Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL/APPELLATE JURISDICTION

Writ Petition (C) No.804 of 2020

MADRAS BAR ASSOCIATION

...Petitioner

Versus

UNION OF INDIA & ANR.

...Respondents

WITH

Misc. Application No.1058 of 2020
In
Writ Petition (C) No.640 of 2017

Misc. Application No.1152 of 2020
In
Writ Petition (C) No. 279 of 2017

Writ Petition (C) No. 867 of 2020

Writ Petition (C) No.1431 of 2019

Transfer Petition (C) Nos. 905-915 of 2020

Civil Appeal Nos.3505-3506 of 2020
(@ SLP (C) Nos. 9587-9588 of 2020)

Transfer Petition (C) No. 1356-1360 of 2020
(@ Diary No. 18900 of 2020)

Misc. Application No.1481 of 2020
In
Writ Petition (C) No.279 of 2017

Writ Petition (C) No.995 of 2020

Writ Petition (C) No.991 of 2020

Misc. Application No.1654 of 2020
In
Writ Petition (C) No.279 of 2017

Writ Petition (C) No.1085 of 2020

Misc. Application No.1811 of 2020
In
Writ Petition (C) No.279 of 2017

Civil Appeal No.3598 of 2020
(@ SLP (C) No.11612 of 2020)

J U D G M E N T

L. NAGESWARA RAO, J.

1. This Court is once again, within the span of a year, called upon to decide the constitutionality of various provisions concerning the selection, appointment, tenure, conditions of service, and ancillary matters relating to various tribunals, 19 in number, which act in aid of the judicial branch. That the judicial system and this Court in particular has to live these *déjà vu* moments, time and again (exemplified by no less than four constitution bench judgments) in the last 8 years, speaks profound volumes about the constancy of other branches of governance, in their insistence regarding these issues. At the heart of this, however, are stakes far greater: the

guarantee of the rule of law to each citizen of the country, with the concomitant guarantee of equal *protection* of the law. This judgment is to be read as a sequel, and together with the decision of the Constitution Bench in ***Rojer Mathew* v. *South Indian Bank Limited***[1].

2. The core controversy arising for this Court's consideration is the constitutional validity of the "Tribunal, Appellate Tribunal and other Authorities [Qualification, Experience and Other Conditions of Service of Members] Rules, 2020" (hereinafter referred to as "the 2020 Rules").

3. Before considering the merits of the case, it is necessary to refer to the events preceding the issuance of the 2020 Rules for a better understanding of the dispute. Like many other nations, India recognized the need for Tribunalisation of justice to provide for adjudication by persons with ability to decide disputes in specific fields as well as to provide expedited justice in certain kinds of cases. Part XIV-A was inserted in the Constitution of India by the Constitution (42nd Amendment) Act, 1976. Article 323-A enables the Parliament to constitute administrative tribunals for adjudication of the disputes relating to the recruitment and conditions of service of persons appointed to public posts in connection with the affairs of

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[1] (2020) 6 SCC 1

the Union or of any State or any local or other authority. According to Article 323-B, the appropriate Legislature may constitute Tribunals for adjudication of any dispute, complaints, or other offences with respect to all or any of the matters specified in Clause (2) therein. The *vires* of the Administrative Tribunals Act, 1985 (enacted by Parliament in furtherance of Article 323A, for setting up administrative tribunals for adjudication of service disputes of public servants) was challenged in proceedings under Article 32 of the Constitution of India. Two questions that were posed in the said Writ Petition related to the exclusion of jurisdiction of the High Court under Articles 226 and 227 of the Constitution in service matters, the composition of the administrative Tribunal and the mode of appointment of Chairman, Vice-Chairman and Members. While holding that the bar on jurisdiction of the High Courts' cannot be a ground of attack, this Court in ***S.P. Sampath Kumar* v. *Union of India***[2] held that the Tribunal "*should be a real substitute of the High Courts not only in form and de jure but in content and de facto*". The Central Government was directed to make modifications to the Administrative Tribunals Act, 1985 pertaining to the composition of

[2] (1987) 1 SCC 124

the Tribunal to ensure selection of proper and competent people to the posts of Presiding Officers of the Tribunal.

4. The judgment in ***S.P. Sampath Kumar*** (supra) was referred to a larger Bench for re-consideration in view of later rulings, notably ***R.K. Jain* v. *Union of India***[3] which had called for a review with respect to functioning of tribunals. In ***L. Chandra Kumar* v. *Union of India*,**[4] this Court held that the power of judicial review vested in the High Courts and this Court under Articles 226 and 227, and 32 is a part of the basic structure of the Constitution. Therefore, the Court held that the Tribunals cannot act as *substitutes* of the High Courts and this Court, and that their functioning is only *supplementary* and that all decisions of administrative Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. Addressing the issue of the dependence of tribunals on the Executive for administrative requirements, a recommendation was made for creation of a single umbrella organisation which will be an independent supervisory body to oversee the working of the Tribunals. This Court was also of the opinion that the Ministry of Law and Justice, Government of India should be the nodal Ministry.

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[3] [1993] 4 SCC 119
[4] (1997) 3 SCC 261

5. Part I-B and Part I-C were inserted in the Companies Act, 1956 providing for the constitution of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). Madras Bar Association filed a Writ Petition in the Madras High Court challenging the vires of the above provisions on the grounds of violation of rule of law, doctrine of separation of powers and the independence of the judiciary, which are essential features of the basic structure of the Constitution. The Madras High Court allowed the Writ Petition, which was subject matter of several appeals which were disposed of by this Court in ***Union of India* v. *R. Gandhi, President, Madras Bar Association***[5]. This Court was of the opinion that while it cannot be said that the Legislature is denuded the power to transfer judicial functions performed by courts to Tribunals, nevertheless *independent* judicial Tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the rule of law. It was held in the above judgment that judicial independence and separation of judicial power from the executive, are part of common law traditions implicit in a Constitution like ours. The creation of the NCLT and NCLAT was upheld. However, the defects found in Parts

[5] (2010) 11 SCC 1

I-B and I-C of the Companies Act, 1956 were directed to be rectified by suitable amendments with modifications suggested by this Court in order to uphold the judicial independence of the Tribunals. The suggestions pertained to composition of the Search-cum-Selection Committee (for appointment of members of the tribunals), qualifications for appointment, and service conditions of members of the Tribunals. Later, Madras Bar Association had assailed the constitutional validity of the National Tax Tribunal Act, 2005. This Court held the National Tax Tribunal Act, 2005 to be unconstitutional.[6] Nonetheless, the vesting of adjudicatory functions in Tribunals was held to be not violative of the basic structure of the Constitution. The Companies Act, 2013 replaced the earlier Act of 1956 in which amendments were made to provisions relating to the establishment of NCLT and NCLAT. A Writ Petition was filed under Article 32 by the Madras Bar Association questioning the amended provisions of Chapter XXVII of the Companies Act, 2013, and more particularly Sections 408, 409, 411(3), 412, 413, 425, 431 and 434. The complaint of the Madras Bar Association in the said Writ Petition was that the offending provisions were analogous to the provisions in the 1956 Act which were found to be unconstitutional by this Court in

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[6] *Madras Bar Association* v. *Union of India*, (2014) 10 SCC 1.

Union of India* v. *Madras Bar Association* (2010)** (supra). The constitutional validity of the provisions in Chapter XXVII of the Companies Act, 2013 was upheld by a judgment in ***Madras Bar Association* v. *Union of India[7]. However, this Court was of the view that certain provisions relating to composition of the Search-cum-Selection Committee and qualification of Members of the Tribunals are invalid as they are contrary to the directions issued by the earlier judgment in ***Union of India* v. *Madras Bar Association* (2010)** (supra).

6. By the Finance Act, 2017, amendments were made to certain Acts to provide for merger of Tribunals and other authorities, and conditions of service of Chairpersons, Members, etc. According to Section 183 of the Finance Act, 2017, the provisions of Section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal or Appellate Tribunal or other authorities, as specified under Column (2) of the Eighth Schedule to the Finance Act, 2017 on and from the appointed day i.e. 26.05.2017. It was further provided that Section 184 shall not apply to those holding such office immediately before the appointed day. Section 184

[7] (2015) 8 SCC 583

empowered the Central Government to make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Presiding Officer, Vice-President, or Member of the Tribunal or the Appellate Tribunal or other authorities as specified in Column (2) of the Eighth Schedule to the 2020 Rules. Maximum tenure of the aforementioned persons was fixed as five years. Chairperson, Chairman or Presiding Officer of the Tribunals cannot continue beyond 70 years. Likewise, the Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member shall be entitled to continue till they attain the age of 67 years. The validity of the Finance Act, 2017 and the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2017 (hereinafter referred to as "the 2017 Rules") came up for consideration before this Court in ***Rojer Mathew* v. *South Indian Bank Limited***[8]. This Court formulated the following issues for consideration:

> *"86.1. (I.) Whether the "Finance Act, 2017" insofar as it amends certain other enactments and alters conditions of service of*

[8] (2020) 6 SCC 1

persons manning different Tribunals can be termed as a "Money Bill" under Article 110 and consequently is validly enacted?

