SOLPO
RESEARCH

LEGAL NOTE ON ELECTRICITY (AMENDMENT) BILL, 2020

Society for Legal
and Policy Research
New Delhi

Published by: Society for Legal and Policy Research, New Delhi

E-mail: contactus@solpor.org

Website: www.solpor.org

Printed at: New Delhi

Year of Publication: 2020

The comments in this report have been drafted as a result of internal deliberations of the Society for Legal and Policy Research ("SOLPO Research") aimed at understanding and analysing the draft Electricity (Amendment) Bill 2020. These comments intend to provide constructive feedback to the general public and interested stakeholders. They should not be construed as an institutional position, as SOLPO Research does not take an institutional position on issues.

LEGAL NOTE ON ELECTRICITY (AMENDMENT) BILL, 2020

1. The present note is in two parts. Firstly, it examines the judgments of the Supreme Court in relation to "independence of tribunals". The purpose is simply to cull out the ingredients for maintaining independence, so that law made by Parliament does not fall foul of the Constitutional scheme. The second part of the note directly addresses the question in hand, which is - whether the proposed Electricity Contract Enforcement Agency (herein "the ECEA" or the "Dispute Resolution Authority") proposed to be created by introducing an amendment to Electricity Act, 2003) can be lawfully sit within the Central Electricity Regulatory Commission (herein "the CERC"). If this is possible, what should be the minimum safeguards that is required for ensuring that the scheme does not fall foul of the law laid down by the Apex Court in various judgments.

PART 1

2. At the outset, it is necessary to appreciate that the foundational basis for seeking *independence of tribunals* (particularly from the executive branch of the State) is the Supreme Court recognition that doctrine of separation of power is one of the basic structures of our Constitution[1]. The Supreme Court in *The Supreme Court Advocate on Record Association v. UOI (NJAC case) (2016)*[2] held that separation of power or distribution of power is the tectonic structure of the Constitution. It was further held under our Constitutional scheme one branch does not interfere impermissibly with the constitutionally assigned powers and functions of another branch and that there shall be no interference of powers central to each branch.

3. For the Supreme Court, the issue of independence of tribunals (particularly those discharging judicial functions) has been a matter of concern from the time of L. Chandrakumar's case (1997)[3]. It was then observed by the Court that *"... unfortunately tribunals have not achieved full independence.*"

[1] Indira Gandhi vs. Raj Narian., 1975 Supp. SCC 1
[2] 2016 5 SCC 1, see Para.987, opinion of Kurian Joseph, J.
[3] 1997 3 SCC 261

The aforesaid observations in L. Chandrakumar's case was referred to and relied upon by the Supreme Court in Madras Bar Association's case (2010)[4] where it held as follows:

> *"70. But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] are brought about, tribunals in India will not be considered as independent."*

4. In the Madras Bar Association (2010) case the Supreme Court specifically culled out the following principles:

> "106. We may summarise the position as follows:
>
> (*a*) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.
>
> (*b*) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters

[4] (2010) 11 SCC 1

and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.

(*c*) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

(*d*) The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive."

5. This was followed by another important judgment, the Madras Bar Association (2014)[5], where the Supreme Court struck down National Tax Tribunal Act, 2005 and proceeded to hold as follows:

[5] (2014) 10 SCC 1

"*Conclusions*

134. (i) Parliament has the power to enact legislation and to vest adjudicatory functions earlier vested in the High Court with an alternative court/tribunal. Exercise of such power by Parliament would not per se violate the "basic structure" of the Constitution.

135. (ii) Recognised constitutional conventions pertaining to the Westminster model do not debar the legislating authority from enacting legislation to vest adjudicatory functions earlier vested in a superior court with an alternative court/tribunal. Exercise of such power by Parliament would per se not violate any constitutional convention.

136. (iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

137. (iv) Constitutional conventions pertaining to the Constitutions styled on the Westminster model will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced are not incorporated in the court/tribunal sought to be created.

