
(2015) 02 MAD CK 0123

In the Madras High Court

Case No : Writ Petition No. 31409 of 2014 and M.P. Nos. 1 and 2 of 2014

S. Manoharan

APPELLANT

Vs

The Deputy Registrar and Others

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Administrative Tribunals (Amendment) Act, 1986 — Section 4(4)(c), 5, 5(1), 5(2), 5(4)
Administrative Tribunals Act, 1985 — Section 28, 5(4)(d)
Constitution of India, 1950 — Article 226, 227, 32, 323-A, 323-A(2)(d)
National Green Tribunal Act, 2010 — Section 21, 35, 4(4), 4(4)(c)
National Tax Tribunal Act, 2005 — Section 7

Citation : (2015) LabIC 2580 : (2015) 2 LLN 448 : (2015) 2 LW 343 : (2015) 3 MLJ 1 : (2015) WritLR 342

Hon'ble Judges : P.R. Shivakumar, J.; V. Ramasubramanian, J.

Bench : Division Bench

Advocate : R. Vaigai for K.M. Ramesh, for the Appellant; R. Maheswari, SCGSC, Advocates for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—This writ petition challenges an order of the Hon'ble Chairman of the Central Administrative Tribunal, refusing to change the composition of a Full Bench constituted by him, comprising of two Administrative Members and one Judicial Member.

2. We have heard Ms. R. Vaigai, learned counsel for the petitioner and Mrs. R. Maheswari, learned Senior Central Government Standing Counsel, appearing for the respondents 1 to 3.

3. The petitioner is working as an Engine Fitter SK (Skilled) in INS Kattabomman, Naval Base. He received a show cause notice dated 10.11.2008, proposing to revise the seniority list of Engine Fitters, on the basis of the judgment of the Central Administrative Tribunal, Madras Bench made in O.A. No. 371 of 2007 dated 26.6.2008. As per the show cause notice, it was proposed to place the

fourth respondent in this writ petition as senior to the writ petitioner.

4. Since the show cause notice was issued on the basis of the judgment of the Central Administrative Tribunal, in an application to which the writ petitioner was not a party, the petitioner filed W.P. No. 8391 of 2009 challenging the order of the Tribunal in O.A. No. 371 of 2007. But the writ petition was dismissed by order dated 9.6.2009, on the ground that the petitioner will have to approach the Tribunal itself.

5. Therefore, the petitioner filed an application in O.A. No. 1203 of 2009, challenging the order of refixation of seniority dated 13.3.2009. The said application was heard by a Division Bench of the Central Administrative Tribunal, comprising of one Judicial Member and one Administrative Member. After hearing arguments, the Division Bench of the Tribunal passed an order dated 20.4.2011 expressing disagreement with the views taken by the Bench in O.A. No. 371 of 2007 and consequently referring the issue to a larger Bench for consideration.

6. Pursuant to the order dated 20.4.2011, the Chairman of the Tribunal constituted a Full Bench. In the Full Bench, an Administrative Member by name Mr. R. Satapathy was included. Since the said Administrative Member was a party to the earlier order in O.A. No. 371 of 2007, the petitioner raised a preliminary objection. Since the objection was not sustained, the petitioner moved a writ petition in W.P. No. 1910 of 2012. This Court entertained the writ petition and granted a stay.

7. During the pendency of the writ petition, the Hon'ble Mr. R. Satapathy, Administrative Member retired. Therefore, the writ petition was dismissed on 29.10.2013, as having become infructuous.

8. Thereafter, the Hon'ble Chairman of the Central Administrative Tribunal constituted a Full Bench afresh, for hearing O.A. No. 1203 of 2009. But the Full Bench so constituted, comprises of one Judicial Member and two Administrative Members.

9. Upon coming to know of the composition of the Full Bench, the counsel for the petitioner circulated a letter dated 14.11.2014 praying for reconstitution of the Full Bench with two Judicial Members and one Administrative Member. But the Chairman of the Tribunal refused to reconstitute and the said decision was communicated by the Section Officer of the Tribunal, to the counsel for the petitioner, by a letter dated 20.11.2014. Challenging the said order, the petitioner has come up with the above writ petition.

