
(2006) 02 BOM CK 0022
In the Bombay High Court
Case No : Writ Petition No. 45 of 2006

P.C. Joshi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-02-2006

Acts Referred:

Administrative Tribunals Act, 1985 — Section 5(2), 5(5), 6, 6(6), 6(7)
National Tax Tribunal Act, 2005 — Section 15, 24, 7(2)
Reserve Bank of India Act, 1934 — Section 45S

Citation : (2006) 202 CTR 57 : (2006) 282 ITR 39

Hon'ble Judges : H.L. Gokhale, J; Abhay S. Oka, J

Bench : Division Bench

Advocate : Soli Dastur, instructed by N. R. Jagtap, for the Appellant; B.A. Desai, Addl. Solicitor General, for respondents Nos. 1 to 3, for the Respondent

Judgement

1. This petition filed by an advocate, who is a senior tax practitioner, seeks a declaration that the National Tax Tribunal Act, 2005 is bad in law and seeks to restrain respondents Nos. 1 to 3 from taking any steps in pursuance thereof. The petition invokes Articles 14, 19(1)(g) and 50 amongst other submissions. Respondents No. 1 to 3 are the Union of India through Secretary (Finance), Ministry of Law and Justice and Ministry of Finance.

2. We have heard Mr. Dastur, senior advocate, in support of this petition and Mr. B. A. Desai, Additional Solicitor General for respondents No. 1 to 3.

3. This National Tax Tribunal Act, which is to come into force on December 20, 2005, seeks to create a National Tax Tribunal in pursuance of Article 323B of the Constitution of India to deal with the disputes in respect of levy, assessment collection and enforcement of direct taxes as well as to provide for adjudication by that Tribunal of disputes with respect to determination of rates of customs duties and Central excise on goods and matters connected thereunder. Section 15 of this Act provides for an appeal from the decisions of the Income Tax Appellate Tribunal and Customs, Excise and Service Tax Tribunal to the National

Tax Tribunal wherever the cases involve substantial questions of law. Presently, these proceedings are filed in the High Court and all matters including the appeals and references concerning direct taxes and indirect taxes pending before the High Courts are to stand transferred to the National Tax Tribunal immediately from a date notified by the Central Government. The writ jurisdiction of the High Courts is not disturbed, but appeals are provided against the decisions of the National Tax Tribunal only to the Supreme Court u/s 24 of the Act.

4. Various submissions are made by Mr. Dastur to challenge the provisions of this Act. Principally, it is submitted that the Act by and large ousts the jurisdiction of the High Courts and it is now to be vested in a Tribunal. It is submitted that various Departments of the Government, particularly concerning Revenue, are parties in these proceedings and u/s 7(2) of this Act, the appointments of the Chairman and other members are to be made by the Central Government on the recommendations of a three member Selection Committee consisting of the Hon"ble Chief Justice of India or a judge of the Supreme Court of India nominated by him, and the Secretaries of Ministry of Law and Justice and Finance. Thus, it is submitted that the Ministries, whose matters are to come up before the Tribunal, have a say in the appointment of the members of the Tribunal. That apart, the Hon"ble Chief Justice of India is to be only a member of this three- member committee and on the recommendations of the committee, the Central Government has to appoint the Chairman and the members of this Tribunal. If we compare this provision with the one u/s 6, Sub-sections (6) and (7) of the Administrative Tribunal Act, 1985, the Chairman and the Vice-Chairman and the members of the Administrative Tribunal are to be appointed by the President of India and no such appointment shall be made except after the consultation with the Chief Justice of India. In all such matters, the opinion of the Hon"ble Chief Justice of India has always been held to have primacy. The names are recommended by the administration and the Hon"ble Chief Justice of India is consulted. That is different from making him a member of a three-member Selection Committee and to make his recommendation subservient to the decision of the Government. Thus, apart from affecting the independence of judiciary and of the persons to be appointed, it undermines the high office of the Hon"ble Chief Justice of India.

5. The petitioner has further submitted that on the one hand a substantial part of tax work of the High Court is being shifted to this Tribunal, on the other hand the members of the Income Tax Tribunal or the Customs, Excise and Service Tax Appellate Tribunal, who are otherwise subordinate to the High Court, are made eligible to become members of this Tribunal. Besides, their appointment is to be only for 5 years subject to a further reappointment making their positions vulnerable.

