Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3067 OF 2004

Union of India … Appellant

Vs.

R. Gandhi, President, Madras Bar Association … Respondent

WITH

CIVIL APPEAL NO.3717 OF 2005

Madras Bar Association … Appellant

Vs.

Union of India … Respondent

J U D G M E N T

R.V.RAVEENDRAN, J.

These appeals arise from the order dated 30.3.2004 of the Madras High Court in WP No. 2198/2003 filed by the President of Madras Bar Association (MBA for short) challenging the constitutional validity of Chapters 1B and 1C of the Companies Act, 1956('Act' for short) inserted by Companies (Second Amendment) Act 2002 ('Amendment Act' for short)

providing for the constitution of National Company Law Tribunal ('NCLT' or 'Tribunal') and National Company Law Appellate Tribunal ('NCLAT' or 'Appellate Tribunal').

2. In the said writ petition, Madras Bar Association ('MBA') raised the following contentions :

(i) Parliament does not have the legislative competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any Tribunal outside the Judiciary.

(ii) The constitution of the National Company Law Tribunal and transferring the entire company jurisdiction of the High Court to the Tribunal which is not under the control of the Judiciary, is violative of the doctrine of separation of powers and independence of the Judiciary which are parts of the basic structure of the Constitution.

(iii) Article 323B of the Constitution enables the appropriate Legislature to provide for adjudication or trial by Tribunals of disputes, complaints or offences with respect to all or any of the matters specified in clause (2). Clause (2) enumerate the matters in regard to which Tribunals can be constituted. The said list is exhaustive and not illustrative. The list does not provide for constitution of Tribunal for insolvency, revival and restructuring of the company. In the absence of any amendment to Article 323B providing for a National Tribunal for revival of companies and winding up companies,

there is no legislative competence to provide for constitution of NCLT and NCLAT.

(iv) The various provisions of Chapters IB and IC of the Act (sections 10FB, 10FD, 10FE, 10FF, 10FL(2), 10FO, 10FR(3), 10FT and 10FX) are defective and unconstitutional, being in breach of basic principles of Rule of Law, Separation of Powers and Independence of the Judiciary.

3. The Union of India submitted that it had constituted a High Level Committee on Law relating to Insolvency of Companies under the Chairmanship of Justice V. Balakrishna Eradi, a retired Judge of this Court, with other experts to examine the existing laws relating to winding-up proceedings of the company in order to remodel it in line with the latest developments and innovations in corporate laws and governance and to suggest reforms to the procedures at various stages followed in insolvency proceedings of the company in order to avoid unnecessary delay, in tune with international practices in the field. The said Committee identified the following areas which contributed to inordinate delay in finalisation of winding-up/dissolution of companies : (a) filing statement of affairs; (b) handing over of updated books of accounts; (c) realization of debts; (d) taking over possession of the assets of the company and sale of assets; (e) non-availability of funds for the Official Liquidator to discharge his duties

and functions (f) settlement of the list of creditors; (g) settlement of list of contributories and payment of calls; (h) finalisation of income-tax proceedings; and (i) disposal of misfeasance proceedings. The Committee found that multiplicity of court proceedings is the main reason for the abnormal delay in dissolution of companies. It also found that different agencies dealt with different areas relating to companies, that Board for Industrial & Financial Reconstruction (BIFR) and Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dealt with references relating to rehabilitation and revival of companies, High Courts dealt with winding-up of companies and Company Law Board (CLB) dealt with matters relating to prevention of oppression and mismanagement etc. Considering the laws on corporate insolvency prevailing in industrially advanced countries, the Committee recommended various amendments in regard to the provisions of Companies Act, 1956 for setting-up of a National Company Law Tribunal which will combine the powers of the CLB under the Companies Act, 1956, BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 as also the jurisdiction and powers relating to winding-up presently vested in the High Courts.

4. It is stated that the recommendations of the Eradi Committee were accepted by the Government and Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts. It is submitted that the establishment of NCLT and NCLAT will have the following beneficial effects: (i) reduce the pendency of cases and reduce the period of winding-up process from 20 to 25 years to about two years; (ii) avoid multiplicity of litigation before various fora (High Courts and quasi-judicial Authorities like CLB, BIFR and AAIFR) as all can be heard and decided by NCLT; (iii) the appeals will be streamlined with an appeal provided against the order of the NCLT to an appellate Tribunal (NCLAT) exclusively dedicated to matters arising from NCLT, with a further appeal to the Supreme Court only on points of law, thereby reducing the delay in appeals; and (iv) with the pending cases before the Company Law Board and all winding-up cases pending before the High Courts being transferred to NCLT, the burden on High Courts will be reduced and BIFR and AAIFR could be abolished.

5. It was contended that the power to provide for establishment of NCLT and NCLAT was derived from Article 245 read with several entries in List I

of the Seventh Schedule and did not originate from Article 323B. It was submitted that various provisions in Parts IB and IC of the Act relating to the constitution of NCLT and NCLAT were intended to provide for selection of proper persons to be their President/Chairperson/members and for their proper functioning. It was submitted that similar provisions relating to establishment of other alternative institutional mechanisms such as Administrative Tribunals, Debt Recovery Tribunals and Consumer fora, had the seal of approval of this Court in *S. P. Sampath Kumar vs. Union of India* – 1987 (1) SCC 124, *L. Chandrakumar v. Union of India* (1997) 3 SCC 261; *Union of India v. Delhi High Court Bar Association* (2002) 4 SCC 275 and *State of Karnataka v. Vishwabharathi House Building Co-operative Society 2003(2) SCC 412.*

6. The Madras High Court by its order dated 30.3.2004 held that creation of the NCLT and vesting the powers hitherto exercised by the High Courts and CLB in the Tribunal was not unconstitutional. It referred to and listed the defects in several provisions (that is mainly sections 10FD(3)(f)(g)(h), 10FE, 10FF, 10FL(2), 10FR(3), 10FT) in Parts IB and IC of the Act. It therefore declared that until the provisions of Part IB and IC of the Act, introduced by the Amendment Act which were defective being violative of

basic constitutional scheme (of separation of judicial power from the Executive and Legislative power and independence of judiciary enabling impartial exercise of judicial power) are duly amended by removing the defects that were pointed out; it will be unconstitutional to constitute a Tribunal and Appellate Tribunal to exercise the jurisdiction now exercised by the High Court or the Company Law Board.

7. The Union of India has accepted that several of the defects pointed out by the High Court in Parts IB and IC of the Act, require to be corrected and has stated that those provisions will be suitably amended to remove the defects. It has not however accepted the decision of the High Court that some other provisions of Parts IB and IC are also defective. To narrow down the controversy in regard to the appeal by the Union, we note below the defects pointed out by the High Court in regard to various provisions in Parts IB and IC of the Act and the stand of Union of India in respect of each of them.

Sections 10FE and 10FT : Tenure of President/Chairman and Members of NCLT and NCLAT fixed as three years with eligibility for re-appointment

7.1) The High Court held that 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, 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.

The Union Government has accepted the finding and agreed to amend section 10FE and 10FT 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 re-appointment only once or twice.

Section 10FE – second proviso : Enabling the President/Members of NCLT to retain their lien with their parent cadre/Ministry/Department while holding office

7.2) The High Court held that in so far as the President is concerned, there is no question of holding a lien and the reference to President must be deleted from the second proviso to section 10FE.

The Union Government has accepted the decision and has stated that it proposes to amend the proviso and delete the reference to the President in the second proviso.

7.3) The High Court also held that the period of lien in regard to the members of NCLT should be restricted to only one year instead of the entire period of service as a Member of NCLT.

The Union Government has submitted that in view of the proposed longer tenure of five years as against the three years, the government proposes to permit the members to retain their lien with their parent cadre/Ministry/Department for a period of three years, as one year may be too short for the members to decide whether to give up the lien or not.

Section 10FD(1) : Qualification for appointment as President

7.4) The High Court has suggested that it would be appropriate to confine the choice of persons to those who have held the position of a Judge of a High Court for a minimum period of five years instead of the existing provision which provides that Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court, for the post of President of the Tribunal.

The Government has agreed in part and proposes to amend the Act for appointment of a retired or serving High Court Judge alone as the President of the Tribunal. It however feels that minimum length of service as experience, need not be fixed in the case of High Court Judges, as the Selection Committee headed by the Chief Justice of India or his nominee would invariably select the most suitable candidate for the post.