10. The only question arising for consideration in this writ petition is as to whether in a Full Bench of the Administrative Tribunal, the number of Administrative Members could be more than the number of Judicial Members.

11. To find an answer to this question, we may need to undertake a journey into the past. The power to establish Administrative Tribunals, was conferred upon the Parliament by Article 323-A and 323-B of the Constitution, which were

inserted by the Constitution (42nd Amendment) 1976. In exercise of the power conferred by Clause (1) of Article 323-A of the Constitution, the Parliament enacted the Administrative Tribunals Act, 1985 (Act 13 of 1985). In tune with the provisions of the Act, the Central Administrative Tribunal was established on 1.11.1985 with five Benches throughout the Country.

12. Several writ petitions came to be filed before different High Courts as well as in the Supreme Court, challenging the Constitutional validity of Article 323-A of the Constitution as well as several provisions of the Administrative Tribunals Act, 1985. The writ petitions that were filed directly before the Supreme Court under Article 32 of the Constitution, were by S.P. Sampath Kumar and others. Along with those writ petitions, several Transfer Petitions were also filed before the Supreme Court so that all the writ petitions pending before various High Courts could be withdrawn and transferred to the file of the Supreme Court itself.

13. On 31.10.1985, the Supreme Court issued Rule Nisi in the writ petitions filed by S.P. Sampath Kumar and others and directed the writ petitions to be posted before a Constitution Bench of 5 Judges. In the meantime, the Supreme Court also granted an interim order, which is reported in S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, . The interim order was to the effect (1) that appointments of Judicial Members to the Tribunal should be made in consultation with the Chief Justice of India (2) that every Bench of the Tribunal should consist of one Judicial Member and one non-Judicial Member and in case of difference of opinion between them, the case should be referred for decision to the Chairman of the Tribunal.

14. The second part of the interim order passed by the Supreme Court in S.P. Sampath Kumar on 31.10.1985 is of significance and hence it is extracted as follows:-

"(2) Each Bench of the Tribunal will consist of one Judicial Member and one non-Judicial Member and in case of difference of opinion between them, the case shall be referred for decision to the Chairman of the Tribunal."

15. In order to give effect to the above interim directions issued by the Supreme Court, the Parliament passed the Administrative Tribunals (Amendment) Act 19 of 1986. Section 5 of the Act which deals with the composition of the Tribunals and Benches thereof, underwent a significant change, by the Amendment Act 19 of 1986. Sub-Section (2) and Sub-Section (4) (d) of Section 5 of the Act, both before the Amendment Act 19 of 1986 and after the amendment, are presented in a tabular form, for appreciating the scope of the amendment, with reference to the question arising for consideration in this writ petition.

16. After the Parliament brought out amendments under Amendment Act 19 of 1986, in compliance with the interim directions issued in S.P. Sampath Kumar, the case filed by S.P. Sampath Kumar and others were finally heard. By a judgment rendered on 9.12.1986 reported in S.P. Sampath Kumar and Others Vs. Union of India (UOI) and Others, , the Supreme Court held that the

Administrative Tribunal has been contemplated as a substitute and not as supplemental to the High Court and that to provide the Tribunal as an additional forum from where the parties could go to the High Court would have been a retrograde step. However, speaking for the majority, Ranganath Misra, J., indicated in para 17 of the report that the Tribunal should be a real substitute for the High Court, not only in form and de jure, but in content and de facto. In para 18, the Court observed that it is of paramount importance that the substitute institution must be a worthy successor of the High Court in all respects. Though the Supreme Court directed Section 6(1)(c) which enabled even a bureaucrat to be appointed as the Chairman of the Tribunal to be deleted, the Supreme Court nevertheless approved the qualifications prescribed for the post of Vice-Chairman.

