APPOINTMENTS IN TRIBUNALS: A CRITICAL ANALYSIS OF THE MADRAS BAR ASSOCIATION JUDGEMENTS[1]

Swarnendu Chatterjee*

Managing Associate (L&L Partners)

&

Ashley George**

A Writ Petition was filed by the Bar Association of Madras in the Apex Court questioning the constitutionality of the 'Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 ('Tribunal Rules 2020). The Central Government notified the Rules in February 2020, while exercising its authority under Section 184 of the Finance Act, 2017. This was after the Supreme Court set aside the similar rules made in 2017 in the decision Rojer Mathew v. South Indian Bank Ltd[2] delivered on November 13, 2019.

The issue as to whether the Finance Act 2017 could have been passed as a money bill was referred by the Constitution Bench to a larger bench, after voicing concerns over the efficacy of treating the Aadhar Act as a money bill. In Rojer Mathew, the Constitution Bench had held that the 2017 Rules were ultra vires ""for contravening the principles of separation of powers, diluting the independence of the Judiciary and for being against previous decisions of this Hon'ble Court." The current petition declared that the very same question was present in the new 2020 Tribunal Rules as well.

The Apex Court held that the 2020 Rules shall apply prospectively from February 12, 2020, and issued a slew of directions to govern tribunals and the appointments and service conditions of tribunal members. Accordingly, it was propounded that lawyers with legal practice of 10 years would be qualified for nomination as judicial officers of tribunals. Herein, are a few of the most important takeaways of the judgement and their analysis.

*Advocate-On-Record, Supreme Court of India and Managing Associate – L&L Partners, New Delhi
**Intern – L&L Partners, New Delhi and 4th year – NUALS, KOCHI.

[1] Madras Bar Association vs. UOI (2020 SCCONLINE SC 962)

[2] (2020) 6 SCC 1

ANALYSIS

- A separate wing should be established at the Ministry of Finance to cater to the requirements of tribunals, till the constitution of the National Tribunals Commission.

Tribunals are judicial institutions formulated to adjudicate on issues of law and disputes that are covered within the scope of their parent statutes. Although tribunals were developed with the effort to mitigate the accumulation of cases in courts and expedite resolutions in cases that fall within the necessary facets of law, in practice the intention has been defeated. This is due to the unreliable and erratic manner in which the diverse central tribunals have been founded. There are present two broad issues that inhibit the effectiveness of tribunals: (a) the omission of consistency and rationality across the framework; (b) lack of independence. The constitution of a National Tribunals Commission will help usher in much needed uniformity.

The court has formerly taken cognizance of the question of independence of tribunals wherein a five-judge bench of the Supreme Court in the National Tax Tribunal (NTT) Case struck down the National Tax Tribunal Act (NTT Act), 2005 as unconstitutional[3]. While doing so, the court laid down doctrines that dealt with the tribunals and their need for independence. Firstly, the mandate which empowered the central government to decide the transfer of members, constitution of benches, jurisdiction, location etc. as redundant government interference. As the executive was itself a potential stakeholder before the tribunal, such authority was seen to be jeopardizing the autonomy of the tribunal.

- The composition of Search-cum-Selection Committees provided for in Column (4) of the Schedule to the 2020 Rules stood changed with the addition of the CJI or his nominee as the Chairperson (with a casting vote). This would make sure that the power of removal and selection would not lie in the hands of the executive alone.

The relevance of this decision may be highlighted through the NCLT Case, wherein it was observed that selection committees are oftentimes not autonomous, because secretaries of the sponsoring division are a part of them. Moreover, several division officials are delegated as tribunal representatives, carrying on their tenure with the parent members. Since departments also support and aid with the everyday organization of these tribunals, there would be a clear conflict of interest if the resolutions by these administrations are disputed in the tribunals, they operate in. In order to assure autonomy, the control of the executive needs to be diminished.