86.2. (II.) If the answer to the above is in the affirmative then whether Section 184 of the Finance Act, 2017 is unconstitutional on account of excessive delegation?"

86.3 III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

86.4 IV. Whether there should be a Single Nodal Agency for administration of all Tribunals?

86.5 V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

86.6 VI. Whether judges of Tribunals set up by Acts of Parliament under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

86.7 VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

86.8 VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches."

7. The issue pertaining to whether the Finance Act, 2017 was a "Money Bill" (and if not, the need for it to be passed by the Rajya Sabha) was referred to a larger Bench and it was held that Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions. The 2017 Rules were struck down as being contrary to the principles of the Constitution as interpreted by various decisions of this Court (including those previously referred to herein). The Central Government was directed to re-formulate the Rules strictly in conformity and in accordance with the principles delineated by this Court in its earlier judgments read with the observations made in the judgment in ***Rojer Mathew*** (supra). Non-discriminatory and uniform conditions of service including assured tenure were directed to be formulated by the Central Government in the new set of Rules. A Writ of Mandamus was issued to the Ministry of Law & Justice to carry out a judicial impact assessment for all the Tribunals. Appointments to the Tribunals, Appellate Tribunals and the other Authorities were directed to be held in accordance with the respective statutes which governed the conditions of service of members of Tribunals before the enactment of the Finance Act, 2017 till a fresh set of Rules were made by the

Central Government. The Union of India was granted liberty to seek modification of the said order after fresh Rules are framed.

8. Thereafter, by a Notification dated 12.02.2020, the Central Government in exercise of the power conferred by Section 184 of the Finance Act, 2017 made the impugned 2020 Rules. The 2020 Rules which deal with the qualification and appointment of members by recruitment, procedure for inquiry into misbehavior, House Rent Allowance and other Conditions of Service are the subject matter of challenge in these cases before us and will be dealt with in detail in the succeeding paragraphs.

9. Pursuant to the liberty granted by this Court in the judgment of ***Rojer Mathew*** (supra), the Union of India filed Miscellaneous Application No.1152 of 2020 placing the 2020 Rules before this Court and seeking a direction that the 2020 Rules would apply to all persons appointed as Members, President, Chairperson, etc. of Tribunals after the appointed day *i.e.* 26.05.2017. Several applications were filed by Bar Associations and the Members of the Tribunals seeking directions to fill up the vacant posts by making appointments to the Tribunals and for clarifications relating to the retrospective operation of the 2020 Rules. The Madras Bar Association filed a Writ Petition under Article 32 seeking a

declaration that the 2020 Rules are *ultra vires* of Article 14, 21 and 50 of the Constitution apart from being violative of the principles of separation of powers and independence of the judiciary. According to the Writ Petitioner, the 2020 Rules were also contrary to the earlier judgments of this Court in ***Union of India* v. *Madras Bar Association* (2010)** (supra)[9], ***Madras Bar Association* v. *Union of India* (2014)** (supra)[10] and ***Rojer Mathew*** (supra). Other Writ Petitions filed in the High Courts were transferred to this Court.

10. We requested Mr. Arvind P. Datar, learned Senior Counsel who has been actively associated with the litigation from the beginning and who was appointed as Amicus Curiae in the earlier rounds to assist this Court as Amicus Curiae to which he readily and graciously accepted. We have heard Mr. Arvind P. Datar, learned Senior Counsel (Amicus Curiae), Mr. Mukul Rohtagi, Mr. C.A. Sundaram, learned Senior Counsel, Mr. Vikas Singh, learned Senior Counsel, Ms. Anitha Shenoy, learned Senior Counsel, Mr. K.K. Venugopal, learned Attorney General for India, Mr. Balbir Singh, learned Additional Solicitor General, Mr. S.V. Raju, learned Additional Solicitor General, Mr. R. Balasubramanium, learned Senior Counsel,

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[9] (2010) 11 SCC 1
[10] (2014) 10 SCC 1

Mr. A.S. Chandhiok, learned Senior Counsel, Mr. Virender Ganda, learned Senior Counsel, Mr. M.S. Ganesh, learned Senior Counsel, Mr. Sidharth Luthra, learned Senior Counsel, Mr. C.S. Vaidyanathan, learned Senior Counsel, Mr. Guru Krishnakumar, learned Senior Counsel, Mr. Rakesh Kumar Khanna, learned Senior Counsel, Mr. Gautam Misra, learned Senior Counsel, Mr. P.S. Narasimha, learned Senior Counsel and other learned counsel appearing for the parties. For the sake of convenience, Writ Petition (Civil) No.804 of 2020 filed by the Madras Bar Association is taken as the lead case. The points raised in the said Writ Petition will broadly cover all the issues that have been the subject matter of discussion during the course of the hearing of this case.

11. The main issues raised in the Writ Petition are that the 2020 Rules are unconstitutional as:

a) The Search-cum-Selection Committees provided for in the 2020 Rules did not conform to the principles of judicial dominance;

b) Appointment of persons without judicial experience to the posts of Judicial Members/ Presiding Officer/ Chairpersons is in contravention to the earlier judgments of this Court;

c) The term of office of the Members for four years is contrary to the earlier decisions of this Court;

d) Advocates are not being made eligible for appointment to most of the Tribunals;

e) Administrative control of the executive in matters relating to appointments and conditions of service is violative of the principles of separation of powers and independence of judiciary and demonstrates non-application of mind.

NATIONAL TRIBUNALS COMMISSION:

12. Mr. Datar, learned Amicus Curiae submitted that there is an imperative need for the Tribunals to function independently and free from executive control. Tribunals which are exercising power once vested with the High Courts and adjudicating disputes should be completely independent to infuse confidence in the mind of the litigant public. He relied upon the observations of Vivian Bose, J. in ***Bidi Supply Co.* v. *Union of India***[11] which are as follows:

> *"The heart and core of a democracy lies in the judicial process, and that means independent and fearless judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking."*

[11] (1956) SCR 267

13. Mr. Datar also referred to the Reports of the Franks[12] and Leggatt[13] Committees which describe the role of Tribunals in the United Kingdom in a detailed manner. Mr. Datar brought to our notice that the recommendations of the Leggatt Committee were cited with approval in the judgment of this Court in ***Union of India* v. *Madras Bar Association* (2010)** (supra). According to the learned Amicus Curiae, the administrative support is provided by a Department of the Government of India, the Secretary of which is a Member of the Search-cum-Selection Committee. He cited the judgment of this Court in ***L. Chandra Kumar*** (supra) to argue that there should be a wholly independent agency for the administration of all the Tribunals. The learned Amicus Curiae also brought to our notice a statement made by Mr. Arun Jaitley, the then Minister of Law and Justice on the floor of the Parliament on 02.08.2001 that there was a proposal to set up a Central Tribunals Division. According to the learned Amicus Curiae, setting up a National Tribunals Commission as a supervisory body over the Tribunals would go a long way in

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[12] the Franks Report of 1957 was issued by a British committee of inquiry chaired by Sir Oliver Franks; the committee was set up by the Lord Chancellor, in view of concerns voiced with regard to the range, and diversity of tribunals, uncertainty regarding the procedures they followed and lack of cohesion and supervision.

[13] Finalized in 2001, the Sir Andrew Leggatt Committee reviewed the existing tribunal system in UK in its report *'Tribunals for Users – One System, One Service'.* The Report, highlighted concerns in the court system, such as delay, expense, technicality and formality, lack of expertise etc and recommended, a new *'independent, coherent, professional, cost-effective, user friendly'* and structurally reformed Tribunal system

improving the effective functioning of the Tribunals and enhancing the public image of the Tribunals. The mounting arrears in the Tribunals is mainly due to the delay in filling up the vacancies of the Presiding Officers and members of the Tribunals. The learned Amicus Curiae suggested that there should be a National Tribunals Commission manned by retired Judges of the Supreme Court, Chief Justices of the High Courts and Members from the Executive which will have a full-time Secretary performing the following functions:

a) Selection of candidates;
b) Re-appointment of candidates;
c) Conducting of inquiry against Members;
d) Sanction leave of Members wherever necessary;
e) Monitor the functioning of the Tribunals, in particular, the arrears and disposal of cases and filling up of vacancies and ensuring adequate infrastructure; and
f) Ensure adequate infrastructure and IT support.

