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AN UNCONSTITUTIONAL TRIBUNAL?

INTRODUCTION

The introduction of specialist tribunals in India has been a relatively recent development to the Indian Judiciary. Tribunals have been created to look over a wide variety of matters such as foreign exchange, labour disputes, and land reforms. Tribunals provide for a simpler, speedier, and more accessible avenue towards justice than ordinary Courts are able to provide. Plus, each Tribunal includes specialists in the field that uniquely provide a confident and competent decision based on the merits of each case. Discussing Debt Recovery Tribunals, the Madras High Court emphasized the case of *Union of India v. Delhi High Court Bar Association*, 2002 4 SCC 275 where the Bench held that although tribunals do not strictly fall under the concept of the judiciary outlined in Article 50 of the Indian Constitution, the Tribunal was nevertheless an effective part of the justice delivery system.

The National Company Law Tribunal (hereinafter “NCLT”) is another example of these adjudicating bodies where many corporate professionals hope their company law issues will be fairly and efficiently decided. However, the Madras High Court in *R. Gandhi, President, Madras Bar Association v. Union of India Through Secretary, Department of Company Affairs* held portions of 1B and 1C of the Constitution of the NCLT to be unconstitutional. The following paragraphs discuss the nature and impact of this decision.

Separation of Powers

The Madras High Court was very concerned with the growth of executive control in a traditionally judicially controlled arena. Specifically, the justices

challenged the Executive-created provisions relating to, *inter alia*, composition of the tribunals, tenure of the members of the Tribunals, their salaries, and their selection methods (all provided for in the Constitution of the NCLT). The Court held that these provisions of the Companies (Second Amendment) Act, 2002 was, for the previous nine decades under the jurisdiction of the High Court to deal with areas relating to, *inter alia*, amalgamation and reconstruction of companies, winding up, reduction of share capital and other matters.

Most notably, the High Court stressed that the freedom from control and potential domination of the executive are necessary preconditions for the independence and impartiality of Judges. The Court cited the U.S. Supreme Court decision of *Northern Pipeline Construction Co. v. Marathon Pipeline Com. et al*, 458 U.S. 50, quoting *United States v. Will*, 449 U.S. 200. “A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by Judges who are free from potential domination by other branches of government.”

Tenure

A large factor in the Madras High Court decision was the issue of ascertaining the tenure of those Members of the NCLT. The tenure of the Members and President of the Tribunal is three years with eligibility for reappointment. The court mentioned “[t]he short tenure of the Members undermines their independent functioning, as such persons will have to depend upon the executive government and the selection committee in which

four out of five members are serving officers of the Government, for their continuance in office.”

Furthermore, the likelihood of attempts at political pressure on the Members by the executive is high. When a Member is seeking reappointment, the incentive for external influence becomes very real.

The short tenure also provides a disincentive for well-qualified candidates to seek a position on the Tribunal. Persons who have built a reputation and business in a certain field cannot be asked to give up their lifetime career for a period of three years. After a term on the Tribunal, members are forced into retirement. This provides another deterrent for young, qualified experts and judicial officers to take a position on the Tribunal.

Additional Concerns

The Madras Court also listed a host of other problems with the current state of the NCLT. For example, persons are being appointed who are clearly not qualified to make judicial decisions on company law matters, and there seem to be numerous internal inconsistencies within the Constitution of NCLT.

Winding up proceedings is one such example. The Proviso to Section 10FL(2) reads as follows: “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.” The “Special Bench” referred to comprises of three Members: a Judicial Member, a Technical Member appointed under Section 10FD(3)(a) to (f), and a Technical Member appointed under class (g) or (h). The Member who may be assigned to adjudicate over this winding up proceeding may be a Labour Member who has no interest or knowledge in this complicated corporate matter. The Court added, “This is making a mockery of a specialist tribunal by entrusting to a person who is wholly ignorant of company law the power to decide complicated questions of law, as also questions of fact after assessing the evidence without knowing legal principles to be applied for assessing the evidence.”

Thus, the concern is that such a decision with potentially large economic consequences will be left in the hands of a person with little or no knowledge of company law. Allowing this type of appointment would necessarily do injustice to those seeking justice and remedy from the NCLT.

The Solution

If the Executive is allowed to limit the term periods of the Tribunal Members and President, the power of the Judiciary is necessarily encroached upon. To solve this issue, the Court held that this portion of the Constitution of NCLT would not be under the control of the Executive or Legislative powers in India.

The Madras Court also offered the following: unless the term of office is fixed as at least five years, with a provision for renewal, except in cases of incapacity, misconduct and the like, and the period for which lien may be retained is fixed at not more than one year, the Constitution of the Tribunal cannot be regarded as satisfying the essential requirements of an independent and impartial body exercising judicial functions of the State.

If these defects in Parts 1B and 1C remain, the Madras High Court has deemed Parts 1B and 1C to be unconstitutional. The Court calls for the elimination of this blatant intrusion of ‘executising’ a judicial tribunal.

CONCLUSION

The justification behind creating Tribunals in the Indian Judiciary is uncontested. They provide for a more efficient judicial process for a country with over one million people. The issue comes in the drafting of this particular Tribunal, the NCLT. As the Madras High Court deemed fit to hold, the NCLT lacks the careful attention necessary for a properly formed and functioning Tribunal. The selection of its Members should be ascertained by the judiciary, not the executive, to ensure fairness and competence in all decisions made by the National Company Law Tribunal.

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