Supreme Court Of India

L. Nageswara Rao, Hemant Gupta, S. Ravindra Bhat, JJ.

Madras Bar Association v. Union Of India

Writ Petition (Civil) No. 502 of 2021

14.07.2021

Judgment

L. Nageswara Rao, J.:— The Madras Bar Association has filed this Writ Petition seeking a declaration that Sections 12 and 13 of the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 and Sections 184 and 186(2) of the Finance Act, 2017 as amended by the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 as ultra vires Articles 14, 21 and 50 of the Constitution of India inasmuch as these are violative of the principles of separation of powers and independence of judiciary, apart from being contrary to the principles laid down by this Court in Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1, Madras Bar Association v. Union of India (2014) 10 SCC 1, Rojer Mathew v. South Indian Bank Limited (2020) 6 SCC 1 and Madras Bar Association v. Union of India 2020 SCC OnLine SC 962. The Petitioner seeks a further direction to Respondent No. 2 for establishment of a separate wing to cater to the requirements of tribunals in India.

2. A brief reference to the historical background of tribunalisation in this country is necessary for a better appreciation of the dispute that falls for adjudication in this Writ Petition. The Statement of objects and reasons for insertion of Articles 323-A and 323-B in the Constitution of India by the Forty-Second Amendment is as follows:

"To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Articles 136 of the Constitution. It is also necessary to make certain modifications in the Writ Jurisdiction of the High Courts under Article 226."

3. The vires of the Administrative Tribunals Act, 1985, enacted under Article 323-A (1), was challenged in S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124 before this Court. The main ground taken in the writ petition was that the jurisdiction of the High Court under Article 226 and Article 227 cannot be barred. It was held by this Court in S.P. Sampath Kumar (supra) that in place of a High Court, the Parliament can set up an effective alternative institutional mechanism with the power of judicial review vested in it, by placing reliance on the observation made in Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625. However, this Court was of the firm opinion that the tribunals should be a real substitute to High Courts. While scrutinizing Chapter II of the Act which dealt with the establishment of

tribunals, this Court expressed its view that a short tenure of Members of tribunals would be a deterrent for competent persons to seek appointment as Members.

4. The correctness of the judgment of this Court in S.P. Sampath Kumar (supra) was considered by a larger bench of this Court in L. Chandra Kumar v. Union of India (1997) 3 SCC 261 which found the exclusion of the jurisdiction of the High Courts and the Supreme Court in Articles 323-A and 323-B to be unconstitutional. This Court declared that tribunals shall continue to act like courts of first instance in respect of areas of law for which they have been constituted.

5. A High-Level Committee on law relating to insolvency of companies was constituted by the Union of India under the Chairmanship of Justice V. Balakrishna Eradi, retired Judge of this Court who made certain recommendations for setting up the National Company Law Tribunal (hereinafter referred to as NCLT) combining the powers of the Company Law Board under the Companies Act, 1956 (hereinafter referred to as the 1956 Act), BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 and the jurisdiction and powers relating to winding up vested in the High Courts. The Government accepted the recommendations and passed the Companies (Second Amendment) Act, 2002. The reason for the said amendment was to avoid multiplicity of litigation before various fora and to reduce pendency of cases. The Madras Bar Association filed a writ petition in the Madras High Court challenging the constitutional validity of the said amendment to the 1956 Act on the ground of legislative incompetence and violation of the doctrines of separation of powers and independence of the judiciary. The High Court upheld the validity of the Amendment Act of 2002 but pointed out certain defects in the provisions of the Act. The High Court declared that the NCLT and the National Company Law Appellate Tribunal (hereinafter referred to as NCLAT) cannot be constituted without removing the defects pointed out in the judgment. The judgment of the High Court was upheld by this Court in Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1 (hereinafter referred to as MBA-I). Parts I-B and I-C of the 1956 Act were directed to be modified in accordance with the observations made in the judgment.

6. The Companies Act, 2013 (hereinafter referred to as the 2013 Act), which replaced the 1956 Act, contained provisions for establishment of the NCLT and the NCLAT. Madras Bar Association filed a writ petition under Article 32 of the Constitution challenging the formation of NCLT under Section 408 of the 2013 Act. Several other provisions pertaining to constitution of the NCLT and the NCLAT, qualifications for appointment of Members and Chairperson/President and constitution of the Selection Committee were also assailed in the said writ petition. This Court in Madras Bar Association v. Union of India (2015) 8 SCC 583 (hereinafter referred to as MBA-II) upheld the validity of Section 408 by which the NCLT was constituted. However, clauses (a) and (e) of Section 409(3) relating to the appointment of Technical Members were held to be invalid. Section 411(3), which provided qualifications of Technical Members, and Section 412(2), which dealt with the constitution of the Selection Committee, were also held to be invalid. A direction was given to the Union of India to scrupulously follow the judgment in MBA-I and set right the defects that were pointed out therein by bringing the provisions in accord with the MBA-I judgment.

7. The Finance Act, 2017 was brought into force from 31.03.2017 to give effect to the financial proposals for the financial year 2017-18. Sections 183 to 189 thereof dealt with conditions of service of Chairperson and Members of Tribunals, Appellate Tribunals and other authorities. According to Section 183, provisions of Section 184 applied to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal and other specified authorities, notwithstanding anything to the contrary contained in the provisions of the statutes listed in Column (3) of the Eighth Schedule. The Central Government was empowered by Section 184 to make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chairperson and Vice-Chairperson (and commensurate positions bearing different nomenclature) and other Members. As per the first proviso, the Chairperson, Vice-Chairperson (and commensurate positions bearing different nomenclature) or Member of the Tribunal shall hold office for such term as may be specified by the rules made by the Central Government, not exceeding five years from the date on which such person enters office. The Chairperson, Chairman or President can hold office till they reach the age of 70 years and the Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member can continue till the age of 67 years, as per the second proviso to Section 184.

8. A Notification was issued by the Central Government on 01.06.2017 by which the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 (hereinafter referred to as the 2017 Rules) were made. The validity of Part XIV of the Finance Act, 2017 and the 2017 Rules framed thereunder was questioned in Rojer Mathew (supra). The petitioners contended that para XIV of the Finance Act, 2017 cannot be classified as a money bill. The question of money bill was referred to a larger bench. The validity of Section 184 of the Finance Act, 2017 was upheld. The 2017 Rules were held to be contrary to the parent amendment and therefore, struck down. The Central Government was directed to reformulate the rules strictly in accordance with the principles delineated by this Court in R.K Jain v. Union Of India . (1993) 4 SCC 119, L. Chandra Kumar (supra), Madras Bar Association v. Union of India (2014) 10 SCC 1 and Gujarat Urja Vikas Nigam Limited v. Essar Power Limited . (2016) 9 SCC 103 The Central Government was directed to formulate a new set of rules which would ensure non-discriminatory and uniform conditions of service, including assured tenure. As an interim order, this Court in Rojer Mathew (supra) directed that the appointments to the Tribunals/Appellate Tribunals and the service conditions shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. Union of India was given liberty to seek modification of the orders after framing fresh rules. On 12.02.2020, a notification was issued by the Central Government by which the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 (hereinafter referred to as the 2020 Rules) were framed. The validity of the 2020 Rules was challenged by Madras Bar Association. After detailed deliberations on the issues involved, this Court by its judgment in Madras Bar Association v. Union of India 2020 SCC OnLine SC 962 (hereinafter referred to as MBA-III) disposed of the writ petition by issuing the following directions:

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

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

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

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

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

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

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

(e) Secretary to the sponsoring or parent Ministry or Department—Member Secretary/Convener (without a vote). Till amendments are carried out, the 2020 Rules shall be read in the manner indicated.

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.

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

(v) The Union of India shall make serious efforts to provide suitable housing to the Chairman or Chairperson or President and other members of the Tribunals. If providing housing is not possible, the Union of India shall pay the Chairman or Chairperson or

President and Vice-Chairman, Vice-Chairperson, Vice President of the Tribunals an amount of Rs. 1,50,000/- per month as house rent allowance and Rs. 1,25,000/- per month for other members of the Tribunals. This direction shall be effective from 01.01.2021.

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

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

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

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

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

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

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

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

that they are not in accord with this judgment.

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

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

9. The Tribunal Reforms (Rationalisation and Conditions of Service) Bill, 2021 was introduced in the Lok Sabha on 13.02.2021 but could not be taken up for consideration. According to the Statement of objects and reasons, the said Bill was proposed with a view to streamline tribunals and sought to abolish certain tribunals and other authorities, which "only add to another additional layer of litigation" and were not "beneficial for the public at large". Thereafter, the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 (hereinafter referred to as the Ordinance) was promulgated on 04.04.2021. Chapter II thereof makes amendments to the Finance Act, 2017. The dispute raised in this Writ Petition relates to the first proviso to Section 184(1) according to which a person below the age of 50 years shall not be eligible for appointment as Chairperson or Member and also the second proviso, read with the third proviso, which stipulates that the allowances and benefits payable to Chairpersons and Members shall be the same as a Central Government officer holding a post carrying the same pay as that of the Chairpersons and Members. Section 184(7) stipulates that the Selection Committee shall recommend a panel of two names for appointment to the post of Chairperson or Member and the Central Government shall take a decision preferably within three months from the date of the recommendation of the Committee, notwithstanding any judgment, order or decree of any Court. The said provision is also assailed in this Writ Petition. Section 184(11) which shall be deemed to have been inserted with effect from 26.05.2017 provides that the term of office of the Chairperson and Member of a tribunal shall be four years. The age of retirement of the Chairperson and Members is specified as 70 years and 67 years, respectively. If the term of office or the age of retirement specified in the order of appointment issued by the Central Government for those who have been appointed between 26.05.2017 and 04.04.2021 is greater than that specified in Section 184(11), the term of office or the age of retirement shall be as set out in the order of appointment, subject to a maximum term of office of five years. The validity of Section 184(11) is also challenged in the Writ Petition.

10. We have heard Mr. Arvind P. Datar, learned Amicus Curiae, Mr. K.K. Venugopal, learned Attorney General for India, Mr. Balbir Singh, learned Additional Solicitor General, Mr. Mukul Rohatgi, learned Senior Counsel, Mr. Sidharth Luthra, learned Senior Counsel, Mr. Gaurab Banerjee, learned Senior Counsel, Mr. Aruneshwar Gupta, learned Senior Counsel and Mr.

Krishnan Venugopal, learned Senior Counsel.

11. Mr. Arvind P. Datar, learned Amicus Curiae, made the following submissions:

i) The Ordinance is violative of the rule of separation of powers which forms part of the basic structure of the Constitution. The Ordinance is liable to be struck down as being violative of another basic feature of the Constitution, i.e., independence of the judiciary.

ii) Reversal of judgments which are not in accord with the Government's views undermines the judiciary, violating the supremacy of the Constitution.

iii) Stipulation of a minimum age limit of 50 years for appointment is contrary to the directions given in the judgments of this Court in MBA-I, Rojer Mathew (supra) and MBA-III.

iv) The provisos to Section 184(1) fixing the allowances and benefits payable to the Members to the extent as admissible to Central Government officers holding a post carrying the same pay is unsustainable and requires to be set aside.

v) Section 184(7) is liable to be declared invalid as the direction issued by this Court in MBA-III to make appointments within three months from the date of recommendation of the Selection Committee is sought to be annulled.

vi) Section 184(11) is unconstitutional insofar as it fixes the tenure of the Chairperson and Members as four years.

vii) Retrospectivity given to Section 184(11) is only to nullify the effect of interim orders of this Court which are in the nature of mandamus and is, therefore, prohibited legislative activity.

viii) The appointments made pursuant to the directions of this Court on 09.02.2018, 16.07.2018 and 21.08.2018 with the consent of the learned Attorney General cannot be disturbed. The directions issued by this Court with the consent of the Union of India cannot be legislatively overruled.

12. Mr. P.S. Patwalia, learned Senior Counsel appearing for Mr. P. Dinesha, Member, CESTAT, submitted that there are at least four orders passed by this Court on 09.02.2018, 20.03.2018, 16.07.2018 and 21.08.2018 which clarified that the age of retirement would be 62 years for Members of the CESTAT and the ITAT. Relying upon the judgment of this Court in Virender Singh Hooda v. State of Haryana (2004) 12 SCC 588, he submitted that even if this Court upholds the Ordinance, the appointments made pursuant to the interim orders of this Court should not be disturbed.

13. Mr. Rohatgi, learned Senior Counsel, argued that Mr. Ajay Sharma who was practicing as an AOR in this Court responded to an advertisement issued on 29.06.2016 for the appointment to the post of Member (Judicial), CESTAT. He was appointed along with others on 11.04.2018 with a condition that his tenure will be for five years or till he attains the age of 65 years, whichever is earlier. This Court clarified on 21.08.2018 that the retirement age

of Member (Judicial), CESTAT shall be 62 years. Proviso to Section 184(11) which prescribes a maximum of five years tenure is a result of an impermissible exercise undertaken by the Union of India. He further submitted that a mandamus issued by this Court cannot be overruled by the legislature. Mr. Gaurab Banerjee, learned Senior Counsel, submitted that Mr. S.K. Pati was appointed Member (Judicial), CESTAT on 11.04.2018. He submitted that Mr. Pati left his employment as an Additional District Judge and joined as Member (Judicial). Mr. Sidharth Luthra, learned Senior Counsel, submitted that Mrs. Rachna Gupta who is at present working as Member (Judicial) has resigned as District Judge. He requested this Court to permit the Members, CESTAT and other tribunals to continue till 62 years as directed by this Court in its judgment in Kudrat Sandhu v. Union of India W.P. No. 279 of 2017. Mr. Krishnan Venugopal, learned Senior Counsel appearing for Advocates' Association, Bengaluru, which was interested in appointments being made to the posts of Judicial and Accountant Members of the ITAT, submitted that pursuant to the advertisement issued on 06.07.2018 inviting applications to 37 posts of Members (Judicial)/(Accountant) in the ITAT, 650 applications were filed. The candidates between the age of 35 years and 50 years were eligible according to the advertisement. Interviews were held between May-September, 2019. Appointments to the post of Accountant Members were made but the Judicial Members were not appointed. He submitted that there are few persons who are below 50 years and would not be considered for appointment in view of the Ordinance. He argued that Section 184(11) alone is given retrospective effect and the amendments to Section 184(1) to (10) would be prospective and cannot be made applicable to the recruitment and selection conducted prior to 04.04.2021. Therefore, according to Mr. Krishnan Venugopal, learned Senior Counsel, the candidates who have been selected pursuant to the advertisement issued in 2018 should not be held ineligible on the ground that some of the candidates were below the age of 50 years on the date of the advertisement.

14. The learned Attorney General strongly refuted the contentions of the learned Amicus Curiae and other Senior Counsel. He stated that a judgment of a court can be overridden by the legislature. Service conditions of Members of tribunals is a policy decision which should be left to the collective decision of the Parliament. Legislative overruling is a permissible exercise as has been held in a number of judgments of this Court. He asserted that there can be no direction issued by this Court to make law in a particular manner. Such directions issued by this Court are treated as suggestions. Ultimately, the will of the people has to prevail. Even interstitial directions given in the absence of law are subject to future legislation. He was of the opinion that the Ordinance cannot be challenged on the ground that it is contrary to the judgment of this Court in MBA-III. The learned Attorney General argued that the minimum age for appointment to tribunals is fixed at 50 years for the purpose of maintaining equality. All aspirants from various fields have been put on an even keel. According to him, there is no uniformity in the directions issued by this Court regarding the tenure of Chairperson and Members. Initially in S.P. Sampath Kumar (supra), this Court recommended five to seven years as tenure. Thereafter, directions were issued to the effect that tenure should be five years. The learned Attorney General submitted that tenure of four years instead of five years was fixed after detailed deliberations by experts which should not be interdicted by this Court. Insofar as HRA is concerned, the learned Attorney General submitted that Members of tribunals cannot be permitted to claim

allowances higher than officers in the Government carrying the same pay scale. In respect of two names being sent for each post by the Selection Committee, the learned Attorney General stated that the recommendations are subject to inquiry by the Intelligence Bureau (IB) and in case the selected candidate is found to be not suitable, there should be an alternative. Therefore, it was decided that at least two names should be recommended by the Selection Committee for each post. The Government is also interested in filling up the vacant posts in the tribunals and the stipulation of taking a decision preferably within three months does not mean that the Government will not act with alacrity.

15. Mr. Balbir Singh, learned Additional Solicitor General defended the retrospectivity given to Section 184(11) by arguing that the defect pointed out by the judgment of MBA-III has been cured by the Ordinance. It was held in MBA-III that the 2020 Rules came into force on the date of their notification, i.e., 12.02.2020. Further, it was held that subordinate legislation cannot be given retrospective operation unless authorized by the parent legislation. By the Ordinance, the Finance Act has been amended and retrospective effect has been given to Section 184(11). Any judgment or orders passed between 26.05.2017 and 04.04.2021 are overridden by the Ordinance which is in the nature of a curative legislation. The learned ASG submitted that all appointments that have been made between 26.05.2017 and 04.04.2021 shall be governed by the Ordinance.

Separation of Powers

16. Sir Edward Coke on being summoned by King James I to answer why the King could not himself decide cases which had to go before his own Courts of justice, asserted:“… no king after the conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within his realm, but these were solely determined in the Courts of justice”. When the King said that “he thought the law was founded on reason, and that he and others had reason, as well as the Judges”, Coke answered:

“True it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden metwand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace. (“The Higher Law —Background of American Constitutional Law” by Edward S. Corwin, pp. 38-39).”16

17. This dictum of Coke, announced in Dr. Bohman case [(1610) 8 Co Rep 118-A] was soon repudiated in England, but the doctrine announced in Coke’s dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court in the decision of cases coming before it; and it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of Coke’s doctrine of control of the Courts over legislation (See : Willis on Constitutional Law, 1936 Edn., p. 76).

18. De l'esprit des lois was published in 1748 by Charles de Secondat, Baron de Montesquieu. According to Montesquieu, there can be no liberty where the legislative and executive powers are united in the same person or body of Magistrates. He argued that there is no liberty, if the judicial power is not separated from the legislative and executive. He further noted that there would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

19. The Federalist Papers were written by Alexander Hamilton, James Madison, and John Jay under the collective pseudonym "Publius" to promote the ratification of the United States Constitution. James Madison dealt with the particular structure of the new government and the distribution of powers among its different parts in Federalist No. 47 and separation of the departments not having constitutional control over each other in Federalist No. 48. The structure of the Government furnishing proper checks and balances between different departments was the subject matter of Federalist No. 51.

20. All powers of Government — legislative, executive and judicial — result in the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic Government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy-three despots would surely be as oppressive as one. [See : Jefferson : Works : 3, 223]

21. The American Constitution provides for a rigid separation of governmental powers into three basic divisions, executive, legislative and judiciary. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of the separation of powers. Unlike these Constitutions, Indian Constitution does not expressly vest the three kinds of powers in three different organs of the State.

22. The doctrine of separation of powers informs the Indian constitutional structure and is an essential constituent of rule of law. In other words, the doctrine of separation of powers, though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of the Indian Constitution. The Constitution has made demarcation, without drawing formal lines between the three organs— legislature, executive and judiciary. Separation of powers between three organs—the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution. (2014) 12 SCC 696 Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to

decide whether the limits have been transgressed has been placed on the judiciary. (2007) 2 SCC 1 Though, there is no rigid separation of governmental powers between the executive, legislative and judiciary, it is clear from the above judicial pronouncements and literature that separation of powers forms part of the basic structure of the Constitution. Violation of separation of powers would result in infringement of Article 14 of the Constitution. A legislation can be declared as unconstitutional if it is in violation of the principle of separation of powers.