17. Immediately after the decision in S.P. Sampath Kumar, a writ petition was filed under Article 32 of the Constitution before the Supreme Court by a Judicial Member of the Central Administrative Tribunal seeking parity of treatment for the Chairman of the Tribunal with the Chief Justice of the High Court and for the Vice-Chairman and Members with the sitting Judges of the High Court. However, a three Member Bench of the Supreme Court rejected the claim in its decision in M.B. Majumdar Vs. Union of India, . The basis on which a claim for parity of treatment was made in M.B. Majumdar was the observations of the Supreme Court in S.P. Sampath Kumar to the effect that the Tribunal is a substitute for the High Court. But the Supreme Court held that the Tribunal cannot be equated with the High Court, for a variety of reasons and that even under Article 323-A, the Administrative Tribunals are to be distinct from the High Courts. The Supreme Court also clarified that the equation of the Tribunal with the High Court in S.P. Sampath Kumar, was only for the purpose of adjudication of disputes and not for all practical purposes. Thus, a small wedge was created in M.B. Majumdar from what was opined in S.P. Sampathkumar.

18. In a collateral development, a two Member Bench of the Supreme Court held in J.B. Chopra and Others Vs. Union of India (UOI) and Others, that since the Administrative Tribunal is a substitute for the High Court, it had the necessary jurisdiction, power and authority to adjudicate upon all disputes including the power to deal with all questions pertaining to the Constitutional validity or other wise of such laws.

19. Thereafter another question came up before the Supreme Court in Amulya Chandra Kalita Vs. Union of India (UOI) and Others, , as to whether the Administrative Member of the Central Administrative Tribunal could decide a case, sitting singly, in the face of the decision in S.P. Sampath Kumar. By a brief order passed on 16.1.1990, the Supreme Court held that as per Section 5(2) of the Act, a Bench should consist of one Judicial Member and one Administrative Member and that therefore it was obvious that the Administrative Member alone could not hear and decide the matter. Interestingly, Amulya Chandra Kalita did not deal with the question whether a single Judicial Member was competent to hear the case or not, though the observations appearing therein were generally

in respect of the composition of Benches.

20. Subsequently, in a fete of rare nature, a Full Bench of the Andhra Pradesh High Court exploded a nuclear bomb in Sakinala Harinath Vs. State of Andhra Pradesh [1993(2) An. W.R. 484], by questioning the wisdom of the Constitution Bench of the Supreme Court, which decided S.P. Sampath Kumar. This adventurism was made possible on account of the fact that the State of Andhra Pradesh already got an Administrative Tribunal constituted by the President of India, in terms of Article 371-D(5) of The Constitution, that was inserted by the Constitution (32nd Amendment) Act, 1973. The Government of Andhra Pradesh was empowered by the Proviso to Clause (5) of Article 317-D of The Constitution, even to annul or modify any order of the Administrative Tribunal. Therefore, a Constitution Bench of the Supreme Court declared Clause (5) of Article 371-D unconstitutional, in Sambamurthy Vs. State of Andhra Pradesh [1987(1) SCC 386]. It is of interest to note that this was a post-S.P. Sampath Kumar decision and the Supreme Court reiterated not only the basic structure doctrine, but also the fact that if an alternative institutional mechanism is created, it should be no less effective than the High Court, for its survival. It was this experiment in Sambamurthy that emboldened a Full Bench of the Andhra Pradesh High Court to declare in Sakinala Harinath that Article 323-A(2)(d) of The Constitution, as well as Section 28 of the Administrative Tribunals Act, 1985, which ousted the jurisdiction of the High Court under Article 226, is unconstitutional. Therefore, the first missile to torpedo S.P. Sampath Kumar directly, was the decision of the Full Bench of the Andhra Pradesh High Court, in Sakinala Harinath.