Section 10FD(3)(f) : Appointment of Technical Member to NCLT

7.5) The High Court has held that appointment of a member under the category specified in section 10FD(3)(f), can have a role only in matters concerning revival and rehabilitation of sick industrial companies and not in relation to other matters. The High Court has therefore virtually indicated that NCLT should have two divisions, that is an Adjudication Division and a Rehabilitation Division and persons selected under the category specified in clause (f) should only be appointed as members of the Rehabilitation Division.

The Union Government contends that similar provision exists in section 4(3) of the Sick Industrial Companies (Special Provisions) Act, 1985; that the provision is only an enabling one so that the best talent can be selected by the Selection Committee headed by the Chief Justice of India or his nominee; and that it may not be advisable to have Division or limit or place restrictions on the power of the President of the Tribunal to constitute appropriate benches. It is also pointed out that a Technical Member would always sit in a Bench with a Judicial Member.

Section 10FD(3)(g) : Qualification for appointment of Technical Member

7.6) The High Court has observed that in regard to Presiding Officers of Labour Courts and Industrial Tribunals or National Industrial Tribunal, a minimum period of three to five years experience should be prescribed, as what is sought to be utilized is their expert knowledge in Labour Laws.

The Union Government submits that it may be advisable to leave the choice of selection of the most appropriate candidate to the Committee headed by the Chief Justice of India or his nominee.

7.7) The High Court has also observed that as persons who satisfy the qualifications prescribed in section 10FD(3)(g) would be persons who fall under section 10FD(2)(a), it would be more appropriate to include this qualification in section 10FD(2)(a). It has also observed in section 10FL dealing with "Benches of the Tribunal", a provision should be made that a 'Judicial Member' with this qualification shall be a member of the special Bench referred to in section 10FL(2) for cases relating to rehabilitation, restructuring or winding up of Companies.

The Union Government has not accepted these findings and contends that the observations of the High Court would amount to judicial legislation.

Section 10FD(3)(h) : Qualification of technical member of NCLT

7.8) The High Court has observed that clause (h) referring to the category of persons having special knowledge of and experience in matters relating to labour, for not less than 15 years is vague and should be suitably amended so as to spell out with certainty the qualification which a person to be appointed under clause (h) should possess.

The Union Government contends that in view of the wide and varied experience possible in labour matters, it may not be advisable to set out the

nature of experience or impose any restrictions in regard to the nature of experience. It is submitted that the Selection Committee headed by the Chief Justice of India or his nominee would consider each application on its own merits.

7.9) The second observation of the High Court is that the member selected under the category mentioned in clause (h) must confine his participation only to the Benches dealing with revival and rehabilitation of sick companies and should also be excluded from functioning as a single Member Bench for any matter.

The Union Government contends that it may not be advisable to fetter the prerogative of the President of the Tribunal to constitute benches by making use of available members. It is also pointed out that it may not be proper to presume that a person well-versed in labour matters will be unsuitable to be associated with a Judicial Member in regard to adjudication of winding-up matters.

Section 10FL(2) – Proviso : Winding up proceedings by single Member

7.10) The High Court has held that it is impermissible to authorize a single member Bench to conduct the winding up proceedings after a special three Members Bench passes an order of winding up; and if such single member happens to be a labour member appointed under section 10FD(3)(f), it would be a mockery of a specialist Tribunal.

The Union Government has accepted the finding and has agreed to amend the proviso to section 10FL(2) to provide that a winding up proceedings will be conducted by a Bench which would necessarily include a judicial member.

Sections 10FF and 10FK(2) : Power of Central Government to designate any member to be a Member (Administration)

7.11) The High Court has held that sections 10FF and 10FK(2) should be suitably amended to provide that a member may be designated as Member (Administration) only in consultation with the President, and further provide that the Member (Administration) will discharge his functions in relation to finance and administration of the Tribunal under the overall control and supervision of the President.

The Union Government has accepted the decision and has agreed to drop the provision for Member Administration. It was stated that the Act would be amended to provide that the administration and financial functions would be discharged under the overall control and supervision of the President. It was stated that the Act would be further amended to provide for creation of the posts of Vice-Presidents.

Section 10 FR(3) : Appointment of members of the Appellate Tribunal

7.12) The High Court has observed that section 10FR(3) must be suitably amended to delete the reference to all subjects other than law and accountancy. It has also stated that it would be more appropriate to

incorporate a provision similar to that in section 5(3) of the SICA which provides that a member of the Appellate Authority shall be a person who is or has been a Judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government who has been a member of the Board for not less than three years.

The Union Government contends that the provision is only an enabling one; and since the Chairperson of the Appellate Tribunal would be a former Judge of the Supreme Court or former Chief Justice of High Court, it may not be advisable to limit the scope of eligibility criteria for members especially when a Selection Committee headed by the Chief Justice of India or his nominee would make the selection.

Section 10FX – Selection Process for President/Chairperson

7.13) The High Court has expressed the view that the selection of the President/Chairperson should be by a Committee headed by the Chief Justice of India in consultation with two senior Judges of the Supreme Court.

The Union Government has submitted that it would not be advisable to make such a provision in regard to appointment of President/Chairperson of statutory Tribunals. It is pointed out no other legislation constituting Tribunals has such a provision.

The challenge in the appeals

8. Union of India contends that the High Court having held that the Parliament has the competence and power to establish NCLT and NCLAT, ought to have dismissed the writ petition. It is submitted that some of the directions given by the High Court to reframe and recast Parts IB and IC of the Act amounts to converting judicial review into judicial legislation. However, as Union of India has agreed to rectify several of the defects pointed out by the High Court (set out above), the appeal by the Union Government is now restricted to the findings of the High Court relating to sections 10FD(3)(f), (g) and (h) and 10FX.

9. On the other hand, MBA in its appeal contends that the High Court ought not to have upheld the constitutional validity of Parts IB and IC of the Act providing for establishment of NCLT and NCLAT; that the High Court ought to have held that constitution of such Tribunals taking away the entire Company Law jurisdiction of the High Court and vesting it in a Tribunal which is not under the control of the Judiciary, is violative of doctrine of separation of powers and the independence of Judiciary which are parts of the basic structure of the Constitution. MBA also contends that the decisions

of this Court in *Union of India vs. Delhi High Court Bar Association* – 2002 (4) SCC 275, with reference to constitutional validity of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 providing for constitution of the Debt Recovery Tribunals and *State of Karnataka vs. Vishwabharathi House Building Co-op., Society* – 2003 (2) SCC 412 in regard to the constitutional validity of Consumer Protection Act, 1986 providing for constitution of consumer fora require reconsideration.

10. When these civil appeals came up for hearing before a three-Judge Bench of this Court, the Bench was of the view that the decisions in *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261, *Union of India v. Delhi Bar Association* (2002) 4 SCC 275 and *State of Karnataka v. Vishwa Bharati Housing Building Cooperative Societies & Anr* (2003) 2 SCC 412 holding that Parliament and State legislatures possessed legislative competence to effect changes in the original jurisdiction in the Supreme Court and High Court, had not dealt with the following issues:

(i) To what extent the powers and judiciary of High Court (excepting judicial review under Article 226/227) can be transferred to Tribunals?

(ii) Is there a demarcating line for the Parliament to vest intrinsic judicial functions traditionally performed by courts in any Tribunal or authority outside the judiciary?

(iii) Whether the "wholesale transfer of powers" as contemplated by the Companies (Second Amendment) Act, 2002 would offend the constitutional scheme of separation of powers and independence of judiciary so as to aggrandize one branch over the other?

Therefore the Three Judge Bench, by order dated 13.5.2007 directed the appeals to be heard by a Constitution Bench, observing that as the issues raised are of seminal importance and likely to have serious impact on the very structure and independence of judicial system.

11. We may first refer to the relevant provisions of the Companies Act, 1956 as amended by the Companies (Second Amendment) Act, 2002 relating to the constitution of NCLT and NCLAT :

Part IB – National Company Law Tribunal

10FB. Constitution of National Company Law Tribunal: The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

10FC. Composition of Tribunal: The Tribunal shall consist of a President and such number of Judicial and Technical Members not exceeding sixty-two, as the Central Government deems fit, to be appointed by that Government, by notification in the Official Gazette.

