REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No. 8588 of 2019
[Arising out of Special Leave Petition (Civil) No.15804 of 2017]

Rojer Mathew **…Appellant(S)**

VERSUS

South Indian Bank Ltd. & Ors. **… Respondent(S)**

WITH

W.P.(C) No.267/2012, W.P.(C) No. 279/2017, W.P.(C) No. 558/2017, W.P.(C) No. 561/2017, W.P.(C) No. 625/2017, W.P.(C) No. 640/2017, W.P.(C) No. 1016/2017, W.P.(C) No. 788/2017, W.P.(C) No. 925/2017, W.P.(C) No. 1098/2017, W.P.(C) No. 1129/2017, W.P.(C) No. 33/2018, W.P.(C) No. 205/2018, W.P.(C) No. 467/2018, T.C.(C) No. 49/2018, T.C.(C) No. 51/2018, T.P.(C) No. 2199/2018

J U D G M E N T

RANJAN GOGOI, CJI

1. Leave granted.

BRIEF BACKGROUND:

2. In the present batch of cases, the constitutionality of Part XIV of the Finance Act, 2017 and of the rules framed in consonance has been assailed. While it would be repetitious to reproduce the pleadings of each case separately, a brief reference is being made, illustratively, to the prayers made in three matters to aid the formulation of core issues arising for adjudication.

3. The Madras Bar Association has preferred Writ Petition (Civil) No. 267 of 2012 seeking the following reliefs:

> "i. A writ of mandamus, directing the Union of India, to implement the directions of this Hon'ble Court in Union of India v. R. Gandhi [(2010) 11 SCC 1, para 96 at pg. 310] and L. Chandra Kumar v. Union of India [(1997) 3 SCC 261], paras 120 and 121 at page 65 to 67], where Ministry of Law and Justice, Govt. Of India was ordered to take over the administration of all tribunals created by Parliament and streamline the functioning of the same.
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> ii. A writ of mandamus directing the Ministry of Law & Justice to promptly carry out a 'Judicial Impact Assessment' on all tribunals created by Parliament and submit a report on the same to this Hon'ble Court."

4. This Writ Petition was originally heard by a three-judge Bench on 18th February, 2015 wherein it was observed that the case presented substantial questions of Constitutional interpretation, necessitating hearing by a Constitution Bench. The orders passed from time to time reveal that, on 18th January, 2016, this Court perused the contents of the Tribunals, Appellate Tribunals and other Authorities (Conditions of Service) Bill, 2014 and felt that *"it would be more appropriate if observations made in* ***Union of India vs. R. Gandhi, President, Madras Bar Association***[1] *(in paragraphs 64-70) are also considered by the Government*."

5. The matter was listed again on 27th March, 2019 and this Court took cognizance of non-implementation of the directions issued vide para 96 of ***L. Chandra Kumar vs. Union of India***[2]***,*** which reads as follows:

> "96. We are of the opinion 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."

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[1] (2010) 11 SCC 1.
[2] (1997) 3 SCC 261.

6. Thereafter on the same day, this Court opined as follows:

> "Tentatively, we are of the view that the said directions ought to have been implemented by the Government of India long back. In the course of hearing today, learned Attorney General for India relying on an affidavit filed on behalf of the Union of India in the year 2013, had pointed out certain difficulties including the need for an amendment of the Government of India (Allocation of Business) Rules, 1961. Learned Attorney General has also pointed out that the Ministry of Law and Justice is overburdened and may not be able to act and function as the nodal agency, which the Court had in mind while issuing directions way back in the year 1997 in L. Chandra Kumar (supra). There cannot by any manner of doubt that to ensure the efficient functioning and to streamline the working of Tribunals, they should be brought under one agency, as already felt and observed by this Court in L. Chandra Kumar (supra). The Court would like to have benefit of the view of the Government of India as on today by means of an affidavit of the competent authority to be filed within two weeks from today.
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> The second prayer made in the writ petition has also been considered by us and in this regard we have taken note of compilation placed before the Court by the learned Attorney General, which would go to show the present vacancy position in different Tribunals, which is one of the issues that we would attempt to resolve. From the compilation of the learned Attorney General, it appears that the Central Administrative Tribunal, the Intellectual Property Appellate Board, the Armed Forces Tribunal, the National Green Tribunal and the Income Tax Appellate Tribunal would require immediate attention. While every endeavour would be made by the nominee of the Chief Justice who heads the Selection Committee before whom the issue of recommendations may have been pending to expedite the same, such of the recommendations which have already been made by the Search-cum-Selection Committee as is in the case of National Company Law Tribunal and National Law Appellate Tribunal, should be immediately implemented by making appointments within the aforesaid period of two weeks and the result thereof be placed before the Court vide affidavit of the competent authority, as ordered to be filed by the present order.
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> Once the aforesaid information is made available, appropriate orders will be passed by this Court, which may, inter alia, include remitting the matter to smaller Bench for monitoring on a continuous basis, so as to ensure due and proper functioning of the Tribunals. Matter be listed before this Bench after two weeks."

7. During the pendency of the aforementioned writ petition, the present lead matter bearing SLP(C) No. 15804/2017 was filed by Rojer Mathew, assailing the final judgment and order of the High Court of Kerala. The petitioner had originally approached the High Court challenging the constitutional validity of Section 13 (5-A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 which permits secured creditors to participate in auction of immoveable property if it remained unsold for want of

reserve bid in an earlier auction. Rojer Mathew claimed that the aforementioned provision violated his rights under Article 300A and Article 14 of the Constitution, besides being in contravention of the Code of Civil Procedure which prohibits mortgagees from participating in auction of immovable property without prior Court permission.

8. During the course of arguments, it was brought to the notice of this Court that appointments to the Debt Recovery Tribunals was not in consonance with the Constitutional spirit of judicial independence. Accordingly, though Rojer Mathew was given an opportunity to approach the High Court for reconsideration of his plea on 16th May, 2018, nevertheless this Court kept his petition pending to allow consideration of broader issues concerning restructuring of Tribunals. Assistance of Shri Arvind P. Datar, Sr. Advocate as Amicus Curiae was also requested by this Court.

9. The third matter to be taken note of is Writ Petition (Civil) No. 279/2017 where the petitioner, Kudrat Sandhu, has filed a Public Interest Litigation challenging the vires of Part XIV of the Finance Act, 2017 by which the provisions of twenty-five different enactments were amended to effect sweeping changes to the requisite qualifications, method of appointment, terms of office, salaries and allowances, and various other terms and conditions of service of the members and presiding officers of different statutory Tribunals. The impugned provisions of the Finance Act, 2017 have been referred to *in extenso* at appropriate parts of this order.

GENESIS OF TRIBUNALISATION:

10. Delay and backlogs in the administration of justice is of paramount concern for any country governed by the rule of law. In our present judicial setup, disputes often take many decades to attain finality, travelling across a series of lower courts to the High Court and ending with an inevitable approach to the Supreme Court.

11. Such crawling pace of the justice delivery system only aggravates the misery of affected parties. Although with nebulous origins, the adage "*justice delayed, is justice denied*" is apt in this context. Courts in this country, probably in a quest to ensure complete justice for everyone, overlook the importance of expediency and finality. This situation has only worsened over the years, as evidenced through piling pendency across all Courts. It would however be wrong to place the blame of such delay squarely on the judiciary, for an empirical examination of pendency clearly demonstrates that the ratio of judges against the country's population is one of the lowest in the world and the manpower (support staff) and infrastructure provided is dismal.

12. In addition to the delay in administration of justice, another important facet requiring attention is the rise of specialization and increase of complex regulatory and commercial aspects, which require esoteric appraisal and adjudication. The existing lower courts in the country are not well equipped to deal with such complex new issues which see constant evolution as compared to the stable nature of existing civil, criminal and the tax jurisprudence.

13. Evidently, there is a desperate need to overcome these hurdles of delay in administration of justice. Creation of tribunals has evolved as one solution in the ever-constant strive to increase access to justice. A 'Tribunal' can be understood as a body tasked with discharging quasi-judicial functions with the primary objective of providing a special forum for specific type of disputes and for faster and more efficacious adjudication of issues. In ***Jaswant Sugar Mills Ltd., Meerut vs. Lakshmichand***[3], a test was laid down whereunder it is to be examined whether the authority has the trappings of a Court, facets of which include the authority to make determinations, evidentiary and procedural powers and ability to impose sanctions. However, per a five-judge bench in ***Associated Cement Co. Ltd. v. PN Sharma***[4]**,** Tribunals were vested with a primarily judicial character for it was observed that:

> "9. ….. Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic; both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions", (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [(1955) 1 SCR 267 at p. 272]). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge. Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes

[3] AIR 1963 SC 677.

[4] AIR 1965 SC 1595.

> between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State."

14. Further, this Court has in various judgments explicitly held that tribunals are mutually exclusive from administrative or legislative bodies, and although not strictly Courts, they nevertheless perform judicial functions. With the inclusion of technical members along with judicial members in composition of Tribunals, it is ensured that the adjudicatory authority is equipped with the technical knowledge required to comprehend and decide issues involving specialised subjects.

15. Such issues are not unique to our country. Globally, the issues such as need for specialization or pendency have resulted in a unanimous consensus for tribunalisation. A perusal of the prevailing legal regime governing tribunals and their interface with the government, provides a useful benchmark in examining methods to retain their character.

AN INTERNATIONAL PERSPECTIVE

16. The global approach to the institution of specialized Tribunals is a largely consistent one. A cursory examination brings to fore a universal inherent need to disperse disputes across different adjudicatory bodies to reduce the burden on Constitutional Courts and ensure faster resolution of specific disputes. Almost all countries in the world have incorporated laws pertaining to the working of Tribunals within their Constitutional framework in some form or the other. In light of our common law traditions and colonial history, it would be imperative to examine the position of law across the world:

I. United Kingdom

17. Tribunals are one of the most important institutions in the dispensation of justice in the British Judicial system. Numerous Tribunals have been established to deal with issues involving property rights, employment, immigration, mental health, etc. Their functions are similar to the mainstream judicial bodies and are concerned with disputes between individuals and the State. However, there is a stark distinction between Tribunals and Ordinary Courts in England; for unlike ordinary Courts, the Tribunals comprise of members with special expertise and experience with many of them being appointed from amongst advocates or from persons with technical exposure.

18. Such tribunalisation traces its origins to the early twentieth century. The efficacy of a specialised, quasi-judicial body for adjudication of specific disputes was realised over a period of time as the newly evolved system of Tribunals gradually gained appreciation and recognition in the legal fraternity. During the development of the railways in the early 19th century, the judges found themselves ill-equipped to deal with technically specialised trade disputes arising from monopolistic railway companies. Such inexpert adjudication also resulted in dissatisfaction of the litigants. Consequently, a specialized tribunal of Commissioners was appointed in 1873 and later converted to the Railways and Canals Commission. Later in the nineteenth century, the British Government set up tribunals for pension and unemployment benefit to enhance accessibility to the poor and less-educated, including, special tribunals set up to adjudicate disablement pensions for servicemen wounded in World War I. In the twentieth century, post the Leggatt review, many dozens of tribunals for subjects as diverse

as tax, mental health, social security, employment and asylum were set up, with thousands of adjudicating members.

19. As Tribunals started marking their individual identity and resolving conflicts brought before them, there was an emergent need to amend the framework of these alternate fora in tune with societal changes. The Donoughmore Committee, in 1932, critiqued the delegation of judicial functions to quasi-judicial body and recommended that the judicial powers should vest solely with the Ordinary Courts of law. It was further recommended that establishment of Tribunals should only be in special cases where Ordinary Courts lacks expertise. Applicability of principles of natural justice must also be extended to such Tribunals. Courts should be adequately empowered to ensure that the Tribunals function within their restricted domain.

20. The need for supervisory jurisdiction over Tribunals was again discussed in 1957 when the Frank's Committee made its recommendations which were implemented by the Tribunal and Inquiries Act, 1958. The Frank's Committee Report presented a glowing critique in favour of tribunalisation, contending that it was cheaper, faster, better and more accessible. This finding has been echoed by various international commissions which have noted the beneficial impacts of tribunalisation viz., cost effectiveness, accessibility, reduction in pendency, specialized expertise, etc.

> "Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence … appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social services field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for

> adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance … or on appeal from a decision of a Minister or of an official in a special statutory position… Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable."[5]

21. Pursuant to this, the Council on Tribunals was established with the purpose of overseeing composition and working of various Tribunals. Further, the Sir Andrew Leggatt Committee (2001) scrutinised the existing state of Tribunals wherein the inherent deficiencies of a non-uniform Tribunal system were highlighted. The report of the Committee, titled *'Tribunals for User— One System, One Service'* suggested a new structurally reformed system of Tribunals with a more uniform administration and procedure. It was also suggested that a single Appellate Division should be the only route of appeal against the orders of the Tribunals. In 2007, the Tribunals, Courts and Enforcement Act was enacted which formulated a new system of two Tribunals -the First-tier Tribunal and the Upper Tribunal - with unified route for appeal.[6]

22. In the year 2006 the United Kingdom created a Tribunal Service, which was later merged with the Courts Service in 2010, resulting in the creation of a single cohesive judicial structure and service for the country.

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[5] Drewry, Gavin, "The Judicialisation of Administrative Tribunals in the U.K: From Hewart to Leggatt" 28 TRAS 51 (2009)

[6] Excerpts from the 'Explanatory Notes to the Tribunals, Courts and Enforcement Act, 2007' prepared by the Ministry of Justice, British Parliament.

II. Canada

23. The Tribunal system in Canada, although of recent origin, is well established having a distinct identity of its own. Similar to the system in England, in Canada too, the Tribunal system has successfully become one of the foundations of the judicial system.[7] Federal or provincial legislations are enacted to constitute and empower specialised Tribunals for specific subject matters such as human rights, insurance claims, etc.[8] The work of the Tribunals are regulated by legislation and Members are usually appointed for their expertise in the subject.

24. Many of the Tribunals are empowered by their enabling legislation or general legislations to have powers similar to Civil Courts. However, Tribunals in Canada are less formal than Courts and are outside the general Court system; their decisions are subject to Judicial Review to ensure adherence to law. In a striking resemblance to our judicial system, the Canadian Constitution also provides inherent power of judicial review of decisions of Tribunals to superior Courts, where either no provision of appeal is provided or is specifically barred by a statute. Appeals from orders of Tribunals in Canada are heard by Federal Court of Canada, the immediate forum below the Supreme Court of Canada.

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[7] Malik, Lokendra; Lata, Kusum; Kaur, Avneet, Constitutional Government in India (Satyam Law International, New Delhi, 2016) at p. 191.

[8] Administrative Tribunals in Canada, available at: http://www.thecanadianencyclopedia.ca/en/article/administrative-tribunals/ (last visited on 10.09.2019).

III. Australia

25. The Australian system of Tribunals is an amalgamation of the system prevalent in England and Canada. Tribunals in Australia were established primarily to reduce the burden on Civil Courts and provide an effective, yet cheap means of justice for the public. There prevails a variety of Tribunals to review different types of Government decisions including social security, taxation, etc. The Tribunals serve a multifarious purpose, deciding issues between individuals and individuals & State. For instance, in several Australian States, the Tribunals work as Small Claims Courts. The Court of Appeals is a facet of the Supreme Court, enjoying appellate powers over all the other Courts and Tribunals in the country.

IV. United States of America

26. The doctrine of separation of powers is adhered to in a much stringent manner in comparison to other common law countries. There is no delegation of judicial powers and no judicial power is vested in administrative bodies which are not Courts. The inception of judicial control over administrative action was with the enactment of Administrative Procedure Act, 1946. However, the Act merely made the decisions of Tribunals appealable on question of interpretation of law. Nevertheless, the Supreme Court of the United States had taken a more liberal view of the same leaving scope, though extremely limited, for judicial review.

V. France

27. Being a Civil Law system, France has a dual legal system comprising of— Private Law (*droit privé*) and Administrative Law (*droit administratif*).[9] It has a special Tribunal viz. *Tribunal des Conflicts* for performing both judicial and administrative functions.[10] The decisions of *Tribunal des Conflicts* are not entirely within the purview of judicial review. Judicial Review is expressly ousted from some of the administrative actions. Further, to adjudicate disputes between individual and officials of State, the *Counseil d'Etat* was formed.

28. With change in time, the Tribunal system of France also evolved. A new Three-Tier Tribunal system was established. The first tier being *Tribunal administratif* — Administrative Court or the Original Court having a wide jurisdiction covering all subject matters; the second tier is *Cour administrative d'appel* — Administrative Court of Appeal, formed to decide appeals from the Original Court and; the third tier is *Conseil d'Etat* — Court of Last Resort, which was formed to finally decide appeals from the Original Court or Court of Appeal. However, unlike in common law countries, the Appellate Courts in France lack power of judicial review on the ground of authority being ultra vires.

VI. South Africa

29. South Africa having similar colonial origins as India, inherited a similar legal system as India. Having multiple functions and discharging a range of judicial,

[9] George A. Bermann; Etienne Picard, Introduction to French Law (Kluwer Law International, Netherlands, 2008) at p. 58.

[10] Bartlett, C. A. Hereshoff, "The French Judicial System" 33 CLT 952 (1913).

quasi-judicial as well as administrative powers, every tribunal is a unique creation of its parent statute. Akin to many critiques in India, such tribunals are often criticized for their lack of uniformity, incoherence and haphazardness.

DOMESTIC PERCEPTION:

30. It is interesting to note that establishment of Tribunals in India relate back to as early as the year 1941 when the Income Tax Appellate Tribunal (ITAT) was established to expedite tax disputes. To structuralise the establishment of Tribunals, vide the 42nd Constitutional Amendment, Article 323A and 323B were introduced, delineating powers as well as the composition and formation of Tribunals. Numerous Tribunals thereafter have been established, with the source of power to legislate for establishing such tribunals being referable to Article 323A or Article 323B of the Constitution. The three-tier tribunal system in India finds its resemblance to the system as prevalent in France. The forums of first instance have Original Jurisdiction with High Court as the Appellate Court and the Supreme Court being the final adjudicatory body. Furthermore, it is not out of context to point out the similarity of the Constitution of India with the Canadian Constitution, insofar as it also provides inherent power of judicial review to Constitutional Courts over all subordinate Courts.

31. Hence, the need for establishment of newer and more specialised adjudicatory bodies is not newfound but has evolved through developments spread over an era.

I. Administrative Reforms Commission - 1966

32. The Administrative Reforms Commission was set up to explore the arenas for establishing Administrative Tribunals for different subject matters. It recommended establishment of Civil Services Tribunals as adjudicatory entities for disciplinary punishments awarded to civil servants.

II. Wanchoo Committee - 1970

33. The Wanchoo Committee recommended reforms to the Income Tax Appellate Tribunal to effectuate replacement of Civil Courts for expeditious redressal of tax disputes. It also recommended formation of a Direct Taxes Settlement Tribunal to ensure speedy remedies and decisions of disputes.

III. High Court's Arrears Committee Report - 1972

34. A committee headed by Justice JC Shah highlighted an urgent need for individual-specialised Tribunals for exclusively dealing with service matters and to unburden High Courts by restricting the barrage of writ petitions being filed by government employees.

IV. Swaran Singh Committee - 1976

35. The Swaran Singh Committee took a radical view by advocating amendments to the Constitution for regulation of Tribunals and to curtail the writ jurisdiction of High Court and the Supreme Court. This report attracted a lot of critique from the legal fraternity and was later rejected in ***Sakinala Hari Nath vs. State Of Andhra Pradesh***[11]*.*

[11] 1993 (3) ALT 471; See also: L. Chandra Kumar v. Union of India 1997 (2) SCR 1186

V. Raghavan Committee - 2002

36. In accordance with contemporaneous evolutions in the commercial sphere, the Raghavan Committee was set up to suggest methods to regulate anti-competitive practices. This Committee recommended establishment of the Competition Commission of India (CCI), which was envisioned to maintain adequate competition in the market and protect consumer welfare. Further, the Competition Act, 2002 was later enacted which provided certain powers of Civil Courts to the CCI for effective enquiry and adjudication.

37. Tribunals can thus be viewed as alternate avenues to facilitate swift dispensation of justice through less-formal procedures of adjudication. An examination of existing Tribunals in India and across foreign jurisdictions, shows that they are best suited to deal with complex subject-matters requiring technical expertise such as service law, tax law, company law or environment law, etc.

LEGISLATIVE DEVELOPMENT OF TRIBUNALISATION :

38. In India, the Constitution (42nd Amendment) Act, 1976 paved way for tribunalisation of the justice dispensation system by introduction of Articles 323A and 323B in the Constitution. These provisions are to the following effect:

> "PART XIV-A: TRIBUNALS
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> **323-A. Administrative tribunals**.—(1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
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> (2) A law made under clause (1) may—
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> (a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

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

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

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

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of Article 371-D;

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323-B. Tribunals for other matters.—(1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.

(2) The matters referred to in clause (1) are the following, namely:—

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in Article 31-A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in Article 329 and Article 329-A;

(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

(h) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;

(i) offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters;

(j) any matter incidental to any of the matters specified in sub-clauses (a) to (i).

(3) A law made under clause (1) may—

(a) provide for the establishment of a hierarchy of tribunals;

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

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

(d) exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals;

(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, "appropriate Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI."

39. Drawing its competence from Article 323A of the Constitution, the Parliament enacted the Administrative Tribunals Act, 1985. The primary objective was to provide a forum alternative to the High Courts for routine service appeals, which otherwise was overburdening the working of the Constitutional Courts. It recognised that the higher Courts were envisaged to primarily deal with important Constitutional issues and substantial question of law of general public importance.

40. Furthermore, guidelines were issued by this Court in numerous decisions to highlight a paucity of technical expertise in certain subject-matters and thus the imminent need for an expedited disposal of such cases through Tribunals. It was

indicated in ***M.C. Mehta v. Union of India***[12], that a dedicated Tribunal with both judicial and technical experts is necessary to hear environmental disputes.

41. Consequently, the National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997 were enacted. However, these were soon found to be incapable of providing expeditious resolution of disputes which necessitated reforms as suggested by the Law Commission of India. This led to the establishment of the National Green Tribunal (NGT) in 2010 as a special fast-track Court only to deal with issues related to the environment.

42. Similarly, Article 323B empowers the appropriate Legislature to enact legislation to provide for adjudication or trial by Tribunals of any disputes, complaints or offences with respect to the matters specified in Clause (2) of the said Article. The matters specified in Article 323B(2) exhaustively deal with a variety of matters which can be brought within the purview of tribunalisation by both the Parliament and State Legislatures.

JUDICIAL DEVELOPMENT OF TRIBUNALISATION :

43. This Court has observed through numerous decisions that the term 'Tribunal' refers to a quasi-judicial authority. A test to determine whether a particular body was merely an administrative organ of the Executive or a Tribunal was evolved by this Court in ***Jaswant Sugar Mills Ltd., Meerut vs. Lakshmichand***[13]***.*** It was to be examined whether the body is vested with powers of a Civil Court or not, and it was held that any adjudicatory body vested with

[12] 1986 (2) SCC 176

[13] AIR 1963 SC 677.

powers of taking evidence, summoning of witnesses, etc. must be categorised as a Tribunal.

44. In ***R.K. Jain vs. Union of India***[14] a three-judge Bench of this Court emphasised the need for a safe and sound justice delivery system adept at satisfying the confidence of litigants. It was further noted that since members of Tribunals discharge quasi-judicial functions, it is imperative that they possess requisite legal expertise, some judicial experience and an iota of legal training. Moreover, since Tribunals are constituted as substitutes to Courts, their efficacy in upholding the faith of litigants cannot be compromised. It was however observed that true delivery of justice by Tribunals was still a far-fetched idea since the mechanism for judicial review and remedy of appeal to the Supreme Court was costly and discouraging. People from remote areas often found their right to appeal being handicapped by geographical and financial constraints. Hence, it was suggested by this Court that newer fora be dispersed across the country and that members from the Bar also be included in the composition of such Tribunals. An urgent need to reform the working of tribunals and regular monitoring of their functioning was also stressed upon.

45. Subsequently, in ***L. Chandra Kumar v. Union of India***[15]***,*** a Constitution Bench of seven judges of this Court examined reports of expert committees and commissions analysing the problem of arrears. The Malimath Committee Report (1989-1990) was also referred to, wherein it was found that many Tribunals failed the test of public confidence due to purported lack of competence, objectivity and

[14] (1993) 4 SCC 119.

[15] (1997) 3 SCC 261.

judicial approach. This Court thus called for drastic measures to elevate the standards of Tribunals in the country.

46. It was also reiterated that the exclusion of judicial review by High Courts was impermissible and providing direct statutory appeals to the Supreme Court impeded the common litigant from exercising his right to appeal because the appellate forum, being situated in Delhi, was inaccessible to many. While criticising the short terms of members and the lack of judicial experience of non-judicial members, this Court observed a need for establishment of an oversight mechanism to review the competence of all persons manning Tribunals. Thus, it was suggested that all Tribunals be brought under a 'Single Nodal Ministry', most appropriately the Ministry of Law & Justice, for overseeing of working of Tribunals. Liberty was however, granted to the Ministry to appoint an independent supervisory body to delegate the aforesaid functions. Further, the court noted that the procedure of selection of members of Tribunals, allocation of funds and all other intricacies would have to be culled out by such an umbrella organisation.

47. In ***Union of India vs. R. Gandhi, President, Madras Bar Association[16],*** a Constitution Bench of five judges of this Court reviewed the Constitutional validity of Parts I-B and I-C of The Companies Act, 1956 inserted by the Companies (2nd Amendment) Act, 2002.

48. The bench observed that if Tribunals are established in substitution of Courts, they must also possess independence, security and capacity. Additionally, with transfer of jurisdiction from a traditional Court to a Tribunal, it would be

[16] (2010) 11 SCC 1

imperative to include members of the judiciary as presiding officers/members of the Tribunal. Technical members could only be in addition to judicial members and that also only when specialised knowledge or know-how is required. Any inclusion of technical members in the absence of any discernible requirement of specialisation would amount to dilution and encroachment upon the independence of the judiciary.

49. This Court also observed that higher administrative experience does not necessarily result in better adjudication and that there had been a gradual encroachment on the independence of the judiciary through inclusion of more administrative/technical members in the Tribunals. It held that such practice needed to be checked and accordingly made requisite corrections to Parts I-B and I-C of The Companies Act, 1956 (as amended in 2002) as elucidated in para 120 of the judgement, which is reproduced below:

> "**120.** We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:
>
> (i) Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in sub-sections (2)(c) and (d) of Section 10-FD. The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as technical members.
>
> (ii) As NCLT takes over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and clauses (a) and (b) of sub-section (3) of Section 10-FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in the

Central or the State Government, being qualified for appointment as Members of Tribunal, are invalid

(iii) A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law cannot be considered as "experts" qualified to be appointed as technical members. Therefore clauses (a) and (b) of sub-section (3) are not valid.

(iv) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 20 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as technical members in the Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as technical members.

(vi) In regard to category of persons referred in clause (g) of sub-section (3) at least five years' experience should be specified.

(vii) Only clauses (c), (d), (e), (g), (h), and the latter part of clause (f) in sub-section (3) of Section 10-FD and officers of civil services of the rank of the Secretary or Additional Secretary in the Indian Company Law Service and the Indian Legal Service can be considered for purposes of appointment as technical members of the Tribunal.

(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:

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

b. A Senior Judge of the Supreme Court or Chief Justice of High Court—Member;

c. Secretary in the Ministry of Finance and Company Affairs—Member; and

d. Secretary in the Ministry of Law and Justice—Member.

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(x) The second proviso to Section 10-FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any

person appointed as member should be prepared to totally disassociate himself from the executive. The lien cannot therefore exceed a period of one year.

(xi) To maintain independence and security in service, sub-section (3) of Section 10-FJ and Section 10-FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xii) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned.

(xiii) Two-member Benches of the Tribunal should always have a judicial member. Whenever any larger or special Benches are constituted, the number of technical members shall not exceed the judicial members."

50. Later, in ***Madras Bar Association vs. Union of India (2014)[17],*** whilst striking down the newly-created National Tax Tribunal under the National Tax Tribunals Act, 2005, it was observed that procedure of appointment and conditions of service of members must be akin to judges of the Courts which were sought to be substituted by the Tribunal(s).

51. Only persons with professional legal qualifications coupled with substantial experience in law were held to be competent to handle complex legal issues. It was further held that a litigating party (Govt.) should never be a participant in the appointment process of members of the Tribunal. Similarly, a provision for reappointment or extension of tenure is ipso facto prejudicial to the independence of the members of Tribunal. A difference was also drawn between appointments to Tribunals which substituted Courts of first instance and to those which were not subordinate to High Courts.

52. It was further reiterated that establishment of a Tribunal with its seat at Delhi could cause hardship to litigants from other parts of the country, depriving them of

[17] (2014) 10 SCC 1.

convenient access to justice. Moreover, the Court held that in order to uphold their independence and fairness it would be inappropriate for the Central Government to have any administrative control over members of the Tribunal.

53. In ***Madras Bar Association vs. Union of India (2015)***[18]***,*** vires of the Companies Act, 2013 which contemplated establishment of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) were challenged. Interestingly, while examining Chapter XXVII of Companies Act, 2013 i.e. Sections 407 to 434, this Court held that although the establishment of NCLT and NCLAT was not unconstitutional but there was a need for curing defects in accordance with the dictum of ***R. Gandhi (supra)*****.**

54. Finally, in ***Gujarat Urja Vikas Ltd. vs. Essar Power Ltd.***[19]***,*** while examining the composition and working of Tribunals and statutory framework thereof, this Court reiterated its earlier decisions in ***L. Chandra Kumar (supra)*** and ***Madras Bar Association (2014) (supra)****,* observing that remedy of appeal to this Court was in effect, being obliterated due to cost and inaccessibility. In addition to this, a flood of appeals from all the Tribunals directly to this Court hindered its efficiency in fulfilling its primary Constitutional role. Since appellate tribunals, manned by non-judicial members, were adjudging complex questions of law, the composition of Tribunals was put under review by this Court and a reference to the Law Commission of India was made in this regard. Pursuant to this, the Law Commission of India, in its 272nd Report titled 'Assessment of Statutory

[18] (2015) 8 SCC 583.

[19] (2016) 9 SCC 103.

Frameworks of Tribunals in India' gave a detailed analysis of statutory framework with respect to Tribunalisation in India.

THE FINANCE ACT, 2017: ITS LEGISLATIVE BACKGROUND

55. Primary challenge in the present batch of cases is to the Finance Act, 2017. Though this enactment was purportedly to give effect to "*the finance proposals of the central government for the financial year 2017-18*" but Part XIV thereof consists of comprehensive provisions meant to effect "*Amendments to Central Acts to Provide for Merger of Tribunals and other Authorities and Conditions of Service of Chairpersons, Members, etc*".

56. A scrutiny of Part XIV of the Finance Act, 2017 discloses how by virtue of Sections 158 to 182, Parliament has amended twenty-five central enactments which form the foundation for multiple Tribunals. It has been submitted by the learned Attorney General, these amendments seek to rationalise the functioning of Tribunals, in conformity with the principles laid down by this Court in its prior decisions.

57. Sections 158 to 182 of Part-XIV are broadly *in pari materia* except that each Section deals with a separate Tribunal. In order to comprehend the manner in which Parliament has sought to achieve a uniform pattern of qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of members and presiding officers of various Tribunals, it would be sufficient to illustratively reproduce Sections 158 and 173 of Part XIV of the Finance Act, 2017. Section 173 reads as follows:

"I.—AMENDMENT TO THE CINEMATOGRAPH ACT, 1952

173. In the Cinematograph Act, 1952, after section 5D, the following section shall be inserted, namely:—

"5E. Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairman and other members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of section 184 of that Act: Provided that the Chairman and member appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act and the rules made thereunder as if the provisions of section 184 of the Finance Act, 2017 had not come into force.".

58. In addition to this, some Sections in Part XIV also amalgamate existing Tribunals. Section 158 has been reproduced below as an example of such Sections which in addition to the elements of Section 173 also effect amalgamations:

"**158. Amendment of Act 14 of 1947**.— In the Industrial Disputes Act, 1947,—

(a) in Section 7A, after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) The Industrial Tribunal constituted by the Central Government under sub-section (1) shall also exercise, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, the jurisdiction, powers and authority conferred on the Tribunal referred to in Section 7D of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).";

(b) after Section 7C, the following section shall be inserted, namely:—

"7D. Qualifications, terms and conditions of service of Presiding Officer.— Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation and removal and other terms and conditions of service of the Presiding Officer of the Industrial Tribunal appointed by the Central Government under sub-section (1) of Section 7A, shall, after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be governed by the provisions of Section 184 of that Act:

Provided that the Presiding Officer appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act, and the rules made thereunder as if the provisions of Section 184 of the Finance Act, 2017 had not come into force."

59. There are two significant expressions worth noticing in these similarly worded Sections 158 to 182. *First,* every such Section opens up with a non-obstante clause and it provides that "*notwithstanding anything contained in ……*

Act the qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairman and other members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of section 184 of that Act". Second, Section 184 of the Finance Act overrides all other provisions in both the Finance Act, 2017 as well as the other twenty-five enactments which stand amended.

60. To critical analyse the intention of the legislature in enacting Section 184, reference must be made to the immediately preceding Section 183 which is to be found in sub-part 'S' of the Act titled "*Conditions of service of Chairpersons and members of Tribunals, Appellate Tribunals and other Authorities*". Since Sections 183 and 184 would need to be read conjointly, both are reproduced below:

> **"S.—CONDITIONS OF SERVICE OF CHAIRPERSON AND MEMBERS OF TRIBUNALS, APPELLATE TRIBUNALS AND OTHER AUTHORITIES**
>
> **183. Application of Section 184**.— Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of Section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:
>
> Provided that the provisions of Section 184 shall not apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day.
>
> **184**. **Qualifications, appointment, term and conditions of service, salary and allowances, etc., of Chairperson, Vice-Chairperson and Members, etc., of the Tribunal, Appellate Tribunal and other Authorities**.— (1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:
>
> Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate

> Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:
>
> Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—
>
> (a) in the case of Chairperson, Chairman [President or the Presiding Officer of the Securities Appellate Tribunal], the age of seventy years;
>
> (b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer [of the Industrial Tribunal constituted by the Central Government and the Debts Recovery Tribunal] or any other Member, the age of sixty-seven years:
>
> (2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment."

61. Further, the Central Government in purported exercise of its powers under the aforementioned provisions, has notified the 'Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017' [in short "the Rules"].

PETITIONERS' CASE :

62. The pleadings and arguments in most of the individual cases are similar and overlapping. Hence, for the sake of brevity, it is not necessary to refer to the submissions of each of the counsel individually. Broadly, however, petitioners have questioned the validity of Part XIV read with the 8th and 9th Schedules of the Finance Act 2017, as being ex-facie unconstitutional, arbitrary, in colourable exercise of legislative power, and offensive to the basic structure of the Constitution.

63. The foremost contention on behalf of the petitioners is that Part-XIV could not and ought not to have been made part of the Finance Act, 2017 as the said

part is not classifiable as a ‘money bill’. Emphasis was placed on the wordings of Article 110 which allows those bills which contain “only” provisions which fall within the metes and bounds of Clauses (a) to (g) thereof, to be treated as ‘money bill’. By virtue of inclusion of Part XIV, the entirety of the Finance Act, 2017 was contended to have lost its colour as a ‘money bill’ under Article 110 and hence its passage without the assent of the Rajya Sabha as required under Article 107 renders it ultra vires the legislative scheme contemplated in the Constitution.

64. Learned counsels vehemently placed reliance on the Constituent Assembly Debates to lend strength to the importance of the expression “only” under Article 110(1). They seek to make out a case that such phraseology was deliberately incorporated in the Constitution by making a conscious departure from Section 37 of the Government of India Act, 1935. Inclusion of Part XIV in the Finance Act, 2017 is shown as being an act of camouflage and a colourable exercise and petitioners assert that such indirect manner of bypassing of the Rajya Sabha is impermissible. A larger narrative was presented before this Court, that is, of the Central Government undermining the character and essence of a bicameral legislature as envisaged under the Constitution; and interference of this Court was sought through examination of the substance of the legislation and not mere acceptance of the nomenclature accorded by the Lok Sabha Speaker under Article 110(3).

65. A nuanced argument was also furthered by petitioners’ counsels who highlighted that Tribunals are governed by Article 323-A and 323-B of the Constitution and laws enacted in this regard cannot be classified as money bills. Further, Parliament in making changes to Tribunals can trace its competence to

Entry 11-A of List III of the Constitution which deals with administration of justice, and not financial matters.

66. Part XIV was also impugned for its effect of terminating the services of presiding officers and members of various now-defunct Tribunals, which was claimed as being a direct interference in the independence of the judiciary.

67. Section 184(1) of the Finance Act, 2017, in so far as it empowers the Central Government to make rules to provide for qualifications and procedure of appointment, conditions of service, terms and salaries was contended to suffer from the vice of excessive delegation. It was stated that the said provision takes away all judicial safeguards and makes the Tribunals amenable to the whims and fancies of the largest litigant, the State. This was contended as being against the grain of the Constitution, besides affecting administration of justice. In the alternative, counsels also contended that the present formulation of Rules under Section 184 was ultra vires the parent enactment and the binding dictum expressed by this Court in a catena of judgments.

68. Further, during the course of arguments, various other deficiencies and contradictions in the administration of Tribunals and certain anomalous situations like providing direct appeals to this Court were highlighted, which were contended as being against the spirit of the Constitution. Petitioners, in addition to challenging the vires of the Finance Act, 2017 also prayed for a mandamus directing the State to mandatorily conduct 'Judicial Impact Assessment' of legislations.

UNION OF INDIA'S CASE :

69. Learned Attorney General, on the other hand, passionately drew attention to the existence of over 40 tribunals, statutory commissions, and authorities functioning under the Government of India, each of which has been established under a different enactment and is governed by different set of rules. As a result, the conditions of service, modes of appointment, tenures etc. of members and presiding officers in different Tribunals were shown as vastly varying from one to another, giving rise to several anomalies and distortions. He put forth multiple examples; like how while members of some of the Commissions/Tribunals enjoy the status of Supreme Court judges, others like the members of the Debt Recovery Tribunal have only been kept at par with District Court judges. Similarly, while a person once appointed to the ITAT can continue till the age of superannuation, tenures of persons appointed to the APTEL was merely three years. The Attorney General attributed such inconsistencies as drafting errors and further stressed the need to streamline and harmonise the applicable rules, which is what was attempted through the Finance Act, 2017.