21. Thereafter, under completely different circumstances, the decisions of the Supreme Court in S.P. Sampath Kumar, M.B. Majumdar and J.B. Chopra came up again for consideration in R.K. Jain Vs. Union of India and Others, . The said case arose out of a letter written by the Editor of Excise Law Times to the then Chief Justice of India complaining about the malfunctioning of CEGAT. When the Supreme Court issued Rule Nisi, treating the letter as a writ petition, the Government appointed a person as the President of the Tribunal. The appointment was challenged in a writ petition. While dealing with this writ petition, the Supreme Court took note of the decision in S.P. Sampath Kumar, M.B. Majumdar and J.B. Chopra, in paragraph 66 of the report. But it was pointed out by K. Ramaswamy, J that judicial review is a basic and essential feature of the Constitution and that though the basic and essential feature of judicial review cannot be dispensed with, it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism, provided it is not less efficacious than the High Court. The Supreme Court clarified in paragraph 66 of the report in R.K. Jain that what was meant by the Supreme Court in Sampath Kumar was that the Administrative Tribunals Act created an institutional alternative mechanism and that it must be effective and efficacious to exercise the power of judicial review. The last line of para 66 of the report in R.K. Jain is of significance. It reads as follows:-

"This Court did not appear to have meant that the Tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution."

22. Again in para 67 of the report, the Supreme Court pointed out in R.K. Jain that the personnel appointed to man the Tribunals are called upon to discharge judicial or quasi-judicial powers and that therefore they must have a judicial approach, 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 efficiency and effectiveness of the judicial adjudication. The Supreme Court also held that it is 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 the trained judges would arise for discussion and decision.

23. Some of the observations made by the Supreme Court in para 71 of the report in R.K. Jain are relevant and hence they are extracted as follows:-

"71. The daily practice in the courts not only gives training to Advocates to intersect the rules but also adopt the conventions of courts. In built experience would play vital role in the administration of justice and strengthen and develop the qualities, of intellect and character, forbearance and patience, temper and resilience which are very important in the practice of law. Practising Advocates from the Bar generally do endow with those qualities to discharge judicial functions. Specialised nature of work gives them added advantage and gives benefit to broaden the perspectives. "Judges " by David Pannick (1987 Edition), at page 50, stated that, "we would not allow a man to perform a surgical operation without a thorough training and certification of fitness. Why not require as much of a trial judge who daily operates on the lives and fortunes of others". This could be secured with the initial training given at the Bar and later experience in judicial adjudication. No-one should expect expertise in such a vast range of subjects, but familiarity with the basic terminology and concept coupled with knowledge of trends is essential. A premature approach would hinder the effective performance of judicial functions. Law is a serious matter to be left exclusively to the judges, because judges necessarily have an important role to play in making and applying the law There is every reason for ensuring that their selection, training and working practice facilitate them to render their ability to decide the cases wisely on behalf of the community. If judges acts in injudicious manner, it would often lead to miscarriage of justice and a brooding sense of injustice rankles in an aggrieved person."

24. Therefore, the view taken in Sampath Kumar was actually clarified in R.K. Jain. Thereafter, the view taken in Amulya Chandra Kalita that a single Administrative Member cannot constitute a Bench, was tested by a three Member Bench in Dr Mahabal Ram Vs. Indian Council of Agricultural Research and Others, . After taking note of the Non-Obstante Clause in sub-section (6) of

Section 5 and the power conferred in sub-section (6) upon the Chairman to authorise a single Member to decide the cases, the Supreme Court held in Mahabal Ram that the decision in Amulya Chandra Kalita was not correct. But nevertheless the Court pointed out that whenever questions of law and interpretation of the Constitution are involved, the same shall not be assigned to a single Member. The Court also pointed out that it would be open to either party appearing before a single Member to suggest that it should go to a Bench of two Members. However, the Supreme Court held that to make a distinction between the Judicial Member and Administrative Member functioning under sub-section (6) of Section 5 may not be appropriate.