… … … …"

6. Additionally, Justice Nariman in a separate and concurring opinion held as follows:

"141. The precise question arising in these appeals concerns the constitutional validity of the National Tax Tribunal Act, 2005. The question raised on behalf of the petitioners is one of great public importance and has, therefore, been placed before this Constitution

Bench. Following upon the heels of the judgment in Union of India v. Madras Bar Assn. [Union of India v. Madras Bar Assn., (2010) 11 SCC 1] , these matters were delinked and ordered to be heard separately vide judgment and order dated 11-5-2010 in Madras Bar Assn. v. Union of India [(2010) 11 SCC 67] . The precise question formulated on behalf of the petitioners is whether a tribunal can substitute the High Court in its appellate jurisdiction, when it comes to deciding substantial questions of law.

... ...

179. *L. Chandra Kumar [L. Chandra Kumar* v. *Union of India,* (1997) 3 SCC 261 : 1997 SCC (L&S) 577] and *Madras Bar Assn.* [*Union of India* v. *Madras Bar Assn.*, (2010) 11 SCC 1] have allowed tribunalisation at the original stage subject to certain safeguards. The boundary has finally been crossed in this case. I would, therefore, hold that the National Tax Tribunals Act is unconstitutional, being the ultimate encroachment on the exclusive domain of the superior Courts of Record in India." (Underline supplied)

7. Later Supreme Court in Madras Bar Association (2015)[6], while rejecting the challenge to the establishment of National Company Law Tribunal and National Company Law Appellate Tribunal (created under the Companies Act, 2013) reiterated the principles set-out in para 106 of Madras Bar Association (2010), which has been set-out hereinbefore. The Court distinguished National Company Law Tribunal scheme from that which was envisaged in relation to the National Tax Tribunal. The relevant portion of the judgment is para 19 and 20.

"19. *Thirdly, NTT was a matter where power of judicial review hitherto exercised by the High Court in deciding the pure substantial question of law was sought to be taken away to be vested in NTT which was held to be impermissible. In the instant case, there is no such*

[6] (2015) 8 SCC 583

situation. On the contrary, NCLT is the first forum in the hierarchy of quasi-judicial fora set up in the 2013 Act. NCLT, thus, would not only deal with question of law in a given case coming before it but would be called upon to thrash out the factual disputes/aspects as well. In this scenario, NCLAT which is the first appellate forum provided under the 2013 Act to examine the validity of the orders passed by NCLT, will have to revisit the factual as well as legal issues. Therefore, situation is not akin to NTT. Jurisdiction of the Appellate Tribunal is mentioned in Section 410 itself which stipulates that NCLAT shall be constituted "for hearing appeals against the orders of the Tribunal". This jurisdiction is not circumscribed by any limitations of any nature whatsoever and the implication thereof is that appeal would lie both on the questions of facts as well as questions of law. Likewise, under sub-section (4) of Section 421, which provision deals with "appeal from orders of Tribunal", it is provided that NCLAT, after giving reasonable opportunity of being heard, "pass such orders thereon as it thinks fit, forming, modifying or setting aside the order appealed against". It is thereafter that further appeal is provided from the order of NCLAT to the Supreme Court under Section 423 of the 2013 Act. Here, the scope of the appeal to the Supreme Court is restricted only "to question of law arising out of such order".

20. Fourthly, it is not unknown rather a common feature/practice to provide one appellate forum wherever an enactment is a complete code for providing judicial remedies. Providing one right to appeal before an appellate forum is a well-accepted norm which is perceived as a healthy tradition." *(Underline Supplied)*

8. While the aforesaid principles are firmly in place and full operational, the Supreme Court in Gujarat Urja Vikas Nigam Ltd. v. Essar Power (2016)[7] expressed concern on the fact that Supreme Court was being routinely vested with Second Appellate jurisdiction over tribunals and felt that this distraction affected the Court's primary role

[7] (2016) 9 SCC 103

of being a Constitutional Court to decide matters of greater constitutional importance. To address its concern the Court in para 40 made the following observations and also framed certain queries for the Law Commission to answer:

> *"40. While there may be no lack of legislative competence with Parliament to make provision for direct appeal to the Supreme Court from orders of tribunals but the legislative competence is not the only parameter of constitutionality. It can hardly be gainsaid that routine appeals to the highest court may result in obstruction of the constitutional role assigned to the highest court as observed above. This may affect the balance required to be maintained by the highest court of giving priority to cases of national importance, for which larger Benches may be required to be constituted. Routine direct appeals to the highest court in commercial litigation affecting individual parties without there being any issue of national importance may call for reconsideration at appropriate levels. Further question is composition of tribunals as substitutes for High Courts and exclusion of High Court jurisdiction on account of direct appeals to this Court. Apart from desirability, constitutionality of such provisions may need to be gone into. We are, however, not expressing any opinion on this aspect at this stage.*
>
> *41. We are, thus, of the view that in the first instance the Law Commission may look into the matter with the involvement of all the stakeholders.*
>
> *42. We make it clear that as far as heavy pendency in this Court on account of liberal exercise of jurisdiction under Article 136 of the Constitution of India is concerned, we do not wish to make any comment as this is a matter in the discretion of the Court and it is for the Court to address this issue. Our discussion is limited to the consideration of desirability of providing statutory appeals directly to this Court from orders of tribunals on issues not affecting national or public interest*

and other aspects of statutory framework in respect of tribunals as discussed above.

43. The questions which may be required to be examined by the Law Commission are:

43.1. Whether any changes in the statutory framework constituting various tribunals with regard to persons appointed, manner of appointment, duration of appointment, etc. is necessary in the light of the judgment of this Court in Madras Bar Assn. [Madras Bar Assn. v. Union of India, (2014) 10 SCC 1] or on any other consideration from the point of view of strengthening the rule of law?

43.2. Whether it is permissible and advisable to provide appeals routinely to this Court only on a question of law or substantial question of law which is not of national or public importance without affecting the constitutional role assigned to the Supreme Court having regard to the desirability of decision being rendered within reasonable time?

43.3. Whether direct statutory appeals to the Supreme Court bypassing the High Courts from the orders of Tribunal affects access to justice to litigants in remote areas of the country?

43.4. Whether it is desirable to exclude jurisdiction of all courts in the absence of equally effective alternative mechanism for access to justice at grass root level as has been done in provisions of the TDSAT Act (Sections 14 and 15).

43.5. Any other incidental or connected issue which may be considered appropriate." (Underline supplied)

9. The Law Commission gave its report in October 2017[8]. In this report, the Law Commission after summarizing the various judgments of the Supreme Court, made the following recommendations:

A. In case of transfer of jurisdiction of High Court to a Tribunal, the members of the newly constituted Tribunal should possess the qualifications akin to the judges of the High Court. Similarly, in cases where the jurisdiction and the functions transferred were exercised or performed by District Judges, the Members appointed to the Tribunal should possess equivalent qualifications required for appointment as District Judges.

B. There shall be uniformity in the appointment, tenure and service conditions for the Chairman, Vice-Chairman and Members appointed in the Tribunals. While making the appointments to the Tribunal, independence shall be maintained.

C. There shall be constituted a Selection Board/Committee for the appointment of Chairman, Vice-Chairman and Judicial Members of the Tribunal, which shall be headed by the Chief Justice of India or a sitting judge of the Supreme Court as his nominee and two nominees of the Central Government not below the rank of Secretary to the Government of India to be nominated by the Government.

D. For the selection of Administrative Member, Accountant Member, Technical Member, Expert Member or Revenue Member, there shall be a Selection Committee headed by the nominee of the Central Government, to be appointed in consultation with the Chief Justice of India.

E. The Chairman of the Tribunals should generally be the former judge of the Supreme Court or the former Chief Justice of a High Court and Judicial Members should be the former judges of the High Court or persons qualified to be appointed as a Judge of the High Court. Administrative Members, if required, should be such persons who have held the post of Secretary to the Government of India or any other equivalent post under the Central Government or a State

[8] 272nd Report of the law commission

Government, carrying the scale of pay of a Secretary to the Government of India, for at least two years; OR held a post of Additional Secretary to the Government of India, or any other equivalent post under the Central or State Government, carrying the scale of pay of an Additional Secretary to the Government of India, at least for a period of three years. Expert Member/Technical Member/Accountant Member should be a person of ability, integrity and standing, and having special knowledge of and professional experience of not less than fifteen years, in the relevant domain. (can be increased according to the nature of the Tribunal).The appointment of Technical/Expert members in addition to the judicial members be made only where the Tribunals are intended to serve an area which requires specialised knowledge or expertise or professional experience and the exercise of jurisdiction involves consideration of, and decisions into, technical or special aspects.