70. He also highlighted the inherent contradiction in according status and rank equivalent to that of Constitutional Court judges to members and presiding officers of such Tribunals and regulatory bodies. It was argued that the two have different functions and roles in our Constitutional setup. While the Supreme Court had a strength of 31 judges (when the matter was argued), he pointed out, that there are more than 50 functionaries enjoying the conditions of service of a Supreme Court judge and more than 150 such functionaries who have been brought at par with High Court judges. After placing on record multiple problems arising in the

administration of justice as a result of such practice, he advocated the need to keep 'rank' and 'status' separate from 'salary' and 'allowances'.

71. Learned Attorney General further relied upon an order passed by this Court in ***Rajiv Garg vs. Union of India (WP No. 120 of 2017)*** on 08th February, 2013 directing that a decision be taken by the Central Government on uniformity of service conditions in various tribunals. Reliance was also placed on the 13th Report of the 2nd Administrative Reforms Commission submitted in April 2009 which recommended greater uniformity in service conditions in various tribunals. It was pointed out that, in fact, the Tribunals, Appellate Tribunals and other Authorities (Conditions of Service) Bill, 2014 was introduced in the Rajya Sabha on 14th February, 2014 but somehow could not be passed. Introducing separate amendments for each of these Tribunals would have been unwieldy and impractical, besides resulting in several inconsistencies. Resultantly, he submits a holistic view was taken and a single enactment was sought to be introduced in order to harmoniously bring uniformity.

72. On behalf of the Union, the petitioners' contentions were elaborately refuted. It was submitted that it is a settled principle of Constitutional interpretation that terms of the Constitution, including Clauses (a) to (g) of Article 110(1), must be interpreted in their widest amplitude, with the result that when the principal enactment had the dominant character of a 'money bill', all matters incidental thereto and inserted therein would also draw the colour and characteristic of a 'money bill'.

73. In the alternative, he took aid of Clause (3) of Article 110 to contend that the Speaker of the Lok Sabha was the final and only Constitutional authority to adjudge the nature of a bill sought to be introduced under Article 109. Such decision was both final and hence not subject to any judicial review by any Court; even otherwise such exercise of passing legislations and certifications by the Speaker were "proceedings in Parliament" and could hence "not be called in question" before this Court in view of Article 122(1).

74. Both sides have extensively relied upon case law and Constitutional history to substantiate their respective pleas. Relevant portions of the same are being referred to in the latter parts of this judgment whenever necessary.

BRIEF REFERENCE TO INTERLOCUTORY ORDERS :

75. After considering the suggestions filed during the course of hearing in SLP(C) No. 15804/2017, this Court passed an interim order on 9 February 2018, suggesting:

> "1. Staying the composition of Search-cum-Selection Committee as prescribed in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017 both in respect of Chairman/Judicial Members and Administrative Members. A further direction to constitute an interim Search-cum- Selection Committee during the pendency of this W.P. in respect of both Judicial/Administrative members as under :
>
> a. Chief Justice of India or his nominee - Chairman
>
> b. Chairman of the Central Administrative Tribunal - Member
>
> c. Two Secretaries nominated by the Government of India - Members
>
> 2. Appointment to the post of Chairman shall be made by nomination by the Chief Justice of India.
>
> 3. Stay the terms of office of 3 years as prescribed in Column 5 of the Schedule to the Tribunal, Appellate Tribunal and other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017. A further direction fixing the term of office of all selectees by the aforementioned interim Search-cum- Selection Committee and consequent appointees as 5 years.

> 4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall be with conditions of service as applicable to the Judges of High Court.
>
> 5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members for a term of 5 years with conditions of service as applicable to Judges of High Court shall not be affected by the final outcome of the Writ Petition."

76. The learned Attorney General agreed with all except the fourth and fifth suggestions reproduced above, and suggested certain modifications as follows:

> "4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall abide by the conditions of service as per the old Acts and the Rules.
>
> 5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members shall be for a period as has been provided in the old Acts and the Rules."

77. This Court agreed to the learned Attorney General's suggestions and accordingly made the following operative directions:

> "In view of the aforesaid, we accept the suggestions and direct that the same shall be made applicable for selection of the Chairpersons and the Judicial/Administrative/ Technical/Expert Members for all tribunals."

78. Since many of the Search-cum-Selection Committees had initiated selection processes and had completed a substantial portion of the exercise prior to the above order dated 9th February, 2018, this Court, on 12th February, 2018 passed the following order:

> "As some Committees had proceeded, the matter was listed for further hearing. We have heard learned counsel for the parties. Mr. Rohit Bhat, learned counsel assisting the learned Attorney General for the Union of India shall file the status of the selection process by the Committees, by 13.2.2018.
>
> Mr. Arvind Datar, Mr. C.A. Sundaram and Mr. Mohan Parasaran, learned senior counsel shall also file through their Advocates-on- Record a joint memorandum with regard to which tribunals are covered and not covered. The same shall be filed by 10.30 a.m. on 13.2.2018.
>
> Orders reserved."

79. Further, vide order dated 20th March 2018, this Court clarified its previous order of 9th February 2018 and directed:

> "(iii) The tenure of the Chairperson and the Judicial/Administrative/Expert/Technical Members of all the Tribunals shall be for a period of five years or the maximum age that was fixed/determined under the old Acts and Rules;"

80. The following directions were also issued on 16th July, 2018 with regard to the age of superannuation of Members of the ITAT:

> "At this juncture, we may note that there is some confusion with regard to the Income Tax Appellate Tribunal (ITAT) as regards the age of superannuation. We make it clear that the person selected as Member of the ITAT will continue till the age of 62 years and the person holding the post of President, shall continue till the age of 65 years."

81. Corollary to the order dated 16th July 2018, six officers who had been selected as Member (Judicial) in CESTAT, also demanded the age of superannuation as noted in the case of Members of ITAT, to be applicable to them. Following the same dictum, vide order dated 21st August 2018, clarification regarding the age of superannuation for Members of CESTAT, Armed Forces Tribunal and Central Administrative Tribunal was made. The relevant portion of that order reads as follows:

> "CESTAT:
>
> 2. In IA 113281 of 2018, the applicant is an Additional District and Sessions Judge in the State of West Bengal, who has been selected as Member (Judicial) in the CESTAT. The notification of appointment of six officers who have been selected as Member (Judicial), including the applicant, stipulates that they shall hold office for a period of five years or till attaining the age of 62 years, whichever is earlier "in terms of the Hon'ble Supreme Court's order dated 20 March 2018". A member of the judicial service would have ordinarily continued until the date of superannuation in the state judicial service, subject to the service rules. It would be manifestly inappropriate to adopt an interpretation as a result of which, upon assuming office as Member (Judicial) in CESTAT the officer will have a tenure which will expire after five years, if it falls prior to attaining the age of 62 years. We, accordingly, are of the view that the clarification issued for the ITAT in the order dated 20 March 2018 needs to be reiterated in the case of the members of the CESTAT, which we do. We clarify that a person selected as Member of the CESTAT will continue until the age of 62 years while a person holding the post of President shall continue until the age of 65 years.

AFT:

3. Members of the Armed Forces Tribunal shall hold office until the attainment of the age of 65 years. Chairpersons who have been former Judges of the Supreme Court shall hold office until the attainment of the age of 70 years.

CAT:

4. In the case of the Central Administrative Tribunal, we clarify that the old rules/provisions shall continue to apply."

CONCEPT NOTE OF LEARNED AMICUS CURIAE :

82. On the request of this Court, learned Senior Advocate Arvind Datar has provided invaluable assistance as the Amicus Curiae. In his detailed Concept Note, he has stressed the need for setting up an independent oversight body in light of the observations in ***L. Chandra Kumar (supra)***, and as reiterated in ***Madras Bar Association v. Union of India (2015) (supra)*** to the effect that Tribunals or their members should not be required to seek facilities from the sponsoring or parent ministries or concerned departments.

83. The Concept Note also emphasised the need to implement the '74th Report of the Parliamentary Standing Committee' which recommended the creation of a `National Tribunal Commission' (NTC) to oversee all the Tribunals in the country. Mr. Datar further suggests that such National Tribunal Commission may consist of the following:

- Two retired Supreme Court Judges (with the senior-most amongst them to be Chairman).
- Two retired High Court Judges (Members).
- Three members representing the Executive.

84. It is further suggested in the concept note that such members be appointed by the following Selection Committee :

- Chief Justice of India (as Chairperson of the Committee who exercises a casting vote);
- Two senior-most judges of the Supreme Court after the Chief Justice of India;
- Current Law Minister; and
- Leader of the opposition.

85. The Concept Note also contains the following suggestions:

- The NTC should oversee functioning of central Tribunals and similar body may be constituted for State Tribunals.
- The NTC should deal with appointment and removal of members of the Tribunals by constituting sub-committees.
- The member of the Tribunals should be recruited by national competition. Once recruited they should continue till the age of 62/65 years subject to their efficiency and satisfactory working.
- The Tribunals should not be haven for retired persons and appointment process should not result in decisions being influenced if the Government itself is a litigant and the appointing authority at the same time.
- There should be restriction on acceptance of any employment after retirement.
- Bypassing of High Court jurisdiction under Article 226/227 need to be remedied by statutory amendment excluding direct appeals to this Court.

- There should be proper mechanism for removal of members.

86. The aforementioned Concept Note of Learned Amicus Curiae was considered by this Court on 07.05.2018, resulting in the following observations:-

> "We broadly approve the concept of having an effective and autonomous oversight body for all the Tribunals with such exceptions as may be inevitable. Such body should be responsible for recruitments and oversight of functioning of members of the Tribunals. Regular cadre for Tribunals may be necessary. Learned amicus suggests setting up of all India Tribunal service on the pattern of U.K. The members can be drawn either from the serving officers in Higher Judicial Service or directly recruited with appropriate qualifications by national competition. Their performance and functioning must be reviewed by an independent body in the same was as superintendence by the High Court under Article 235 of the Constitution. Direct appeals must be checked. Members of the Tribunals should not only be eligible for appointment to the High Courts but a mechanism should be considered whereby due consideration is given to them on the same pattern on which it is given to the members of Higher Judicial Service. This may help the High Courts to have requisite talent to deal with issues which arise from decisions of Tribunals. A regular cadre for the Tribunals can be on the pattern of cadres for the judiciary. The objective of setting up of Tribunals to have speedy and inexpensive justice will not in any manner be hampered in doing so. Wherever there is only one seat of the Tribunal, its Benches should be available either in all states or at least in all regions wherever there is litigation instead of only one place."

87. On 07.05.2018 itself, the following additional issues were also suggested for consideration:

> "(i) Creation of a regular cadres laying down eligibility for recruitment for Tribunals;
>
> (ii) Setting up of an autonomous oversight body for recruitment and overseeing the performance and discipline of the members so recruited and other issues relating thereto;
>
> (iii) Amending the scheme of direct appeals to this Court so that the orders of Tribunals are subject to jurisdiction of the High Courts;
>
> (iv) Making Benches of Tribunals accessible to common man at convenient locations instead of having only one location at Delhi or elsewhere. In the alternative, conferring jurisdiction on existing courts as special Courts or Tribunals."

88. Thereafter, this Court opined the following recourse :-

> "20. The above issues may require urgent setting up of a committee, preferably of three members, one of whom must be retired judge of this Court who may be served in a Tribunal. Such Committee can have inter action with all stakeholders and suggest a mechanism consistent with the constitutional scheme as interpreted by this Court in several decisions referred to above and also in the light of

recommendations of expert bodies. This exercise must be undertaken in a time bound manner."

89. This was followed by yet another order of 16th May, 2018 recommending constitution of a Committee within two months and expecting the Committee to give its report within three months thereafter.

FORMULATION OF ISSUES:

90. The core issues canvassed at the Bar concern the constitutionality of the Finance Act, 2017, particularly whether it satisfies the test of a 'money bill' under Article 110 of the Constitution? Further, in the eventuality that it is held that the impugned legislation has been validly enacted, then does it through Section 184 excessively delegate legislative power to the Executive? Finally, whether the Rules thus framed as delegated legislation are ultra vires their parent enactments and are liable to be struck down?

91. In addition, learned Counsel for the parties have drawn attention to the need to rationalise the administration of Tribunals, especially the conditions of service, mode of appointment, security of tenure and requisite qualifications of members and presiding officers of various Tribunals. They have also highlighted the growing menace of pendency before this Court arising from direct statutory appeals from orders of such Tribunals.

92. In light of these arguments put forth by learned Counsels and the suggestions of by the Amicus Curiae, the following issues arise for our consideration:

I. Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a 'money bill' under Article 110 and consequently is validly enacted?

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?

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?

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

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

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?

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

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

ISSUE I: WHETHER THE 'FINANCE ACT, 2017' INSOFAR AS IT AMENDS CERTAIN OTHER ENACTMENTS AND ALTERS CONDITIONS OF SERVICE OF PERSONS MANNING DIFFERENT TRIBUNALS CAN BE TERMED AS A 'MONEY BILL' UNDER ARTICLE 110 AND CONSEQUENTLY IS VALIDLY ENACTED?

93. The Indian Parliament is a bicameral legislature. In order to become law, as per the general legislative scheme as provided under Article 107, an ordinary bill must be passed by a simple majority of both the Rajya Sabha and the Lok Sabha and must then receive Presidential ratification. Ordinary bills can be introduced either by the government or by any private member in either house of Parliament. After securing requisite majority in the House it is introduced in, ordinary bills are then sent to the other House for its assent. The Constitution, however, makes two exemptions to this general legislative procedure for formulation of laws.

94. Article 368 provides for the Constituent power of the Parliament to amend the Constitution itself and concomitantly requires a higher threshold of majority in both houses of Parliament, and in certain cases also require the assent of a simple majority of the State legislatures. Article 110, in stark contrast, reverses the threshold and significantly reduces the role of the Rajya Sabha for 'money bills'. Articles 109 and 110 provide that:

> "**109.** (1) A Money Bill shall not be introduced in the Council of States.
>
> (2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.
>
> (3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses

with the amendments recommended by the Council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:—

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the Consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill."

95. 'Money bills' as defined under Article 110(1) thus include bills which contain "only" provisions covered by sub-clauses (a) to (g). These money bills can be introduced only in the Lok Sabha and the role of the Rajya Sabha is merely consultative. Unlike in the case of ordinary bills where the Upper House can block

the proposed legislation and act as a check on the power of the directly elected Lower House, in case of money bills, the Rajya Sabha merely has the ability to recommend amendments, that too only within fourteen days. In case the Lok Sabha refuses to accept those recommendations or in case no recommendations are made by the Rajya Sabha within the period of fourteen days, the money bill can be directly sent for Presidential ratification and thereafter it becomes valid law.

96. Such an exceptional provision has its roots in British tradition and is an inheritance of the Westminster form of government. The Parliament Act of 1911 was formulated by the United Kingdom Parliament in response to the Constitutional crisis of 1909 whereby the unelected Upper House (House of Lords) had stalled important budgetary bills passed by the elected Lower House (House of Commons), causing a governmental crisis and forcing the elected government to resign and seek re-election. Through Section 3, the said enactment required the Speaker of the House of Commons to certify that the bill was a 'money bill' and post such certification, the Upper House would forfeit its ability to amend or veto the bill. Further, it also allowed 'public bills' to become law irrespective of refusal by the House of Lords, in case the House of Commons had passed the same draft thrice in a minimum span of two years. It must be noted that the Indian adaptation under Article 109 and 110 do not have exceptions for 'public bills' nor do they explicitly provide that such certification shall not be amenable to judicial review unlike in the Parliament Act of 1911.

97. The Constitution of India by Article 110(4), requires that every 'money bill' be certified to be so by the Speaker before it is transmitted to the Rajya Sabha for

their non-binding consideration. The Speaker of the Lok Sabha hence is the only appropriate authority to decide the nature of a bill under Article 110(3).

98. In the present dispute, the Union has relied upon the finality accorded to such certification by the terminology of Article 110(3) which provides that in case of any dispute as to the nature of a bill, "*the decision of the Speaker of the House of the People thereon shall be final."* The Lok Sabha Speaker, in fact, on a dispute having so arisen has adjudicated the then Finance Bill, 2017 to be a 'money bill'. Further, the Union also places emphasis on Article 122(1) of the Constitution which provides that:

> "**122.** (1) The validity of any proceedings in Parliament all not be called in question on the ground of any alleged irregularity of procedure."

99. The Union thus, alternatively, contends that the challenge before this Court to the certification of the Speaker of the Finance Bill, 2017 as a 'money bill' and its consequent passage without the assent of the Rajya Sabha would at best amount to an 'irregularity of procedure' of 'proceedings in Parliament' and hence cannot be inquired into by this Court.

100. It must be noted once again, that like Articles 109 and 110, Article 122 of our Constitution too can be traced to the Constitutional history and developments in the United Kingdom. Certain Members of Parliament were tried and imprisoned for their remarks in Parliament during the seventeenth century resulting in the enactment of Article 9 of the Bill of Rights, 1688 which specifies that "*…. proceedings in Parliament ought not to be impeached or questioned in any Court….*" Article 212(1) of the Constitution of India provides a direct corollary of Article 122(1) with respect to State legislatures.

101. This provision was initially interpreted in ***MSM Sharma vs. Dr. Shree Krishna Sinha***[20] to mean that legislative business cannot be invalidated even if it is not strictly in compliance with law for such issues were within the "special jurisdiction" of the legislature to regulate its own business.

102. The Union's contention that Article 122 would exempt from judicial scrutiny passage of bills is a far-fetched contention. If such a blanket exemption were to be granted, then it would open the floodgates to deviation from any Constitutional provision governing the functioning of Parliament and its legislative procedure. Since the Constitution explicitly provides a self-contained detailed procedure for enactment of legislation, and does not suggest that mere assent of the President to a law, by whatsoever method adopted, would become a valid law, it is necessary that this Court being the highest Constitutional forum for judicial review is provided with enough space for enforcement and protection of the Constitutional scheme. A perusal of the expressions used in Article 122 and a comparison with its British roots make it clear that the "proceedings" referred to include the power of the Parliament to frame its own rules, set out procedures for debate and discussion and powers to enforce disciple. Section 3 of the Parliament Act, 1911 in the United Kingdom makes the decision of the Speaker of the House of Commons 'conclusive for all purposes' and 'shall not be questioned in any court of law'. The Constitution of India however, under Article 110(3), states that 'if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final'. A different syntax seems to indicate that our Constitution

[20] AIR 1959 SC 395.

makes the decision of the Speaker as to the nature of Bill final qua members of both the Houses of Parliament, though it is not conclusive and unchallengeable before the Courts. The scope of judicial review of decisions that enjoy the status of finality under the Constitution has been examined by this Court on several occasions. We would like to refer to a few precedents in this regard. In ***Raja Ram Pal*** v. ***Lok Sabha***[21], this Court had examined the ambit and scope of judicial review in matters of Parliamentary privileges and powers under Article 105 of the Constitution. The Court had held that under Article 122(1) and 212(1), immunity that has been granted is limited to 'irregularity of procedure' and does not extend to substantive illegality or unconstitutionality by observing:

> *"Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality."*

In ***Union of India*** v. ***Jyoti Prakash Mitter***[22], this Court had examined clause (3) to Article 217 which makes the decision of the President after consultation with the Chief Justice of India 'final', if the question arises as to the age of a Judge of a High Court. It was observed that notwithstanding the declared finality of the order of the President, the Court can, in appropriate cases when the order has been passed on collateral considerations or the rules of natural justice are not observed or when the judgment of the President is coloured by the advice or representation made by the Executive or is made with no evidence, set aside the order of the

[21] (2007) 3 SCC 184
[22] (1971) 1 SCC 396

President made under Article 217(3). The Courts, however, do not sit in appeal over the judgment of the President or decide the weight to be attached to the evidence which is entirely within the domain of the President.

Reading of the above decisions exposit that 'finality' of decisions under the Constitution has been subject to judicial review by the Courts. However, the jurisdiction exercisable by the Courts in such matters is rather limited and is subject to the satisfaction of specific conditions as discussed. We find no good ground and reason to take a different view with respect to the power of judicial review against certification of a bill as a Money Bill by the Speaker under Article 110(4). Article 110(3) which makes this decision final qua both the Houses of Parliament and Article 122(1) which prohibits review by the courts in matters of 'irregularity of procedure' cannot operate as a bar when a challenge is made on the ground of illegality or unconstitutionality under the Constitutional scheme.

103. Determining whether an impugned action or breach is an exempted irregularity or a justiciable illegality is a matter of judicial interpretation and would undoubtedly fall within the ambit of Courts and cannot be left to the sole authority of the Parliament to decide. Such a position has also been taken in the United Kingdom by the House of Lords in ***R (Jackson) vs. Attorney General***[23] where notwithstanding the explicit bar to judicial consideration of all Parliamentary proceedings (and not just procedural irregularities as under the Constitution of India), the Court assumed jurisdiction whilst noting that interpretation of statutes dealing with legislative processes would fall within the domain of the Courts;

[23] [2005] UKHL 56.

statutory interpretation being a judicial exercise, regardless of the immunities granted to parliamentary proceedings under the Bill of Rights.

104. It would hence be gainsaid that gross violations of the Constitutional scheme would not be mere procedural irregularities and hence would be outside the limited ambit of immunity from judicial scrutiny under Article 122(1). In the case at hand, jurisdiction of this Court is, hence, not barred.

105. On the substantive question of whether the Finance Act, 2017 was a 'money bill' under Article 110(3) it must be noted that until the turn of the twenty-first century, this Court took a consistent position that Article 110(3) of the Constitution would act as an express bar against judicial inquiry into the correctness of the certificate of 'money bill' given by the Speaker of the Lok Sabha.

106. In ***Mohd. Saeed Siddiqui vs. State of Uttar Pradesh***[24]**,** a three-judge bench refused to judicially review the speaker's certification of the Uttar Pradesh Lokayukta and Up-Lokayuktas (Amendment) Bill as a Money bill. The phrase "proceedings of the Legislature" under Article 212(1) was interpreted to include "everything said or done in either house". This Court thus held:

> "43. As discussed above, the decision of the Speaker of the Legislative Assembly that the Bill in question was a Money Bill is final and the said decision cannot be disputed nor can the procedure of the State Legislature be questioned by virtue of Article 212. Further, as noted earlier, Article 255 also shows that under the Constitution the matters of procedure do not render invalid an Act to which assent has been given to by the President or the Governor, as the case may be. Inasmuch as the Bill in question was a Money Bill, the contrary contention by the Petitioner against the passing of the said Bill by the Legislative Assembly alone is unacceptable."

[24] (2014) 11 SCC 415.

107. This was relied upon in ***Yogendra Kumar Jaiswal vs. State of Bihar***[25]**,** wherein a division bench of this Court refused to judicially review the certification of 'money bill' accorded by the Speaker to the Orissa Special Courts Bill noting that it was settled post ***Mohd. Siddiqui (supra)*** that any such certification would be an "irregularity" and not a "substantiality".

108. A co-ordinate bench of this Court in ***Justice Puttaswamy (Retd.) and Anr. v. Union of India***[26]***,*** was tasked with a similar question of the certification of 'money bill' accorded to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 by the Speaker of the Lok Sabha. The majority opinion after noting the important role of the Rajya Sabha in a bicameral legislative setup, observed that Article 110 being an exceptional provision, must be interpreted narrowly. Although the majority opinion did not examine the correctness of the decisions in ***Md. Siddiqui (supra)*** and ***Yogendra Kumar Jaiswal (supra)*** or conclusively pronounce on the scope of jurisdiction or power of this Court to judicially review certification by the Speaker under Article 110(3), yet, it independently reached a conclusion that the impugned enactment fell within the four-corners of Articles 110(1) and hence was a 'money bill'. The minority view rendered, however, explicitly overruled both ***Md. Siddiqui (supra)*** and ***Yogendra Kumar Jaiswal (supra).***

109. The majority opinion in ***Puttaswamy (supra)*** by examining whether or not the impugned enactment was in fact a 'money bill' under Article 110 without explicitly dealing with whether or not certification of the speaker is subject to judicial

[25] (2016) 3 SCC 183
[26] (2019) 1 SCC 1.

review, has kept intact the power of judicial review under Article 110(3). It was further held therein that the expression 'money bill' cannot be construed in a restrictive sense and that the wisdom of the Speaker of the Lok Sabha in this regard must be valued, save where it is blatantly violative of the scheme of the Constitution. We respectfully endorse the view in ***Puttaswamy (supra)*** and are in no doubt that ***Md. Siddiqui*** and ***Yogendra Kumar Jaiswal*** in so far as they put decisions of the Speaker under Article 110(3) beyond judicial review, cannot be relied upon.

110. It must be emphasized that the scope of judicial review in matters under Article 110(3) is extremely restricted, with there being a need to maintain judicial deference to the Lok Sabha Speaker's certification. There would be a presumption of legality in favour of the Speaker's decision and onus would undoubtedly be on the person challenging its validity to show that such certification was grossly unconstitutional or tainted with blatant substantial illegality. Courts ought not to replace the Speaker's assessment or take a second plausible interpretation. Instead, judicial review must be restricted to only the very extreme instance where there is a complete disregard to the Constitutional scheme itself. It is not the function of Constitutional Courts to act as appellate forums, especially on the opinion of the Speaker, for doing so would invite the risk of paralyzing the functioning of the Parliament.

111. In light of the aforementioned narrow scope of inquiry and the high burden to be discharged by the petitioner(s) against the Speaker's certification, we may now examine the challenge laid to the Finance Act, 2017.

112. Provisions of Part XIV can be broken down into three broad categories. First, abolition and merger of existing Tribunals; second, uniformizing and delegating to the Central Government through the Rules the power to lay down qualifications; method of appointment and removal, and terms and conditions of service of Presiding Officers and members; and third, termination of services and payment of compensation to presiding officers and members of certain tribunals that have now become de-funct.

113. Interpretation of Article 110 was made by a coordinate Constitution Bench in ***K.S. Puttaswamy*** (Aadhaar-5) and is relied upon by both sides.

114. The majority judgment in ***K.S. Puttaswamy*** (Aadhaar-5) under the heading 'Money Bill', in paragraph 448 and then in paragraphs 452 to 461, had recorded the submissions made by the learned counsel, including the submission made on behalf of the petitioners relying upon the word 'only' appearing in Article 110 which defines a 'Money Bill'. With regard to the interpretation to be given to the meaning of the word 'only', reliance was placed on ***Hari Ram*** v. ***Babu Gopal Prasad***[27] and ***M/s Saru Smelting (P) Ltd.*** v. ***Commissioner of Sales Tax, Lucknow***[28]. The majority judgment had thereupon referred to the power of judicial review notwithstanding the use of the word 'final' with reference to the power of the Speaker under Article 110(3) of the Constitution, an aspect which we have already answered earlier, and examined Section 7 of the Aadhaar Act to observe *"it is also accepted by the petitioners that Section 7 is the main provision of the Act"*. Thereafter, reference was made to the other provisions of the Aadhaar Act to

[27] (1991) Supp. 2 SCC 608
[28] (1993) Supp. 3 SCC 97

record the majority opinion that the bill in question was rightly introduced as a "Money Bill". The majority judgment, therefore, did not elucidate and explain the scope and ambit of sub-clauses (a) to (f) to clause (1) of Article 110 of the Constitution, a legal position and facet which arises for consideration in the present case and assumes considerable importance.

115. Ashok Bhushan, J., in his concurring judgment, from paragraph 886 onwards, had examined the issue of "Money Bill" and its justiciability and as noticed above, overruled ***Mohd. Saeed Siddiqui*** (supra) and ***Yogesh*** (supra) as not laying down the correct law by relying upon the decisions of this Court in ***Kihoto Hollohan*** v. ***Zachillhu and Others***[29] and ***Raja Ram Pal*** (supra). Referring to the definition of "Money Bill" and the meaning and purpose of the word 'only' used in Article 110(1) of the Constitution, Ashok Bhushan, J. had observed that legislative intent was that the main and substantive provision of an enactment should only be any or all of the sub-clauses from (a) to (f). In the event the main or substantive provisions of the Act are not covered by sub-clauses (a) to (f), the bill cannot be said to be a "Money Bill" {See paragraph 905}. It was further observed that the use of the word 'only' in Article 110(1) has its purpose, which is clear restriction for a bill to be certified as a "Money Bill" {See paragraph 906}. Referring to the Aadhaar Act, it was observed that it veers around the government's constitutional obligation to provide for subsidies, benefits and services to individuals and other provisions are only incidental provisions to the main provision. Therefore, the Aadhaar Bill was rightly certified by the Speaker as a "Money Bill".

[29] (1992) Supp. 2 SCC 651

116. Dr. D.Y. Chandrachud, J., in his minority opinion on the said question, referring to the word 'only' in Article 110(1) of the Constitution had observed that the pith and substance doctrine which is applicable to legislative entries would not apply when deciding the question whether or not a particular bill is a "Money Bill". Referring to sub-clause (e) of Article 110(1), it was held that the Money Bill must deal with the declaration of any expenditure to be charged on the Consolidated Fund of India (or increasing the amount of expenditure) and, therefore, Section 7 of the Aadhaar Act did not have the effect of making the bill a Money Bill as it did not declare the expenditure incurred on services, benefits or subsidies to be a charge on the Consolidated Fund of India. Section 7 mandates Aadhaar for availing services, benefits or subsidies which were already charged to the Consolidated Fund of India. However, this view was not accepted by the majority judgment.

117. In the context of Article 110(1) of the Constitution, use of the word 'only' in relation to sub-clauses (a) to (f) pose an interesting, *albeit* a difficult question which was not examined and answered by the majority judgment in ***K.S. Puttaswamy*** (Aadhaar-5). While it may be easier to decipher a bill relating to imposition, abolition, remission, alteration or regulation of any tax, difficulties would arise in the interpretation of Article 110(1) specifically with reference to sub-clauses (b) to (f) in a bill relating to borrowing of money or giving of any guarantee by the Government of India, or an amendment of law concerning financial obligation. In the book, "Practices and Procedures of Parliament" by Kaul and Shakdher, it is opined that unless the word 'only' is interpreted in a right manner, Article 110(1) would be a nullity. A liberal and wide interpretation, on the other hand, possibly exposits an

opposite consequence. Relevant portion of the opinion by Kaul and Shakdher reads:

> "Speaker Mavalankar observed as follows: "Prima facie, it appears to me that the words of article 110 (imposition, abolition, remission, alteration, regulation of any tax) are sufficiently wide to make the Consolidated Bill a Money Bill. A question may arise as to what is the exact significance or scope of the word 'only' and whether and how far that word goes to modify or control the wide and general words 'imposition, abolition, remission, etc.'. I think, prima facie, that the word 'only' is not restrictive of the scope of the general terms. If a Bill substantially deals with the imposition, abolition, etc., of a tax, then the mere fact of the inclusion in the Bill of other provisions which may be necessary for the administration of that tax or, I may say, necessary for the achievement of the objective of the particular Bill, cannot take away the Bill from the category of Money Bills. One has to look to the objective of the bill. Therefore, if the substantial provisions of the Bill aim at imposition, abolition, etc., of any tax then the other provisions would be incidental and their inclusion cannot be said to take it away from the category of a Money Bill. Unless one construes the word 'only' in this way it might lead to make article 110 a nullity. No tax can be imposed without making provisions for its assessment, collection, administration, reference to courts or tribunals, etc, one can visualise only one section in a Bill imposing the main tax and there may be fifty other sections which may deal with the scope, method, manner, etc., of that imposition. Further, we have also to consider the provisions of sub-clause (2) of article 110; and these provisions may be helpful to clarify the scope of the word 'only', not directly but indirectly."

118. The majority judgment did not advert to the doctrine of pith and substance whereas judgment of Ashok Bhushan, J. had referred to the dominant purpose. The test of dominant purpose possibly has its own limitation as many a legislation would have more than one dominant objective especially when this prescription is read with reference to sub-clauses (a) to (f) of Article 110(1) of the Constitution. Further, determination of what constitutes paramount and cardinal purpose of the legislation and the test applicable to determine this compunction and incertitude itself is not free from ambiguity. Difficulties would arise with reference to sub-clauses (b), (c), (d) and (e) of Article 110(1), when we apply the principles of dominant or the main purpose of an enactment test. Sub-clause (c) to Article 110(1) refers to payment of monies into or withdrawal of monies from the Consolidated

Fund of India. Sub-clause (d) refers to appropriation of monies out of the Consolidated Fund of India. Sub-clause (e) refers to declaration of any expenditure charged on the Consolidated Fund of India or increasing of the amount of such expenditure. Sub-clause (f) relates to receipt of money on account of Consolidated Fund of India or Public Account of India or issue of such money or the audit of the accounts of the Union or of State. Even clause (b) in its amplitude includes an amendment of the law in respect of a financial obligation undertaken or to be undertaken by the Government of India. Once we hold that the decision of the Speaker under clause (3) of Article 110 of the Constitution though final, is subject to judicial scrutiny on the principle of constitutional illegality, the provisions of Article 110(1) have to be given an appropriate meaning and interpretation to avoid and prevent over-inclusiveness or under-inclusiveness. Any interpretation would have far reaching consequences. It is therefore, necessary that there should be absolute clarity with regard to the provisions and any ambiguity and debate should be ironed out and affirmatively decided. In case of doubt, certainly the opinion of the Speaker would be conclusive, but that would not be a consideration to avoid answering and deciding the scope and ambit of "Money Bill" under Article 110(1) of the Constitution. For example, taxation enactments like the Income Tax Act would qualify as Money Bill under sub-clause (a) to clause (1) of Article 110 and may include provisions relating to Appellate Tribunals which would possibly qualify as incidental provisions covered under sub-clause (g) to clause (1) of Article 110, even if we exclude application of sub-clause (d) to clause (1) of Article 110. The position it could be argued would be different with reference to provisions for constitution of a tribunal under the Administrative Tribunal Act or the National Green Tribunal Act.

The bill could however state that the expenditure would be charged on the Consolidated Fund of India.

119. Another aspect which would arise for consideration would be the legal consequences in case a Non-Money Bill certified by the Speaker as a Money Bill, when presented before the Rajya Sabha is specifically objected to on this count by some Members, but on being put to vote no recommendations are made in respect of "Non-Money" Bill related provisions.

120. The petitioners had argued on the strength of the concurring opinion by Ashok Bhushan, J. holding that in addition to at least one provision falling under Article 110(1) (a) to (f), each of the other remaining provisions must also be incidental to such core provision(s), and hence must satisfy the requirement of Article 110(g). Such an interpretation, it was contended, would make the insertion of the word 'only' under the prefatory part of Article 110(1) purposeful, which was said to have been glossed over by the Union. Further, it was contended that the manner in which the majority correlated Section 7 of the Aadhaar Act to Article 110(1)(e) was erroneous, for it only regulated procedure for withdrawal by imposing a requirement for authentication and did not declare any expenditure to be a charge on the Consolidated Fund of India. They had contended that the interpretation of the enactment by the majority judgement was constitutionally inexact and that a similar analysis ought not to be made in the present case. The petitioners, therefore, contend that every impugned provision be individually examined and brought either under Article 110(1)(a) to (f) or be incidental thereto, as permitted by Article 110(g). In case even a single provision did not satisfy either of the aforementioned two categories, then the entire Finance Act, 2017 would be an

affront to the prefatory phraseology of Article 110(1) and must be declared as being unconstitutional.

121. However, the learned Attorney General has propounded that constitutionality of the Finance Act, 2017 would be safe if its dominant provisions, which form the core of the enactment, fall within the ambit of Article 110(1)(a) to (f). Other minor provisions, even if not strictly incidental, could take the dominant colour and could be passed along with it as a Money Bill. As per such interpretation, provisions ought not to be read in a piece-meal manner, and judicial review ought to be applied deferentially.

122. Upon an extensive examination of the matter, we notice that the majority in ***K.S. Puttaswamy*** (Aadhaar-5) pronounced the nature of the impugned enactment without first delineating the scope of Article 110(1) and principles for interpretation or the repercussions of such process. It is clear to us that the majority dictum in ***K.S. Puttaswamy*** (Aadhaar-5) did not substantially discuss the effect of the word 'only' in Article 110(1) and offers little guidance on the repercussions of a finding when some of the provisions of an enactment passed as a "Money Bill" do not conform to Article 110(1)(a) to (g). Its interpretation of the provisions of the Aadhaar Act was arguably liberal and the Court's satisfaction of the said provisions being incidental to Article 110(1)(a) to (f), it has been argued is not convincingly reasoned, as might not be in accord with the bicameral Parliamentary system envisaged under our constitutional scheme. Without expressing a firm and final opinion, it has to be observed that the analysis in ***K.S. Puttaswamy*** (Aadhaar-5)

makes its application difficult to the present case and raises a potential conflict between the judgements of coordinate Benches.

123. Given the various challenges made to the scope of judicial review and interpretative principles (or lack thereof) as adumbrated by the majority in ***K.S. Puttaswamy*** (Aadhaar-5) and the substantial precedential impact of its analysis of the Aadhaar Act, 2016, it becomes essential to determine its correctness. Being a Bench of equal strength as that in ***K.S. Puttaswamy*** (Aadhaar-5), we accordingly direct that this batch of matters be placed before Hon'ble the Chief Justice of India, on the administrative side, for consideration by a larger Bench.

124. There is yet another reason why we feel the matter should be referred to a Constitution Bench of seven judges. ***L. Chandra Kumar*** (supra), which was decided by a Bench of seven Judges, had also interpreted on the ambit of supervision by the High Courts under Article 227(1) of the Constitution to observe that the Constitutional scheme does not require all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction, as the idea is to divest the High Courts of their onerous burden. Consequently, adding to their supervisory functions vide Article 227(1) cannot be of assistance in any manner. Thereafter, it was observed that different tribunals constituted under different enactments are administered by the Central and the State Governments, yet there was no uniformity in administration. This Court was of the view that until a wholly independent agency for 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, the Court observed that the Ministry of Law would be the appropriate ministry. The Ministry of Law in turn was required to appoint an independent supervisory body to oversee the working of the Tribunals. As noticed above, this has not happened. In these circumstances, it would be appropriate if these aspects and questions are looked into by a Bench of seven Judges.