Independence of the Judiciary

23. Alexander Hamilton wrote in The Federalist No. 78 as follows:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

24. Basic Principles on the Independence of the Judiciary were adopted by the 7 United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26.08.1985 to 06.09.1985 and endorsed by the General Assembly resolutions on 29.11.1985 and 13.12.1985. The relevant basic principles are that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of the governmental and other institutions to respect and observe the independence of the judiciary. The term of office of Judges, their independence, security, adequate renumeration, conditions of service, pensions and the age of retirement shall be adequately secured by law. The United Nations Economic and Social Council authorized the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to request Dr. L.M. Singhvi to prepare a report on the independence and impartiality of judiciary. He submitted a draft declaration on the independence and impartiality of the judiciary, jurors, assessors and the independence of lawyers, which came to be known as the Singhvi Declaration. The United Nations Commission on Human Rights invited governments to take the Singhvi Declaration into account in implementing the Basic Principles on the Independence of the Judiciary. The Bangalore Principles on Judicial Conduct, the product of several meetings and deliberations of Chief Justices and Judges of both common law and civil law systems and adopted by the United Nations Commission on Human Rights on 29.04.2003, identified core values of the judiciary, one of which is independence. The measures adopted by the Judicial Integrity Group at its meeting held in Lusaka, Zambia on 21 and 22 January, 2010 for effective implementation of the Bangalore Principles of Judicial Conduct referred to the responsibilities of States to ensure guarantees, through constitutional or other means, on judicial independence. One of the guarantees required to be provided by the State to maintain judicial independence is that the legislative or executive powers that may affect Judges in respect of their office, their renumeration, conditions of service or other resources, shall not be used with the object or

consequence of threatening or bringing pressure upon a particular Judge or Judges.

25. In his address dated 24.05.1949, Dr. B.R. Ambedkar stated that:—

“There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured”.

26. Article 50 of the Constitution of India provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. The concept of separation of judiciary from executive cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an anomalous position that the Constitution does not emphasise the separation of higher judiciary from the executive (1993) 4 SCC 441. Article 50, occurring in a chapter described by Granville Austin as “the conscience of the Constitution” in his work titled ‘The Indian Constitution : Cornerstone of a Nation’, underlines the importance given by the Constitution-makers to immunize the judiciary from any form of executive control or interference. (1977) 4 SCC 193

27. The independence of the judiciary is a fighting faith of our Constitution. It is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours and the judiciary which is to act as a bastion of the rights and freedom of the people is given certain constitutional guarantees to safeguard the independence of judiciary. An independent and efficient judicial system has been recognised as a part of the basic structure of our Constitution.

28. Article 37 of the Constitution declares that the principles laid down in Part IV of the Constitution are fundamental in the governance of the country and it should be the duty of the State to apply the principles in making laws. Undoubtedly, it is true that the provisions of Part IV are not enforceable by the courts of law. However, this does not absolve the obligation of the State from applying the principles of Part IV in making laws. It is necessary to remind ourselves of what Dr. B.R. Ambedkar stated in the Constituent Assembly on 19.11.1948 of Part IV, which is as under:—

“It is the intention of this Assembly that in future both the legislature and the executive should not merely pay lip services to the principles enacted in this part, but they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country”.

29. Impartiality, independence, fairness and reasonableness in decision-making are the hallmarks of the judiciary. If “impartiality” is the soul of the judiciary, “independence” is the lifeblood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects

but also upon several mundane things—security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the judiciary) and without (from the executive). The independence of an individual Judge, that is, decisional independence; and independence of the judiciary as an institution or an organ of the State, that is, functional independence are the broad concepts of the principle of independence of the judiciary/tribunal (2016) 5 SCC 1.

30. 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.

31. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person’s rights adjudicated by a forum which exercises judicial power in an impartial and independent manner.

32. The constitutional mandate is that the legislature should adhere to the principles laid down in Part IV of the Constitution of India while enacting legislations. No provision shall be made in legislative acts which would have the tendency of making inroads into the judicial sphere. Any such encroachment by the legislature would amount to violating the principles of separation of powers, judicial independence and the rule of law. Independence of courts from the executive and the legislature is fundamental to the rule of law and one of the basic tenets of the Indian Constitution. Separation of powers between the three organs, i.e., the legislature, the executive and the judiciary, is a consequence of the principles of equality as enshrined in Article 14 of the Constitution. Any incursion into the judicial domain by the other two wings of the Government would, thus, be unconstitutional.

Judicial decisions and legislative overruling

I. Comparative Jurisdictions

33. It would be profitable to refer to the reaction of courts to legislative override in comparative jurisdictions. Chief Justice John Marshall of the US Supreme Court in Marbury v. Madison 5 US 137 (1803) referred to the Constitution as the fundamental and paramount law of the nation. He declared that “It is emphatically the province and duty of the judicial department to say what the law is.” In United States v. Peters 9 US 115 (1809), Chief Justice Marshall speaking for an unanimous Court said that “If the legislatures of the several states may at will annul the judgments of the Courts of the United States, and destroy rights

acquired under those judgments, the Constitution itself becomes a solemn mockery…"

34. In Brown v. Board of Education of Topeka 347 US 483 (1954), the United States Supreme Court held that the Fourteenth Amendment forbids states to use governmental powers to bar children on racial grounds from attending school where there is states' participation through any arrangement, management, funds or property. The Governor or legislature cannot declare that they are not bound by the judgment mentioned above. The Board of Little Rock's Central High School suspended its plan to do away with desegregation in public schools. The said action of the school was rejected by the District Court which was affirmed by the Court of Appeal. There was an amendment to the Arkansas Constitution pursuant to which a law was made relieving school children from compulsory attendance at racially mixed schools. The school filed a petition in the District Court seeking postponement of the programme of desegregation. The District Court allowed the writ petition. The Court of Appeal reversed the decision of the District Court which was affirmed by the United States Supreme Court in Cooper v. Aaron 358 US 1 (1958). It was held therein that the constitutional rights of children not to be discriminated against in school admissions on grounds of race or color as declared by the United States Supreme Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation. The Supreme Court declared that the principles announced in the decision of Brown v. Board of Education (supra) are indispensable for the protection of the freedoms guaranteed by the fundamental charter.

35. Chief Justice Warren speaking for the majority in Miranda v. Arizona 384 US 436 (1966), declared that a person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in a court. He must be clearly informed that he has the right to consult with a lawyer and have the lawyer with him during interrogation and, that, if he is indigent, a lawyer will be appointed to represent him. The Congress enacted § 3501 which provided that a confession shall be admissible in criminal prosecution brought by the United States or by the District of Columbia if it is voluntarily given. Charles Thomas Dickerson charged with a robbery and use of a firearm moved the District Court to suppress his statement which he made to the Federal Bureau of Investigation (FBI) that he has not received Miranda warnings. The motion to suppress was quashed by the District Court which was reversed by the United States Court of Appeal for the Fourth Circuit on the basis of the enactment § 3501. The United States Supreme Court in Dickerson v. United States 530 US 428 (2000) authoritatively pronounced that the Congress cannot legislatively supersede a decision of the Supreme Court interpreting and applying the Constitution. As Miranda amounts to a constitutional rule, the Supreme Court concluded that the Congress cannot supersede the judgment legislatively. The learned Attorney General referred to an article written by Erwin Chemerinsky titled "The Court should have remained silent : Why the Court erred in deciding Dickerson v. United States" 149 Pennsylvania Law Review 287-308 (2001). The said article is a critical analysis of the judgment of the Supreme Court in Dickerson wherein the author wrote that the desire to rule on the constitutionality of the law simply does not justify the courts raising it sua sponte. He opined that the Fourth Circuit and ultimately the Supreme Court violated the separation of powers by considering § 3501 over the objection

of the executive branch. In Dickerson, the justice department informed the Supreme Court that it was not invoking § 3501 and that it could not use the confession only if the Court found that Miranda warnings were not properly administered. In spite of the submission made by the justice department, the Fourth Circuit ruled on the admissibility of the confession on the basis of § 3501. Chemerinsky argues in his article that the judiciary exceeded its jurisdiction in considering § 3501 when none of the parties raised the issue.

36. Justice Scalia speaking for the majority in Plaut v. Spendthrift Farm, Inc. 514 US 211 (1995) referred to earlier judgments of the United States Supreme Court which held that a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and the Congress may not declare by retrospective action that the law applicable to that very case or a whole class of cases was something other than what the courts said it was. Justice Scalia held that depriving judicial judgments of the conclusive effect that they had when they were announced would be in violation of separation of powers.

37. In his article, “The Case for the Legislative Override” 10 UCLA Journal of International Law and Foreign Affairs 250 (2005), Nicholas Stephanopoulos has explored the response of courts to legislative overruling in various jurisdictions. Judicial review of legislative action is limited in United Kingdom and New Zealand as the interpretation of statutes would be in accordance with the European Convention of Human Rights and the New Zealand Bill of Rights, respectively. The Courts in United Kingdom and New Zealand follow hortatory judicial review by which the Court cannot strike down a legislation but can declare it to be incompatible with the European Convention or the Bill of Rights. As far as Germany is concerned, statutes would be stricken if they are declared unconstitutional by the courts, and would be unrescuable by constitutional amendment if they are found to violate certain unamendable constitutional provisions. If the statutes are invalidated on being found unconstitutional by the courts in Canada and Israel, the legislature could override the judgments of the courts leveraging what is termed as the ‘notwithstanding’ clause in the Canadian context, i.e., notwithstanding their conflict with the Charter or Basic Law.

II. India

(A) Scope of judicial review

38. Shifting focus to legislative override in our country, it is necessary to first appreciate the scope of judicial review of ordinances which is the same as that of a legislative act. Article 123 of the Constitution empowers the President to promulgate an ordinance during recess of the Parliament, which shall have the same force and effect as an act of the Parliament. The validity of an ordinance can be challenged on grounds available for judicial review of a legislative act. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance-making power is legislative power and an ordinance shall have the same force as an act, an ordinance should be clothed with all the attributes of an act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. It is settled law that judicial review of an ordinance should be akin to that of legislative action.

39. The controversy that arises for the consideration of this Court relates to the legislative response to the judgment of this Court in MBA-III. The power to strike down primary legislation enacted by the Union of India or the State legislatures is on limited grounds. The Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other constitutional rights/provisions of the Constitution of India. (2017) 7 SCC 59 Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment and a clear transgression of constitutional principles must be shown. In State of Madhya Pradesh v. Rakesh Kohli (2012) 6 SCC 312, this Court held that sans flagrant violation of the constitutional provisions, the law made by Parliament or a State legislature is not declared bad and legislative enactment can be struck down only on two grounds : (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it takes away or abridges any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. Subsequently, the Court has also recognised “manifest arbitrariness” as a ground under Article 14 on the basis of which a legislative enactment can be judicially reviewed. (2019) 1 SCC 1

(B) Permissible legislative overruling

40. The judgment in Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality (1969) 2 SCC 283 was relied upon by both sides. The validity of the rules framed by Municipal Corporation under Section 73 of the Bombay Municipal Boroughs Act, 1925 for levying a rate on open lands was the subject matter of challenge in Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad (1964) 2 SCR 608. The relevant rule was declared ultra vires of the Act itself. Later, the State legislature passed a validation act seeking to validate the imposition of tax, the validity of which was considered in Shri Prithvi Cotton Mills Ltd. (supra). This Court held that it is not sufficient to merely declare that the decision of the Court shall not bind as such declaration would amount to the reversal of a decision of the Court which the legislature cannot do. It was further observed that a Court’s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

41. It is open to the legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court. (1970) 1 SCC 509 The test of judging the validity of the amending and validating enactment is, whether the legislature enacting the validating statute has competence over the subject-matter; whether by validation, the said legislature has removed the defect which the Court had found in the previous laws; and whether the validating law is consistent with the provisions of Part III of the Constitution. In State of Tamil Nadu v. State of Kerala (supra), this Court held that any law enacted by the legislature may be invalidated if it is an attempt to interfere with judicial process by being in breach of the doctrine of separation of powers.

42. The judgment of this Court in Madan Mohan Pathak v. Union of India (1978) 2 SCC 50 requires a close scrutiny as it was adverted to and relied upon by both sides. A writ petition was filed in the High Court of Calcutta for a mandamus directing the Life Insurance Corporation (LIC) to act in accordance with the terms of settlement dated 24.01.1974 read with administrative instructions dated 29.03.1974. The writ petition was allowed by the learned single Judge against which a Letters Patent Appeal (LPA) was preferred by the LIC. During the pendency of the LPA, the LIC (Modification of Settlement) Act, 1976 came into force. The LPA was withdrawn in view of the subsequent legislation and the decision of the learned single Judge became final. Validity of the said statute was assailed in a writ petition filed under Article 32 by the employees of the LIC. Justice Bhagwati, speaking for the majority, was of the opinion that the judgment of the Calcutta High Court was not a mere declaratory judgment holding an impost or tax as invalid so that a validating statute can remove the defect pointed out in the judgment. He observed that the judgment of the Calcutta High Court gave effect to the rights of the petitioners by mandamus, directing the LIC to pay annual cash bonus. As long as the judgment of the learned single Judge is not reversed in appeal, it cannot be disregarded or ignored. The LIC was held to be bound by the writ of mandamus issued by the Calcutta High Court. Justice Beg, in his concurrent opinion, held that the rights which accrued to the employees on the basis of the mandamus issued by the High Court cannot be taken away either directly or indirectly by subsequent legislation. Thereafter, Madan Mohan Pathak (supra) came up for discussion in Sri Ranga Match Industries v. Union of India 1994 Supp (2) SCC 726. Justice Jeevan Reddy was of the opinion that the Madan Mohan Pathak case cannot be treated as an authority for the proposition that mandamus cannot be set aside by a legislative act. Justice Hansaria was not in agreement with such view. Relying upon the judgment of this Court in A.V. Nachane v. Union of India (1982) 1 SCC 205, Justice Hansaria held that the legal stand taken by Justice Beg in the Madan Mohan Pathak case had received majority’s endorsement and it was because of this that retrospectivity given to the relevant rule assailed in A.V. Nachane was held to have nullified the effect of the writ and was accordingly invalid. In view of the difference of opinion, the matter was referred to a larger bench. We are informed by the leaned Amicus Curiae that the difference of opinion could not be resolved as the case was settled out of court.

43. In Virender Singh Hooda (supra), this Court did not accept the contention of the petitioners therein that vested rights cannot be taken away by retrospective legislation. However, it was observed that taking away of such rights would be impermissible if there is violation of Articles 14, 16 or any other constitutional provision. The appointments already made in implementation of a decision of this Court were protected with the reason that “the law does not permit the legislature to take away what has been granted in implementation of the Court’s decision. Such a course is impermissible.” This Court in Cauvery Water Disputes Tribunal 1993 Supp (1) SCC 96 (2) declared the ordinance which sought to displace an interim order passed by the statutory tribunal as unconstitutional as it set side an individual decision inter partes and therefore, amounted to a legislative exercise of judicial power. When a mandamus issued by the Mysore High Court was sought to be annulled by a legislation, this Court quashed the same in S.R. Bhagwat v. State of Mysore (1995) 6 SCC 16 on the ground that it was impermissible legislative exercise. Setting at naught a decision of the Court without removing the defect pointed out in the judgment

would sound the death knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the Government to defy a law and yet to get away with it. (1987) 1 SCC 362

44. The permissibility of legislative override in this country should be in accordance with the principles laid down by this Court in the aforementioned as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective. Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution. (1985) 2 SCC 197

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect pointed out should have been cured such that the basis of the judgement pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise [See : S.R. Bhagwat (supra)]. Even interim directions cannot be reversed by a legislative veto [See : Cauvery Water Disputes Tribunal (supra) and Medical Council of India v. State of Kerala (2019) 13 SCC 185].

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of Article 14 of the Constitution of India.

Validity of the Impugned Ordinance

45. The learned Amicus Curiae submitted that the Ordinance impugned in the Writ Petition is unconstitutional as it is violative of the separation of powers, the rule of law and independence of the judiciary. He argued that the principle of independence of the judiciary can be traced to Article 14 of the Constitution and the Ordinance is liable to be struck down as being violative of the equality clause. The learned Amicus Curiae relied upon the judgments of this Court to submit that the impugned Ordinance is a classic case of law laid down by this Court being overturned by the legislature unreasonably. Responding to the submissions of the learned Attorney General that deference has to be shown by courts to the policy decisions of the executive and the legislature, the learned Amicus Curiae argued that deference has to be shown to the reasons of the policy and not the policy itself. The learned Attorney General asserted that the law laid down by this Court is not the final word as it is settled that the Parliament can legislate by curing the defects pointed out by the Court. The learned Attorney General stated that legislation is made after the decision undergoes detailed deliberations at various levels in the Government and the legislature. The collective wisdom of the Parliament cannot be interfered with by the Court. He emphasized that service conditions of Chairperson and Members of tribunals is a matter of policy over which the Parliament should have the final word. He stressed the need for

judicial restraint to be shown by courts in giving directions to legislate. He stated that any interstitial directions given by this Court in the absence of any existing legislation shall be treated as suggestions to the Parliament for consideration at the time of making legislation. He insisted that a later legislation cannot be struck down on the ground that the directions issued by the Court earlier are violated. Judicial review of the Ordinance can be only on those grounds that are available for review of a legislative act. The Ordinance cannot be declared as unconstitutional as being violative of Article 14, as no facet of the said Article comes into play in the instant case.

46. The grievance of the Petitioners in this Writ Petition mainly relates to the violation of the first proviso and the second proviso, read with the third proviso, to Section 184(1), Sections 184(7) and 184(11) of the Finance Act, 2017. Section 184(1) of the Finance Act, 2017, prior to amendment, is as follows:

(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:

47. The amendment to Section 184 by the Ordinance is as follows:

184. (1) The Central Government may, by notification, make rules to provide for the qualifications, appointment, salaries and allowances, resignation, removal and the other conditions of service of the Chairperson and Members of the Tribunal as specified in the Eighth Schedule:

Provided that a person who has not completed the age of fifty years shall not be eligible for

appointment as a Chairperson or Member:

Provided further that the allowances and benefits so payable shall be to the extent as are admissible to a Central Government officer holding the post carrying the same pay:

Provided also that where the Chairperson or Member takes a house on rent, he may be reimbursed a house rent subject to such limits and conditions as may be provided by rules.

(2) The Chairperson and Members of a Tribunal shall be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee (hereinafter referred to as the Committee) constituted under sub-section (3), in such manner as the Central Government may, by rules, provide.