10FD. Qualifications for appointment of President and Members: (1) The Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court as the President of the Tribunal.

(2) A person shall not be qualified for appointment as Judicial Member unless he-

(a) has, for at least fifteen years, held a judicial office in the territory of India; or

(b) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has been partly in practice as an advocate for a total period of fifteen years; or

(c) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government including at least three years of service as a Member of the Indian Company Law Service (Legal Branch) in Senior Administrative Grade in that service; or

(d) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government (including at least three years of service as a Member of the Indian Legal Service in Grade I of that service).

(3) A person shall not be qualified for appointment as Technical Member unless he-

(a) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that Service]; or

(b) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or

(c) is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or

(d) is, or has been, for at least fifteen years in practice as a cost accountant under , the Costs and Works Accountants Act, 1959 (23 of 1959); or

(e) is, or has been, for at least fifteen years working experience as a Secretary in whole-time practice as defined in clause (45A) of section 2 of this Act and is a member of the Institute of the Companies Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980); or

(f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty years in, science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be in the opinion of the Central Government useful to the Tribunal; or

(g) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947); or

(h) is a person having special knowledge of, and experience of not less than fifteen years in, the matters relating to labour.

Explanation.-For the purposes of this Part,-

(i) "Judicial Member" means a Member of the Tribunal appointed as such under sub-section (2) of section 10FD and includes the President of the Tribunal;

(ii) "Technical Member" means a Member of the Tribunal appointed as such under sub-section (3) of section 10FD.

10FE. Term of office of President and Members: The President and every other Member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office but shall be eligible for re-appointment:

Provided that no President or other Member shall hold office as such after he has attained,-

(a) in the case of the President, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years:

Provided further that the President or other Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such.

10FF. Financial and administrative powers of Member Administration: The Central Government shall designate any Judicial Member or Technical Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:

Provided that the Member Administration shall have authority to delegate

such of his financial and administrative powers as he may think fit to any other officer of the Tribunal subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member Administration.

10FK. Officers and employees of Tribunal: (1) The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.

(2) The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.

(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Tribunal shall be such as may be prescribed.

10FL. Benches of Tribunal: (1) Subject to the provisions of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal; out of which one shall be a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD:

Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD :

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.

(3) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points shall be decided according to the other of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.

(4) There shall be constituted such number of Benches, as may be notified by the Central Government.

(5) In addition to the other Benches, there shall be a Principal Bench at New Delhi presided over by the President of the Tribunal.

(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

10FO. Delegation of powers: The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any Member or officer or other employee of the Tribunal or other person authorized by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary.

Part IC - APPELALTE TRIBUNAL

10FR. Constitution of Appellate Tribunal: (1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

10FT. Term of office of Chairperson and Members: The Chairperson or a Member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of three years:

Provided that no Chairperson or other member shall hold office as such after he has attained,-

(a) in the case of the Chairperson, the age of seventy years;

(b) in the case of any other Member, the age of sixty-seven years.

10FX. Selection Committee: (1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of:

(a) Chief Justice of India or his nominee Chairperson;

(b) Secretary in the Ministry of Finance and Company Affairs Member;

(c) Secretary in the Ministry of Labour Member;

(d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;

(e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.

(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.

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(5) Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.

(6) No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

10G. Power to punish for contempt: The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971 (70 of 1971), shall have the effect subject to modifications that-

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such law officers as the Central Government may specify in this behalf.

10GB. Civil court not to have jurisdiction: (1) No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force.

10GF. Appeal to Supreme Court: Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Section 10FJ relates to removal and suspension of President or members of the NCLT. Section 10FV relates to removal and suspension of Chairman or members of NCLAT. Sub-section (2) of those sections provide that the President/Chairman or a member shall not be removed from his office except by an order made by the Central Government on the ground of proven misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which the President/Chairman or member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Sub-section (3) provides that the Central Government may suspend from office, the President/Chairman or Member of the Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

Difference between Courts and Tribunals

12. The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power

of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc).

13. This court had attempted to point out the difference between Court and Tribunal in several decisions. We may refer a few of them.

13.1) In *Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala* – (1962) 2 SCR 339, Hidayatullah J., succinctly explained the difference between Courts and Tribunals, thus:

> "All Tribunals are not courts, though all courts are Tribunals". The word "courts" is used to designate those Tribunals which are set up in an organized state for the administration of justice. By administration of justice is meant the exercise of juridical power of the state to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the courts are there to restore the vinculum juris, which is disturbed……..
>
> When rights are infringed or invaded, the aggrieved party can go and commence a querela before the ordinary Civil Courts. These Courts which are instrumentalities of Government, are invested with the judicial power of the State, and their authority is derived from the Constitution or some Act of Legislature constituting them. Their number is ordinarily fixed and they are ordinarily permanent, and can try any suit or cause within their jurisdiction. Their numbers may be increased or decreased, but they are almost always permanent and go under the compendious name of "Courts of Civil Judicature". There can thus be no doubt that the Central Government does not come within this class.
>
> With the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence. These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art.136, 227, or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227.
>
> By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise

of this power, a clear division is thus noticeable. *Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature. Their procedures may differ, but the functions are not essentially different.* What distinguishes them has never been successfully established."

In my opinion, a Court in the strict sense is a Tribunal which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its constitution to exercise the judicial power of the State. *These Courts perform all the judicial functions of the State except those that are excluded by law from their jurisdiction.* The word "judicial", be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 Q.B. 431, in these words :

> "The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to being to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration."

That an officer is required to decide matters before him "judicially" in the second sense does not make him a Court or even a Tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest.

Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included".

(emphasis supplied)

13.2) In *Jaswant Sugar Mills vs. Laxmi Chand* – 1963 Supp (1) SCR 242, this Court observed that in order to be a Tribunal, a body or authority must, besides being under a duty to act judicially, should be invested with the judicial power of the state.

13.3) In *Associated Cement Companies Ltd. vs. P. N. Sharma* – (1965) 2 SCR 366, another Constitution Bench of this Court explained the position of Tribunals thus:

> "The expression "court" in the context denotes a Tribunal constituted by the State as a part of the ordinary hierarchy of courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as legislative, executive and judicial powers. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions. The Constitution recognised a hierarchy of courts and their adjudication are normally entrusted all disputes between citizens and citizens as well as between the citizens and the State. These courts can be described as ordinary courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which in described as judicial process. The powers which these courts exercise, are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions.
>
> In every State there are administrative bodies or authorities which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. In reaching their administrative decisions, administrative bodies can and often to take into consideration questions of policy. It is not unlikely that even in this process of reaching administrative divisions, the administrative bodies or authorities are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority to reach decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decision pronounced by courts.
>
> Tribunals which fall under the purview of Article 136(1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the court one common characteristic; both the courts and the Tribunals are constituted by the state and are invested with judicial as distinguished from purely administrative or executive functions (vide *Durga Shankar Mehta v. Raghuraj Singh* - 1955 (1) SCR 267). They

> are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. *The procedure which the Tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the Tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of Tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the State's inherent judicial function which they discharge*."
>
> (emphasis supplied)

13.4) In *Kihoto Hollohan vs. Zachillhu* – 1992 Supp (2) SCC 651, a Constitution Bench reiterated the above position and added the following :

> Where there is a lis – an affirmation by one party and denial by another – and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a court".

In *S.P. Sampath Kumar vs. Union of India* – (1987) 1 SCC 124, this Court expressed the view that the Parliament can without in any way violating the basic structure doctrine make effective alternative institutional mechanisms or arrangements for judicial review.

14. Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals. They are :

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

Re: Independence of judiciary

15. Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of 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).

16. In *Union of India vs. Sankalchand Himatlal Sheth* – 1977 (4) SCC 193, a Constitution Bench of this Court explained the importance of 'Independence of Judiciary' thus :

> "Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced

> great judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise…….
>
> The Constitution makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control,……
>
> ……..even with regard to the Subordinate Judiciary the framers of the Constitution were anxious to secure that it should be insulated from executive interference and once appointment of a Judicial Officer is made, his subsequent career should be under the control of the High Court and he should not be exposed to the possibility of any improper executive pressure."