<u>ISSUE II</u>: WHETHER SECTION 184 OF THE FINANCE ACT, 2017 IS UNCONSTITUTIONAL ON ACCOUNT OF EXCESSIVE DELEGATION?

125. The second challenge against Part XIV of the Finance Act, 2017 is predicated on the assertion that this is a case of excessive delegation as it falters on the anvil of "essential legislative functions" and "policy and guidelines" tests.

126. The Eighth Schedule referred to in Section 183 contains a list of 19 tribunals with corresponding enactments under which they were constituted. Section 183 overrides the provisions of the enactments specified in column (3) of the Eighth Schedule and mandates that from the appointed date, the Chairperson, Vice-Chairperson, Chairman, Vice Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule shall be appointed in terms of provisions of Section 184 of the Finance Act. These provisions however,

do not apply to those who have already been appointed to the said posts immediately before the appointed date, that is the date on which the Central Government may, by a notification in the Official Gazette, bring the said provisions into effect.

127. Section 184, to repeat, reads as under:

> "**184. Qualifications, appointment, term and conditions of service, salary and allowances, etc., of Chairperson, Vice-Chairperson and Members, etc., of the Tribunal, Appellate Tribunal and other Authorities**.—(1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:
>
> Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:
>
> Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—
>
> (a) in the case of Chairperson, Chairman or President, the age of seventy years;
>
> (b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:
>
> (2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment."

Section 184 has conferred upon the Central Government power to make rules by way of notification to provide for (a) qualifications; (b) appointment; (c) term of office; (d) salaries and allowances; (e) resignation; and (f) removal and other terms and conditions of service of the

Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule. The first proviso states that the incumbent officers shall hold office for such terms as may be specified in the rules made by the Central Government but the term shall not exceed five years from the date on which he assumes the office and shall be eligible for reappointment. The second proviso states that the persons so appointed shall hold office till they attain the age specified in the rules made by the Central Government which shall not exceed in the case of Chairperson, Chairman and the President, the age of 70 years and in the case of Vice-Chairperson, Vice-Chairman, Vice-President or any other Members, the age of 67 years. Sub-section 2 to Section 184 states that the salaries and allowances and other terms and conditions of service of the persons appointed may not be varied to their disadvantage after appointment.

128. Section 185 (1) of the Finance Act is also relevant and reads:

> "**185. Transitional provisions.—** (1) Any person appointed as the Chairperson or Chairman, President or Vice-Chairperson or Vice-Chairman, Vice-President or Presiding Officer or Member of the Tribunals, Appellate Tribunals, or as the case may be, other Authorities specified in column (2) of the Ninth Schedule and holding office as such immediately before the appointed day, shall on and from the appointed day, cease to hold such office and such Chairperson or Chairman, President, Vice-Chairperson or Vice-Chairman, Vice-President or Presiding officer or Member shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service."

The Chairperson or Chairman, President or Vice-Chairperson or Vice-Chairman, Vice-President or Presiding Officer or Member of the Tribunals/Appellate Tribunals specified in column (2) of the Ninth Schedule who

hold office as per the above provisions before the appointed date shall cease to do so and will be entitled to compensation not exceeding three months' pay and allowance for the premature termination of the office or the contract of office. However, we would clarify that presently we are not examining constitutional vires of sub-section (1) to Section 185.

129. Section 186 of the Finance Act, 2017 reads as under:

> "**186. General Power to make rules.—** Without prejudice to any other power to make rules contained elsewhere in this Part, the Central Government may, by notification, make rules generally to carry out the provisions of this Part."

The aforesaid provisions stipulate that without prejudice to any other power to make rules contained elsewhere in the Part XIV of the Finance Act, 2017, the Central Government may, by notification, makes rules generally to carry out the provisions of the said Part.

130. Reading of the said provisions indicates that except for providing the upper age limit and that the person appointed shall not have tenure exceeding five years from the date on which he enters office and shall be eligible for re-appointment, the Finance Act delegates the power to specify the qualifications, method of selection and appointment, terms of office, salaries and allowances, removal including resignation and all other terms and conditions of service to the Central Government which would act as a delegatee of the Parliament. The governing statutory provisions embodied in the existing parent legislation specified in the column (3) of the Schedule and the rules made thereunder are overwritten and authority and power is conferred on the Central Government to decide qualifications for appointment, process for selection, and terms and conditions of service including salaries allowance, resignation and removal through delegated

or subordinate legislation. Before we look into the vires of this delegation, it behoves us to recount and reflect on the approach adopted by this Court in gauging the validity of delegated legislation.

131. This Court addressed this conundrum the first time in ***In re: The Delhi Laws Act***,[30] wherein a seven-Judge Bench delivered seven different judgements clearly evincing the divergence of opinion on the issue. Albeit, the majority view, as clarified and held by J. M. Shelat, J. speaking for the majority in ***B. Shama Rao*** v. ***Union Territory of Pondicherry***,[31] can be deduced as under:

> "In view of the intense divergence of opinion except for their conclusion partially to uphold the validity of the said laws it is difficult to deduce any general principle which on the principle of state decision can be taken as binding in for future cases. It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein. The utmost therefore that can be said of this decision is that the minimum on which there appears to be consensus was (1) that legislatures in India both before and after the Constitution had plenary power within their respective fields; (2) that they were never the delegates of the British Parliament; (3) that they had power to delegate within certain limits not by reason of such a power being inherent in the legislative power but because such power is recognised even in the United States of America were separatist ideology prevails on the ground that it is necessary to effectively exercise the legislative power in a modem state with multifarious activities and complex problems facing legislatures and (4) that delegation of an essential, legislative function which amounts to abdication even partial is not permissible. All of them were agreed that it could be in respect of subsidiary and ancillary power."

All the seven Judges were in unison that abdication or effacement by conferring the power of legislation to the subordinate authority even if partial is not permissible. The difference of opinion primarily arose from the meaning and scope of the abdication or effacement of the legislative power. On the said aspect, we would like to refer to the judgments of Fazl Ali, J, Mukherjea, J and Bose, J. Fazl Ali, J. had expressed the said principle as :

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[30] 1951 AIR 332
[31] (2015) 4 SCC 770

> "The true distinction ..... is this. The legislature cannot delegate the power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government.
>
> 2. The true import of the rule against delegation is this:
> "This rule in a broad sense involves the principle underlying the maxim, delegatus non potest delegate, but it is apt to be misunderstood and has been misunderstood. In my judgment, all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duty with which it has been entrusted. This rule has been recognised both in America and in England .....
>
> xx xx xx
>
> What constitutes abdication and what class of cases will be covered by that expression will always be a question of fact, and it is by no means easy to lay down any comprehensive formula to define it, but it should be recognised that the rule against abdication does not prohibit the Legislature from employing any subordinate agency of its own choice for doing such subsidiary acts as may be necessary to make its legislation effective, useful and complete."

The learned Judge had further observed that an act is a law when it embodies policies, defines standards and directs the authority chosen to act within certain prescribed limits and not go beyond. The Act should be a complete expression of the will of the Legislature to act in a particular way and of its command on how it should be carried out. When the Legislature decides the circumstances as the best way to legislate on a subject, then, such legislation does not amount to abdication of powers because from the very nature to legislation it is manifest that when power is misused it can be withdrawn, altered and repealed. Most importantly, the delegate is to only adopt and extend the laws enacted by the Legislature.

132. Mukherjea, J. opined that the legislative functions concern with declaring the legislative policy and laying down the standards which is to be enacted into a rule of law, and what can be delegated as the task of subordinate legislation by its very nature is ancillary to the statute which delegates the power to make it. When the

legislative policy is enunciated with sufficient clearness or the standards are laid down, the Courts cannot interfere with the discretion that the Legislature has exercised in determining the extent of necessary delegation. The delegatee cannot be allowed to check the policy declared by the legislators and cannot be given the power to repeal or abrogate any statute.

133. Bose, J. while observing that the main function of the legislature is to legislate and not leave it to others, nevertheless acknowledged that it is impossible to carry on government of a modern State with its infinite complexities and ramifications without a large devolution of power and delegation of authority. This is a practical necessity which has been acknowledged even by the American Courts. To decide otherwise would make it difficult for the government to function and work effectively.

134. A Division Bench of this Court in ***Ramesh Birch*** v. ***Union of India***[32] had examined the aforesaid seven opinions and culled out the ratio to observe that the lines of reasoning were different but nevertheless the judges had accepted the inevitable- that while Parliament has ample and extensive powers of legislation, these would include the power to entrust some of the functions and powers to another body or authority. At the same time, in ***Delhi Laws Act*** (supra) the judges had agreed that there should be limitations on such delegation. However, on the question as to what is this limitation, there was a lack of consensus. The two judges in ***Ramesh Birch*** (supra) relying on the ratio in ***Delhi Laws Act*** (supra), had observed:

[32] 1990 AIR 560

> "Some thought that there is no abdication or effacement unless it is total i.e. unless Parliament surrenders its powers in favour of a "parallel" legislature or loses control over the local authority to such an extent as to be unable to revoke the powers given to, or to exercise effective supervision over, the body entrusted therewith. But others were of opinion that such "abdication" or "effacement" could not even be partial and it would be bad if full powers to do everything that the legislature can do are conferred on a subordinate authority, although the legislature may retain the power to control the action of such authority by recalling such power or repealing the Acts passed by the subordinate authority. A different way in which the second of the above views has been enunciated--and it is this view which has dominated since--is by saying that the legislatures cannot wash their hands off their essential legislative function. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature."

Thereupon the Division Bench had referred to the "policy and guideline" theory as a test to decide whether or not it is a case of excessive delegation which it was observed means reference and giving proper regard to the context of the Act and the object and purposes sought to be achieved which should be clear and it is not necessary that the legislation should "dot all the i's and cross all the t's of its policy". It is sufficient if it gives the broadest indication of the general policy of the legislature.

135. We would now refer to an earlier decision of this Court in ***Devi Das Gopal Krishnan & Ors*** v. ***State of Punjab & Ors***[33] wherein K. Subba Rao, CJ. speaking for the Court had struck down Section 5 of the East Punjab General Sales Tax Act, 1948 which had empowered the State Government to fix rate of tax to such rate as it deemed fit, as bad and unconstitutional observing that the needs of the State and the purposes of the Act did not provide sufficient guidance for fixing the rates of tax. It was observed:

[33] AIR 1967 SC 1895

> "16. ...But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal on construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

136. A year later in ***Municipal Corporation of Delhi*** v. ***Birla Cotton, Spinning and Weaving Mills, Delhi and Another***[34] this Court, however, upheld Section 113(2) of the Delhi Municipal Act, 1957 which had empowered the corporation to levy certain optional taxes by observing that there were sufficient guidelines, safeguards and checks in the Act which prevented excessive delegation as the Act had provided maximum rate of tax. It was observed that the nature of body to which delegation is made is also a relevant factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation and also when delegation is made to an elected body accountable to the people including those who paid taxes, as this acted as a sufficient check. It was observed:

> "A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate

[34] AIR 1968 SC 1232

> legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

Thus, the guidelines in the form of providing maximum rates of tax up to which a local body may be given discretion to make its choice or provision for consultation with the people of the local area and then fixing the rates or subjecting the rate of tax so fixed by the local authority to the approval of the Government which acts as watch-dog were treated as satisfying the policy and guideline test.

137. This ratio was followed and expounded in ***M.K. Papiah & Sons*** v. ***Excise Commissioner***[35] in which this Court had examined what constitutes essential features that the legislature cannot delegate, to observe that this cannot be delineated in detail but nevertheless and certainly it does not include the change of policy. The legislator is the master of the policy and the delegate is not free to switch the policy for then it would be usurpation of legislative power itself. Therefore, when the question of the excessive delegation arises, investigation has to be made whether policy of the legislation has not been indicated sufficiently or whether change of policy has been left to the pleasure of the delegate. This aspect is of substantial importance and relevance in the present case.

138. In ***Avinder Singh*** v. ***State of Punjab***[36] this Court had highlighted that the founding document, that is, the Constitution had created three instrumentalities

[35] (1975) 1 SCC 492
[36] (1979) 1 SCC 137

with certain basic powers and it is axiomatic that legislative powers are not abdicated for this would mean betrayal of the Constitution and is intolerable in law. Therefore, legislature cannot self-efface its personality and make over in terms the plenary and essential legislative functions. Nevertheless, the complexities of modern administration are bafflingly intricate and present themselves with urgencies and difficulties and the need for flexibility, which the direct legislation may not provide. Delegation of some part of the legislative powers therefore became inevitable and an administrative necessity. Thus, while essential legislative policy cannot be delegated, however inessentials can be delegated over to relevant agencies.

139. Similar opinion was expressed in ***Registrar of Coop. Societies*** v. ***K. Kunjabmu***[37], wherein it has been observed:

> "3. …They function best when they concern themselves with general principles, broad objectives and fundamental issues instead of technical and situational intricacies which are better left to better equipped full time expert executive bodies and specialist public servants. Parliament and the State Legislatures have neither the time nor the expertise to be involved in detail and circumstance. Nor can Parliament and the State Legislatures visualise and provide for new, strange, unforeseen and unpredictable situations arising from the complexity of modern life and the ingenuity of modern man. That is the raison d'etre for delegated legislation. That is what makes delegated legislation inevitable and indispensable. The Indian Parliament arid the State Legislatures are endowed with plenary power to legislate upon any of the subjects entrusted to them by the Constitution, subject to the limitations imposed by the Constitution itself. The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism uninhibited. So, the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must by laying down policy and principle and delegate it may to fill in detail and carry out policy. The legislature may guide the delegate by speaking through the express provision empowering delegation or the other provisions of the statute, the preamble, the scheme or even the very subject matter of the statute. If guidance there is, wherever it may be found, the delegation is valid. A good deal of latitude has been held to be permissible in the case of taxing statutes and on the same principle a generous degree of latitude must be permissible in the case of welfare

[37] (1980) 1 SCC 340

> legislation, particularly those statutes which are designed to further the Directive Principles of State Policy."

The above decision states that the policy and principles test can be applied through express provisions empowering delegation or any other provision of the statute including the preamble, the scheme or even the subject matter of the statute.

140. We will refer to a recent decision of this Court in ***Keshavlal Khemchand and Son Private Limited & Others*** v. ***Union of India***[38] wherein a Division Bench of this Court had observed that in spite of abundance of authority on the subject we are not blessed with certainty, and then observed that in ***Kunjabmu*** (supra) this Court had declined to consider whether ***M.K. Papiah & Sons*** (supra) had beaten the final retreat from the position enunciated in ***Delhi Laws Act*** (supra) and had proceeded to examine the theory of "policy and guidelines" referring to several judgments. The Division Bench then went on to observe that the earlier judgments had not been able to lay down the principle including as to what exactly constitutes "essential legislative function", but the following inferences can be drawn:

> "51.1 The proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled proposition and requires a further examination which exercise is not undertaken by the counsel appearing in the matter. We leave it open for debate in a more appropriate case on a future date. For the present, we confine to the examination of the question:
>
> 'Whether defining every expression used in an enactment is an essential legislative function or not?'
>
> 51.2 All the judgments examined above recognize that there is a need for some amount of delegated legislation in the modern world.
>
> 51.3 If the parent enactment enunciates the legislative policy with sufficient clarity, delegation of the power to make subordinate legislation to carry out the purpose of the parent enactment is permissible.
>
> 51.4 Whether the policy of the legislature is sufficiently clear to guide the delegate depends upon the scheme and the provisions of the parent Act.

[38] (2015) 4 SCC 770

> 51.5 The nature of the body to whom the power is delegated is also a relevant factor in determining "whether there is sufficient *guidance* in the matter of delegation."

141. Appropriate in regard to 'policy and guideline' test would be reference to yet another earlier judgment of this Court in ***Gwalior Rayon Silk Mfg. (Wvg.) Co.*** v. ***Asstt. Commissioner of Sales***[39] wherein while referring to the views of an eminent American jurist Willioughby, it was stated:

> "24. The matter has been dealt with on page 1637 of Vol. III in *Willoughby on the Constitution of the United States*, 2nd Edition, in the following words:
>
> "The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised; and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met, and the rights therein created to be enjoyed."
>
> 25. The matter has also been dealt with in *Corpus Juris Secundum* Vol. 73, page 324. It is stated there that the law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the Legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the Legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity."

142. It is in this context we have to examine whether the plea of excessive delegation would prevail and merits acceptance as Section 184 of the Finance Act does not prescribe the qualifications for appointment, and terms and conditions of service. It will be difficult to hold that Part XIV of the Finance Act suffers from the

[39] (1974) 4 SCC 98

vice of unguided delegation as it fails to clearly specify the eligibility qualifications for the Members, Chairpersons, Chairman etc. of different Tribunals as such requirements, though important, are not *per se* functionally undelegatable.

143. The objects of the parent enactments as well as the law laid down by this Court in ***R.K. Jain*** (supra), ***L Chandra Kumar*** (supra), ***R. Gandhi*** (supra)**,** ***Madras Bar Association*** (supra) and ***Gujarat Urja Vikas*** (supra) undoubtedly bind the delegate and mandatorily requires the delegate under Section 184 to act strictly in conformity with these decisions and the objects of delegated legislation stipulated in the statutes. It must also be emphasised that the Finance Act, 2017 nowhere indicates that the legislature had intended to differ from, let alone make amendments, to remove the edifice and foundation of such decisions by enacting the Finance Act. Indeed, the learned Attorney General was clear in suggesting that Part XIV was inserted with a view to incorporate the changes recommended by this Court in earlier decisions.

144. Independence of a quasi-judicial authority like the tribunal highlighted in the above decisions would be, therefore, read as the policy and guideline applicable. Principle of independence of judiciary/tribunal has within its fold two broad concepts, as held in ***Supreme Court Advocates-On-Record Association and Another*** v. ***Union of India***[40] {See paragraph 714}, (i) independence of an individual judge, that is, decisional independence; and (ii) independence of the judiciary or the Tribunal as an institution or an organ of the State, that is, functional

[40] (2016) 5 SCC 1

independence. Individual independence has various facets which include security of tenure, procedure for renewal, terms and conditions of service like salary, allowances, etc. which should be fair and just and which should be protected and not varied to his/her disadvantage after appointment. Independence of the institution refers to sufficient degree of separation from other branches of the government, especially when the branch is a litigant or one of the parties before the tribunal. Functional independence would include method of selection and qualifications prescribed, as independence begins with appointment of persons of calibre, ability and integrity. Protection from interference and independence from the executive pressure, fearlessness from other power centres – economic and political, and freedom from prejudices acquired and nurtured by the class to which the adjudicator belongs, are important attributes of institutional independence.

145. Further, cursory examination of the specified enactments mentioned in column (3) of the Eighth Schedule reveals that most enactments did not stipulate the manner of appointment, terms of office, salaries and allowances, resignation, removal, that is, the terms and conditions of service, which stipulations are delegated and they are not part of the principal enactment. For example, sub-section (1) of Section 252 of the Income Tax Act, 1961 states that the Central Government may constitute the Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions prescribed by the Act. Sub-sections (3) and (4) state that the Central Government shall ordinarily appoint a judicial Member as the President and may appoint one or more members as Vice President or Senior Vice President. Sub-section (2) prescribes the eligibility requirements for being a judicial member and

sub-section (2A) stipulates the eligibility requirements for being an administrative member. The Income Tax Act does not prescribe or stipulate manner or method for selection or terms and conditions of service. This is equally true for the Appellate Tribunal constituted under the Central Excise Act.

146. Wanchoo, CJ. in ***The Municipal Corporation of Delhi*** (supra) had observed:

> "13. The question as to the limits of permissible delegation of legislative power by a legislature to a subordinate authority has come before this Court in a number of cases and the law as laid down by this Court is not in doubt now. Considering the complexity of modern life it is recognised on all hands that legislature cannot possibly have time to legislate in every minute detail. That is why it has been recognised that it is open to the legislature to delegate to subordinate authorities the power to make ancillary rules for the purpose of carrying out the intention of the legislature indicated in the law which gives power to frame such ancillary rules. The matter came before this Court for the first time *In re The Delhi Laws Act, 1912* and it was held in that case that it could not be said that an unlimited right of delegation was inherent in the legislative power itself. This was not warranted by the provisions of the Constitution, which vested the power of legislation either in Parliament or State legislatures and the legitimacy of delegation depended upon its being used as an ancillary measure which the legislature considered to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", it was held further, was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct. Thus where the law passed by the legislature declares the legislative policy and lays down the standard which is enacted into a rule of law, it can leave the task of subordinate legislation which by its very nature is ancillary to the statute to subordinate bodies i.e. the making of rules, regulations or bye-laws. The subordinate authority must do so within the frame-work of the law which makes the delegation, and such subordinate legislation has to be consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case.
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> xx xx xx
>
> 28. A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and

> objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

147. Referring to ***The Municipal Corporation of Delhi*** (supra), this Court in ***Keshav Lal***, had observed:

> "45. ... The Court held that there was no impermissible delegation of legislative power. Hidayatullah, J. speaking for himself and for Ramaswami, J. agreed with the conclusion reached at by Wanchoo, C.J., though on slightly different reasons."

148. On examining the Constitutional scheme, the statutes which had created tribunals and the precedents of this Court laying down attributes of independence of tribunals in different facets, we do not think that the power to prescribe qualifications, selection procedure and service conditions of members and other office holders of the tribunals is intended to vest solely with the Legislature for all times and purposes. Policy and guidelines exist. Subject to aforesaid, the submission of learned Attorney General that Section 184 was inserted to bring uniformity and with a view to harmonise the diverse and wide-ranging qualifications and methods of appointment across different tribunals carries weight and, in our view, needs to be accepted.

149. Cautioning against the potential misuse of Section 184 by the executive, it was vehemently argued by the learned counsel for the petitioner(s) that any desecration by the Executive of such powers threatens and poses a risk to the independence of the tribunals. A mere possibility or eventuality of abuse of

delegated powers in the absence of any evidence supporting such claim, cannot be a ground for striking down the provisions of the Finance Act, 2017. It is always open to a Constitutional court on challenge made to the delegated legislation framed by the Executive to examine whether it conforms to the parent legislation and other laws, and apply the "policy and guideline" test and if found contrary, can be struck down without affecting the constitutionality of the rule making power conferred under Section 186 of the Finance Act, 2017.

ISSUE 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?

150. Given that the Central Government has formulated the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, (hereinafter referred to as "the Rules") under Section 184 of the Finance Act, 2017, it is necessary at this stage to examine whether the Rules conform to the judicial principles inherent in our Constitutional scheme as established by this Court in its earlier dicta. Some salient provisions of the Rules are extracted hereunder:

> **"TRIBUNAL, APPELLATE TRIBUNAL AND OTHER AUTHORITIES (QUALIFICATIONS, EXPERIENCE AND OTHER CONDITIONS OF SERVICE OF MEMBERS) RULES, 2017**
>
> xxxxxx
>
> **3. Qualifications for appointment of Member**.— The qualification for appointment of the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall be such as specified in column (3) of the Schedule annexed to these rules.

4. Method of recruitment.— (1) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee specified in column (4) of the said Schedule in respect of the Tribunal, Appellate Tribunal or, as the case may be, Authority specified in column (2) of the said Schedule.

(2) The Secretary to the Government of India in the Ministry or Department under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established shall be the convener of the Search-cum-Selection Committee.

(3) The Search-cum-Selection Committee shall determine its procedure for making its recommendation.

(4) No appointment of Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or Authorities shall be invalid merely by reason of any vacancy or absence in the Search-cum-Selection Committee.

(5) Nothing in this rule shall apply to the appointment of Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority functioning as such immediately before the commencement of these rules.

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6. Resignation by a Member.— A Member may, by writing under his hand addressed to the Central Government, resign his office at any time:

Provided that the Member shall, unless he is permitted by the Central Government to relinquish office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as a successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

7. Removal of Member from office.— The Central Government may, on the recommendation of a Committee constituted by it in this behalf, remove from office any Member, who —

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that where a Member is proposed to be removed on any ground specified in clauses (b) to (e), the Member shall be informed of the charges against him and given an opportunity of being heard in respect of those charges:

Provided further that the Chairperson or member of the National Company Appellate Tribunal shall be removed from office in consultation with the Chief Justice of India.

8. Procedure for inquiry of misbehavior or incapacity of the Member.— (1) If a written complaint is received by the Central Government, alleging any definite charge of misbehavior or incapacity to perform the functions of the office in respect of a Chairman, Vice-Chairman, Chairperson, Vice-Chairperson, President, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, the Ministry or Department of the Government of India under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established, shall make a preliminary scrutiny of such complaint.

(2) If on preliminary scrutiny, the Ministry or Department of the Government of India under which the Tribunal, Appellate Tribunal or, as the case may be, Authority is constituted or established, is of the opinion that there are reasonable grounds for making an inquiry into the truth of any misbehavior or incapacity of a Chairman, Vice-Chairman, Chairperson, Vice-Chairperson, President, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, it shall make a reference to the Committee constituted under rule 7 to conduct the inquiry.

(3) The Committee shall complete the inquiry within such time or such further time as may be specified by the Central Government.

(4) After the conclusion of the inquiry, the Committee shall submit its report to the Central Government stating therein its findings and the reasons therefor on each of the charges separately with such observations on the whole case as it may think fit.

(5) The Committee shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and shall have power to regulate its own procedure, including the fixing of date, place and time of its inquiry.

9. Term of office of Member.— Save as otherwise provided in these rules, the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or, as the case may be, Member shall hold office for a term as specified in column (5) of the said Schedule and shall hold the office up to such age as specified in column (6) in the said Schedule from the date on which he enters upon his office and shall be eligible for reappointment.

10. Casual vacancy.— (1) In case of a casual vacancy in the office of,—

(a) the Chairman, Chairperson, President, or Presiding Officer of the Security Appellate Tribunal, the Central Government shall have the power to appoint the senior most Vice-Chairperson or Vice-Chairman, Vice-President or in his absence, one of the Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority to officiate as Chairperson, Chairman, President or Presiding Officer.

(b) the Chairperson of the Debts Recovery Appellate Tribunal, the Central Government shall have power to appoint the Chairperson of another Debts Recovery Appellate Tribunal to officiate as Chairperson and in case of a casual vacancy in the office of the Presiding Officer of the Debts Recovery Tribunal, the Chairperson of the Debts Recovery Appellate Tribunal shall have power to appoint the Presiding Officer of another Debts Recovery Appellate Tribunal to officiate as Presiding Officer.

11. Salary and allowances.— (1) The Chairman, Chairperson or President of the Tribunal, Appellate Tribunal or, as the case may be, Authority or the Presiding Officer of the Security Appellate Tribunal shall be paid a salary of Rs. 2,50,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay.

(2) The Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or, as the case may be, Member shall be paid a salary of Rs. 2,25,000 and shall be entitled to draw allowances as are admissible to a Government of India Officer holding Group 'A' post carrying the same pay.

(3) A Presiding Officer of the Debt Recovery Tribunal or a Presiding Officer of the Industrial Tribunal constituted by the Central Government shall be paid a salary of Rs. 1,44,200-2,18,200 and shall be entitled to draw allowances as are admissible to a Government of India officer holding Group 'A' post carrying the same pay.

(4) In case of a person appointed as the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member, as the case may be, is in receipt of any pension, the pay of such person shall be reduced by the gross amount of pension drawn by him.

12. Pension, Gratuity and Provident Fund.— (1) In case of a serving Judge of the Supreme Court, a High Court or a serving Judicial Member of the Tribunal or a member of the Indian Legal Service or a member of an organised Service appointed to the post of the Chairperson, Chairman, President or Presiding Officer of the Security Appellate Tribunal, the service rendered in the Tribunal, Appellate Tribunal or, as the case may be, Authority shall count for pension to be drawn in accordance with the rules of the service to which he belongs and he shall be governed by the provisions of the General Provident Fund (Central Services) Rules, 1960 and the Contribution Pension System.

(2) In all other cases, the Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be governed by the provisions of the Contributory Provident Fund (India) Rules, 1962 and the Contribution Pension System.

(3) Additional pension and gratuity shall not be admissible for service rendered in the Tribunal, Appellate Tribunal or, as the case may be, Authority.

13. Leave.— (1) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, Presiding Officer or a Member shall be entitled to thirty days of earned Leave for every year of service.

(2) Casual Leave not exceeding eight days may be granted to the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member or Technical Member, Presiding Officer or a Member in a calendar year.

(3) The payment of leave salary during leave shall be governed by rule 40 of the Central Civil Services (Leave) Rules, 1972.

(4) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be entitled to encashment of leave in respect of the earned Leave standing to his credit, subject to the condition that maximum leave encashment, including the amount received at the time of retirement from previous service shall not in any case exceed the prescribed limit under the Central Civil Service (Leave) Rules, 1972.

14. Leave sanctioning authority.— (1) Leave sanctioning authority,—

(a) for the Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer of the Debts Recovery Tribunal and Industrial Tribunal, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member shall be Chairman, Chairperson or as the case may be, President; and

(b) for the Chairman, Chairperson, Presiding Officer of Security Appellate Tribunal or President, shall be the Central Government, who shall also be sanctioning authority for Accountant Member, Administrative Member, Judicial Member, Expert Member or Member in case of absence of Chairman, Chairperson, Presiding Officer of Security Appellate Tribunal or President.

(2) The Central Government shall be the sanctioning authority for foreign travel to the Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or a Member.

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18. Other conditions of service.— (1) The terms and conditions of service of a Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member with respect to which no express provision has been made in these rules, shall be such as are admissible to a Group 'A' Officer of the Government of India of a corresponding status.

(2) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member shall not practice before the Tribunal, Appellate Tribunal or Authority after retirement from the service of that Tribunal, Appellate Tribunal or, as the case may be, Authority.

(3) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Accountant Member, Administrative Member, Judicial Member, Expert Member, Technical Member, Presiding Officer or Member shall not undertake any arbitration work while functioning in these capacities in the Tribunal, Appellate Tribunal or Authority.

(4) The Chairman, Chairperson, President, Vice-Chairman, Vice-Chairperson, Vice-President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member or Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any person who has been a party to a proceeding before the Tribunal, Appellate Tribunal or, as the case may be, Authority:

Provided that nothing contained in this rule shall apply to any employment under the Central Government or a State Government or a local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013).

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20. Power to relax.— Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class or category of persons.

21. Interpretation.— If any question arises relating to the interpretation of these rules, the decision of the Central Government thereon shall be final.

22. Saving.— Nothing in these rules shall affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Castes, Scheduled Tribes, Ex-servicemen and other special categories of persons in accordance with the orders issued by the Central Government from time to time in this regard."

(A) Composition of Search-cum-Selection Committees

151. The composition of some of the Search-cum-Selection Committees, as provided in the Rules, have been reproduced below illustratively:

"**Industrial Tribunal**:

Search-cum-Selection Committee for the post of the Presiding Officer, -

(i) a person to be nominated by the Central Government-chairperson;

(ii) Secretary to the Government of India, Ministry of Labour and Employment-member;

(iii) .Secretary to the Government of India to be nominated by the Central Government-member;

(iv) two experts to be nominated by the Central Government- members.

Income Tax Appellate Tribunal:

(A) Search-cum-Selection Committee for the post of the President and Vice-President, -

(i) a sitting Judge of Supreme Court to be nominated by the Chief Justice of India-chairperson;

(ii) the President, Income-tax Appellate Tribunal-member; and

(iii) the Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs)- member.

(B) Search-cum-Selection Committee for the Accountant Member and Judicial Member, –

(i) a nominee of the Minister of Law and Justice-chairperson;

(ii) Secretary to the Government of India, Ministry of Law and Justice (Department of Legal Affairs)- member;

(iii) President of the Income tax Appellate Tribunal – member; and

(iv) such other persons, if any, not exceeding two, as the Minister of Law and Justice may appoint-member.

Central Administrative Tribunal:

(A) Search-cum-Selection Committee for the post of Chairman and Judicial Member, –

(i) Chief Justice of India or his nominee- chairperson;

(ii) Chairman of the Central Administrative Tribunal, Principal Bench – member;

(iii) Secretary to the Government of India, (Department of Personnel and Training)-member;

(iv) Secretary to the Government of India, Ministry of Law and Justice -member;

(v) one expert, to be nominated by the Central Government of India - member.

(B) Search-cum-Selection Committee for the post of Administrative Member, –

(a) a person to be nominated by the Central Government - chairperson;

(b) Chairman of the, Central Administrative Tribunal – member;

(c) Secretary to the Government of India, (Department of Personnel and Training)-member;

(d) Secretary to the Government of India, Ministry of Law and Justice -member;

(e) one expert, to be nominated by the Government of India - member."

152. Composition of a Search-cum-Selection Committee is contemplated in a manner whereby appointments of Member, Vice-President and President are predominantly made by nominees of the Central Government. A perusal of the Schedule to the Rules shows that save for token representation of the Chief Justice

of India or his nominee in some Committees, the role of the judiciary is virtually absent.

153. 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***[41]**,** 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.

154. Clearly, the composition of the Search-cum-Selection Committees under the Rules amounts to excessive interference of the Executive in appointment of members and presiding officers of statutory Tribunals and would undoubtedly be detrimental to the independence of judiciary besides being an affront to the doctrine of separation of powers.

155. In ***R.K. Jain v. Union of India (supra)*****,** a three-Judge Bench of this Court asserted the need for independent system of appointment and administration of

[41] (1973) 4 SCC 225

Tribunals to maintain public trust in the judiciary while expressing its agony over inefficacy of the working of Tribunals in the country. In addition to discussing the perils of providing direct statutory appeals to the Apex Court from the Tribunals, it was also suggested that there is an imminent need for reform in the manner of recruitment of members of Tribunals to maintain public faith in the institution of judiciary. Adjudication of disputes by technical members should be confined only to cases requiring specialised technical knowledge. [**Union of India** vs. **Madras Bar Association**[42] and **Madras Bar Association** vs. **Union of India & Anr.**[43]]

156. Subsequently, in its dictum in ***L. Chandra Kumar v. Union of India (supra),*** a seven-Judge Bench of this Court noted the observations in the Malimath Committee Report, discussing the administration of the Tribunals established under Article 323-A and Article 323-B of the Constitution. The Malimath Committee Report had pointed out that a Tribunal constituted in substitution of any other Court should have similar standards of appointment, qualifications and conditions of service, to inspire the confidence of the public at large. Shortcomings in composition, tenure, conditions of service, etc. of the Members of Tribunals were also highlighted in the Report as reasons for increased intervention by the Executive in the working of judicial institutions. The relevant extract is reproduced below:

> "**88.** …The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "Alternative Modes and Forums for Dispute Resolution", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up "Gram Nyayalayas", Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323-A and

[42] (2010) 11 SCC 1
[43] (2014) 10 SCC 1 [Para 107 & 126]

323-B of the Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

> "Functioning of Tribunals
>
> 8.63 Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.
>
> 8.64 Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.
>
> Tribunals — Tests for Including High Court's Jurisdiction
>
> 8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (See S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial

> character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid…."'

157. We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. This Court has been lucid in its ruling in ***Supreme Court Advocates-on-Record Assn. v. Union of India***[44] ***(Fourth Judges Case)***, wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of High Court and Supreme Court. Cognisant of the doctrine of Separation of Powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of judiciary is the only means to maintain a system of checks and balances on the working of Legislature and the Executive. The Executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments.

158. 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

[44] (2016) 5 SCC 1.

dilute the involvement of judiciary in the process of appointment of members of tribunals which is in effect an encroachment by the executive on the judiciary.

(B) Qualifications of members and presiding officers

159. The Rules also prescribe the qualifications for Chairperson, Vice-Chairperson, Member, etc. of both judicial and technical members. A bare perusal of the Rules reveals that while prescribing the qualifications of technical member, the prior dicta of this Court has been ignored by the Central Government inasmuch as the technical members are being appointed without any adjudicatory experience. The qualifications for appointment as technical member in the Customs, Excise and Service Tax Appellate Tribunal as prescribed under the Rules are illustratively reproduced below:

> "(1) A person shall not be qualified for appointment as President unless, -
>
> (a) he is or has been a Judge of a High Court; or
>
> (b) he is the member of the Appellate Tribunal.
>
> (2) A person shall not be qualified for appointment as a Judicial Member, unless, -
>
> (a) he has for at least ten years held a judicial office in the territory of India; or
>
> (b) he has been a member of the Indian Legal Service and has held a post in Grade-I of that Service or any equivalent or higher post for at least three years; or
>
> (c) he has been an advocate for at least ten years.
>
> (3) A person shall not be qualified for appointment as a Technical Member unless he has been a member of the Indian Revenue Service (Customs and Central Excise Service Group 'A') and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years."

160. In addition to this, there has been a blatant dilution of judicial character in appointments whereby candidates without any judicial experience are prescribed to be eligible for adjudicatory posts such as that of the Presiding Officer.

Illustratively, the qualifications for Presiding Officer in Industrial Tribunal as specified in the Rules may be noticed below:

> "A person shall not be qualified for appointment as Presiding Officer, unless he, -
>
> (a) is, or has been, or is qualified to be, a Judge of a High Court; or
>
> (b) he has, for a period of not less than three-years, been a District Judge or an Additional District Judge; or
>
> (c) is a person of ability, integrity and standing, and having special knowledge of, and professional experience of not less than twenty years in economics, business, commerce, law, finance, management, industry, public affairs, administration, labour relations, industrial disputes or any other matter which in the opinion of the Central Government is useful to the Industrial Tribunal."

161. The contentions of the Learned Counsel for petitioner(s) are, therefore, duly accepted by this Court insofar as it is contended that the Rules have an effect of dilution of the judicial character in adjudicatory positions. It has been repeatedly ruled by this Court in a catena of decisions that judicial functions cannot be performed by technical members devoid of any adjudicatory experience.