(3) The Search-cum-Selection Committee shall consist of—

(a) the Chief Justice of India or a Judge of Supreme Court nominated by him– Chairperson of the Committee;

(b) two Secretaries nominated by the Government of India — Members;

(c) one Member, who–

(i) in case of appointment of a Chairperson of a Tribunal, shall be the outgoing Chairperson of the Tribunal; or

(ii) in case of appointment of a Member of a Tribunal, shall be the sitting Chairperson of the Tribunal; or

(iii) in case of the Chairperson of the Tribunal seeking re-appointment, shall be a retired Judge of the Supreme Court or a retired Chief Justice of a High Court nominated by the Chief Justice of India:

Provided that, in the following cases, such Member shall always be a retired Judge of the Supreme Court or a retired Chief Justice of a High Court nominated by the Chief Justice of India, namely:—

(i) Industrial Tribunal constituted by the Central Government under the Industrial Disputes Act, 1947;

(ii) Tribunals and Appellate Tribunals constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;

(iii) Tribunals where the Chairperson or the outgoing Chairperson, as the case may be, of the Tribunal is not a retired Judge of the Supreme Court or a retired Chief Justice or Judge of a High Court; and

(iv) such other Tribunals as may be notified by the Central Government in consultation with the Chairperson of the Search-cum-Selection Committee of that Tribunal; and

(d) the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted or established — Member-Secretary.

(4) The Chairperson of the Committee shall have the casting vote.

(5) The Member-Secretary of the Committee shall not have any vote.

(6) The Committee shall determine its procedure for making its recommendations.

(7) Notwithstanding anything contained in any judgment, order or decree of any Court or in any law for the time being in force, the Committee shall recommend a panel of two names for appointment to the post of Chairperson or Member, as the case may be, and the Central Government shall take a decision on the recommendations of the Committee preferably within three months from the date on which the Committee makes its recommendations to the Government.

(8) No appointment shall be invalid merely by reason of any vacancy or absence in the Committee.

(9) The Chairperson and Member of a Tribunal shall be eligible for re-appointment in accordance with the provisions of this section:

Provided that in making such re-appointment, preference shall be given to the service rendered by such person.

(10) The Central Government shall, on the recommendation of the Committee, remove from office, in such manner as may be provided by rules, any Member, who—

(a) has been adjudged as an insolvent; or

(b) has been convicted of an offence which 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), he shall be informed of the charges against him and given an opportunity of being heard in respect of those charges.

Explanation. — For the purposes of this section, the expressions —

(i) “Tribunal” means a Tribunal, Appellate Tribunal or Authority as specified in column (2) of the Eighth Schedule;

(ii) “Chairperson” includes Chairperson, Chairman, President and Presiding Officer of a Tribunal;

(iii) “Member” includes Vice-Chairman, Vice-Chairperson, Vice-President, Account Member, Administrative Member, Judicial Member, Expert Member, Law Member, Revenue Member and Technical Member, as the case may be, of a Tribunal;

53(11) Notwithstanding anything contained in any judgment, order, or decree of any Court or any law for the time being in force, —

(i) the Chairperson of a Tribunal shall hold office for a term of four years or till he attains the age of seventy years, whichever is earlier;

(ii) the Member of a Tribunal shall hold office for a term of four years or till he attains the age of sixty-seven years, whichever is earlier:

Provided that where a Chairperson or Member is appointed between the 26th day of May, 2017 and the notified date and the term of his office or the age of retirement specified in the order of appointment issued by the Central Government is greater than that which is specified in this section, then, notwithstanding anything contained in this section, the term of office or age of retirement or both, as the case may be, of the Chairperson or Member shall be as specified in his order of appointment subject to a maximum term of office of five years.

48. The first proviso of Section 184(1) provides minimum age for appointment as Chairperson or Member as 50 years. One of the issues considered in MBA-III was the correctness of the condition imposed in the 2020 Rules that an advocate is eligible for appointment as a Member only if he has 25 years of experience. It is relevant to state that advocates were ineligible for most of the tribunals. The learned Attorney General fairly submitted in his arguments that suitable amendment will be made to make advocates eligible, subject to their having 25 years’ experience. The learned Amicus Curiae contended in MBA-III that in order to attract competent advocates to apply for appointment as Members in tribunals, it is necessary that they should be made eligible for appointment on the same criteria as applicable for appointment of a High Court Judge. The learned Amicus Curiae suggested that advocates with a standing of 15 years at the bar should be made eligible for appointment as Members of tribunals. In MBA-III, exclusion of advocates from being appointed as Members was found to be contrary to the judgment of this Court in MBA-I and MBA-II. While recording the submission of the learned Attorney General that Rules shall be amended to make advocates eligible for appointment as Members, it was held in MBA-III that experience at the bar for advocates to be considered for appointment as Members should be the same as is applicable for appointment as High Court Judges, i.e., 10 years. In such view of the matter, a direction was given in MBA-III to amend the 2020 Rules to make advocates with at least 10 years of experience at the bar eligible for appointment as Members in tribunals. The experience of advocates at the bar and their specialization in the relevant branch of law was directed to be taken into account by the Search-cum-Selection Committee (hereinafter referred to as SCSC) while considering their

appointment. Advocates were held to be entitled for reappointment for at least one term by giving preference to the service rendered by them in the tribunals. Thereafter, an application was filed by the Union of India for modification of the direction aforementioned by substituting the word, “eligible for reappointment” in the place of “entitled for reappointment”. The said request of the Union of India was acceded to by this Court.

49. The direction given by this Court in the nature of mandamus in MBA-III is to the effect that advocates are entitled for appointment as Members, provided they have experience of 10 years. The first proviso to Section 184 which prescribes a minimum age of 50 years is an attempt to circumvent the direction issued in MBA-III striking down the experience requirement of 25 years at the bar for advocates to be eligible. Introduction of the first proviso to Section 184(1) is a direct affront to the judgment of this Court in MBA-III. This Court in MBA-I and Roger Mathew (supra) underlined the importance of recruitment of Members from the bar at a young age to ensure a longer tenure. Fixing a minimum age for recruitment of Members as 50 years would act as a deterrent for competent advocates to seek appointment. Practically, it would be difficult for an advocate appointed after attaining the age of 50 years to resume legal practice after completion of one term, in case he is not reappointed. Security of tenure and conditions of service are recognised as core components of independence of the judiciary. Independence of the judiciary can be sustained only when the incumbents are assured of fair and reasonable conditions of service, which include adequate renumeration and security of tenure. Therefore, the first proviso to Section 184(1) is in violation of the doctrine of separation of powers as the judgment of this Court in MBA-III has been frustrated by an impermissible legislative override. Resultantly, the first proviso to Section 184(1) is declared as unconstitutional as it is violative of Article 14 of the Constitution. Selections conducted for appointment of Members, ITAT pursuant to the advertisement issued in 2018 should be finalized and appointments made by considering the candidates between 35 to 50 years as also eligible.

50. The second proviso to Section 184(1) deals with the allowances and benefits payable to the Members which are to be the same as are admissible to a Central Government officer holding a post carrying the same pay. According to Rule 15 of the 2020 Rules, Chairpersons and Members of tribunals were entitled to House Rent Allowance at the same rate as admissible to officers with the Government of India holding Group ‘A’ post carrying the same pay. The contention of the learned Amicus Curiae in MBA-III was that the majority of the tribunals are situated in Delhi and there is scarcity of housing in Delhi. Not many Judges of the High Court are interested in accepting appointment to tribunals in view of the acute problem of housing. An amount of Rs. 75,000/- per month which was paid as House Rent Allowance (HRA) was not sufficient to get a decent accommodation in Delhi for Chairpersons and Members of tribunals. Taking note of the serious problem of housing and the inadequate amount that was being paid as HRA to the Members, this Court in MBA-III directed enhancement of HRA to Rs. 1,25,000/- per month to the Members and Rs. 1,50,000/- per month to Chairperson or Vice-Chairperson or President of tribunals. This direction was made effective from 01.01.2021. The learned Amicus Curiae argued that the Union of India filed an application seeking modification of the HRA directed in the judgment. The clarification sought by the Union of India is to the effect that HRA payable to a Tribunal Member should not be a fixed amount and should, instead, be twice the HRA payable to the

holder of a subsequent rank in the Government, e.g., Secretary to the Government. Miscellaneous Application No. 111 of 2021 filed by the Union of India is pending as this Court directed the Union of India to furnish details of the accommodation available for Chairpersons and Members of tribunals and to submit a proposal as to what amount would be reasonable towards HRA in case accommodation cannot be provided to Members. The learned Amicus Curiae contended that the result of the amendment is that Members of tribunals working in Delhi will get Rs. 60,000/- as HRA. The second proviso to Section 184(1), read with the third proviso, is an affront to the judgment of this Court in MBA-III. By no stretch of imagination can it be said that the said provisos are a result of curative legislation. The direction issued by this Court in MBA-III for payment of HRA was to ensure that decent accommodation is provided to Tribunal Members. Such direction was issued to uphold independence of the judiciary and it cannot be subject matter of legislative response. A mandamus issued by this Court cannot be reversed by the legislature as it would amount to impermissible legislative override. Therefore, the second proviso, read with the third proviso, to Section 184(1) is declared as unconstitutional.

51. It has come to our notice that after the judgement in this Writ Petition had been reserved on 03.06.21, a notification was issued by the Ministry of Finance (Department of Revenue) on 30.06.21 amending the 2020 Rules. By Rule 6 of the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 (hereinafter referred to as the 2021 Amendment Rules), the following rule was substituted for Rule 15 of the 2020 Rules:

“15. House rent allowance.- With effect from the 1st January, 2021, the Chairman, Chairperson, President, Vice Chairman, Vice Chairperson or Vice President shall have option to avail of accommodation to be provided by the Central Government as per the rules for the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh fifty thousand rupees per month and the Presiding Offices and Members shall have option to avail of accommodation to be provided by the Central Government as per the rules for the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh twenty-five thousand rupees per month.”

52. According to the notification dated 30.06.2021, the 2021 Amendment Rules shall come into force on the date of their publication in the official gazette. However, it may be noted that the Explanatory Memorandum at the end of the notification states that Rule 6 of the 2021 Amendment Rules, amending Rule 15 of the 2020 Rules on HRA, shall be given retrospective operation with effect from 01.01.21, in order to give effect to the judgement of this Court in MBA-III. Though we have adjudicated the validity of the second and third provisos to Section 184(1) of the Finance Act, 2017, as amended by the Ordinance, we find that the amendment to Rule 15, made with retrospective effect from 01.01.21, is in conformity with the directions of this Court on the subject of HRA in MBA-III. In view thereof, no further direction is required to be given with respect to HRA.

53. Rule 4(2) of the 2020 Rules pertains to the procedure to be followed by the SCSC. According to the said Rule, the SCSC should recommend two or three names for appointment to each post. A direction was given in MBA-III to amend Rule 4(2) of the 2020

Rules to provide that the SCSC shall recommend one person for appointment in each post in place of a panel of two or three persons for appointment to each post. One more name could be recommended to be included in the waiting list. Relying upon the earlier judgments of this Court in MBA-I, MBA-II and Rojer Mathew (supra), the learned Amicus Curiae had submitted during the course of the hearing in MBA-III that the procedure for appointment to the Tribunal should be clearly outside executive control. The learned Attorney General submitted in MBA-III that the number of candidates to be recommended by SCSC can be restricted to two instead of three. To limit the discretion of the executive after the SCSC has recommended names of selected candidates, this Court in the interest of preserving independence of the judiciary, directed that Rule 4(2) should be read as empowering SCSC to recommend the name of only one person to each post.

54. The learned Attorney General asserted that this Court cannot direct the legislature to make law. He relied upon the judgment in Dr. Ashwani Kumar v. Union of India (2020) 13 SCC 585 wherein it was held that it is beyond the competence of this Court to direct legislature to make law. There is no quarrel with the said proposition. The learned Attorney General further asserted that the direction given by this Court in MBA-III relating to the number of candidates to be recommended for appointment to each post can only be taken to be a suggestion. The Court, as a wing of the State, by itself is a source of law. The law is what the Court says it is. To clarify the position relating to Article 141 vis-à-vis Article 142, it has been held by this Court in Ram Pravesh Singh v. State of Bihar (2006) 8 SCC 381 that directions given under Article 142 is not law laid down by the Supreme Court under Article 141. Any order not preceded by any reason or consideration of any principle is an order under Article 142. Article 136 of the Constitution is a corrective jurisdiction that vests a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in Union of India v. Karnail Singh (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as under Article 141 of the Constitution. “Declaration of law” as contemplated in Article 141 of the Constitution is the speech express or necessarily implied by the highest Court of the land. The law declared by the Supreme Court is binding on all courts within the territory of India under Article 141, whereas, Article 142 empowers the Supreme Court to issue directions to do complete justice. Under Article 142, the Court can go to the extent of relaxing the application of law to the parties or exempting altogether the parties from the rigours of the law in view of the peculiar facts and circumstances of the case. Sufficient reasons were given in MBA-III to hold that executive influence should be avoided in matters of appointments to tribunals – therefore, the direction that only one person shall be recommended to each post. The decision of this Court in that regard is law laid down under Article 141 of the Constitution. The only way the legislature could nullify the said decision of this Court is by curing the defect in Rule 4(2). There is no such attempt made except to repeat the provision of Rule 4(2) of the 2020 Rules in the Ordinance amending the Finance Act, 2017. Ergo, Section 184(7) is unsustainable in law as it is an attempt to override the law laid down by this Court. Repeating the contents of Rule 4(2) of the 2020 Rules by placing them in Section 184(7) is an indirect method of intruding into judicial sphere which is proscribed.

55. The second part of Section 184(7) provides that the Government shall take a decision

regarding the recommendations made by the SCSC preferably within a period of three months. This is in response to the direction given by this Court in MBA-III that the Government shall make appointments to tribunals within three months from the completion of the selection and recommendation by the SCSC. Such direction was necessitated in view of the lethargy shown by the Union of India in making appointments and filling up the posts of Chairpersons and Members of tribunals which have been long vacant. The tribunals which are constituted as an alternative mechanism for speedy resolution of disputes have become non-functional due to the large number of posts which are kept unfilled for a long period of time. Tribunals have become ineffective vehicles of administration of justice, resulting in complete denial of access to justice to the litigant public. The conditions of service for appointment to the posts of Chairpersons and Members have been mired in controversy for the past several years, thereby, adversely affecting the basic functioning of tribunals. This Court is aghast to note that some tribunals are on the verge of closure due to the absence of Members. The direction given by this Court for expediting the process of appointment was in the larger interest of administration of justice and to uphold the rule of law. Section 184(7) as amended by the Ordinance permitting the Government to take a decision preferably within three months from the date of recommendation of the SCSC is invalid and unconstitutional, as this amended provision simply seeks to negate the directions of this Court.

56. The tenure of the Chairperson and Member of a tribunal is fixed at four years by Section 184(11), notwithstanding anything contained in any judgment, order or decree of any court. It is relevant to mention that sub-section (11) of Section 184 has been given retrospective effect from 26.05.2017. Rule 9 of 2020 Rules had specified the term of appointment of the Chairperson or Member of the Tribunal as four years. The learned Amicus Curiae while making his submissions in MBA-III had insisted that the Chairperson and Members of a tribunal should have a minimum term of five years by placing reliance on the judgment of this Court in S.P. Sampath (supra), MBA-I and Rojer Mathew (supra). The stand taken by him was that a short tenure would be a disincentive for competent persons to seek appointment as Members of tribunals. The learned Attorney General submitted that the term of four years is subject to reappointment. He contended that advocates who are appointed at an early age can get more than one extension and continue till they reach the age of superannuation. After perusing the law laid down by this Court in MBA-I and Rojer Mathew (supra) which held that a short stint is anti-merit, we directed the modification of tenure in Rules 9(1) and 9(2) as five years in respect of Chairpersons and Members of tribunals in MBA-III. This Court declared in para 53(iv) that the Chairperson, Vice-Chairperson and the Members of the tribunals shall hold office for a term of five years and shall be eligible for reappointment. The insertion of Section 184(11) prescribing a term of four years for the Chairpersons and Members of tribunals by giving retrospective effect to the provision from 26.05.2017 is clearly an attempt to override the declaration of law by this Court under Article 141 in MBA-III. Therefore, clauses (i) and (ii) of Section 184(11) are declared as void and unconstitutional.

57. The proviso to Section 184(11) refers to appointments that were made to the posts of Chairperson or Members between 26.05.2017 and the notified date, i.e., 04.04.2021. The proviso lays down that if the tenure of office or age of retirement specified in the order of

appointment issued by the Government is greater than what is specified in Section 184(11), the term of office or the age of retirement of the Chairperson or Members shall be as specified in the order of appointment subject to a maximum term of office of five years. In other words, the term of office of Chairperson and Members of tribunals who were appointed between 26.05.2017 and 04.04.2021 shall be five years even though the order of appointment issued by the Government has a higher term of office or age of retirement which may involve the term of office being more than 5 years in practice. It is necessary at this stage to deal with the validity of retrospective effect given to sub-section (11) of Section 184. The learned Amicus Curiae canvassed a submission that Sections 184(1) to (10) are prospective in operation and Section 184(11) is given retrospective effect from 26.05.2017, thereby leading to an anomalous situation. He submitted that sub-section (11) is made with the object of reversing the interim orders passed by this Court in Kudrat Sandhu v. Union of India (supra). He stated that the terms and conditions of appointments to be made to the Tribunals/Appellate Tribunals shall be in terms of the respective statutes in force, before the enactment of the Finance Bill, 2017, according to para 224 of Rojer Mathew (supra). Mr. Balbir Singh, learned Additional Solicitor General, submitted that retrospectivity given to sub-section (11) of Section 184 is a permissible legislative override of the judgment of this Court in MBA-III. The 2020 Rules were held to be prospective in MBA-III on two grounds – a) it was clear from the Notification dated 12.02.2020 that there was no intention on the part of the Government of India to make the 2020 Rules retrospective; b) subordinate legislation cannot be given prospective effect unless the parent statute specifically provided the same. It is understood that while inserting subsection (11) in Section 184 in the Finance Act, 2017 and giving it retrospective effect from 26.05.2017, the Ordinance has attempted to cure the defect as was pointed out by this Court in terms of retrospective application while considering the 2020 Rules. However, the implications are not relevant for clauses (i) and (ii) of Section 184(11) which are declared as void and unconstitutional for the reasons mentioned above.

58. Insofar as the proviso to Section 184(11) is concerned, the Ordinance sets the maximum tenure at five years even with respect to the appointment orders passed between 26.05.2017 and 04.04.2021 provide for a higher tenure. In the process, interim directions given by this Court in Kudrat Sandhu (supra) are also nullified. It would be relevant to refer to the directions issued by this Court in Kudrat Sandhu (supra) on 09.02.2018. After taking the consent of the learned Attorney General and making modifications incorporating his suggestions, this Court held that all selections to the post of Chairperson/Chairman, Judicial/Administrative Members shall be for a period as provided in the Act and the Rules in respect of all tribunals. On 16.07.2018, this Court directed that persons selected as Members of ITAT can continue till the age of 62 years and persons who were holding the post of President till 65 years. By an order dated 21.08.2018, this Court clarified that a person selected as Member, CESTAT shall continue till the age of 62 years while a person holding the post of President can continue till the age of 65 years. Though, there is nothing wrong with the proviso to Section 184(11) being given retrospective effect, the appointments made pursuant to the interim directions passed by this Court cannot be interfered with. This Court in Virender Singh Hooda (supra) upheld the retrospectivity of the legislation which had been challenged but the appointment of the petitioners therein pursuant to a direction of the Court were saved. It was held that the law does not permit

the legislature to take back what has been granted in the implementation of the Court's decision and such a course is impermissible. Similarly, in S.R. Bhagwat (supra), it was declared that a mandamus against the respondent-State giving financial benefits to the petitioners therein cannot be nullified by a legislation. It is also relevant to point out that even interim orders passed by this Court cannot be overruled by a legislative act, as discussed above. While making it clear that the appointments that are made to the CESTAT on the basis of interim orders passed by this Court shall be governed by the relevant statute and the rules framed thereunder, as they existed prior to the Finance Act, 2017, we uphold the retrospectivity given to the proviso to Section 184(11). To clarify further, all appointments after 04.04.2021 shall be governed by the Ordinance, as modified by the directions contained herein.