In *Supreme Court Advocates-on-Record Association & Ors. v. Union of India* (1993) 4 SCC 441, J.S. Verma, J. (as he then was) speaking for the majority, described the attributes of an independent judge thus :

> " …Only those persons should be considered fit for appointment as Judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. *Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge*.".
>
> (emphasis supplied)

In his concurring opinion, Pandian J. stated that "it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours." He further stated :

> "..that to have an independent judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at

> all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always wedded only to the principles of the Constitution and 'Rule of Law'. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity. Though it is illogical to spin out a new principle that the keynote is not the judge but the judiciary especially when it is accepted in the same breath that an erroneous appointment of an unsuitable person is bound to produce irreparable damage to the faith of the community in the administration of justice and to inflict serious injury to the public interest and that the necessity for maintaining independence of judiciary is to ensure a fair and effective administration of justice."

The framers of the Constitution stated in a Memorandum ("See *The Framing of India's Constitution – B.Shiva Rao*, volume I-B, Page 196) :

> "We have assumed that it is recognized on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive … in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view."

In *L. Chandra Kumar*, the seven Judge Bench of this Court held :

> "The Constitution of India while conferring power of judicial review of legislative action upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary."

Independence of Judiciary has always been recognized as a part of the basic structure of the Constitution (See : *Supreme Court Advocates-on-Record Association vs. Union of India* – 1993 (4) SCC 441, *State of Bihar vs. Bal Mukund Shah* – 2000 (4) SCC 640, *Shri Kumar Padma Prasad vs. Union of India* – 1992 (2) SCC 428, and *All India Judges Association vs. Union of India* – 2002 (4) SCC 247).

Separation of Power

17. In *Rai Sahib Ram Jawaya Kapur vs. The State of Punjab* – 1955 (2) SCR 225, this Court explained the doctrine of separation of powers thus :

> "The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."

In *Chandra Mohan vs. State of UP* – AIR 1966 SC 1987, this Court held :

> "The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important,

> that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. *Simply stated, it means that there shall be a separate judicial service free from the executive control*."
>
> (emphasis supplied)

In *Indira Nehru Gandhi vs. Raj Narain* – 1975 Supp SCC 1, this Court observed that the Indian Constitution recognizes separation of power in a broad sense without however their being any rigid separation of power as under the American Constitution or under the Australian Constitution. This Court held thus :

> "It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial power as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.
>
> "The Constitution has a basic structure comprising the three organs of the Republic: the Executive, the Legislature and the Judiciary. It is through each of these organs that the sovereign will of the people has to operate

> and manifest itself and not through only one of them. None of these three separate organs of the Republic can take over the functions assigned to the other. This is the basic structure or scheme of the system of Government of Republic……
>
> "But no constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought to enter into problems entwined in the 'political thicket", Parliament must also respect the preserve of the court. The principle of separation of powers is a principle of restraint …… …"

In *L. Chandra Kumar*, the seven-Judge Bench of this Court referred to the task entrusted to the superior courts in India thus :

> "The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. *It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations*. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial and judicial independence."
>
> (emphasis supplied)

The doctrine of separation of powers has also been always considered to be a part of the basic structure of the Constitution (See : *Keshavananda Bharati vs. State of Kerala* – 1973 (4) SCC 225, *Indira Gandhi vs. Raj Narain* – 1975 Supp SCC 1, *State of Bihar vs. Bal Mukund Shah* – 2000 (4) SCC 640 and *I.R. Coelho vs. State of Tamil Nadu* – 2007 (2) SCC 1).

The argument in favour of Tribunals

18. The argument generally advanced to support tribunalisation is as follows : The courts function under archaic and elaborate procedural laws and highly technical Evidence Law. To ensure fair play and avoidance of judicial error, the procedural laws provide for appeals, revisions and reviews, and allow parties to file innumerable applications and raise vexatious objections as a result of which the main matters get pushed to the background. All litigation in courts get inevitably delayed which leads to frustration and dissatisfaction among litigants. In view of the huge pendency, courts are not able to bestow attention and give priority to cases arising under special legislations. Therefore, there is a need to transfer some selected areas of litigation dealt with by traditional courts to special Tribunals. As Tribunals are free from the shackles of procedural laws and Evidence Law, they can provide easy access to speedy justice in a 'cost-affordable' and 'user-friendly' manner. Tribunals should have a Judicial Member and a Technical Member. The Judicial Member will act as a bulwark against apprehensions of bias and will ensure compliance with basic principles of natural justice such as fair hearing and reasoned orders. The Judicial Member would also ensure impartiality, fairness and reasonableness in consideration. The presence of Technical Member ensures the availability

of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision-making.

19. United Kingdom has a rich experience of functioning of several types of Tribunals as dispute resolution-and-grievance settlement mechanisms in regard to varied social welfare legislations. Several Committees were constituted to study the functioning of the Tribunals, two of which require special mention. The first is the Franks Report which emphasized that Tribunals should be independent, accessible, prompt, expert, informal and cheap. The second is the report of the Committee constituted to undertake the review of delivery of justice through Tribunals, with Sir Andrew Leggatt as Chairman. The Leggatt Committee submitted its report to the Lord High Chancellor of Great Britain in March, 2001. The Committee explained the advantages of Tribunals, provided they could function independently and coherently, thus :

> "Choosing a tribunal to decide disputes should bring two distinctive advantages for users. First, tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills. Secondly, tribunals' procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms. Most users ought therefore to be capable of preparing and presenting their cases to the tribunal themselves, providing they have the

> right kind of help. Enabling that kind of direct participation is an important jurisdiction for establishing tribunals at all. x x x x x

De Smith's *Judicial Review*, (6th Edn., Page 50 Para 1.085) sets out the advantages of Tribunals thus :

> "In the design of an administrative justice system, a Tribunal may be preferred to an ordinary court because its members have specialized knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Many of the decisions given to Tribunals concern the merits of cases with relatively little legal content, and in such cases a Tribunal, usually consisting of a legally qualified Tribunal judge and two lay members, may be preferred to a court. Indeed dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards social welfare legislation led to a transfer of functions to special Tribunals; the Workmen's Compensation Acts were administered by the ordinary courts, but the National Insurance (Industrial Injuries) scheme was applied by Tribunals. *It is, however, unrealistic to imagine that technicalities and difficult legal issues can somehow be avoided by entrusting the administration of complex legislation to Tribunals rather than the courts*."
>
> (emphasis supplied)

H. W. R. Wade & C. F. Forsyth also refer to the advantage of Tribunals in their '*Administrative Law'* (10th Edn., pp.773-774):

> "The social legislation of the twentieth century demanded Tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the best article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. Thus when in 1946 workmen's compensation claims were removed from the courts and

> brought within the Tribunal system much unproductive and expensive litigation, particularly on whether an accident occurred in the course of employment, came to an end. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise.
>
> An accompanying advantage is that of expertise. Qualified surveyors sit on the Lands Tribunal and experts in tax law sit as Special Commissioners of Income Tax. Specialized Tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialized Tribunal quickly builds up expertise in its own field. Where there is a continuous flow of claims of a particular class, there is every advantage in a special jurisdiction."

Recommendations for better working of Tribunals

20. Only if continued judicial independence is assured, Tribunals can discharge judicial functions. In order to make such independence a reality, it is fundamental that the members of the Tribunal shall be independent persons, not civil servants. They should resemble courts and not bureaucratic Boards. Even the dependence of Tribunals on the sponsoring or parent department for infrastructural facilities or personnel may undermine the independence of the Tribunal (vide : Wade & Forsyth : '*Administrative Law'* – 10th Edn., pp.774 and 777).

21. The Leggatt Committee's Report explained the task of improving the Tribunals thus :

> "There are 70 different administrative tribunals in England and Wales, leaving aside regulatory bodies. Between them they deal with nearly one million cases a year, and they employ about 3,500 people. But of these 70 tribunals only 20 each hear more than 500 cases a year and many are defunct. Their quality varies from excellent to inadequate. Our terms of reference require them to be rendered coherent. So they have to be rationalized and modernized; and this Review has as its four main objects: first, to make the 70 tribunals into one Tribunals System that its members can be proud of; secondly, to render the tribunals independent of their sponsoring departments by having them administered by one Tribunals Service; thirdly, to improve the training of chairmen and members in the interpersonal skills peculiarly required by tribunals; and fourthly, to enable unrepresented users to participate effectively and without apprehension in tribunal proceedings."

