

**(1992) 01 MAD CK 0070**  
**In the Madras High Court**

V. Balachandran

APPELLANT

Vs

Union of India and another

RESPONDENT

**Date of Decision :** 13-01-1992

**Acts Referred:**

Companies Act, 1956 — Section 10A, 10E, 10E(2), 10F, 141  
Company Law Board Members (Qualifications and Experience) Rules, 1989 — Rule 10, 3, 4, 4(1), 4(3)  
Constitution of India, 1950 — Article 13(2), 14, 226

**Citation :** (1993) 76 CompCas 67 : (1992) 1 LW 396

**Hon'ble Judges :** Swamidurai, J; Misra, J

**Bench :** Division Bench

**Advocate :** Arvind P. Datar and V. Kuberan, for the Appellant; T. Srinivasamoorthy, for the Respondent

## **Judgement**

Mishra J.

1. The petitioner herein, who was enrolled as an advocate in the Bar Council of Tamil Nadu in 1975 and who has been practising as an advocate in this court for the last 15 years, has filed the instant petition challenging the constitutional validity of the Company Law Board Members (Qualifications and Experience) Rules, 1989\*, hereinafter called "the impugned Rules," brought into force by G. S. R. No. 740(E) dated August 4, 1989. He has, however, also sought a declaration that the provisions of section 10E(2) of the Companies Act, 1956 (Act 1 of 1956), are illegal, void and ultra vires the Constitution of India.

2. Two sections, viz., section 10E and 10F, were inserted as part I-A into the Companies Act, 1956, (Act 1 of 1956), by section 4 of the Companies (Amendment) Act (53 of 1963), with effect from January 1, 1964, only to be amended in some parts by the Companies (Amendment) Act No. 41 of 1941 and by Act No. 46 of 1977 and by the Companies (Amendment) Act, 1988. Since the rules, however, have been framed only in Notification No. G. S. R. 740(E), dated 4th August, 1989, we may take notice of the two sections 10E and 10F with all

the amendments therein

3. Section 10E runs as follows :

"Section 10E. constitution of Board of Company Law Administration. - (1) As soon as may be after the commencement of the Companies (Amendment) Act, 1989, the Central Government shall, by notification in the Official Gazette, constitute a Board to be called the Board of Company Law Administration.

(1A) The Company Law Board shall exercise and discharge such powers and functions as may be conferred on it, by or under this Act or nay other law, and shall also exercise and discharge such other powers and functions of the Central Government under this Act or nay other law as may be conferred on it by the Central Government, by notification in the Official Gazette under the provisions of this Act or that other law.

(2) The Company Law Board shall consist of such number of members, not exceeding nine, as the Central Government deems fit, the be appointed by that Government by notification in the Official Gazette:

Provided that the Central Government may, by notification in the Official Gazette, continue the appointment of the chairman or any other member of the Company Law Board function as such immediately) before the commencement of the Companies (amendment) Act, 1988, as the chairman or any other member of the Company Law Board, after such commencement for such period not exceeding three years as may be specified in the notification.

(2A) The members of the Company law Board shall possess such qualifications and experience as may be prescribed.

(3) One of the members shall be appointed by the Central Government to be the chairman Law Board.

(4) No act done by the Company Law Board shall be called in question on the ground only of any defect in the constitution of, or the existence of any vacancy in, the Company Law Board...

(4B) The Board may, by order in writing from one or more benches from among its members and authorise each such bench to exercise and discharges such of the Board's powers and functions as may be specified in the order, and every order made or act done by a bench in exercise of such powers or discharge of such functions shall be deemed to be the order or a act, as the case may be, of the Board.

(4C) Every Bench referred to in sub-section (4C) shall have powers which are vested in a court under th Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely :

(a) discovery and inspection of documents or other material objects procedure producible as evidence ;

- (b) enforcing the attendance of witnesses and requiring the deposits of their expenses ;
- (c) compelling the production of documents or other material objects procedure as evidence and impounding the same ;
- (d) examining witnesses on oath ;
- (e) granting adjournments ;
- (f) reception of evidence on affidavits.

(4D) Every Bench shall be deemed to be a civil court for the purposes of section 195 and chapter XXVI of the Code of Criminal procedure, 1973, and every proceeding before the bench shall be deemed to be a judicial proceeding within the meaning of sections 195 and 228 of the Indian Penal Code and for the purposes of section 196 of that Code.

(5) Without prejudice to the provisions of sub-sections (4C) and (4D), the Company Law Board shall in the exercise of its powers and the discharge of its functions under this Act, or any other law be guided by the principles of natural justice and shall act in its discretion.