162. In ***Madras Bar Assn. v. Union of India*** **(supra),** a five-judge Bench of this Court reiterated the urgent need to monitor the pressure and/or influence of the executive on the Members of the Tribunals. It was asserted that any Tribunal which sought to replace the High Court must be no less independent or judicious in its composition. It was also clarified that the Members of the Tribunal, replacing any Court, including the High Court must possess expertise in law and shall have appropriate legal experience. Even though Parliament can transfer jurisdiction from the traditional Courts to any other analogous Tribunal, the Tribunal must be manned by members having qualifications equivalent to that of the Court from which adjudicatory function is transferred. Hence, any adjudication transferred to

a Technical or Non-Judicial member is a clear act of dilution and an encroachment upon the independence of judiciary. It was further ruled by this Court that even though the legislature has the powers to reorganise or prescribe qualifications for members of Tribunals, it is open for this Court to exercise "judicial review" of the prescribed standards, if the adjudicatory standards are adversely affected. The decision of this Court read as follows:

> "**105.** … It was also sought to be asserted that the tribunal constituted under the enactment being a substitute of the High Court ought to have been constituted in a manner that it would be able to function in the same manner as the High Court itself. Since insulation of the judiciary from all forms of interference even from the coordinate branches of the Government was by now being perceived as a basic essential feature of the Constitution, it was felt that the same independence from possibility of executive pressure or influence needed to be ensured for the Chairman, Vice-Chairman and Members of the Administrative Tribunal. In recording its conclusions, even though it was maintained that "judicial review" was an integral part of the "basic structure" of the Constitution yet it was held that Parliament was competent to amend the Constitution, and substitute in place of the High Court another alternative institutional mechanism or arrangement. This Court, however cautioned that it was imperative to ensure that the alternative arrangement was no less independent and no less judicious than the High Court (which was sought to be replaced) itself.
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> **107.** In Union of India v. Madras Bar Assn. [(2010) 11 SCC 1] , all the conclusions/propositions narrated above were reiterated and followed, whereupon the fundamental requirements which need to be kept in mind while transferring adjudicatory functions from courts to tribunals were further crystallised. It came to be unequivocally recorded that tribunals vested with judicial power (hitherto before vested in, or exercised by courts), should possess the same independence, security and capacity, as the courts which the tribunals are mandated to substitute. The members of the tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. Technical members can be appointed to tribunals where technical expertise is essential for disposal of matters, and not otherwise. Therefore it was held that where the adjudicatory process transferred to tribunals did not involve any specialised skill, knowledge or expertise, a provision for appointment of technical members (in addition to, or in substitution of judicial members) would constitute a clear case of delusion and encroachment upon the independence of the judiciary and the "rule of law". The stature of the members, who would constitute the tribunal, would depend on the jurisdiction which was being transferred to the tribunal. In other words, if the jurisdiction of the High Court was transferred to a tribunal, the stature of the members of the newly constituted tribunal, should be possessed of qualifications akin to the Judges of the High Court. Whereas in case, the jurisdiction and the functions sought to be transferred were being exercised/performed by District Judges, the Members appointed to the tribunal should be possessed of equivalent

qualifications and commensurate stature of District Judges. The conditions of service of the members should be such that they are in a position to discharge their duties in an independent and impartial manner. The manner of their appointment and removal including their transfer, and tenure of their employment, should have adequate protection so as to be shorn of legislative and executive interference. The functioning of the tribunals, their infrastructure and responsibility of fulfilling their administrative requirements ought to be assigned to the Ministry of Law and Justice. Neither the tribunals nor their members, should be required to seek any facilities from the parent ministries or department concerned. Even though the legislature can reorganise the jurisdiction of judicial tribunals, and can prescribe the qualifications/eligibility of members thereof, the same would be subject to "judicial review" wherein it would be open to a court to hold that the tribunalisation would adversely affect the adjudicatory standards, whereupon it would be open to a court to interfere therewith. Such an exercise would naturally be a part of the checks and balances measures conferred by the Constitution on the judiciary to maintain the rule of "separation of powers" to prevent any encroachment by the legislature or the executive.

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113.2. …The power of discharging judicial functions which was exercised by members of the higher judiciary at the time when the Constitution came into force should ordinarily remain with the court, which exercised the said jurisdiction at the time of promulgation of the new Constitution. But the judicial power could be allowed to be exercised by an analogous/similar court/tribunal with a different name. However, by virtue of the constitutional convention while constituting the analogous court/tribunal it will have to be ensured that the appointment and security of tenure of Judges of that court would be the same as of the court sought to be substituted. This was the express conclusion drawn in Hinds case [Hinds v. R., 1977 AC 195] . In Hinds case, it was acknowledged that Parliament was not precluded from establishing a court under a new name to exercise the jurisdiction that was being exercised by members of the higher judiciary at the time when the Constitution came into force. But when that was done, it was critical to ensure that the persons appointed to be members of such a court/tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the holder of the judicial office at the time when the Constitution came into force. Even in the treatise Constitutional Law of Canada by Peter W. Hogg, it was observed: if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a Superior, District or County Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a Superior, District or County Court, satisfy the requirements and standards of the substituted court. This would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be substituted. In the judgments under reference it has also been concluded that a breach of the above constitutional convention could not be excused by good intention (by which the legislative power had been exercised to enact a given law). We are satisfied, that the aforesaid exposition of law is in consonance with the position expressed by this Court while dealing with the concepts of "separation of powers", the "rule of law" and "judicial review". In this behalf, reference may be made to the judgments in L. Chandra Kumar case, as also, in Union of India v. Madras Bar Assn. (2010). Therein, this Court has recognised that transfer of jurisdiction is permissible but in effecting such

> transfer, the court to which the power of adjudication is transferred must be endured with salient characteristics, which were possessed by the court from which the adjudicatory power has been transferred…
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> **128.** There seems to be no doubt, whatsoever, that the Members of a court/tribunal to which adjudicatory functions are transferred must be manned by Judges/members whose stature and qualifications are commensurate to the court from which the adjudicatory process has been transferred. This position is recognised the world over. The constitutional conventions in respect of Jamaica, Ceylon, Australia and Canada, on this aspect of the matter have been delineated above. The opinion of the Privy Council expressed by Lord Diplock in Hinds case, has been shown as being followed in countries which have Constitutions on the Westminster model. The Indian Constitution is one such constitution. The position has been clearly recorded while interpreting Constitutions framed on the above model, namely, that even though the legislature can transfer judicial power from a traditional court to an analogous court/tribunal with a different name, the court/tribunal to which such power is transferred should be possessed of the same salient characteristics, standards and parameters, as the court the power whereof was being transferred. It is not possible for us to accept that Accountant Members and Technical Members have the stature and qualification possessed by the Judges of High Courts."

163. We concur with the above which reiterates the consistent view taken by this Court in a number of cases. It is also a well-established principle followed throughout in various other jurisdictions as well, that wherever Parliament decides to divest the traditional Courts of their jurisdiction and transfer the lis to some other analogous Court/Tribunal, the qualification and acumen of the members in such Tribunal must be commensurate with that of the Court from which the adjudicatory function is transferred. Adjudication of disputes which was originally vested in Judges of Courts, if done by technical or non-judicial member, is clearly a dilution and encroachment on judicial domain. With great respect, Parliament cannot divest judicial functions upon technical members, devoid of the either adjudicatory experience or legal knowledge.

164. It is necessary to notice few other changes brought about by the new Rules. Firstly, most Tribunals were earlier headed by judicial members. With the

exception of some Tribunals like the Debt Recovery Tribunal, presiding officers were retired judges either of the Supreme Court or of High Courts. Under the present formulation of Rules, the Central Government has widened eligibility by making persons who otherwise have no judicial or legal experience but if they are otherwise of "*ability, integrity and standing, and having special knowledge of, and professional experience of*" certain specialised subjects "*which in the opinion of the Central Government is useful"* eligible for being appointed as presiding officers. Further, others who are "*qualified to be*" Supreme Court and High Court judges can also head Tribunals. A perusal of Articles 124(3) and 217(2) of the Constitution shows that it specifies only the very minimum prerequisites for appointment as a judge of the Constitutional Courts. Instead, a predominant portion of the consideration for appointment to this Court or to the High Courts is uncodified and is based on a holistic consideration of the practice, legal acumen, expertise and character of Advocates. The effect of the new criteria would be to make every second advocate eligible, in effect, vastly diluting the qualifications for appointment. The characteristics necessary of such people are also vague which resultantly increases executive discretion. It thus affects both judicial independence as well as capability and competency of these Tribunals. The power/discretion vested to specify qualifications and decide who should man the Tribunals has to be exercised keeping in view the larger public interest and the same must be just, fair and reasonable and not vague or imprecise.

165. At this juncture it must also be reiterated that equality can only be amongst equals, and that it would be impermissible to treat unequals equally on the basis of undefined contours of 'Uniformity'. A Tribunal to have the character of a quasi-

judicial body and a legitimate replacement of Courts, must essentially possess a dominant judicial character through their members/presiding officers. It was observed in ***Madras Bar Association (2010)*** **(supra)** that it is a fundamental prerequisite for transferring adjudicatory functions from Courts to Tribunals that the latter must possess the same capacity and independence as the former, and that members as well as the presiding officers of Tribunals must have significant judicial training and legal experience. Further, knowledge, training and experience of members/presiding officers of a Tribunal must mirror, as far as possible, that of the Court which it seeks to substitute. Illustratively, the composition of Appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, delineating this incongruity is reproduced below for reference:

> **Appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976**
>
> (1) The Chairman of the Appellate Tribunal shall be a person who is or has been or is qualified to be a Judge of a Supreme Court or a Judge of a High Court.
>
> (2) The Member of the Appellate Tribunal shall be a person not below the rank of Joint Secretary to the Government of India.

166. It appears to us to be incomprehensible as to how both Supreme Court and High Court judges can be eligible for the same post when their experience, exposure, knowledge and stature under the Constitution are vastly different and the two do not form one homogenous class. There can be no forced equality between the two. Doing so would be suggestive of non-application of mind. Such an exercise would merit judicial interference.

167. Further, dispensation of justice requires that the adjudicating institution command respect with the populace. Anomalous situations created by allowing

High Court judges to be appointed to a position occupied earlier by a Supreme Court judge, affects the prestige of the Judiciary as an institution.

168. The stature of the people manning an institution lends credibility and colour to the institution itself. There is a perceptible signalling effect in having retired Supreme Court justices as presiding officers of a particular Tribunal of National importance. The same instils an inherent fairness, dignity and exalted status in the Tribunal. Permitting such institutions to be also occupied by persons who have not manned an equivalent position or those with lesser judicial experience, does not bode well for the Tribunal besides discouraging competent people from offering their services. On the same analogy, it would be an anathema to say that High Court judges and District Court judges can both occupy the same position in a Tribunal.

(C) Constitutionality of procedure of removal

169. It is clear from the Scheme contemplated under the Rules that the government has significantly diluted the role of the Judiciary in appointment of judicial members. Further, in many Tribunals like the NGT, the role of the Judiciary in appointment of non-judicial members has entirely been taken away. Such a practice violates the Constitutional scheme and the dicta of this Court in various earlier decisions already referred to. It is also important to note that in many Tribunals like the National Green Tribunal where earlier removal of members or presiding officer could only be after an enquiry by Supreme Court Judges and with necessary consultation with the Chief Justice of India, under the present Rules it is permissible for the Central Government to appoint an enquiry committee for

removal of any presiding officer or member on its own. The Rules are not explicit on who would be part of such a Committee and what would be the role of the Judiciary in the process. In doing so, it significantly weakens the independence of the Tribunal members. It is well understood across the world and also under our Constitutional framework that allowing judges to be removed by the Executive is palpably unconstitutional and would make them amenable to the whims of the Executive, hampering discharge of judicial functions.

170. In ***Madras Bar Association (2014)*** (supra), this Court held that:

> "…it was acknowledged that Parliament was not precluded from establishing a court under a new name to exercise the jurisdiction that was being exercised by members of the higher judiciary at the time when the Constitution came into force. But when that was done, it was critical to ensure that the persons appointed to be members of such a court/tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the holder of the judicial office at the time when the Constitution came into force. Even in the treatise Constitutional Law of Canada by Peter W. Hogg, it was observed: if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a Superior, District or Country Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a Superior, District or Country Court, satisfy the requirements and standards of the substituted court. This would mean that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service as were available to the Judges of the court sought to be substituted."

171. It is essential that the same be observed in letter and spirit and we therefore reiterate that Members and Presiding Officers of Tribunals cannot be removed without either the concurrence of the Judiciary or in the manner specified in the Constitution for Constitutional Court judges.

(D) Term of Office and Maximum Age

172. Various enactments providing for appointment and other incidentals of members have been brought to our notice to demonstrate an apparent disparity in

age of superannuation of Members and Chairpersons/Presiding Officers of different Tribunals. Illustratively, Section 14D of the Telecom Regulatory Authority of India Act, 1997 provides a Member of Telecom Disputes Settlement and Appellate Tribunal shall not hold office after attaining the age of sixty-five years, whereas, Section 55(1) of the Consumer Protection Act, 2019 provides that a Member of the National Consumer Disputes Redressal Commission shall not hold office after attaining the age of sixty-seven years. This difference in superannuation age may lead to an undesirable situation wherein a member of a Tribunal with low retirement age can be reappointed in another Tribunal with a higher retirement age.

173. The Constitution of India doesn't differentiate between High Courts in terms of conditions of service of judges and prescribes a uniform age of superannuation for judges of all High Courts. Conforming to the principle, as held in earlier judgements of this Court, the Tribunals should have similar standards of appointment and service as that of the Court it is substituting. There must, therefore, be a uniform age of superannuation for all members in all the Tribunals.

174. The only differentiation in age of superannuation provided by the Constitution is that between judges of High Courts and Supreme Court. We find the reason for the same in the intention of the Constituent Assembly which aimed to incorporate the experience and knowledge of a High Court Judge when elevated as a Supreme Court judge. Hence, to utilise the experience and knowledge acquired during tenure as a judge of High Court, Supreme Court judges are provided with higher age of superannuation than the judges of High Court. Similarly, the difference between age of superannuation of Chairman/Presiding Officer and Member of a Tribunal is because Chairman/Presiding Officer is not a

promotional post and thus cannot be equated with that of the Member. The post of Chairman/Presiding Officer requires judicial and administrative experience of at least that of the judge of a High Court which is evident from the statutes prescribing them.

175. Another oddity which was brought to our notice is that there has been an imposition of a short tenure of three years for the members of the Tribunals as enumerated in the Schedule of Tribunals Rules, 2017. A short tenure, coupled with provision of routine suspensions pending enquiry and lack of immunity thereof increases the influence and control of the Executive over Members of Tribunals, thus adversely affecting the impartiality of the Tribunals. Furthermore, prescribing such short tenures precludes cultivation of adjudicatory experience and is thus injurious to the efficacy of Tribunals.

176. This Court criticised the imposition of short tenures of members of Tribunals in ***Union of India v. Madras Bar Association, (2010)*** (supra) and a longer tenure was recommended. It was observed that short tenures also discourage meritorious members of Bar to sacrifice their flourishing practice to join a Tribunal as a Member for a short tenure of merely three years. The tenure of Members of Tribunals as prescribed under the Schedule of the Rules is anti-merit and attempts to create equality between unequals. A tenure of three years may be suitable for a retired Judge of High Court or the Supreme Court or even in case of a judicial officer on deputation. However, it will be illusory to expect a practising advocate to forego his well-established practice to serve as a Member of a Tribunal for a period of three years. The legislature intended to incorporate uniformity in the administration of Tribunal by virtue of Section 184 of Finance Act, 2017. Nevertheless, such

uniformity cannot be attained at the cost of discouraging meritorious candidates from being appointed as Members of Tribunals.

177. Additionally, the discretion accorded to the Central or State Government to reappoint members after retirement from one Tribunal to another discourages public faith in justice dispensation system which is akin to loss of one of the key limbs of the sovereign. Additionally, the short tenure of Members also increases interference by the Executive jeopardising the independence of judiciary.

178. In the light of the discussion as aforesaid, we hold that the Rules would require a second look since the extremely short tenure of the Members of Tribunals is anti-merit and has the effect of discouraging meritorious candidates to accept posts of Judicial Members in Tribunals.

(E) Contradictions in the Rules

179. On the contentions of parties and in the light of the aforementioned discussion, the Bench has observed following contradictions in the Rules:

(a) There is an inconsistency within the Rules with regard to the tenure prescribed for the Members of Tribunals insofar as a fixed tenure of three years for both direct appointments from the Bar and appointment of retired judicial officers or judges of High Court or Supreme Court. It is also discriminatory to the extent that it attempts to create equality between unequal classes. The tenure of Members, Vice-Chairman, Chairman, etc. must be increased with due consideration to the prior decisions of the Court.

(b) The difference in the age of superannuation of the Members, Vice-Chairmen and Chairmen, as formulated in the Rules is contrary to the objectives of the Finance Act, 2017 viz., to attain uniformity in the composition of the Tribunal framework. There should be a uniform age of superannuation for Members, Vice-Chairmen, Chairmen, etc. in all Tribunals.

(c) Rule 4(2) of the Rules providing that the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted shall be the convener of the Search-cum-Selection Committee, is in direct violation of the doctrine of Separation of Powers and thus contravenes the basic structure of the Constitution. Corollary to the dictum of this Court in the ***Fourth Judges Case,*** judicial dominance in appointment of members of judiciary cannot be diluted by the Executive.

(d) Rule 7 accords unwarranted discretion to the Central Government insofar as it merely directs and not mandates the Central Government to consider the recommendation of Committee for removal of a Member of a Tribunal. The Central Government shall mandatorily consider the recommendation of the Committee before removal of any Member of Tribunal. Furthermore, the proviso to Rule 7 creates an unjust classification between National Company Law Appellate Tribunal (NCLAT) and other fora inasmuch as the removal of Chairperson or member of NCLAT alone is to be in consultation with the Chief Justice of India.

(e) Moral turpitude is a term well defined by this Court in numerous decisions. Rule 7(b) cannot be allowed to survive as it allows the Executive to interpret the meaning of 'moral turpitude', which is an encroachment on the judicial domain.

(f) The power of relaxation of rules with respect to any class of persons shall be vested with the Search-cum-Selection Committee and not with the Central Government as provided under Rule 20. As ruled by this Court earlier in ***Madras Bar Association (2014) (supra),*** the Central Government cannot be allowed to have administrative control over the Judiciary without subverting the doctrine of separation of powers.

ISSUE IV: WHETHER THERE SHOULD BE A SINGLE NODAL AGENCY FOR ADMINISTRATION OF ALL TRIBUNALS?

180. Ld. Amicus highlighted an apparent problem persisting in the current Tribunal framework in India. Tribunals established under different Central and State enactments are usually administered by their sponsoring or parent Ministry or concerned department. Thus, when Tribunals or members thereof have to seek financial, administrative or any other facility from a department who is also the litigant before them, their fairness or independence is likely to be compromised. Such an anomalous situation can only be remedied by the establishment of a single nodal agency, overseeing the entire Tribunal system in the country, bringing all such Tribunals to parity.

181. This Court in ***L. Chandra Kumar v. Union of India*** **(supra),** envisaged the administration of the entire Tribunal Framework in the country to be monitored by a single nodal agency/ministry. It was observed not to be advisable to allow

supervision of a Tribunal by a department/ministry which is a party before it. This Court recommended constitution of an independent agency by the concerned Ministry, to oversee the working of Tribunals. The independent agency when constituted, may also prescribe a uniform code for appointment, qualification, condition of service, manner of allocation of fund, etc. of the Tribunals. This will, the Court suggested, minimise the influence of the parent ministry of the Tribunal, in addition to ensuring uniformity in the entire Tribunal framework. The relevant excerpt may be reproduced below:

> "**96.** …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."

182. In ***Union of India vs. Madras Bar Association (2010)*** (supra)**,** a five-Judge Constitution Bench of this Court had the opportunity to discuss the Tribunals' structure as prevalent in the United Kingdom. It was noted that United Kingdom has a variety of dispute redressal mechanisms which necessitated constitution of numerous committees to analyse the functioning of Tribunals. However, this Court primarily referred to the Leggatt Committee Report, constituted to undertake the review of delivery of justice through tribunals. After analysing the success story of

Tribunals in U.K., this Court noticed a contrast in India and expressed its dissatisfaction with respect to the functioning of Tribunals in India, observing:

> "**70.** But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by L. Chandra Kumar are brought about, tribunals in India will not be considered as independent."

183. This Court had earlier noted the statements of the Ld. Attorney General vide order dated 27 March 2019 in *W.P. (C) No. 267/2012*, wherein it was submitted that the Ministry of Law is already overburdened and cannot effectively perform the supervisory function, as a single nodal Ministry, for all the Tribunals, as was earlier suggested by this Court.

184. What appears to be of paramount importance is that every Tribunal must enjoy adequate financial independence for the purpose of its day to day functioning including the expenditure to be incurred on (a) recruitment of staff; (b) creation of infrastructure; (c) modernisation of infrastructure; (d) computerisation; (e) perquisites and other facilities admissible to the Presiding Authority or the Members of such Tribunal. It may not be very crucial as to which Ministry or Department performs the duties of Nodal Agency for a Tribunal, but what is of utmost importance is that the Tribunal should not be expected to look towards such Nodal Agency for its day to day requirements. There must be a direction to allocate adequate and sufficient funds for each Tribunal to make it self-sufficient and self-sustainable authority for all intents and purposes. The expenditure to be incurred on the functioning of each Tribunal has to be necessarily a charge on the

Consolidated Fund of India. Therefore, hitherto, the Ministry of Finance shall, in consultation with the Nodal Ministry/Department, shall earmark separate and dedicated funds for the Tribunals. It will not only ensure that the Tribunals are not under the financial control of the Department, who is a litigant before them, but it may also enhance the public faith and trust in the mechanism of Tribunals.

ISSUE V: WHETHER THERE IS A NEED FOR CONDUCTING A JUDICIAL IMPACT ASSESSMENT OF ALL TRIBUNALS IN INDIA?

185. It was brought to our notice by the Learned Counsel for the petitioner(s) that there is an imminent need for conducting a Judicial Impact Assessment of all the Tribunals referable to the Finance Act, 2017. It was argued that neither the Legislature nor the Executive had conducted any assessment to analyse the adverse repercussions of the changes brought in the framework of Tribunals in India, if any, by the legislative exercises carried out from time to time.

186. The contentions of the petitioner(s) cannot be said to be unfounded. The three limbs of the State viz., the Legislature, the Executive and the Judiciary are so intertwined that there is a direct impact of the action of one limb on another. Every legislation results in an immediate increase in the number of pending litigations. It is the responsibility of the other branches of the State to be conscious of the limitations of the Judiciary in keeping pace with increasing pendency of litigation. Care has to be taken to ensure that while enhancing the efficacy of legislations the accrual of resultant litigation is minimal.

187. The American principle of 'Judicial Impact Assessment' was first borrowed by this Court in its dictum in ***Salem Advocate Bar Assn. (II) v. Union of India***[45]**,** whereby it was observed that it is imperative for the Legislature to perform a Judicial Impact Assessment of the enactment passed to assess its ramifications on the judiciary. This Court had directed for a committee to be constituted to assess the need for Judicial Impact Assessment in the Indian context. Pursuant thereto the *Jagannadha Rao Committee Report* was submitted. The *Report* suggested that by way of Judicial Impact Assessment, the legislature must analyse the budgetary requirement of the staff that would require to be created by the statute and additional expenditure arising out of the new cases consequent to the enactment. Further, the financial memorandum, as prepared by the legislature, must specifically include the number of civil and criminal cases expected to arise from the new enactment, requirement of more judges and staff for adjudication of these cases and the necessary infrastructure. The requisite paragraphs of the decision in ***Salem Advocate Bar Assn.*** **(supra)** are reproduced as follows:

> "**49.** The Committee has also suggested that:
>
> > "Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country."
>
> **50.** Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report to this Court within four months."

[45] (2005) 6 SCC 344

188. In the present case, we are of the view that the legislature has not conformed to the opinion of this Court with respect to 'Judicial Impact Assessment' and thus, has not made any attempt to assess the ramifications of the Finance Act, 2017. It can be legitimately expected that the multifarious amendments in relation to merger and reorganisation of Tribunals may result in massive increase in litigation which, in absence of adequate infrastructure, or budgetary grants, will overburden the Judiciary.

189. In the fitness of things, we deem it appropriate to direct the Union of India to carry out financial impact assessment in respect of all the Tribunals referable to Sections 158 to 182 of the Finance Act, 2017 and undertake an exercise to assess the need based requirements and make available sufficient resources for each Tribunal established by the Parliament.

ISSUE 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?

190. A concerning trend has been brought to the notice of this Court by the Learned Counsels. The Union has, in addition to equal pay and perks, accorded status equivalent to that of Supreme Court and High Court judges to Chairmen/Presidents of various Tribunals and authorities.

191. It is apposite to refer to the 'Warrant of Precedence' which delineates the sequential hierarchy of functionaries which is used most often for formal ceremonial arrangements. Such enhancement of the status of certain officials is

sans any rationale and falls squarely outside the Constitutional scheme. Although seemingly pedantic, according status equivalent or higher than Constitutional functionaries by executive order or by legislation strikes at the essence of the Constitutional dignity and stature accorded to such authorities. The absurdity of the situation can be demonstrated clearly if tomorrow a bureaucrat is accorded higher status than that of a Minister, who is the head of his department. Such designations do not have a personal value but rather represent the framework and structure of governance envisaged. Illogical changes or altercations hence disturbs the fabric of hierarchy and discipline necessary for the effective functioning of the State.

192. A similar situation arose in ***T.N. Seshan vs. Union of India***[46] wherein the Government of India had by ordinance accorded pay and perks equivalent to that of Supreme Court judges to the Chief Election Commissioner. Consequently, a demand was made for according rank in the Warrant of Precedence equivalent to that of Supreme Court judges. A five-judge bench of this Court held that mere equality in conditions of service to that of a Supreme Court judge cannot confer equal status to such other functionaries. It was noted that:

> **"34.** One of the matters to which we must advert is the question of the status of an individual whose conditions of service are akin to those of the Judges of the Supreme Court. This seems necessary in view of the reliance placed by the CEC on this aspect to support his case. In the instant case some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned instead of repeating the provisions of Article 124(4), the draftsman has incorporated the same by reference. The second provision is similar to the proviso to Article 125(2). But does that confer the status of a Supreme Court Judge on the CEC? It appears from the D.O. No. 193/34/92 dated 23-7-1992 addressed to the then Home Secretary, Shri Godbole, the CEC had suggested that the position of the CEC in the Warrant of

[46] (1995) 4 SCC 611.

> Precedence needed reconsideration. This issue he seems to have raised in his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole's reply dated 25-7-1992, that the CEC desired that he be placed at No. 9 in the Warrant of Precedence at which position the Judges of the Supreme Court figured. It appears from Shri Godbole's reply that the proposal was considered but it was decided to maintain the CEC's position at No. 11 along with the Comptroller and Auditor General of India and the Attorney General of India. However, during the course of the hearing of these petitions it was stated that the CEC and the Comptroller and Auditor General of India were thereafter placed at No. 9-A. At our request the learned Attorney General placed before us the revised Warrant of Precedence which did reveal that the CEC had climbed to position No. 9-A along with the Comptroller and Auditor General of India. Maintenance of the status of Judges of the Supreme Court and the High Courts is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equation with High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them not realising the distinction between constitutional and statutory functionaries. We would like to impress on the Government that it should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be, without first seeking the views of the Chief Justice of India. We may add that Mr G. Ramaswamy, learned counsel for the CEC, frankly conceded that the CEC could not legitimately claim to be equated with Supreme Court Judges. We do hope that the Government will take note of this and do the needful."

193. In light of the unequivocal assertions of a co-ordinate bench of this Court, there can be no doubt that executive action cannot confer status equivalent to that of either Supreme Court or High Court judges on any member or head of any Tribunal or other judicial fora.

194. Furthermore, that even though manned by retired judges of High Courts and the Supreme Court, such Tribunals established under Article 323-A and 323-B of the Constitution cannot seek equivalence with High Courts or the Supreme Court. Once a judge of a High Court or Supreme Court has retired and he/she no longer enjoys the Constitutional status, the statutory position occupied by him/her cannot be equated with the previous position as a High Court or a Supreme Court judge. The rank, dignity and position of Constitutional judges is hence *sui generis* and arise not merely by their position in the Warrant of Precedence or the salary and perquisites they draw, but as a result of the Constitutional trust accorded in them.

Indiscriminate accordance of status of such Constitutional judges on Tribunal members and presiding officers will do violence to the very Constitutional Scheme[47].

195. This Court in ***L. Chandra Kumar*** (supra) observed that Tribunals are not substitutes of Superior Courts and are only supplemental to them. Hence, the status of members of such Tribunals cannot be equated with that of the sitting judges of Constitutional Courts else, as V.R. Krishna Iyer, J. aptly pointed in his article titled 'Why Stultify Judges' Status?', "Creating deemed Justices of High Courts with equal status and salaries suggests an oblique bypassing of the Constitution….". The relevant extract of ***L. Chandra Kumar*** (supra) is reproduced as follows:

> "93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional power of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts…."

196. We would further point out that the Warrant of Precedence is a mere self-serving executive decision and not a law in itself. It is a reflection of the inter-se hierarchy amongst functionaries for the purposes of discharge of important ceremonial functions and other State duties. It cannot either confer rights or alter the status accorded by law. It would further be clearly abhorrent to use such an

[47] Justice VR Krishna Iyer, "Why Stultify Judges' Status?", (2002) 2 LW (JS) 85 (June, 2000)

instrument to undermine the order of precedence clearly accorded under the Constitution.

197. It is hence essential that the Union of India, takes note of the observations of this Court herein and abide by the spirit of the Constitution in respecting the aforementioned difference between constitutional functionaries and statutory authorities. It is important for the Union of India to ensure that judges of High Courts and the Supreme Court are kept on a separate pedestal distanced from any other Tribunal or quasi-judicial Authority.

ISSUE VII: WHETHER DIRECT STATUTORY APPEALS FROM TRIBUNALS TO THE SUPREME COURT OUGHT TO BE DETOURED?

198. During the course of arguments, various facets were highlighted before this Court, including the soaring pendency of cases and non-adherence of directions of this Court in earlier judgments requiring reconsideration by the legislature of the increasing trend of providing direct statutory appeals to this Court against orders of Tribunals.

199. As discussed earlier, Tribunalisation has increased at a rapid pace in the past few decades in our country. Since establishment of the ITAT during the pre-independence era, the number of tribunals has now increased to several dozens. The Constitution of India (42nd Amendment) Act, 1976 provided for setting up of Administrative Tribunals through Article 323A as well as other Tribunals under Article 323B. These aforementioned provisions in the Constitution were construed by the legislature in a manner resulting in the ousting of jurisdiction of all Courts except the Supreme Court under Article 136. Later, in ***L. Chandrakumar (supra),***

this court very aptly held that judicial review by High Courts under Article 226 is a part of the basic structure and hence could not be ousted by any legislation or even Constitutional amendment. Moreover, this Court in ***L. Chandrakumar (supra)*** and later in ***Madras Bar Association (2014) (supra)*** and ***Gujarat Urja Vikas Ltd. (supra)*** reiterated the urgent need to do away with increasingly common provisions in statutes providing direct statutory appeal to this Court, which as discussed elaborately below poses significant problems in the administration of justice and is also against the Constitutional scheme.

200. Since the aforesaid issue has not been directly raised by the petitioners and only a passing reference has been made, it is necessary to delineate whether providing such appeals to this Court is in consonance with the three-tier Judicial system as established under our Constitution.

201. An examination of the jurisdiction of the Supreme Court as envisaged under the Constitution must be made. Such jurisdiction bestowed upon this Court by the Constitution can be broken into three limbs: appellate, original and advisory. A brief description of these jurisdictions is provided below:

Original jurisdiction:

(i) Writ jurisdiction under Article 32.

(ii) Disputes of election to President/Vice-President under Article 71.

(iii) Inter-state or State-Centre disputes under Article 131.

(iv) Transfer cases under Articles 139 and 139A.

(v) Contempt of Court under Article 145.

Appellate jurisdiction:

(i) Appeals against orders of High Courts with certificate of there being substantial constitutional questions under Article 132.

(ii) Appeals against orders of High Courts in civil cases with certificate that there is substantial question of general importance or that the matter needs to be decided by the HC under Article 133.

(iii) Appeals against orders of High Courts in criminal cases against award of death penalty in the first instance by the HC, either on appeal or in original trial under Article 134.

(iv) All other cases appealable to the Federal Court before commencement of the Constitution under Article 135.

(v) Discretionary power to grant special leave to appeal any order by any court or tribunal under Article 136.

Advisory jurisdiction:

(i) Presidential reference under Article 143.

(ii) Reference on removal of Public Service Commission member under Article 317.

202. The ambit of appellate jurisdiction is clear from a perusal of Articles 132 to 136 of the Constitution. Article 132 provides that an appeal may be instituted before the Supreme Court against any order of the High Court where a substantial question of law arises for consideration. Article 133(3) specifies that there shall be no appeal from the order of a single judge of the High Court unless the contrary is provided through a law by the Parliament. Further, Article 134 delineates the

jurisdiction of the Supreme Court in criminal matters restricting it primarily to cases where the High Court has awarded death sentence either in trial before it or in reversal of an earlier acquittal by the trial court. In addition to this, Article 134(2) is lucid in its wording to provide that in absence of any specific legislation by the Parliament to enlarge the criminal appellate jurisdiction of this Court, no routine appeal lies before the Supreme Court in criminal matters. The extract from Article 134(2) has been reproduced below:

> "(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

203. Article 134(2) is successful in clarifying two things. *Firstly*, there is no provision analogous to Article 134(2) under Article 133 to expand the jurisdiction of the Supreme Court in non-criminal matters. *Secondly*, Article 134(2) does not encompass matters other than those arising out of criminal proceedings from the High Courts.

204. Presently, there are more than two dozen statutes which provide direct appeals to the Supreme Court from various Tribunals and High Courts. A non-exhaustive list of such Statutes includes:

(i) Section 35L of the Central Excise Act, 1944 (1 of 1944);

(ii) Section 116A of the Representation of the People Act, 1951 (43 of 1951);

(iii) Section 38 of the Advocates Act, 1961 (25 of 1961);

(iv) Section 261 of the Income Tax Act, 1961 (43 of 1961) before the establishment of National Tax Tribunal;

(v) Section 130E of the Customs Act, 1962 (52 of 1962);

(vi) Section 19(1)(b) of the Contempt of Courts Act, 1971 (70 of 1971);

(vii) Section 374 and 379 of the Code of Criminal Procedure, 1973 (2 of 1974) read with Section 2 of Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970);

(viii) Section 23 of the Consumer Protection Act, 1986 (68 of 1986);

(ix) Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987);

(x) Section 10 of the Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992 (27 of 1992);

(xi) Section 15Z of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(xii) Section 18 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997);

(xiii) Section 53T of the Competition Act, 2002 (12 of 2003);

(xiv) Section 125 of the Electricity Act, 2003 (36 of 2003);

(xv) Section 24 of the National Tax Tribunal Act, 2005 (49 of 2005);

(xvi) Section 30 of the Armed Forces Tribunal Act, 2007 (55 of 2007);

(xvii) Section 37 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006);

(xviii) Section 31 of the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008);

(xix) Section 22 of the National Green Tribunal Act, 2010 (19 of 2010);

(xx) Section 423 of the Companies Act, 2013 (18 of 2013);

(xxi) Section 38 of the Pension Fund Regulatory and Development Authority Act, 2013 (23 of 2013);

(xxii) Section 21 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015);

(xxiii) Section 62 and 182 of Insolvency and Bankruptcy Code, 2016 (31 of 2016); and

(xxiv) Section 118 of the Central Goods and Services Tax Act, 2017 (12 of 2017).

205. Such statutory appeals take away the inherent ability of the Supreme Court, as envisaged in the Constitution, to regulate cases before it by confining its consideration to cases involving the most egregious of wrongs and/or having the greatest impact on public interest.

206. Further, in providing for appeals directly from Tribunals, the jurisdiction of High Courts is in effect curtailed to a great extent. Not only does this hamper access to justice, but it also takes away the much needed exposure for High Court judges, earnestly needed in a vibrant and ever-evolving judiciary. Since majority of the judges of the Supreme Court are elevated from the High Courts, their lack of exposure to these specialised areas of law hinders their efficacy in adjudicating the direct statutory appeals from specialised Tribunals.

207. A perusal of the *Indian Judiciary: Annual Report 2017-18*, published by this Court shows that pendency in the Supreme Court stands at more than 56,000 cases. Each year this Court hears a humungous volume of cases and disposes of approximately 60,000 - 90,000 cases annually, thus amounting to a staggering

4,000 - 6,000 cases per bench. Out of all the cases instituted before this Court, less than 2% is for exercise of writ jurisdiction under Article 32 whereas an overwhelming majority of cases are petitions for special leave to appeal under Article 136.

208. Although the rate of admission of cases peaked at about 20% in 2011 and has fallen since then, it is still far above the marginal rate of about 1% in other comparable jurisdictions such as the Supreme Court of the United States. The mere task of hearing all cases and considering whether to grant leave or not usurps a majority of the Court's time. As a result of frequent invocation of Article 136 by litigants, the Court is left with hardly any time to discharge its key Constitutional functions of deciding substantial Constitutional questions, as envisaged by our founding fathers. As compared to the early 1960s where Constitution Benches decided hundreds of cases, the number is no more than a dozen now. Most seminal cases involving major issues of jurisprudence or effecting revolutionary changes on the legal landscape are by compulsion heard by Division Benches, thus defeating the very objective of Article 145(3).

209. The decrease in propensity of a person with humble means or situated farther away from the Delhi to approach the Supreme Court is evidence of the fact that the remedy to approach this Court has been, in effect, limited to only those with access to ample financial resources. Numerous studies have shown how every tenth case decided by the High Court of Delhi or every sixteenth case decided by the High Court of Punjab & Haryana is appealed before this Court, as compared to a minuscule rate of appeal of a little over 1% against the decision of High Court of Madras. Being an authority entrusted to resolve Constitutional

conflicts or to safeguard the fundamental rights of citizens, this Court cannot afford to provide access only to the affluent. Although it would be futile to examine the effects of such rampant regular appeals, however, it is apparent that it substantially affects the time and quality of judicial determination by this Court. This view had also been noted in the 272nd Report of the Law Commission wherein it was pointed out that:

> "3.12. The objective behind establishing the 'Tribunals' was to provide an effective and speedier forum for dispensation of justice, but in the wake of routine appeals arising from the orders of such forums, certain issues have been raised because such appeals are obstructing the constitutional character of the Supreme Court and thus,disturbing the effective working of the Supreme Court as the appeals in these cases do not always involve a question of general public importance. The Supreme Court is primarily expected to deal with matters of constitutional importance and matters involving substantial question of law of general public importance. Due to overburdening, the Supreme Court is unable to timely address such matters."

