2023INSC787

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 2299 OF 2010

UNION OF INDIA & ORS. …APPELLANTS

VERSUS

MANJURANI ROUTRAY & ORS. …RESPONDENTS

JUDGMENT

J.K. Maheshwari, J.

1. This Appeal has been filed by the appellants challenging the judgment dated 26.09.2008 passed by the High Court of Orrisa at Cuttack (for short "**the High Court**") in Writ Petition (C) No. 7080 of 2005. By the said judgment, the High Court, while allowing the writ petition issued certain directions in supersession of the directions issued in O.A. No. 148 of 2001 by the Central Administrative Tribunal, Bench at Cuttack (for short "**the CAT**") by its order dated 04.05.2005. The order of the Tribunal had been assailed before the High Court by the respondent no. 1 herein.

The facts in brief are that, at the time of filing O.A. No. 148 of 2001 on 22.04.2001 before the CAT, the respondent no. 1 was working as Principal System

Analyst (Scientist D) in the National Informatics Centre, Cuttack. As recommended by the 5th Pay Commission, a promotion policy known as Flexible Complementing Scheme (for short "**FCS**") was introduced vide office memorandum dated 09.11.1998 by Department of Personnel and Training. During the pendency of the original application filed by the respondent no.1 before the CAT, Ministry of Information Technology vide office memorandum dated 06.08.2001 communicated the rules made in exercise of powers conferred under proviso to Article 309 of the Constitution of India. These rules regulated the in-situ promotion of Scientific and Technical Group A posts and were called The Scientific and Technical Group "A" (Gazetted) posts in the Ministry of Information Technology (in-situ Promotion under Flexible Complementing Scheme) Rules 1998 (for short "**Rules**"). Rule 4 of the Rules prescribed a revised assessment procedure in sub-clause (a), (b) and (c) and provided that assessment for promotion shall consist of two stages: (i) "screening" by a screening committee on the basis of performance reflected in the officer's confidential reports; and (ii) "interview" by a selection committee. As per the Rules, the respondent no. 1 was eligible for consideration for promotion to the post of 'Scientist E' on completion of four years of service as 'Scientist D'. In December, 1999, she was called for interview, but her name was not recommended. On 30.12.2000, she was again called for interview but again she could not find place in the promotion list, while her juniors were recommended and granted promotion vide order dated 14.02.2001. As the respondent no. 1 was not granted promotion, she submitted representations on 25.02.2001 and 12.03.2001 to the appellant No.

2/Director General and on 13.03.2001 to the Secretary, Ministry of Information Technology, making a request to reconsider her case. The said representations were rejected vide memorandum dated 16.04.2001 communicated by Joint Director, National Informatics Centre.

3. The respondent no. 1, by filing OA No. 148 of 2001 on 22.04.2001, assailed the order rejecting the representation and the promotion order of the incumbent juniors (respondent no. 5 and 6 therein) dated 14.02.2001 before the CAT. Vide order dated 04.05.2005, CAT disposed of the said original application and observed as under:-

> *"In the circumstances the respondents will be well advised to clarify the guidelines of selection of scientists for promotion from one grade to another by explaining the objective of ACR assessment and objectives of assessment through interview for promotion and whether the combined performance of a candidate at the work place as well as interview determined the final outcome of the selection process. Once the promotion policy is thus clearly spelt out, no dispute would arise. Therefore in the interest of fairness and justice, we would call upon the Respondents to inform the applicant about her rating by the interview board and as to why inspite of her above average performance at the work place, she was not considered ripe enough for promotion. We are not however impressed with the prayer of the applicant that the respondents should give her promotion to Scientist E (Grade of Technical Director) from the date when her juniors were promoted to the said post as the promotion policy of the scientist is not based on the principle of seniority but wholly and solely on the basis of merit as propounded by them both in the counter as well as before us during oral argument. We however for the reasons stated earlier direct the respondents Department in the interest of fairness and justice, to inform the applicant the reasons how she was not found suitable for promotion inspite of the high rating given to her by the Assessment board in the scale of 10 points. This exercise shall be completed within a period of 120 (one hundred and twenty) days from the date of receipt of this order."*