25. Since the court found itself bound in Dr. Mahabal Ram, by the express provisions of the statute which placed the Administrative Member and the Judicial Member on par and which also empowered the Chairman to authorise a single Member to hear and decide cases, the Constitutional validity of Section 5(6) of the Act itself came to be challenged by L. Chandra Kumar. Noting that in M.B. Majumdar the Supreme Court struck a note of discordant to that of Sampath Kumar, a two member Bench of the Supreme Court passed an order in the writ petition filed by L. Chandra Kumar Vs. Union of India and others, , referring the matter to a Larger Bench for reconsideration of the decision in Sampath Kumar. It was particularly noted in the penultimate paragraph of the reference that examination of the questions indicated therein would be necessary to instill confidence in the minds of the people. This is how, L. Chandra Kumar ultimately found its way to a Larger Bench of 7 Judges.

26. Several distinct questions of law arose before the Larger Bench of the Supreme Court in L. Chandra Kumar, all of which were grouped broadly under three heads. In answer to these issues, it was held by the Larger Bench in L. Chandra Kumar Vs. Union of India and others, , that the power of judicial review available to the High Courts under Articles 226/227 cannot be wholly excluded. After making the decisions of the Tribunals, subject to the High Courts' jurisdiction under Articles 226 and 227, the Larger Bench of the Supreme Court defined the jurisdictional powers of the Tribunal in para 93 of the report. Thereafter, the Supreme Court took up the issue of competence of persons who manned the Tribunals. An argument was advanced that only those who have had judicial experience should be appointed to the Tribunals and that Administrative Members should not be appointed. After rejecting the said contention the Supreme Court held in para 95 as follows:-

"It was expected that a judicious mix of judicial members and those with gross root experience would best serve the purpose. The court also indicated that the Selection Committee should take care to ensure that Administrative Members are chosen mere amongst those who have some background to deal with such cases."

27. Ultimately the Supreme Court held Section 5(6) to be Constitutionally valid and that Sections 5(2) and 5(6) are to be read harmoniously in the manner in which they were read in Dr. Mahabal Ram. The court indicated in para 98 of the

report that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for consideration, the proviso to Section 5(6) will come into operation. The relevant portion of paragraph 98 of the report reads as follows:-

"We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality."

28. Since the Larger Bench upheld the validity of Section 5(6) after reading it harmoniously with sub-section (2) and after taking note of the proviso thereto, it is necessary to extract Section 5(6) together with the proviso thereto.

Section 5(1).....

"(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Administrative Member."

.....

"(6) Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorised by the Chairman 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 classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member 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 Chairman or, as the case may be, referred to him for transfer to, such Bench as the Chairman may deem fit."

29. However, the question as to what should happen if a matter is required to be heard by a Bench comprising of more than two Members, did not fall for consideration in L. Chandra Kumar. The Supreme Court had no occasion in L. Chandra Kumar to consider the impact of clause (d) of subsection (4) of Section 5 and the proviso thereto, which deals with the question of constitution of a Bench comprising of more than two Members. Therefore, this question as to how the proviso to Section 5(4)(d) has to be construed, is on a virgin ground. Section 5(4)(d) and the proviso thereto reads as follows:-

"Section 5(4)

.....

(d) may, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central Government in his behalf to be decided by a Bench composed of more than two Members issue such general or special orders, as he may deem fit:

Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member."

30. Before proceeding to analyse the import of the proviso to Section 5(4)(d) we should also take note of three more decisions of the Supreme Court, on which reliance is placed by the learned counsel for the petitioner. They are:

- (1) State of M.P. Vs. B.R. Thakare and Others, ;
- (2) V.K. Majotra Vs. Union of India (UOI) and Another, ; and
- (3) Union of India (UOI) Vs. R. Gandhi, President, Madras Bar Association, .

31. In B.R. Thakare, the Supreme Court was concerned with the orders passed by a Single Member of the Tribunal who was an Administrative Member. An Office Order issued by the Chairman of the Tribunal, authorising the Judicial Member to function as a Bench, was produced before the Supreme Court. After taking note of the decision in L. Chandra Kumar, the Supreme Court held that it was not merely a question of lack of jurisdiction of a Single Member, but a question of Administration of Justice.