210. Resultantly, majority of the matters involving significant Constitutional questions remain untouched for years; consequently the ability of this Court to keep in check the legislative and executive encroachments is significantly compromised. Cases heard by the Constitution Bench comprising of five or more judges have fallen significantly from over 15% in the 1950s to an average of 0.1 - 0.2% during the last two decades. Hence, it is clear that this Court has been, in a way, transformed from a Constitutional-Writ Court to a Court of Appeals whereunder mere increase of the number of judges is no more a solution. Whilst the number of judges has increased slightly more than four times, the number of cases since 1950 has increased more than seventy folds! It is clear that there is a pressing need to realign the exercise of jurisdiction of this Court and ensure that the Constitutional vision is not defeated. This view has been resonated by this Court since it was

highlighted by Justice P.N. Bhagwati in ***Bihar Legal Support Authority vs. Chief Justice of India***[48] in the following manner:

> "The Supreme Court of India was never intended to be a regular court of appeal against orders made by the High Court or the sessions court of the magistrates. It was created for the purpose of laying down the law for the entire country and the extraordinary jurisdiction of granting special leave was conferred upon it under Article 136 of the Constitution so that it could interfere whenever it found that the law was not correctly enunciated by the lower courts or tribunals and it was necessary to pronounce the correct law on the subject."

211. It is evident that this Court has also lost its original character owing to the routine hearing of appeals through invocation of the discretionary jurisdiction under Article 136. It is apposite to hold that Article 136 was never meant to be used in this manner as was very aptly remarked by Dr. B.R. Ambedkar before the Constituent Assembly, who noted that:

> "The Supreme Court is not likely to grant special leave in any matter whatsoever unless it finds that it involves a serious breach of some principle in the administration of justice, or breach of certain principles which strike at the very root of administration of justice as between man and man."

212. Such self-effacement of this Court's Constitutional duties requires to be reined in. It is, therefore, essential that this Court judiciously exercise its appellate jurisdiction. For the discharge of Constitutional functions of deliberating on substantial questions of law, answering Constitutional questions and resolving other issues of great public importance, it is essential that this Court has adequate time to apply its mind and consider matters in depth. The existing practice of bringing every second case before the SC under Article 136 must be deprecated.

213. Such a proposed restrictive appellate jurisdiction would mirror the practice of the highest Courts in various other jurisdictions. The Supreme Court of the

[48] (1986) 4 SCC 767

United States in the famous case of ***Marbury vs. Madison***[49] noted that it was impermissible for the legislature to expand its original jurisdiction. After examining the framework of the Constitution of the United States, the Court noted that the original jurisdiction of the SC was limited to disputes involving States (as federal units) and the Union only. Except for that, all other cases can only be brought about in appellate jurisdiction. Although not explicitly stated, such an exercise was felt to be necessary to check a burgeoning expansion and overloading of the Court's docket.

214. Providing statutory appeals directly to the Supreme Court dents this to no end. With increasing tribunalisation, statutory appeal provisions are ostensibly being included without undertaking any 'Judicial Impact Assessment'. As of last count there are several hundreds of cases which have been decided by the NCLAT and many other thousands by other tribunals pending in this Court.

215. Note must be taken of the direction this country is heading towards for the same has a lasting impact on the kind of disputes which arise before this court. No system can be made in a vacuum, including our own. With the establishment of more tribunals and with increasing commercialisation in line with India's transformation to an open market liberal economy, the number of these cases is bound to only increase. Unlike routine criminal or civil matters which are tried exclusively before ordinary courts, matters which fall before Tribunals are often complex and commercial.

[49] 5 U.S. (1 Cranch) 137 (1803).

216. In light of this, provisions for statutory appeals directly and liberally to the Supreme Court raises the inevitability of bogging the Court down and inhibiting its Constitutional objective. Further, providing statutory appeals to this Court against orders of Tribunals also undermines the essence of tribunalisation. It is hardly rational to state on one hand that an alternate to the ordinary method of justice dispensation needs to be provided owing to the complicated procedures and owing to the lack of specialisation of District and High Courts, and in the same breadth also provide statutory appeals to the final Court in that very original system.

217. If High Courts are ill placed to hear routine matters then it hardly seems justifiable that this Court would be any better placed to resolve disputes in appellate jurisdiction. Finality as a principle must be encouraged and providing statutory appeals to the Supreme Court only undermines the same. Instead, no discernible harm would arise if decisions of Tribunals or High Courts attain finality, without reaching this Court.

218. A dichotomy in law is further caused by provisions of direct appeal from Tribunals to this Court, as noted in the case of the Armed Forces Tribunals in ***Union of India v. Major General Shrikant Sharma***[50]. The two-judge Bench viewed that:

> **"Likelihood of anomalous situation**
>
> 42. If the High Court entertains a petition under Article 226 of the Constitution of India against an order passed by the Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.
>
> 43. Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the

[50] (2015) 6 SCC 773.

> appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of the Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 of the Armed Forces Tribunal Act.
>
> 44. The High Court (the Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of the Act. However, we find that the Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that the Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."

219. The seven-judge Constitution Bench in ***L. Chandra Kumar (supra)*** considered at great length the permissibility of altering the power of judicial review exercisable by High Courts under Article 226. It authoritatively held that all orders passed by Tribunals which have been established under Article 323A or 323B of the Constitution, shall be amenable to the writ jurisdiction of High Courts. This Court, however, in an attempt to respect the intent of facilitating speedy disposal expressed by the Parliament, directed that such orders of the Central Administrative Tribunals be heard by a Division Bench of the High Court if challenged under Article 226. This Court, thus, held:-

> "**91.** It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them

> leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In R.K. Jain case [(1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464] , after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls."

220. It is hence clear post ***L Chandrakumar (supra)*** that writ jurisdiction under Article 226 does not limit the powers of High Courts expressly or by implication against military or armed forces disputes. The limited ouster made by Article 227(4) only operates qua administrative supervision by the High Court and not judicial review. Article 136(2) prohibits direct appeals before the Supreme Court from an order of armed forces tribunals, but would not prohibit an appeal to the Supreme Court against the judicial review exercised by the High Court under Article 226.

221. However, it is essential that High Courts use such powers of judicial review restrictively and on limited grounds, similar to the concept of 'regulatory deference' which has evolved in the United States. Such a need was also noted by a nine-judge bench in ***Mafatlal Industries Ltd. vs. Union of India***[51] which held that:

> "… While the jurisdiction of the High Courts under Article 226—and of this Court under Article 32—cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that

[51] (1997) 5 SCC 536

the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it."

222. The jurisdiction under Article 226, being part of the basic structure, can neither be tampered with nor diluted. Instead, it has to be zealously-protected and cannot be circumscribed by the provisions of any enactment, even if it be formulated for expeditious disposal and early finality of disputes. Further, High Courts are conscious enough to understand that such power must be exercised sparingly by them to ensure that they do not become alternate forums of appeal. A five-judge bench in ***Sangram Singh v. Election Tribunal***[52] whilst reiterating that jurisdiction under Article 226 could not be ousted, laid down certain guidelines for exercise of such power:

> **"13.** The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles 226 and 136. Therefore, the jurisdiction of the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105."

223. It is apparent that the Legislature has not been provided with desired assistance so that it may rectify the anomalies which arise from provisions of direct appeal to the Supreme Court. Considering that such direct appeals have become serious impediments in the discharge of Constitutional functions by this Court and also affects access to justice for citizens, it is high time that the Union of India, in

[52] (1955) 2 SCR 1

consultation with either the Law Commission or any other expert body, revisit such provisions under various enactments providing for direct appeals to the Supreme Court against orders of Tribunals, and instead provide appeals to Division Benches of High Courts, if at all necessary. Doing so would have myriad benefits. In addition to increasing affordability of justice and more effective Constitutional adjudication by this Court, it would also provide an avenue for High Court Judges to keep face with contemporaneous evolutions in law, and hence enrich them with adequate experience before they come to this Court. We direct that the Union undertake such an exercise expeditiously, preferably within a period of six months at the maximum, and place the findings before Parliament for appropriate action as may be deemed fit.

ISSUE VIII: WHETHER THERE IS A NEED FOR AMALGAMATION OF EXISTING TRIBUNALS AND SETTING UP OF BENCHES

224. While seeking a 'Judicial Impact Assessment' of all existing Tribunals, counsels for petitioners/appellant(s) have underscored the exorbitant pendency before of a number of Tribunals like the CESTAT and ITAT, which they claim affects the very objective of tribunalisation. On the other hand, they also highlight an incongruity wherein numerous Tribunals are hardly seized of any matters, and are exclusively situated in one location.

225. As noted by this court on numerous occasions, including in ***Madras Bar Association (2014)*** (supra), although it is the prerogative of the Legislature to set up alternate avenues for dispute resolution to supplement the functioning of existing Courts, it is essential that such mechanisms are equally effective,

competent and accessible. Given that jurisdiction of High Courts and District Courts is affected by the constitution of Tribunals, it is necessary that benches of the Tribunals be established across the country. However, owing to the small number of cases, many of these Tribunals do not have the critical mass of cases required for setting up of multiple benches. On the other hand, it is evident that other Tribunals are pressed for resources and personnel.

226. This 'imbalance' in distribution of case-load and inconsistencies in nature, location and functioning of Tribunals require urgent attention. It is essential that after conducting a Judicial Impact Assessment as directed earlier, such 'niche' Tribunals be amalgamated with others dealing with similar areas of law, to ensure effective utilisation of resources and to facilitate access to justice.

227. We accordingly direct the Union to rationalise and amalgamate the existing Tribunals depending upon their case-load and commonality of subject-matter after conducting a Judicial Impact Assessment, in line with the recommendation of the Law Commission of India in its 272nd Report. Additionally, the Union must ensure that, at the very least, circuit benches of all Tribunals are set up at the seats of all major jurisdictional High Courts.

CONCLUSION

228. In light of the above discussions and our analysis, it is held that:

(i) The issue and question of Money Bill, as defined under Article 110(1) of the Constitution, and certification accorded by the Speaker of the Lok Sabha in respect of Part-XIV of the Finance Act, 2017 is referred to a larger Bench.

(ii) Section 184 of the Finance Act, 2017 does not suffer from excessive delegation of legislative functions as there are adequate principles to guide framing of delegated legislation, which would include the binding dictums of this Court.

(iii) The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities as observed earlier. These Rules formulated by the Central Government under Section 184 of the Finance Act, 2017 being contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this Court, are hereby struck down in entirety.

(iv) The Central Government is accordingly directed to re-formulate the Rules strictly in conformity and in accordance with the principles delineated by this Court in ***R.K. Jain (supra), L. Chandra Kumar (supra), Madras Bar Association (supra)*** and ***Gujarat Urja Vikas Ltd. (supra)*** conjointly read with the observations made in the earlier part of this decision.

(v) The new set of Rules to be formulated by the Central Government shall ensure non-discriminatory and uniform conditions of service, including assured tenure, keeping in mind the fact that the Chairperson and Members appointed after retirement and those who are appointed from the Bar or from other specialised professions/services, constitute two separate and distinct homogeneous classes.

(vi) It would be open to the Central Government to provide in the new set of Rules that the Presiding Officers or Members of the Statutory Tribunals shall not hold 'rank' and 'status' equivalent to that of the Judges of the Supreme Court or High Courts, as the case may be, only on the basis of drawing equal salary or other perquisites.

(vii) There is a need-based requirement to conduct 'Judicial Impact Assessment' of all the Tribunals referable to the Finance Act, 2017 so as to analyse the ramifications of the changes in the framework of Tribunals as provided under the Finance Act, 2017. Thus, we find it appropriate to issue a writ of mandamus to the Ministry of Law and Justice to carry out such 'Judicial Impact Assessment' and submit the result of the findings before the competent legislative authority.

(viii) The Central Government in consultation with the Law Commission of India or any other expert body shall re-visit the provisions of the statutes referable to the Finance Act, 2017 or other Acts as listed in para 174 of this order and place appropriate proposals before the Parliament for consideration of the need to remove direct appeals to the Supreme Court from orders of Tribunals. A decision in this regard by the Union of India shall be taken within six months.

(ix) The Union Government shall carry out an appropriate exercise for amalgamation of existing Tribunals adopting the test of homogeneity of the subject matters to be dealt with and thereafter constitute adequate number of Benches commensurate with the existing and anticipated volume of work.

INTERIM RELIEF

229. As the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 have been struck down and several directions have been issued vide the majority judgment for framing of fresh set of Rules, we, as an interim order, direct that appointments to the Tribunal/Appellate Tribunal and the terms and conditions of appointment shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. However, liberty is granted to the Union of India to seek modification of this order after they have framed fresh Rules in accordance with the majority judgment. However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new members.

230. The present batch of matters is accordingly disposed of.

231. Writ Petition (Civil) No. 267 of 2012 is also disposed of in the above terms as the issues arising are similar.

……., CJI
[RANJAN GOGOI]

……..,J
[N.V. RAMANA]

……..,J
[DR DHANANJAYA Y CHANDRACHUD]

……..,J
[DEEPAK GUPTA]

NEW DELHI,
NOVEMBER 13, 2019

……..,J
[SANJIV KHANNA]

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO 8588 OF 2019
(Arising out of SLP (C) No 15804 of 2017)

Rojer Mathew **.... Appellant**

Versus

South Indian Bank Ltd **....Respondents**
Rep by its Chief Manager & Ors

With

Writ Petition (C) No 279 of 2017

With

Writ Petition (C) No 558 of 2017

With

Writ Petition (C) No 561 of 2017

With

Writ Petition (C) No 625 of 2017

With

Writ Petition (C) No 640 of 2017

With

Writ Petition (C) No 1016 of 2017

With

Writ Petition (C) No 788 of 2017

With

Writ Petition (C) No 925 of 2017

With

Writ Petition (C) No 1098 of 2017

With

Writ Petition (C) No 1129 of 2017

With

Writ Petition (C) No 33 of 2018

With

Writ Petition (C) No 205 of 2018

With

Writ Petition (C) No 467 of 2018

With

Transferred Case (C) No 49 of 2018

With

Transferred Case (C) No 51 of 2018

And
With

Transfer Petition (C) No 2199 of 2018

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

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A Introduction

A.1 Challenges of the tribunal structure

A global trend

1 India is no exception to the global trend towards the tribunalisation of justice. World over, tribunals have been constituted both in regulatory and adjudicatory areas. Tribunals act as adjudicators of disputes. This movement has in part been occasioned by new legislation governing modern societies as they confront the challenges thrown up by the complexities of social and economic orderings. The engagement of law with economics and technology has been shaped by social, cultural and historical contexts. While many of them may reflect the shared aspirations of societies governed by a common legal tradition, it would be simplistic to assume that the challenges thrown up by the layered adjudication through tribunals are common to all societies. Hence, as we analyse the impact of the growing movement towards tribunalisation – a feature which is common to all societies – it is important to bear in mind the context in which our problems have arisen as we attempt to find answers to many of those concerns. Precedents, both judicial and scholarly, in other jurisdictions furnish a useful point of reference, so long as we understand that which is peculiarly our own.

The old and the new

2 Courts and tribunals should in theory be, but are not always in practice, cooperative allies. Tribunals have taken over the mantle of deciding cases which conventionally were assigned for adjudication to courts. Litigation, traditionally the domain of courts, has in incremental stages come to be transferred to the decision-making authority of tribunals. There is hence a jurisdictional transfer of dispute resolution to tribunals. Accompanied by legislative enactment, this postulates the exclusivity of entrustment to tribunals. Then again, new tribunals have been constituted to deal with subject areas of a genre quite distinct from, and therefore, unlike the traditional pattern of litigation with which conventional courts were familiar. Tribunals have thus not only taken away subjects which have been carved out of the jurisdiction of courts as a matter of legislative policy, but have also fostered a new culture of adjudication over areas in which a traditional court mechanism had little experience and expertise. In that sense, tribunalisation represents an amalgam of the old and the new: a combination of the role which was traditionally performed by the court together with new functional responsibilities, quite unlike the dispute resolution function which was traditionally performed by courts.

Domain specialisation

3 The movement towards setting up tribunals has been hastened in many parts by the need for specialisation. Specialisation acknowledges the pool of knowledge and domain expertise of persons who discharge core adjudicatory functions within

tribunals. The assumption which underlies the setting up of tribunals is that those who decide are individuals possessed of the qualities necessary for adjudication in that specific field. Acquisition of knowledge prior to appointment to a tribunal and practical experience of handling subject areas reserved for the tribunal bring together a pool of individuals possessing the qualifications and abilities to render specialised justice. In fostering specialisation, the tribunal structure emphasises the specialisation of adjudicatory personnel. But equally, an important facet is the specialisation of those who appear before the tribunals. A specialised Bar is an invaluable input towards the efficiency of institutional adjudication. Together, this contributes to an adjudicatory process which is cognisant of the special features, needs and requirements of the subject areas carved for the tribunal.

4 The extent to which the purpose of setting up tribunals is realized is often a projection of ground realities. These realities, including the manner and extent to which provisions of the law governing a tribunal are enforced, directly impact upon the efficacy of the tribunal. Critical to the purpose of having a specialised tribunal is the presence of specialised adjudicators on decision-making posts. For, it is their domain expertise which defines the quality of outcomes in the adjudicatory process. Collectively, the presence of specialised adjudicators depends upon well-trained and qualified persons and their availability in a source pool. This factor has often been lost sight of in the selection of judges to specialised tribunals. Absent the requisite degree of expertise, the procedure and functioning of the tribunal may only replicate a conventional adjudication in a court of law which the tribunal seeks to substitute.

Expedition

5 Apart from specialisation, a significant reason for the establishment of tribunals is expedition in the course of justice. This is also linked to the perceived values implicit in a specialised adjudicatory process. Domain expertise, particularly in a complex area, is a means of allowing adjudicators who understand the subject to decide quickly and effectively. It is often expected that the tribunal will follow procedures which are less cumbersome and tied to forms established in conventional courts. By allowing for a measure of procedural flexibility coupled with domain knowledge, tribunals are expected to remedy some of the causes which burden the judicial system.

6 Similarly, another object of the growing need for tribunalisation is to unburden the court system. That purpose may be subserved when a chunk of existing cases pending before the conventional court system are transferred for adjudication to the newly created body. Reducing the burden on courts is a partial realisation of the purpose underlying the creation of the tribunal. Equally significant is that the tribunal must possess the ability not to allow, over a period of time, accretions of undisposed cases which had created judicial arrears in the first place. Statistical reduction of pending arrears in the judicial system occasioned by the creation of a tribunal has to be matched by the capacity of the new body to dispose of cases transferred to it from the court as well as new institutions before it. If this is not achieved, the net result is to defeat the very purpose of establishing the tribunal.

Impact assessment

7 Our analysis above indicates that the actual impact of the creation of a structure of tribunals needs to be closely monitored to assess the efficacy of a tribunal as a measure of legal reform. The efficacy of the tribunal is functionally dependent on the availability of resources and capital, both human and otherwise. The tribunal must be possessed of adequate infrastructure both in terms of physical availability and the deployment of technological knowledge in the management of litigation. The procedures adopted by the tribunal must be flexible enough to allow for decision-making effectively and without delay. The process of making appointments to the tribunals must be seamless in order to fill up vacancies arising from retirement or unforeseen causes. The presence of large-scale vacancies can render tribunals defunct. This defeats the cause of justice in the area of the jurisdiction of the tribunal. This problem becomes particularly acute where a jurisdiction of a conventional court has been transferred to the tribunal under the provisions of an operating enactment. Absent a recourse to traditional courts for the resolution of conflicts, a litigant is virtually denied access as a result of an unavailable adjudicator to resolve a dispute. In other words, the process for appointment and selection has a direct bearing on the efficacy of tribunalisation. Keeping vacancies unfilled, either as a matter of tardy procedures or for other reasons, has the tendency to denude the efficacy of the tribunal as a dispute resolution mechanism. The surest way to deny access to justice is to keep a large number of vacancies.

Independence

8 Above all, the efficacy of tribunalisation rests in the confidence in the process of providing justice. This is determined by the independence and objectivity of justice providers. There is a vital societal interest in preserving the sanctity of the process by which judges are selected for appointment. The method of selecting and appointing judges to tribunals determines in the ultimate analysis, the independence of the tribunals. Tribunals have been conceived as institutional measures to provide justice in substitution of that provided by conventional courts. Hence, there is a valid reason to ensure the independence of these adjudicating bodies. The process of selection as well as the terms of appointment is determinative of the ability to attract talent to the tribunals. Hence, in preserving the independence of the tribunals as a facet of judicial independence, the effort must be to ensure that the adjudicatory body is robust: subservient to none and accountable to the need to render justice in the context of specialised adjudication.

A2 A brief history of tribunalisation in India

9 Delay and backlog in adjudication of cases was a problem even during the colonial era.[1] The earliest available effort suggesting reforms to handle arrears was the Justice Rankin Committee report in 1924. Since then, there have been a number of expert body reports, including the Law Commission of India. In India, the establishment of tribunals was done in 1941 by the colonial government. Post-Independence, tribunals were first created in the sphere of tax laws. The original

[1] Arun K Thiruvengadam, 'Tribunals' in The Oxford Handbook Of The Indian Constitution (Sujit Choudhry et al eds., (Oxford University Press New York, 2016), pp. 412-31.

Constitution referred to tribunals only incidentally in Articles 136 and 227, which specify that the Supreme Court and the High Courts respectively shall have power to review decisions of tribunals. The High Court Arrears Committee constituted with Justice J. C. Shah as Chairperson in 1969 recommended the constitution of an independent tribunal to handle service matters pending before the High Courts and the Supreme Court. The Swaran Singh Committee had been constituted by the Union Government to recommend changes to the Constitution. Its report released in 1986 recommended the setting up of tribunals for three broad subject areas to reduce arrears in the Indian legal system. The report further recommended that the decisions of all these tribunals should be subject to the jurisdiction of the Supreme Court under Article 136 of the Constitution, but should exclude the jurisdiction of all other courts, including writ jurisdiction.

10 Consequently, the establishment of tribunals in India attained constitutional recognition by the insertion of Articles 323A and 323B in the Constitution, which granted power to the Parliament and state legislatures to establish administrative tribunals and tribunals for other matters respectively.

11 In pursuance of the power conferred upon it by clause (1) of Article 323A of the Constitution, Parliament enacted the Administrative Tribunals Act 1985[2] for the setting up of tribunals to deal exclusively with service matters. In **S P Sampath Kumar** v **Union of India**[3] ('**Sampath Kumar**'), the first challenge to the constitutionality of

[2] "1985 Act"
[3] (1987) 1 SCC 124

tribunals arose. This court held that the 'tribunal should be a real substitute for High Courts — 'not only in form and *de jure* but in content and *de facto*.' In this view, alternative arrangements have to be effective and efficient as also capable of upholding constitutional limitations. The court held that though judicial review is a basic feature of the Constitution, vesting of the power of judicial review in an alternative institutional mechanism would not do violence to the basic structure of the Constitution so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court. It was also held that a High-Power Selection Committee[4] must be constituted with a sitting judge of the Supreme Court nominated by the Chief Justice of India to ensure the selection of competent adjudicators to the tribunals. Upholding the vires of the 1985 Act, the Court suggested several amendments to cure the defects with respect to the composition of the tribunal and the mode of appointment of the Chairperson, Vice-Chairperson and members which were to be carried out by 31 March, 1987.

12 Decisions subsequent to **Sampath Kumar** had required a fresh look by a larger Bench of this Court over the issues that had been decided. In **L Chandra Kumar** v **Union of India**[5] ('**Chandra Kumar**'), a seven judge Bench of this Court revisited the challenge to the 1985 Act and the power conferred on the Parliament or the state legislatures by Articles 323A(2)(d) and 323B(3)(d), as the case may be, to exclude the jurisdiction of 'all courts', except that of this Court under Article 136 in respect of

[4] "We do not want to say anything about Vice-Chairman and members dealt with in sub-sections (2), (3) or (3-A) because so far as their selection is concerned, we are of the view that such selection when it is not of a sitting Judge or retired Judge of a High Court should be done by a high-powered committee with a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India as its Chairman. This will ensure selection of proper and competent people to man these high offices of trust and help to build up reputation and acceptability."
[5] (1997) 3 SCC 261

disputes referred to in those Articles. Overruling the decision in **Sampath Kumar**, this Court drew a distinction between the substitutional role and the supplemental role of tribunals with respect to High Courts and held that the role of tribunals is supplemental in nature.

13 Chief Justice A M Ahmadi noted that the Constitution provides elaborate provisions dealing with terms of appointments of judges of higher courts. The learned judge observed that the same safeguards are not available to the subordinate judiciary or members of tribunals. Hence, they can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation :

> **"78…The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation…"**
>
> (Emphasis supplied)

The Court struck down Articles 323A(2)(d) and 323B(3)(d) as unconstitutional. It was also held that an "exclusion of jurisdiction" clause enacted in any legislation, under the aegis of Articles 323A(2)(d) and 323B(3)(d) is unconstitutional.

14 In **Union of India** v **R Gandhi, President, Madras Bar Association**[6] (**'R Gandhi'**), the constitutional validity of Chapters 1-B and 1-C of the Companies Act,

[6] (2010) 11 SCC 1

1956 as inserted by the Companies (Second Amendment) Act 2002 which provided for the constitution of a National Company Law Tribunal[7] and the National Company Law Appellate Tribunal[8] was challenged. Justice R V Raveendran noted that despite the salient objective behind the constitution of tribunals, 'full independence' had not been achieved by them. The Court affirmed the view in **Chandra Kumar** that a tribunal may consist of both judicial and technical members. Judicial members ensure 'impartiality, fairness and reasonableness in consideration' and technical members ensure 'the availability of expertise and experience related to the field of adjudication'.

15 Though the legislature is empowered to prescribe qualifications for members, the Court held that superior courts in the country retain their power of judicial review over the prescribed qualifications to ensure that judicial functions are discharged effectively. The Court surveyed various enactments[9] and the qualifications prescribed in them for appointment as judicial and technical members and noted that the 'speed at which the qualifications for appointment as members is being diluted is, to say the least, a matter of great concern for the independence of the judiciary.' The Court cautioned that tribunals cannot become providers of sinecure to members of civil services, by appointing them as technical members. The Court emphasised that 'impartiality, independence, fairness and reasonableness in decision making are the hallmarks of judiciary' and laid down the eligibility criteria for judicial and technical members. Taking note of the recruitment conditions for judicial and technical members, tenure and service conditions, the Court upheld the creation of the NCLT

[7] "NCLT"
[8] "NCLAT"
[9] Administrative Tribunals Act 1985, Information Technology Act 2000, Companies Act 1956 as amended (Chapter 1B).

and NCLAT. Several suggestions to amend part 1-B and 1-C were issued, to be carried out as a condition precedent to ensure that the NCLT and the NCLAT may be made operational in accordance with the observations made by this Court.

16 In **Madras Bar Association** v **Union of India**[10] ('**Madras Bar Association II**'), the constitutional validity of the National Tax Tribunal Act 2005[11] and the Constitution (Forty-Second) Amendment 1976 was challenged on the ground of violating the basic structure of the Constitution. The National Tax Tribunal[12] was vested with the power of adjudicating appeals which included a substantial question of law arising from orders passed by appellate tribunals under specific tax enactments. Prior to the 2005 Act, the jurisdiction to adjudicate these appeals lay with the jurisdictional High Court.

17 The Court rejected the contention that there was a constitutional mandate for the appellate jurisdiction pertaining to tax matters to remain with the High Courts, but held that the members of the Tribunal should be appointed in the same manner and should be entitled to the same security of tenure as the judges of the Court sought to be substituted. The Court rejected the challenge based on the separation of powers and proceeded to examine the validity of individual provisions. Section 6 of the Act permitted accountant members or technical members in the respective appellate tribunals to be appointed as members of the NTT. The Court affirmed the position laid down in **Chandra Kumar** and **R Gandhi** that the appointment of technical members is

[10] (2014) 10 SCC 1
[11] 2005 Act
[12] "NTT"

restricted to the cases where technical expertise is essential for adjudication and is impermissible in any other case. Thus, the provision was struck down.

18 Section 7 of the 2005 Act provided for the process of selection and appointment of the Chairperson and members of the NTT. The Court observed that as the jurisdiction of the High Courts was being transferred to the Tribunal, the stature of the members, conditions of service, and manner of appointment and removal of members must be akin to that of the judges of High Courts. The selection process included Secretaries of the Departments of the Central Government. The Court struck down the section as unconstitutional. Finally, Section 8 stipulated that that a Chairperson/Member who is appointed for an initial duration of five years, is eligible for reappointment for a further period of five years. Striking down the provision as unconstitutional, the Court held that the provision for reappointment would undermine the independence of the member who would presumably be constrained to decide matters in a manner that would ensure their reappointment. The Court noted that since the NTT had been vested with jurisdiction that earlier vested in the High Courts, all matters of appointment and extension of tenure must be shielded from the executive. The Court noted that upon the declaration of numerous provisions as unconstitutional, the remaining provisions were rendered 'otiose and worthless'. Hence, the 2005 Act was struck down in its entirety.

19 Pursuant to the enactment of the Companies Act 2013, a Constitution Bench of this Court in **Madras Bar Association** v **Union of India**[13] dealt with the contention that despite the directions issued in **R Gandhi** in respect of the provisions concerning the NCLT and the NCLAT, analogous provisions had been inserted in the 2013 Act without complying with those directions. The Court embarked on a comparison of various provisions of the Companies Act 2013 with the directions issued in **R Gandhi** and observed that many discrepancies persisted which were in contravention of the directions issued by this Court in the earlier round of litigation concerning the qualifications, appointments, eligibility, and composition of the Selection Committees. The Court affirmed the directions issued in **R Gandhi** including the direction on the composition of the Selection Committee and held that once remedial measures are taken to bring the provisions in conformity with the directions issued, the NCLT and the NCLAT may commence operations.

A.3 Shortcomings of the current framework

20 Tribunalisation was intended to combat the high pendency of cases before Indian Courts. However, experience gained from the working of tribunals suggests that the efficiency of tribunals in India is significantly reduced due to systemic and administrative problems. The 272nd Report of the Law Commission of 2017 has highlighted the high level of pendency before the Tribunals. The chart from the report is reproduced below:

[13] (2015) 8 SCC 583

	Tribunal	As On	Number of Pending cases
1	Central Administrative Tribunal	July, 2017	44,333
2	Railway Claims Tribunal	30.09.2016	45, 604
3	Debt Recovery Tribunal	03.07.2016	78,118
4	Customs, Excise, and Service Tax Appeal Tribunal	End of 2016	90,592
5	Income Tax Appellate Tribunal	End of 2016	91, 538

21 Vidhi Centre for Legal Policy in a report titled "**Reforming The Tribunals Framework In India**" highlights the problems plaguing the tribunal system in India. These problems have been categorised thus:

A) Lack of independence

The report highlights that in some cases, Ministries are parties before the tribunals. The staff, finances, and administration are under the control of the Ministry. The problem is exacerbated by a revolving door between the bureaucracy and tribunal posts. Therefore, the report states that it is crucial to assess the independence of tribunals based on the certain parameters including (a) appointment of members; b) removal of members; (c) reappointments; (d) nodal ministry; and (e) proclivity to appoint judges/bureaucrats.

B) Administrative concerns: lack of uniformity in regulation

The report notes that an inconsistency in qualification requirements leads to differences in competencies, maturity and status of members. These inconsistencies are problematic with regard to the growing trend of tribunalisation. Further, the short tenure of members obviates the cultivation of 'domain expertise', which can have an impact on the efficacy of tribunals. It is also recommended that the age of retirement be made uniform as uneven tenures hamper institutional continuity. The report notes the holding in **L Chandra Kumar** which criticizes the inconsistencies in the appointment process, qualification of members, age of retirement, resources and infrastructure of different tribunals. They can be attributed to tribunals operating under different ministries. The report affirms the observation in the judgment that a single nodal authority or ministry is required for the administration of tribunals in order to improve efficiency.

C) Pendency and vacancy in Tribunals

The report notes that the high rate of pendency can be attributed to systemic issues. For example, the Debt Recovery Tribunal had 58% failed hearings (i.e. avoidable adjournments that were not penalised) and condonations were often granted due to delays in filing. Such delays accounted for more than half the time taken up by cases. Another significant cause for delays is absenteeism of tribunal members.

D) Jurisdiction of the High Courts

Provisions allowing direct appeals to the Supreme Court which by-pass the jurisdiction of High Courts have been examined in multiple cases. Despite existing precedents and Law Commission of India recommendations, parent statutes of many tribunals allow for a direct appeal to the Supreme Court. Two issues have been noted: Firstly, a direct appeal to the Supreme Court is inaccessible to litigants; and Secondly, such a provision leads to congestion of the docket of the Supreme Court.

B The Reference to the Constitution Bench

22 At its core, the present reference before the Constitution Bench raises the issue of whether a law which seeks to substitute existing statutory provisions governing the appointment, selection and conditions of service of diverse tribunals can validly be enacted as a Money Bill as a component of the Finance Act. The answer to this question must in turn depend upon two facets :

(i) Whether judicial review can extend to determining the constitutional validity of a decision of the Speaker of the Upper House to certify the passage of a Bill as a Money Bill under Article 110 of the Constitution; and

(ii) Whether the statutory modification of the procedure for appointment and selection of members and their conditions of service is destructive of judicial independence and hence *ultra vires.*

Between the universe represented by these two issues, lie the shades of argument upon which the decision of this case will turn.

C Money Bills

Ordinary Bills, Money Bills and Financial Bills

23 Conceptually, the Constitution contains a classification of Bills as: (i) Ordinary Bills; (ii) Money Bills and (iii) Financial Bills. Bills other than Money Bills and Financial Bills can originate in either House of Parliament[14]. An Ordinary Bill is passed by both the Houses of Parliament when it has been agreed upon by both the Houses, either without amendment or with such amendments as agreed. The President is conferred with the constitutional authority to convene a joint sitting of both the Houses of Parliament in order to deliberate upon and vote on a Bill which is not a Money Bill[15]. Special provisions are engrafted into the Constitution for the passage of Money Bills. Unlike an Ordinary Bill which can originate in either House of Parliament, a Money Bill

[14] Article 107(1) : Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

[15] Article 108 : (1) If after a Bill has been passed by one House and transmitted to the other House—
(a) the Bill is rejected by the other House; or
(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it,
the President may, unless the Bill has elapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:
Provided that nothing in this clause shall apply to a Money Bill.
(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.
(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.
(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:
Provided that at a joint sitting—
(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;
(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;
and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.
(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

cannot be introduced in the Council of States. Article 109 specifies the procedure for the passage of a Money Bill. Article 109 reads thus:

> "109. (1) A Money Bill shall not be introduced in the Council of States.
>
> (2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.
>
> (3) If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.
>
> (4) If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.
>
> (5) If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People."

24 The role of the Rajya Sabha in the passage of Money Bill is restricted. A Money Bill can originate only in the Lok Sabha. After it is passed by the Lok Sabha, the Bill is transmitted to the Rajya Sabha for its recommendation. The Rajya Sabha has a stipulated period of fourteen days to submit the Bill back to the Lok Sabha with its recommendation. Recommendations of the Rajya Sabha are of a non-binding

character. If the Lok Sabha rejects the recommendations, it is deemed to have been passed by both the Houses in the form in which it was passed by the Lok Sabha without the recommendations of the Rajya Sabha. If the Rajya Sabha were not to respond within the stipulated period of fourteen days, the same consequence would ensue. In distinction to the role which is entrusted to the Rajya Sabha in the passage of Ordinary Bills by Article 107, Article 109 confers virtually an overriding authority to the Lok Sabha in the passage of Money Bills. A Money Bill, unlike an Ordinary Bill, can only originate in the Lok Sabha. In the passage of a Money Bill, the Rajya Sabha has thus only a recommendatory role. Ordinary Bills, on the other hand, require the agreement of both the Houses of Parliament to ensure their passage.

25 The third category of Bills - Financial Bills, is specified in Article 117[16]. The reference to Financial Bills is contained in the marginal note to Article 117. Article 117 (1) indicates that a Bill which makes provision for any of the matters specified in clauses (a) to (f) of Article 110 (1) can be introduced or moved only on the recommendation of the President and such a Bill shall not be introduced in the Rajya Sabha. The text of Article 117 (1) speaks of Money Bills and other Financial Bills as classes of Bills which can originate only in the Lok Sabha.

[16] Article 117 : (1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States:
Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.
(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.
(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill.

Money Bills : Article 110

Article 110 contains a definition of Money Bills in the following terms :

> "110. (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:—
> (a) the imposition, abolition, remission, alteration or regulation of any tax;
> (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;
> (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;
> (d) the appropriation of moneys out of the Consolidated Fund of India;
> (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;
> (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or
> (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).
>
> (2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.
>
> (3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.
>
> (4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under article 109, and when it is presented to the President for assent under article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill."

26 Tracing the origin and evolution of Money Bills, **Thomas Erskine May** in "**The Treatise on The Law, Privileges, Proceedings and Usage of Parliament**"[17] dwells on the relationship between the House of Commons and House of Lords in Britain in regard to their powers of taxation and on matters of national revenue and public expenditure. For nearly three hundred years, the House of Commons was possessed of the legal right to originate grants, but the House of Lords was not precluded from amending a Bill. By two resolutions of the Commons in 1671 and 1678, the powers of the House of Lords were curtailed so as to enable only the Commons to have the sole right to direct or limit the scope of a Bill regarding taxation and government expenditure. The House of Lords came to be excluded from altering any such Bill. Even after the enactment of the Standing Order of 1849 which accommodated space to the House of Lords to suggest amendments of legislative issues, the tussle between the House of Commons and the House of Lords continued, resulting in the passage of the Parliament Act of 1911. Section 1 defines the power of the House of Lords in Money Bills in the following terms :

> "1. Powers of House of Lords as to Money Bills.—(1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill."

[17] C. Knight & Company, 1844

Section 1(2) defines the expression Money Bill in the following manner :

> "1. (2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this sub-section the expressions "taxation", "public money", and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes."