F. While making the appointments to the Tribunal, it must be ensured that the Independence in working is maintained. The terms and conditions of service, other allowances and benefits of the Chairman shall be such as are admissible to a Central Government officer holding posts carrying the pay of Rs.2,50,000/-, as revised from time to time. The terms and conditions of service, other allowances and benefits of a Member of a Tribunal shall be such as are admissible to a Central Government officer holding posts carrying the pay of Rs.2,25,000/-, as revised from time to time. The terms and conditions of service, other allowances and benefits of Presiding Officer/Member of a Tribunal (to which the jurisdiction and functions exercised or performed by the District Judges are transferred) shall be such as are admissible to a Central Government officer drawing the corresponding pay of a District Judge.

G. The Chairman should hold office for a period of three years or till he attains the age of seventy years, whichever is earlier. Whereas Vice-Chairman and Members should hold the office for a period of three years or till they attain the age of sixty seven years whichever is earlier. It will be appropriate to have uniformity in the service conditions of the Chairman, Vice-Chairman and other Members of the Tribunals to ensure smooth working of the system.

H. The Tribunals must have benches in different parts of the country so that people of every geographical area may have easy Access to Justice. Ideally, the benches of the Tribunals should be located at all places where the High Courts situate. In the event of exclusion of jurisdiction of all courts, it is essential to provide for an equally effective alternative mechanism even at grass root level. This could be ensured by providing State- level sittings looking to the quantum of work of a particular Tribunal. Once that is done, the access to justice will stand ensured.

10. While the Report of the Law Commission was relied upon by the Supreme Court in the Rojer Mathews case (2019)[9], it then proceeded to make additional observations which are relevant:

> "163. We are in agreement with the contentions of the Learned Counsel for the petitioner(s), that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain. The doctrine of separation of powers has been well recognised and re-interpreted by this Court as an important facet of the basic structure of the Constitution, in its dictum in *Kesavananda Bharati* v. *State of Kerala*[41], and several other later decisions. The exclusion of the Judiciary from the control and influence of the Executive is not limited to traditional Courts alone, but also includes Tribunals since they are formed as an alternative to Courts and perform judicial functions.
>
> 164. Clearly, the composition of the Search-cum-Selection Committees under the Rules amounts to excessive interference of the Executive in appointment of members and presiding officers of statutory Tribunals and would undoubtedly be detrimental to the

[9] 2019 SCC OnLine SC 1456

independence of judiciary besides being an affront to the doctrine of separation of powers.

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

… … … …

172. In *Madras Bar Assn.* v. *Union of India* (supra), a five-judge Bench of this Court reiterated the urgent need to monitor the pressure and/or influence of the executive on the Members of the Tribunals. It was asserted that any Tribunal which sought to replace the High Court must be no less independent or judicious in its composition. It was also clarified that the Members of the Tribunal, replacing any Court, including the High Court must possess expertise in law and shall have appropriate legal experience. Even though Parliament can transfer jurisdiction from the traditional Courts to any other analogous Tribunal, the Tribunal must be manned by members having qualifications equivalent to that of the Court from which adjudicatory function is transferred. Hence, any adjudication transferred to a Technical or Non-Judicial member is a clear act of dilution and an encroachment upon the independence of judiciary. It was further ruled by this Court that even though the legislature has the powers to reorganise or prescribe qualifications for members of Tribunals, it is open for this Court to exercise "judicial review" of the prescribed standards, if the adjudicatory standards are adversely affected.

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

175. At this juncture it must also be reiterated that equality can only be amongst equals, and that it would be impermissible to treat unequals equally on the basis of undefined contours of 'Uniformity'. A Tribunal to have the character of a quasi-judicial body and a legitimate replacement of Courts, must essentially possess a dominant judicial character through their members/presiding officers. It was observed in *Madras Bar Association (2010)* (supra) that it is a fundamental prerequisite for transferring adjudicatory functions from Courts to Tribunals that the latter must possess the same capacity and independence as the former, and that members as well as the presiding officers of Tribunals must have significant judicial training and legal experience. Further, knowledge, training and experience of members/presiding officers of a Tribunal must mirror, as far as possible, that of the Court which it seeks to substitute……

… … … …

178. *The stature of the people manning an institution lends credibility and colour to the institution itself. There is a perceptible signalling effect in having retired Supreme Court justices as presiding officers of*

a particular Tribunal of National importance. The same instils an inherent fairness, dignity and exalted status in the Tribunal. Permitting such institutions to be also occupied by persons who have not manned an equivalent position or those with lesser judicial experience, does not bode well for the Tribunal besides discouraging competent people from offering their services. On the same analogy, it would be an anathema to say that High Court judges and District Court judges can both occupy the same position in a Tribunal."

