorable conclusion that can be drawn is that when an applicant (individual/Association) covered under Section 14 of the Act raises a dispute with respect to service matter as defined under Section 3(q) thereof, the Forum that is available for redressal of the grievance is the Tribunal as a Court of first instance *albeit* there can be no quarrel with the proposition of law that writ jurisdiction of a High Court under Article 226 of the Constitution can never be ousted and can certainly be exercised in exceptional circumstances and sparingly. Petitioner cannot, therefore, urge that this remedy can be bypassed as it is only an ‘alternative’ remedy.

34. One of the concerns expressed by learned Senior counsel for the Petitioner was that since there is a challenge to the O.M. dated 19.09.2016 and the Circular dated 10.12.2021, the Tribunal will not have the power to exercise jurisdiction to interfere with the same and quash them. The apprehension and the fear expressed by the Petitioner on this count, according to this Court, is without any basis. In para 99 of the judgment in *L. Chandra Kumar (supra)*, the Supreme Court has clearly observed that the Tribunal will have the power to test the vires of all statutory legislations, except where the legislation which creates the particular Tribunal is questioned. The O.M. and the Circular in question are merely Executive Instructions and this Court sees no reason why a challenge to the same cannot be laid before the Tribunal.

35. Reliance by the Petitioner on the judgments in *State of Uttar Pradesh (supra)*, *A.V. Venkateswaran, Collector of Customs, Bombay (supra)*, *Calcutta Discount Co. Ltd. (supra)* and *Dr. (Smt.) Kuntesh Gupta (supra)*, is misplaced as all these judgments are distinguishable on facts and the legal issues involved, besides the fact that they are prior to the judgment of the Constitution Bench in

L. Chandra Kumar (supra), where the Supreme Court has decided a question which directly covers the present case. Insofar as the judgments in *Whirlpool Corporation (supra)*, *U.P. State Spinning Co. Ltd. (supra)*, *L.K. Verma (supra)*, *Assistant Commissioner of State Tax and Others (supra)*, and *M/s. Magadh Sugar & Energy Ltd. (supra)* are concerned, none of these cases deal with ‘service matters’ and consequently, the jurisdiction of the Tribunal and thus have no relevance or applicability to the present case. Insofar as the judgment in *T.K. Rangarajan (supra)* is concerned, the facts of the case from a plain reading of the judgment were extremely extenuating and unprecedented, where the Court was dealing with large scale termination of Government employees and in those circumstances, the Supreme Court held that if thousands of these employees are directed to approach the Tribunal, the Tribunal would not be in a position to render justice to the cause. The present case which deals with a few sets of employees, who are in any case represented through a registered Association, in my view, does not meet the threshold permitting the Petitioner to bypass the Tribunal, the Court of first instance. In any case, as pointed out by the Respondents fairly a large number of employees have already approached the Tribunal. I may add that the Act itself provides a mechanism enabling applicants to seek transfer of similar Original Applications, filed before different Regional Benches of the Tribunal to the Principal Bench and therefore there is no substance in the contention that if Applications are filed before different Benches, there is a chance of delay or the risk of contradictory verdicts.

36. At this stage, I may add that if the persons amenable to the Tribunal’s jurisdiction are permitted to bypass the remedy of approaching the Tribunal on grounds of time taken to decide the

disputes or pendency thereof and/or necessity of urgent relief, without a caveat of existence of unprecedented circumstances, this would open a floodgate of litigation before the High Courts, which would be directly against the judgment in *L. Chandra Kumar (supra)*, where it was emphasised by the Supreme Court that the avowed purpose of creating the Tribunals was to filter cases to the High Courts so that backlogs, which had reached colossal levels, were cleared and pendency reduced. Therefore, in view of the binding and enduring dicta of the Supreme Court in *L. Chandra Kumar (supra)*, writ petition cannot be entertained.

37. For all the aforesaid reasons, the writ petition is dismissed as not maintainable, with liberty to the Petitioner to take recourse to the appropriate remedy available in law before the appropriate Forum, if so advised.

38. It is made clear that the writ petition has been dismissed only on the ground of maintainability and this Court has not expressed any opinion on the merits of the dispute.

JYOTI SINGH, J

DECEMBER 14, 2022/shivam