4. Respondent no. 1 being aggrieved by the said order, filed W.P. (C) No. 7080 of 2005 seeking a writ in the nature of certiorari to set aside the order dated 04.05.2005 passed by the CAT. In the said Writ Petition filed before the High Court, *vires* of Rule 4(b) was not under challenge. No such prayer was made in the Writ Petition. In the absence of any foundation in the pleading to challenge the *vires* of the said rule and without asking for any relief, Rule 4(b) has been declared *ultra vires* by the impugned order. The operative part of the order passed by the High Court is reproduced as thus:-

> *"In view of the above, we allow the writ application with the following directions:*
>
> *(A) We declare Rule-4(b) of the Ministry of Information Technology (In-situ promotion under Flexible Complementing Scheme) Rules, 1998 to be invalid in law and fixation of the basis of percentage in interview to be excessive and beyond the limits prescribed by the Hon'ble Apex Court in the case of Ashok Kumar Yadav (supra).*
>
> *(B) We direct the Opp. Party-Union of India to carry out necessary amendments to Rule-4(b) in order to make it in consonance with the dicta of the Hon'ble Apex Court.*
>
> *(C) We further declare that the promotion under 'Flexible Complementing Scheme' should only be made by taking into consideration both, the marks secured on consideration of ACRs as well as at interview.*
>
> *(D) The entire exercise shall be completed within a period of three months, whereafter, the petitioner's case for promotion shall be reconsidered in the light of the aforesaid directions and/or the amendments that may be carried out by the Union of India and if the petitioner is found suitable, be given promotion from the date of her entitlement, on notional basis, so that the said period can be taken into account for her future promotions."*

5. We have perused the averments made in the original application filed before the CAT on 22.04.2001 and the relief as prayed, by which it is apparent that Rule 4(b)

of the Rules was not under challenge because the original application was filed prior to notifying the Rules vide office memorandum dated 06.08.2001. For ready reference, prayer made in the original application is reproduced as under:-

> *"It is therefore humbly prayed that this Hon'ble Tribunal may be graciously pleased to issue notice to the Respondents for show cause as to why the prayer made here under shall not be allowed. If the Respondents failed to show cause or upon insufficient causes shown be pleased to:*
>
> *i. quash the promotion order of respondents No. 5 and 6 dated 14.2.2001.*
>
> *ii. direct the Respondents to give promotion to the applicant to the rank of technical director from the date when her juniors promoted to the said post i.e. from 1.1.2001 with all service benefits.*
>
> *iii. and may pass such other order / orders as deemed just and proper."*

6. The CAT disposed of the said original application vide order dated 04.05.2005 directing the department to inform the respondent no.1 why she was not found suitable for promotion in spite of the high rating given to her by the Assessment Board in the scale of 10 points. The order passed by the CAT indicates that promotion order of juniors (respondent no. 5 and 6 therein) of respondent no. 1 were not quashed.

7. The said order was challenged by the respondent no. 1 by filing W.P. (C) No. 7080 of 2005 seeking a writ in the nature of certiorari for setting aside the order dated 04.05.2005 passed by the CAT. The prayer made in the Writ Petition is also relevant and is reproduced for ready reference as under:-

> *"It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to issue Rule Nisi calling upon the Op. Parties to show cause as to a writ of certiorari shall not be issued by set aside the order dtd.*

04.05.2005 passed in O.A. No. 148/2001 so far as in not allowing the O.A. in full and directing for promotion and further be pleased to issue writ/writ(s) directing the Opp. Parties to give promotion to the petitioner from Scientist 'D' to 'E' w.e.f. 01.01.2001 with all consequential and financial benefits and on perusal of causes shown or insufficient causes shown, if any make the said Rule absolute and may pass any appropriate order as just and proper."