14. The learned Attorney General was also of the opinion that constitution of a National Tribunals Commission would provide a solution to the existing problems and ensure the smooth functioning of the Tribunals.

15. Docket explosion and mounting arrears are serious problems faced by the justice system in this country. Initially, creation of

Tribunals was understood to provide a solution to the problems and to ease the burden on the Constitutional Courts. Specialized Tribunals were set up to meet the exigencies of adjudication of disputes in some branches of law. A constant complaint has been that the Tribunals are not free from the Executive control and that they are not perceived to be independent judicial bodies. There is an imperative need to ensure that the Tribunals discharge the judicial functions without any interference of the Executive whether directly or indirectly.

16. This Court has been repeatedly urging the Union of India to set up a single umbrella organization which would be an independent body to supervise the functioning of the Tribunals and ensure that the independence of the Members of the Tribunals is maintained. For the first time, this Court in its judgment in ***L. Chandra Kumar*** (supra) persuaded the Government of India to have the Ministry of Law as the nodal Ministry which would appoint an independent supervisory body to oversee the working of the Tribunals. The observations in ***L. Chandra Kumar*** are to the following effect:

> "96. ...*The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some*

Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out."

17. In para 70 of ***Union of India* v. *Madras Bar Association* (2010)** (supra), this Court deprecated the practice of administrative support from the Departments other than the Ministry of Law and Justice. Dependence on the parent Ministry or departments by the Members of the Tribunal for their facilities and administrative needs was found to be contrary to the principle of independence of the judiciary. Later, the learned Amicus Curiae submitted 'a concept note' on the National Tribunals Commission which was approved by this Court in ***Rojer Mathew* v. *South Indian Bank Limited***[14]. This Court was of the opinion that an autonomous oversight body should be established for recruitment of members and functioning of the Tribunals. In fact, the Court in ***Rojer Mathew*** (supra) even held that control of the tribunals by the executive is fraught and undermines their independence:

> "168. We are in complete agreement with the analogy elucidated by the Constitution Bench in the *Fourth Judges Case* (supra) for compulsory need for exclusion of control of the Executive over quasi-judicial bodies of Tribunals discharging responsibilities akin to Courts. The Search-cum-Selection Committees as envisaged in the Rules are against the constitutional scheme inasmuch as they dilute the involvement of judiciary in the process of appointment of members of

[14] (2018) 16 SCC 341

tribunals which is in effect an encroachment by the executive on the judiciary."

18. The suggestions made by the learned Amicus Curiae regarding the setting up of All India Tribunal Service on the pattern prevalent in the United Kingdom was accepted. This Court was convinced that the performance and functioning of the Members of the Tribunals must be reviewed by the said independent body in the same way as superintendence by the High Courts under Article 235 of the Constitution. By an order dated 07.05.2018, this Court in fact, recommended constitution of a wholly independent agency to oversee the working of the Tribunals.

19. While considering the vires of validity of the 2017 Rules, this Court in ***Rojer Mathew*** (supra) referred to the current problems faced by the Tribunals. Administration of the Tribunals by the sponsoring or parent Ministry or Department concerned and dependence for financial, administrative or other facilities by the Tribunals on the said Department which is a litigant before them are some of the serious problems highlighted by this Court. There is a likelihood of the independence of adjudication process being compromised in a situation where the Tribunal is made dependent

for its needs on a litigant. The need for financial independence of the Tribunals has been dealt with by this Court in ***Rojer Mathew*** (supra). A direction was given to the Ministry of Finance to earmark separate and dedicated funds for the Tribunals from the Consolidated Fund of India so that the Tribunals will not be under the financial control of the parent Departments. We reiterate the importance of the constitution of an autonomous oversight body for recruitment and supervision of the performance of the Tribunals. It is high time that the observations and suggestions made in this regard by this Court shall be implemented by the Union of India. An independent body headed by a retired Judge of the Supreme Court supervising the appointments and the functioning of the Tribunals apart from being in control of any disciplinary proceedings against the Members would not only improve the functioning of the Tribunals but would also be in accordance with the principles of judicial independence. We also notice that in the final directions and conclusions recorded in ***Roger Mathew*** (supra)[15], the wisdom or legality of setting up such an independent oversight body was not

[15] See para 238 of ***Rojer Mathew*** (supra), which refers only the issue relating to Money Bills to a larger bench.

doubted and it was not referred to a larger Bench, since the view in ***L. Chandra Kumar*** on this point was not doubted.

20. In view of the preceding discussion, we direct the Union of India to set up a National Tribunals Commission as suggested by this Court by its order dated 07.05.2018 at the earliest. Setting up of such Commission would enhance the image of the Tribunals and instill confidence in the minds of the litigants. Dependence of the Tribunals for all their requirements on the parent Department will not extricate them from the control of the executive. Judicial independence of the Tribunals can be achieved only when the Tribunals are provided the necessary infrastructure and other facilities without having to lean on the shoulders of the executive. This can be achieved by establishment of an independent National Tribunals Commission as suggested above. To stop the dependence of the Tribunals on their parent Departments for routing their requirements and to ensure speedy administrative decision making, as an interregnum measure, we direct that there should be a separate "tribunals wing" established in the Ministry of Finance, Government of India to take up, deal with and finalize requirements of all the Tribunals till the National Tribunals Commission is established.

SEARCH-CUM-SELECTION COMMITTEE:

21. The contention of the learned Amicus Curiae is that the composition of the Search-cum-Selection Committees to make recommendations for appointment as Chairman or Chairperson or President and the other members of the Tribunals is contrary to the requirements of judicial dominance as held by the judgments of this Court. Mr. Datar submitted that the Schedule to the 2020 Rules provides for the Search-cum-Selection Committees for all the 19 Tribunals which broadly consist of the Chief Justice of India or a Judge of the Supreme Court nominated by him (who will serve as the Chairperson of the Search-cum-Selection committee), outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or Chairperson or President of the Tribunal or the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of the Tribunal and two Secretaries to the Government of India. He stated that the Search-cum-Selection Committees cannot have the Secretaries of the sponsoring departments as its members, as held by this Court in ***Madras Bar Association v. Union of India*** **(2014)** (supra).

22. During the course of arguments, the learned Attorney General submitted that the 2020 Rules would be amended providing for a

casting vote to the Chairperson of the Search-cum-Selection Committee to allay the apprehension of the petitioner. In that event, judicial dominance in the Search-cum-Selection Committee can be maintained as the Chief Justice of India or his nominee and the Presiding Officer of the Tribunal who is normally a retired Judge of the Supreme Court or a retired Chief Justice of a High Court, who represent the judiciary, along with a casting vote to the Chief Justice of India or his nominee, will be in majority in the Search-cum-Selection Committee. In response to the submission of the learned Attorney General, Mr. Datar argued that there are some Tribunals where the Presiding Officer of the Tribunal is not a retired Judge of the Supreme Court or Chief Justice of the High Court or Judge of a High Court. According to Mr. Datar, the Selection Committee should consist of the Chief Justice of India or his nominee along with another Judge of the Supreme Court and two Secretaries who are not from the sponsoring departments with a casting vote to the Chief Justice of India or his nominee.

23. The learned Attorney General for India in his usual fairness submitted that the composition of the Search-cum-Selection Committees, according to the 2020 Rules consist of the Chief Justice of India or his nominee, the Chairman or Chairperson or President

or the outgoing Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India. He submitted that there has been no instance where the Secretaries to Government disagreed with the views of the Judge of the Supreme Court. All the decisions of the Search-cum-Selection Committees till now have been unanimous. In any event, he suggested that in case of a dead lock, the Chairperson of the Search-cum-Selection Committee who is Chief Justice of India or his nominee shall have a casting vote and the 2020 Rules will be amended accordingly to include the casting vote to the Chairperson of the Search-cum-Selection Committee. The learned Attorney General further submitted that in case the Chairman or Chairperson or President of the Tribunal is himself seeking re-appointment, the Search-cum-Selection Committee shall have another Judge of the Supreme Court as a Member. He submitted that the acceptance of the request made by the petitioner that there should be two Judges of the Supreme Court in the Search-cum-Selection Committee will lead to practical difficulties. There are 475 members in all the Tribunals put together and there will be frequent retirements and to fill up the said posts, the requirement for the meetings of the Search-cum-Selection Committees will arise on a regular basis. It might not be possible for

two Judges of the Supreme Court to spare so much time in view of their already busy schedules. Countering the submission of the learned Amicus Curiae that Rule 4 of the 2020 Rules is violative of the judgments of this Court, the learned Attorney General submitted that this Court in ***Union of India*** **v.** ***Madras Bar Association*** **(2010)** (supra) accepted that the Secretary of the department concerned can be a member of the Search-cum-Selection Committee. It is to be noted that this Court held to the contrary in ***Madras Bar Association v. Union of India*** **(2014)** (supra). He argued that in view of the law laid down by this Court in ***Sundeep Kumar Bafna v. State of Maharashtra***[16] that in case of a conflict between decisions of two Coordinate Benches of this Court, the law laid down by the earlier Bench shall prevail. He further stated that in a later judgment in ***Madras Bar Association v. Union of India*** **(2015)** (supra) this Court approved the Search-cum-Selection Committee consisting of the Secretary of the sponsoring department.