(6) Subject to the forgoing provisions of this section, the Company Law Board shall have power to regulate its own procedure."

4. Viewed in the historical perspective, until the companies (Amendment) Act, 1974, came into existence, there existed a Board of Company Law Administration which functioned as a delegatee of the Central Government. The 1974 Amendment, however, introduced a substantial change with respect to the powers that hitherto were exercised by the courts under sections 17, 18, 19, 79, 141 and 186 of the Act and empowered the Board to exercise the powers under these sections instead of the courts exercising the power. The Amendment Act of 1988, however, has established an independent Company Law Board to exercise the judicial and quasi judicial functions besides the powers already statutorily vested in the Board by the Amendment Act of 1974. The joint Committee of Parliament which made certain recommendations leading to the amendment of 1974 by Parliament had observed :

19. New clause 4. -... In order to enable the Company Law Board to discharge its quasi-judicial functions it is also necessary to clothe it with the powers of a civil court to enforce the attendance of witnesses and production of documents, etc., and also to provide for punishment for its contempt. The Committee also recommend that it should be ensured that persons having adequate legal qualifications and experience are appointed as members of the Company Law Board discharge its quasi-judicial powers."

5. Another Committee called the Sachar Committee appointed for the purpose of examining the administrative structure and procedure regarding enforcement of the provisions of the Act, observed :

"16.8 There is also the strong feeling, expressed almost without any reservation, by all the organisations and individuals who has submitted their memoranda to the Committee or had appeared before it that there is a definite need for a quasi-judicial Tribunal, independent of the executive authority of the Central Government, which should not only ensure that the Act is administered in a manner which gives the affected party a right to be heard but also see that the decisions are taken uninfluenced by executive considerations. In the circumstances, what needs to be ensured is an in-built system which combines the application of judicial mind with speed and administrative efficiency, first, in respect of those matters which are at present with the Central Government though delegated to the Company Law Board and, secondly, in respect of such matters as are statutory with the Company Law Board.

16.9 We, therefore, feel that the appropriate solution would lie in statutorily constituting an independent quasi-judicial Company Law Board broadly on the lines of the Income Tax Appellate Tribunal, as provided in section 252 of the Income Tax Act, 1961, with Benches permanently located at different regions, including Delhi, so that matter are heard at place not far removed from the offices of the companies. In order to see that the Company Law Board functions independently as a statutorily constituted Tribunal and is independent of the Department of Company Affairs, it would be necessary to frame rules for recruitment and conditions of service of the persons appointed as members of the Company Law Board by a presidential notification under article 309 of the Constitution on India, read with the relevant section of the Companies Act dealing with the constitution of the Company Law Board, as in the case of the Income- tax Appellate Tribunal. We are also anxious to see the suitable qualifications are prescribed for recruitment as members of the Company Law Board.

16.10 Under rule 3(2)(ii) of the Income Tax Appellate Tribunal (Recruitment and Conditions of service) Rules, 1963, the Assistant Commissioners of Income Tax, who are members of the Indian Revenue Service and who have served for at least three years as such are eligible to be appointed as accountant members. The rules also provided for indication of the members of the Central Legal Service as judicial members of the Tribunal. Besides, the rules also permit direct recruitment of practising lawyers and accountants or members of the Judicial service. In the case of the Department of Company Affairs, there exists a specialised service, namely, the Central Company Law Service which has two distinct branches, the legal branch and the accounts branch and the members of this service are persons drawn from the legal and the accounting professions. We feel that on the same analogy, members of this service should be eligible to be appointed to the Company Law Board. In addition, provision may also be made for direct recruitment of members from the accounting and the legal professions.

16.11... We would also recommend the modification of the existing provisions relating to the constitution and the function of the Company Law Board in the

following manner :

(a) the power to constitute the Company Law Board shall remain with the Central Government as at present, but the power to constitute the regional Benches with permanent secretariat which we recommend for the purpose of administering the Act shall be with the Company Law Board.

(b) The Company Law Board alone shall have powers to frame the rules and procedures for the conduct of its business and the business of its regional Benches.

(c) The Company Law Board including its regional benches shall have powers of the Court under the CPC not only in respect of matters specified in the present sub-sections (4C) and (4D) of section 10E, but also in respect of the powers conferred upon it or the regional Benches by the Act.

(d) the Chairman of the Company Law Board shall ordinarily be one who is qualified to be appointed as a judicial member. He shall hold office until he attains the age of 65 years or until he has served for a period of five years as the chairman of the Company Law Board, whichever is earlier, the other members of the must be persons having legal and accounting qualification, in addition to the experience of the working and administration of the Companies Act allied statutes and of corporate sector.