8. After hearing the learned counsel for the parties and considering the prayer made in the writ petition, it is luculent that the respondent no. 1 did not set out any grounds to declare Rule 4(b) of the Rules as *ultra vires*. No such relief was even prayed for in the writ petition. The respondent no. 1 in the writ petition merely sought a writ in the nature of certiorari to set-aside the order of the CAT. Therefore in the given facts, there was no occasion for the High Court to declare Rule 4(b) as *ultra vires*.

9. While hearing learned counsels appearing for the parties, we asked Shri B.H. Marlapalle, learned senior counsel along with Shri Shibashish Mishra appearing on behalf of the respondents and intervenors, as to how, in absence of any pleading setting out grounds challenging the *vires* of Rule 4(b) and in the absence of seeking any relief to that effect, the High Court was justified in exercising jurisdiction to declare Rule 4(b) as *ultra vires*? In response, learned senior counsel has fairly stated that it is a defect in the pleadings as well as in the relief sought before the CAT and in the writ petition. But still, they made an unsuccessful attempt to satisfy this Court that the said rule appears to be discriminatory and therefore the High Court has rightly exercised the jurisdiction while passing the impugned order. It is a trite law that for

striking down the provisions of law or for declaring any rules as *ultra vires*, specific pleading to challenge the rules and asking of such relief ought to be made, that is conspicuously missing in the present case. In the absence of such a pleading, the Union of India did not have an opportunity to rebut the same. The other side had no opportunity to bring on record the object, if any, behind the Rules that were brought into force. We are also of the considered view that, in the writ petition seeking a writ of certiorari challenging the order of the CAT, the High Court ought not to have declared Rule 4(b) as *ultra vires* in the above fact situation. Therefore, the High Court was not justified to declare Rule 4(b) as *ultra vires*.

10. In view of the foregoing discussion, the order dated 26.09.2008 of the High Court declaring Rule 4(b) of the Rules is set aside. Since we have set aside the declaration of the High Court holding Rule 4(b) to be invalid consequently, the grievance of the respondent no. 1 about any illegality in denial of promotion to her also does not arise. No case has been made out as to how in the event of Rule 4(b) being valid, the denial of promotion to her was unjustified in the years 1999, 2000 and for the years before 2007.

11. In any event, the FCS has been modified, pursuant to the recommendations of the sixth pay commission vide Office Memorandum dated 10.09.2010. Further, by Office Memorandum dated 19.09.2016, the Ministry of Electronics and Information Technology has issued a personnel policy for Group 'A' S&T officers and its organizations and that was made effective retrospectively w.e.f. 01.01.2011 in view

of the modified FCS. Even otherwise, the respondent no.1 had already been promoted during the pendency of the writ petition and has attained the age of superannuation by now. The issue of the validity of the promotion of her juniors (respondent nos. 5 & 6 in O.A. No. 148 of 2001) also does not survive, as their names were deleted by the CAT, vide order of 03.05.2001.

12. Before parting with this Appeal, we note that, vide order dated 15.09.2016, an application being I.A. No. 3 of 2015 for intervention was allowed. By virtue of the same, respondents nos. 3 to 141 were impleaded. They seek to support the order of the High Court and have urged various grounds to demonstrate that Rule 4(b) was rightly struck down. As we have set aside the order of the High Court declaring Rule 4(b) as unconstitutional on the ground of lack of any challenge, either in the O.A. or in the writ petition, we do not permit the impleaded parties here to urge those grounds. In case, any of them are adversely affected, they will have the liberty to take recourse in law by instituting appropriate proceedings. We, therefore, recall the order dated 15.09.2016 allowing their impleadment and delete them from the array of parties. We make it clear that we have not expressed any view regarding the validity of the Rules on merits, one way or the other and, therefore, this judgment will not come in the way of any court dealing with the issue of the *vires* of the Rules in any pending proceeding or in any proceeding that may be initiated afresh.

13. This Appeal is allowed in the above terms. No order as to costs. Pending applications, if any, shall stand disposed of.

…….J.
(J.K. MAHESHWARI)

…….J.
(K.V. VISWANATHAN)

NEW DELHI;
SEPTEMBER 01, 2023