27 Two facets of the above definition merit emphasis: the first is the use of the expression 'means' which indicates that the definition is exhaustive; and second, that the content of a Money Bill can have "only provisions" dealing with the subjects enunciated in the provision. Under Section 1(3), a Money Bill sent to the House of Lords and to Her Majesty for assent should be endorsed with the certificate of the Speaker of the House of Commons that it is a Money Bill. Section 3 attributes finality to the decision of the Speaker, rendering it immune from judicial review :

> "3. Certificate of Speaker.—Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, **and shall not be questioned in any court of law**."
>
> (Emphasis supplied)

The Treatise by **Erskine May** contains the following elaboration of the procedure in passing a Money Bill:

> "A 'Money Bill' which has been passed by the House of Commons and sent up to the House of Lords at least one

month before the end of the session, but is not passed by the House of Lords without amendment within one month after it is so sent up, is, unless the House of Commons direct to the contrary, to be presented for the Royal Assent and becomes an Act of Parliament on the Royal Assent being signified to it.
A 'Money Bill', when it is sent up to the House of Lords and when it is presented to Her Majesty, must be endorsed with the Speakers' certificate that it is such a bill. Before giving this certificate the Speaker is directed to consult, if practicable, those two members of the Panel of Chairs who are appointed for the purpose at the beginning of each session by the Committee of Selection.
When the Speaker has certified a bill to be a 'Money Bill' this is recorded in the journal; **and Section 3 of the Parliament Act 1911 stipulates such certificate is conclusive for all purposes and may not be questioned in a court of law.**
No serious practical difficulty normally arises in deciding whether a particular bill is or is not a 'Money Bill'; and criticism has seldom been voiced of the Speaker's action in giving or withholding a certificate. **A bill which contains any of the enumerated matters and nothing besides is indisputably a 'Money Bill'. If it contains any other matters, then, unless these are 'subordinate matters incidental to' and of the enumerated matters so contained in the bill, the bill is not a 'Money Bill'. Furthermore, even if the main object of a bill is to create a new charge on the Consolidated Fund or on money provided by Parliament, the bill will not be certified if it is apparent that the primary purpose of the new charge is not purely financial.**
The Speaker does not consider the question of certifying a bill until it has reached the form in which it will leave the House of Commons, and has declined to give an opinion on whether the acceptance of a proposed amendment would prevent a bill for being certified as a Money bill. Similarly, in committee the chairman has declined to anticipate the Speaker's decision in this matter or to allow the effect of an amendment in this regard to be raised as a point of order."

(Emphasis supplied)

28 Section 37 of the Government of India Act 1935 contained a special provision for Financial Bills:

"37. Special provisions as to financial Bills.—(1) A Bill or amendment making provision—

> (a) for imposing or increasing any tax; or
>
> (b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or
>
> (c) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure, shall not be introduced or moved except on the recommendation of the Governor-General, and a Bill making such provision shall not be introduced in the Council of State."

As the Bill could not be introduced or moved "except on the recommendation of the Governor General", Section 38 authorized each House namely the Council of States and the Federal Assembly to make rules for regulating their procedure and the conduct of business.

During the course of the debates in the Constituent Assembly, one of the draft amendments moved to Article 90 was the deletion of the expression "only". Explaining the rationale for moving the proposed amendment, Shri Ghanshyam Singh Gupta stated thus :

> "…This article is a prototype of Section 37 of the Government of India Act which says that a Bill or amendment providing for imposing or increasing a tax or borrowing money, etc. shall not be introduced or moved except on the recommendation of the governor-General. This means that the whole Bill need not be a money Bill: it may contain other provisions, but if there is any provision about taxation or borrowing, etc. It will come under this Section 37 and the recommendation of the Governor-General is necessary. Now article 90 says that a Bill shall be deemed to be a money Bill if it contains only provisions dealing with the imposition, regulation, etc., of any tax or the borrowing of money, etc. This can mean that if there is a Bill which has other provisions and also a provision about taxation or borrowing etc., it will not become a money Bill. If that is the intention I have nothing to say; but that if that

> is not the intention I must say the word "only" is dangerous, because if the Bill does all these things and at the same time does something else also it will not be a money Bill. I do not know what the intention of the Drafting Committee is but I think this aspect of the article should be borne in mind."[18]

The amendment was however negatived.

29 Article 110 of the Constitution defines a Money Bill for the purposes of the Chapter. A Bill is deemed to be a Money Bill "if it contains only provisions" dealing with any of the matters described in clauses (a) to (g). The word "only" is of crucial significance. The consequence of the use of the expression "only" is to impart exclusivity. In other words, a Bill will be deemed to be a Money Bill only if it falls within the description of the matters enunciated in clauses (a) to (g). If the Bill contains matters which are unrelated to or do not fall within clauses (a) to (g), it is not a Money Bill. Article 110 (2) supports this construction since it indicates that a Bill shall not be deemed to be a Money Bill only for the reason that it provides for:

(i) Imposition of fines or other pecuniary penalties;

(ii) Demand or payment of fees for licences or fees for services rendered; or

(iii) The imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

[18] Constituent Assembly Debates (20 May 1949)

30 This is a clear indicator of the constitutional position that what makes a Bill a Money Bill for the purposes of Chapter II of Part V of the Constitution is that it deals only with matters falling under the description provided in clauses (a) to (g) of Article 110 (1). Clause (g) of Article 110 (1) covers "any matter incidental to" what is specified in clauses (a) to (f). Clause (g) must not be understood as a residuary provision or a catch-all-phrase encompassing all other matters which are not specified in clauses (a) to (f). If this construction were to be placed on clause (g), the distinction between an Ordinary Bill and a Money Bill would vanish. Hence, to be incidental within the meaning of clause (g), the Bill must cover only those matters which fall within the ambit of clauses (a) to (f). It is only a matter which is incidental to any of the matters specified in clauses (a) to (f) which is contemplated in clause (g).

Certification by the Speaker

31 The issue which needs analysis is whether a certification of a Bill as a Money Bill by the Speaker is immune from judicial review. Article 110 (3) states that if any question arises as to whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. In essence, the point for consideration is whether the finality as stipulated in clause (3) to Article 110 excludes judicial review.

32 During the course of the framing of the Constitution, Sir B N Rau, acting as the Constitutional Advisor, prepared a memorandum of the draft Constitution for the Union

Constitution Committee. B Shiva Rao makes a reference to Article 75 of the draft which provided that :

> "if any question arises whether a Bill is a "Money Bill" or not, the decision of the Speaker of the House of the People thereon shall be final."[19]

The draft provision bore a resemblance to Article 22 of the Constitution of Ireland (1937) which provides thus:

> "1.The Chairman of Dáil Éireann [Lower House in Ireland] shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, **be final and conclusive**.
>
> 2. Seanad Éireann [Upper House in Ireland], by a resolution, passed at a sitting at which not less than thirty members are present, may request the President to refer the question whether the Bill is or is not a Money Bill to a Committee of Privileges.
>
> 3. If the President after consultation with the Council of State decides to accede to the request he shall appoint a Committee of Privileges consisting of an equal number of members of Dáil Éireann and of Seanad Éireann and a Chairman who shall be a Judge of the Supreme Court: these appointments shall be made after consultation with the Council of State. In the case of an equality of votes but not otherwise the Chairman shall be entitled to vote.
>
> 4. The President shall refer the question to the Committee of Privileges so appointed and the Committee shall report its decision thereon to the President within twenty-one days after the day on which the Bill was sent to Seanad Éireann.
>
> 5. The decision of the Committee shall be final and conclusive.
>
> 6. If the President after consultation with the Council of State decides not to accede to the request of Seanad Éireann, or if the Committee of Privileges fails to report within the time hereinbefore specified the certificate of the Chairman of Dáil Éireann shall stand confirmed."
>
> (Emphasis supplied)

[19] B. Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration (2012), at p. 32

The Irish model contained a provision for resolving a dispute on the certification of a Bill as a Money Bill. This part of the dispute resolution procedure was not adopted when our Constitution was framed. Moreover, the clause on finality was adopted in a modified form. Whereas clause (1) of Article 22 of the Irish Constitution uses the expression "final and conclusive", draft Article 75 provided for the decision of the Speaker of the House of People being final. On 5 December 1947, the Expert Committee on Financial Provisions suggested an amendment to the draft provision, the gist of which is indicated by B Shiva Rao :

> "When a Money Bill is sent from the Lower House to the Upper, a certificate of the Speaker of the Lower House saying that it is a Money Bill should be attached to, or endorsed on, the Bill and a provision to that effect should be made in the Constitution on the lines of the corresponding provision in the Parliament Act, 1911. **This will prevent controversies about the matter outside the Lower House.**"[20]
>
> (Emphasis supplied)

The extract quoted above is a clear indicator that the purpose of the certification by the Speaker was to prevent controversies in the Upper House of Parliament by incorporating an element of procedural simplicity.

Final but not conclusive

33 When the draft Article as proposed was accepted and eventually incorporated as Article 110, clause (3) incorporated the principle of finality without a specific exclusion of judicial review. Section 3 of the Parliament Act 1911 in Britain specifically excluded judicial review by providing that a certificate of the Speaker of the House of Commons "shall be conclusive for all purposes and shall not be questioned in any

[20] B. Shiva Rao, The Framing of India's Constitution: Selected Documents, Indian Institution of Public Administration, at p. 281.

court of law". These words imparted both conclusiveness and immunity from judicial review to the certificate from the Speaker. This language was not adopted in the Indian Constitution. The draftspersons of the Constitution carefully did not incorporate an exclusion from judicial review, in respect of a certificate issued by the Speaker under clause (3) of Article 110. Finality, in other words, operates as between the Upper and the Lower Houses and does not exclude judicial review by a constitutional court.

34 The interpretation that we have adopted is supported for yet another reason. In contexts where the Constitution intends to confer immunity from judicial review, specific words to that effect are used. The expression "shall not be called in question in any court" is, for instance, utilized in Article 329 (a), Article 243-O and Article 243ZG. These Articles read thus:

> "**329. Bar to interference by courts in electoral matters**.— Notwithstanding anything in this Constitution—
> (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, **shall not be called in question in any court**."
>
> "**243-O. Bar to interference by courts in electoral matters**.—Notwithstanding anything in this Constitution—(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K, **shall not be called in question in any court**."
>
> "**243ZG. Bar to interference by courts in electoral matters**.—Notwithstanding anything in this Constitution—(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-ZA **shall not be called in question in any court**."
>
> (Emphasis supplied)

In **N P Ponnuswami** v **Returning Office**, **Namakkal Constituency, Namakkal, Salem, Dist.**[21], a six judge Bench of this Court construed Article 329 of the Constitution in the following terms :

> "5. … A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two articles begin with the words "subject to the provisions of this Constitution", the last article begins with the words "notwithstanding anything in this Constitution". It was conceded at the Bar that the effect of this difference in language is that whereas any law made by Parliament under Article 327, or by the State Legislature under Article 328, cannot exclude the jurisdiction of the High Court under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329."

35 Distinct from the exclusion of judicial review by the above provisions, there are other provisions of the Constitution where a decision is made "final". Finality in such contexts has been held not to exclude judicial review. Articles 217 (3), 311 (3) and paragraph 6 (1) of the Tenth Schedule use the expression "final" :

> "217. (3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President **shall be final**.
> "311. (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank **shall be final**.
> "6. *Decision on questions as to disqualification on ground of defection*.—(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman, or, as the case may be, the Speaker of such House and his decision **shall be final**:
> Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be

[21]1952 SCR 218

> referred for the decision of such member of the House as the House may elect in this behalf and his decision **shall be final**."
>
> (Emphasis supplied)

In **Union of India** v **Jyoti Prakash Mitter**[22], a six judge Bench of this Court held that under Article 217 (3), the President performs a judicial function and a decision rendered is subject to judicial review on stipulated grounds :

> "32. … The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. … appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion."

36 In the context of Article 311 (3), a Constitution Bench of this Court in **Union of India** v **Tulsiram Patel**[23] held that the finality attributed to the decision of a disciplinary authority that it is not reasonably practical to hold an inquiry, does not render it immune from judicial review. In **Kihoto Hollohan** v **Zachillhu**[24], a Constitution Bench of this Court held that the finality attributed to the decision of the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha in paragraph 6 (1) of the Tenth Schedule of the Constitution does not abrogate judicial review :

> "111. … That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the

[22] (1971) 1 SCC 396
[23] (1985) 3 SCC 398
[24] 1992 Supp. (2) SCC 651

> Speakers/Chairmen is valid. But the concept of statutory finality embodied in Para 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with rules of natural justice and perversity, are concerned."

The Constitution Bench held:

> "101. … The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations…."

Consequently, purely as a matter of textual analysis, the finality attributed to a certificate issued by the Speaker under Article 110 (3) does not grant immunity from judicial review.

Matters of procedure and substantive illegalities

37 Article 118 of the Constitution allows each of the Houses of Parliament to make rules for regulating their procedure and the conduct of business, subject to the provisions of the Constitution. Article 118 provides thus :

> "118. Rules of procedure.—
> (1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.
> (2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the legislature of the Dominion of India shall have effect in

> relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.
>
> (3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.
>
> (4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside."

Article 122 of the Constitution provides thus:

> "122. Courts not to inquire into proceedings of Parliament.—
> (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
>
> (2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Article 122 of the Constitution is similar to Section 41 of the Government of India Act 1935[25]. In the Commentary on the Government of India Act 1935 by N Rajagopala Aiyangar[26], there is an eloquent distinction made between matters of procedure and those of substance in the context of Section 41 (1):

> "**This sub-section seeks to cure defects arising from irregularity of procedure in the Legislature. The activities of a chamber may be divided into internal and external, the internal activities being the sphere of procedure, while the external are subject to the law of the**

[25] 41. – (1) The validity of any proceedings in the Federal Legislature shall not be called in question on the ground of any alleged irregularity of procedure.
(2) No officer or other member of the Legislature in whom powers are vested by or under this Act for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

[26] N Rajagopala Aiyangar, Government of India Act 1935, Madras Law Journal Office (1937) at page 63.

> **constitution. It is to irregularities in the domain of the former class that this sub-section addresses itself. Under the latter head would fall defects arising from want of legislative competence, which is a matter external to the assembly and not a matter of procedure.**"
>
> (Emphasis supplied)

38 In the decision of a Constitution Bench in **Babulal Parate** v **State of Bombay**[27], this Court noted the distinction between an issue which pertains to the validity of proceedings in Parliament and a violation of a constitutional provision. This was in the context of the provisions contained in clauses (a) to (e) of Article 3. The Constitution Bench held:

> "11. It is advisable, perhaps, to add a few more words about Article 122(1) of the Constitution. Learned counsel for the appellant has posed before us the question as to what would be the effect of that Article if in any Bill completely unrelated to any of the matters referred to in clauses (*a*) to (*e*) of Article 3 an amendment was to be proposed and accepted changing (for example) the name of a State. We do not think that we need answer such a hypothetical question except merely to say that if an amendment is of such a character that it is not really an amendment and is clearly violative of Article 3, the question then will be not the validity of proceedings in Parliament but the violation of a constitutional provision. That, however, is not the position in the present case."

39 Article 122 (1) provides immunity to proceedings before Parliament being called into question on the ground of "any alleged irregularities of procedure". In several decisions of this Court which construed the provisions of Article 122 and the corresponding provisions contained in Article 212 for the state legislatures, a distinction has been drawn between an irregularity of procedure and an illegality. Immunity from judicial review attaches to the former but not to the latter. This

[27] (1960) 1 SCR 605

distinction found expression in a seven judge Bench decision of this Court in **Special Reference No. 1 of 1964**[28] ("**Special Reference**"). This Court held :

> "61. … Article 212(2) confers immunity on the officers and members of the legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. Article 212(1) seems to make it possible for a citizen to call in question in the appropriate Court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. **If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a Court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular...**"
>
> (Emphasis supplied)

This formulation was applied in the context of Article 122 by the Constitution Bench in **Ramdas Athawale** v **Union of India**[29] ("**Ramdas Athawale**"):

> "36. This Court under Article 143, Constitution of India In re (Special Reference No. 1 of 1964) [Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), AIR 1965 SC 745] (also known as Keshav Singh case) while construing Article 212(1) observed that it may be possible for a citizen to call in question in the appropriate court of law, the validity of any proceedings inside the legislature if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular. The same principle would equally be applicable in the matter of interpretation of Article 122 of the Constitution."

[28] Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), AIR 1965 SC 745
[29] (2010) 4 SCC 1

A subsequent Constitution Bench decision in **Raja Ram Pal** v **Hon'ble Speaker, Lok Sabha**[30] emphasized the distinction between a procedural irregularity and an illegality:

> "386. … Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of "expressio unius est exclusio alterius" (whatever has not been included has by implication been excluded), it is plain and clear that **prohibition against examination on the touchstone of "irregularity of procedure" does not make taboo judicial review on findings of illegality or unconstitutionality.**
>
> ***
>
> 398. … the court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure". But **in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner by Article 122, or for that matter by Article 105…**"
>
> (Emphasis supplied)

40 The fundamental constitutional basis for the distinction between an irregularity of procedure and an illegality is that unlike in the United Kingdom where Parliamentary sovereignty governs, India is governed by constitutional supremacy. The legislative, executive and judicial wings function under the mandate of a written Constitution. The ambit of their powers is defined by the Constitution. The Constitution structures the powers of Parliament and the state legislatures. Their authority is plenary within the field reserved to them. Judicial review is part of the basic structure of the Constitution. Any exclusion of judicial review has to be understood in the context in which it has been mandated under a specific provision of the Constitution. Hence the provisions contained in Article 122 which protect an alleged irregularity of

[30] (2007) 3 SCC 184

procedure in the proceedings in Parliament being questioned cannot extend to a substantive illegality or a violation of a constitutional mandate.

41 Mr K K Venugopal, learned Attorney General for India relied on three decisions in support of his submission that the certificate issued by the Speaker of the Lok Sabha that a Bill is a Money Bill is immune from judicial review :

(I) **Mangalore Ganesh Beedi Works** v **State of Mysore**[31] ("**Mangalore Beedi**");

(II) **Mohd. Saeed Siddiqui v State of Uttar Pradesh**[32] ("**Mohd. Saeed Siddiqui**"); and

(III) **Yogendra Kumar Jaiswal v State of Bihar**[33] ("**Yogendra Kumar**").

Mangalore Beedi was a case where a new system of coinage had introduced a naya paisa (one hundred naya paisas being equivalent to a rupee) instead of the erstwhile legal tender of sixteen annas or sixty-four pice, which continued to remain legal tender. The appellant which was subjected to an additional amount as sales tax due to the change in currency urged that as a result of the substitution of the coinage, there was a change in tax imposed under the Mysore Sales Tax Act 1948 which could have been effectuated only by passing a Money Bill under Articles 198, 199 and 207 of the Constitution. Rejecting this submission, the Constitution Bench held that the substitution of a new coinage did not amount to an enhancement of tax.

[31] AIR 1963 SC 589
[32] (2014) 11 SCC 415
[33] (2016) 3 SCC 183

Consequently, there was no requirement of taking recourse to the provisions for enacting a Money Bill. However, Justice J L Kapur, speaking for the Court held:

> "5. … Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution. Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Article 255 lays down that requirements as to recommendation and previous sanction are to be regarded as matters of procedure only."

42 The ratio of the decision in **Mangalore Beedi** is that the substitution of coinage did not amount to an enhancement of tax. Hence, the provisions of Article 199 pertaining to a Money Bill were not attracted. Once that was the finding, it was not necessary for the decision to rule on whether the certificate of a Speaker under Article 199 (3) (corresponding to Article 110 (3)) is immune from judicial review. The ratio of the decision is that a new coinage does not amount to an enhancement of tax and hence a Bill providing for the substitution of coinage is not a Money Bill. The observations which are extracted above proceed on an assumption, namely that even assuming that it was a taxing measure, its validity could not be challenged on the ground of an alleged irregularity of procedure. This part of the observations is evidently not the ratio of **Mangalore Beedi**.

43 Subsequently in **Mohd. Saeed Siddiqui**, a three judge Bench of this Court dealt with an amendment brought about by the state legislature to a statute governing the Lokayukta and Up-Lokayukta so as to provide for an extension of the term from six years to eight years or until the successor enters office. The amendment was

challenged on the ground that the Bill could not have been introduced as a Money Bill. Relying on the decision in **Mangalore Beedi**, a three judge Bench held that the issue as to whether a Bill was a Money Bill could only be raised by a Member before the legislative assembly before it was passed. Chief Justice P Sathasivam, speaking for the Bench formulated the following principles:

> "(i) the validity of an Act cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202;
>
> (ii) Article 212 prohibits the validity of any proceedings in a legislature of a State from being called in question on the ground of any alleged irregularity of procedure; and
>
> (iii) Article 255 lays down that the requirements as to recommendation and previous sanction are to be regarded as a matter of procedure only.
>
> It is further held that the validity of the proceedings inside the legislature of a State cannot be called in question on the allegation that the procedure laid down by the law has not been strictly followed and that no court can go into those questions which are within the special jurisdiction of the legislature itself, which has the power to conduct its own business."

The decision adverted to Article 212 (1) (which corresponds to Article 122(1)) and to Article 255[34] of the Constitution. While the decision also adverted to **Raja Ram Pal**, this Court held that any infirmity of procedure was protected by Article 255.

44 The subsequent decision of a two judge Bench of this Court in **Yogendra Kumar** dealt with the constitutional validity of the Orissa Special Courts Act 2006, enacted to provide special courts for offences involving the accumulation of properties

[34] Article 255 : No Act of Parliament or of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—
(a) where the recommendation required was that of the Governor, either by the Governor or by the President;
(b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;
(c) where the recommendation or previous sanction required was that of the President, by the President.

disproportionate to their known-sources of income by persons who have held or hold high political and public offices. Repelling the challenge that the law could not have been introduced as a Money Bill in the legislative assembly, this Court, speaking through Justice Dipak Misra (as the than was) held thus:

> "43. In our considered opinion, the authorities cited by the learned counsel for the appellants do not render much assistance, for the introduction of a Bill, as has been held in Mohd. Saeed Siddiqui [Mohd. Saeed Siddiqui v. State of U.P., (2014) 11 SCC 415] , comes within the concept of "irregularity" and it does come with the realm of substantiality. What has been held in Special Reference No. 1 of 1964 [Powers, Privileges and Immunities of State Legislatures, In re (Special Reference No. 1 of 1964), AIR 1965 SC 745] has to be appositely understood. The factual matrix therein was totally different than the case at hand as we find that the present controversy is wholly covered by the pronouncement in Mohd. Saeed Siddiqui and hence, we unhesitatingly hold that there is no merit in the submission so assiduously urged by the learned counsel for the appellants."

45 The three judge Bench decision in **Mohd Saeed Siddiqui** relied on **Mangalore Beedi** as laying down the principle that a certificate of the Speaker that a Bill is a Money Bill is immune from judicial review. The decision in **Mangalore Beedi**, as we have seen, was based on a finding by the Constitution Bench that the substitution of a new coinage did not constitute an enhancement of tax and hence did not attract the requirements of a Money Bill. But the three judge Bench decision in **Mohd. Saeed Siddiqui** also adverts to the provisions of the Article 255 in attributing immunity to the certificate of the Speaker that a Bill is a Money Bill. Now Article 255 applies in a situation where "some recommendation or previous sanction" required by the Constitution was not given though the Act of Parliament or the legislature of state has since received assent. Thus, where the recommendation required is that of the

Governor, the assent of the President or of the Governor and where the recommendation or previous sanction required is that of the President, the assent by the President will protect the legislation being called into question. The subsequent assent to the law cures the absence of a recommendation, or as the case may be, sanction. Article 255 does not deal with the certificate of the Speaker under Article 110 (3) or Article 199 (3), which is neither a recommendation nor a previous sanction within the meaning of Article 255.

46 **Mohd Saeed Siddiqui** proceeds on an incorrect construction of the decision in **Mangalore Beedi** and on an erroneous understanding of Article 255. The decision in **Pandit MSM Sharma** v **Dr Shree Krishna Sinha**[35] which was adverted to in **Mohd Syed Siddiqui** was discussed in the **Special Reference** to hold that the validity of the proceedings in a legislative chamber can be questioned on the ground of illegality. The decisions in the **Special Reference, Ramdas Athawale** and **Raja Ram Pal** clearly hold that the validity of the proceedings before Parliament or a state legislature can be subject to judicial review on the ground of an illegality (as distinguished from an irregularity of procedure) or a constitutional violation. Hence, the decisions in **Mohd Syed Siddiqui** and **Yogendra Kumar** on the above aspect do not lay down the correct position in law and are overruled.

D Puttaswamy: Judicial review of the certificate of the Speaker

47 The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill 2016 was certified as a Money Bill under Article 110 by the Speaker of

[35] AIR 1960 SC 1186

the Lok Sabha. The exclusion of the Rajya Sabha from the legislative process consequent upon the certification by the Speaker under Article 110(3) was one of the specific challenges addressed before the Constitution Bench **(K S Puttaswamy** v **Union of India**).[36] Justice A K Sikri, speaking for three of the five judges of the Constitution Bench, analysed the provisions of the Aadhaar Act 2016 on the basis of two fundamental precepts: first, the importance of the Rajya Sabha in a bicameral legislature as "succinctly exemplified"[37] by the decision in **Kuldip Nayar** v **Union of India**[38] ("**Kuldip Nayar**") and second, the Rajya Sabha as an "important institution signifying the constitutional federalism"[39].

48 Having enunciated these principles, Justice Sikri emphasised the need for the passage of a Bill by both the Houses of Parliament which, according to the learned Judge, is a "constitutional mandate"[40]. The only exception, the majority observed, is contained in Article 110. As a result, Article 110 being an exception to the scheme of bicameralism had to be given a "strict construction"[41]. The majority held thus:

> "463. The Rajya Sabha, therefore, becomes an important institution signifying constitutional federalism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides."

[36] (2019) 1 SCC 1 ("**Puttaswamy**")
[37] Puttaswamy at para 462
[38] (2006) 7 SCC 1
[39] Puttaswamy at para 463
[40] Puttaswamy at para 463
[41] Puttaswamy at para 463

The above extract clearly indicates that the arguments were considered on the touchstone of the requirement that for a Bill to be a Money Bill, strict adherence to the provisions of Article 110 is necessary.

49 On the issue of justiciability[42] Justice Sikri rejected specifically the submissions urged on behalf of the Union of India that the certification of the Speaker was not subject to judicial review. The majority held:

> "464. We would also like to observe at this stage that insofar as submission of the respondents about the justiciability of the decision of the Speaker of the Lok Sabha is concerned, we are unable to subscribe to such a contention. Judicial review would be admissible under certain circumstances having regard to the law laid down by this Court in various judgments which have been cited by Mr P. Chidambaram, learned senior counsel appearing for the petitioners, and taken note of in paragraph 455."

The decisions which were adverted to in para 455 referred to in the above extract are:

> "455.1.Sub-Committee on Judicial Accountability v. Union of India (1991) 4 SCC 699].
> 455.2.S.R. Bommai v. Union of India, (1994) 3 SCC 1] .
> 455.3.Raja Ram Pal v. Lok Sabha (Supra)
> 455.4.Ramdas Athawale (5) v. Union of India (Supra)
> 455.5.Kihoto Hollohan v. Zachillhu (Supra)."

The majority then proceeded to analyse whether the provisions contained in the Act could validly pass muster under Article 110. In the view of the majority, Section 7 which makes the receipt of a subsidy, benefit or service conditional on the identity of the recipient being established by the process of authentication under Aadhaar was referable to Article 110 since these financial benefits were "extended with the support

[42] Puttaswamy at para 455

of the Consolidated Fund of India"[43]. The provisions of Section 23(2)(h) and Section 54 were held to be incidental to the main provision and covered by Article 110(g). Section 57, which permitted the use of Aadhaar by private entities for other purposes, was held to be unconstitutional. Having thus analysed the provisions of the Bill, the majority held:

> "472. For all the aforesaid reasons, we are of the opinion that Bill was rightly introduced as Money Bill. **Accordingly, it is not necessary for us to deal with other contentions of the petitioners, namely, whether certification by the Speaker about the Bill being Money Bill is subject to judicial review or not,** whether a provision which does not relate to Money Bill is severable or not. We reiterate that main provision is a part of Money Bill and other are only incidental and, therefore, covered by clause (g) of Article 110 of the Constitution."
>
> (Emphasis supplied).

50 Both Mr Arvind Datar, learned a*micus curiae* and the learned Attorney General for India have highlighted the apparent inconsistency among the observations contained in paragraphs 463, 464 and 472 of the judgment. For, paragraph 464 rejects the submissions of the Union of India that the Speaker's decision is not justiciable in the aftermath of the earlier discussion that Article 110 must receive a strict construction, while para 472 holds that it was not necessary for the majority to deal with whether certification by the Speaker of a Bill as a Money Bill is subject to judicial review. However, in the course of the conclusion in paragraph 515, the issue to which answers were framed was:

> "515.(6). Whether the Aadhaar Act could be passed as "Money Bill" within the meaning of Article 110 of the Constitution?"

[43] Puttaswamy at para 466

The answer in paragraph 515.1 is in the following terms:

> "515.1. We do recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in Kuldip Nayar's case [Kuldip Nayar v. Union of India, (2006) 7 SCC 1]. The Rajya Sabha, therefore, becomes an important institution signifying constitutional federalism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides."

51 On merits, Section 7 was held to be a core provision, satisfying the conditions of Article 110 while the others were held to be incidental in nature. Section 57 had been held to be unconstitutional. Hence the conclusion was in the following terms:

> "467…Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.
>
> 515.5. On examining of the other provisions pointed out by the petitioners in an attempt to take it out of the purview of Money Bill, we are of the view that those provisions are incidental in nature which have been made in the proper working of the Act. In any case, a part of Section 57 has already been declared unconstitutional. We, thus, hold that the Aadhaar Act is validly passed as a 'Money Bill'.

52 A holistic reading of the decision of the majority would indicate that: (i) Article 110 has been construed to be an exception to the principle of bicameralism and, therefore, the provision must (it has been held) receive strict interpretation; (ii) Section 7 constituted the core provision of the Aadhaar Bill which was referable to Article 110

while the other provisions were incidental; and (iii) Section 57 was held to be unconstitutional in so far as it allowed the use of the Aadhaar platform by private entities including corporate bodies. The observations in para 472 cannot, therefore, be construed to mean that the majority desisted from expressing a final view on justiciability.

53 The judgment of Justice DY Chandrachud specifically holds that the decision of the Speaker to certify a Bill as a Money Bill is not immune from judicial review. After tracing the constitutional history of Article 110 including the provisions of the Parliament Act 1911 in Britain and Section 37 of the Government of India Act 1935, the judgment places reliance on the construction placed on the provisions of Article 122 and the corresponding provision in Article 212 in (i) **Special Reference**; (ii) **Ramdas Athawale** ; and (iii) **Raja Ram Pal**. In coming to the conclusion that the decision of the Speaker is amenable to judicial review if it suffers from illegality or from a violation of constitutional provisions, the decisions in **Mohd Saeed Siddiqui** and **Yogendra Kumar Jaiswal** were disapproved. Distinguishing the principle of Parliamentary sovereignty in the UK from the position of constitutional supremacy in India, the decision observes:

> "1067. The purpose of judicial review is to ensure that constitutional principles prevail in interpretation and governance. Institutions created by the Constitution are subject to its norms. No constitutional institution wields absolute power. No immunity has been attached to the certificate of the Speaker of the Lok Sabha from judicial review, for this reason. The Constitution makers have envisaged a role for the judiciary as the expounder of the Constitution. The provisions relating to the judiciary, particularly those regarding the power of judicial review, were framed, as Granville Austin observed, with "idealism" [Granville Austin, The Indian Constitution: Cornerstone of a

> Nation, Oxford University Press (1966), at p. 205.] Courts of the country are expected to function as guardians of the Constitution and its values. Constitutional courts have been entrusted with the duty to scrutinise the exercise of power by public functionaries under the Constitution. No individual holding an institutional office created by the Constitution can act contrary to constitutional parameters. Judicial review protects the principles and the spirit of the Constitution. Judicial review is intended as a check against arbitrary conduct of individuals holding constitutional posts. It holds public functionaries accountable to constitutional duties. If our Constitution has to survive the vicissitudes of political aggrandisement and to face up to the prevailing cynicism about all constitutional institutions, notions of power and authority must give way to duties and compliance with the rule of law. Constitutional institutions cannot be seen as focal points for the accumulation of power and privilege. They are held in trust by all those who occupy them for the moment. The impermanence of power is a sombre reflection for those who occupy constitutional offices. The Constitution does not contemplate a debasement of the institutions which it creates. The office of the Speaker of the House of People, can be no exception. The decision of the Speaker of the Lok Sabha in certifying a Bill as a Money Bill is liable to be tested upon the touchstone of its compliance with constitutional principles. Nor can such a decision of the Speaker take leave of constitutional morality."

54 Justice Ashok Bhushan, in his separate opinion, specifically held that the decision of the Speaker in certifying a Bill as a Money Bill is capable of judicial review. The learned judge held thus:

> "901. We have noticed the Constitution Bench judgments in Kihoto Hollohan [Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651] and Raja Ram Pal [Raja Ram Pal v. Lok Sabha, (2007) 3 SCC 184] that finality of the decision of the Speaker is not immuned from Judicial Review. All Bills are required to be passed by both Houses of Parliament. Exception is given in case of Money Bills and in the case of joint sitting of both Houses. In event, we accept the submission of learned Attorney General that certification by Speaker is only a matter of procedure and cannot be questioned by virtue of Article 122(1), any Bill, which does not fulfil the essential constitutional condition under Article 110 can be certified as Money Bill by-passing the Upper House. **There is a clear difference between the subject "irregularity of procedure" and "substantive illegality". When a Bill does not fulfil the essential constitutional condition under**

> **Article 110(1), the said requirement cannot be said to be evaporated only on certification by Speaker. Accepting the submission that certification immunes the challenge on the ground of not fulfilling the constitutional condition, Court will be permitting constitutional provisions to be ignored and by-passed. We, thus, are of the view that decision of the Speaker certifying the Bill as Money Bill is not only a matter of procedure and in event, any illegality has occurred in the decision and the decision is clearly in breach of the constitutional provisions, the decision is subject to Judicial Review.** We are, therefore, of the view that the Three Judge Bench judgment of this Court in Mohd. Saeed Siddiqui [Mohd. Saeed Siddiqui v. State of U.P., (2014) 11 SCC 415] and Two Judge Bench judgment of this Court in Yogendra Kumar Jaiswal [Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 SCC 183 : (2016) 2 SCC (Cri) 1] do not lay down the correct law. We, thus, conclude that the decision of the Speaker certifying the Aadhaar Bill as Money Bill is not immuned from Judicial Review."
>
> (Emphasis supplied)

Justice Ashok Bhushan then held on merits that the Bill had been correctly passed as a Money Bill.

55 From the above analysis, it is evident that the judgments of both Justice D Y Chandrachud and Justice Ashok Bhushan categorically held that the decision of the Speaker to certify a Bill as a Money Bill is not immune from judicial review. There is a clear distinction between an irregularity of procedure under Article 122(1) and a substantive illegality. The certificate of the Speaker under Article 110(3) is not conclusive in so far as judicial review is concerned. Judicial review can determine whether the conditions requisite for a Bill to be validly passed as a Money Bill were fulfilled. The point of difference between the majority (represented by the decisions of Justice Sikri and Justice Ashok Bhushan) and Justice Chandrachud was that on merits, the majority came to the conclusion that the Aadhaar Bill is a Money Bill within the meaning of Article 110(1) while the dissent held otherwise.

56 On an overall reading of the judgment of Justice Sikri, it is not possible to accede to the submission of the learned Attorney General that the issue of the reviewability of the certificate of the Speaker is left at large by the decision of the majority. In any event, in view of the issue having arisen in the present case, we have dealt with the aspect of judicial review independently of the decision in **Puttaswamy**.

E Role of the Rajya Sabha

57 The Rajya Sabha consists of not more than two hundred and fifty members, twelve nominated by the President (from persons with special knowledge or practical experience in literature, science, art and social service) and not more than two hundred and thirty eight representatives of the States and Union Territories[44]. The Fourth Schedule specifies the manner in which allocation of seats is made in the Rajya Sabha. The elected members of the legislative assembly of every state elect the representatives of the state in the Rajya Sabha in accordance with "the system of proportional representation by means of the single transferable vote". Representation of the Union Territories is provided by a law enacted by Parliament.

[44]80 (1) The Council of States] shall consist of—
(a) twelve members to be nominated by the President in accordance with the provisions of clause (3); and
(b) not more than two hundred and thirty-eight representatives of the States 3[and of the Union territories.]
(2) The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories] shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.
(3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:-
Literature, science, art and social service.
(4) The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.
(5) The representatives of the [Union territories] in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

58 The Rajya Sabha, unlike the Lok Sabha, is not subject to dissolution but one-third of its members retire by rotation[45]. The Lok Sabha, unless sooner dissolved, has a life span of five years. In contrast, the Constitution envisages that the Rajya Sabha is an institution possessed of constitutional continuity with a third of its members retiring by rotation at stipulated intervals. In line with the principle of constitutional continuity, Article 107(4) stipulates that a Bill which is pending in the Rajya Sabha which has not been passed by the Lok Sabha shall not lapse on the dissolution of the Lok Sabha. On the other hand, under Clause (5), a Bill which is pending in the Lok Sabha or upon being passed by the Lok Sabha is pending in the Rajya Sabha, shall lapse on a dissolution of the Lok Sabha, subject to Article 108[46]. The role of the Rajya Sabha in respect of Money Bills has, however, been substantially curtailed. Money Bills can originate only in the Lok Sabha. Moreover, the Rajya Sabha has only a recommendatory power, as noticed earlier, in regard to Money Bills.

Bicameralism

59 Bicameralism emerged in 14th century Britain. The House of Lords represented a chamber where a debate took place with feudal lords, while the House of Commons was where citizens were represented. The House of Lords comprised of hereditary peers while the House of Commons in their historical origin comprised of persons possessed of property as required. Across the Atlantic, the Constitution of the United

[45] 83. (1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.
(2) The House of the People, unless sooner dissolved, shall continue for 1[five years] from the date appointed for its first meeting and no longer and the expiration of the said period of 1[five years] shall operate as a dissolution of the House:
Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.
[46] Article 108 contains provisions for a joint sitting of two Houses of Parliament.