(e) The present sub-section (6) of section 10E should be modified to provide that the Company Law Board or any of its regional benches in exercise of their powers and discharge of their functions, shall not be subject to the control of the Central Government."

6. It is conceded almost by all the courts in India that with the increase in the administrative activities of the State in various fields it will be necessary to appoint Administrative Tribunals and Boards and that so long as a judicial review of the actions of such Tribunals/Boards it cannot be said that the mechanism of the Tribunal/Board in lieu of the courts is any way unconstitutional or invalid. What has been guaranteed under our Constitution is that there is to be an independent mechanism of judicial review, of every State action and as long as such independent mechanism is available, creation of Tribunals and Boards of a specified and limited jurisdiction cannot be questioned. The oft quoted observations of Bhagwati J., as he then was, in the case of *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, :

"I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective, alternative institutional mechanisms or arrangements for judicial review cannot be made by parliament. But what I wish to emphasise is that judicial review is a vital principle of our

Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the Legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile."

is always applied as the test to find out whether the mechanism or arrangement of adjudication by a Tribunal or authority or a Board of limited jurisdiction is subject to judicial by a competent court or not. In the instant case, a reference first to section 10F and then the fact that there is no bar to the jurisdiction of the High court under article 226 of the Constitution of India or that of the Supreme Court in article 32 of the Constitution, in our opinion, leaves no manner of doubt that the decisions of the Company Law Board are subject to judicial control of the High court and the judicial review of the orders of the Company Law Board is permissible.

7. Section 10F says "appeals against the orders of the Company Law Board", It says :

"Any person aggrieved by any decision or order of the company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order :

Provided that the High 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."

8. This shows that on questions of law that may arise for determination in a proceeding before the Company Law Board, the High Court can entertain an appeal against the order of the Board. Even though a right of appeal has been provided by section 10F of the Act, the power of the Constitution of India has not been taken away. the orders and action of the Company Law Board are reviews in writ jurisdiction under articles 32 and 226 of the Constitution. the High Courts can exercise the power of super intendence under article 227 of the Constitution.

9. That no appeal has been provided against any decision on facts by the Company Law Board cannot be a ground to say that any fundamental error has been committed by the Legislature. Judicial review as understood in our country is the same as in the United Kingdom. while judicial review is confined to interference in the cases of errors of law, jurisdiction, unreasonableness, violation of principles of natural justice, right of appeal on facts is distinguished from this form of judicial review, Something unlawful done will be undone by way of judicial review. Interference in the erroneous findings of fact is permissible only when a right of appeal is granted by a statute.

10. In *S. P. Sampath Kumar v. Union of India*, AIR 1987 SC 386, the Supreme court has said (at page 389) :

"The basic and essential feature of judicial review cannot be dispensed with it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review provided it is not less efficacious than the High Court. Then, instead authority which would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the rule of law."

11. That the Supreme Court said with respect to the constitutional amendment by article 323A of the Constitution of India which provided for the establishment of Administrative Tribunals to exercise exclusive powers and exclusion of the jurisdiction of the High Court under articles 226 and 227 of the Constitution of India. In view of the above in our considered opinion there is no constitutional in section 10E of the Act.

12. In *Kalika Kuar alias kalika Singh v. State of Bihar* : 1990(1)BLJR51 , a Full Bench judgment of the Patna High Court, it is said :

"The characteristic attribute of a judicial act or decision is that it binds, whether it be a right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principle govern not only the findings of that inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been vested with power to err within the limits of their jurisdiction; and provided that they keep within these limits of their jurisdiction, their decisions must be accepted as valid unless set aside on appeal Even the doctrine of *res judicata* is authority to decide. Whenever a judicial or quasi-judicial Tribunal is empowered to required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon became final until reversed on appeal. Where a quasi judicial authority has jurisdiction to decide a matter, it is wrong in law or in fact. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire or upon the correctness of its findings on these facts, but upon their nature, and it is determinable at the commencement, not at the conclusion of the enquiry. Such jurisdiction may depend upon the fulfilment of some condition precedent or upon the the existence of some facts. Such a fact is collateral to the actual matter which the deemed court or the tribunal has to try. This determination whether it exists or not, is logically prior to the determination of the actual question. A decision as to the collateral fact, this, is necessary before jurisdiction to decide such questions, which fall for decision by the authority concerned, are decided."