24. The issue of constitution of the Search-cum-Selection Committees for appointment to the posts of Chairperson and Members of the Tribunal has been dealt with by this Court earlier. Section 10 FX of the Companies Act, 1956 provided for constitution

[16] (2014) 16 SCC 623

of a Search-cum-Selection Committee consisting of the Chief Justice of India or his nominee as the Chairperson and four Secretaries to the Government of India from the Ministry of Finance and Company Affairs, Ministry of Labour, and Ministry of Law and Justice respectively as Members. The validity of Section 10 FX was challenged by the Madras Bar Association as being violative of the principles of separation of powers and judicial independence. This Court in ***Union of India*** **v.** ***Madras Bar Association*** **(2010)** (supra) while dealing with a judgment of the Madras High Court held that Parts IB and IC of the Companies Act can be made operational only after making suitable amendments suggested therein. In respect of the Search-cum-Selection Committee, the amendment suggested by this Court was that it should consist of the Chief Justice of India or his nominee as Chairperson and another Judge of the Supreme Court and two Secretaries of the Government of India from the Ministry of Finance and Company Affairs and the Ministry of Law and Justice. It is relevant to mention that in the said judgment, this Court took note of the fact that the Secretary of the sponsoring department is serving as a member of the Search-cum-Selection Committee. This Court was of the opinion that the Tribunals will not be considered independent unless reforms that were implemented in the United

Kingdom pursuant to the Report of the Leggatt Committee are implemented in the Tribunals in India. Nonetheless, this Court observed that the Secretary, Ministry of Finance and Company Affairs can be a member of the Search-cum-Selection Committee for appointment of members to NCLT and NCLAT.

25. In the meanwhile, the Madras Bar Association filed another Writ Petition challenging the creation of the National Tax Tribunal. With regard to the constitution of the Search-cum-Selection Committee for the National Tax Tribunal, this Court in ***Madras Bar Association v. Union of India*** **(2014)** (supra) observed that a party to a litigation, i.e. the Secretary of the concerned department, cannot be permitted to participate in the selection process for appointment to the posts of Chairperson and Members of the Tribunal. This Court was of the opinion that the said procedure would be contrary to the recognised constitutional conventions reiterated by Lord Diplock in ***Hinds v. R***[17], which is as follows:

> *"It would make a mockery of the Constitution, if the legislature could transfer the jurisdiction previously exercisable by holders of judicial offices to holders of a new court/Tribunal (to which some different name was attached) and to provide that persons holding the new judicial offices should not be appointed in the*

[17] (1976) 1 All ER 353 (PC)

manner and on the terms prescribed for appointment of members of the judicature".

26. Provisions made for the NCLT and NCLAT in the Companies Act, 2013 were again the subject matter of challenge before this Court in ***Madras Bar Association v. Union of India*** **(2015)** (supra). Section 412 of the Companies Act, 2013 deals with the selection of the Members of the NCLT and NCLAT. The President of the Tribunal, the Chairperson and Judicial Members of the Appellate Tribunal shall be appointed after consultation with the Chief Justice of India. The Search-cum-Selection Committee for appointment of the Members of the Tribunal and the Technical Members of the Appellate Tribunal shall consist of the Chief Justice of India or his nominee, a Senior Judge of the Supreme Court or the Chief Justice of a High Court and the Secretaries of the Ministry of Corporate Affairs, Ministry of Law and Justice and the Ministry of Finance. In ***Madras Bar Association v. Union of India*** **(2015)** (supra), this Court expressed its displeasure in the constitution of the Search-cum-Selection Committee which is contrary to the principles laid down in its earlier judgment in ***Union of India v. Madras Bar Association*** **(2010)** (supra). Section 412 (2) of the Companies Act, 2013 was held to be not valid as it was found to be against the binding precedents

of this Court in ***Union of India v. Madras Bar Association*** **(2010)** (supra). A direction was issued to remove the deficiency in the constitution of the Search-cum-Selection Committee by bringing the same into accord with sub-para (viii) of para 120 of the judgment in ***Union of India v. Madras Bar Association*** (supra).

27. The 2017 Rules were made in exercise of the powers conferred under Section 184 of the Finance Act, 2017. Rule 4 provides for method of recruitment to the post of Chairman or Chairperson or President and the Members of the Tribunals. Under the 2017 Rules, the Search-cum-Selection Committee consisted of the Chief Justice of India or his nominee as the Chairperson and the Chairman of the Tribunal along with the Secretaries to Government. While striking down the 2017 Rules, this Court in ***Rojer Mathew*** (supra) commented that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain[18]. This Court further observed that excessive interference by the executive in

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[18] It was held that
"163. We are in agreement with the contentions of the Learned Counsel for the petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The doctrine of separation of powers has been well recognised and re-interpreted by this Court as an important facet of the basic structure of the Constitution, in its dictum in Kesavananda Bharati v. State of Kerala, and several other later decisions. The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions."

appointment of the members would be detrimental to the independence of judiciary and an affront to the doctrine of separation of powers. The principles laid down in the aforementioned judgments are binding precedents which have to be implemented by the Respondent. However, the 2020 Rules which are in challenge in the Writ Petitions replicate the 2017 Rules in respect of the constitution of the Search-cum-Selection Committees, insofar as they do not ensure judicial dominance. We appreciate the stand taken by the learned Attorney General that a casting vote will be given to the Chief Justice of India or his nominee as the Chairperson of the Search-cum-Selection Committee. We also accept the submission of the learned Attorney General that normally the Chairperson of the Tribunal would be a retired Judge of the Supreme Court or the Chief Justice of a High Court. As such, two members of the judiciary with a casting vote to the Chairperson of the Search-cum-Selection Committee should ensure judicial dominance over the selection process and take care of the grievances of the Writ Petitioner. Mr. Datar submitted that there are certain Tribunals in which the Chairperson may not be a judicial member. In such Tribunals, we are of the opinion that the Search-cum-Selection Committee should have a retired Judge of the Supreme Court or a

retired Chief Justice of a High Court nominated by the Chief Justice of India in place of the Chairperson of the Tribunal.

28. The learned Attorney General stated that the 2020 Rules would be amended to reflect that whenever the re-appointment of the Chairman or Chairperson or President of a Tribunal is considered by the Search-cum-Selection Committee, the Chairman or Chairperson or President of the Tribunal shall be replaced by a retired Judge of the Supreme Court or a retired Chief Justice of a High Court nominated by the Chief Justice of India. We approve this submission of the Attorney General.

29. It has been repeatedly held by this Court that the Secretaries of the sponsoring departments should not be members of the Search-cum-Selection Committee. We are not in agreement with the submission of the learned Attorney General that the Secretary of the sponsoring department being a member of the Search-cum-Selection Committee was approved by this Court in ***Union of India v. Madras Bar Association*** **(2010)** (supra) and it would prevail over the later judgment in **Madras Bar Association v. Union of India (2014)** (supra). We have already referred to the findings recorded in paragraph 70 of the judgment in ***Union of India v. Madras Bar Association*** **(2010)** (supra) that the sponsoring department should

not have any role to play in the matter of appointment to the posts of Chairperson and members of the Tribunals. Though the ultimate direction of the Court was to constitute a Search-cum-Selection Committee for appointment of members to NCLT and NCLAT of which Secretary, Ministry of Finance and Company Affairs is a member, the ratio of the judgment is categorical, which is to the effect that Secretaries of the sponsoring departments cannot be members of the Search-cum-Selection Committee. We, therefore, see no conflict of opinion in the two judgments as argued by the learned Attorney General. However, we find merit in the submission of the learned Attorney General that the presence of the Secretary of the sponsoring or parent department in the Search-cum-Selection Committee will be beneficial to the selection process. But, for reasons stated above, it is settled that the Secretary of the parent or sponsoring Department cannot have a say in the process of selection and service conditions of the members of Tribunals. Ergo, the Secretary to the sponsoring or parent Department shall serve as the Member-Secretary/Convener to the Search-cum-Selection Committee and shall function in the Search-cum-Selection Committee without a vote.