6. This Tribunal is supposed to be created so that the arrears of tax matters in the High Courts are disposed of. It is however pointed out that u/s 5(2) of this Act, the Tribunal is ordinarily to sit in Delhi with such other Benches as the

Central Government may appoint and u/s 5(5), the members of the Tribunal can be transferred by the Central Government though in consultation with the Chair person. As of now, there are Benches taking tax work in almost all the High Courts. It is submitted that almost 40 per cent, of the revenue comes from the city of Mumbai but to begin with the Act does not provide for a Bench here. The tax work is being taken care of by the respective High Courts which are much easily accessible. In this behalf, reliance is placed on the Report of the Parliamentary Committee made on August 2, 2005, concerning setting up of this Tribunal which had in terms expressed doubts as to whether setting up of a Tribunal alone will reduce the pendency of tax related cases. It is also pointed out that this Committee had recommended setting up of regular Benches in the High Courts as a better way out than setting up of such a Tribunal. Similarly, with respect to uniformity of the decisions, it was pointed out that High Courts have been by and large following the uniform yardstick since it is a Central Act and there has not been much of divergence. Principally, it is therefore submitted that separation of the judiciary from the executive as expected under Article 50 will be undermined. Reliance is placed on para. 582 of the judgment of the apex court in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, wherein demarcation of power between the legislation, the executive and the judiciary is stated to be a basic element in the constitutional structure.

7. It is lastly pointed out that ad interim orders have been passed by different High Courts. Thus, it is pointed out that the Punjab and Haryana High Court has stopped the transfers of pending High Court matters and granted ad interim stay. The Orissa High Court has granted ad interim stay. The Madras High Court has granted interim stay. It is therefore submitted that the petition ought to be admitted and the interim relief as sought ought to be granted.

8. Mr. Desai, Additional Solicitor General for respondents Nos. 1 to 3, sought time of 4 weeks to file a reply. This is on the background that the notice has been served on the respondents more than 4 weeks ago. The respondents rely upon the normal procedure of appointments and submit that it will take its own time. But Mr. Desai is not inclined to make a statement that the Tribunal will not be set up until the matter is further heard. The petitioner is, therefore, seeking appropriate interim order.

9. Mr. Desai submits that the petitioner has not relied upon any constitutional provisions apart from Article 50 thereof. In his submission, setting up of such a Tribunal is a policy matter and is fully justified under Article 323B of the Constitution. In deference to the judgment in L. Chandra Kumar Vs. Union of India and others, , the writ jurisdiction of the High Court is not being disturbed. He submits that the objections raised could be taken care of, but setting up of the Tribunal should not be halted which will mean an action against the statute. He relied upon the observations of the apex court in para. 30 in the case of Bhavesh D. Parish and Others Vs. Union of India and Another, . In that matter, the Supreme Court was concerned with the constitutionality of Section 45S of the

Reserve Bank of India Act, 1934 which placed certain restrictions on the financial activities of unincorporated bodies. The apex court noted that a few of the High Courts had granted stay on the implementation of that section. It has then observed that when considering an application for stay of the operation of a piece of legislation and that too pertaining to economic reform or change, the court must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, they must show judicial restraint in staying the applicability of the Act. Merely because the statute comes for examination and some arguable point is raised, one should not entertain the tendency to grant stay relating to economic reform. There is always a presumption in favour of the constitutional validity of a legislation unless the same is set aside after final hearing. Mr. Desai has submitted that the Tribunals are now necessary and possibility of abuse is no ground to declare a provision void. He relies on *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, in that behalf.

10. We are quite conscious of the guidelines laid down by the apex court in the above matter. However, unlike the case concerning Section 45S of the RBI Act, the present case is not one of economic reform but that of transfer of cases to a new Tribunal which is being set up. We cannot ignore that the proceedings which are sought to be transferred are presently going on in various High Courts. The National Tax Tribunal is not constituted as yet. Constituting this Tribunal and transferring the pending cases to this Tribunal in the meanwhile and subsequently deciding the validity of the statute would unnecessarily result in shifting of the cases and then bringing them back. We do not consider this case as merely a challenge to the setting up of a Tribunal. It is a matter concerning the separation of the judiciary from the executive. In our view, the high office of the Hon'ble Chief Justice of India cannot be undermined in the manner in which it is sought to be undermined by making him merely a member of a three-member recommending committee. These are all questions which go to the root of the matter and are concerning basic structure of the judicial framework and the Constitution. They require an examination.

11. In *S. P. Gupta v. Union of India* [1981] Suppl SCC 87, the apex court held in paragraph 27 that if there is one principle which runs through the entire Constitution, it is the principle of rule of law. In paragraph 10 of *C. Ravichandran Iyer Vs. Justice A.M. Bhattacharjee and Others*, , the apex court referred to this judgment and noted that rule of law and judicial review are basic features of the Constitution, As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law.

12. We would be justified in admitting the petition and granting interim relief. However, with a view not to deny any opportunity to respondents Nos. 1 to 3, we grant them time to file their reply which they may file within 4 weeks. The matter stands adjourned to March 8, 2006, when it will be notified for further direction. In the meanwhile, there will be an ad interim order restraining respondents Nos. 1 to 3 from constituting the National Tax Tribunal and

transferring the matters pending in this Court to the said Tribunal.