13. The above observation has been by the full Bench of the Patna High Court

after reiterating the view expressed by the House of Lords in *O'Reilly v. Mackman* [1982] 3 All ER 1124, which reads thus (at page 1129):

"It was this provision that provided the occasion for the land-mark decision of this House in *Anisminic Ltd. v. Foreign Compensation Commissioner* [1969] 1 All ER 208; [1969] 2 AC 147, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had, theretofore, imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that *Anisminic* [1969] 1 All ER 208; [1969] 2 AC 147 made was that recognition by the majority of this House that if a Tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., on into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity."

14. Thus viewed, there can be no hesitation to hold that the demand of the petitioner that section 10E be declared ultra vires is not acceptable.

15. It is one thing, however, to say that any legislative power conferred upon a court can be taken away and instead vested in a quasi-judicial or judicial mechanism; and another to say that in the name of a parallel mechanism for exercising judicial and quasi-judicial powers such Boards and Tribunals can be constituted which are manned by people who do not qualify for holding any adjudicatory office. We have already taken notice of the recommendations of the Joint Parliamentary Committee and the Sachar Committee on the subject. They have said, in unambiguous words, (1) It should be ensured that persons having adequate legal qualifications and experience are appointed as members of the Company Law Board to discharge its quasi-judicial powers (Joint Parliamentary Committee Report), and (2) The Chairman of the Company Law Board shall ordinarily be one who is qualified to be appointed as a judicial member. He shall hold office until he attains the age of 65 years or until he has served for a period of five years as the Chairman of the Company Law Board, whichever is earlier. The other members of the Board must be persons having legal and accounting qualification in addition to the experience of the working and administration of the Companies Act and allied statutes and of corporate sector. (Sachar Committee Recommendations). When we attempt to ascertain the judicial opinion in this regard, we find that the Supreme Court in *Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc.,* has said (at page 474 of 66 Comp Cas):

"But, like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its governance by perceptible limitations, limitations arising by reference to the need for readjustment in a



changing society, a readjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that 'the life of the law has not been logic, it has been experience', and again when he declared in another study that 'the law is forever adopting new principles from life at one end', and 'sloughing off' old ones at the other. Explaining the conceptual import of what Holmes had said, Julius Stone elaborated that it is by the introduction of new extra-legal propositions emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined.

Legal compulsions cannot be limited by existing legal propositions, because there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogmas. The search for solutions responsive to a changing social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as 'fairness' or 'reasonableness', but also among propositions from outside the ruling law, corresponding to the empirical knowledge or accepted values of present time and place, relevant to the dispensation of justice within the new parameters."

16. Dealing with a case where the Bribery Tribunal was constituted under the Constitution Amendment Act in Ceylon, the Privy Council in the *Bribery Commissioner v. Pedrick Ranasinghe* [1965] AC 172 said:

"The Constitution is contained in Ceylon (Constitution) Orders in Council, 1946, and 1947... Viscount Radcliffe in *Attorney-General of Ceylon v. de Livera* [1963] AC 103, said of the Constitution, 'although there are many variations in matters of detail, its general conceptions are seen at once to be those of a parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom'."

The Constitution does not specifically deal with the judicial system which was established in Ceylon by the Charter of Justice of 1833 and is dealt with in certain Ordinances, the principal being the Courts Ordinance, cap. 6. The power and jurisdiction of the courts are, therefore, not expressly protected by the Constitution. But the importance of securing the independence of judges and of maintaining the dividing line between the judiciary and the executive was appreciated by those who framed the Constitution . . ."

17. Having said as above, the Privy Council pronounced that the law which provided that appointments could be made of persons who were not judicial officers to constitute the Tribunal was ultra vires and so were the orders passed by persons who constituted the Tribunal without being judicial officers.

18. In *Don John Francis Douglas Liyanage v. The Queen* [1967] AC 259, the Privy

Council once again dealt with the issue of severance of powers between Legislature, Executive and Judiciary. In that case, the Criminal Law Special Provisions Act, No. 1 of 1962, which purported to create ex post facto new offences after the acts complained of had been committed and to alter the rule of evidence and criminal procedure obtaining under the general law at the time when the offences were committed with the manifest intention to do away with the prohibition under the general law of certain kinds of evidence, was put into challenge. The Privy Council said (at page 290):

"As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere... "

19. Specifically speaking about the bar of jurisdiction of the civil court (ordinary civil jurisdiction of the courts u/s 9, Civil Procedure Code) in the case of *State of Bombay Vs. Narothamdas Jethabai and Another*, , the Supreme Court referred to section 9 of the CPC and said (at page 71 of 1951 AIR):