59. To conclude, the first proviso and the second proviso, read with the third proviso, to Section 184 overriding the judgment of this Court in MBA-III in respect of fixing 50 years as minimum age for appointment and payment of HRA, Section 184(7) relating to recommendation of two names for each post by the SCSC and further, requiring the decision to be taken by the Government preferably within three months are declared to be unconstitutional. Section 184(11) prescribing tenure of four years is contrary to the principles of separation of powers, independence of judiciary, rule of law and Article 14 of the Constitution of India. Though, we have upheld the proviso to Section 184(11), the appointments made to the CESTAT pursuant to the interim orders passed by this Court shall be governed by the relevant statute and the rules framed thereunder that existed prior to 26.05.2017. We have already taken notice of the notification dated 30.06.21 by way of which Rule 15 of the 2020 Rules dealing with HRA has been amended in conformity with our directions in MBA-III.

Peroration

60. The Petitioner continues its relentless struggle in its endeavour to make tribunals effective avenues of administration of justice. The endeavour of the Petitioner is to extricate the tribunals from the clutches of the executive in the interest of independence of judiciary. Security of tenure, adequate remuneration and other conditions of service are necessary to ensure that Members of tribunals would feel secure during their tenure. The judgment in MBA-III was passed after a detailed dialogue with the learned Attorney General. Existence of large number of vacancies of Members and Chairpersons and the inordinate delay caused in filling them up has resulted in emasculation of the tribunals. The main reason for tribunalisation, which is to provide speedy justice, is not achieved as tribunals are wilting under the unbearable weight of the exploding docket. Undoubtedly, the legislature is free to exercise its power to make laws and the executive is the best judge to decide policy matters. However, it is high time that a serious effort is made by all concerned to ensure that all the vacancies in the tribunals are filled up without delay. Access to justice and confidence of the litigant public in impartial justice being administered by tribunals need to be restored.

61. The Writ Petition is disposed of accordingly.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 502 OF 2021

Madras Bar Association.....Appellant(s)

v.

Union of India & Anr.....Respondent(s)

JUDGMENT

Hemant Gupta, J.:— I have gone through the detailed judgment authored by Justice L. Nageswara Rao as also separate but concurring judgment of Justice Ravindra Bhat, but I am unable to persuade myself to agree with the views expressed therein except to the limited extent that part of Section 187(7) of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 that the Search and Selection Committee shall recommend two names for a post and that the tenure of members including Chairperson etc. shall be four years in terms of Clauses (i) and (ii) of Section 184(11) of the Ordinance is illegal since the issues of constitution of panel and tenure have already been decided in MBA-III and that without removing such defect, the Ordinance could not be enacted.

63. Before I advert to the grounds of challenge, some of well-established and settled principles of the applicability of the principles of interpretation need to be recapitulated.

(i) The power of Legislature is to enact law and the power of Judiciary of that of judicial review of the statutory enactments.

64. The three organs of the State i.e., Legislature, Judiciary and Executive have separate and distinct roles and functions as provided in the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of others. By segregating the powers and functions of the three institutions, the Constitution ensures such a structure where the institutions function as per their own institutional strength. Secondly, it also creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by another branch (2020) 13 SCC 585 (Para 10).

65. The Constitution does not permit the courts to direct, advise or sermonize other organs of the State in the spheres reserved for them, provided the legislature or executive does not transgress its constitutional limits or statutory conditions. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is the essence of the power and function of judicial review that strengthens and promotes the rule of law.

66. It is also to be noted that the application of law by the Judges is not synonymous with

the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject-matter of interpretation or challenge before the courts.

67. This Court has observed that if a law is enacted by the Parliament or Legislature, even if it is assumably contrary to the directions or guidelines issued by the Court, it cannot be struck down by reason of such directions/guidelines issued by the Court; it can be struck down only if it violates the fundamental rights or the right to equality under Article 14 of the Constitution.

68. A seven Judge Bench of this Court (2002) 4 SCC 578 held that the primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. The Court while interpreting Articles 32, 21, 141 and 142 of the Constitution held that prescribing periods at which criminal trial would terminate resulting in acquittal or discharge of the accused or making such directions applicable to all cases in present or in future would amount to judicial law making and cannot be done by judicial directives. The Courts can declare law, interpret law, remove obvious lacunae and fill up the gaps but they cannot entrench upon in the field of legislation. The bars of limitation were deleted by this Court on two grounds, first, it amounts to judicial legislation which was not permissible and secondly, it runs counter to the doctrine of binding precedents.

69. The Constitution Bench of this Court (1982) 1 SCC 271 (Para 51) held that a writ of mandamus cannot be issued to bring Section 3 of the 44 Constitutional Amendment Act in force. It was held that the Parliament having left to the unfettered judgment of the Central Government, the question as regards the time for bringing the provisions of the 44 Amendment into force, it was not for the court to compel the Government to do what according to the mandate of the Parliament lies in its discretion to do so when it considered it opportune to do it. Since the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms, it makes it difficult for the Courts to substitute their own judgment for that of Government on the question whether Section 3 of the 44 Amendment should be brought into force.

70. This Court (2017) 7 SCC 221 (Para 36) held that the Court cannot direct the legislature to enact a particular law when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact the law which it has been empowered to do under the delegated legislative authority.

71. In another Constitution Bench judgment of this Court (2018) 7 SCC 1 (Para 42), it was held that the duty of judicial review bestowed upon the judiciary is not unfettered and it comes within the ambit of judicial restraint. The Parliament and Legislative Assemblies exercise sovereign power to enact law and no outside power or authority can issue a direction to enact a particular kind of legislation.

72. In a separate but concurring judgment in Kalpana Mehta authored by D.Y. Chandrachud, J., the Court held as under:

“255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.”

73. The lack of binding nature of the guidelines on the legislature is also evident from the fact that even though directions that are mandatory in nature may be issued within the ambit of Article 142 of the Constitution, but the same cannot be enforced against the legislature as the legislators have absolute and unfettered freedom in terms of Article 194(2) in respect of State Legislatures, which is pari materia with Article 105(2) relating to Parliament. The seven Judges Bench of this Court AIR 1965 SC 745 in the celebrated case of controversy between the Uttar Pradesh Assembly and the High Court held as under:

“32. Having conferred freedom of speech on the legislators, clause (2) emphasises the fact that the said freedom is intended to be absolute and unfettered. Similar freedom is guaranteed to the legislators in respect of the votes they may give in the legislature or any committee thereof. In other words, even if a legislator exercises his right of freedom of speech in violation, say, of Article 211, he would not be liable for any action in any court. Similarly, if the legislator by his speech or vote, is alleged to have violated any of the fundamental rights guaranteed by Part III of the Constitution in the Legislative Assembly, he would not be answerable for the said contravention in any court. If the impugned speech amounts to libel or becomes actionable or indictable under any other provision of the law, immunity has been conferred on him from any action in any court by this clause. He may

be answerable to the House for such a speech and the Speaker may take appropriate action against him in respect of it; but that is another matter. It is plain that the Constitution-makers attached so much importance to the necessity of absolute freedom in debates within the legislative chambers that they thought it necessary to confer complete immunity on the legislators from any action in any court in respect of their speeches in the legislative chambers in the wide terms prescribed by clause (2). Thus, clause (1) confers freedom of speech on the legislators within the legislative chamber and clause (2) makes it plain that the freedom is literally absolute and unfettered.

40. Our legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and can be exercised within the legislative fields allotted to their jurisdiction by the three Lists under the Seventh Schedule; but beyond the Lists, the legislatures cannot travel. They can no doubt exercise their plenary legislative authority and discharge their legislative functions by virtue of the powers conferred on them by the relevant provisions of the Constitution; but the basis of the power is the Constitution itself. Besides, the legislative supremacy of our legislatures including the Parliament is normally controlled by the provisions contained in Part III of the Constitution. If the legislatures step beyond the legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by courts in India. Therefore, it is necessary to remember that though our legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."

74. A conspectus of the above judgments, inter alia, among many others, is that the judiciary in exercise of power of judicial review can strike down any legislation which violates fundamental rights or if it is beyond the legislative competence but the courts cannot direct the legislature to frame or enact a law and in a particular manner. The law declared by the Supreme Court is binding on all Courts in India in terms of Article 141 of the Constitution. The directions issued under Article 142 of the Constitution, are binding on every Court in terms of Article 141 of the Constitution. The legislature cannot be said to be Court within the meaning of Article 141 of the Constitution by any stretch of imagination. Article 144 of the Constitution mandates, civil and judicial authorities in India shall act in aid of the Supreme Court meaning thereby executive and judicial authorities shall act in aid of the Supreme Court. The legislature is neither civil or judicial authority who is mandated by the Constitution to act in the aid of Court. The legislature is supreme so as to enact a law falling within its legislative competence. The directions of the court cannot compel the legislature to frame law in that particular manner only. The legislature while enacting laws can legislate in a manner which is not in accordance with the directions issued by the Court to the legislature, even if the Court has specially chosen to do so. The directions of this Court stop outside the four walls of legislature. The judiciary will step in only after a law is enacted to test the legality of a statue on the known principles of judicial review. The Judiciary cannot and should not usurp the powers vested with legislature. The Judiciary cannot legislate in the scheme of the constitution as propounded by many judgments including larger Bench Judgments, which are binding on the smaller strength benches. The directions of this Court in MBA-III are encroaching upon the field reserved for legislature.

(ii) Whether a judgment has to be read in the context in which it was given and cannot be read as a statute, inter alia, in view of the principles that the Court while interpreting a provision cannot generally add word to a statute in view of doctrine of Casus Omissus.

75. A Constitution Bench (2002) 3 SCC 533 (Para 9) of this Court has held that Courts should not place reliance on decisions without discussing as to how the factual situation of the matter fits in with the factual situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. This Court further held as under:

"12. The rival pleas regarding rewriting of statute and casus omissus need careful consideration. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage [218 FR 547].) The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama [(1990) 1 SCC 277 : AIR 1990 SC 981].

xxxxxx

14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. v. P.N.B Capital Services Ltd. . [(2000) 5 SCC 515]) The legislative casus omissus cannot be supplied by judicial interpretative process……"

76. This Court (2006) 1 SCC 275 (Para 12) held that according to the well-settled theory of precedents, every decision contains three basic postulates : (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein, nor what logically flows from the various observations made in the judgment. The said view has been relied upon by the Constitution Bench of this Court Special Reference No. 1 of 2012.

77. This Court (2004) 3 SCC 75 (Para 15) also held that the observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. The observations must be read in the context in which they appear to have been stated.

78. This Court (2008) 3 SCC 574 (Para 9) has observed that judgments are not to be

construed as statutes. The words or phrases in judgments are not to be interpreted like provisions of a statute. The words in a judgment should be read and understood contextually and not intended to be taken literally. Such interpretation has been followed by a two Judge Bench of this Court (2013) 15 SCC 414 (Para 32) wherein it was held that the ratio of any decision must be understood in the background of the facts of that case.

79. In another recent judgment (2018) 8 SCC 396, it was held that the ratio of a judgment is what it decides and not what logically follows therefrom. The Court held as under:

“31. It is trite that ratio of a judgment is what it decides and not what logically follows therefrom. The observations in the Three Judges cases [Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441], [S.P. Gupta v. Union of India, 1981 Supp SCC 87], [Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739] are to be read in the context in which they are rendered. Once that is kept in mind, we arrive at a conclusion that the ratio of those judgments cannot be extended to read the expression “Chief Justice”, wherever it occurs, to mean the “Collegium” of the senior Judges.”

80. This Court (2000) 6 SCC 213 observed that the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are “complementary” to those powers which are specifically conferred on the Court by various statutes. The powers conferred on the Court by Article 142 are curative in nature, they cannot be construed as powers which authorize the Court to ignore the substantive rights of a litigant. This power cannot be used to “supplant” substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly. The Court held as under:

“19. …Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.”

81. Thus, the Court will not direct to the State or Union to enact any particular law, or amend/issue any notification for amendment of any statutory Rule or even to direct an Act to be enforced, when the legislature has conferred such power on the executive. The directions of this Court in MBA-III were issued in the peculiar facts to make the Tribunal functional at the earliest rather than mandating legislature to amend the law in a particular manner. The legislature has a right to enact law, which may not be necessarily in terms of the directions of this Court. Such law when enacted by Parliament or the State Legislature, even if contrary to the directions or guidelines issued by the Court, cannot be struck down for the said reason. The legislation can be struck down if the basis of the provision interpreted by the Court is not altered or if it violates the fundamental rights or the right to equality under Article 14 of the Constitution.

82. The questions of law raised in MBA-III were in respect of separation of powers and independence of judiciary in the matter of constitution of Search and Selection Committee;

appointment of persons without judicial experience as Judicial Members; failure to provide proper technical specialized expertise; failure to provide for adequate tenure of members; exclusion of advocates for being appointed as members of tribunals; continuing role of the parent department in Search and Selection Committee; the preliminary inquiry by the Central Government for removal of the members is invalid and the Executive's continuing administrative and financial control over the tribunals.

83. The directions of this Court which are at variance with the Ordinance are as follows:

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

(i) xxx xxx

(iii) Rule 4(2) of the 2020 Rules shall be amended to provide that the Search-cum-Selection Committee shall recommend the name of one person for appointment to each post instead of a panel of two or three persons for appointment to each post. Another name may be recommended to be included in the waiting list.

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

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

(vi) xxx xxx

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

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

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

(xii) xxx xxx

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

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

84. The arguments were concluded on 3 June 2021 but before we could finalize our views, the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 stands notified on 30 June 2021. The Search and Selection Committee as ordered by this Court in MBA-III, the Advocate being eligible for appointment in certain Tribunal and option to pay House Rent Allowance in terms of the directions of this Court in MBA-III stands incorporated in such Rules. The questions raised now have to be examined in the light of amended Rules.

85. The judgment authored by Justice L. Nageswara Rao has held as under:

"43. The permissibility of a legislative override in this country should be in accordance with the principles laid down by this Court in the aforementioned as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective. Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution. (Lohia Machines Ltd. v. Union of India ((1985) 2 SCC 1987).

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect pointed out should have been cured such that the basis of the judgment pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise (See : S.R. Bhagwat v. State of Mysore, ((1995) 6 SCC 16). Even interim directions cannot be reversed by a legislative veto (See : Cauvery Water Disputes Tribunal, 1993 Supp (1) SCC 96) and Medical Council of India v. State of Kerala, ((2019) 13 SCC 185).

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of Article

14 of the Constitution of India."

86. I have my reservation with respect to the aforementioned conclusions (c) and (d). In Cauvery Water Disputes Tribunal, the State of Karnataka promulgated Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 on 25.7.1991. In pursuance of the order passed by this Court in a writ petition, the Tribunal by way of an interim order directed the State of Karnataka to release water from its reservoirs to ensure 205 TMC is available in Tamil Nadu's Mettur reservoir in a year from June to May vide its order dated 25.6.1991. It is thereafter the Ordinance in dispute was promulgated. It is the said interim order which was sought to be nullified by enactment of the Ordinance, later substituted by an Act by the State of Karnataka. This Court held as under:

"73. The Ordinance is unconstitutional because it affects the jurisdiction of the Tribunal appointed under the Central Act, viz., the Inter-State Water Disputes Act which legislation has been made under Article 262 of the Constitution. As has been pointed out above, while analysing the provisions of the Ordinance, its obvious purpose is to nullify the effect of the interim order passed by the Tribunal on June 25, 1991. The Ordinance makes no secret of the said fact and the written statement filed and the submissions made on behalf of the State of Karnataka show that since according to the State of Karnataka the Tribunal has no power to pass any interim order or grant any interim relief as it has done by the order of June 25, 1991, the order is without jurisdiction and, therefore, void ab initio. This being so, it is not a decision, according to Karnataka, within the meaning of Section 6 and not binding on it and in order to protect itself against the possible effects of the said order, the Ordinance has been issued. The State of Karnataka has thus arrogated to itself the power to decide unilaterally whether the Tribunal has jurisdiction to pass the interim order or not and whether the order is binding on it or not. Secondly, the State has also presumed that till a final order is passed by the Tribunal, the State has the power to appropriate the waters of the river Cauvery to itself unmindful of and unconcerned with the consequences of such action on the lower riparian States……. To the extent that the Ordinance interferes with the decision of this Court and of the Tribunal appointed under the Central legislation, it is clearly unconstitutional being not only in direct conflict with the provisions of Article 262 of the Constitution under which the said enactment is made but being also in conflict with the judicial power of the State."

(Emphasis Supplied)

87. The judgment of this Court in Medical Council of India was again to nullify the judgment of this Court where this Court had struck down the admission of 180 students in Kannur Medical College and Karuna Medical College in the State of Kerala. This Court held as under:

"23. What has been done by the impugned Ordinance by the State Government is clearly entrenching upon the field of judicial review and it was obviously misadventure resorted to. In our considered opinion, it was not at all permissible to the State Government to promulgate the Ordinance/legislate in the matter. Not only the judgment of the court is nullified and the arbitrariness committed in admissions was glaring, and the decision of the High Court of Kerala which was affirmed by this Court with respect to applications to be

entertained if they were online applications has been undone. It was clearly an act of nullifying judgment and is violative of judicial powers which vested in the judiciary. It was not open for the State Government to nullify the judgment/orders passed by the Kerala High Court or by this Court. It was not a case of removal of a defect in existing law. Various Constitution Bench decisions of this Court have settled the principles of law governing the field. It passes comprehension how the State Government has promulgated the Ordinance in question".

(Emphasis Supplied)

88. In S.R. Bhagwat, the petitioners were senior in the final seniority list but their juniors got promoted on the basis of higher ranking in the provisional seniority list which was earlier operative. The writ petitions were allowed wherein the petitioners were directed to be considered for promotion. In implementation of the said judgment, the State granted deemed dates of promotions but denied the consequential monetary benefits. The petitioners filed contempt petitions before the High Court. It was at that stage that an Ordinance was promulgated whereby payment of actual financial benefits was sought to be taken away. The said judgment is clearly not applicable to the facts of present case as the defect was not even attempted to be cured. The legislative action was to deny financial benefits arising out of a judgment, which had attained finality. In the present case, I am of the opinion that except two aspects that are contained in Rules 4(2) and 9(2) of the 2020 Rules, rest of directions were dehors the legality or illegality of the Rules with an idea of making Tribunals being made functional at the earliest.

89. Therefore, three judgments referred hereinabove have to be read in the context of the facts and the issues raised therein. In fact, none of the judgments was to the effect that whatever are the directions of this Court to enact law, it is binding on the legislature. The three judgments arise out of facts, wherein, the defect was not even attempted to be cured but simpliciter, the judgment was sought to be nullified.