30. The Government of India is duty bound to implement the directions issued in the earlier judgments and constitute the Search-cum-Selection Committees in which the Chief Justice of India or his nominee shall be the Chairperson along with the Chairperson of the Tribunal if he is a retired Judge of the Supreme Court or a retired Chief Justice of a High Court and two Secretaries to the Government of India. In case the Tribunal is headed by a Chairperson who is not a judicial member, the Search-cum-Selection Committee shall consist of the Chief Justice of India or his nominee as Chairperson and a retired Judge of the Supreme Court or a retired Chief Justice of a High Court to be nominated by the Chief Justice of India and Secretary to the Government of India from the Ministry of Law and Justice and a Secretary of a department other than the parent or sponsoring department to be nominated by the Cabinet Secretary. As stated above, the Secretary of the parent or sponsoring department shall serve as the Member-Secretary or Convener, without a vote.

31. Rule 4 (2) of the Rules postulates that a panel of two or three persons shall be recommended by the Search-cum-Selection Committee from which the appointments to the posts of Chairperson or members of the Tribunal shall be made by the Central

Government. The learned Amicus Curiae voiced serious objections to Rule 4(2) on the ground that it would be compromising judicial independence. According to Mr. Datar, the procedure for appointment to the Tribunals should be completely outside executive control. The learned Attorney General stated that a panel of names consisting two or three persons is essential because their antecedents have to be examined by the Intelligence Bureau before appointing them to a Tribunal. He suggested that the number of persons to be recommended can be two instead of three to limit the discretion of the Appointments Committee of the Cabinet. The recommendations for appointments by the Search-cum-Selection Committee should be final and the executive should not be permitted to exercise their discretion in the matter of appointments to the Tribunals. Accordingly, we direct that Rule 4(2) of the 2020 Rules shall be amended and till so amended, that it be read as empowering the Search-cum-Selection Committee to recommend the name of only one person for each post. However, taking note of the submissions made by the learned Attorney General regarding the requirement of the reports of the selected candidates from the Intelligence Bureau, another suitable person can be selected by the Search-cum-Selection Committee and placed in the waiting list. In

case, the report of the Intelligence Bureau regarding the selected candidate is not satisfactory, then the candidate in the waiting list can be appointed.

TERM OF OFFICE

32. Mr. Datar argued that the term of office of the Chairperson and the members of the Tribunal should be for a minimum period of five years by relying upon the judgments of this Court in ***S.P. Sampath Kumar*** (supra), ***Union of India v. Madras Bar Association*** **(2010)** (supra) and ***Rojer Mathew*** (supra). He referred to Section 184 of the Finance Act, 2017 which stipulated the term of office shall be for a period not exceeding five years. He submitted that in spite of this Court holding that the tenure should be between five to seven years, the 2020 Rules have provided for only four years as the maximum term. According to him, a term of minimum five years for the members of the Tribunals with a right of re-appointment is mandatory. Citing Rule 9(2) of the 2020 Rules which stipulates that the term of office shall be four years or till a person attains the age of 65 years whichever is earlier, the learned Amicus Curiae argued that a Judge of a High Court will not get more than three years as a member of the Tribunal after his retirement at the age of 62 years

even if he is appointed immediately after his superannuation. He mentioned that in 18 out of the 19 Tribunals governed by the 2020 Rules, retired Judges of High Courts can be appointed either as Vice Chairperson or as the member. In view of the delay in making appointments, most of such retired Judges of High Courts will normally have a very short tenure of not more than two years. Therefore, Mr. Datar submitted that Rule 9 (2) requires to be struck down as being arbitrary.

33. According to the learned Attorney General, as the term of four years is subject to re-appointment, it would not make much of a difference if the term fixed is four years instead of five years. He mentioned that due to the provision for re-appointment, eligible lawyers who shall be appointed at the age of 45 years will have the advantage of four or five extensions or till the said member reaches the age of 65 years.

34. This Court directed the extension of the tenure of the members of the Tribunal from three years to seven or five years subject to their eligibility in the case of ***Union of India v. Madras Bar Association*** **(2010)** (supra). This Court was of the opinion that the term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, the term would be

over. In the said judgment it was further observed that the Tribunals would function effectively and efficiently only when they are able to attract younger members who have a reasonable period of service. In spite of the above precedent, a tenure of three years was fixed for the members of Tribunals in the 2017 Rules. While setting aside the 2017 Rules, this Court in ***Rojer Mathew*** (supra) held that a short period of service of three years is anti-merit as it would have the effect of discouraging meritorious candidates to accept the posts of judicial members in the Tribunals. In addition, this Court was also convinced that the short tenure of members increases interference by the executive jeopardizing the independence of judiciary.

35. The 2020 Rules are not in compliance with the principles of law laid down in ***Union of India v. Madras Bar Association*** **(2010)** (supra) and ***Rojer Mathew*** (supra) in respect of the tenure of the members of the Tribunals in spite of this Court repeatedly holding that short tenure of members is detrimental to the efficiency and independence of the Tribunals. Rule 9(1) of the 2020 Rules provide for a term of four years or till a Chairman or Chairperson or President attains the age of 70 years whichever is earlier. No rationale except that four years is more than three years prescribed in the 2017 Rules (described as too short, in ***Roger Mathew*** (supra)) was put forward

on behalf of the Union of India. In so far as the posts of Vice Chairman or Vice-Chairperson or Vice-President and members are concerned, Rule 9(2) fixes the tenure as four years or till they attain the age of 65 years whichever is earlier. In view of the law laid down in the earlier judgments, we direct the modification of the tenure in Rules 9(1) and 9(2) of the 2020 Rules as five years in respect of Chairman or Chairperson, Vice Chairman or Vice-Chairperson and the members. Rule 9(1) permits a Chairman, Chairperson or President of the Tribunal to continue till 70 years which is in conformity with Parliamentary mandate in Section 184 of the Finance Act. However, Rule 9(2) provides that Vice Chairman and other members shall hold office till they attain 65 years. We are in agreement with the submission made by the learned Amicus Curiae that under the 2020 Rules, the Vice Chairman, Vice-Chairperson or Vice-President or members in almost all the Tribunals will have only a short tenure of less than three years if the maximum age is 65 years. We, therefore, direct the Government to amend Rule 9 (1) of the 2020 Rules by making the term of Chairman, Chairperson or President as five years or till they attain 70 years, whichever is earlier and other members dealt with in Rule 9(2) as five years or till they attain 67 years, whichever is earlier.

36. Section 184 of the Finance Act, 2017 provides for reappointment of Chairpersons, Vice-Chairpersons and members of the Tribunals on completion of their tenure. There is no mention of reappointment in the 2020 Rules. However, the learned Attorney General submitted that the members shall be entitled to seek reappointment. Reappointment for at least one term shall be provided to the persons who are appointed to the Tribunals at a young age by giving preference to the service rendered by them.

HOUSE RENT ALLOWANCE

37. According to Rule 15 of the 2020 Rules, the Chairperson and the other members of the Tribunals shall be entitled to house rent allowance at the same rate admissible to officers of the Government of India holding grade 'A' posts carrying the same pay. The contention of the learned Amicus Curiae is that it is a well-known fact that it is difficult to get Judges of High Courts of merit and ability as members of Tribunals, particularly due to the absence of a provision for housing. Lack of housing facilities becomes a deterrent for retired Judges from States outside Delhi to accept appointments to the Tribunals. It will not be possible for a retired Judge of the Supreme Court or the Chief Justice of a High Court or a Judge of a

High Court to get suitable accommodation in Delhi, where most of the Tribunals are situated, for Rs. 75,000/- per month which is paid as house rent allowance. Similarly, where tribunals have benches, members (especially those drawn from amongst Advocates) would find it hard put to find accommodation if there is insufficient incentive, whenever they have to move to different cities. The learned Attorney General relied upon the observations made by this Court in ***Rojer Mathew*** (supra) that the retired Judges of the High Court cannot be equated with the sitting Judges of the High Court and are not entitled to the same perquisites. It is also the submission of the learned Attorney General that it is not possible to provide housing to all the Presiding Officers and members of the Tribunals in view of the acute shortage of housing in Delhi.