179. It is clear from the Scheme contemplated under the Rules that the government has significantly diluted the role of the Judiciary in appointment of judicial members. Further, in many Tribunals like the NGT, the role of the Judiciary in appointment of non-judicial members has entirely been taken away. Such a practice violates the Constitutional scheme and the dicta of this Court in various earlier decisions already referred to. It is also important to note that in many Tribunals like the National Green Tribunal where earlier removal of members or presiding officer could only be after an enquiry by Supreme Court Judges and with necessary consultation with the Chief Justice of India, under the present Rules it is permissible for the Central Government to appoint an enquiry committee for removal of any presiding officer or member on its own. The Rules are not explicit on who would be part of such a Committee and what would be the role of the Judiciary in the process. In doing so, it significantly weakens the independence of the Tribunal members. It is well understood across the world and also under our Constitutional framework that allowing judges to be removed by the Executive is palpably unconstitutional and would make them amenable to the whims of the Executive, hampering discharge of judicial functions.

……..

183. The Constitution of India doesn't differentiate between High Courts in terms of conditions of service of judges and prescribes a uniform age of superannuation for judges of all High Courts.

Conforming to the principle, as held in earlier judgements of this Court, the Tribunals should have similar standards of appointment and service as that of the Court it is substituting. There must, therefore, be a uniform age of superannuation for all members in all the Tribunals.

184. The only differentiation in age of superannuation provided by the Constitution is that between judges of High Courts and Supreme Court. We find the reason for the same in the intention of the Constituent Assembly which aimed to incorporate the experience and knowledge of a High Court Judge when elevated as a Supreme Court judge. Hence, to utilise the experience and knowledge acquired during tenure as a judge of High Court, Supreme Court judges are provided with higher age of superannuation than the judges of High Court. Similarly, the difference between age of superannuation of Chairman/Presiding Officer and Member of a Tribunal is because Chairman/Presiding Officer is not a promotional post and thus cannot be equated with that of the Member. The post of Chairman/Presiding Officer requires judicial and administrative experience of at least that of the ~~judge~~ of a High Court which is evident from the statutes prescribing them.

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

186. This Court criticised the imposition of short tenures of members of Tribunals in *Union of India* v. *Madras Bar Association, (2010)* (supra) and a longer tenure was recommended. It was observed that short tenures also discourage meritorious members of Bar to

sacrifice their flourishing practice to join a Tribunal as a Member for a short tenure of merely three years. The tenure of Members of Tribunals as prescribed under the Schedule of the Rules is anti-merit and attempts to create equality between unequals. A tenure of three years may be suitable for a retired Judge of High Court or the Supreme Court or even in case of a judicial officer on deputation. However, it will be illusory to expect a practising advocate to forego his well-established practice to serve as a Member of a Tribunal for a period of three years. The legislature intended to incorporate uniformity in the administration of Tribunal by virtue of Section 184 of Finance Act, 2017. Nevertheless, such uniformity cannot be attained at the cost of discouraging meritorious candidates from being appointed as Members of Tribunals.

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

11. While Roger Mathews is the last in the series of judgment, the law that was settled in Madras Bar Asso. (2010) and as such continues to guide all the subsequent decisions of Supreme Court, it may relevant to also refer to the judgments passed by the Supreme Court in the context of Electricity Act, 2003. In the State of Gujarat v. Utility Users' Welfare Association and Others (2018)[10], the Court had was pleased to review the scheme in relation to appointment of Chairman of the Commissions. It held as follows:

"118. We are, thus, of the view that it is mandatory to have a person of law, as a member of the State Commission. When we say so, it does not imply that any person from the field of law can be picked up. It has to be a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial

[10] (2018) 6 SCC 21

experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

… … … …

121. We are, thus, of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

… … … …

Conclusion

125. In view of our observations above, we conclude as under:

125.1. Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so.