"This section obviously postulates among other things the barring of the jurisdiction of the civil courts by Legislatures with respect to particular classes of suits of a civil nature, and the statute-book abounds in instances in which the jurisdiction of the civil courts is barred under Acts passed by the Central and Provincial Legislatures. There are also many Acts providing that any suit or proceeding concerning the subject-matters of those Acts shall be triable by the court or courts specified therein. Such provisions are to be found in a number of Acts enacted both prior to and after the enactment of the Government of India Act, 1935, and there can be no doubt that the British Parliament while enacting that Act was fully aware of the existing legislative practice obtaining in this country as well as of the fact that the provisions in question were sometimes necessary and, therefore, it empowered the Central and Provincial Legislatures to make them under entry 53 of List I and entry 2 of List II, respectively. This, in my opinion, is the true meaning of these entries, and it also explains why a separate entry was necessary enabling the two Legislatures to legislate with regard to the power and jurisdiction of the courts in respect of the subject-matters mentioned in the three Legislative Lists."

20. On a Presidential reference with respect to *In Re: The Special Courts Bill, 1978*, , the Supreme Court said in its judgment (at page 502):

"Though Parliament's legislative competence to create special courts, for the

purpose in the instant case of trying criminal cases, cannot be denied for reasons set out above, it is necessary to advert to an off-shoot of the argument to the effect that, in any event, Parliament has no power to create a court outside the hierarchy of courts recognized by the Constitution. It was suggested during the course of arguments on the question of legislative competence that the Constitution contains a complete code of judicial system which provides for the Supreme Court at the apex and for the High Courts, the district courts and subordinate courts next in order of priority. Article 124 provides that there shall be a Supreme Court of India, article 214 provides that there shall be a High Court for each State, article 231(1) provides that Parliament may by law establish a common High Court for two or more States or for two or more States and a union territory whole Chapter VI of Part VII of the Constitution provides by articles 233 and 234, for the district courts and courts sub-ordinate thereto. To complete the picture, article 236(a) defines a "district judge" to include the judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cases court, chief presidency magistrate, additional chief presidency magistrate sessions judge, additional sessions judge and assistant sessions judge. Finally, article 237 empowers the Governor to apply the provisions of Chapter VI and any rules made thereunder to any class or classes of Magistrates. The Constitution having provided so completely, and consciously for a hierarchy of courts, it is urged that it is impermissible to Parliament to create a court or a class of courts which does not fall within or fit in that scheme. An important limb of this argument which requires serious considerations is that the creation of a trial court which is not subject to the control and superintendence of the High Court detrimental to the constitutional concept of judicial independence particularly when the Bill empowers the Central Government by clause 5 to designate the special court in which a prosecution shall be instituted or to which a pending prosecution shall be transferred... It is true that the special courts created by the Bill will not have the constitutional status which High Courts have because such courts are not High Courts as envisaged by the constitution. Indeed, there can but be one High Court only for each State, though two or more States or two or more States and a Union Territory can have a common High Court, It is also true to say that the special courts are not district courts within the meaning of article 235, with the result that the control over them will not be vested in any High Court. But we do not accept that by reason of these considerations, the creation of special courts is calculated to damage or destroy the constitutional safeguards of judicial independence. Our reasons for this view will become clearer after we deal with the questions arising under articles 14 and 21 but suffice it to say at this stage that the provision in clause 10(1) of the Bill for an appeal to the supreme court from every judgment and order of a special court and the provision for transfer of a case from one special court to another (which the Bill does not contain but without which, as we will show, the Bill will be invalid) are or will be enough to ensure the independence of special courts. Coupled with that will be the consideration, as we will in course of our judgment point out that only sitting judges of the High Courts shall have to be appointed to

the Special Courts. A sitting judge of the High Court, though appointed to the special courts, will carry with him his constitutional status, rights, privileges and obligations. There is no reason to apprehend that the mere change of venue will affect his sense of independence or lay him open to the influence of the executive. One may also not be unmindful of the benign presence of article 226 of the Constitution which may in appropriate cases be invoked to ensure justice."

21. Speaking in the same vein the Supreme Court in *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, :

"...whenever a special machinery is devised by the Legislature entrusting the power of determination of disputes to another authority set up by the Legislature in substitution of regular courts of law, one should not react adversely against the establishment of such an authority merely because of a certain predilection for the prevailing system of administration of justice by courts of law. In the context of the need for speedy and expeditious recovery of public premises for utilisation for important public uses, where dilatoriness of the procedure may defeat the very object of recovery, the special procedure prescribed by the two Acts was held not to be really and substantially more drastic and prejudicial than the ordinary procedure of a civil court. The special procedure prescribed by the two Acts, it was observed, was not so substantially and qualitatively disparate as to attract the vice of discrimination."