38. Experience has shown that lack of housing in Delhi has been one of the reasons for retired Judges of the High Courts and the Supreme Court to not accept appointments to Tribunals. At the same time, scarcity of housing is also a factor which needs to be kept in mind. The only way to find a solution to this problem is to direct the Government of India to make serious efforts to provide suitable housing to the Chairperson and the members of the Tribunals and in case providing housing is not possible, to enhance the house rent

allowance to Rs.1,25,000/- for members of Tribunals and Rs.1,50,000/- for the Chairman or Chairperson or President and Vice Chairman or Vice Chairperson or Vice President of Tribunals. In other words, an option should be given to the Chairperson and the members of the Tribunals to either apply for housing accommodation to be provided by the Government of India as per the existing rules or to accept the enhanced house rent allowance. This direction shall be effective from 01.01.2021.

ADVOCATES AS JUDICIAL MEMBERS

39. The learned Amicus Curiae complained of the deliberate exclusion of the Advocates from being considered for appointment as judicial members in a majority of Tribunals by the 2020 Rules. It was argued that in respect of seven tribunals (such as Central Administrative Tribunal, Income Tax Appellate Tribunal, Customs Excise and Sales Tax Appellate Tribunal, etc.), the 2020 Rules impose a new condition whereby Advocates without 25 years of experience are ineligible. It is submitted that there is nothing in the provisions of the Finance Act, 2017, with respect to exclusion, from consideration, of Advocates, nor any restrictive condition and, on the other hand, the parent enactments and previously existing rules enabled Advocates (who were eligible to be appointed as Judges of

High Courts) to be considered for appointment for these tribunals. The learned Amicus curiae argued that it would be very difficult for competent and successful Advocates, in the concerned field, to uproot themselves and accept membership of tribunals, if they are to be eligible at the late age of 50 years and resultantly, those less competent would be willing, contrary to public interest. The Attorney General had submitted that exclusion of Advocates was a matter of policy and that the eligibility condition wherever they could be considered, in some tribunals of 25 years practice, was to bring about parity with members of the Indian Legal Service, who could, in some instances be considered for appointment as judicial members. During the submissions, the Attorney General had fairly stated that the 2020 Rules will be amended making Advocates eligible for appointment in the tribunals where they are presently excluded under the 2020 Rules as judicial members provided, they have 25 years of experience. This is in line with the previous rulings of this Court that advocates and retired judges are to be considered as judicial members of tribunals. Furthermore, this Court notices that the 2017 Rules did not exclude Advocates from consideration; nor did they impose restrictive eligibility conditions, such as 25 years of experience.

40. The learned Amicus Curiae submitted that stipulation of 25 years of experience would be a serious handicap in selecting meritorious candidates from among advocates. He suggested that Advocates with the standing of 15 years at the bar should be made eligible for being considered for appointment as judicial members to the Tribunals. The learned Amicus Curiae further submitted that Advocates should be made eligible for appointment to Single Member Tribunals, particularly to the Debt Recovery Tribunals as their experience in law can be suitably utilized. It is the submission of learned Attorney General that though the Constitution prescribes that an Advocate having experience of 10 years can be considered for appointment as a Judge of a High Court, normally an Advocate is considered only after he attains the age of 45 years. He suggested that an experience of 25 years at the Bar would make Advocates at the age of 47-48 years eligible for appointment as judicial members of the Tribunals. It would be attractive for the Advocates to apply for appointment to the post of judicial members of the Tribunals after having experience of 25 years, especially due to the provision for re-appointment.

41. In view of the submission of the learned Attorney General that the 2020 the Rules will be amended to make Advocates eligible for

appointment to the post of judicial members of the Tribunals, the only question that remains is regarding their experience at the bar. While the Attorney General suggested that an advocate who has 25 years of experience should be considered for appointment as a Judicial member, the learned Amicus Curiae suggested that it should be 15 years. An Advocate of a High Court with experience of ten years is qualified for appointment as a Judge of the High Court as per Article 217 (2) of the Constitution of India. As the qualification for an advocate of a High Court for appointment as a Judge of a High Court is only 10 years, we are of the opinion that the experience at the bar should be on the same lines for being considered for appointment as a judicial member of a Tribunal. Exclusion of Advocates in 10 out of 19 tribunals, for consideration as judicial members, is therefore, contrary to ***Union of India*** **v.** ***Madras Bar Association*** **(2010)**[19] and ***Madras Bar Association*** **v.** ***Union of India*** **(2015)**[20]**.** However, it is left open to the Search-cum-Selection Committee to take into account in the experience of the Advocates at the bar and the specialization of the Advocates in the relevant branch of law while considering them for appointment as judicial members.

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[19] Para 120 (i) @ page 65, 2010 (11) SCC 1 @ page 65
[20] Para 27, page 608 (2015 (8) SCC 583)

ELIGIBILITY OF MEMBERS OF INDIAN LEGAL SERVICE

42. The grievance of the learned Amicus Curiae is that members of the Indian Legal Service have been made eligible for appointment as judicial members to some Tribunals in spite of the judgment of this Court in ***Union of India v. Madras Bar Association*** **(2010)** (supra), wherein it was held that they can only be appointed as technical members. The contention of the Union of India is that there is a conflict of opinion in ***Union of India v. Madras Bar Association*** **(2010)** (supra) and the judgment of this Court in ***S.P. Sampath Kumar*** (supra). It was argued that this Court in ***S.P. Sampath Kumar*** (supra) upheld the appointment of the members of the Indian Legal Service as judicial members whereas in ***Union of India v. Madras Bar Association*** **(2010)** (supra), it was held that the members of the Indian Legal Services can only be appointed as technical members of Tribunals. It was argued by the learned Attorney General that the judgment of this Court in ***S.P. Sampath Kumar*** (supra) shall prevail over a later judgment as both the judgments are delivered by Constitution Benches of five Judges. Further submission made by the learned Attorney General is that members of Indian Legal Service are practicing lawyers who have experience of 7 years to 13 years depending upon the grade in which they were recruited. He also

referred to the different cadres in the Indian Legal Service which are directly related to law such as Advocates-on-Record or instructing counsel working in the Central Agency Section in this Court or holding the post of Director of Prosecution in the Central Bureau of Investigation or legal advisors in the Ministry of Law and Justice. The learned Attorney General further submitted that the experience of the members of Indian Legal Service in various branches of law would stand in good stead for their appointment as judicial members. The learned Amicus Curiae does not have an objection to members of Indian Legal Service who are practicing in Courts as Government Advocates to be considered for appointment as judicial members in Tribunals. But he suggested that this can be done only by a legislative amendment in light of the law laid down in ***Union of India v. Madras Bar Association*** **(2010)** (supra). He also submitted that specialization being a mandatory requirement for Advocates should be the same for members of the Indian Legal Service.

43. As we have already held that Advocates are entitled to be considered as judicial members of the Tribunals, we see no harm in members of the Indian Legal Service being considered as judicial members, provided they satisfy the criteria relating to the standing at the bar and specialization required. The judgment of ***Union of***

India v. Madras Bar Association **(2010)** (supra) did not take note of the above points relating to the experience of members of Indian Legal Service at the bar. The Indian Legal Service was considered along with the other civil services for the purpose of holding that the members of Indian Legal Service are entitled to be appointed only as technical members. In the light of the submission made by the learned Attorney General and the Amicus Curiae, we hold that the members of Indian Legal Service shall be entitled to be considered for appointment as a judicial member subject to their fulfilling the other criteria which advocates are subjected to. In addition, the nature of work done by the members of the Indian Legal Service and their specialization in the relevant branches of law shall be considered by the Search-cum-Selection Committee while evaluating their candidature.

44. We would wish to emphasize here that the setting up of tribunals, and the subject matters they are expected to deal with, having regard to the challenges faced by a growing modern economy, are matters of executive policy. When it comes to personnel who would operate these tribunals (given that the issues they decide would ultimately reach this Court, in appellate review or in some cases, judicial review), competence, especially in matters of

law as well as procedure to be adopted by such judicial bodies, becomes matters of concern for this Court. These tribunals discharge a judicial role, and with respect to matters entrusted to them, the jurisdiction of civil courts is usually barred. Therefore, wherever legal expertise in the particular domain is implicated, it would be natural that advocates with experience in the same, or ancillary field would provide the "catchment" for consideration for membership. This is also the case with selection of technical members, who would have expertise in the scientific or technical, or wherever required, policy background. These tribunals are expected to be independent, vibrant and efficient in their functioning. Appointment of competent lawyers and technical members is in furtherance of judicial independence. Younger advocates who are around 45 years old bring in fresh perspectives. Many states induct lawyers just after 7 years of practice directly as District Judges. If the justice delivery system by tribunals is to be independent and vibrant, absorbing technological changes and rapid advances, it is essential that those practitioners with a certain vitality, energy and enthusiasm are inducted. 25 years of practice even with a five-year degree holder, would mean that the minimum age of induction would be 48 years: it may be more, given the time taken to process recommendations.