32. In V.K. Majotra, the Supreme Court was concerned with the validity of appointment of the Vice-Chairman of the Central Administrative Tribunal. After taking note of the lead judgment of Ranganath Misra, J, which left the manner of selection of Vice-Chairman untouched, the Supreme Court referred to the separate but concurrent judgment of P.N. Bhagawati, CJ, to the following effect:

"It was held that there should be no preponderance of Administrative Members in the Tribunal and the Tribunal should consist of one Judicial Member and one Administrative Member of any Bench."

33. However, the Supreme Court held in V.K. Majotra that the appointment of Vice-Chairman need not be from amongst persons mentioned in Section 6(2)(a) of the Act. In other words, the Supreme Court did not agree with the contention that those who are or have been Judges of the High Court alone could be appointed as Vice-Chairmen.

34. In Union of India vs. R. Gandhi, the Supreme Court was concerned with a challenge to the Constitutional validity of Parts-I-B and I-C of the Companies Act, 1956, providing for the constitution of the National Company Law Tribunal and National Company Law Appellate Tribunal. While considering the question as to

whether judicial functions can be transferred to Tribunals manned by persons who are not competent to discharge such judicial powers, the Constitution Bench of the Supreme Court held in *R. Gandhi* (para 109 of the report) that a life time of experience in administration may make a member of the Civil Services, a good and able Administrator, but not necessarily a good, able and impartial Adjudicator with a judicial temperament capable of rendering decisions. After looking at the qualifications for appointment of Administrative Members in the Administrative Tribunals, the Supreme Court observed in para 112.3 of the report that the first dilution in the Administrative Tribunals Act, 1985 was that matters that were decided till then by the High Courts could be decided by a Tribunal comprising of two Secretaries or two Additional Secretary level officers with five years of experience. In paragraph 113 of the report the Supreme Court pointed out that though senior officers of Civil Services may function as Administrative Members of Administrative Tribunals, they cannot become Technical Members in the Company Law Tribunals.

35. At about the same time, when the challenge to the constitution of the National Company Law Tribunal and National Company Law Appellate Tribunal was taken up for consideration, another batch of cases challenging the Constitutional validity of the National Tax Tribunal Act, 2005 was also referred to the Constitution Bench. Finding that the challenge to Parts I-B and I-C of the Companies Act, 1956 drew support from Article 323-B of The Constitution, in contrast to the challenge to the National Tax Tribunal Act, which was based upon a very challenge to Article 323-B itself, the Supreme Court passed an order reported in *Madras Bar Association Vs. Union of India (UOI)*, de-linking the challenge to the National Tax Tribunal Act, 2005 from the challenge to the validity of Parts I-B and I-C of the Companies Act, 1956.

36. After about four years, the challenge to the validity of the National Tax Tribunal Act, 2005 was sustained by another Constitution Bench in *Madras Bar Association Vs. Union of India (UOI)*, . In paragraph 126 of the report, the Supreme Court pointed out that as per the law declared in *L. Chandra Kumar and the Company Law Tribunal's* case, Technical Members could be appointed only where technical expertise is essential for disposal of matters and not otherwise. The Court also pointed out that where the adjudicatory process transferred to a Tribunal does not involve any specialised skill, knowledge or expertise, the provision for appointment of Non Judicial Members would constitute a clear case of delusion and encroachment upon the "independence of Judiciary" and the "rule of law". Despite the fact that taxation is a highly specialised branch and despite the common perception that accountants can easily understand the nuances of taxation, the Supreme Court held in paragraph 126 that Accountant Members and Technical Members cannot handle complicated question of law relating to taxation matters. In no uncertain terms, the Supreme Court pointed out that persons not qualified in the profession and practice of law would not be able to deal with substantial questions of law. In paragraph 128 of the report, the Supreme Court emphasized that in a Constitutional set up that followed the