125.2. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

125.3. That in any adjudicatory function of the State Commission, it is mandatory for a member having the aforesaid legal expertise to be a member of the Bench.

125.4. The challenge to the appointment of the Chairman and Member of the Tamil Nadu State Commission is rejected as also the suo motu proceedings carried out by the Commission.

125.5. Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time.

125.6. In case there is no member from law as a member of the Commission as required aforesaid in para 125.2 of our conclusion, the next vacancy arising in every State Commission shall be filled in by a Member of law in terms of para 125.2 above."

(Underline Supplied)

12. The aforesaid judgment is in line with the earlier judgment, except to the extent that (based on the textual reading of Section 84 of Electricity Act, 2003) it did not insist that the Chairman of the Commission has to mandatorily have legal / judicial background. In fact it proceeded distinguish (and dilute) the judgment of the Supreme Court in T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014)[11]:

"*59. In view of the aforesaid categorical statement of law, we would accept the submission of Mr Nariman that the tribunal such as the State Commission in deciding a lis, between the appellant and the respondent discharges judicial functions and exercises judicial power to the State. It exercises judicial functions of far-reaching effect. Therefore, in our opinion, Mr Nariman is correct in his submission that it must have essential trapping of the court. This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a civil court. Not only the decisions of the State Commission have far-reaching consequences, they are final and binding between the parties, subject, of course, to judicial review.*

……

[11] (2014) 11 SCC 53

61. Keeping in view the aforesaid observations of this Court, in our opinion, the State of Tamil Nadu ought to make necessary appointments in terms of Section 84(2) of the Act. We have been informed that till date no judicial member has been appointed in the Tamil Nadu State Commission. We are of the opinion that the matter needs to be considered, with some urgency, by the appropriate State authorities about the desirability and feasibility for making appointments, of any person, as the Chairperson from amongst persons who is, or has been, a Judge of a High Court.

62. We have noticed earlier that Section 113 of the Act mandates that the Chairman of APTEL shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can be appointed as the member of the Appellate Tribunal who is or has been or is qualified to be a Judge of a High Court. This would clearly show that the legislature was aware that the functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature. Necessary provision has been made in Section 113 to ensure that APTEL has the trapping of a court. This essential feature has not been made mandatory under Section 84 although provision has been made in Section 84(2) for appointment of any person as the Chairperson from amongst persons who is or has been a Judge of a High Court. In our opinion, it would be advisable for the State Government to exercise the enabling power under Section 84(2) to make appointment of a person who is or has been a Judge of a High Court as Chairperson of the State Commission."

The aforesaid judgment in the PPN case (2014) was referred and approved by the Supreme Court in A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468.

.

13. Based on review of all the relevant judgments, the principles that can be culled out in order to provide the broad contours within which the legislature can effectively make a law vesting jurisdiction in a tribunal are as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) A Tribunal to have the character of a quasi-judicial body and a legitimate replacement of Courts, must essentially possess a dominant judicial character through their members/presiding officers. It is a fundamental prerequisite for transferring adjudicatory functions from Courts to Tribunals that the latter must possess the same capacity and independence as the former, and that members as well as the presiding officers of Tribunals must have significant judicial training and legal experience. Further, knowledge, training and experience of members/presiding officers of a Tribunal must mirror, as far as possible, that of the Court which it seeks to substitute.

(c) While enacting legislation pertaining to transfer of judicial power, Parliament has to ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

(d) The tribunal should have as members, persons of a rank, capacity and status (as nearly as possible) equal to the rank, status and capacity of the court which was till then dealing with such matters. The members of the tribunal should have the independence and security of tenure associated with judicial tribunals. A tenure of three years may be suitable for a retired Judge of High Court or the Supreme Court or even in case of a judicial officer on deputation. However, it will be illusory to expect a practising advocate to forego his well-established practice to serve as a Member of a Tribunal for a period of three years.

(e) The difference between age of superannuation of Chairman/ Presiding Officer and Member of a Tribunal is because Chairman/ Presiding Officer is not a promotional post and thus cannot be equated with that of the Member. The post of Chairman/ Presiding Officer requires judicial and administrative experience of at least that of the ~~judge~~ of a High Court which is evident from the statutes prescribing them.