Therefore, a tenure without assured re-engagements would not be feasible. A younger lawyer, who may not be suitable to continue after one tenure (or is reluctant to continue), can still return, to the bar, than an older one, who may not be able to piece her life together again.

REMOVAL OF MEMBERS

45. Rule 8 of the 2020 Rules provides the procedure for inquiry of misbehavior or incapacity of a member. According to the said Rule, the preliminary scrutiny of the complaint is done by the Central Government. If the Central Government finds that there are reasonable grounds for conducting an inquiry into the allegations made against a member in the complaint, it shall make a reference to the Search-cum-Selection Committee which shall conduct an inquiry and submit the report to the Central Government. The learned Amicus Curiae argued that there is no clarity in the Rules as to whether the reports submitted by the Search-cum-Selection Committee are binding on the Central Government. According to Mr. Datar, it is impermissible for the Central Government to further scrutinize the report of the Search-cum-Selection Committee which comprises of sitting and retired Judges. He submitted that the proper procedure to be followed in matters of complaints against the

Presiding Officers and members of the Tribunals is that a preliminary scrutiny may be made by the Central Government and the report should be placed before the Search-cum-Selection Committee. It is open to the Search-cum-Selection Committee to accept or reject the preliminary scrutiny. In case the Search-cum-Selection Committee is of the opinion that the findings of the preliminary scrutiny are correct, then the Search-cum-Selection Committee should be entitled to proceed further to conduct an inquiry on its own, if it so choses. The findings of the Search-cum-Selection Committee shall be final and the action recommended by the Search-cum-Selection Committee shall be implemented by the Central Government.

46. The learned Attorney General submitted that the preliminary scrutiny done by the Central Government, according to Rule 8 (1) is only for the purpose of weeding out frivolous complaints. The learned Attorney General has also fairly submitted that the recommendations made by the Search-cum-Selection Committee shall be implemented by the Central Government. We are in agreement with the submissions of the learned Attorney General.

TIME LIMIT FOR APPOINTMENT

47. The learned Amicus Curiae brought to our notice that there are several instances where appointments are delayed even after the selections are completed by the Search-cum-Selection Committee. The learned Attorney General also agreed that there is an imminent need for appointments to be made in an expeditious manner, but implored that no time be fixed for making appointments. The very reason for constituting Tribunals is to supplement the functions of the High Courts and the other Courts and to ensure that the consumer of justice gets speedy redressal to his grievances. This would be defeated if the Tribunals do not function effectively. It has been brought to our notice that there are a large number of unfilled vacancies hampering the progress of the functioning of the Tribunals. The pendency of cases in the Tribunals is increasing mainly due to the lack of personnel in the Tribunals which is due to the delay in filling up the vacancies as and when they arise due to the retirement of the members. There is imminent need for expediting the process of selections and appointments to ensure speedy justice. We, therefore, direct that the Government of India shall make the appointments to the Tribunals within three months after the Search-

cum-Selection Committee completes the selection and makes its recommendations.

RETROSPECTIVITY OF THE 2020 RULES

48. The learned Amicus Curiae submitted that the 2020 Rules have been made in exercise of the powers conferred by Section 184 of the Finance Act, 2017. Rule 1(2) provides that Rules shall come into force on the date of their publication in the Official Gazette. According to the learned Amicus Curiae, the Rules have come into force on 12.02.2020, the date on which they were notified. He stated that it is a well settled principle that delegated legislations such as Rules, notifications and circulars cannot have retrospective effect unless the parent statute itself permits such retrospective effect. He stated that Section 183 of the Finance Act, 2017 enabled the notification of Rules made under Section 184 to take effect from the appointed day. Under Section 157 (a) of the Finance Act, 2017, the appointed day means such date as the Central Government by notification in the Official Gazette appoint. The date on which Rules were notified is 12.02.2020. The learned Amicus Curiae relied upon the judgment of this Court in ***Sri Vijayalakshmi Rice Mills v. State of A.P.***[21] to argue that the Rules cannot be given retrospective effect. He stated

[21] (1976) 3 SCC 37

that the 2017 Rules have become *non est* after being struck down in ***Rojer Mathew*** (supra) and the 2020 Rules cannot be treated as an amendment or modification of the 2017 Rules. He stressed on the point that giving retrospective effect to 2020 Rules would result in inequitable consequences and serious hardship. For instance, some Vice Chairpersons, Vice Presidents and Vice Chairmen were appointed for a period of three years with an upper age limit of 67 years under the 2017 Rules. However, under the 2020 Rules their appointment period is four years with the upper age limit of 65 years. The term of office of persons who are appointed under the 2017 Rules would be altered if the 2020 Rules are given retrospective effect. The learned Amicus Curiae was supported by other Senior Counsel who vehemently argued that the 2020 Rules are only prospective.

49. The Attorney General argued that Section 183 of the Finance Act, 2017 provided that the Rules made under Section 184 shall have effect from the appointed day which was 26.05.2017. As per Section 183, all persons appointed prior to 26.05.2017 would be governed by the old Acts and Rules under which the Tribunals were established and those who are appointed after 26.05.2017 would be governed by the 2017 Rules. The Attorney General further argued that though the 2017 Rules were struck down by this Court in ***Rojer***

Mathew (supra), an opportunity was given to the Government of India to frame new Rules and place them before this Court. As the new Rules have been framed in exercise of powers under the Finance Act, 2017, the 2020 Rules would be effective from 26.05.2017. The Government of India has filed M.A. No. 1152 of 2020 in Writ Petition (C) No. 279 of 2017 seeking a direction that the 2020 Rules would apply to all persons appointed as Members, Presidents and Chairpersons to the Tribunals after appointed day i.e. 26.05.2017 in accordance with the mandate of Section 183 of the Finance Act.

50. Before expressing our view on this point, it would be necessary to refer to certain interim orders that were passed by this Court in ***Rojer Mathew*** (supra). By an order dated 09.02.2018, this Court gave certain interim directions regarding constitution of the Search-cum-Selection Committee and other issues in relation to appointments to the post of members of the Central Administrative Tribunal. The direction with which we are concerned at present pertains to appointments that were directed to be made pursuant to the recommendations of the interim Search-cum-Selection Committee which shall abide by the conditions of service stipulated in the old Acts and Rules. By an order dated 20.03.2018, the order

passed on 09.02.2018 was clarified by this Court and the tenure of the Chairperson and the members was directed to be for a period of five years. There is another order passed on 21.08.2018 by this Court in Writ Petition (C) No. 279 of 2017 by which it was clarified that appointments made to the post of members of the Customs Excise Sales Tax Appellate Tribunal shall be for a period of five years or till the member attains the age of 62 years. This Court clarified that the President shall continue till he attains the age of 65 years. In respect of the Central Administrative Tribunal, the old Rules were directed to be applied.