States adopted bicameralism. The Constitutional Convention of 1787 represented a constitutional compromise where the House of Representatives comprised of directly elected legislatures, each voter possessed of an equal vote in the elections and the Senate, where each state could send two members elected indirectly. In the *Federalist Papers*, James Madison underscored the importance of the Senate as an indirectly elected Upper House of a bicameral legislature:

> "First … a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. …
>
> Second: The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. …
>
> Third: Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. …
>
> A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. …
>
> Fourth: The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government."

60 Madison conceived of the Senate as a body which imposes a salutary check on government. To Madison, the requirement of concurrence of two legislative bodies ensured against usurpation of public power. The Senate was conceived of as a body capable of calm deliberation, isolated from the governing passions of the day. As a sobering voice, the Senate, it was conceived would reflect an expertise in framing legislation. It was an institution which symbolises stability in constitutional governance.

HM Seervai in his classical text, **Constitutional Law of India**[47] emphasises the position of the Rajya Sabha as a critical ingredient in the federal structure:

> "First and foremost, Parliament (the Central Legislature) is dependent upon the States, because one of its Houses, the Council of States, is elected by the Legislative Assemblies of the States. Where the ruling party, or group of parties, in the House of the People has a majority but not an overwhelming majority, the Council of States can have a very important voice in the passage of legislation other than financial Bills. Secondly, a Bill to amend the Constitution requires to be passed by each House of Parliament separately by an absolute majority in that House and by not less than two-thirds of those present and voting. Since the Council of States is indirectly elected by the State Legislatures, the State Legislatures have an important say in the amendment of the Constitution because of the requirement of special majorities in each House. Thirdly, the very important matters mentioned in the proviso to Article 368 (Amendment of the Constitution) cannot be amended unless the amendments passed by Parliament are ratified by not less than half the number of Legislatures of the States … Fourthly, the amendment of Article 352 by the 44th Amendment gives the Council of States a most important voice in the declaration of Emergency, because a proclamation of emergency must be approved by each House separately by majorities required for an amendment of the Constitution … Fifthly, the executive power of the Union is vested in the President of India who is not directly elected by the people but is elected by an electoral college consisting of (a) the elected Members of the Legislative Assemblies of the States, and (b) the elected members of both Houses of Parliament … Directly the State Legislatures have substantial voting power in electing the

[47] HM Seervai, Constitutional Law of India, Universal Law Co Pvt Ltd, Vol I, (1991), at pp.299-300

> President; that power is increased indirectly through the Council of States, which is elected by the Legislative Assemblies of States."

61 The Rajya Sabha Secretariat has, in its publication titled "Second Chamber in Indian Parliament: Role and Studies of Rajya Sabha", emphasised the position of the Rajya Sabha as an institution sensitive to the aspirations of the states, contributing in that capacity to strengthening the federal structure of the nation. The publication emphasises some of the special powers possessed by the Rajya Sabha:

> "(i) Article 249 of the Constitution provides that Rajya Sabha may pass a resolution, by a majority of not less than two-thirds of the Members present and voting to the effect that it is necessary or expedient in the national interest that Parliament should make a law with respect to any matter enumerated in the State List. Then, Parliament is empowered to make a law on the subject specified in the resolution for the whole or any part of the territory of India. Such a resolution remains in force for a maximum period of one year but this period can be extended by one year at a time by passing a further resolution;
>
> (ii) Under Article 312 of the Constitution, if Rajya Sabha passes a resolution by a majority of not less than two-thirds of the Members present and voting declaring that it is necessary or expedient in the national interest to create one or more All India Services common to the Union and the States, Parliament has the power to create by law such services; and
>
> (iii) Under the Constitution, the President is empowered to issue Proclamations in the event of national emergency (Article 352), in the event of failure of constitutional machinery in a State (Article 356), or in the case of financial emergency (Article 360). Normally, every such Proclamation has to be approved by both Houses of Parliament within a stipulated period. Under certain circumstances, however, Rajya Sabha enjoys special powers in this regard. If a Proclamation is issued at a time when the dissolution of the Lok Sabha takes place within the period allowed for its approval, then the Proclamation can remain effective if a resolution approving it, is passed by Rajya Sabha."

62 In **Kuldip Nayar**, Chief Justice Y K Sabharwal speaking for the Constitution Bench emphasised the role of the Rajya Sabha in the following observations:

> "47. The Rajya Sabha is a forum to which experienced public figures get access without going through the din and bustle of a general election which is inevitable in the case of the Lok Sabha. It acts as a revising chamber over the Lok Sabha. The existence of two debating chambers means that all proposals and programmes of the Government are discussed twice. As a revising chamber, the Rajya Sabha helps in improving Bills passed by the Lok Sabha."

The significance of the role of the Rajya Sabha was also emphasised by Justice A K Sikri (writing on behalf of himself and two other judges) in **Puttaswamy**. Complementing those observations, the judgment of Justice DY Chandrachud places the position of the Rajya Sabha, in the context of federalism being a part of the basic features of the Constitution:

> "1106. The institutional structure of the Rajya Sabha has been developed to reflect the pluralism of the nation and its diversity of language, culture, perception and interest. The Rajya Sabha was envisaged by the makers of the Constitution to ensure a wider scrutiny of legislative proposals. As a second chamber of Parliament, it acts as a check on hasty and ill-conceived legislation, providing an opportunity for scrutiny of legislative business. The role of the Rajya Sabha is intrinsic to ensuring executive accountability and to preserving a balance of power. The Upper Chamber complements the working of the Lower Chamber in many ways. The Rajya Sabha acts as an institution of balance in relation to the Lok Sabha and represents the federal structure [In *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1998] of India. Both the existence and the role of the Rajya Sabha constitute a part of the basic structure of the Constitution. The architecture of our Constitution envisions the Rajya Sabha as an institution of *federa* bicameralism and not just as a part of a simple bicameral legislature. Its nomenclature as the "Council of States" rather than the "Senate" appropriately justifies its federal importance."

63 Bicameral legislatures have a significant constitutional role particularly in the context of federal structures. The Rajya Sabha, as our Constitution emphasises, represents the aspirations of the states and is hence a critical element in the constitutional design of the federal structure. The Rajya Sabha is an institution possessed of constitutional continuity. The body is not dissolved like the House of the People and its members retire by rotation. The exclusion of the Rajya Sabha has been contemplated in the context of Money Bills. However, this is an exception to the overarching principle that Bills have to be passed by both Houses of Parliament.

64 There is a significant difference between the provisions of Article 110(1) which defines Money Bills and the provisions of Article 117(1) which enunciates special provisions as to Financial Bills. Article 117(1) provides that a Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of Article 110(1) shall not be introduced or moved except on the recommendation of the President of India and the Bill making such provision shall not be introduced in the Council of States. The word 'only' which is employed in Article 110(1) in the definition of Money Bills is absent in Article 117(1). The Legislative Procedure in the Rajya Sabha[48] explains that Financial Bills are comprised in categories I and II respectively:

> "b. Financial Bills – Category-I
>
> A Bill falling under clause (1) of article 117 of the Constitution is called a Financial Bill. It is a Bill which seeks to make provision for any of the matters specified in sub-clauses(a) to (f) of clause (1) of article 110 as also other matters. It is, so to say, a Bill which has characteristics both of a Money Bill… firstly, it cannot be introduced in Rajya Sabha, and secondly, it cannot be introduced except on the recommendations of the

[48] Legislative Procedure in the Rajya Sabha,: Rajya Sabha Secretariat at p. 17

> President. Except these two points of difference, a Financial Bill in all other respects is just like any other ordinary Bill.
>
> (c). Financial Bills – Category-II
>
> There is yet another class of Bills which are also Financial Bills under article 117(3). Such Bills are more in the nature of ordinary Bills rather than the Money Bills and Financial Bills mentioned earlier. The only point of difference between this category of Financial Bills and the ordinary Bills is that such a Financial Bill, if enacted and brought into operation, involves expenditure from the Consolidated Fund of India and cannot be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill. In all other respects this category of Bills is, just like ordinary Bills, so that such a Financial Bill can be introduced in Rajya Sabha, amended by it or a joint sitting can be introduced in Rajya Sabha, amended by it or a joint sitting can be held in case of disagreement between the Houses over such a Bill. There is, in other words, no limitation on the power of Rajya Sabha in respect of such Financial Bills."

The above classification re-emphasises the distinction of a Financial Bill with a Money Bill, which is a Bill which contains 'only' provisions of the description specified in sub-clauses (a) to (g) of Article 110(1).

65 The Rajya Sabha reflects the pluralism of the nation and ensures a balance of power. It is an indispensable constitutive unit of the federal backbone of the Constitution. Potential differences between the two houses of the Parliament cannot be resolved by simply ignoring the Rajya Sabha. In a federal polity such as ours, the efficacy of a constitutional body created to subserve the purpose of a deliberate dialogue, cannot be defeated by immunising from judicial review the decision of the Speaker to certify a Bill as a Money Bill.

F Merits of the challenge

F.1 Passage as a Money Bill

66 On 19 February 2014, the Appellate Tribunals and Other Authorities (Conditions of Service) Bill 2014 was introduced in the Rajya Sabha to provide "uniform conditions of service of the Chairman and Members" of 26 tribunals. Clause 3 of the Bill provides:

> "3. Notwithstanding anything to the contrary contained in the provisions of the specified Acts, the provisions of this Act shall apply to the Chairman and Members appointed under the specified Acts:
> Provided that the provisions of this Act shall not apply to the Chairman and other Members, as the case may be, holding such office immediately before the commencement of the said Act."

'Specified Acts' were enunciated in the First Schedule to the Bill. The Bill was referred to the Department related Standing Committee which submitted its Seventy Fourth Report on 26 February 2015. The Bill was withdrawn on 11 April 2017.

67 The Finance Bill 2017 was introduced as a Money Bill in the Lok Sabha with a recommendation of the President under clauses (1) and (3) of Article 117 of the Constitution. At the time of the introduction of the Bill on 1 February 2017, the Finance Bill 2017 comprised of 150 clauses together with seven schedules "to give effect to the financial proposals of the Central Government for the financial year 2017-18". The Bill contained proposals *inter alia* to amend, add to and modify legislation dealing with taxation – direct, indirect and service taxes and other fiscal aspects. Part VIII of the Finance Bill 2017 sought to expand the jurisdiction of the Securities Appellate

Tribunal[49] established under the SEBI Act 1992[50] and to make changes in the existing provisions for the appointments to the SAT. The Finance Bill was taken up for discussion on 21 March 2017 and was passed by the Lok Sabha on 22 March 2017 with 29 government amendments.

68 On 21 March 2017, the Union Finance Minister proposed an amendment to incorporate Part XI (subsequently renumbered as Part XIV in the Finance Act) containing 34 new clauses and two schedules to the Finance Bill. Rule 80(i) of the Rules of Procedure for the Conduct of Business in the Lok Sabha stipulates that:

> "80. Admissibility of amendments.
> The following conditions shall govern the admissibility of amendments to clauses or schedules of a Bill:
> (i) An amendment shall be within the scope of the Bill and relevant to the subject-matter of the clause to which it relates."

During the course of the discussion, the Speaker overruled the objection against the inclusion of the proposed amendments dealing with non-fiscal subjects. The Lok Sabha Debates elucidate:

> "Hon. Members would recall that during last year when similar objections were raised at the time of consideration of the Finance Bill, 2016, I had observed that as per rule 219, the primary object of a Finance Bill is to give effect to the financial proposals of the Government. There is no doubt about it. At the same time, this Rule does not rule out the possibility of inclusion of non-taxation proposals. Therefore, I have accepted this. The Finance Bill may contain non-taxation proposals also…
> So, incidental provisions can be made. That is why, keeping in view that rule 2019 does not specifically bar inclusion of non-taxation proposals in a Finance Bill, I rule out the Point of Oder."

[49] "SAT"
[50] "SEBI Act 1992"

69 The Lok Sabha suspended the operation of Rule 80(1) so as to allow the proposed amendments to be incorporated in the Finance Bill. On 22 March 2017, the House adopted the Finance Bill 2017 along with an amendment to insert Part XI (renumbered as Part XIV in the Finance Act). The Bill was transmitted to the Rajya Sabha under Article 109(2) together with the certification of the Speaker. The Rajya Sabha returned the Bill with its recommendations on 29 March 2017. On 30 March 2017, the Lok Sabha rejected the recommendations. Resultantly the Finance Bill was deemed to have been passed by both the Houses.

70 Upon the passage of the Finance Bill 2017, the Rules were notified by the Union of India in the Ministry of Finance on 1 June 2017. In terms of Section 184 of the Finance Act 2017, the Rules specify: (i) criteria of eligibility; (ii) procedure of selection; (iii) provisions for resignation and removal; (iv) salaries and emoluments; (v) term and tenure; and (vi) other service conditions such as leave and allowances to members of scheduled tribunals.

Part XIV of the Finance Act 2017 is titled: "**Amendments to certain Acts to provide for Merger of Tribunals and Other Authorities and Conditions of Service of Chairpersons, Members etc**."

71 Section 158 effects amendments to several Parliamentary enactments:

i. The Industrial Disputes Act,1947
ii. The Employees' Provident Funds and Miscellaneous Provisions Act 1952
iii. The Copyright Act 1957
iv. The Trade Marks Act 1999

v. The Railway Claims Tribunal Act 1987

vi. The Railways Act 1989

vii. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act 1976

viii. The Foreign Exchange Management Act 1999

ix. The Airports Authority of India Act 1994

x. The Control of National Highways (Land and Traffic) Act 2002

xi. The Telecom Regulatory Authority of India Act 1997

xii. The Information Technology Act 2000

xiii. The Airports Economic Regulatory Authority of India Act 2008

xiv. The Competition Act 2002

xv. The Companies Act 2013

xvi. The Cinematograph Act 1952

xvii. The Income Tax Act 1961

xviii. The Customs Act 1962

xix. The Administrative Tribunals Act 1985

xx. The Consumer Protection Act 1986

xxi. The Securities and Exchange Board of India Act 1992

xxii. The Recovery of Debts Due to Banks and Financial Institutions Act 1993

xxiii. The Armed Forces Tribunal Act 2007

xxiv. The National Green Tribunal Act 2010

72 Section 183 provides:

> "183. Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of

> section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice- Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:
> Provided that the provisions of section 184 shall not apply to the Chairperson, Vice Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day."

The Eighth Schedule contains a list of 19 Tribunals together with the corresponding enactments under which they were constituted. The effect of Section 183 is to override the provisions of those enactments and to stipulate that from the appointed day, the provisions of Section 184 shall apply to Chairpersons, Vice Chairpersons, Presidents, Vice Presidents, Presiding Officers and Members of the Tribunals or, as the case may be, Appellate Tribunals. Those who hold office immediately before the appointed day have been excluded.

Section 184 stipulates:

> "184. (1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:
> Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:
> Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—
> (a) in the case of Chairperson, Chairman or President, the age of seventy years;

> (b) in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:
> (2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment."

73 Section 184 has conferred a rule making power on the Central Government to provide for the (i) qualifications; (ii) appointment; (iii) terms of office; (iv) salaries and allowances; (iv) resignation; (vi) removal; and (viii) other terms and conditions of service. The proviso stipulates that the term of office shall be such as is prescribed in the Rules made by the Central Government not exceeding five years and that a Member would be eligible for reappointment. An upper age limit is prescribed by the second proviso. Section 185 (1) stipulates that Chairpersons, Presidents or Vice Chairpersons, Vice Presidents, Presiding Officers and Members of the Tribunals or Appellate Tribunals who hold office before the appointed day shall cease to do so and be entitled to compensation not exceeding three months' pay and allowances for the premature termination of the term of office or the contract of service.

74 The learned Attorney General for India submitted that Part XIV of the Finance Act 2017 is sustainable with reference to sub-clauses (c), (d) and (g) of clause (1) of Article 110. The submission is that the certification by the Speaker is of the entire Finance Bill when it was transmitted to the Rajya Sabha. The Attorney General urged that payment of salaries is made out of the Consolidated Fund of India. Once this be the position, the other provisions of Part XIV are, it was urged, incidental in nature. It is argued that salaries, allowances and pension will have a direct nexus with the

Consolidated Fund of India and are incidental to the provisions contained in the Finance Act 2017. In this context, reliance was placed on: (i) the presumption of constitutional validity (**State of West Bengal** v **Anwar Ali Sarkar**[51], **R.K. Garg** v **Union of India**[52] and **Subramanian Swamy** v **Director, Central Bureau of Investigation**[53]); (ii) the importance of the doctrine of separation of powers (**Bhim Singh** v **Union of India**[54]).

75 The provisions of Part XIV of the Finance Act 2017 amend, first and foremost, the legislative enactments under which diverse tribunals, including appellate tribunals were constituted. By and as a result of the amendments, the statutory provisions relating to qualifications for appointment, the process of appointment, terms of office and the terms and conditions of service including salaries, allowances, resignation and removal are overridden and are to be governed by the provisions of Section 184. Section 184 confers a rule making power on the Central Government to stipulate all the above aspects in regard to the adjudicatory personnel appointed to these tribunals. By this process, the governing statutory provisions embodied in the parent legislation are overridden and authority is conferred upon the Central Government to formulate other aspects of the process from qualifications for office and the process of appointment to the terms of service, through delegated legislation.

76 This, in our view, completely transgresses the conditions stipulated in Article 110(1) for constituting a Money Bill. Article 110 does not bar the inclusion of non-fiscal proposals in a Money Bill. But while permitting the inclusion of non-fiscal

[51] (1952) SCR 284
[52] (1981) 4 SCC 675
[53] (2014) 8 SCC 682
[54] (2010) 5 SCC 538

subjects, sub-clause (g) of Article 110(1) embodies the requirement that such a matter must be incidental to any of the matters specified in sub-clauses (a) to (f). In other words, the inclusion of a non-fiscal matter is permissible in a Money Bill only if it is incidental or ancillary to a matter specified in sub-clauses (a) to (f). Part XIV has repealed and replaced substantive provisions contained in the enactments specified in the Eighth and Ninth Schedules which are not referable to sub-clauses (a) to (f) of Article 110(1). Part XIV of the Finance Act 2017 is thus not incidental within the meaning of sub-clause (g). The plain consequence is that by adopting the special procedure contained in Article 109, the substantive procedure governing Ordinary Bills under Articles 107 and 108 has been rendered otiose. If the provisions contained in Part XIV were to be enacted in the form of an Ordinary Bill, the Rajya Sabha would have a vital voice in deliberating and discussing on the nature of the legislative proposals. Part XIV contains provisions which lie outside the domain permissible under Article 110.

77 We are unimpressed with the submissions of the learned Attorney General that since salaries are payable out of the Consolidated Fund, Part XIV of the Finance Act bears a nexus with sub-clauses (c) and (d) of Article 110(1) and that the other provisions are merely incidental. That the amendment has a bearing on the financial burden on the Consolidated Fund of India cannot be the sole basis of brining the amendment within the purview of Article 110(1). On a close analysis of the provisions, it is evident that what is claimed to be incidental has swallowed up the entire legislative exercise. The provisions of Part XIV of the Finance Act 2017 canvass a range of amendments which include qualifications and process for appointment terms of office and terms and conditions of service including salaries, allowances,

resignation and removal which cannot be reduced to only a question of the financial burden on the Consolidated Fund of India. The effect of Part XIV is to amend and supersede the provisions contained in the parent enactments governing all aspects of the appointment and terms of service of the adjudicatory personnel of the tribunals specified in the Eighth and Ninth Schedules. This exercise cannot be construed as a legitimate recourse to the power of enacting a Money Bill.

78 The Attorney General for India urged that the provisions of Part XIV of the Finance Act 2017, in so far as they have a financial bearing on the Consolidated Fund of India, are sustainable with reference to sub-clauses (c), (d), (e) and (g) of clause (1) of Article 110.

79 Sub-clause (c) deals, *inter alia*, with the withdrawal of money from either the Consolidated Fund of India or the Contingency Fund of India. Sub-clause (d) deals with the appropriation of money out of the Consolidated Fund of India. Sub-clause (e) stipulates either the declaration of any expenditure or the increase in the amount of expenditure charged on the Consolidated Fund of India. It was contended that Part XIV of the Finance Act 2017, in so far as it has a bearing on the Consolidated Fund of India, is *incidental* to the matters referred in sub-clauses (c), (d) and (e) of Article 110(1).

80 Sub-clause (g) stipulates that provisions dealing with any matter incidental to the matters specified in sub-clauses (a) to (f) fall within the purview of Article 110(1). However, this is distinct from contending that where a bill contains provisions not referable to the sub-clauses (a) to (f) stipulated in clause (1) of Article 110 but has an

incidental bearing on the Consolidated Fund of India, this by itself would bring such a bill within the purview of sub-clause (g) of Article 110(1).

81 Article 110(1) defines a Money Bill as a bill which contains "only provisions" dealing with all or any of the matters enumerated in sub-clauses (a) to (f). The import of sub-clause (g) of clause (1) of Article 110 is that the proposed bill may also contain provisions which have an incidental bearing on the matters enumerated in sub-clauses (a) to (f). However, sub-clause (g) cannot be read to permit a bill consisting of provisions which do not directly pertain to matters enumerated in sub-clauses (a) to (f), but have only an incidental bearing on the matters enumerated in sub-clauses (a) to (f). Implicit in the term "incidental" is the relation between the principal subject matters of the bill which must be referable to sub-clauses (a) to (f) and other matters. Every provision of a bill which is claimed to be a Money Bill must directly pertain to any of the matters enumerated in clauses (a) to (f). Where it is claimed that a provision falls within the ambit of sub-clause (g), the provision must depend on or be appurtenant "to any of the matters specified in sub-clauses (a) to (f)."

82 Part XIV of the Finance Act 2017 canvasses a range of amendments which include qualifications and process for appointment of members of tribunals, terms of office and terms and conditions of service including salaries, allowances, resignation and removal which are not referable to sub-clauses (a) to (f) of clause (1) of Article 110. Almost every government action involves an increase or decrease of expenditure which may be relatable to the Consolidated Fund of India. Accepting the argument urged would amount to inverting sub-clause (g) and allowing any bill which is not referable to the matters enumerated in Article 110(1) to be passed as a Money Bill so

long as it can be shown that the provisions may have some bearing on the Consolidated Fund of India.

83 Further, the contention urged that the transfer of the power to determine salaries has a direct nexus with the Consolidated Fund of India glosses over the distinction between the **power** to determine of modify salaries and the determination or modification of the salary. The transfer of the power to determine or modify salaries does not, by itself, lead to the conclusion that such transfer of authority to the rule making function by the Central Government is referable to the Consolidated Fund of India in the manner contemplated in the sub-clauses referred to above.

84 The transfer of authority to determine qualifications and process for appointments, terms of office and terms and conditions of service including salaries, allowances, resignation and removal of tribunal members from the statutory provisions determined by the legislature to the executive is the transfer of a substantive right which has a bearing on constitutional design as well as the independence of adjudicatory tribunals. They are not referable to sub-clauses (c), (d) and (e) of Article 110(1) and do not amount to matters incidental to any of the matters enumerated in sub-clauses (a) to (f) of clause (1) of Article 110.

85 There is undoubtedly a presumption of constitutionality which attaches to legislation. The presumption is founded on the principle that the legislature in a parliamentary democracy understands the needs and conditions of the time and that the executive government which pilots legislation through the competent legislature is accountable to both the legislature and to the people whom the elected arm of government represents. But the presumption of constitutionality is what it is, namely, a

presumption. The presumption can be displaced on a clear violation of a constitutional mandate or infraction being established. Where a Bill which contains provisions which are not referable to sub-clauses (a) to (g) of clause (1) of Article 110 is passed as a Money Bill, that constitutes a clear violation of the mandate of Article 110. The presumption of constitutionality stands displaced.

86 The learned Attorney General urged that the doctrine of separation of powers would require this Court to tread with caution since certification of a Bill as a Money Bill, as he submits, pertains to the internal functioning of Parliament. Judicial review, it was submitted, would violate the separation of powers. The submission overlooks the fundamental position that the certification of a Bill as a Money Bill and the invocation of the provisions of Article 110 is an exception which has been carved out by the Constitution to the constitutional requirements accompanying the passage of ordinary legislation. In passing the Bill as a Money Bill, the immediate impact is to denude the Rajya Sabha of the legislative role which is assigned to it in the passage of legislation.

87 The Rajya Sabha as a legislative institution represents the voice, concerns and aspirations of Indian federalism. The reduction of the role of the Rajya Sabha in the case of a Money Bill was engrafted by the draftspersons of the Constitution with a specific purpose. In their view, Money Bills should appropriately be reserved for the authority of the Lower House which consists of directly elected representatives of the people. But to regard a Bill which is not a Money Bill as one which passes muster under Article 110 is a breach of a substantive constitutional provision, a violation of constitutional process and hence, an illegality.

88 The basic postulate of our Constitution is that every authority is subservient to constitutional supremacy. No authority can assume to itself the ultimate power to decide the limits of its own constitutional mandate. Judicial review is intended to ensure that every constitutional authority keeps within the bounds of its constitutional functions and authority. In holding a constitutional institution within its bounds, judicial review does not trench upon the doctrine of separation of powers. The adjudicatory power vests in the Supreme Court as a constitutional court. In adjudicating on whether there has been a violation of a constitutional mandate in passing a Bill as a Money Bill, judicial review does not traverse beyond the limit set by the separation of powers. On the contrary, the independence of judicial tribunals has been consistently recognised by this Court as an inviolable feature of the basic structure of the Constitution. Determination of the norms of eligibility, the process of selection, conditions of service, and those regulating the impartiality with which the members of the tribunals discharge their functions and their effectiveness as adjudicatory bodies is dependent on their isolation from the executive. By leaving the rule making power to the uncharted wisdom of the executive, there has been a self-effacement by Parliament. The conferment of the power to frame rules on the executive has a direct impact on the independence of the tribunals. Allowing the executive a controlling authority over diverse facets of the tribunals would be destructive of judicial independence which constitutes a basic feature of the Constitution.

F.2 Violation of directions issued by this Court

89 The Rules under Section 184 of the Finance Act 2017, termed the Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other

Conditions of Service of Members) Rules 2017 were notified on 1 June 2017. Rule 1 (3) provides for the applicability of the rules in the following terms:

> "(3) These rules shall apply to the Chairman, Vice-Chairman, Chairperson, Vice- Chairperson, President, Vice- President, Presiding Officer, Accountant Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member, Technical Member, Member of the Tribunal, Appellate Tribunal or, as the case may be, Authority as specified in column (2) of the Eighth Schedule of the Finance Act, 2017 (7 of 2017)."

90 Rule 3 prescribes the qualifications for appointment to those tribunals which are specified in Column 3 of the Schedule. Rule 4 provides that the method of recruitment is specified in Column 4 of the Schedule. Rule 7 provides for the removal of a member from office by the Central Government "on the recommendation of a committee constituted by it in this behalf". Rule 8 provides for the procedure for enquiry into an alleged misbehaviour or incapacity of a member. It contemplates a preliminary scrutiny by the Ministry or the Department of the Government of India under which the tribunal or appellate tribunal is constituted or established. Upon finding that there are reasonable grounds in an inquiry, a reference is made to the committee constituted under Rule 7. After the conclusion of the enquiry, the committee is to submit its report to the Central Government with its findings. Rule 9 provides for the term of office as specified in Column 5 of the Schedule with a cap on age as specified in Column 6. Rule 11 provides for a fixed salary of Rs 2.50 lakhs together with allowances and benefits admissible to a Central Government officer holding an office carrying the same pay in the case of the Chairperson or President or Presiding Officer of SAT. A consolidated salary of Rs 2.25 lakhs is payable to Vice Chairpersons, Vice Presidents and Members.

Column 4 of the Schedule stipulates the composition of the Search-cum-Selection Committee for the various tribunals. The Search-cum-Selection Committee of the Industrial Tribunal is as follows:

> "Search-cum-Selection Committee for the post of the Presiding Officer, - (i) a person to be nominated by the Central Government chairperson; (ii) Secretary to the Government of India, Ministry of Labour and Employment-member; (iii) Secretary to the Government of India to be nominated by the Central Government-member; (iv) two experts to be nominated by the Central Government-members."

It is evident that the Search-cum-Selection Committee is constituted entirely from personnel within or nominated by the Central Government. Barring the National Company Law Appellate Tribunal, the Search-cum-Selection Committee for all other seventeen tribunals specified in the Schedule is constituted either entirely from personnel within or nominated by the Central Government or comprises a majority of personnel from the Central Government. The Search-cum-Selection Committee of the National Company Law Appellate Tribunal consists of an equal number of members from the judiciary as well as from the Central Government with no casting vote to the Chief Justice of India or their nominee:

> "(B) Search-cum-Selection Committee for the post of the Judicial Member and Technical Member of the Appellate Tribunal, - (i) Chief Justice of India or his nominee - chairperson; (ii) a senior Judge of the Supreme Court or a Chief Justice of a High Court-member; (iii) Secretary to the Government of India, Ministry of Corporate Affairs- member; (iv) Secretary to the Government of India, Ministry of Law and Justice-member."

The procedure for selection is fundamentally destructive of judicial independence. The Union Government has vital status in the disputes before many tribunals. Even

otherwise, conferring upon the government such a dominating and overwhelming voice in making appointments is a negation of judicial independence.

91 Sub-rule 2 of Rule 4 of the 2017 Rules stipulates that the Secretary to the Government of India in the Ministry or Department shall be the Convener of the Search-cum-Selection Committee. In **R Gandhi**, the Court specifically issued the following directions in regard to the constitution of the Selection Committees:

> "(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:
>
> (a) Chief Justice of India or his nominee—Chairperson (**with a casting vote**);
>
> (b) A Senior Judge of the Supreme Court or Chief Justice of High Court—Member;
>
> (c) Secretary in the Ministry of Finance and Company Affairs—Member; and
>
> (d) Secretary in the Ministry of Law and Justice—Member."
>
> (Emphasis supplied)

Significantly, Section 10 (FX) which was inserted into the Companies Act 1956 by the Companies (Second Amendment) Act 2002 relating to the Constitution of NCLT and NCLAT contained the following provision:

> "**10-FX. *Selection Committee***.—(1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of—
>
(*a*)	Chief Justice of India or his nominee	Chairperson;
(*b*)	Secretary in the Ministry of Finance and Company Affairs	Member;
(*c*)	Secretary in the Ministry of Labour	Member;
(*d*)	Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department)	Member;
(*e*)	Secretary in the Ministry of Finance and	

Company Affairs (Department of Company Affairs)"	Member

92 In **Madras Bar Association**, Section 7 of the National Tax Tribunal Act 2005 provided for the process of selection and appointment of the Chairperson and members of the NTT. The Court observed that as the jurisdiction of the High Courts was being transferred to the Tribunal, the stature of the members, conditions of service, and manner of appointment and removal of members must be akin to that of the judges of High Courts. Section 7 was held to be invalid (among other provisions). The leading judgment of the majority by Justice J S Khehar (as the learned Judge then was) held:

> "131. Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected. This would also be violative of the recognised constitutional convention recorded by Lord Diplock in *Hinds case* [*Hinds* v. *R.*, 1977 AC 195 : (1976) 2 WLR 366 : (1976) 1 All ER 353 (PC)] , namely, that 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 manner and on the terms prescribed for appointment of members of the judicature. For all the reasons recorded hereinabove, we hereby declare Section 7 of the NTT Act, as unconstitutional."

93 The constitution of the Search-cum-Selection committees as stipulated in the Schedule to the 2017 Rules cannot pass constitutional muster under a system governed by the rule of law that accords primacy to the independence of the judiciary.

Independence of the judiciary requires that judicial functioning be free from interference by the other two organs of the state. The Central Government is the largest litigant before the tribunals constituted under various statutes. The independent functioning of the tribunals stands compromised where the executive has the controlling authority in the selection of members to the tribunals. The executive is often a litigant before and has an interest in the disputes which are adjudicated by the tribunals. The constitution of the Search-cum-Selection committees stipulated in the 2017 Rules violates the principle of judicial independence and the directions issued by this Court in **R Gandhi** and **Madras Bar Association**.

94 Column 5 of the Schedule to the 2017 Rules stipulates that the term of office shall be three years for all tribunals. This disregards the principle enunciated by this Court in **R Gandhi**. By the judgment of this Court, the following direction was issued:

> "(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service."

Rule 18(2) stipulates that members who have been appointed to tribunals shall not practice before the tribunal, appellate tribunal or the authority after retirement. We are in agreement with the views expressed by this Court in **R Gandhi**. Inherent in the efficient functioning of tribunals is that appointment to tribunals is made attractive to practicing individuals who are guaranteed a reasonable period of service.

95 Section 184 stipulates that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority is eligible for reappointment. This is restated in Rule 9. This is in violation of the direction issued by this Court in **Madras Bar Association** where Section 8 which provided for reappointment was struck down in the following terms:

> "132. Insofar as the validity of Section 8 of the NTT Act is concerned, it clearly emerges from a perusal thereof that a Chairperson/Member is appointed to NTT, in the first instance, for a duration of 5 years. Such Chairperson/Member is eligible for reappointment for a further period of 5 years. **We have no hesitation to accept the submissions advanced at the hands of the learned counsel for the petitioners, that a provision for reappointment would itself have the effect of undermining the independence of the Chairperson/Members of NTT. Every Chairperson/Member appointed to NTT would be constrained to decide matters in a manner that would ensure his reappointment in terms of Section 8 of the NTT Act. His decisions may or may not be based on his independent understanding. We are satisfied that the above provision would undermine the independence and fairness of the Chairperson and Members of NTT**. Since NTT has been vested with jurisdiction which earlier lay with the High Courts, in all matters of appointment, and extension of tenure, must be shielded from executive involvement. The reasons for our instant conclusions are exactly the same as have been expressed by us while dealing with Section 5 of the NTT Act. We therefore hold that Section 8 of the NTT Act is unconstitutional."
>
> (Emphasis supplied)

Rule 20 vests the Central Government with vast powers to relax the provisions of the applicable rules:

> "Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class or category of persons."

96 The Central Government to whom a rule making authority was conferred by Section 184 has not observed the principles which were enunciated in **R Gandhi** and **Madras Bar Association** either in letter or in spirit. The dangers inherent in conferring such an unguided power on the executive to frame rules governing the selection, appointment and conditions of service of the members of the tribunals is evident from the rules which have been framed. The rules disregard binding principles enunciated in decisions of this court. The rules are destructive of judicial independence and are unconstitutional.

97 Before concluding, it is necessary to advert to two pre-eminent authorities which were adverted to in the decisions in **R Gandhi** and in the concurring judgment in **Madras Bar Association**. In **R Gandhi**, Justice RV Raveendran observed:

> "112. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts."

The learned Judge referred to the cautionary words of Justice William O Douglas, a distinguished judge of the US Supreme Court:

> "52.The need for vigilance in jealously guarding the independence of courts and Tribunals against dilution and encroachment, finds an echo in an advice given by Justice William O. Douglas to young lawyers (The Douglas Letters: Selections from the Private Papers of William Douglas, edited by Melvin L. Urofsky, 1987 Edn., p. 162, Adler and Adler):
>
> "… The Constitution and the Bill of Rights were designed to get Government off the backs of people—all the people. Those great documents did not give us the welfare State.

> Instead, they guarantee to us all the rights to personal and spiritual self-fulfilment.
> But that guarantee is not self-executing. As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness."

In **Madras Bar Association**, Justice Rohinton Nariman, in the course of his concurring judgment, adverted to a decision of Lord Atkin:

> "178. In Proprietary Articles Trades Assn. v. Attorney General for Canada [1931 AC 310 (PC)] , Lord Atkin said: (AC p. 317)
> "… Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment."

98 We find that though the decision in **R Gandhi** was delivered in 2010 and in **Madras Bar Association** in 2014, the same anomalies have persisted. An attempt has been made to dilute judicial independence by a creeping assertion of executive power. This is unconstitutional.

F.3 Severability

99 The learned Attorney General submitted that the certification of the Speaker of the Bill as a Money Bill attaches to the entirety of the Finance Bill. Hence, it was urged, that the consequence of accepting the submission of the petitioners would result in the invalidation of the entire Finance Act. We are of the view that this Court should apply the doctrine of severability to Part XIV of the Finance Act 2017. Severability was applied in a judgment of this Court in **R.M.D. Chamarbaugwalla** v

Union of India ("**Chamarbaugwalla**")[55]. Justice Venkatarama Ayyar, speaking for a Constitution Bench of this Court observed:

> "12. The question whether a statute which is void in part is to be treated as void *in toto*, or whether it is capable of enforcement as to that part which is valid, is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Sections 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. "

Adverting to the decision in **State of Bombay** v **F N Balsara**[56], the Constitution Bench observed:

> "This decision is clear authority that the principle of severability is applicable even when the partial invalidity of the Act arises by reason of its contravention of constitutional limitations."

100 In **State of Bombay** v **United Motors (India) Ltd.**[57], Chief Justice Patanjali Sastri held that the doctrine of severability should be extended in dealing with taxing

[55] 1957 SCR 930
[56] 1951 SCR 682
[57] 1953 SCR 1069

statutes. After adverting to these decisions in **Chamarbaugwalla**, Justice Venkatarama Ayyar concluded:

> "21…The resulting position may thus be stated: When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions."

The principles which govern the exercise of the doctrine of severability have been formulated thus:

> "22…
>
> 1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2 pp. 176-177.
>
> 2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. I at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.
>
> 3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.
>
> 4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

> 5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide Cooley's Constitutional Limitations, Vol. I, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.
>
> 6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.
>
> 7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178."

101 In the present case, applying these principles enunciated above, Part XIV of the Finance Act 2017 is severable. The intent of the legislature is the guiding principle under the first of the above principles. Parliament would, in any event, have enacted the valid parts of the Finance Act 2017 if it had known that Part XIV is invalid. The valid and invalid parts are not so inextricably linked that the invalidity of Part XIV should result in the invalidity of the rest. Nor is Part XIV a part of a composite scheme linked to the other parts of the Finance Act 2017. Even after the excision of Part XIV the remaining part of the Finance Act would still survive on its own. Hence, Part XIV of the Finance Act 2017 can be excised from the Act.