22. Speaking separately in two Division Bench judgments of the Patna High Court in *K. P. Verma v State of Bihar* [1986] PLJR 1036 and *Avadhesh Kumar Singh v. State of Bihar* [1988] PLJR 269, the learned judges of the court said that unless judicially trained independent persons of proven integrity are appointed to adjudicate and judicial review is left untrammelled, the litigant public could carry a feeling that the decision-making process might be affected by reason of dependence upon the executive.

23. In *S. P. Sampath Kumar's* case, AIR 1987 SC 386, the Supreme Court said (at page 390) :

"It is necessary to bear in mind that service matters which are removed from the jurisdiction of the High Court under articles 226 and 227 of the Constitution and entrusted to the Administrative Tribunal set up under the impugned Act for adjudication involve questions of interpretation and applicability of articles 14, 15, 16 and 311 in quite a large number of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law. It is necessary that those who adjudicate upon these questions should have some modicum of legal training and judicial experience because we find that some of these questions are so difficult and complex that they baffle the minds of even trained judges in the High Courts and the Supreme Court. That is the reason why at the time of the preliminary hearing of these writ petitions we insisted that every bench of the Administrative Tribunal should consist of one judicial member, one administrative member and

there should be no preponderance of administrative members on any bench."

24. It is indeed noticeable that by the amendment Act of 1988, some of the powers hitherto exercised by the High Courts and falling exclusively within the domain of the High courts are vested in the company Law Board. The powers which were hitherto exercised by the courts, that is to say, the power to grant relief to a private company from the consequence of accidental failure to comply with conditions constituting it a private company (section 43), to direct an immediate inspection register of investments if inspection is refused ( section 49(10)), to pass an order directing that a copy of a trust deed be sent forthwith to a person requiring it (section 118(3)) ; to pass an order directing immediate inspection of copies of instruments creating charges or register of charges (section 144(4)) ; to pass an order directing immediate inspection of registers and returns or directing copies thereof be sent forthwith to the person requiring it (section 163(6)); to decide as to whether rights of requisitionists to get their resolution circulated to shareholders is being abused to secure needless publicity for defamatory matter and to order company's costs on an application to be paid in whole or in part by the requisitionists (section 188(5)) : to pass an order directing immediate inspection of minute books or directing a copy thereof be sent forthwith to the person requiring it (section 196(4)) ; to pass an order directing that a copy of the balance-sheet and auditor's report demanded be furnished forthwith to persons concerned (section 219(2)) : to decide as to whether the right of auditors to get their representations circulated and read out at a meeting is being abused to secure needless publicity for defamatory matter and to order company's costs on an application to be paid in whole or in part on the retiring auditors (section 225(3), proviso) : to decide as to whether the right of a director to get his representation circulated and read out at meetings is being abused to secure needless publicity for defamatory matter and to order company's costs on application to be paid in whole or in part by such director (section 284(4), Proviso) ; to pass an order directing immediate inspection of the register maintained u/s 303 (section 304(2)(b)) ; to pass an order directing immediate inspection of register maintained under the section (section 307(9)) : to recommend removal of managerial personnel (section 388B to 388E); to exercise powers in connection with prevention of oppression and mismanagement ( section 397, 398, 401, 402, 403, 404 and 406) and to grant leave for appointment of managerial director or manager whose agreement has been terminated or set aside provided notice has been served on the Central Government (section 407(1)(b)), have been taken away from the courts and vested in the Company Law Board, Questions of grave consequences as to the management which were required to be determined by the High Court, for example, matters falling under chapter VI-A ( section 388B to 388E) which require a judicial determination for these provisions are related to any person concerned in the conduct and management of the affairs of a company found guilty of fraud, misfeasance, persistent negligence or default in carrying out obligations and functions under the law, or breach of trust; and management

without following sound business principles or prudent commercial practice; or causing or likely to cause serious injury or damage to the interest of the trade, industry or business to which such company pertains or intended to defraud creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest, matters falling under chapter VI for prevention of mismanagement are after the new amendments transferred to the exclusive jurisdiction of the Company Law Board, matters thus which were originally found only judicially determinable by courts and some exclusively by the High Court are now to be determined by the Company Law Board. Unless judicially trained independent persons of proven integrity are appointed to adjudicate such questions, one may get a feeling that there is an attempt to create not a parallel and independent mechanism for the purposes that were noticed by the experts, namely the joint Parliamentary Committee and the Sachar Committee but for unknown reasons tramelling adjudicatory mechanism and the litigants who hitherto were entitled to move the courts thus may get a feeling that the decision-making process might be affected by reason of dependence upon the executive ( see Avadhesh Kumar Singh v. State of Bihar [1988] PLJR 289 and Kalika Kuar alias Kalika Singh v. State of Bihar : 1990(1)BLJR51 .