90. In respect of conclusion (d), though transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of Article 14 of the Constitution of India, but it is equally true that judiciary in exercise of power of judicial review cannot direct legislature to frame any law in a particular manner.

Legality and validity of first proviso to Section 184(1) of the Ordinance

91. The said proviso to Section 184(1) of the Ordinance reads as below:

"Provided that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or Member"

92. I am unable to agree to the opinion that the first proviso to Section 184 prescribing a minimum age of fifty years is an attempt to circumvent the direction issued in MBA-III. The condition of eligibility for appointment as a Judge of a High Court was kept in view while considering the eligibility of advocates as members of Tribunals. However, the

Memorandum of Procedure for appointment as judges of the High Court finalized by this Court and forwarded to the Central Government in March, 2017 was that a person shall not be eligible to be considered for appointment as Judge of a High Court against Bar quota unless he has completed forty-five years of age on the date of recommendation by the High Court Collegium. Though, in terms of Article 217 of the Constitution, a candidate becomes eligible for appointment after 10 years of practice as an Advocate. Thus, an Advocate would be eligible for appointment as judge of the High Court around the age of 35 years. The Memorandum of Procedure adopted by the Collegium of this Court prescribed forty-five years of age as the minimum age. I find that eligibility to seek appointment is not solely dependent upon qualification of a candidate but experience and suitability, likely term which a candidate may have are necessary considerations. The relevant part from the memorandum of the collegium is reproduced as under:

“17. A person shall not be eligible to be considered for appointment as Judge of a High Court against Bar quota, unless he has completed 45 years of age on the date of recommendation by the High Court Collegium.”

93. In terms of the Constitution read with the Memorandum of Procedure adopted by this Court, an advocate would have maximum tenure of 17 years as a Judge of the High Court, may be another three years as Judge of this Court. On the other hand, an advocate appointed as member of a Tribunal can have a tenure of 17 years, even if 50 is the minimum age for appointment. The tenure of such member is up to the age of 67 years with the possibility of being appointed as the Chairperson. This is not to compare the status of a High Court Judge with that of a member of a Tribunal. The members would be appointed on the basis of recommendation of the high-powered Search and Selection Committee having judicial dominance. If a member is discharging his functions legally, there is no need to bear any apprehension about his not being re-appointed. The process of re-appointment is again with the High-Powered Search and Selection Committee with judicial dominance. A provision in the statute cannot be found to be untenable merely for the reason that there is a possibility of not being reappointed.

94. The advocates were not eligible for appointment under 2020 Rules. Therefore, there was no condition of age of eligibility of such candidates. It may be noted that though this Court discussed the age of the candidates eligible for appointment to be “around 45 years” in para 44, but there was no particular direction qua age.

95. The discussions in the judgment are not to be considered as directions. There is background in which the ultimate directions are issued. Since no directions were issued in respect of eligibility conditions particularly relating to age, thus, fixing of eligible age as fifty years cannot be treated to be in contradiction to the directions issued in MBA-III. Even if it is contravening to any such direction, the legislature is within its jurisdiction to determine the minimum eligibility age for the purpose of appointment.

96. Mr. R. Gandhi, the President of Madras Bar Association challenged the provisions of The Companies Act, 1956 as amended by Central Act 11 of 2003 when Part 1B and Part 1C were inserted constituting National Company Law Tribunal and the Appellate Tribunal

respectively before the Madras High Court. The High Court allowed the writ petition (2004) 2 CTC 561 on 30.3.2004. The High Court held that the power of reappointment was read to be a 'renewal', apart from rendering many provisions of the amending Act as illegal in as much as they were in breach of basic constitutional scheme of separation of powers and independence of the judicial function. The Madras High Court held as under:

"74. Unless the term of office is fixed as at least five years with a provision for renewal, except in cases of incapacity, misconduct and the like, and the period for which lien may be retained is fixed at not more than one year, the constitution of the Tribunal cannot be regarded as satisfying the essential requirements of an independent and impartial body exercising judicial functions of the State.

xxxxxx

123. In the light of foregoing discussions it is declared that until the provisions in parts 1B and 1C of the Companies Act introduced by the Companies (Amendment) Act, 2002, which have been found to be defective in as much as they are in breach of the basic constitutional scheme of separation of powers and independence of the judicial function, are duly amended, by removing the defects that have been pointed out, it would be unconstitutional to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High courts or the Company Law Board."

97. In an appeal against the said order, this Court in MBA-I noticed the contention of the Union as under:

"11. The Union Government has accepted the finding and agreed to amend Sections 10-FE and 10-FT of the Act to provide for a five-year term for the Chairman/President/Members. However, the Government proposes to retain the provision for reappointment instead of "renewal", as the reappointments would be considered by a Selection Committee which would be headed by the Chief Justice of India or his nominee. As the Government proposes to have minimum eligibility of 50 years for first appointment as a Member of the Tribunal, a Member will have to undergo the process of reappointment only once or twice."

98. The finding of the High Court that the President or the Chairman was entitled to renewal of term was not accepted. This Court held as under:

"120(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."

99. Subsequently, the Companies Act, 2013 was enacted, repealing the Companies Act,

1956. The said Act provided for establishment of National Company Law Tribunal and National Company Law Appellate Tribunal. The provisions of the new Companies Act, 2013 were upheld by this Court subject to certain modifications as provided in MBA-II. The provisions of the Act which were not challenged or interfered with are contained in Sections 413 and 414 of the Act. Sections 413 prescribes that a person who has not completed fifty years of age shall not be eligible to be appointed as a Member or Chairperson.

100. This Court in MBA-II held the provisions contained under Section 409(3)(a), (c) and Section 411(3) of the Companies Act, 2013 to be invalid. The appointments of technical members as in the Madras Bar judgment rendered in the year 2010 were to be scrupulously followed. This Court held as under:

“28. Having regard to the aforesaid clear and categorical dicta in 2010 judgment [(2010) 11 SCC 1], tinkering therewith would evidently have the potential of compromising with standards which the 2010 judgment [(2010) 11 SCC 1] sought to achieve, nay, so zealously sought to secure. Thus, we hold that Sections 409(3)(a) and (e) are invalid as these provisions suffer from same vice. Likewise, Section 411(3) as worded, providing for qualifications of Technical Members, is also held to be invalid. For appointment of Technical Members to NCLT, directions contained in sub-paras (ii), (iii), (iv), (v) of para 120 of the 2010 judgment [(2010) 11 SCC 1] will have to be scrupulously followed and these corrections are required to be made in Section 409(3) to set right the defects contained therein. We order accordingly, while disposing of Issue 2.”

101. In MBA-II, the age for appointment of members of the National Law Company Tribunal was fixed as fifty years. Same was not disputed by the present petitioner in the writ petition before the Madras High Court or before this Court. Therefore, the age of 50 years as the eligibility condition is not off the hat but is based upon previous legislation in respect of members of the National Company Law Tribunal. Thus, the fixation of fifty years of age as the eligibility condition cannot be said to be manifestly arbitrary or violative of any of the Fundamental Rights of any of the candidates which may render such condition of age as illegal. The argument is based on apprehension that it would be difficult for an advocate appointed after attaining the age of fifty years to resume legal practice after completion of one term, in case he is not reappointed. A person who is competent and good in his work will not find any difficulty to resume his practice but what would happen to his professional career if his term is not extended is a calculated risk which a candidate shall take at the time of seeking appointment. Such apprehensions as to what will happen in future cannot be a ground to strike down a condition of age in the statute. This Court is not possessed of the expertise to say that it will be difficult for an advocate to resume practice if he is not reappointed. I am unable to agree that the statutory provisions can be struck down on such grounds based on presumed apprehensions.

102. The apprehensions or misuse of a statutory provision is not a ground to declare the provisions of a statute as void. A five Judges Bench of this Court AIR 1962 SC 316 held as under:

“33. ...This Court has held in numerous rulings, to which it is unnecessary to refer, that the

possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:

“If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably”

and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [[1960] A.C. 490 at pp. 520-521]:

“It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute.”

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements.”

103. Similar view was reiterated by this Court in number of judgments (2007) 11 SCC 528, (2004) 9 SCC 580, (1990) 1 SCC 613. In another judgment (1988) 3 SCC 241, it was held as under:

“24. ... It is also necessary to reiterate that a mere possibility of abuse of a provision, does not, by itself, justify its invalidation. The validity of a provision must be tested with reference to its operation and efficiency in the generality of cases and not by the freaks or exceptions that its application might in some rare cases possibly produce. The affairs of government cannot be conducted on principles of distrust. If the selectors had acted mala fide or with oblique motives, there are administrative law remedies to secure reliefs against such abuse of powers. Abuse vitiates any power.”

(Emphasis supplied)

104. Therefore, I am of the opinion that in case of failing to secure reappointment, the candidate will not be able to resume practice is based upon apprehensions. Whether they are good or valid grounds to refuse reappointment can be subject matter of judicial review although I am of the opinion that the decision of the high-power Search and Selection Committee not to re-appoint a candidate may not warrant interference in exercise of judicial review.

Legality and validity of the Second & Third proviso to Section 184(1) of the Ordinance

105. The said proviso reads thus:

“Provided further that the allowances and benefits so payable shall be to the extent as are admissible to a Central Government officer holding the post carrying the same pay:

Provided also that where the Chairperson or Member takes a house on rent, he may be reimbursed a house rent subject to such limits and conditions as may be provided by rules.”

106. The second proviso is to the effect that allowances and benefits shall be to the extent as are admissible to a Central Government officer holding the post carrying the same pay. The third proviso to Section 184(1) is that where Chairperson or Members take a house on rent, he may be reimbursed a house rent subject to such limits and conditions as may be prescribed. In terms of third proviso, the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) (Amendment) Rules, 2021 have been published. As per the Rules now notified, the Chairman, Chairperson, President, Vice Chairman, Vice Chairperson or Vice President shall have option to avail of accommodation to be provided by the Central Government as per the rules for the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh fifty thousand rupees per month and the Members shall have option to avail of accommodation to be provided by the Central Government as per the rules for the time being in force or entitled to house rent allowance subject to a limit of Rs. one lakh twenty-five thousand rupees per month with effect from the 1st January, 2021. Therefore, the directions issued stands complied with.

107. As a matter of fact, there is a common grievance of the members of the Bar and the litigating parties other than from Delhi that there is a concentration of Tribunals in Delhi which deprives the advocates from other parts of the country to deal with the matters entrusted to the Tribunals. It is also expensive for the litigants to engage professional services in Delhi, which is out of capacity for a large section of the society. In fact, because of housing scarcity and expensive professional services, it will be open to the Government/legislature to shift the principal benches of the certain Tribunals outside Delhi so that concentration of Tribunals in Delhi is minimized which will in turn help the Bar to grow at different places, ensuring affordable administration of justice and resolution of the challenge of scarcity of housing in Delhi.

Section 184(7)

108. The direction of this Court in Para 53(ix) was that the Union shall make appointments to Tribunals within three months whereas the Ordinance has used the expression that the Central Government shall take a decision on the recommendations of the Committee “preferably within three months”. Both the directions in sub-para (ix) and in subsection (7) are only directory. It is well-settled that the use of expression ‘shall’ or ‘may’ is not determinative of the fact that whether the condition is mandatory or directory. Therefore, there is no reason to set aside the expression ‘preferably’ used in sub-section (7) of Section

184. Such directions were issued in terms of Article 142 of the Constitution which stop at the four walls of the Parliament. The language to be used falls within the legislative competence and do not violate any fundamental right nor can be said to be manifestly arbitrary.

Whether the Ordinance nullifies the judgment of this Court in MBA-III without removing the defect in the 2020 Rules?

109. The Petitioner herein has relied upon certain judicial pronouncements to contend that the effect of the Ordinance is to nullify the judgment of this Court in MBA-III without removing the defects in the 2020 Rules. They are produced and analyzed hereinbelow.

110. In a judgment (1969) 2 SCC 283 relied upon, the levy of the property tax was found to be not legal in view of the language of the Statute. The State legislature thus altered the basis of levy of property tax. Therefore, the said judgment is not appliable to the facts of the present case where the directions were issued dehors the legality of the 2020 Rules.

111. The reliance on another judgment of this Court (1978) 2 SCC 50 is not tenable wherein a settlement was arrived at regarding payment of bonus effective from April 1, 1973 to March 31, 1977 with four different associations of employees. A writ of Mandamus was issued by the Calcutta High Court. The Payment of Bonus (Amendment) Ordinance, 1975 was thereafter promulgated in September, 1975. The Payment of Bonus Act was not applicable to the Life Insurance Corporation by virtue of Section 32 of the said impugned Act. This Court found that the impugned Act did not set at naught the entire settlement relating to payment of annual cash bonus of Class III and Class IV employees and that too from April, 1 1975. Since the settlement had attained finality as the same was approved by the Board of Directors as well as by the Central Government, and that the Writ of Mandamus was issued by the Calcutta High Court to pay annual cash bonus to the employees, it was held that the judgment can be remedied by way of an appeal or review, but it cannot be disregarded or ignored and must be obeyed by Life Insurance Company. In S.S. Bola v. B.D. Sardana (1997) 8 SCC 522, this Court explained the Judgment in Madan Mohan Pathak. It was found that in as much as six Hon’ble Judges out of seven rested their decision on the ground that the impugned Act violates Article 31(2) of the Constitution and did not consider the enactment in question to be an act of usurpation of judicial power by the legislature. It was held as under:

“189……The majority judgment came to hold that the impugned Act is violative of Article 31 clause (2) as the effect of the Act was to transfer ownership debts due owing to Class III and Class IV employees in respect of annual cash bonus to the Life Insurance Corporation and there has been no provision for payment of any compensation for the compulsory acquisition of these debts It may be stated that the majority judgment did not consider the question as to whether the legislatures by enacting the Act have usurped the judicial power and have merely declared the judgment of a competent court of law to be invalid. Beg, CJ. in his concurring judgement in para 32 of the judgment, however, has observed that the real object of the Act was to set aside the result of the mandamus issued by the Calcutta High Court, though, it does not mention as such, and therefore, the learned Judge held that

Section 3 of the Act would be invalid for trenching upon the judicial power.

190. Three other learned Judges, namely, Y.V. Chandrachud, S. Murtaza Fazal Ali and P.N. Shinghal, JJ. agreed with the conclusion of Bhagwati, J. but preferred to rest their decision on the sole ground that the impugned Act violates the provisions of Article 31(2) of the Constitution and in fact they considered it unnecessary to express any opinion on the effect of the judgment of the Calcutta High Court in Writ Petition No. 371 of 1976. Thus out of seven learned Judges, six learned Judges rested their decision on the ground that the impugned Act violates Article 31(2) of the Constitution and did not consider the enactment in question to be an act of usurpation of judicial power by the legislature. The observation of Beg, C.J., in para 32 does not appear to be in consonance with the several authorities of this Court on the point to be discussed hereafter……."

112. In B.K. Pavitra v. Union of India (2019) 16 SCC 129, the judgment in Madan Mohan Pathak has been considered. It was held that the said case did not involve a situation where a law was held to be ultra vires and the basis of the declaration of invalidity of the law was sought to be cured. It was observed as under:

"83.2. Indian Aluminium Co. [Indian Aluminium Co. v. State of Kerala, (1996) 7 SCC 637], where it was held that : (SCC p. 660, para 49)

"49. In Madan Mohan Pathak v. Union of India [Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : 1978 SCC (L&S) 103] … From the observations made by Bhagwati, J. per majority, it is clear that this Court did not intend to lay down that Parliament, under no circumstance, has power to amend the law removing the vice pointed out by the court. Equally, the observation of Chief Justice Beg is to be understood in the context that as long as the effect of mandamus issued by the court is not legally and constitutionally made ineffective, the State is bound to obey the directions. Thus understood, it is unexceptionable. But it does not mean that the learned Chief Justice intended to lay down the law that mandamus issued by court cannot at all be made ineffective by a valid law made by the legislature, removing the defect pointed out by the court."

(emphasis supplied)

84. Madan Mohan Pathak [Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : 1978 SCC (L&S) 103] involved a situation where a parliamentary law was enacted to override a mandamus which was issued by the High Court for the payment of bonus under an industrial settlement. The case did not involve a situation where a law was held to be ultra vires and the basis of the declaration of invalidity of the law was sought to be cured."

113. Another judgment (2014) 12 SCC 696 which has been relied upon dealt with an inter-se water dispute between two states relating to the height of Mullaperiyar Dam. Kerala Irrigation and Water Conservation Act, 2003 '2003 Act' was enacted by Kerala legislature, which came into force on 18.09.2003. Such Act was neither referred to nor relied upon by the State of Kerala at the time of hearing by this Court on 27.2.2006. On 18.03.2006, in less than three weeks of the decision of this Court (2006) 3 SCC 643, the Kerala State legislature amended the 2003 Act by introducing Kerala Irrigation and Water Conservation

(Amendment) Act, 2006 '2006 (Amendment) Act', which was the subject matter of judgment in question. The said Act was challenged by the State of Tamil Nadu in an original suit before this Court. An argument was raised that the impugned legislation amounts to usurpation of judicial power inasmuch as Kerala State Legislature has arrogated to itself the role of a judicial body and has itself determined the questions regarding the dam safety and raising the water level when such questions fall exclusively within the province of the judiciary and have already been determined by this Court in its judgment dated 27.02.2006. This Court in an exhaustive judgment held as under:

"126. The decision of this Court on 27.02.2006 in the Mullaperiyar Environmental Protection Forum case was the result of judicial investigation, founded upon facts ascertained in the course of hearing. It was strictly a judicial question. The claim of the State of Kerala was that water level cannot be raised from its present level of 136 ft. On the other hand, Tamil Nadu sought direction for raising the water level to 142 ft. and, after strengthening, to its full level of 152 ft. The obstruction by Kerala to the water level in the Mullaperiyar dam being raised to 142 ft. on the ground of safety was found untenable, and, in its judgment, this Court so pronounced.

xxxxxx

154. Where a dispute between two States has already been adjudicated upon by this Court, which it is empowered to deal with, any unilateral law enacted by one of the parties that results in overturning the final judgment is bad not because it is affected by the principles of res judicata but because it infringes the doctrine of separation of powers and rule of law, as by such law, the legislature has clearly usurped the judicial power.

xxxxxx

164. In light of the above legal position, if the 2006 judgment is seen, it becomes apparent that after considering the contentions of the parties and examining the reports of Expert Committee, this Court posed the issue for determination about the safety of the dam to increase the water level to 142 ft. and came to a categorical finding that the dam was safe for raising the water level to 142 ft. and, accordingly, in the concluding paragraph the Court disposed of the writ petition and the connected matters by permitting the water level of Mullaperiyar dam being raised to 142 ft. and also permitted further strengthening of the dam as per the report of the Expert Committee appointed by the CWC. The review petition filed against the said decision was dismissed by this Court on 27.7.2006. The 2006 judgment having become final and binding, the issues decided in the said proceedings definitely operate as res judicata in the suit filed under Article 131 of the Constitution."

114. Ram Pravesh Singh is another case where the State law was under consideration. It was not a case where the legislature had intervened to enact a law contrary to the directions given by the High Court. Similarly, Karnail Singh was a case of interpretation of statute and not dealing with enactment by the legislature or Parliament consequent to the directions issued by this Court. The law declared by this Court is binding on all Courts within the territory of India under Article 141 of the Constitution whereas Article 142 of the

Constitution empowers this Court to issue directions to do complete justice. The interpretation of law is binding under Article 141 of the Constitution even if there is a direction under Article 142 but such direction is not all pervasive and binding on the legislature. Such is the consistent line of judgments by this Court ending with three Judge Bench judgment in Dr. Ashwani Kumar.