Westminster model, the power of the legislature to transfer judicial power from a traditional court to an analogous court or tribunal is circumscribed by the condition that such a transferee tribunal is possessed of the same salient characteristics, standards and parameters. Therefore, the Court rejected the argument that Accountant Members and Technical Members have the same stature and qualification possessed by the Judges of the High Courts. In paragraph 129 of the report in National Tax Tribunal Act case, the Supreme Court pointed out that when references on questions of law are to be adjudicated by a Bench of at least two judges of the jurisdictional High Court, it is not possible to vest the same power upon a Tribunal that would have an Accountant Member or a Technical Member. After analysing the decision in L. Chandra Kumar with reference to Section 7 of the National Tax Tribunal Act, the Supreme Court pointed out in paragraph 130 of its decision in Madras Bar Association that the status of the members, who would constitute a Tribunal, would depend on the jurisdiction, which was being transferred to the Tribunal.

37. The importance of the decision in National Tax Tribunal's case is that it focussed particularly on cases where substantial questions of law are required to be answered by a Tribunal. This is why, in his separate opinion, expressing dissent from the reasonings given by the majority, but concurring with the ultimate outcome, Rohinton Fali Nariman, J made a comparison to the role played by the courts of record and the cases where the courts are called upon to decide substantial questions of law. The minority view made a distinction between one specialised Tribunal replacing another at the original (and not at the appellate) stage and a case where a specialised Tribunal is created to decide substantial questions of law. We think it would be useful to quote the observations made in paragraph 156 of the report in Madras Bar Association, which reads as follows:

"It is clear, therefore, that the decision of a substantial question of law is a matter of great moment. It must be a question of law which is of general public importance or is not free from difficulty and/or calls for a discussion of alternative views. It is clear, therefore, that a judicially trained mind with the experience of deciding questions of law is a sine qua non in order that such questions be decided correctly."

38. In other words, L. Chandra Kumar was primarily concerned with the question as to whether the Administrative Tribunals constituted under Article 323-A of The Constitution were a substitute or supplemental to the High Court and whether the jurisdiction of the Constitutional Court could stand ousted or not. The case that arose out of the Companies Act, 1956 focussed on the role of Technical Members. The law was taken to the next level in the National Tax Tribunal's case where the competence of Technical Members, however qualified they are in other fields, to decide substantial questions of law was questioned. Therefore, the question that arises for consideration in this writ petition has to be understood in the context of the journey that the law had taken from S.P. Sampath Kumar to L.

Chandra Kumar to Union of India to Madras Bar Association. If L. Chandra Kumar made it clear that the Tribunals are to be manned by a judicious mix of Judicial Members and those with grass-root experience, the decisions relating to the National Company Law Tribunal and the National Tax Tribunals Act made it clear that substantial questions of law cannot be decided by Administrative Members.

39. But, no provision in any other similar enactment has been brought to our notice, where the question of composition of a Full Bench of the Tribunal has been dealt with. The Administrative Tribunal itself contains a provision, which gives a very vague indication. While empowering the Chairperson of the Tribunal under Section 5(4)(d) to constitute a Bench comprised of more than two members, the Act circumscribes such a power through a Proviso to the effect that every Bench so constituted should include at least one Judicial Member and one Administrative Member. In other words, the bottom line prescribed by the Proviso to Section 5(4)(d) is that there should be one Judicial Member and one Administrative Member. This simply would mean that in a Bench of Three Members, all of them cannot be Judicial Members and all of them cannot also be Administrative Members.

40. This very same issue appears to have been addressed in a different manner in the National Green Tribunal Act, 2010. Section 4(4) of the National Green Tribunal Act, 2010 empowers the Central Government to make rules, in consultation with the Chairperson of the Tribunal for regulating the practices and procedure of the Tribunal. Under Clause (c) read with the Proviso thereto, the Rules so made by the Central Government may indicate the minimum number of persons, who shall hear the applications and appeals in respect of any class or classes of applications and appeals. However, as per the proviso to section 4(4) (c), the number of Expert Members shall be equal to the number of Judicial Members hearing such application or appeal.