25. So long as the rules were not framed one had no reason to think that the executive Government in exercise of its subordinate legislative powers conferred by sub-section (2A) of section 10E of the Act read with clause (a) of sub-section (1) of section 642 of section Companies Act, frame such rules which shall be diluting the legal standards and principles and instead of meeting the standard of justice cause degradation that would deprive the litigants of the same standard of justice that they receive at the hands of the courts. The rules speak of various things including qualifications and age limit for appointment of members and Chairman of the Board. Rule 3 reads as follows :

"3. Qualifications and age limit for appointment of members. - (1) A person shall not be qualified for appointment as a member unless he -

(i) is, or has been, a member of the Company Law service and is holding, or has held, a post in supertime grade or selection grade in that service and is eligible to be appointed to a post in the grade of joint Secretary to the Government of India : or

(ii) is eligible to be appointed as a joint Secretary to the Government of India under the Central Staffing Scheme, or to any other post under the Central Government carrying a scale of pay which is not less than that of joint Secretary to the Government of India, and had adequate knowledge of, and experience in dealing with the problems relating to commerce, industry, economics, taxation or law : or

(iii) has, for at least 10 years, held a judicial office in the territory of India : or

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

period of ten years : or

(v) is, or has been, for at least fifteen years in practice as a -

(a) chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949) : or

(b) cost accountant under the Cost and Works Accountants Act, 1959 (23 of 1959) ; or

(vi) has, for at least fifteen years working experience as a secretary in whole time practice as defined in clause (45A) of section 2 of the Companies Act, 1956 (1 of 1956,) and is member of the Institute of Company Secretaries of India under the Company Secretaries Act, 1980 (59 of 1980)

(2) A person shall not be eligible for appointment as member unless he has completed the age of forty-five years."

26. Rule 4 follows this provision says :

" 4. composition of the company Law Board. - (1) As nearly as may be, one-half of the members shall be persons possessing qualifications as specified in clause (i) of sub-rule (1) of rule (3) :

Provided that in respect of a vacancy which is to be filled by a member of a Company Law service, where either no such person is eligible or found suitable for appointment, the vacancy shall be filled by selection from other sources.

(2) the Chairman, to be appointed under sub-rule (2), shall be a person who is eligible to be appointed as an Additional Secretary to the Government of India ; or who has at least for three years held the office of members."

27. The rules thus create no obligation that there shall be one or more than one judicial member in the Board or that the Chairman of the Board shall be one who would be adequately trained in the role of a judge. If there is any class of employees, who appeared to qualify better than other candidates falling under other categories or rule (3), they are members of the Company Law service who held or is found to hold a post in super time grade or selection grade in that service and have got the eligibility to be appointed to a post in the grade of joint Secretary to the government of India. Akin to their category are people falling under clause (ii) of sub-rule (1) of rule 3, i, e., persons who are eligible to be appointed as joint Secretary to the Government of India, under the Central Staffing Scheme or any other post under the Central Government carrying a scale of pay which is not less than that of joint Secretary of the Government of India, IN other cases there is a mention that they should possess adequate knowledge of and experience in dealing with the problems relating to commerce, industry, economics, taxation or law There is no such requirement with respect to the members of the Company Law Service. Sandwiched between the members of the Company Law service or persons eligible to be appointed as a joint Secretary to the Government of India under the Central Staffing Scheme, or to any other

post under the Central Government carrying a scale of pay which is not less than that of joint Secretary to the government of India, and has adequate knowledge of, and experience in dealing with the problems relating to commerce, industry, economics, taxation or law and chartered accountant, cost accountant or persons having not less than fifteen years working experience as a Secretary in whole time practice as defined in clause (45A) of section 2 of the Companies Act, 1956, are two other categories, (i) persons who held a judicial office for at least ten years, and (ii) advocates of a High court, who practised for at least ten years or partly a judicial office and partly practised as an advocate for a total period of not less than ten years.

28. We are tempted to refer to the Report of the Inquiry by Sir Oliver Franks, who was commissioned by the Lord Chancellor in 1955, which has been quoted in some detail in the Book Administrative Law by Dr. William Wade, 5th edition, The quotable passages are :

" The Committee had to make a fundamental choice between two conflicting attitudes, the legal and the administrative. The legal attitude was that tribunals must be regarded as part of the machinery of justice and organised accordingly. the administrative attitude was that tribunals were primarily part of the machinery of administration. The head of the Lord Chancellor's Department and the Treasury solicitor, being both lawyers and administrators, were able to appreciate both viewpoints, but other government Departments strongly pressed the "administrative view". Witnesses from the universities put forward suggestions for a permanent body of some kind to concern itself with tribunal procedure, to supervise the making of procedural rules, and to make sure that the elements of legal justice were observed throughout the whole system with as much uniformity as was practicable."