The Leggatt Committee explained what the users of the system expected from an alternative public adjudication system:

> "We do not believe that the current arrangements meet what the modern user needs and expects from an appeal system running in parallel to the courts. *First, users need to be sure, as they currently cannot be, that decisions in their cases are being taken by people with no links with the body they are appealing against.* Secondly, a more coherent framework for tribunals would create real opportunities for improvement in the quality of services that can be achieved by tribunals acting separately. Thirdly, that framework will enable them to develop a more coherent approach to the services which users must receive if they are to be enabled to prepare and present cases themselves. Fourthly, a user-oriented service needs to be much clearer than it is now in telling users what services they can expect, and what to do if the standards of these services are not met."

The Leggatt Committee expressed the view that a single structure for all Tribunals would achieve independence and effective functioning of the Tribunal. It stated :

> "There is only one way to achieve independence and coherence: to have all the tribunals supported by a Tribunals Service, that is, a common administrative service. It would raise their status, while preserving their distinctness from the courts. In the medium term it would yield considerable economies of scale, particularly in relation to the provision of premises for all tribunals, common basic training, and the use of IT. It would also bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centres, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunals Service. It should be committed by Charter to provide a high quality, unified service, to operate independently, to deal openly and honestly with users of tribunals, to seek to maintain public confidence, and to report annually on its performance.

The report expressed the view that the independence of tribunals would best be safeguarded by having their administrative support provided by the Lord Chancellor's Department as he is uniquely placed to protect the independence of those who sit in tribunals as well as of the judiciary, through a Tribunals Service and a Tribunals System analogous with, but separate from, the Court Service and the courts. Most of the recommendations of the Leggatt Report were accepted and culminated in the 'Tribunals, Courts & Enforcement Act, 2007'. The Act recognizes that Tribunals do not form part of administration, but are machinery of adjudication. As a result of the said Act, the appointments to Tribunals are on the recommendations of a Judicial Appointments Commission. The sponsoring Department (that generates the disputes that the Tribunal will

have to decide) has no say in the appointments. Neither the infrastructure nor the staff are provided to the Tribunals by the sponsoring Parent Department. The Tribunals have become full-fledged part of Judicial system with no connection or link with the 'parent department'. A common Tribunal service has been established as an executing agency in the Ministry of Law & Justice.

22. This Court, in *L. Chandra Kumar,* made similar suggestions for achieving the independence of Tribunals :

> "It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements…..… The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by Parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that

> extent, the procedure for the selection of the members of the Tribunals, the manner in which funds arc allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out."

23. But in India, unfortunately Tribunals have not achieved full independence. The Secretary of the concerned 'sponsoring department' sits in the Selection Committee for appointment. When the Tribunals are formed, they are mostly dependant 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 *Chandra Kumar* are brought about, Tribunals in India will not be considered as independent.

Whether the Government can transfer the judicial functions traditionally performed by courts to Tribunals?

24. It is well settled that courts perform all judicial functions of the State except those that are excluded by law from their jurisdiction. Section 9 of Code of Civil Procedure, for example, provides that the courts shall have

jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

25. Article 32 provides that without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) of the said Article, Parliament may by law, empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) of Article 32. Article 247 provides that notwithstanding anything contained in Chapter I of Part XI of the Constitution, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 deals with the subject matter of laws made by Parliament and by the legislatures of States. The Union List (List I of Seventh Schedule) enumerates the matters with respect to which Parliament has exclusive powers to make laws. Entry 77 of List I refers to Constitution, organization, jurisdiction and powers of the Supreme Court. Entry 78 of List I refers to constitution and

organization of the High Courts. Entry 79 of List I refers to extension or exclusion of the jurisdiction of a High Court, to or from any Union Territory. Entry 43 of List I refers to incorporation, regulation and winding up of trading corporations and Entry 44 of List I refers to incorporation, regulation and winding up of corporations. Entry 95 of List I refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in Union List. The Concurrent List (List III of the Seventh Schedule) enumerates the matters with respect to which a Parliament and legislature of a state will have concurrent power to make laws. Entry 11A of List III refers to administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts. Entry 46 of List III refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III.

26. Part XIV-A was inserted in the Constitution with effect from 3.1.1977 by the Constitution (Forty-second Amendment) Act, 1976. The said part contains two Articles. Article 323A relates to Administrative Tribunals and empowers the Parliament to make a law, providing for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Government or of any State or

of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Article 323B empowers the appropriate Legislature to make a law, providing for the adjudication or trial by Tribunals of any disputes, complaints, or offences with respect to all or any of the following matters specified in clause (2) with respect to which such Legislature has power to make laws:

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

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

(c) industrial and labour disputes;

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

(e) ceiling on urban property;

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

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

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

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

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

Clause (2) of Article 323A and clause (3) of Article 323B lay down that a law made under sub-clause (1) of the respective Articles may provide for the following :

	Article 323A	Article 323B
(a)	provide for the establishment of an administrative Tribunal for the Union and a separate administrative Tribunal for each State or for two or more States;	Provide for the establishment of a hierarchy of Tribunals;
(b)	specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals;	Specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals;
(c)	provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;	provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;
(d)	exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);	exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under article 136 with respect to all or any of the matters falling within the jurisdiction of the said Tribunals;
(e)	provide for the transfer to each such administrative Tribunal of any cases pending before any court or other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal if the cause of action on which such suits or proceedings are based had arisen after such establishment;	provide for the transfer to each such Tribunal of any cases pending before any court or any other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal if the cause of action on which such suits or proceedings are based had arisen after such establishment;
(f)	repeal or amend any order made by the President under clause (3) of article 371D;	---
(g)	contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such Tribunals.	contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such Tribunals.

27. In *L. Chandra Kumar v. Union of India* [1997 (3) SCC 261], this Court held that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they empower Parliament and State Legislature to totally exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136, in regard to the disputes and complaints referred to in Article 323A(1) and the matters specified in Article 323B(2), offended the basic and essential features of the Constitution and were unconstitutional. This Court also held that "exclusion of jurisdiction" clause enacted in any legislation, under the aegis of Articles 323A [2(d)] and 323B[3(d)] are also unconstitutional. It was declared that the jurisdiction conferred upon the High Court under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution.

28. The legislative competence of Parliament to provide for creation of courts and Tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Item 11A read with Entry 46 of List III of the Seventh Schedule. Referring to these Articles, this Court in two cases, namely, *Union of India v. Delhi High Court Bar Association* [2002 (4) SCC 275] and *State of Karnataka v. Vishwabharathi House Building Cooperative*

Society & Ors. [2003 (2) SCC 412] held that Articles 323A and 323B are enabling provisions which enable the setting up of Tribunals contemplated therein; and that the said Articles, however, cannot be interpreted to mean that they prohibited the legislature from establishing Tribunals not covered by those Articles, as long as there is legislative competence under the appropriate Entry in the Seventh Schedule.

29. In *Navinchandra Mafatlal vs The Commissioner of Income-Tax* – 1955 (1) SCR 829, this Court held:

> ".. As pointed out by Gwyer C.J. in *United Provinces v. Atiqa Begum* - 1940 F.C.R. 110 none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear-and it is acknowledged by Chief Justice Chagla-that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein. The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

In *Union of India vs. Harbhajan Singh Dhillon* – 1971 (2) SCC 779, this Court held :

> "It seems to us that the function of Article 246(1), read with Entries 1 to 96 of List I, is to give positive power to Parliament to legislate in respect of those entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so."