51. The 2017 Rules have been declared as being contrary to the parent enactment and the principles envisaged in the Constitution and hence struck down by this Court in ***Rojer Mathew*** (supra). The Central Government was directed to reformulate the Rules in conformity and in accordance with the principles delineated by this Court in its earlier judgment and the observations made in ***Rojer Mathew*** (supra). The 2020 Rules are made in exercise of the power conferred under Section 184 of the Finance Act which came into force on their publication in the official Gazette as per Rule 1(2). The date of publication of the 2020 Rules is 12.02.2020. We are unable to accept the submission of learned Attorney General that the 2020

Rules which replaced the 2017 Rules shall come into force with effect from 26.05.2017 which was the appointed day in accordance with the 2017 Rules. It is true that the 2017 Rules were brought into force from 26.05.2017 and Section 183 of the Finance Act provides for any appointment made after the appointed day shall be in accordance with the Rules made under Section 184 of the Finance Act, 2017. 2017 Rules which have come into force with effect from 26.05.2017 in accordance with Section 183 have been struck down by this Court. The 2020 Rules which came into force from the date of their publication in the Official Gazette, i.e. 12.02.2020, cannot be given retrospective effect. The intention of Government of India to make the 2020 Rules prospective is very clear from the notification dated 12.02.2020. In any event, subordinate legislation cannot be given retrospective effect unless the parent statute specifically provides for the same.[22]

52. As we have held that the 2020 Rules are not retrospective, the point that remains to be determined is the applicable Rules for appointments that were made prior to the 2020 Rules. The appointments made during the pendency of ***Rojer Mathew*** (supra)

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[22] ITO v. M.C. Ponnoose, (1969) 2 SCC 351; Sri Vijayalakshmi Rice Mills v. State of A.P., (1976) 3 SCC 37.

on the date of interim orders passed therein and appointments made after the judgment of ***Rojer Mathew*** (supra), like the appointments made prior to the 2017 Rules are, no doubt, to be governed by the then existing parent Acts and Rules. In view of the interim orders passed by this Court in ***Rojer Mathew*** (supra), appointments made during the pendency of the case in this Court are also to be governed by the parent Acts and Rules and the clarifications issued by this Court in ***Rojer Mathew*** (supra). According to paragraph 224 of the judgment in ***Rojer Mathew*** (supra), the appointments to the Tribunals were directed to be in terms of the respective Acts and Rules which governed appointments to Tribunals prior to the enactment of the Finance Act, 2017. For the purpose of clarity, we hold that all appointments made prior to the 2020 Rules which came into force on 12.02.2020 shall be governed by the parent Acts and Rules. Any appointment made after the 2020 Rules have come into force shall be in accordance with the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

53. The upshot of the above discussion leads this court to issue the following directions:

(i) The Union of India shall constitute a National Tribunals Commission which shall act as an independent body to supervise the appointments and functioning of Tribunals, as well as to conduct disciplinary proceedings against members of Tribunals and to take care of administrative and infrastructural needs of the Tribunals, in an appropriate manner. Till the National Tribunals Commission is constituted, a separate wing in the Ministry of Finance, Government of India shall be established to cater to the requirements of the Tribunals.

(ii) Instead of the four-member Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules with the Chief Justice of India or his nominee, outgoing or sitting Chairman or Chairperson or President of the Tribunal and two Secretaries to the Government of India, the Search-cum-Selection Committees should comprise of the following members:

(a) The Chief Justice of India or his nominee—Chairperson (with a casting vote).

(b) The outgoing Chairman or Chairperson or President of the Tribunal in case of appointment of the Chairman or

Chairperson or President of the Tribunal (or) the sitting Chairman or Chairperson or President of the Tribunal in case of appointment of other members of the Tribunal (or) a retired Judge of the Supreme Court of India or a retired Chief Justice of a High Court in case the Chairman or Chairperson or President of the Tribunal is not a Judicial member or if the Chairman or Chairperson or President of the Tribunal is seeking re-appointment—member;

(c) Secretary to the Ministry of Law and Justice, Government of India—member;

(d) Secretary to the Government of India from a department other than the parent or sponsoring department, nominated by the Cabinet Secretary—member;

(e) Secretary to the sponsoring or parent Ministry or Department—Member Secretary/Convener (without a vote).

Till amendments are carried out, the 2020 Rules shall be read in the manner indicated.

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a

panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.

(iv) The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of five years and shall be eligible for reappointment. Rule 9(2) of the 2020 Rules shall be amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and other members shall hold office till they attain the age of sixty-seven years.

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or President and Vice-Chairman, Vice-Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs. 1,25,000/- per month for other members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals. While considering

advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

(vii) The members of the Indian Legal Service shall be eligible for appointment as judicial members in the Tribunals, provided that they fulfil the criteria applicable to advocates subject to suitability to be assessed by the Search-cum-Selection Committee on the basis of their experience and knowledge in the specialized branch of law.

(viii) Rule 8 of the 2020 Rules shall be amended to reflect that the recommendations of the Search-cum-Selection Committee in matters of disciplinary actions shall be final and the recommendations of the Search-cum-Selection Committee shall be implemented by the Central Government.

(ix) The Union of India shall make appointments to Tribunals within three months from the date on which the Search-cum-Selection Committee completes the selection process and makes its recommendations.

(x) The 2020 Rules shall have prospective effect and will be applicable from 12.02.2020, as per Rule 1(2) of the 2020 Rules.

(xi) Appointments made prior to the 2017 Rules are governed by the parent Acts and Rules which established the concerned Tribunals. In view of the interim orders passed by the Court in ***Rojer Mathew*** (supra), appointments made during the pendency of ***Rojer Mathew*** (supra) were also governed by the parent Acts and Rules. Any appointments that were made after the 2020 Rules came into force i.e. on or after 12.02.2020 shall be governed by the 2020 Rules subject to the modifications directed in the preceding paragraphs of this judgment.

(xii) Appointments made under the 2020 Rules till the date of this judgment, shall not be considered invalid, insofar as they conformed to the recommendations of the Search-cum-Selection Committees in terms of the 2020 Rules. Such appointments are upheld, and shall not be called into question on the ground that the Search-cum-Selection Committees which recommended the appointment of Chairman, Chairperson, President or other members were in terms of the 2020 Rules, as they stood before the modifications directed in this judgment. They are, in other words, saved.

(xiii) In case the Search-cum-Selection Committees have made recommendations after conducting selections in accordance with the 2020 Rules, appointments shall be made within three months from today and shall not be subject matter of challenge on the ground that they are not in accord with this judgment.

(xiv) The terms and conditions relating to salary, benefits, allowances, house rent allowance etc. shall be in accordance with the terms indicated in, and directed by this judgment.

(xv) The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and Rules as per which they were appointed. The 2020 Rules shall be applicable with the modifications directed in the preceding paragraphs to those who were appointed after 12.02.2020. While reserving the matter for judgment on 09.10.2020, we extended the term of the Chairpersons, Vice-Chairpersons and members of the Tribunals till 31.12.2020. In view of the final judgment on the 2020 Rules, the retirements of the Chairpersons, Vice-Chairpersons and the members of the Tribunals shall be in accordance with the applicable Rules as mentioned above.

54. We will be failing in our duty unless we acknowledge the invaluable assistance of Mr. Arvind Datar, learned Amicus Curiae, Mr. K.K. Venugopal, learned Attorney General, Mr. S.V. Raju and Mr. Balbir Singh, learned Additional Solicitors General and the other senior counsel and advocates.

55. For the aforementioned reasons, the Writ Petitions, Transfer Petitions, Civil Appeals and all the Applications are disposed of.

Epilogue

Dispensation of justice by the Tribunals can be effective only when they function independent of any executive control: this renders them credible and generates public confidence. We have noticed a disturbing trend of the Government not implementing the directions issued by this Court. To ensure that the Tribunals should not function as another department under the control of the executive, repeated directions have been issued which have gone unheeded forcing the Petitioner to approach this Court time and again. It is high time that we put an end to this practice. Rules are framed which are completely contrary to the directions issued by this Court. Upon the tribunals has devolved the task of marking boundaries of what is legally permissible and feasible (as opposed to what is not lawful and is indefensible) conduct, in a normative

sense guiding future behavior of those subject to the jurisdictions of such tribunals. This task is rendered even more crucial, given that appeals against their decisions lie directly to the Supreme Court and public law intervention on the merits of such decisions is all but excluded. Also, these tribunals are expected to be consistent, and therefore, adhere to their precedents, inasmuch as they oversee regulatory behavior in several key areas of the economy. Therefore, it is crucial that these tribunals are run by a robust mix of experts, i.e. those with experience in policy in the relevant field, and those with judicial or legal experience and competence in such fields. The functioning or non-functioning of any of these tribunals due to lack of competence or understanding has a direct adverse impact on those who expect effective and swift justice from them. The resultant fallout is invariably an increased docket load, especially by recourse to Article 226 of the Constitution of India. These aspects are highlighted once again to stress that these tribunals do not function in isolation, but are a part of the larger scheme of justice dispensation envisioned by the Constitution and have to function independently, and effectively, to live up to their mandate. The involvement of this Court, in the series of decisions, rendered by no less than six Constitution Benches, underscores the importance of this aspect. The role of both

the courts as upholders of judicial independence, and the executive as the policy making and implementing limb of governance, is to be concordat and collaborative. This Court expects that the present directions are adhered to and implemented, so that future litigation is avoided.

The Government is, accordingly, directed to strictly adhere to the directions given above and not force the Petitioner-Madras Bar Association, which has been relentless in its efforts to ensure judicial independence of the Tribunals, to knock the doors of this Court again.

..................................J.
[L. NAGESWARA RAO]

.................................J.
[HEMANT GUPTA]

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[S. RAVINDRA BHAT]

New Delhi,
November 27, 2020.