(f) The Tribunals should have similar standards of appointment and service as that of the Court it is substituting. The Search-cum-Selection Committees should not go against the constitutional scheme so as to dilute the involvement of judiciary in the process of appointment of members of tribunals which is in effect an encroachment by the executive on the judiciary.

(g) Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

(h) The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly, while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria.

(i) It is an acceptable feature/practice to provide one appellate forum wherever an enactment is a complete code for providing judicial remedies. Providing one right to appeal before an appellate forum is a well-accepted norm which is perceived as a healthy tradition. A second appeal to the Supreme Court is permissible, where the scope of the appeal to the Supreme Court is restricted only "to question of law arising out of such order"

14. Keeping in view the aforesaid, one can now proceed to attempt a response on the second issue - whether the proposed Electricity Contract Enforcement Agency (herein "the ECEA" or the "Dispute Resolution Authority") proposed to be created by introducing an amendment to Electricity Act, 2003 can be lawfully sit within the Central Electricity Regulatory Commission (herein "the CERC"). If this is possible, what should be the minimum safeguards that is required for ensuring that the scheme does not fall foul of the law laid down by the Apex Court in various judgments.

15. As regards the proposed amendment, as seen from para 13 above, the legislature is fully empowered to vest judicial functions in a separate forum – tribunal. In order to ensure independence of tribunals, compliance of the principles summarized in paragraph 13 is essential. The principles are primarily those that were originally enumerated in Madras Bar Asso. (2010) and largely reiterated in Roger Mathew's (2019).

16. Apart from the said judicial principles, there are a few recommendations of the Law Commissions, which is available from its 272nd Report (October, 2107). An important recommendation of the Law Commission is the need for having benches in different parts of the country so that people of every geographical area may have easy access to justice. While the Law Commission report says that ideally benches of the tribunals should be located at all places where the High Courts are situated, looking to the quantum of work of a particular tribunal a possible solution is to have regional benches. Once that is done, the access to justice will stand ensured.

In view of the settled judicial principles, judicial dominance is necessary both at the stage of selection and also in terms of composition of the judicial forum. The presiding member of the forum should have legal / judicial background. Technical member in judicial forum should be included only when there is need for experts. While the Law Commission has opined that there may be any need in involving the judiciary in the selection process of technical members, the view of the Supreme Court is different. The Court has insisted that since adjudicatory function will be discharged by the tribunal, the judiciary must have a dominant say in the selection process of Chairman / Presiding Officer and members of such tribunal.

Since the right of appeal is a creature of statute the same can be introduced. If the CERC is vested with the original jurisdiction of decide adjudicate disputes, the first level of appeal can lie with the Appellate Tribunal for Electricity. The second level of appeal will then be in the Supreme Court.

This procedure is distinguished from the procedure that is followed under the Telecom Regulatory Authority of India Act, 1997, where the original jurisdiction for resolution of dispute is largely vested with the Telecom Dispute Settlement Appellate Tribunal (TDSAT) in terms of section 14 of the 1997 Act (as amended in 2000). The aforesaid

vesting of original jurisdiction in the appellate forum i.e. TDSAT has reduced one level of appeal. Now orders passed by TDSAT is appealable only before the Hon'ble Supreme Court of India. However, the constitutional jurisdiction of High Court under Articles 226 and 227 will always be available for testing orders passed by tribunals, subject to well established self-imposed limitations for exercise of such powers. While it is possible to provide an appeal to the Supreme Court in the first instance, this is not a procedure that may in the long term inure either to the benefit of the sector or the overall discharge of responsibility by the Supreme Court (as has been commented upon by the court in Gujarat Urja Vikas Nigam Ltd. v. Essar Power (2016)).

Therefore, in our view, the proposed legislation should keep in mind the minimum/ basic ingredients mentioned above. The judicial wing can be created within the CERC, which can then be ringfenced, to perform purely adjudicatory functions.

Society for Legal and Policy Research,
A-128, Lower Ground Floor,
Defence Colony, New Delhi – 110 024

E-mail: contactus@solpor.org
Website: www.solpor.org