The power of Parliament to enact a law which is not covered by an entry in Lists II and III is absolute. The power so conferred by Article 246 is in no way affected or controlled by Article 323 A or 323 B. MBA contends that if the power to enact a law to constitute tribunals was already in existence with reference to the various fields of legislation enumerated in the Seventh Schedule, there was no need for enacting Articles 323A or 323B conferring specific power to Legislatures to make laws for constitution of Tribunals. It is their contention that the very fact that Articles 323A and 323B have been specifically enacted empowering the concerned legislature to make a law constituting tribunals in regard to the matters enumerated therein, demonstrated that tribunals cannot be constituted in respect of matters other than those mentioned in the said Articles 323A and 323B. The contention is not sound. It is evident that Part XIV-A containing Articles 323A and 323B was inserted in the Constitution so as to provide for establishment of tribunals which can exclude the jurisdiction of all courts including the jurisdiction of High Courts and Supreme Court under Articles 226/227 and 32, in respect of disputes and complaints covered by those Articles. It was thought that unless such enabling power was vested in the Legislatures by a constitutional provision, it may not be possible to enact laws excluding

the jurisdiction of the High Courts and Supreme Court. However, this is now academic because clause 2(d) of Article 323A and clause 3(d) of Article 323B have been held to be unconstitutional in *Chandra Kumar.*

30. In *ACC* (supra), this Court recognized the competence of the State to transfer a part of the judicial power from courts to Tribunal :

> "Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; *but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to Tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties*. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the Tribunals and the courts, and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the Tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State."
>
> *(emphasis supplied)*

31. Therefore, even though revival/rehabilitation/regulation/winding up of companies are not matters which are mentioned in Article 323A and 323B, the Parliament has the legislative competence to make a law providing for constitution of Tribunals to deal with disputes and matters arising out of the Companies Act.

32. The Constitution contemplates judicial power being exercised by both courts and Tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create Tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to Tribunals.

33. The argument that there cannot be 'whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes

arising under the said Act and the statute substitutes the word 'Tribunal' in place of 'High Court' necessarily there will be 'whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.

34. We will next consider the question whether provision for a Technical Member along with the Judicial Member making any difference to decide the validity of the provision for constitution of Tribunals. This Question is covered by the decision in *L. Chandra Kumar* (supra), this Court held :

> "We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass-roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are

> chosen from amongst those who have some background to deal with such cases.

35. But when we say that Legislature has the competence to make laws providing which disputes will be decided by courts and which disputes will be decided by Tribunals, it is subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of Rule of Law and separation of powers. If Tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such Tribunals should possess the independence, security and capacity associated with courts. If the Tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be Technical Members in addition to Judicial Members. Where however jurisdiction to try certain category of cases are transferred from Courts to Tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial Technical Member. In respect of such Tribunals, only members of the Judiciary should be the Presiding Officers/members of such Tribunals. Typical examples of such special Tribunals are Rent Tribunals, Motor Accident Tribunals and Special Courts under several Enactments. Therefore, when transferring the jurisdiction exercised by Courts to Tribunals, which

does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the Judiciary and Rule of Law and would be unconstitutional.

36. In *R. K. Jain vs. Union of India* – 1993 (4) SCC 119, this Court observed :

> "The Tribunals set up Cinder Articles 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision."

37. Having held that Legislation can transfer certain areas of litigation from Courts to Tribunals and recognizing that the legislature can provide for technical members in addition to judicial members in such Tribunals, let us turn our attention to the question as to who can be the members. If the Act

provides for a Tribunal with a judicial member and a technical member, does it mean that there are no limitations upon the power of the legislature to prescribe the qualifications for such technical member? The question will also be whether any limitations can be read into the competence of the legislature to prescribe the qualification for the judicial member? The answer, of course, depends upon the nature of jurisdiction that is being transferred from the Courts to Tribunals. Logically and necessarily, depending upon whether the jurisdiction is being shifted from High Court, or District Court or a Civil Judge, the yardstick will differ. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees. We may examine this question with reference to the company jurisdiction exercised by the High Court for nearly a century being shifted to a tribunal on the ground that tribunal consisting of a judicial and technical members will be able to dispose of the matters expeditiously and that the availability of expertise of the technical members will facilitate the decision making to be more practical, effective and meaningful. Does this mean that the Legislature can provide for persons not properly qualified to become members? Let us take some examples. Can the legislature provide that a law graduate with a

masters' degree in company law can be a judicial member without any experience as a lawyer or a judge? Or can the legislature provide that an Upper Division Clerk having fifteen years experience in the company law department but with a Law Degree is eligible to become a Judicial Member? Or can the legislature provide that a 'social worker' with ten years experience in social work can become a technical member? Will it be beyond scrutiny by way of judicial review?

38. Let us look at it from a different angle. Let us assume that three legislations are made in a state providing for constitution of three types of Tribunals: (i) Contract Tribunals; (ii) Real Estate Tribunals; and (iii) Compensation Tribunals; and each of those legislations provide that all cases relating to contractual disputes, property disputes and compensation claims hitherto tried by civil courts, will be tried by these tribunals instead of the civil courts; and that these tribunals will be manned by members appointed from the civil services, with the rank of Section Officers who have expertise in the respective field; or that a businessman in the case of Contract Tribunal, a Real Estate Dealer in regard to Property Tribunal, and any social worker in regard to compensation Tribunal, having expertise in the respective field will be the members of the Tribunal. Let us say by these

legislations, all cases in civil courts are transferred to Tribunal (as virtually all cases in civil courts will fall under one or the other of the three Tribunals). Merely because the Legislature has the power to constitute tribunals or transfer jurisdiction to tribunals, can that be done?

39. The question is whether a line can be drawn, and who can decide the validity or correctness of such action. The obvious answer is that while the Legislature can make a law providing for constitution of Tribunals and prescribing the eligibility criteria and qualifications for being appointed as members, the superior courts in the country can, in exercise of the power of judicial review, examine whether the qualifications and eligibility criteria provided for selection of members is proper and adequate to enable them to discharge judicial functions and inspire confidence. This issue was also considered in *Sampath Kumar* (supra) and it was held that where the prescription of qualification was found by the court, to be not proper and conducive for the proper functioning of the Tribunal, it will result in invalidation of the relevant provisions relating to the constitution of the Tribunal. If the qualifications/eligibility criteria for appointment fail to ensure that the members of the Tribunal are able to discharge judicial functions, the said provisions cannot pass the scrutiny of the higher

Judiciary. We may in this context recall the words of Mathew J in *Kesavananda Bharati v. State of Kerala* [AIR 1973 SCC 1461] in a different context:

> "I am not dismayed by the suggestion that no yardstick is furnished to the Court except the trained judicial perception for finding the core or essence of a right, or the essential features of the Constitution. Consider for instance, the test for determining citizenship in the United States that the alien shall be a person of "good moral character" the test of a crime involving "moral turpitude", the test by which you determine the familiar concept of the "core of a contract", the "pith and substance" of a legislation or the "essential legislative function" in the doctrine of delegation. Few Constitutional issues can be presented in black and white terms. What are essential features and non essential features of the Constitution ? Where does the core of a right end and the periphery begin? These are not matters of icy certainty; but, for that reason, I am not persuaded to hold that they do not exist, or that they are too elusive for judicial perception. Most of the things in life that are worth talking about are matters at degree and the great judges are those who are most capable of discerning which of the gradations make genuine difference".

40. MBA contended that constitution of a Tribunal to transfer the entire company law jurisdiction of the High Court was violative of the doctrine of separation of power and independence of judiciary which are parts of basic structure of the Constitution. The Union of India countered it by contending that a Legislation cannot be challenged on the ground it violates the basic structure of the Constitution. It is now well settled that only constitutional amendments can be subjected to the test of basic features doctrine. Legislative measures are not subjected to basic features or basic structure or basic framework. The Legislation can be

declared unconstitutional or invalid only on two grounds namely (i) lack of legislative competence and (ii) violation of any fundamental rights or any provision of the Constitution [See : *Indira Gandhi vs. Raj Narain* - 1975 Supp SCC 1; *Kuldip Nayar vs. Union of India* – 2006 (7) SCC 1; and *State of Andhra Pradesh vs. McDowell & Co.* – 1996 (3) SCC 709]. The reason for this was given by Chandrachud J., in *Indira Gandhi*, thus:

> ‘‘"Basic structure", by the majority judgment [in *Keshavanda Bharati vs. State of Kerala* – 1973 (4) SCC 225], is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. "The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features’ - this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution…….
>
> There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the legislatures of not less than one-half of the States as provided by Article 368(2). An ordinary legislation can be passed by a simple majority. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations.”