[3] Madras Bar Association vs. UOI (2014) 10 SCC 1

Otherwise members would take decisions that side with the majority in an effort to ensure their won reappointment. This Case also held that selection committees should have an equal number of executive and judicial members, with the casting vote reserved for the senior-most judicial member, which has similarly been echoed in the Madras Bar Association case as well.

- The judgement provides that the recommendations made by the Search-cum-Selection Committee with respect to removal of members shall be implemented by the Central Government. This was done with the intention to lessen the role of the executive to discard members.

The independence of tribunals can be directly influenced by the process of removal of its members. Since the policy for expulsion of members lies with the executive, the possibility of its influence over the decisions of the tribunals is present. While judges in the Supreme Court and High Courts need to be impeached (which requires an absolute majority in each house of Parliament), no such safeguard exists for tribunal members. In spite of the fact that certain tribunals were created to supplant the role of High Courts. In this view, both the manner of removal and the grounds of it hold equal weight. This lack of uniformity may be stated through observation of the Airports Economic Regulatory Authority Appellate Tribunal (AERAAT) and The Telecom Disputes Settlement and Appellate Tribunal (TDSAT), wherein procedure of inquiry is only required for some grounds and not all. In other cases, an inquiry is discretionary and not mandatory.

In an effort to resolve these conflicts, it had been recommended by the 74th Parliamentary Standing Committee that there must be harmony not only in the procedure of removal but also in their grounds. With the system envisioned by the current judgment, this uniformity and independence may be achieved.

- It has been provided that 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 upon end of tenure.

The central government has displayed a tendency to select retired judges and officers to head tribunals and this is a worrying trend in these institutions. Such behaviour has been denounced since there exists the possibility to jeopardise the independence of the judiciary. When benefits are put forward to judges post retirement by way of remunerative job opportunities in tribunals, the impartiality of the judges would be brought into question. Such lucrative options after

retirement would act as motivation to side with the government when deciding cases against the executive.

- The court has directed the modification of the tenure in Rules 9(1) and 9(2) of the 2020 Rules as five years in respect of Chairman or Chairperson, Vice Chairman or Vice-Chairperson and the members.

This is a much-needed pronouncement as any tenure shorter than 5 years would not be sufficient to cultivate expertise of a tribunal judge, which can impact the competency of tribunals. This was highlighted both in the case of NCLT and the 74th Parliamentary Standing Committee report. The latter suggested a regular system of appointment where the tenure terminates at the age of retirement while the former recommended a five to seven-year tenure.

CONCLUSION

Administration of justice by the Tribunals is successful only when they operate independent of any government control: this shows them to be reliable and creates public confidence. Furthermore, they are expected to be uniform. Thereby, it is necessary that the tribunals are managed by professionals, i.e. those with judicial experience in the relevant fields and those with policy experience in the such fields. The non-operation of these tribunals due to the inadequacy of its officers causes a significant burden on parties' expectant of quick and decisive pronouncements. The result is an increased case load resulting into inordinate delays and thereby forcing parties to forego the alternative remedy and avail the remedy by approaching the High Court under Article 226 of the Constitution.

These prospects are brought into view to display that these tribunals do not operate in solitude, but form a piece of the larger system of justice administration that had been envisioned by the Constitution. They are therefore required to perform independently, and with efficiency, to dispense justice to the parties. The role of both the executive to formulate and enforce policies and the Courts as upholders of judicial principles is to be collaborative and harmonious. Therefore, the Judgment of the Supreme Court in this case should help in removing the deadlock and impasse which was existing.

It is observed that the judgment however, fails to delve into an important aspect that required consideration, in our opinion, which is, the problem regarding 'post-retirement' benefits that can be offered to tribunal members. It must be ensured by the Executive that the Tribunal Members should be ineligible for further employment with the government and should be held

ineligible to appear, or plead before any Tribunal. Such a step is necessary to ensure faith in the form of speedy justice and quality justice delivery system, which we are sure that Government shall ensure.