Source : www.thehindu.com Date : 2020-03-02

WHITHER TRIBUNAL INDEPENDENCE?

Relevant for: Developmental Issues | Topic: Regulatory & Quasi-Judicial bodies

In November 2019, a Constitution Bench of the Supreme Court, in *Rojer Mathew*, declared the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and other Conditions of Service of Members) Rules, 2017 as unconstitutional for being violative of principles of independency of the judiciary and contrary to earlier decisions of the Supreme Court in the *Madras Bar Association* series. In *Rojer Mathew*, there was also a direction to the Central government to reformulate the rules strictly in accordance with principles delineated by the Court in its earlier decisions. The reframed rules, notified on February 17 by the Ministry of Finance, however, suffer from the same vices.

Through Part XIV of the Finance Act, 2017, around 26 Central statutes were amended, and the power to prescribe eligibility criteria, selection process, removal, salaries, tenure and other service conditions pertaining to various members of 19 tribunals were sub-delegated to the rule-making powers of the Central government. Describing the search-cum-selection-committee as an attempt to keep the judiciary away from the process of selection and appointment of members, vice-chairman and chairman of tribunals, the Court held that the executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in tribunal appointments. Further, reiterating its previous decision in *Madras Bar Association* (2010), the Court held that the tenure of three years for members will “preclude cultivation of adjudicatory experience and is thus injurious to the efficiency of the Tribunals”.

In the 2017 rules, as noted by the Court in *Rojer Mathew*, barring the National Company Law Appellate Tribunal (NCLAT), the selection committee for all other tribunals was made up either entirely from personnel within or nominated by the Central government or comprised a majority of personnel from the Central government. While the selection committee for NCLAT consisted of two judges and two secretaries to the Government of India, all other committees comprised only one judge and three secretaries to the Government of India. Now, in the 2020 rules, by default, all committees consist of a judge, the president/chairman/chairperson of the tribunal concerned and two secretaries to the Government of India.

The common thread in the *Madras Bar Association* series and *Rojer Mathew* decisions is that judiciary must have an equal say in the appointment of members of the tribunals. In other words, to deny the executive an upper hand in appointing members to tribunals, the court ordered to have two judges of the Supreme Court to be a part of the four-member selection committee. In *Madras Bar Association* (2010), a Constitution Bench dealing with the validity and appointment of members to the National Company Law Tribunal (NCLT) under the Companies Act, 1956, held that the selection committee should comprise the Chief Justice of India or his nominee (chairperson, with a casting vote), a senior judge of the Supreme Court or Chief Justice of the High Court, and secretaries in the Ministry of Finance and Ministry of Law and Justice respectively. Subsequent Constitution Bench decisions in *Madras Bar Association* (2014), *Rojer Mathew* and the decision of the Madras High Court in *Shamnad Basheer* have repeatedly held that the principles of the *Madras Bar Association* (2010) are applicable to the selection process and constitution of all tribunals in India.

Under the 2020 rules, the inclusion of the president/chairman/chairperson of the tribunal as a member in the selection committee is in the teeth of previous decisions of the Supreme Court. For instance, now, in the Income Tax Appellate Tribunal (ITAT), Customs Excise and Service Tax Appellate Tribunal (CESTAT), Central Administrative Tribunal (CAT), Debt Recovery Appellate Tribunal (DRAT), etc., a non-judicial member can become the

president/chairman/chairperson, as the case may be. Therefore, when a non-judicial member becomes a member in the selection committee, the Supreme Court judge will be in minority, giving primacy to the executive, which is impermissible.

In *Madras Bar Association* (2010), the Court explicitly held that only judges and advocates can be considered for appointment as judicial member of the tribunal and that persons from the Indian Legal Service cannot be considered for appointment as judicial member. Recently, in *Revenue Bar Association* (2019), the Madras High Court, while dealing with selection and composition of the Goods and Services Tax Appellate Tribunal (GSTAT), declared Section 110(1)(b)(iii) of the CGST Act, 2017 as unconstitutional for allowing members of Indian Legal Service to be judicial members in GSTAT.

In *Madras Bar Association* (2010), the Court had held that the term of office "shall be changed to a term of seven or five years". Based on this, in *Rojer Mathew*, the Court held that the term of three years is too short, and by the time members achieve a refined knowledge, expertise and efficiency, one term will be over. Now, in the 2020 rules, the tenure of members has been increased from three years to four years, thereby blatantly violating the directions of the Supreme Court.

Since *Madras Bar Association* (2010), the government has repeatedly violated the directions of the Supreme Court. One by one, the traditional courts, including the High Courts, have been divested of their jurisdictions and several tribunals have been set up. When the National Taxation Tribunal was struck down as unconstitutional by the Supreme Court, it was hoped that the government would stop experimenting with tribunals. The reality was different. The Madras High Court had to then deal with selection of members to the Intellectual Property Appellate Board. Then came the rules of 2017 and the GST Appellate Tribunal and Advance Authorities under the CGST Act.

The sinister plan is obvious: divest courts of their powers, vest those powers with new tribunals, and fill them with civil servants. Now, only if an advocate has more than 25 years of experience, can he apply to the post of judicial member of various tribunals such as ITAT, CESTAT, Appellate Board under the Trade Marks Act, 1999, Appellate Tribunal for Electricity, etc. This 25-year eligibility is unheard of even for an appointment as a High Court judge. It seems absurd to even think that a lawyer with more than 25 years of successful practice would apply for the post of judicial member with a tenure of just four years. Further, as odd as it sounds, an advocate can no longer apply to the post of judicial member of CAT, DRAT, etc. The exclusion of advocates was first judicially noticed in *Revenue Bar Association* (2019) wherein the Madras High Court merely proceeded to recommend to Parliament to reconsider this proposal. By eliminating chances of bright advocates applying for the post of judicial members, the government surely intends to fill them with candidates from the Indian Legal Service. The 2020 rules are, thus, in contempt of several Constitution Bench decisions of the Supreme Court. Unless the Court comes down heavily on the Central government, we will see these encroachments over and over again.

Rahul Unnikrishnan is an Advocate in the Madras High Court. He assisted Arvind Datar, Senior Advocate, in 'Rojer Mathew' and 'Revenue Bar Association', cited in the article