Proviso to Section 184(11)

115. The inserted proviso to Section 184(11) by the Ordinance deals with two situations. One is in respect of the candidates appointed from 26.5.2017 till the notified date that is 4.4.2021 in terms of sub-Section (11) of Section 184. Second is in respect of the candidates who have not been appointed falling within proviso to sub-Section (1) of Section 184, which provides that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or Member. There is no doubt that this is a prospective provision as no candidate who has not completed 50 years of age is eligible to seek appointment.

116. I do not find any merit in the argument raised by Mr. Krishnan Venugopal that a selected candidate has a right to seek appointment and that too within three months of the order of this Court. Firstly, a selected candidate has no right to seek appointment. A Constitution Bench of this Court (1991) 3 SCC 47 had held that the successful candidates do not acquire an indefeasible right to be appointed which cannot be legitimately denied. This Court held as under:

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in ……”

117. The fact that the legislation has intervened to prescribe a particular age which is at variance with the condition in the advertisement is a good reason not to appoint the candidates. The legality of Sections 174, 175 and 184 of the Finance Act, 2017 has been upheld in the matter of Rojer Mathew. Therefore, after such an amendment, appointments can be made only in terms of the Rules famed under Section 184 of the Finance Act. Now, some of the Rules stand substituted by the Ordinance. Therefore, candidates who have not been appointed will have to seek appointment only in terms of the substituted Section 184 of the Finance Act. The candidates who were selected cannot seek appointment on the basis of their old selection and being in merit.

118. Some of the Chairpersons and Members of the Tribunals were appointed between 26.5.2017 to 4.4.2021 in terms of the interim orders passed by this Court in Kudrat Sandhu. The argument raised is that such interim orders have been nullified though such orders were issued on the basis of concession of the learned Attorney General and that such orders are couched in the form of mandate, therefore such mandatory orders cannot be nullified.

119. The concession of the learned Attorney General at the time when interim orders were passed was in view of the prevalent situation to keep the Tribunals functional. The interim orders in Rojer Mathew have merged with the final orders wherein again, this Court directed the appointments to the Tribunals and terms of conditions of appointment shall be in terms of the respective statute before the enactment of the Finance Bill, 2017. Liberty was granted to the Union to seek modification of this order. Therefore, the interim order which permitted the appointments now stands subsumed in the Ordinance which has defined the tenure and the terms and conditions of appointment. The Ordinance is in fact in terms of the liberty granted to Union to seek modification. Mere fact that an application for modification is pending will not bar the legislature to enact a statute by way of an Ordinance. The appointments made after 26.5.2017 by virtue of Section 184(11) will be governed not by the parent statute but by the terms and conditions as enumerated in the Ordinance. The consent of the learned Attorney General will not act as an estoppel against the statute i.e. the Ordinance.

120. The interim orders which have been set aside by this Court such as in Cauvery Water Disputes Tribunal, or the Medical Council of India were the cases where the State Legislature had nullified interim orders simpliciter without even attempting to cure the defects.

121. The judgment in Virender Singh Hooda is quite different. The appellants before this Court were successful in an earlier round of litigation and were thus appointed. It was thereafter that the Act in question was enacted with retrospective effect. The appellants were falling in the first category out of three category of candidates such as (i) those who had been appointed in implementation of decision in Hooda and Sandeep Singh's cases before passing of the impugned Act (ii) those, though not so appointed, who have judgments of High Court passed in their favour relying upon Hooda and Sandeep Singh's cases, and claim a right to appointment but would be deprived of it if the validity of the Act is upheld and on that basis the judgments of the High Court upturned and (iii) those, who would be covered by law laid down in Hooda's case on interpretation and applicability of the aforenoted two circulars. This Court held as under:

"47. There is a distinction between encroachment on the judicial power and nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the legislature but the latter is within its permissible limits (M/s. Tirath Ram Rajindra Nath, Lucknow v. State of U.P., [(1973) 3 SCC 585]). The reason for this lies in the concept of separation of powers adopted by our constitutional scheme. The adjudication of the rights of the parties according to law is a judicial function. The legislature has to lay down the law prescribing norms of conduct which will govern parties

and transactions and to require the court to give effect to that law [I.N. Saksena's case (supra)].

48. The legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers. (Re : Cauvery Water Disputes Tribunal [1993 Supp (1) SCC 96 (II)]).

xxxxxx

52. It is not possible to accept the contention that vested rights cannot be taken away by legislature by way of retrospective legislation. Taking away of such right would, however, be impermissible if violative of Articles 14, 16 and any other constitutional provision. In State of Tamil Nadu v. Aroorran Sugars Ltd., [(1997) 1 SCC 326], this Court held that whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case, it cannot be urged that the exercise by the legislature while introducing a new provision or deleting an existing provision with retrospective effect per se shall be violative of Article 14 of the Constitution. If that stand is accepted, then the necessary corollary shall be that legislature had no power to legislate retrospectively, because in that event a vested right is affected."

122. It is thereafter that this Court protected the appointment of candidates falling in the first category i.e., those who were appointed prior to the commencement of the Act in question. It was held as under:

"68. Despite the aforesaid conclusion, the Act [proviso to Section 4(3)] to the extent it takes away the appointments already made, some of the petitioners had been appointed much before enforcement of the Act (ten in number as noticed hereinbefore) in implementation of this Court's decision, would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. The law does not permit the legislature of take back what has been granted in implementation of the court's decision. Such a course is impermissible".

123. The candidates in question were appointed during the pendency of lis. These appointments were not concluded appointments but were subject to the provisions of the parent Act which has been amended by the Finance Act, 2017. They cannot claim any right to continue on the post till the age of retirement under the parent Act in terms of proviso to sub-section (11) of Section 184 of the Finance Act as substituted. The provisions of the parent Act cease to be in existence with the order passed in Rojer Mathew and subsequent legislative enactments introduced by way of the Ordinance.

124. Thus, I find that the first, second and third proviso to Section 184(1), the use of expression 'preferably' in Section 184(7) and the proviso to Section 184(11) are legal and valid as such provisions fall within the exclusive domain of the legislature. The legislature

has not nullified the judgment of this Court on the above aspects as there were no such corresponding provisions in the 2020 Rules, which were part of judicial review process.

125. It is open to the legislature to fix tenure of the Chairperson and the members other than four years as the tenure of four years was found to be not tenable in MBA-III. Section 184(7) which contemplates that Select Committee should recommend a panel of two names is contrary to the directions of this Court in MBA-III. Thus, Section 184(11)(i)(ii) and Section 184(7) is declared to be void as the Ordinance has reiterated the provisions which were in 2020 Rules. The challenge to other provisions is not legally sustainable. The writ petition is thus dismissed except to the extent mentioned above.

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL/APPELLATE JURISDICTION)

W.P.(C). 502/2021

Madras Bar Association.....Petitioner(s)

v.

Union of India and Anr.....Respondent(s)

JUDGMENT

S. Ravindra Bhat, J.:— One may well ask why there is need for a concurrence when the judgment with which this author agrees, both as to its reasoning as well as its conclusions, is as fully and well-reasoned as L. Nageswara Rao, J's judgment is. The reason lies in the importance of the themes which have been deliberated-independence of the judiciary and separation of powers, both of which are timeless in their resonance and relevance. This brief prefatory aside at the beginning, outlines the approach this opinion strives to take, while wholeheartedly supporting the conclusions recorded by Rao, J. With great respect to Hemant Gupta, J, I cannot persuade myself to agree with him, that as regards prescription of minimum age (for appointment to tribunals, i.e. 50 years) or with respect to conditions of service such as payment of house rent allowance, this court ought to respect legislative wisdom, and that directions issued in past judgments cannot bind Parliament, as they fell outside the judicial sphere.

127. Independence of the judiciary is one of the foundational pillars of every democracy governed by the rule of law, where the constitution reigns supreme. Some constitutions may guarantee this in emphatic terms, whereas in others, there may be no single provision manifested in the constitution, but rather, the idea may emerge as a compelling inference – through the kind of assurances articulated by express provisions (tenure, eligibility, age of superannuation, conditions where removal is possible only through Parliamentary or legislative process, manner of appointment etc). The Attorney General's assertion that since there is no single provision which expressly articulates independence of the judiciary, and that being the case, the court cannot direct the length of tenure or other eligibility

conditions which are in the domain of the executive, (which, as a co-equal organ of governance) is exclusively entitled to prescribe criteria for selection of tribunal members, therefore, needs careful scrutiny.

128. The original constitution did not expressly – through any entry in the three legislative lists, deal with tribunals. This field of legislation, creating courts, was left to Parliament as well as the states. The absence of an entry pertaining to tribunals meant that the creation of administrative and quasi-judicial tribunals, or offices and agencies conferred with quasi-judicial functions – was recognised as part of legislative activity, whereby laws could create appropriate bodies for their enforcement in exercise of "incidental" and "ancillary powers" adjunct to the concerned legislative head. As has been elaborated by L. Nageswara Rao, J., the Constitution (Forty Second) Amendment Act, 1976 introduced Articles 323A and 323B which paved the way for the creation of tribunals as substitutes for courts. Many tribunals which were created by legislation introduced in the 1990s and the decade beginning in 2000 do not conform to the heads or subject matters enumerated in either of those Articles. Yet, they were created under the relevant fields of legislation combined with Entry 11A of the Concurrent List (List III, Seventh Schedule to the Constitution of India).

129. The Union's position that when a legislation or legislative instrument (such as an ordinance in this case) is questioned, its validity can be scrutinized only by considering its impact on some express provision of the constitution, and not on any concept or notion such as separation of powers and judicial independence, requires examination in the first instance.

130. There can be no doubt that any enactment or subordinate legislation can be questioned as offending a constitutional provision. However, does this articulation preclude a challenge based on principles which are evident in the constitution, but yet, are not clearly spelt out in its plain text through any express provision? In the Constitution Bench judgment of this court in Madras Bar Association v. Union of India (2014) 10 SCC 1 ("MBA-I") the issue was whether High Courts could be divested of their statutory appellate jurisdiction in tax disputes, which they had been exercising for over 80 years, to confer this jurisdiction on a new tribunal whose membership was to be different from judges of High Courts. This court then examined the applicability of the basic structure doctrine, of which independence of the judiciary and separation of powers have been held to be a part, and observed as follows:

"113.2. We have given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the petitioners insofar as the first perspective is concerned. We find substance in the submission advanced at the hands of the learned counsel for the petitioners, but not exactly in the format suggested by the learned counsel. A closer examination of the judgments relied upon lead us to the conclusion, that in every new Constitution, which makes separate provisions for the legislature, the executive and the judiciary, it is taken as acknowledged/conceded that the basic principle of "separation of powers" would apply. And that, the three wings of governance would operate in their assigned domain/province. 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] A.C. 195 : [1976] 2 WLR 366 : (1976) 1 All ER 353 (PC)]. In Hinds case [Hinds v. R., [1977] A.C. 195 : [1976] 2 WLR 366 : (1976) 1 All ER 353 (PC)], 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 [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577], as also, in Union of India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1] 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. In recording our conclusions on the submission advanced as the first perspective, we may only state that our conclusion is exactly the same as was drawn by us while examining the petitioners’ previous submission, namely, that it is not possible for us to accept that under recognised constitutional conventions, judicial power vested in superior courts cannot be transferred to coordinate courts/tribunals. The answer is, that such transfer is permissible. But whenever there is such transfer, all conventions/customs/practices of the court sought to be replaced have to be incorporated in the court/tribunal created. The newly created court/tribunal would have to be established in consonance with the salient characteristics and standards of the court which is sought to be substituted.”

131. Likewise, in Dr. D.C. Wadhwa v. State of Bihar, (1987) 1 SCR 198 a constitution bench

of this court held that the power to promulgate an ordinance does not enable the executive to re-promulgate it several times, without seeking its enactment by the appropriate legislature. There is no provision in the constitution, which precludes the executive from re-promulgating ordinances; yet this court ruled that to be the case, and observed as follows:

“The Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in Session, take over the law-making function of the Legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not the laws made by the Legislature as provided in the Constitution but by laws made by the Executive. The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, repromulgate the Ordinance as soon as the Legislature is prorogued. Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular Session or the time at the disposal of the Legislature in a particular Session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack. But otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation.”

132. The above decision was endorsed in Krishna Kumar Singh v. State of Bihar (2017) 3 SCC 1 which also held that re-promulgation “represents an effort to overreach the legislative body which is a primary source of law-making authority in a parliamentary democracy.” The court pointed out that:

“The danger of repromulgation lies in the threat which it poses to the sovereignty of Parliament and the State Legislatures which have been constituted as primary law-givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of Ordinance-making from transparent and accountable governance through law-making.”

133. In a decision of the Privy Council (which has been cited and approved by decisions of this court, including in Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 , 1973 Supp SCR 1) viz, Liyanage v. The Queen [1967] 1 A.C. 259 the compulsive, though inarticulate premise of these principles was elaborated in the following manner:

“What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.”

134. In L. Chandra Kumar v. Union of India (1997) 3 SCC 261 this court invalidated Section

28 of the Administrative Tribunals Act on the ground that it excluded jurisdiction under Articles 226 and 227, and was thus in conflict with the basic structure of the constitution, as judicial review was part of the basic structure:

“100. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution.”

135. In Ismail Faruqui v. Union of India (1994) 6 SCC 360 provisions of a Central enactment 1993 (No. 33 of 1993) [Section 4(3)] which abated all pending legal proceedings was held to be unconstitutional because : it amounted to “an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid.” It is therefore, too late in the day to contend that infringement by a statute, of the concept of independence of the judiciary – a basic or essential feature of the constitution, which is manifested in its diverse provisions, cannot be attacked, as it is not evident in a specific Article of the Constitution.

136. The challenges to executive or legislative measures based on violation of the twin concepts of separation of powers and independence of the judiciary have to be seen in terms of their impacts, not at one point in time, but cumulatively, over a time continuum. This idea was expressed in Pareena Swarup v. Union Of India . (2008) 14 SCC 107 where the court observed that:

“9. It is necessary that the court may draw a line which the executive may not cross in their misguided desire to take over bit by bit and (sic) judicial functions and powers of the State exercised by the duly constituted courts. While creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function. We agree with the apprehension of the petitioner that the provisions of the Prevention of Money-Laundering Act are so provided that there may not be independent judiciary to decide the cases under the Act but the members and the Chairperson to be selected by the Selection Committee headed by Revenue Secretary.

10. It is to be noted that this Court in L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] has laid down that the power of judicial review over legislative action vested in the High Courts under Article 226 as well as in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution constituting part of its (sic basic) structure. The Constitution guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to divest the regular courts of their jurisdiction in all matters, and entrust the same to the newly created Tribunals which are not entitled to protection similar

to the constitutional protection afforded to the regular courts. The independence and impartiality which are to be secured not only for the court but also for Tribunals and their members, though they do not belong to the "judicial service" but are entrusted with judicial powers. The safeguards which ensure independence and impartiality are not for promoting personal prestige of the functionary but for preserving and protecting the rights of the citizens and other persons who are subject to the jurisdiction of the Tribunal and for ensuring that such Tribunal will be able to command the confidence of the public. Freedom from control and potential domination of the executive are necessary preconditions for the independence and impartiality of Judges. To make it clear that a judiciary free from control by the executive and legislature is essential if there is a right to have claims decided by Judges who are free from potential domination by other branches of Government. With this background, let us consider the defects pointed out by the petitioner and amended/proposed provisions of the Act and the Rules."

137. The decision in S.P. Sampath Kumar v. Union of India 1987 Supp SCC 734 upheld the validity of the Administrative Tribunals Act, 1985 and the exclusion of High Courts' jurisdiction under Article 226 of the Constitution (based on an enabling clause in Article 323A); yet, the reasoning in the judgments delivered are a clear indicator that this court would always be careful in considering the efficacy of the body and its ability to administer justice in a fair and impartial manner, having regard to the qualifications and experience of its personnel as well as the safeguards of tenure, salary etc. L. Chandra Kumar v. Union of India (1997) 3 SCC 261, a seven-judge decision, decisively overruled Sampath Kumar (supra) with respect to the preclusion of jurisdiction of Article 226 of the Constitution; this Court also declared that judicial review is a part of the basic structure of the Constitution. In the next phase, where amendments were proposed to the Companies Act, 1956 to set up a National Company Law Tribunal, this Court, by the Constitution Bench decision in Union of India v. R. Gandhi (2010) 11 SCC 1 again found several provisions of enacted Parliamentary law to be objectionable – they are related to tenure, manner of appointment, qualifications of members etc. Likewise, in Madras Bar Association v. Union of India (MBA-I) (supra), the complete divesting of High Courts' jurisdiction under tax enactments (income tax, customs, central excise and service tax etc) and parliamentary setting up of a National Tax Court was held to be unconstitutional. Here again, the court highlighted the quality of justice expected from such bodies and underlined that the divestment of such jurisdiction was prohibited by the Constitution. Madras Bar Association (2015) 8 SCC 583 ("MBAII") considered the amended provisions of the Companies Act and proceeded to pronounce that many of them could not pass muster of the Constitution. Once again, as in R. Gandhi (supra), this court was concerned with the likely impact on the nature of the justice delivery mechanism envisioned by the new law. The method of appointment, qualifications, eligibility conditions and tenure of all these fell within the undoubted domain of parliamentary concern. Yet, this court held that many of these policy decisions enacted into law were contrary to the principle of an independent judiciary which could guarantee effective and impartial justice. Roger Mathew (2020) 6 SCC 1 held that the rules framed under the Finance Act, 2017 ("the 2017 Rules") were not sustainable due to defects in the constitution of selection cum appointment committees and tenure of members of tribunals, among other aspects. Madras Bar Association v. Union of India 2020 SCC OnLine SC 962 ("MBA-III") held that rules framed in 2020 were invalid as regards the tenure of members of tribunals, constitution of the

mechanism for their selection, lack of any substantive rules for their re-appointment, etc.

138. In all these decisions, this court's scrutiny was based upon its role as the guardian of the constitution and, more specifically, independence of the judiciary. If one were asked to pinpoint any specific provision of the constitution that this court relied upon while holding the enacted provisions to be falling afoul of, there would be none. It is too late now to contend that independence of the judiciary and separation of powers are vague concepts based on which Parliamentary re-enactment cannot be invalidated.

139. The role of this court in considering whether or not provisions of law or executive policies are in consonance with the Constitution is well recognized and cannot be overemphasized. The Attorney General's assertion that the executive or indeed the Parliament acts within its rights in interpreting the Constitution, and therefore this court should adopt a deferential standard in matters of policy are therefore insubstantial, and also disquieting. As conceded by the Union, if a law (passed validly in exercise of its exclusive power by the Parliament on its interpretation of the Constitution) violates any express provision or principle that lies at the core of any express provision or provisions, this Court's voice is decisive and final.