102 Finally, a fervent plea was made by the learned Attorney General to the effect that even though some provisions contained in the Rules framed on 1 June 2017 may run contrary to the principles enunciated by this Court in **R Gandhi** and **Madras Bar Association**, the Central Government would be willing to proceed on the basis of the interim orders which were passed by this Court during the pendency of the

proceedings with certain modifications. We are unable to accept the submission. Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The rules framed by the Central Government are unconstitutional on the ground that they violate the principles of judicial independence set out in judgments of this Court.

G Conclusion

103 Part XIV of the Finance Act 2017 could not have been enacted in the form of a Money Bill. The rules which have been framed pursuant of the rule making power under Section 184 are held to be unconstitutional. However, since during the pendency of these proceedings, certain steps were taken in pursuance of the interim orders and appointments have been made, we direct that those appointments shall not be affected by the declaration of unconstitutionality. The terms and conditions governing the personnel so appointed shall however abide by the parent enactments. Upon the declaration of unconstitutionality, the conditions specified in all corresponding aspects in the parent enactments shall continue to operate.

104 This Court has repeatedly emphasised the need for setting up an independent statutory body to oversee the working of tribunals. Despite the directions issued by this Court in **Chandra Kumar** nearly two decades ago, no action has been taken by the legislature to put in place an umbrella organisation which would be tasked with addressing the drawbacks of the system to which we have adverted above. The lack of a single authority to ensure competence and uniform service conditions has led to a fragmented tribunal system that defeats the purpose for which the system was constituted. Moreover, the co-ordinating authority for all tribunals must be the

Department of Justice. Vesting that function in individual ministries has led to haphazard evolution of the tribunal structure, besides posing serious dangers to the independence of tribunals.

105 It is imperative that an overarching statutory organisation be constituted through legislative intervention to oversee the working of tribunals. We recommend the constitution of an independent statutory body called the "National Tribunals Commission"[58] to oversee the selection process of members, criteria for appointment, salaries and allowances, introduction of common eligibility criteria, for removal of Chairpersons and Members as also for meeting the requirement of infrastructural and financial resources. The legislation should aim at prescribing uniform service conditions for members. The Commission should comprise the following members:

(i) Three serving judges of the Supreme Court of India nominated by the Chief Justice of India;

(ii) Two serving Chief Justices or judges of the High Court nominated by the Chief Justice of India;

(iii) Two members to be nominated by the Central Government from amongst officers holding at least the rank to a Secretary to the Union Government: one of them shall be the Secretary to the Department of Justice who will be the ex-officio convener; and

(iv) Two independent expert members to be nominated by the Union government in consultation with the Chief Justice of India.

[58] "NTC"

106 The senior-most among the Judges nominated by the Chief Justice of India shall be designated as the Chairperson of the NTC.

107 While the setting up of the NTC is within the competence of the legislature, it must be ensured that the guidelines that have been laid down by this Court to ensure the independence and efficient functioning of the tribunal system in India are observed. The independence of judicial tribunals is an inviolable feature of the basic structure of the Constitution. The procedure of selection, appointment, removal of members and prescription of the service conditions of tribunal members determine the independence of the tribunals. As we have held, in preserving the independence of the tribunals as a facet of judicial independence, the adjudicatory body must be robust: subservient to none and accountable to the need to render justice in the context of specialized adjudication. This is reflected in the need for vigilance in guarding the independence of courts and tribunals.

108 Competence, professionalism and specialisation are indispensable facets of a robust tribunal system designed to deliver specialised justice. The Commission must be vested with the power to oversee the administration of all tribunals established under the enactments of Parliament to ensure the adequate manning of the tribunals with the infrastructure and staff required to meet the exigencies of the system. The Union government should also consider formulating a law to ensure the constitution of an All India Tribunal Service governing the recruitment and conditions of service of the non-adjudicatory personnel for tribunals. At present, the administrative staff of the tribunals is by and large brought on deputation. The tribunals are woefully short of an adequate complement of trained administrative personnel. Hence, there is an urgent

need to set up an All India Tribunal Service in the interests of the effective functioning of the tribunal system.

Though the present judgment analyses the ambit of the word “only” in Article 110(1) and the interpretation of sub-clauses (a) to (g) of clause (1) of Article 110 and concludes that Part XIV of the Finance Act 2017 could not have been validly enacted as a Money Bill, I am in agreement with the reasons which have been set out by the learned Chief Justice of India to refer the aspect of money bill to a larger Bench and direct accordingly.

I am in agreement with the observations of brother Justice Deepak Gupta that the qualifications of members to tribunals constitute an essential legislative function and cannot be delegated. Tribunals have been conceptualized as specialized bodies with domain-specific knowledge expertise. Indispensable to this specialized adjudicatory function is the selection of members trained in their discipline. Keeping this in mind, the prescription of qualifications for members of tribunals is a legislative function in its most essential character.

The qualifications for appointment to adjudicatory bodies determine the character of the body. The adjudicatory tribunals are intended to fulfil the objects of legislation enacted by Parliament, be it in the area of consumer protection, environmental adjudication, industrial disputes and in diverse aspects of economic regulation. Defining the qualifications necessary for appointment of members constitutes the core, the very essence of the tribunal. This is an essential legislative function and cannot be delegated to the rule making authority of the central government. It is for

the legislature to define the conditions which must be fulfilled for appointment after assessing the need for domain specific knowledge.

…….....J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
November 13, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO.8588 OF 2019
(@ Special Leave Petition (Civil) No.15804 of 2017)

ROJER MATHEW …APPELLANT(S)

Versus

SOUTH INDIAN BANK LTD. & ORS. …RESPONDENT(S)

WITH

W.P.(C) No.267/2012, W.P.(C) No. 279/2017, W.P.(C) No. 558/2017, W.P.(C) No. 561/2017, W.P.(C) No. 625/2017, W.P.(C) No. 640/2017, W.P.(C) No. 1016/2017, W.P.(C) No. 788/2017, W.P.(C) No. 925/2017, W.P.(C) No. 1098/2017, W.P.(C) No. 1129/2017, W.P.(C) No. 33/2018, W.P.(C) No. 205/2018, W.P.(C) No. 467/2018, T.C.(C) No. 49/2018, T.C.(C) No. 51/2018, T.P.(C) No. 2199/2018

J U D G M E N T

Deepak Gupta, J.

I have had the privilege of going through the detailed and erudite judgments of the Chief Justice and brother Chandrachud, J.

2. Since the entire gamut of facts, submissions and laws have been dealt with in the judgment of Chief Justice, for the sake of brevity, it would not be necessary to set out all the facts and contentions in detail.

3. Reference in this judgment to 'Tribunal' will include tribunal, appellate tribunal or other authorities referred to in Part XIV of the Finance Act, 2017. Reference to 'Chairpersons/Members' will include Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President or other members referred to in Section 184 of the Finance Act, 2017. Some tribunals have both regulatory as well as adjudicatory roles. Most of the discussion hereinafter relates to the adjudicatory role of tribunals.

4. The order dated 27.03.2019 quoted in the judgment of the Chief Justice clearly sets out the issues with which the present bench is concerned. To put it in a nutshell, the issue before this Court is whether tribunals are an effective alternative to Courts; if yes, who should man them. Keeping in view the ever-changing developments in law and the provisions of Articles 323-A and 323-B of the Constitution of India, tribunals as an alternative to Courts, have come to stay. The main issue is how to ensure that these tribunals function effectively, fearlessly and efficiently.

5. The Chief Justice in his judgment has culled out the following issues for determination:-

I. Whether the 'Finance Act, 2017' insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a 'money bill' under Article 110 and consequently is validly enacted?

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?

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?

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

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

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?

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

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

6. By and large I am in agreement with the reasoning and conclusions arrived at by the Chief Justice, especially on issues 1 and 3 to 8. I am, however, unable to persuade myself to agree with the Chief Justice that Section 184 of the Finance Act of 2017 does not suffer from the vice of excessive delegation. I am also of the view that though the issue with regard to the Money Bill may be referred to a larger bench of 7 judges, since the correctness of the law laid down in ***L. Chandrakumar*** v. ***Union of India***[1] has not been doubted, there is no need to refer this matter to a bench of 7 judges.

[1] (1997) 3 SCC 261

7. I also feel that some specific directions need to be given for appointment of a body to carry out judicial impact assessment. It may also be necessary to lay down some parameters or reference points for such a body to look into. I am of the view that since the Government till date has not followed the recommendation of 7-Judge Bench of this Court in ***L. Chandra Kumar*** (supra) that there should be a wholly independent agency for the administration of all tribunals, some directions in this regard are required. Lastly, I feel that a direction needs to be given to constitute a body to select the Chairpersons/Members of the Tribunals.

8. Before entering into a detailed discussion on the issues involved, I would like to highlight that there are some glaring errors in Part XIV which clearly show non-application of mind.

9. Section 9A of the Armed Forces Tribunal Act, 2007 was introduced by Section 181 of the Finance Act, 2017 and reads as follows:

> "9A. Notwithstanding anything contained in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be governed by the provisions of section 184 of that Act:

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

This provides the qualifications, terms and conditions of service etc. of Chairpersons and Members of the appellate tribunal. This provision shows total non-application of mind because the Armed Forces Tribunal Act, 2007 has no provision for an appellate tribunal. In fact, Section 6 of the Armed Forces Tribunal Act, 2007 itself provides the qualifications for appointment for Chairperson and other members and it is not clear what was sought to be achieved by introducing Section 9A by the Finance Act, 2017.

Background

10. On 26.11.1949, we, the people of India gave unto ourselves the Constitution, the basic features of which amongst others are judicial review[2], democracy, separation of powers[3] etc. These basic features of the Constitution are an inherent part of our Constitution and polity.

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[2] Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261

[3] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225

11. Part III of the Constitution which sets out the fundamental rights has often been referred to as the heart and soul of the Constitution. In my view, the essence of the Constitution was beautifully captured by our founding fathers in the Preamble of the Constitution where we promised to ourselves Justice, Liberty, Equality and Fraternity. The first and foremost attribute of the Preamble is Justice. India should be a democratic republic is also a part of the Preamble. The ultimate power under our Constitution resides with the people and not those holding positions of power.

12. The rule of law is the golden thread which runs through our Constitution. This golden thread binds together the various chapters of the Constitution dealing with Citizenship, Fundamental Rights, the Union, the States, the Panchayats, Scheduled and Tribal Areas, Relations between Union and States, Trade, Commerce and Intercourse within the Territory of India, Services under the Union and States etc. Each of these facets amongst others are governed not only by the Constitution but by the laws. The oath, to which each one of us, holding Constitutional posts, subscribes enjoins us to uphold the Constitution and the laws. This is the rule of law. The bedrock of our democracy is the rule of law and not the rule of men. Anywhere, anytime, when

ordinary people are given the chance to choose, the choice is always the same; freedom, not tyranny; democracy, not dictatorship; rule of law, not the rule of men.

13. One of the essential ingredients of both democracy and rule of law is an independent and fearless judiciary. A free and vibrant country is one where there is freedom of expression and governance by the rule of law. There can be rule of law only when we have judges and adjudicators who can take decisions independent of any extraneous influence. If rule of law is absent, there is no accountability, there is abuse of power and corruption. When the rule of law disappears, we are ruled not by laws but by the idiosyncrasies and whims of those in power.

14. Tribunals have come to stay. Both the Chief Justice and brother Chandrachud, J. have dealt with the issue of tribunalisation in great detail. One aspect which needs to be highlighted and also comes out from the judgments of my learned brothers is that the men who man the tribunals should command the same respect as the Judges of Courts and they should, as far as possible, have the same qualifications and attributes. This is absolutely necessary because if the people of this country are to have faith in tribunals then it is the duty of all concerned to ensure

that these tribunals function fairly and independently like Courts are expected to. With the increase in specialisation in different branches of law, it would not be possible to urge that we do not need specialised tribunals. No human being can be expected to know the entire law. As judges we are trained to work in various fields of law. At the same time, it cannot be denied that the fast-changing face of technology and ever-growing demands of the people have led to the introduction of thousands of new legislations and some of these require specialised knowledge of certain branches of law combined with technology.

15. The courts in India were successfully handling all jurisdictions. The problem was not lack of talent. The problem was not lack of knowledge[4]. The main problem was extremely low number of judges as compared to the population and a very high vacancy position. Tribunalisation of justice was done not because the courts were incapable of handling the matters but mainly because there were huge delays in settling matters. Now even for complex commercial matters, specialised commercial courts have been set up. However, at the same time, one cannot deny that in the fast-expanding technological world, there is a need to have

[4] Union of India v. Madras Bar Association, (2010) 11 SCC 1

expert adjudicators. Therefore, there is a need to have specialised tribunals. These tribunals being substitutes for courts must also meet the expectations of our founding fathers and be totally independent and fearless.

16. Unfortunately, the working of some of the tribunals leaves much to be desired. Not all the problems arise because of the persons who run the tribunals. Many difficulties arise because of huge vacancies, few benches, financial crunch and dependence of the tribunals on the departments, which sadly administer the tribunals. Some of the tribunals are virtually subjugated to the departments as far as the administrative matters are concerned and this also affects the independence of the judiciary. Judicial independence not only means independence to take the right decisions but functional independence is equally important. Perceptions are also very important. What does the litigating public appearing before the tribunal feel? Is the tribunal functioning like a wing of the government or as an independent body? If there has to be separation of powers then these tribunals must have functional autonomy to run themselves as they best feel like.

17. In this background, I shall deal with the various issues culled out by the Chief Justice.

Issue No.1

18. I am in total agreement with the Chief Justice in as much as he has held that the decision of the Hon'ble Speaker of the House of People under Article 110 (3) of the Constitution is not beyond judicial review. I also agree with his views that keeping in view of the high office of the Speaker, the scope of judicial review in such matters is extremely restricted. If two views are possible then there can be no manner of doubt that the view of the Speaker must prevail. Keeping in view the lack of clarity as to what constitutes a Money Bill, I agree with the Hon'ble Chief Justice that the issue as to whether Part XIV of the Finance Act, 2017, is a Money Bill or not may be referred to a larger bench.

Issue no. 2

19. As far as Issue No.2 is concerned, I am unable to agree with the conclusion of Chief Justice. There can be no doubt that Parliament is not expected to deal with all matters and it can delegate certain "non-essential" matters to the executive. Every condition need not be laid down by the Legislature.

20. In his judgment the Chief Justice has referred to a catena of judgments dealing with limits of delegation. It is not necessary to repeat all that has been said in those judgments but reference may be made to a few.

21. A 7-Judge Bench of this Court in ***Re Article 143, Constitution of India and Delhi Laws Act (1912) etc.***[5] held that the legislature cannot be expected to legislate on all issues and has the power to delegate non-essential functions to a delegatee. At the same time, a close reading of the judgment indicates that it was clearly held that the "essential legislative functions" cannot be delegated. There can be no quarrel with the proposition that delegation of non-essential legislative functions can be done. Even to this there is a caveat. The legislature must have control and functional powers over the delegatee. One of the known methods of exercising such powers is for the delegatee to place the rules/orders passed by it in exercise of powers delegated to it before the legislature. There should always be legislative control over delegated legislation.

22. In ***Gwalior Rayon Mills*** v. ***Assistant Commissioner, Sales Tax***[6], Khanna, J. dealt with this matter in his inimitable style.

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[5] AIR (38) 1951 SC 332
[6] AIR 1974 SC 1660

Paras 24 and 25 of the judgment have been quoted in the opinion of the Chief Justice but I think Para 26 is also very relevant and it reads as follows:

> "**26**. We are also unable to subscribe to the view that if the legislature can repeal an enactment, as it normally can, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the legislature to lay down legislative policy, standard or guidelines in the statute. The acceptance of this view would lead to startling results. Supposing the Parliament tomorrow enacts that as the crime situation in the country has deteriorated, criminal law to be enforced in the country from a particular date would be such as is framed by an officer mentioned in the enactment. Can it be said that there has been no excessive delegation of legislative power even though the Parliament omits to lay down in the statute any guideline or legislative policy for the making of such criminal law? The vice of such an enactment cannot, in our opinion, be ignored or lost sight of on the ground that if the Parliament does not approve the law made by the officer concerned, it can repeal the enactment by which that officer was authorised to make the law."

This makes it clear that merely because the subordinate legislation has to be placed before the legislature does not mean that there is effective control in all cases.

23. In ***Harishankar Bagla*** v. ***M.P. State***[7], the test laid down was that there should be a reasonably clear statement of policy which should guide formulation of delegated legislation.

[7] AIR 1954 SC 465

24. In **Ramesh Birch v. Union of India**[8], a Bench of this Court clearly held that the legislature cannot wash their hands of their essential legislative functions. It held as follows.

> "**19**…A different way in which the second of the above views has been enunciated — and it is this view which has dominated since — is by saying that the legislatures cannot wash their hands of their essential legislative function. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature."

By the Finance Act, 2017 the number of tribunals were reduced to 19. It is the case of the Government that the tribunals are necessary so that technically qualified people can man the tribunal. The nature of work done by different tribunals is totally different. The essential qualifications for filling up the posts of members of administrative tribunals, company law tribunals or the National Green Tribunal would be totally different. This function, in my opinion, being an essential legislative function, could not have been delegated especially without laying down any guidelines.

[8] 1989 Supp (1) SCC 430

25. Section 184 empowers the Central Government to make rules to provide for qualification, appointment term of office, salaries and allowances etc. of various Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule. Section 184 of the Finance Act, 2017 reads as follows :-

> **184.** *(1)* The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:
>
> Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:
>
> Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—
>
> (a) in the case of Chairperson, Chairman or President, the age of seventy years;

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

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

26. An analysis of Section 184 clearly indicates that the Parliament has delegated to the Central Government the power to make rules to provide for the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the Chairpersons/Members of the tribunals. The issue before us is whether by doing so Parliament has delegated "essential legislative functions" and whether Parliament has retained any control.

27. We are in the present case dealing with the appointment of Chairpersons/Members to various Tribunals. They are enjoined upon to discharge a constitutional function of delivering justice to the people. What should be the essential qualifications and attributes of persons selected to man such high posts is, in my view, an essential part of legislative functions. I have no doubt, in my mind, that the Constitution could not have provided that the

qualifications of the Judges of the Supreme Court of India or of the High Courts could be fixed by the Government. If these tribunals are to replace the High Courts, why should the same principles not apply to them. In my view, laying down the qualifications of the persons eligible to hold these high posts was an essential aspect of the legislation keeping in view the importance of the tribunals, the importance of rule of law and the importance of an independent and fearless judiciary.

28. As far as providing the qualifications for appointment are concerned, as discussed above, I am of the view that these qualifications have to be provided in the legislation and could not be delegated. However, as far as the other terms and conditions such as pay and allowances are concerned, these can be delegated.

29. For the sake of argument, even if it was to be said that laying down the qualifications is not an essential function then also, in view of the law laid down by this Court, the guidelines should have been found in the legislation itself. It is paradoxical that there are no guidelines for the essential qualifications, even though there are some guidelines with regard to the terms and conditions of services of Chairpersons/Members of the Tribunals.

30. I am in respectful disagreement with the Chief Justice that the objects of the parent enactments and the law laid down by this Court in ***R. K. Jain*** v. ***Union of India***[9], ***L. Chandra Kumar*** (supra), ***Union of India*** v. ***Madras Bar Association***[10], ***Madras Bar Association*** v. ***Union of India***[11], ***Madras Bar Association*** v. ***Union of India***[12], ***Gujarat Urja Vikas Nigam Ltd.*** v. ***Essar Power Ltd.***[13] in essence should be read as the guidelines. One would expect the Union Government to abide by the directions of this Court. However, this expectation has been belied by this very enactment which violates every principle of law laid down by this Court and, as held in the judgments of both my brothers, the Rules framed by the delegatee are violative of the law laid down by this Court. In this background, it is apparent that both the delegator and the delegatee felt that they were not bound by these judgments. This is also apparent from the fact that the Rules framed by the delegatee have not been brought in consonance with the law by the delegator.

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[9] (1993) 4 SCC 119
[10] (2010) 11 SCC 1
[11] (2014) 10 SCC 1
[12] (2015) 8 SCC 583
[13] (2016) 9 SCC 103

31. The previous enactments were repealed in so far as matters covered by Part XIV of the Finance Act are concerned. Therefore, it cannot be expected that the delegatee would again refer to the repealed enactments to seek the guidelines for fixing the terms and conditions, etc. of those to be appointed as Chairpersons/Members. If we exclude the judgments of this Court and the terms and conditions laid down in the repealed enactments then there are no guidelines whatsoever left for the delegatee to fall back on. The Finance Act provides no guidelines in this regard. It is absolutely silent with regard to the qualification, the eligibility criteria, experience etc. required for those who are to be appointed as Chairpersons/Members of the Tribunals. These powers have been delegated to the government.

32. There being no guidelines, unfettered and unguided powers have been vested in the delegatee and, therefore, in my opinion, there is excessive delegation. As such, I would hold that Section 184 of the Finance Act, 2017 insofar as it delegates the powers to lay down the qualifications of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the

Eighth Schedule, suffers from the vice of excessive delegation and is accordingly struck down.

Issue Nos. 3 & 6

33. I agree with the Chief Justice and I do not want to add anything.

Issue Nos. 4, 5, 7 & 8

34. I agree with the Chief Justice both on the reasoning and conclusions on these issues. However, as already pointed out above, I am of the view that since nobody has raised a challenge to the correctness of the law laid down by 7-Judge Bench in ***L. Chandra Kumar*** (supra) that there should be one wholly independent agency for the administration of all the tribunals. There is no need to refer this issue to a Bench of 7 Judges.

35. However, I would like to add a few words because I feel that it is important to highlight the problems being faced and the issues which need to be resolved by the body which will carry out the judicial impact assessment of the tribunals in the form of a Judicial Impact Assessment Committee. I am clearly of the view that as laid down in ***L. Chandra Kumar*** (supra), there must be a single independent nodal agency for administering all the

tribunals. The 7-Judge Bench of this Court held that all tribunals should as far as possible be under a single nodal agency. Until such a nodal agency is set up it was felt that the Ministry of Law and Justice would be the most appropriate Ministry for this purpose.

36. There are various reasons why there should be one nodal agency. Tribunals are facing many problems like lack of manpower, very few benches, vacancies lying unfilled for long period, financial dependence on the department which may be litigating before the tribunal etc. These are ills which can be avoided if Tribunals fall under one umbrella organisation. One umbrella organisation will be better equipped to understand the problems faced by all the Tribunals. This could lead to standardization of Tribunals and a uniform approach to the needs of each tribunal. A large number of tribunals, especially those cast with the duty of discharging adjudicatory functions have been constituted with a view to replace the courts and in many cases the jurisdiction earlier exercised by the High Courts has been vested in such tribunals. It is, therefore, imperative that these tribunals must be manned by persons of impeccable integrity, high intellect and having vast experience in the field in which they will

exercise jurisdiction. These tribunals also must have functional autonomy. This cannot be achieved unless there is a nodal body which shall look after the administrative needs of the tribunals. For more than 2 decades the Government has not thought it fit to comply with the 7-Judge Bench judgment of this Court in ***L. Chandra Kumar*** (supra). These matters cannot be permitted to linger on indefinitely. Therefore, in my view, a direction must be given to the Government to set up a single nodal agency within a period of 6 months from today till which time the present system may continue. Merely giving financial autonomy to the tribunals will not do away with the need of having one common umbrella organisation to supervise all the tribunals.

37. Even without carrying out any judicial impact assessment it is clear, as held in ***Madras Bar Association, 2010*** (supra) that tribunals in India have unfortunately not achieved full independence. When tribunals are established, they depend upon the sponsoring department for funds, infrastructure and even space for functioning. Administrative members of the tribunal are, more often than not, drawn from this department. This, in my opinion, strikes at the very root of judicial independence because the biggest litigant or stakeholder itself becomes part and parcel of

the adjudicating body which is supposed to be free, independent and fearless.

38. The need for carrying out judicial impact assessment of all the tribunals in India cannot be over emphasised. Experience has shown that the tribunals are not fully independent and more often than not, the number of vacancies in the tribunals are so high as to make the tribunals dysfunctional if not non-functional. The promised benches remain a mirage in the air and the litigants from remote areas of the country have to come to the State capitals or the National Capital for redressal of their grievances.

39. Access to justice is a fundamental right[14]. Denial of access to justice also takes place when a litigant has to spend too much money, time and effort to approach the adjudicating authority to get justice. In India where delays plague the tribunals, a client will not hurriedly approach a tribunal even if he has a genuine grievance. Amongst the many tribunals set up, the tax tribunals have been probably the most successful. In my view, one of the reasons why the tax tribunals have been successful is that the recruitment of members of these tax tribunals is normally done at

[14] Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509

a younger age and there is scope of career progression not only within the tribunal but also from the tribunals to the High Courts. This can only happen if we recruit younger and competent people rather than retired persons. Another reason for the success of the tax tribunals is that the litigant is either the revenue or an assessee, both of whom have the wherewithal to fight cases. Similarly, in administrative tribunals it is government servants mainly who are involved. Commercial tribunals also deal with the litigants who normally have sufficient finances. But now we have other tribunals like the NGT which may be approached by poor villagers.

40. The Central Administrative Tribunal (CAT) was set up in the year 1985. It can definitely be termed as one of the better functioning tribunals. However, even this tribunal has only 17 regular benches including the Principal Bench at Delhi and 4 Circuit Benches. Prior to the establishment of the CAT, a Central Government employee had a right to move the Civil Courts for grant of relief. This meant that such employee could even approach a Sub-Judge for grant of relief. That jurisdiction has been taken away. In ***L. Chandra Kumar*** (supra), while upholding the constitution of the tribunals, a 7-Judge Bench of this Court

held that the orders of the tribunals would be amenable to judicial review under Article 226 of the Constitution albeit with a caveat that these matters would be decided by a Division Bench.

41. The vacancy position even in the CAT is very high. Out of a total strength of 65 members, the CAT is short by 25 members – 12 administrative members and 13 judicial members. This is a shortage of about 38%. The Chandigarh Bench of the tribunal is supposed to have 4 members. However, presently there is only 1 judicial member and as such there is no bench available in Chandigarh. The Chandigarh Bench has jurisdiction over the States of Punjab, Haryana, Himachal Pradesh and Union Territories of Jammu and Kashmir, Ladakh and Chandigarh. The Central Government employees in these areas have virtually been left remediless. It is easy for the members of the All India Civil Services holding high positions to approach the Principal Bench at Delhi, but one cannot even imagine the plight of a lowly placed peon or clerk who is expected to travel long distances to New Delhi, spend huge amount of money, pay the extremely high fees of the lawyers of a metropolis like Delhi to file a case in Delhi. Such a litigant is financially boarded out of the litigation process.

42. To give another example, the NGT was to have its Principal Bench at Delhi and 4 Zonal Benches and 4 Circuit Benches. It was expected that in the future more benches would be added. Sadly, the reverse has taken place. At the present moment, only the Principal Bench is functioning with only one Chairperson and 3 judicial members (as against the sanctioned strength of 20 judicial members), and two expert members (as against the total sanctioned strength of 20 expert members). The situation is extremely grim. Day in and day out we all talk about pollution and the environment but the harsh reality is that as against a Chairperson and 40 members, at present the Chairperson has the assistance of only 5 members. The result is that no hearings are taking place in the Zonal Benches or the Circuit Benches. We have been informed that cases are taken up by video conferencing. Video conferencing can definitely be used as a tool to hold hearings in some cases but initial filing and hearings must as far as possible be done in open Court if the public is to have faith in the institution. Open hearings are essential to build trust and confidence in the community. Members of the public will have faith only in those tribunals and courts which are open to the public. Presently, the situation is such that if someone from

Andaman and Nicobar Islands wants to raise some issue before the NGT he will have to come at least to Calcutta to file a case, whereas earlier he could have filed a case before the Circuit Bench of the Calcutta High Court at Port Blair. Here also, the hearing, if any, will be conducted through video conferencing. There is no bench of the NGT functioning in the North-East covering as many as 8 States. Similarly, there is no bench functioning in the environmentally and ecologically fragile States of Himachal Pradesh and Uttarakhand and the Union Territories of Ladakh and Jammu and Kashmir. This clearly shows that functioning of the tribunals leaves much to be desired.

43. The committee which carries out the judicial impact assessment of the functioning of the tribunals has to deal with a whole lot of issues. It is neither feasible nor proper to lay down all the issues in this judgment but I am highlighting some of them. Another important issue which must be dealt with is whether the tribunals have really helped in early disposal of the cases. The time spent for disposal may vary from case to case but we are mainly dealing with the cases which end in the High Courts or at the Supreme Court. This must be done not only on an all India basis but also on State to State basis. There are many smaller

States in the country where the Civil Courts and the High Courts are not overburdened with work. In these States, the cases are decided much faster than in many other larger States. Normally, it is these smaller States which do not get permanent benches, sometimes not even Circuit Benches. It is a paradox that the States which are judicially well administered and where disposal is quick, do not get the permanent benches and the litigants suffer whereas States which are very slow in disposing of the cases get more benches. Even when Circuit Benches come to these States there is a huge time gap between two sittings. The whole purpose of providing cheaper and faster justice gets lost because the Circuit Benches come rarely and many times the constitution of the Circuit Benches changes on every visit resulting in matters being reheard every time.

44. Having tribunals without benches in at least the capitals of States and Union Territories amounts to denial of justice to citizens of those States and Union Territories. It also makes the justice delivery system very metropolis centric. This has many adverse effects. The bench and the bar in smaller district towns and capitals of smaller States which were handling these matters in a competent manner are deprived of handling these types of

cases. This also makes access to justice expensive for the litigants. It also leads to a situation where the bench and the bar in these areas would not have any experience of handling matters relating to jurisdictions transferred to tribunals which they used to handle earlier. Therefore, the local bench and bar will never develop and the entire bulk of work will be captured by those practicing in Delhi or in those State capitals where benches of the tribunals are set up. Instead of taking justice to the common man, we are forcing the common man to spend more money, spend more time and travel long distances in his quest for justice, which is his fundamental right.

45. The litigants cannot wait for judicial impact assessment and action by the Government which may or may not take place. Experience has shown that the judgments right from ***L. Chandra Kumar*** (supra) to ***Madras Bar Association***, ***2010*** (supra) have not been complied with by the Union in letter and spirit. Citizens of this country cannot be denied justice which is the first promise made in the Preamble. Therefore, I am of the view that in whichever State/Union Territory the bench of a particular tribunal is not established or functioning, the litigants of that State will have a right to invoke the extraordinary writ jurisdiction of the

jurisdictional High Court under Article 226 of the Constitution for redressal of their grievances. They cannot be expected to go to far off distant places and spend huge amounts of money, much beyond their means to ventilate their grievances. The alternative remedy of approaching a tribunal is an illusory remedy and not an efficacious alternative remedy. The self-imposed bar or restraint of an alternative efficacious remedy would not apply. Such litigants are entitled to file petitions under Article 226 of the Constitution of India before the jurisdictional High Court. In ***L. Chandra Kumar*** (supra) it was clearly held that the right of judicial review is a part of the basic structure of the Constitution and this right must be interpreted in a manner that it is truly available to the litigants and should not be an illusory right.

46. One more aspect which needs to be looked into is the need to have a two-tier tribunal system like in the United Kingdom- a lower tribunal and an appellate tribunal. If there are two-tier tribunals then there would be adjudication at the appellate level by an appellate tribunal. Having one appellate forum within the hierarchy of tribunals would probably lessen the burden on the High Courts and the Supreme Court.

47. Recruitment to the lower tribunal should be done on the basis of an objective criteria like the written test conducted for the post of District Judges. The persons selected to the lower tribunals can be made eligible for promotion to the appellate tribunals. In fact, there can be common service to man more than one or more tribunals. To give an example, there can be a common service for all the tax tribunals. There can also be a common service for the State administrative tribunals, the Central Administrative Tribunal and for the judicial members of the Armed Forces Tribunal. This will obviously require setting up of separate tribunal services. If this is done, we will have tribunal services from which people will rise to man these tribunals, the appellate tribunals and also to the posts of Chairpersons of tribunals. The body carrying out the judicial impact assessment should also look into the issue as to whether it would be better to have a tribunal service rather than appointing retired judges. If members of the bar or from the administration or from the State judiciary are appointed at the lowest rung of the tribunal and they have a long tenure knowing that they will retire after 15 or 20 years, one would be able to attract better talent and a more committed workforce. A long tenure for members is also essential for maintaining judicial

independence. They shall also have aspirations of reaching the higher levels, which would be an inducement for a better work culture.

48. If there are tribunal services and there is provision for appeal within the hierarchy of the tribunals and the High Courts exercise their writ jurisdiction or if in some matters appeals are provided to the High Courts in the first instance, many of the ills which plague the system may be overcome. If the aforesaid system is followed then the question of appointing retired Judges or bureaucrats will not arise. Learned amicus curiae in his note has raised an issue that tribunals should not become a haven for retired persons. In my view, there should normally be no post retiral sinecures. Though the ideal situation would be to have no appointments from retired judges or bureaucrats, this may not be possible in the near future because we have no tribunal services and most of the posts at this stage may have to be filled from amongst retired persons. At the same time, an effort has to be made to ensure that in the foreseeable future the number of retired persons being reappointed is brought down and more persons from within the tribunal services are appointed up to the highest level in the tribunal.

49. There may be some posts which require retired judges to be appointed such as Lokpal, Lokayukta, Chairpersons of the Human Rights Commission, Chairman of the Law Commission of India, etc. But this should not become a matter of routine especially when the appointments are being made by the executive. If the administration makes appointments and judges, serving or newly retired judges, are under consideration for such posts then the independence of the judiciary is likely to be compromised. The public of this country still reposes great faith in the judiciary. That faith will be eroded in case it is felt that the appointments are made for extraneous reasons. Most judges live up to the expectations of the high standards of integrity and propriety expected from them but we cannot shut our eyes to the harsh reality that there are a few black sheep. One cannot expect justice from those who, on the verge of retirement, throng the corridors of power looking for post retiral sinecures. Therefore, I am of the considered opinion that the majority of members of the selecting body must comprise of the Chief Justice of India and/or his/her nominees and the views of the Chief Justice and/or his/her nominees must be given precedence over the views of other members.

50. If retired judges of the High Courts or the Supreme Court are good enough to man the tribunals after retirement, I do not see any reasons why the retirement age of the High Court Judges should not be increased to make it at par with the retirement age of the Judges of the Supreme Court. This would take care of the vacancies which would otherwise arise in the next 3 years. As of 01.09.2019 as against the sanctioned strength of 1079 judges there were 414 vacancies in the High Courts. Given the slow pace at which these vacancies are being filled up, the number of vacancies is bound to rise. Though we are discussing tribunals, even the independence and functioning of the High Courts is threatened by this humungous vacancy position.

51. I agree with the Chief Justice that an attempt should be made to do away with filing of first appeal as a matter of right to the Supreme Court. At present, at least 2 dozen statues provide for appeals directly to the Supreme Court. The Supreme Court becomes a Court of first appeal which is highly avoidable. If we follow the law laid down in ***L. Chandra Kumar*** (supra), the High Courts should have the jurisdiction to entertain writ petitions against the orders of the tribunals. This will reduce the burden on the Supreme Court. Even more importantly, the High Courts,

when they entertain these matters, will deal with them within the limited scope of writ jurisdiction. If the jurisdiction of the High Courts is bypassed by providing for appeals directly to the Supreme Court, soon a stage will come when we will have no High Court Judges who would have heard matters in various jurisdictions. It would be virtually impossible for them to handle such matters in the Supreme Court where the tenure of a Judge is on an average only about 4 years.

52. The Judicial Impact Assessment Committee can also after assessment recommend that some tribunal(s) should be wound up and the jurisdiction of that tribunal(s) be given back to civil courts or to the High Courts or to some other tribunal. It can also suggest the merger of two or more tribunals.

53. The next issue is who should carry out the judicial impact assessment. In my view, the Judicial Impact Assessment Committee should comprise of two retired judges of the Supreme Court, the senior being the Chairperson of the Committee, and one retired Chief Justice of a High Court all three to be nominated by the Chief Justice of India. Out of the three at least two should have been the Chairperson or members of tribunals. Two members of the Executive, not below the rank of Secretary, to the

Government of India, one from the Ministry of Law and Justice and one from some other branch can also be members but these members should be appointed in consultation with the Chief Justice of India.

54. The last issue is whether there should be a Commission or a body to oversee the appointment of members of various tribunals. In my view it is necessary to have such a Commission which is itself an independent body manned by honest and competent persons. This body is required to select those persons who man the specialised tribunals in terms of the law laid down in various judgments of this Court. We need persons who not only have grassroot experience but a judicious mix of judicial members and those with grassroot experience[15]. We need persons who have an independent outlook, integrity, character and good reputation[16]. We need people who are totally free from the influence or pressure from the Government[17]. It is only then that the people will have faith in the adjudicating mechanism of the tribunals.

55. In my view, serving Judges of the Supreme Court or the Chief Justice of the High Courts are already overburdened and have no

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[15] L. Chandra Kumar v. Union of India, (1997) 3 SCC 261
[16] Union of India v. Madras Bar Association, (2010) 11 SCC 1
[17] R.K. Jain v. Union of India, (1993) 4 SCC 119

time to spare. It would be much better if they could spend their time and energy in filling up the vacancies in the High Courts rather than venturing into the field of tribunals.

56. I also feel that having a very large committee would not serve the purpose. A smaller committee comprising of competent people is a better solution and, in my view, such commission should comprise of 2 retired Supreme Court Judges with the senior most being the Chairman and one retired Chief Justice of High Court to be appointed by the Chief Justice of India. There must be one member representing the executive to be nominated by the Central Government from amongst officers holding the rank of Secretary to the Government of India or equivalent. This member shall be the ex-officio convener. One expert member can be co-opted by the by full time members. This expert member must have expertise and experience in the field/jurisdiction covered by the tribunal to which appointments are to be made.

57. At the end I would like to quote what Dr. B. R. Ambedkar said while addressing the Constituent Assembly on 25.11.1949. In his words:-

> "Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may

> be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. "

One can only hope that keeping these thoughts in mind a system is developed which ensures selection of people having impeccable integrity, who are totally independent, have a good character and reputation, are free from influence or pressure, and have requisite experience in the jurisdictions they would deal with as Chairpersons/Members of Tribunals.

.....J.
(Deepak Gupta)

New Delhi
November 13, 2019