The view was also reiterated and explained by Beg. CJ in his leading judgment of a seven-Judge Bench in the *State of Karnataka vs. Union of India* – 1977 (4) SCC 608. He held that in every case where reliance is placed upon the doctrine of basic structure, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an

amendment to the Constitution) what is put forward as part of a basic structure must be justified by reference to the express provision of the Constitution. He further held:

> "The one principle, however, which is deducible in all the applications of the basic structure doctrine, which has been used by this Court to limit even the power of Constitutional amendment, is that whatever is put forward as a basic limitation upon legislative power must be correlated to one or more of the express provisions of the Constitution from which the limitation should naturally and necessarily spring forth. The doctrine of basic structure, as explained above, requires that any limitation on legislative power must be so definitely discernible from the provisions of the Constitution itself that there could be no doubt or mistake that the prohibition is a part of the basic structure imposing a limit on even the power of Constitutional amendment. And, whenever we construe any document, by reading its provisions as a whole, trying to eliminate or resolve its disharmonies, do we not attempt to interpret it in accordance with what we find in its "basic structure" or purposes ? The doctrine is neither unique nor new.
>
> No doubt, as a set of inferences from a document (i.e. the Constitution), the doctrine of "the basic structure" arose out of and relates to the Constitution only and does not, in that sense, appertain to the sphere of ordinary statutes or arise for application to them in the same way. But, if, as a result of the doctrine, certain imperatives are inherent in or logically and necessarily flow from the Constitution's 'basic structure", just as though they are its express mandates, they can be and have to be used to test the validity of ordinary laws just as other parts of the Constitution are so used.
>
> Thus, it is clear that whenever the doctrine of the basic structure has been expounded or applied it is only as a doctrine of interpretation of the Constitution as It actually exists and not of a Constitution which could exist only subjectively in the minds of different individuals as mere theories about what the Constitution is. The doctrine did not add to the contents of the Constitution. It did not, in theory, deduct anything from what was there. It only purported to bring out and explain the meaning of what was already there. It was, in fact, used by all the judges for only this purpose with differing results simply because their assessments or inferences as to what was part of the basic structure in our Constitution differed. This, I think is the correct interpretation of the doctrine of the basic structure of the Constitution. It should only be applied if it is clear,

> beyond the region of doubt, that what is put forward as a restriction upon otherwise clear and plenary legislative power is there as a Constitutional imperative."

Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive. Another facet of Rule of Law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the Executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

41. 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, consistent with the recognized principles of adjudication. Therefore wherever access to courts to

enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary.

42. In *The State of West Bengal v. Anwar Ali Sarkar* [AIR 1952 SC 75], Bose J., made a classic exposition regarding Article 14 :

> "What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be." Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in article 14 does not mean the "legal precepts which are actually recognised and applied in tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them." (Dean Pound in 34 Harvard Law Review 449 at 452).

> "However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like article 14 into a concrete concept."

43. The MBA relied upon the following extract from Chapter 2 of "Orderly & Effective Insolvency Procedures – Key Issues" annexed to Eradi Committee Report in support of its contention that the adjudication of disputes relating to insolvency should be conducted by Judges :

> "An insolvency law will need to provide for an institutional framework for its implementation. Since the adjudication of disputes is a judicial function, insolvency proceedings should be conducted under the authority of a court of law where judges will, at a minimum, be required to adjudicate disputes between the parties on factual issues and, on occasion, render interpretations of the law. The judiciary will only be able to fulfil this function if it is made up of independent judges with particularly high ethical and professional standards."

Learned counsel for MBA also referred to certain decisions of foreign Courts which may not be relevant in the Indian constitutional context. In particular, the decisions of US courts may not be relevant as Indian Constitution does not envisage a strict separation of powers which require judicial power to be exclusively vested in courts. In India, certain amount of overlapping exists and the Executive has been discharging judicial functions in several identified areas.

44. We may summarize 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 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 re-organize 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 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 judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of 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.

Whether the constitution of NCLT and NCLAT under Parts 1B & 1C of Companies Act are valid

45. We may now attempt to examine the validity of Part 1B and 1C of the Act by applying the aforesaid principles. The issue is not whether judicial functions can be transferred from courts to Tribunals. The issue is whether judicial functions can be transferred to Tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. We have already held that the Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided it is understood that the Tribunals exercise judicial power and the persons who are appointed as President/Chairperson/ Members are of a standard which is reasonably approximate to the standards of main stream Judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary.

46. Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law is possible only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.

47. A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done. We may refer to the following words of Bhagwati CJ., in *Sampath Kumar* (supra) :

> "We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. Of course, I must make it clear that when I say this, I do not wish to cast any reflection on the members of the Civil Services because fortunately we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience."

48. As far as the Technical Members are concerned, the officer should be of at least Secretary Level officer with known competence and integrity. Reducing the standards, or qualifications for appointment will result in loss of confidence in the Tribunals. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons

of Under Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post. As, for example, for the post of a Judge of the High Court, 10 years' practice as an Advocate is prescribed. There may be Advocates who even with 4 or 5 years' experience, may be more brilliant than Advocates with 10 years' standing. Still, it is not competence alone but various other factors which make a person suitable. Therefore, when the legislature substitutes the Judges of the High Court with Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary Level officers (that is those who were Secretaries or Additional Secretaries) with specialized knowledge and skills can be appointed as Technical Members of the Tribunal.

49. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards

and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts. Let us take stock.

49.1) To start with, apart from jurisdiction relating to appeals and revisions in civil, criminal and tax matters (and original civil jurisdiction in some High Courts). The High Courts were exercising original jurisdiction in two important areas; one was writ jurisdiction under Articles 226 and 227 (including original jurisdiction in service matters) and the other was in respect to company matters.

49.2) After constitution of Administrative Tribunals under the Administrative Tribunals Act, 1985 the jurisdiction in regard to original jurisdiction relating to service matters was shifted from High Courts to Administrative Tribunals. Section 6 of the said Act deals with qualifications for appointment as Chairman, and it is evident therefrom that the Chairman has to be a High Court Judge either a sitting or a former Judge. For judicial member the qualification was that he should be a judge of a High Court or is qualified to be a Judge of the High Court (i.e. an advocate of the High Court with ten years practice or a holder of a judicial office for ten years) or a person who held the post of Secretary, Govt. of India in the Department of

Legal Affairs or in the Legislative Department or Member Secretary, Law Commission of India for a period of two years; or an Additional Secretary to Government of India in the Department of Legal Affairs or Legislative Department for a period of five years. For being appointed as Administrative Member, the qualification was that the candidate should have served as Secretary to the Government of India or any other post of the Central or State Government carrying the scale of pay which is not less than as of a Secretary of Government of India for atleast two years, or should have held the post of Additional Secretary to the Government of India or any other post of Central or State Government carrying the scale of pay which is not less than that of an Additional Secretary to the Government of India at least for a period of five years. In other words, matters that were decided by the High Courts could be decided by a Tribunal whose members could be two Secretary level officers with two years experience or even two Additional Secretary level officers with five years experience. This was the first dilution. The members were provided a term of office of five years and could hold office till 65 years and the salary and other perquisites of these members were made the same as that of High Court Judges. This itself gave room for a comment that these posts were virtually created as sinecure for members of the executive to extend their period of service by five years

from 60 to 65 at a higher pay applicable to High Court Judges. Quite a few members of the executive thus became members of the "Tribunals exercising judicial functions".

49.3) We may next refer to Information Technology Act, 2000 which provided for establishment of Cyber Appellate Tribunal with a single member. Section 50 of that Act provided that a person who is, or has been, or is qualified to be, a Judge of a High Court, or a person who is, or has been, a member of the India Legal Service and is holding or has held a post in Grade I of that service for at least three years could be appointed as the Presiding Officer. That is, the requirement of even a Secretary level officer is gone. Any member of Indian Legal Service holding a Grade-I Post for three years can be a substitute for a High Court Judge.

49.4) The next dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a National Company Law Tribunal with a President and a large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of National Company Law Tribunal which is a substitute for the High Court, for hearing winding up matters and other

matters which were earlier heard by High Court. A member need not even be a Secretary or Addl. Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years (which means anyone belonging to Indian P&T Accounts & Finance Service, Indian Audit and Accounts Service, Indian Customs & Central Excise Service, Indian Defence Accounts Service, Indian Revenue Service, Indian Ordnances Factories Service, Indian Postal Service, Indian Civil Accounts Service, Indian Railway Traffic Service, Indian Railway Accounts Service, Indian Railway Personal Service, Indian Defence Estates Service, Indian Information Service, Indian Trade Services, or other Central or State Service) with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has 'dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil services - Joint Secretary level officers or officers holding Group 'A' posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for

comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group 'A' posts to serve up to 65 years in Tribunals exercising judicial functions.