140. Pertinently, in matters of independence of the judiciary or arrangement of courts or tribunals, when these provisions come up for interpretation, this court would apply a searching scrutiny standard in its judicial review to ensure that the new body, court, tribunal, commission or authority created to adjudicate (between citizens and government agencies or departments, citizens and citizens, or citizens and corporate entities) are efficient, efficacious and inspire public confidence. The role of courts in considering a provision of law setting up adjudicatory bodies, was recognized in R.K Jain v. Union Of India . (1993) 3 SCR 802 in the following terms:

"The faith of the people is the bed-rock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient. For inspiring confidence and trust in the litigant public they must have an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Govt. To maintain independence and impartiality it, is necessary that the personnel should have at least modicum of legal training, learning and experience. Selection of competent and proper people instil people's faith and trust in the office and help to build up reputation and acceptability. Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured. Absence thereof only may get both law and procedure wronged and wrongheaded views of the facts and may likely to give rise to nursing grievance of injustice. Therefore, functional fitness, experience at the liar and aptitudinal approach are fundamental for efficient judicial adjudication. Then only as a repository of the confidence. as its duty, the tribunal would properly and efficiently interpret the law and apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the constitution. The daily practice in the courts not only gives training to Advocates to interpret the rules but also adopt the conventions of courts. In built experience would play vital role in the administration of justice and strengthen and develop the qualities, of

intellect and character, forbearance and patience, temper and resilience which are very important in the practice of law. Practising Advocates from the Bar generally do endow with those qualities to discharge judicial functions. Specialised nature of work gives them added advantage and gives benefit to broaden the perspectives. “Judges” by David Pannick (1987 Edition), at page 50, stated that, “we would not allow a man to perform a surgical operation without a thorough training and certification of fitness. Why not require as much of a trial judge who daily operates on the lives and fortunes of others”.

141. It would be useful to notice that whenever Parliament creates tribunals with exclusive jurisdiction, the parent enactment or law invariably bars the jurisdiction of ordinary civil courts. 1992, 1993, 2002, 2013, 2016, 2006, 2003, 1997, 2002 This in my opinion is the clearest indicator of the fact that but for such provisions and the creation of such exclusive bodies, civil courts would of necessity have enjoyed jurisdiction to adjudicate disputes arising out of such new legislation. This underscores the fact that the appropriate legislature wishes those disputes arising from such new legislation not to be adjudicated by civil courts : which otherwise would have possessed jurisdiction over them. Such disputes may include issues such as refund of excess amounts claimed as tax, private disputes between two licensees under a statutory regime such as telecom or electricity laws etc., consumer disputes, liability to banks and financial institutions, and so on.

142. Parliament has, over the years, created several tribunals and commissions which exercise judicial functions that would ordinarily fall within the jurisdiction of courts; they would also have been subjected to the supervisory jurisdiction of High Courts under Article 227. This gradual “hiving off” of jurisdiction from the courts, therefore, calls for a careful and searching scrutiny to ensure that those who approach these bodies are assured of the same kind and quality of justice, infused with what citizens expect from courts, i.e., independence, fairness, impartiality, professionalism and public confidence. These considerations are relevant, given that “policy” choices adopted by the executive or legislature in the past, when it concerned dispensation of justice through courts, were the subject matter of scrutiny under judicial review by courts.

143. In the exercise of such judicial review, in the past, this court has ruled that High Courts have a decisive say in matters of recruitment, promotion and conditions of services of judges of District and other courts, although the Constitution only requires the Governor to consult that institution (High Courts). In Chandra Mohan v. State of U.P. (1967) 1 SCR 77, this court unanimously held:

“The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the “Judicial Service” or to the Bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him…. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or

persons designated therein."

144. To the same effect are the decisions in Chandramouleshwar Prasad v. Patna High Court (1969) 3 SCC 56 and many other judgments. In State of Bihar v. Bal Mukund Sah (2004) 4 SCC 640 it was held that:

"the framers of the Constitution separately dealt with Judicial Services of the State and made exclusive provisions regarding recruitment to the posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in a different part of the Constitution stand on their own and quite independent of part XIV dealing with Services in general under the State. Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of Articles dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution."

145. This court, therefore, as the ultimate guardian of the Constitution, and the rule of law, which it is sworn to uphold, has been asserting its role in regard to matters of appointment, and other conditions of service of judges of district and other courts. Since tribunals function within the larger ecosystem of administration of justice, and essentially discharge judicial functions, this court is equally concerned with the qualifications, eligibility for appointment, procedure for selection and appointment, conditions of service, etc. of their members. This court's concern, therefore, is unlike any other subject matter of judicial review. It cannot be gainsaid that if tenures of tribunals' members are short : say two years, or if their salaries are pegged at unrealistically low levels, or if their presiding members are given no administrative control or powers, the objective of efficient, fair, and impartial justice delivery would be defeated. It cannot then be argued that each of these are "policy" matters beyond the court's domain.

146. Ordinarily in pure "policy" matters falling within Parliamentary or executive domain, such as economic, commercial, financial policies, or other areas such as energy, natural resources etc, this court's standard of judicial review is deferential. In almost all subject matters over which legislative bodies enact law, the wisdom of the policy is rarely questioned; it is too well recognised that in such matters, judicial review extends to issues concerning liberties of citizens, and further, whether the particular subject matter falls within the legislative field of the concerned legislative body. In matters where the executive implements those laws, the scrutiny extends to further seeing the legality and constitutionality of such action. Where there is no law, the court considers whether executive competence to act is traceable to the particular legislative field under the Constitution, and whether the executive action sans law, abridges people's liberties. Deference to matters executive appears to be highest, when the country faces emergencies and existential threats. However, in matters that concern administration of justice, especially where alternative adjudicatory forums are created, the court's concern is greater. This is because the Constitution does not and cannot be read so as to provide two kinds of justice : one through courts, and one through other bodies. The quality and efficacy of these justice delivery mechanisms have to be the same, i.e., the same as that provided

by courts, as increasingly, tribunals adjudicate disputes not only between state agencies and citizens, but also between citizens and citizens as well as citizens and powerful corporate entities. Therefore, it is the “equal protection” of laws, guaranteed to all persons, through institutions that assure the same competence of its personnel, the same fair procedure, and the same independence of adjudicators as is available in existing courts, that stands directly implicated. Consequently, when this court scrutinizes any law or measure dealing with a new adjudicatory mechanism, it is through the equal protection of law clause under Article 14 of the Constitution.

147. With these observations, I proceed to deal with the minimum age requirement (hereafter called “age qualification”) which precludes otherwise qualified candidates possessing the requisite experience from appointment to all tribunals, unless they are 50 years of age or older. This age qualification is that candidates, to be appointed, should not be less than 50 years, and has been introduced by the first proviso to Section 184(1) of the Finance Act. What is immediately noticeable is that this age qualification (more by way of an age bar or minimum age requirement) did not find place in any parent enactment 1961, 1962, 1992, 2003, which set out the eligibility conditions for appointments to various tribunals, with the exception of appointment as members to the National Company Law Tribunal, for which, candidates should have completed 50 years to be eligible for appointment, apart from the prescribed eligibility and condition criteria. Such age criteria was not enacted under the provisions of the Finance Act, 2017; nor was it introduced in the 2017 Rules (which were invalidated by Rojer Mathew). An indirect age barrier, for the first time was introduced in the 2020 Rules framed under the Finance Act, 2017, in the form of the requirement of otherwise qualified advocates and chartered accountant candidates having to possess 25 years of practice. This court held that requirement to be untenable, and directed it to be suitably amended. In response, as it were, for the first time, the 50-year minimum age requirement has been enacted in the parent enactment (Finance Act, 2017) through amendment by the impugned Ordinance. The justification given for this age requirement or qualification is threefold:

(a) Advocate members, technical members (including chartered accountants) and those joining the tribunal as departmental members would have a uniform age, which is relatable to the approximate age by which a public servant attains the status and rank of Additional Secretary, which enables consideration of her or his name for appointment as member of a tribunal;

(b) Considerations of equivalence with Additional Secretaries, weighed with the Union in enacting the age qualification;

(c) Whether the minimum age of a tribunal member ought to be 50 years, or less, is within the exclusive domain of the executive, and Parliament and cannot be dependent upon the views of this court, being a pure policy issue.

148. The challenge to the first proviso to Section 184, which prescribes the age qualification, has to be seen from several angles. First, the underlying parent statutes which created the tribunals (ITAT, CESTAT, TDSAT, CAT) did not prescribe, as an eligibility

criterion for selection of candidates as members, any minimum age. The prescription of 50 years as a minimum eligibility criterion, in the opinion of this court, is without any rationale. The ITAT has existed for the last 79 years; no less than 33 of its members were appointed as judges of various High Courts; one of them (Ranganathan, J.) was appointed to this court. The CESTAT too has comprised advocates who have staffed the tribunal efficiently. The absence of any explanation for the preference given to older persons, in fact leads to an absurd result-as was pointed out in MBA-III and as has been reiterated by L. Nageswara Rao, J. in his opinion. The Constitution of India makes an advocate who has practiced for more than 10 years, eligible for consideration for appointment as a judge of the High Court and even this Court. An advocate with 7 years' practice with the Bar can be considered for appointment to the position of a District Judge. Prescribing 50 years as a minimum age limit for consideration of advocates has the devastating effect of entirely excluding successful young advocates, especially those who might be trained and competent in the particular subject (such as Indirect Taxation, Anti-Dumping, Income-Tax, International Taxation and Telecom Regulation). The exclusion of such eligible candidates in preference to those who are more than 50 years of age is inexplicable and therefore entirely arbitrary. As this Court in its previous judgment (Rojer Mathew) has pointed out in another context, the exclusion of such young and energetic legal practitioners could result in not so efficient or competent practitioners left in a field for consideration which would have telling effects on the quality of decisions they are likely to render.

149. Prescribing 50 years' minimum age as a condition for appointment to these tribunals is arbitrary also because absolutely no reason is forthcoming about what impelled Parliament to divert from the long-established criteria of giving weigh-tage to actual practice, reputation, integrity and subject expertise, without a minimum age criterion, in the pleadings in this case, nor in any other cases (R. Gandhi-MBA-I; Madras Bar Association-III and Roger Mathew). Such being the case, it is astonishing that in the span of a year (i.e. after the decision in Roger Mathew) "new thinking" seems to have prevailed to frame rules excluding advocates who can otherwise, based on their expertise, be considered for appointment to even High Courts.

150. This Court would also observe that the consideration of such younger advocates in the age group of 40-45 years would have long term benefits since the domain knowledge and expertise in such areas (Telecom Regulation, Taxation-both Direct and Indirect, GATT Rules, International Taxation etc.) would be useful in adjudication in these tribunals and lead to a body of jurisprudence. Depending on how such counsel/advocates fare as members of the Tribunal, having regard to their special knowledge of these laws, at a later and appropriate stage, they may even be considered for appointment to High Courts.

151. The age criteria, impugned in this case also leads to wholly anomalous and absurd results. For instance, an advocate with 18- or 20-years' practice, aged 44 years, with expertise in the field of indirect taxation, telecom, or other regulatory laws, would be conversant with the subject matter. Despite being eligible, (as she or he would fulfil the parameters of at least 10 years' practice, in the light of the decision in MBA-III) such a candidate would be excluded. On the other hand, an individual who might have practiced law for 10 years, and later served as a private or public sector executive in an entirely

unrelated field, but who might be 50 years of age, would be considered eligible, and can possibly secure appointment as a member of a tribunal. Thus, the age criterion would result in filtering out candidates with more relevant experience and qualifications, in preference to those with lesser relevant experience, only on the ground of age.

152. In the decision reported as State of J&K v. Triloki Nath Khosa (1974) 1 SCC 19, this court explained that a classification for the purpose of Article 14 of the Constitution (as the present minimum age criteria undoubtedly is, in the present case) based on any criteria, must be based on a distinct characteristic, having a rational nexus with the object of the norm, or the law:

“31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.”

153. Similarly, in Mohd. Shujat Ali v. Union of India (1975) 3 SCC 76 this Court cautioned against over-classification, based on artificial distinctions between two categories falling within the same class, in matters of public employment:

“To permit discrimination based on educational attainments not obligated by the nature of the duties of the higher post is to stifle the social thrust of the equality clause. A rule of promotion which, while conceding that non-graduate Supervisors are also fit to be promoted as Assistant Engineers, reserves a higher quota of vacancies for promotion for graduate Supervisors as against non-graduate Supervisors, would clearly be calculated to destroy the guarantee of equal opportunity.”

154. Given that the essential educational qualifications and experience in the relevant field are fixed for all candidates, for a classification based on minimum age for appointment (like in the present case) to succeed, the Union cannot say that it should be held to be valid, irrespective of the nature and purposes of the classification or the quality and extent of the difference in experience between candidates. As between someone with 18 years’ experience but aged 42 or 43 years, and someone with only 12 years’ experience, if a system of weightage for experience and qualification were to be applied, the one with greater experience would in all likelihood be selected. Then, to say that one with lesser experience, but who is more aged should be selected and appointed, not only eliminating the one with more experience, but even disqualifying her or him, would mean that better candidates have to be overlooked and those with lesser experience would be appointed, solely on the ground that the latter is over 50 years of age. Prime Minister Jawaharlal Nehru, in the course of the Constituent Assembly debates, (though in the context of fixing age of retirement of judges) remarked that Vol. VIII dated 24th May, 1949

“But the fact is, when you reach certain top grades where you require absolutely first-class

personnel, then it is a dangerous thing to fix a limit which might exclude these first-rate men."

155. In the present case, the rule has the effect of excluding deserving candidates, without subserving any discernible public policy or goal. Thus, the classification is based on no justifiable rationale; nor can it be said that the age criterion has some nexus with the object sought to be achieved, such as greater efficiency or experience.

156. In Anuj Garg v. Hotel Assn. of India (2008) 3 SCC 1 one of the issues was the bar to employment of anyone less than 25 years of age in the hotel industry. This court held that such age discrimination was unsustainable, and struck it down, observing as follows:

"25. Hotel management has opened up a vista for young men and women for employment. A large number of them are taking hotel management graduation courses. They pass their examinations at a very young age. If prohibition in employment of women and men below 25 years is to be implemented in its letter and spirit, a large section of young graduates who have spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would be deprived of their right of employment. Right to be considered for employment subject to just exceptions is recognised by Article 16 of the Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor.

****

56. Young men who take a degree or diploma in hotel management enter into service at the age of 22 years or 23 years. It, thus, cannot prohibit employment of men below 25 years. Such a restriction keeping in view a citizen's right to be considered for employment, which is a facet of the right to livelihood does not stand judicial scrutiny."

157. In this court's decision in Lt. Col. Nitisha v. Union of India, 2021 SCC OnLine SC 261 a reference was made to a US statute – the Age Discrimination in Employment Act, 1967 and the US Supreme Court decision in Smith v. City of Jackson 544 US 228 (2005) which dealt with discrimination based on age. The relevant provisions of the said enactment proscribe age discrimination in regard to matters of employment. 1967 A recent US Supreme Court decision Baab v. Wilke 589 U.S. ____ (2020) explained what is meant by age discrimination, in the following terms:

"The Civil Service Reform Act of 1978, which governs federal employment, broadly defines a "personnel action" to include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews. See 5 U. S. C. §2302(a)(2)(A). That interpretation is consistent with the term's meaning in general usage, and we assume that it has the same meaning under the ADEA. Under §633a(a), personnel actions must be made "free from" discrimination. The phrase "free from" means "[c]lear of (something which is regarded as objectionable)." Webster's Third New International Dictionary 905 (def. 4(a)(2)) (1976); 4 Oxford English Dictionary 521 (def. 12) (1933); see also American Heritage Dictionary 524 (def. 5(a)) (1969) (defining "free" "used with from"

as “[n]ot affected or restricted by a given condition or circumstance”); Random House Dictionary of the English Language 565 (def. 12) (1966) (defining “free” as “exempt or released from something specified that controls, restrains, burdens, etc.”). Thus, under §633a(a), a personnel action must be made “untainted” by discrimination based on age, and the addition of the term “any” (“free from any discrimination based on age”) drives the point home. And as for “discrimination,” we assume that it carries its “‘normal definition,’” which is “‘differential treatment.’” Jackson v. Birmingham Bd. of Ed., 544 US 167 (2005). Under §633a(a), the type of discrimination forbidden is “discrimination based on age,” and “[i]n common talk, the phrase ‘based on’ indicates a but-for causal relationship.” Safeco Ins. Co. of America v. Burr, 551 US 47 (2007); cf. Comcast Corp. v. National Assn. of African American Owned Media, ante, at 6. Therefore, §633a(a) requires that age be a but-for cause of the discrimination alleged. What remains is the phrase “shall be made.” “[S]hall be made” is a form of the verb “to make,” which means “to bring into existence,” “to produce,” “to render,” and “to cause to be or become.” Random House Dictionary of the English Language, at 866. Thus, “shall be made” means “shall be produced,” etc. And the imperative mood, denoting a duty, see Black’s Law Dictionary 1233 (5th ed. 1979), emphasizes the importance of avoiding the taint. So much for the individual terms used in §633a(a). What really matters for present purposes is the way these terms relate to each other. Two matters of syntax are critical. First, “based on age” is an adjectival phrase that modifies the noun “discrimination.” It does not modify “personnel actions.” The statute does not say that “it is unlawful to take personnel actions that are based on age”; it says that “personnel actions . . . shall be made free from any discrimination based on age.” §633a(a). As a result, age must be a but-for cause of discrimination—that is, of differential treatment— but not necessarily a but-for cause of a personnel action itself. Second, “free from any discrimination” is an adverbial phrase that modifies the verb “made.” Ibid. Thus, “free from any discrimination” describes how a personnel action must be “made,” namely, in a way that is not tainted by differential treatment based on age. If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination. This is the straightforward meaning of the terms of §633a(a), and it indicates that the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account.”

(emphasis supplied)

158. The Delhi High Court, in its decision reported as Commissioner, M.C.D. v. Shashi (2009) 165 DLT 17 invalidated a rule that allowed the public employer to screen candidates based on their age, emphasizing that:

“Subject to constitutionally permissible reservations, every endeavour must be made by the State to employ or engage the most qualified or the most meritorious persons. In doing so, the State may fix shortlisting criteria on the basis of educational qualifications or experience or marks obtained in an examination or an interview or any other criterion which enables the most competent person to be selected. Unfortunately, age has nothing to do either with merit or competence. Wisdom may be an attribute of age, but not merit or competence.

13. There is not even an iota of material to suggest, nor indeed has anything been pointed out by learned Counsel for the Petitioner, that merely because an applicant falls within the age group of 28 to 30 years he is better qualified as a teacher than a person falling in the age group of 18 to 27 years. It is not the case of the Petitioner that persons in the age group of 28 to 30 years are either better qualified educationally or have more experience or are in any manner more meritorious or competent than the applicants falling within the age group of 18 to 27 years solely because of their age. It seems to us that the Petitioner has literally picked the age group of 28 to 30 years out of the hat (as it were) without any reference to any logical or empirical basis"

159. In the present case, therefore, the qualification of a minimum age of 50 years as essential for appointment, is discriminatory because it is neither shown to have a rational nexus with the object sought to be achieved, i.e. appointing the most meritorious candidates; nor is it shown to be based on any empirical study or data that such older candidates fare better, or that younger candidates with more relevant experience would not be as good, as members of tribunals. It is plain and simple, discrimination based on age. The criterion (of minimum 50 years of age) is virtually "picked out from a hat" and wholly arbitrary.