41. But, Section 21 of the National Green Tribunal Act, 2010 contains a Catch-22 situation. It declares that the decision of the Tribunal by majority of members shall be binding. The First Proviso to Section 21 states that if there is a difference of opinion among the Members and the opinion is equally divided, the Chairperson shall hear such application and decide. The Second Proviso to Section 21 states that where the Chairperson himself has heard such application along with other Members and if the opinion among the Members is equally divided, he shall refer the matter to the other Members of the Tribunal. This is despite the fact that the Chairperson of the Tribunal, as per Section 5(1) of the Act, should have been either a Judge of the Supreme Court or the Chief Justice of a High Court. Perhaps, the situation contemplated by the Second Proviso to Section 21 of the National Green Tribunal Act, 2010 has not so far arisen, where it is possible for an Expert Member to tilt the balance in favour of the one contrary to what one set of Members including the Chairperson had decided.

42. It appears that in exercise of the powers conferred by Section 4(4) read with Section 35 of the National Green Tribunal Act, 2010, the Central Government has

issued a set of rules known as National Green Tribunal (Practices and Procedure) Rules, 2011. Rule 3(1) of these Rules empowers the Chairperson of the Tribunal to constitute a Bench of two or more Members consisting of at least one Judicial Member and one Expert Member. Under Rule 5(1), an application or appeal should be heard by the Tribunal consisting of at least one Judicial and one Expert Member. Sub-Rule (2) of Rule 5 makes it incumbent upon the Chairperson to constitute a Bench comprising of more than two Members, if a particular case is to be heard and decided by a Larger Bench. But, interestingly, Rule 5(2) is conspicuously silent about the ratio between Judicial and Expert Members. Therefore, one has to fall back upon the Proviso to Rule 4(4)(c) that mandates a Bench of more than two Members to be loaded with equal number of Judicial and Expert Members.

43. If we carefully analyse the scheme of Section 5(4)(d) of the Administrative Tribunals Act, 1985 and the Proviso thereunder, in the context of Section 4(4)(c) and the Proviso thereunder of the National Green Tribunal Act, 2010, in the backdrop of the development of law from S.P. Sampath Kumar to L. Chandra Kumar to R. Gandhi to Madras Bar Association, it will be clear that a Bench of more than three Members cannot be overloaded with Administrative Members. The Parliament itself appears to have understood the difficulty of allowing a Bench of any Tribunal to be overloaded with Administrative or Technical or Expert Members. That is why it sought to provide equality of representation between Judicial and Expert Members in the National Green Tribunal. If substantial questions of law, as per the decision in the National Tax Tribunals Act case, cannot be decided by Tribunals loaded with Administrative Members, it is incomprehensible that a reference made to a larger Bench of an Administrative Tribunal, which would ordinarily require an exposition of a substantial question of law, can be decided by two Administrative Members, making the Judicial Member a minority. What John Marshall said in *Marbury Vs. Madison* [2 L Ed 60 : 5 US(1) Crunch 137(1803)] could be of assistance in resolving the issue on hand and hence, it is extracted as follows:

"It is emphatically the province and duty of the Judicial Department to say what the law is.....If two laws conflict with each other, the Courts must decide on the operation of each....."

44. The Proviso to Section 5(4)(d) of the Administrative Tribunals Act, 1985 cannot be understood to mean that the Parliament contemplated a single Judicial Member to be a decorative piece in a Bench of more than two. Therefore, we are of the considered view that in a Bench of more than two Members constituted by the Chairperson of the Administrative Tribunal, the number of Administrative Members cannot exceed the number of Judicial Members.

45. Hence, the writ petition is allowed, the impugned order is set aside and the matter remitted back to the Tribunal for reconstitution of the Full Bench. The Chairperson of the Tribunal is requested to reconstitute the Bench in accordance with what is indicated above, within a month from the date of receipt of a copy of

this order, so that the matter could be heard and disposed of at the earliest. No costs. Consequently, the above MPs are closed.