49.5) The dilution of standards may not end here. The proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The speed at which the qualifications for appointment as Members is being diluted is, to say the least, a matter of great concern for the independence of the Judiciary.

50. When Administrative Tribunals were constituted, the presence of members of civil services as Technical (Administrative) Members was considered necessary, as they were well versed in the functioning of government departments and the rules and procedures applicable to Government servants. But the fact that senior officers of civil services could function as Administrative Members of Administrative Tribunals, does not necessarily make them suitable to function as Technical Members in Company Law Tribunals or other Tribunals requiring technical expertise.

The Tribunals cannot become providers of sinecure to members of civil services, by appointing them as Technical Members, though they may not have technical expertise in the field to which the Tribunals relate, or worse where purely judicial functions are involved. While one can understand the presence of the members of the civil services being Technical Members in Administrative Tribunals, or Military Officers being members of Armed Forces Tribunals, or Electrical Engineers being members of Electricity Appellate Tribunal, or Telecom Engineers being members of TDSAT, we find no logic in members of general Civil Services being members of Company Law Tribunals.

51. Let us now refer to the dilution of independence. If any member of the Tribunal is permitted to retain his lien over his post with the parent cadre or ministry or department in the civil service for his entire period of service as member of the Tribunal, he would continue to think, act and function as a member of the civil services. A litigant may legitimately think that such a member will not be independent and impartial. We reiterate that our observations are not intended to cast any doubt about the honesty and integrity or capacity and capability of the officers of civil services in particular those who are of the rank of Joint Secretary or for that matter even

junior officers. What we are referring to is the perception of the litigants and the public about the independence or conduct of the Members of the Tribunal. Independence, impartiality and fairness are qualities which have to be nurtured and developed and cannot be acquired overnight. The independence of members discharging judicial functions in a Tribunal cannot be diluted.

52. The need for vigilance in jealously guarding the independence of courts and Tribunals against dilution and encroachment, finds an echo in an advice given by Justice William O. Douglas to young lawyers (*The Douglas Letters: Selections from the Private Papers of William Douglas*, edited by Melvin L. Urofsky – 1987 - Adler and Adler.) :

> "… The Constitution and the Bill of Rights were designed to get Government off the backs of people – all the people. Those great documents did not give us the welfare state. Instead, they guarantee to us all the rights to personal and spiritual self-fulfillment.
>
> But that guarantee is not self-executing. *As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air – however slight -- lest we become unwitting victims of the darkness."*
>
> (emphasis supplied)

53. The only reason given by Eradi Committee for suggesting transfer of the company law jurisdiction from High Courts to Tribunals is delay, as is evident from the following :

> "Long drawn court proceedings
>
> 24. Multiplicity of court proceedings is the main reason for abnormal delay in dissolution of companies. The proceedings are filed by OL under sections 446,454,468 and 542/543 for non-submission of Statement of Affairs, non production of books of account and assets as also realization of debts and misfeasance proceedings. Similarly, the settlement of list of creditors and contributories take a long time. Disposal of suits or claims filed by the company or against the company in which OL is always a party, take a very long time.
>
> 25. Normally, there is a company court with one Company Judge in each High Court and it is not possible for the court to cope with the work relating to companies under liquidation. Apart from company matters, the court also attends to other cases in the High Court. The orders passed by Company Judge are appealable under section 483. Normal delays and adjournments sought in court proceedings further aggravate the problem and unless all the pending cases are not finally disposed of. OL cannot move the court for dissolution of a company.
>
> 26. Under section 457, OL can exercise the powers with the sanction and subject to the control of the court. Any creditor or contributory may apply to the Court with respect to the exercise of any such power. Elaborate procedure has been prescribed under the Companies (Court) Rules, 1959 relating to Statement of Affairs (Rules 124-134), Preliminary Report (Rules 135-139), Settlement of list of creditors (Rules 147-149), Settlement of list of contributories and payment of calls (Rules 180-196,232-242), examination under section 477/478 (Rule 234-259), Misfeasance proceedings under sections 542 and 543 (Rules 260-262), Disclaimer of property under section 535((Rules 263-269), Compromise and abandonment of claims (Rules 270-271), Sale of assets (Rules 272-274), Declaration of dividend (payment to creditors) and turn of capital to contributories (Rules 275-280), dissolution (rules 281-285), Maintenance of Registers and books by OL (Rules 286-292), Investment of surplus funds (Rules 293-297), Half yearly and yearly Accounts and audit (Rules 298-311), Unclaimed dividend and undistributed assets (Rules 335-338).
>
> 27. It is significant to note that under the Act and the aforesaid Companies (Courts) Rules made by Hon'ble Supreme Court, after

> consulting the High Courts under section 643, OL has to seek sanction of the Court at each and every stage during the course of winding up proceedings. For the purpose, OL has to submit reports from time to time for consideration of the Company Judge on the administrative as well as judicial side. This entails delays due to normal court proceedings. In contract, by and large, there is hardly any interference by the court in case of companies under voluntary winding up."

Eradi Committee merely recommended setting up separate Tribunals to exclusively deal with company matters and transfer of company law jurisdiction from High Court to such Tribunals. Tribunals with only Judicial Members would have served the purpose sought to be achieved. It did not suggest that such Tribunals should have 'Technical Members'. Nor did it suggest introduction of officers of civil services to be made technical members. The jurisdiction relating to company case which the High Courts are dealing with can be dealt with by Tribunals with Judicial Members alone. Be that as it may.

54. Parts IC and ID of the Companies Act proposes to shift the company matters from the courts to Tribunals, where a 'Judicial Member' and a 'Technical Member' will decide the disputes. If the members are selected as contemplated in section 10FD, there is every likelihood of most of the members, including the so called 'Judicial Members' not having any judicial experience or company law experience and such members being required to

deal with and decide complex issues of fact and law. Whether the Tribunals should have only judicial members or a combination of judicial and technical members is for the Legislature to decide. But if there should be technical members, they should be persons with expertise in company law or allied subjects and mere experience in civil service cannot be treated as Technical Expertise in company law. The candidates falling under sub-section 2(c) and (d) and sub-sections 3(a) and (b) of section 10FD have no experience or expertise in *deciding* company matters.

55. There is an erroneous assumption that company law matters require certain specialized skills which are lacking in Judges. There is also an equally erroneous assumption that members of the civil services, (either a Group-A officer or Joint Secretary level civil servant who had never handled any company disputes) will have the judicial experience or expertise in company law to be appointed either as Judicial Member or Technical Member. Nor can persons having experience of fifteen years in science, technology, medicines, banking, industry can be termed as experts in Company Law for being appointed as Technical Members. The practice of having experts as Technical Members is suited to areas which require the assistance of professional experts, qualified in medicine, engineering, and architecture etc.

Lastly, we may refer to the lack of security of tenure. The short term of three years, the provision for routine suspension pending enquiry and the lack of any kind of immunity, are aspects which require to be considered and remedied.

56. We may now tabulate the defects in Parts IB and IC of the Act :

(i) Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.

(ii) As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal.

Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.

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

(v) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.

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

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

(viii) Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal.

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

(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);
(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;
(c) Secretary in the Ministry of Finance and Company Affairs – Member; and
(d) Secretary in the Ministry of Law and Justice – Member.

(x) 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 concerned field. 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.

(xi) The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.

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

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

(xiv) Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members.

57. We therefore dispose of these appeals, partly allowing them, as follows:

(i) We uphold the decision of the High Court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and

vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional.

(ii) We declare that Parts 1B and 1C of the Act as presently structured, are unconstitutional for the reasons stated in the preceding para. However, Parts IB and IC of the Act, may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in pursuance of the impugned order of the High Court.

……..CJI
(K G Balakrishnan)

……..J.
(R V Raveendran)

……..J.
(D K Jain)

…….J.
(P Sathasivam)

…….J.
(J M Panchal)

New Delhi;
May 11, 2010