160. As stated earlier, the tribunals which were reorganized by the Finance Act, 2017 and now, through the impugned ordinance, exercise judicial functions of the State, interpret and enforce the law, in the course of adjudication of disputes. As repeatedly emphasized by this court in previous Constitution Bench judgments, appointment of members (of such tribunals), their conditions of service, manner of selection, remuneration and security of tenure are vital to their efficiency and independent functioning. It is in this backdrop that the Union's contention regarding "equivalence" or "parity" with members of the civil services of the Union or holders of civil posts under the Union, as a justification for the age criterion, needs to be examined.

161. This Court in All India Judges' Assn. (II) v. Union of India (1993) 4 SCC 288, held that:

"9. So much for the contention of the review petitioners that the directions given by this Court would lead to the demand from the members of the other services for similar service conditions. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the Judges and those of the members of the other services. It is true that under Article 309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Article 312, it is the Parliament which is empowered to create an All India Judicial Service which will include posts not inferior to the post of District Judge as defined under Article 236. However, this does not mean that while determining the service conditions of the members of the judiciary, a distinction should not be made between them and the members of the other services or that the service conditions of the members of all the services should be the

same. As it is, even among the other services, a distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out that the linkage between the service conditions of the judiciary and that of the administrative executive was an historical accident. The erstwhile rulers constituted, only one service, viz., the Indian Civil Service for recruiting candidates for the judicial as well as the administrative service and it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on a par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to the comparable improvement in the service conditions of the latter."

162. In addition, it is worthwhile to recollect that a civil servant's experience, though varied and diverse – ranging from co-ordination and administration at taluk, district and state levels, to devising, framing and implementing the government's policies and programmes, to managing statutory corporations and even commercial enterprises of the state, does not always entail adjudicatory functions. However, legal practitioners, chartered accountants and one segment of civil servants, i.e. tax administrators and adjudicators are involved in the day to day interpretation of law, leading to adjudicatory outcomes. Such being the case, the equivalence of "status" of members of tribunals cannot be compared in a linear or rigid manner. That according to the Union's scheme of rules and regulations, members of its services can attain a certain rank upon attaining the age of, say, 50 years, therefore, cannot be determinative. In any case, the argument of equivalence is not relevant. This point too, was brought home in the judgment of this court, in All India Judges Association II (supra):

"Unlike the administrative officer, the judicial officer is obliged to work for long hours at home. When he reserves a judgment he has usually to prepare the same at his residence. For that purpose, he has to read the records as also the judicial precedents cited by counsel for the adversaries. Even otherwise with a view to keeping himself up to date about the legal position he has to read judgments of his own High Court, other High Courts and of the Supreme Court. He has also to read legal journals."

163. There are other points of distinction too between civil servants and members of tribunals. Members of tribunals are not drawn from any civil service; they are not holders of

civil posts. Civil servants, especially members of the All-India Services recruited by the Union, some of whom are deployed to different States, are governed by rules and other service conditions embodied in circulars and orders. These govern their entire universe of employment : starting with eligibility conditions, rules for recruitment and selection, pay and allowances, seniority, promotion, discipline and other matters related to misconduct, pension, terminal benefits etc. On the other hand, such rules or similar rules do not apply to members of tribunals not drawn from public service. It is only conditions of equivalence such as pay scale which they are assured of under the rules, which also determine their status. The manner of selection, conditions of eligibility, rules for their removal upon proven misbehaviour and so on, are entirely different from public servants. In fact, the latter category, i.e. members of tribunals not drawn from public service sources, are not even holders of civil posts or members of any encadred civil service. This has been clarified in at least two judgments of this court. They are not governed by Article 311 of the Constitution, nor are their conditions of service laid out in rules framed under the proviso to Article 309 of the Constitution. Such being the position, the argument of parity, in the opinion of the Court, is entirely devoid of merit. Nor is the argument of the Attorney General that a uniform age is necessary, merited. There is no material to show that members recruited on the technical side, such as experts in engineering, scientific or other technical fields would be suitable only after they cross the age of 50. In fact, one can complete a doctoral thesis and become a holder of a Ph.D at the time that she or he is 30 years or even below. To be a professor, one has to possess 10 years teaching experience; there is no minimum age under the relevant regulations framed by the UGC. Even non-teaching personnel, on the basis of their research, can be designated professors 20104.0.0 DIRECT RECRUITMENT“4.1.0 PROFESSOR A. (i) An eminent scholar with Ph.D. qualification(s) in the concerned/allied/relevant discipline and published work of high quality, 2021 @ 16 . As on date, there are vice-chancellors in some state and national universities who had not completed 45 years at the time of appointment. Such being the position, experience in the field either in the academic, technical or scientific field for a further period of 10 or 12 years or even 15 years would not add up to the minimum threshold of the impugned criteria, i.e. 50 years of age. Purely as empirical data, the ITAT has a sanctioned strength of 126 members, (which includes accountant members, technical members – who are drawn from the Indian Revenue Service holding the rank of Commissioner of Appeals, for 3 years, and advocates). 66 members presently are in office, appointed since the year 1999. Of these, 10 members were below the age of 40 at the time of their appointment; 20 members were between the ages of 40-45, and 15 members were between the ages of 46-50- at the time of their respective appointments. Cumulatively, 44 members out of 66 were appointed below the age of 50. Only 17 members were 50 or above at the time of their appointment. Data is not provided in respect of 5 members. This data-as indeed similar data from other tribunals, shows that past appointment to these positions was amongst younger, and and competent persons. The Union has not shown why this past history requires departure, and why that longstanding basis for appointing younger professionals, now needs to be departed from, in public interest. Significantly, commissioners of appeals (of income tax) – in the respective service rules, typically are appointed after 18 or so years of service; if one adds 3 years, an incumbent Commissioner could be well below 50 years. She or he would be completely familiar with the adjudicatory process in tax laws. Exclusion of such otherwise qualified and suited personnel, too, is irrational. Having regard to all these

reasons, the Union's argument that 50 years is necessary as it brings about parity between the members of the civil services who are eligible to be considered in their stream for tribunals or that there is an overall uniformity, is without merit and accordingly rejected.

164. A further, but crucial issue. In Madras Bar Association v. Union of India 2020 SCC OnLine SC 962 (MBA-III) this court held as unlawful the exclusion of advocates from consideration in the following directions:

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

****

(vi) The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals. While considering advocates for appointment as judicial members in the Tribunals, the Search-cum-Selection Committee shall take into account the experience of the Advocate at the bar and their specialization in the relevant branches of law. They shall be entitled for reappointment for at least one term by giving preference to the service rendered by them for the Tribunals.

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

165. The Union of India had not made any move to give effect to the above directions. The declaration of law in MBA-III recorded in an earlier part of the decision, that advocates in all tribunals are eligible for consideration for appointment as members of various tribunals. It is no longer open to exclude such eligible advocates from consideration. The direction to the following effect is binding and has become final. It has not been interdicted in any manner, by the impugned ordinance:

"Exclusion of Advocates in 10 out of 19 tribunals, for consideration as judicial members, is therefore, contrary to Union of India v. Madras Bar Association (2010) (2007) 2 SCC 1 and Madras Bar Association v. Union of India (2015) (1993) 4 SCC 441. However, it is left open to the Search-cum-Selection Committee to take into account in the experience of the Advocates at the bar and the specialization of the Advocates in the relevant branch of law while considering them for appointment as judicial members".

166. After hearings were concluded, the directions in MBA-III on the above score, were accepted, and Advocates have now been made eligible, for appointment to 15 tribunals, after they complete 10 years' enrolment, and have relevant experience or in the concerned field of practice.

167. As a result of the above discussion, the proviso to Section 184(1), inserted by the impugned ordinance is declared void. A declaration is issued that all candidates, otherwise eligible on their merit, based on qualifications and experience in the relevant field, are entitled to be considered, without reference to the impugned "minimum" age (of 50 years)

criteria.

168. I am in agreement with the reasoning and conclusions of L. Nageswara Rao, J. about the impermissibility of legislative override, even while upholding the retrospectivity accorded to Section 184(11). In addition to the detailed reasons why such a legislative override is impermissible in the circumstances of this case, I would also rely on the Constitution Bench judgment in State of Gujarat v. Raman Lal Keshav Lal Soni (1983) 2 SCC 33. This Court, in Raman Lal dealt with the issue of retrospective application of a provision of the Gujarat Panchayats Act, 1961. The facts pertained to denial of the benefits of two pay commissions to employees of Panchayat Institutions who had previously been employed by municipalities. The legislative provision (Section 102(1)) was given retrospective effect, classifying these employees as servants of Gram/Nagar Panchayats, notwithstanding judgments of courts which had declared them to be Government servants, which would have entitled them to the revised pay scale. The court held:

“53. (…) The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do’s and don’ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today’s rights and not yesterday’s. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in B.S. Yadav v. State of Haryana 1980 Supp SCC 524 : (1981) 1 SCR 1024, Chandrachud CJ., speaking for the Court,

“Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate, must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case”.

Today’s equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tempered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable.”

169. The impugned provision in the present case reads as follows:

“(11) Notwithstanding anything contained in any judgment, order, or decree of any court or any law for the time being in force, —

(i) the Chairperson of a Tribunal shall hold office for a term of four years or till he attains the age of seventy years, whichever is earlier;

(ii) the Member of a Tribunal shall hold office for a term of four years or till he attains the age of sixty-seven years, whichever is earlier:

Provided that where a Chairperson or Member is appointed between the 26th day of May, 2017 and the notified date and the term of his office or the age of retirement specified in the order of appointment issued by the Central Government is greater than that which is specified in this section, then, notwithstanding anything contained in this section, the term of office or age of retirement or both, as the case may be, of the Chairperson or Member shall be as specified in his order of appointment subject to a maximum term of office of five years.”

170. The interim directions of this court, which culminated and were subsumed in Roger Mathew (supra), resulted in the appointment of members of various tribunals, whose term is now sought to be interdicted by the proviso to Section 184(11), which has been introduced with retrospective effect. I agree with Rao, J. that while the retrospectivity accorded to this provision cannot be faulted, nevertheless, the said proviso, to the extent it seeks to interfere with and curtail the tenure of members appointed under interim orders, who are entitled to enjoy their term of office, in accordance with the pre-amended legislation and rules, is arbitrary and void. As held in Raman Lal (supra), “(t)oday’s equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective”. In a manner somewhat reminiscent of the facts of this case, an interim order, enjoining the employer, All India Institute of Medical Sciences (AIIMS) from curtailing the tenure of the then Director, was sought to be legislatively overridden by Parliament. In P. Venugopal v. Union Of India . (2008) 5 SCC 1, this court held that enactment to be unlawful, and held that the curtailment of tenure for one person was arbitrary and based on no reasonable criteria:

“36. From the aforesaid discussion, the principle of law stipulated by this Court is that curtailment of the term of five years can only be made for justifiable reasons and compliance with principles of natural justice for premature termination of the term of a Director of AIIMS squarely applied also to the case of the writ petitioner as well and will also apply to any future Director of AIIMS. Thus there was never any permissibility for any artificial and impermissible classification between the writ petitioner on the one hand and any future Director of AIIMS on the other when it relates to the premature termination of the term of office of the Director. Such an impermissible overclassification through a one-man legislation clearly falls foul of Article 14 of the Constitution being an apparent case of “naked discrimination” in our democratic civilised society governed by the rule of law and renders the impugned proviso as void ab initio and unconstitutional.

37. Such being our discussion and conclusion, on the constitutionality of the proviso to Section 11(1-A), we must, therefore, come to this conclusion without any hesitation in mind, that the instant case is squarely covered by the principles of law laid down by this Court in the various pronouncements as noted hereinabove including in D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor [D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2 SCR 214].

****

39. It was further held in D.S Reddy v. Chancellor, Osmania University & Others ., AIR 1967 SC 1305 : (1967) 2 SCR 214] that such a classification was not founded on an intelligible differentia and was held to be violative of Article 14 of the Constitution of India. Accordingly, the provision of Section 13-A was held to be ultra vires and unconstitutional and hit by Article 14 of the Constitution. Similarly in the present case, the impugned proviso to Section 11(1-A) itself states that it is carrying out premature termination of the tenure of the writ petitioner. It is also admitted that such a premature termination is without following the safeguards of justifiable reasons and notice. It is thus a case similar to D.S Reddy v. Chancellor, Osmania University & Others ., AIR 1967 SC 1305 : (1967) 2 SCR 214] and other decisions cited above that the impugned legislation is hit by Article 14 as it creates an unreasonable classification between the writ petitioner and the future Directors and deprives the writ petitioner of the principles of natural justice without there being any intelligible differentia.

171. In my opinion, like in P. Venugopal (supra) the curtailment of tenure to five years, of these few individuals appointed as members of tribunals, who were entitled to continue in office in terms of the pre-existing enactments (upto the age of 62 years etc.) is arbitrary. Apart from the fact that the Union wishes to curtail their tenure despite the finality of directions of this court in Roger Mathew and MBA-III, there is no conceivable rationale. Nor has any overriding public interest been espoused as a justification for this. The divesting of judicial office by legislative fiat, in this court’s opinion, directly affects the independence of the judiciary. It also amounts to naked discrimination, because all other members of the same tribunals would enjoy longer tenure, in terms of the pre-existing conditions of service, which prevailed at the time of their appointment.

172. In MBA III (supra), this Court directed the Union ‘to make appointments to tribunals within three months from the date on which the Search-cum-Selection Committee completes the selection process and makes its recommendations.’ The necessity to take action on this is emphasized by the nuts and bolts of the adjudicatory functions of tribunals. As many as 21,259 cases were pending before the National Company Law Tribunal as on 31.12.2020, and 2278 cases were filed before the tribunal under the Insolvency and Bankruptcy Code, 2016 during the period of April to December 2020, out of which only 176 have been disposed so far. //economictimes.indiatimes.com/news/economy/policy/over-21250-cases-pending-before-ncltat-end-of-december-2020/articleshow/80754041.cms?from=mdr (last accessed on 20.06.2021) As on April 2021, the NCLT comprised of its Acting President and a total number of 38 members, out of which 17 are judicial members and 21 are technical

members – much below than the sanctioned strength of 63 members. //www.indialegallive.com/top-news-of-the-day/news/plea-in-sc-seeks-extension-of-tenure-of nclt-members/(last accessed on 20.06.2021) At the Armed Forces Tribunal, against a sanctioned strength of 34, only 11 members are currently in office – 4 judicial members and 6 administrative members, for the tribunal's 11 benches. Till 28.02.2021, a total of 18,829 cases were pending for disposal; the highest pendency was before the principal bench in Delhi, with 5553 cases, followed by Chandigarh with 4512 cases and Jaipur with 3154 cases. //www.tribuneindia.com/news/nation/23-out-of-34-posts-of-armed-forces-tribunal-vacant-19-000-cases-pending-mod-tells-parliament-223283 (last accessed on 20.06.2021) At the 18 benches of the Central Administrative Tribunal (CAT), only 36 members are in office, against a sanctioned strength of 65. Over 48,000 cases are pending disposal at the CAT, with over 28,000 cases pending for 1-5 years. //theprint.in/india/governance/purpose-of-central-administrative-tribunal-far-from-being-achieved-parliamentary-panel/378156/(last accessed on 20.06.2021) As on 01.03.2021, 72,452 cases were pending before various benches of the CESTAT. Out of a total strength of 26, 18 positions are filled, and 8 vacancies are still open in the 9 benches of the CESTAT. At the Income Tax Appellate Tribunal (ITAT), only 66 members are in office, out of a sanctioned strength of 126, and a total of about 88,000 appeals are pending. 24,000 are pending before the Delhi bench, followed by about 16,000 before the Mumbai bench. //www.business-standard.com/article/pti-stories/88-000-appeals-pending-before-income-tax-appellate-tribunal-chairman-120022601297_1.html (last accessed on 21.06.2021) At the National Consumer Disputes Redressal Commission (NCDRC), 138105 cases have been filed since inception (i.e. since 1987) out of which 1,16,572 have been disposed of. 21,443 cases are pending. At state commissions, 124559 cases are still pending, and 401184 are pending before district forums. The total pendency is 547186 cases. //ncdrc.nic.in/stats.html (last accessed on 21.06.2021) Out of the 44 benches of the Debt Recovery Tribunal (DRT) and sole Debt Recovery Appellate Tribunal (DRAT), 11 benches have vacancies. //www.business-standard.com/article/economy-policy/banks-flag-tardy-decision-making-piling-of-cases-at-recovery-tribunals-119032300883_1.html (last accessed on 21.06.2021) As of April 2020, the Railway Claims Tribunal had 25,571 pending cases. //indianexpress.com/article/india/rct-judges-drag-govt-to-sc-cite-fundamental-rights-to-seek-extension-6380655/(last accessed on 21.06.2021)

173. The sheer volume of pendency is an indicator of the substantial judicial functions carried out by tribunals, necessitating that they be manned by efficient, well qualified judicial and technical members. It is necessary that the Union expedite the process of appointments to tribunals, towards ensuring swifter, and efficacious justice delivery.

174. As a postscript, one would only say that this judgment-seventh in the series commencing with R. Gandhi, hopefully should conclude all controversies. It would be erroneous on anyone's part to consider that interdiction by this court amounts to conflict with Parliamentary or executive wisdom. Each judgment-when it interprets provisions relating to setting up of tribunals and other arrangements for tribunals, adds to the ongoing discourse between the three branches of governance. The Constitution of India envisions a republic, governed by the rule of law, and guarantees justice : social, economic and

political, as well as equality of status and of opportunity. Acting within their assigned spheres, the legislative, executive and judicial departments strive to further this constitutional vision. When assured rights or the principle of equality cannot be secured by the citizen or person guaranteed it, she turns to the judicial wing. It is to ensure that this wing has the competence, vitality and fairness, expected of it, that this court intervenes, to ensure that the adjudicatory mechanisms are robust, independent, and are manned by competent and merited personnel.

175. In view of the foregoing discussion, I conclude and hold as follows:

(i) The first proviso to Section 184(1) of the Finance Act, 2017, introduced by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 is hereby declared void and inoperative. Similarly, the second proviso to Section 184(1) of the Finance Act, 2017, introduced by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 is held to be void and inoperative.

(ii) Section 184(7) of the Finance Act, 2017, introduced by of the Finance Act, 2017 introduced by Section 12 of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 is hereby declared void and inoperative.

(iii) Section 184(11)(i) and (ii) introduced by Section 12 of the Tribunals (Reforms Rationalisation and Conditions of Service) Ordinance, 2021 are hereby declared as void and unconstitutional.

(iv) Consequently, the declaration of this Court in para 53(iv) of MBA-III shall prevail and the term of Chairperson of a Tribunal shall be five years or till she or he attains the age of 70 years, whichever is earlier and the term of Member of a Tribunal shall be five years or till she or he attains the age of 67 years, whichever is earlier.

(v) The retrospectivity given to the proviso to Section 184(11) – introduced by Section 12 of the Tribunals (Reforms Rationalisation and Conditions of Service) Ordinance, 2021 is hereby upheld; however, without in any manner affecting the appointments made to the post of Chairperson or members of various Tribunals, upto 04.04.2021. In other words, the retrospectivity of the provision shall not in any manner affect the tenures of the incumbents appointed as a consequence of this Court’s various orders during the interregnum period.

(vi) The writ petition is allowed to the above extent.