29. Acknowledging the undoubted need for tribunals as a supplementary system of judicature, the Committee reported :

" Much of the official evidence, including that of the joint Permanent Secretary to the Treasury appeared to reflect the view that the Tribunals should properly be regarded as part of the machinery of administration. for which the Government must retain a close and continuing responsibility. thus, for example, tribunals in the social service field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view, We consider that tribunals should properly be regarded as machinery provided by parliament for adjudication rather than as part of the machinery of administration. the essential point is that in all these cases Parliament has deliberately provided for a decision independent of the Department concerned.. and the intention of parliament to provide for the independence of tribunals is clear and unmistakable."

To make tribunals conform to the standard which parliament thus had in mind, three fundamental objectives were proclaimed : openness, fairness and



impartiality."

30. We have not referred to the recommendations of the Franks committee for we have in our case the two recommendations which appear to contain similar concerns and recommend that persons having adequate legal qualifications and experience are appointed as members of the Company Law Board to discharge its quasi-judicial powers and that in any case a balance is needed, the Chairman of the company Law Board should be one who is qualified to be appointed as a judicial member and others who must have adequate training in the discipline of law.

31. As in *S. P. Sampath Kumar's* case, AIR 1987 SC 386, so in the case in hand, it will be a tribunal in which the presence of the administrative member would provide knowledge of practical experience but, the legal intent would undeniably be more important. Sacrificing the legal knowledge or not giving it sufficient weight, would definitely impair the efficacy and effectiveness of the Company Law Board.

32. It is more so for the reason that the Company Law Board shall be exercising powers that hitherto were exercised by the courts and issues both of fact and law which were amendment required to be determined by the courts will be determined by the Company Law Board. Learned counsel for the respondent has brought to our notice the notification constituting the Central Company Service and the rules framed for the said purpose. There are three branches in the Company Law Service known as the general branch, legal branch and the accounts branch each consisting of four branches, and each grade consisting of the duty posts specified in part B of schedule 1, of the rules. The legal branch of the service, it seems, is constituted of legal adviser, solicitor and the company prosecutor. There is also a rule showing that in the Central Company Law Service there is a supertime grade and any appointment to the supertime grade of the service is made in accordance with the recommendations of the Union Public Service Commission. It is, however, not clear from any of the impugned rules that those who are appointed to supertime grade of the Central Company Law service and / or eligible to be appointed to a post in the grade of joint Secretary to the Government of India are essentially law graduates or persons who are acquainted with the laws that are required to be administered by the Board. The category of such persons who are eligible to be appointed as a joint Secretary or to any other Government of India under the Central Staffing scheme or to any other post in the Central Government carrying a scale of pay which is not less than that of joint Secretary to the Government of India need not be of those who have anything to do with the company law affairs. The words, "has adequate knowledge of and experience in dealing with the problems relating to commerce, industry, economics, taxation or law." show that there may be who is acquainted with the company law affairs or law as such, but there may be another in this category, who never had any knowledge or experience in dealing with the problems relating to law. The words "problems relating to commerce, industry, economics and

taxation or law " are so wide and vague that nay experience in the affairs of the company law may not all be necessary to qualify under this category. the qualification or eligibility for the post of chairman is that the candidate should be a person who is eligible to be appointed as an Addiditional Secretary to the goverment of India. To a pointed question by the court whether a person eligible to be appointed as additional secretary must also be a person who possesses some knowledge of law or exerieence in dealing with the problems relating to law, particularly cmany law affairs, no secifit reply has been given. The rule aforequoted reads that the chairman to be appointed under sub-rule (2) of rule 4 of the Rules shall be aperson wh is eligible to be appointed as an Additional Secretary to the Goverment of India or who has at east for three years held office of the member. Thus, it is not necessary for the chairman to be a person who qualifies to be a member, so such so, that he need not be a member of the Company Law Service holding a post in supertime grade or having held a post in supertime grade r selection grade in that service or other wise eligible to be appointed as a member as envisaged in rule 3 quoted, with sme knowlege of and experience in dealing with the problems relating to commerce, industry, economics, taxation or law. He need not be person who ever held a judicial office or practiced as an advocate. he should just belong to the service that provides the persons who are qualified to be apointed as Additional Secretary to the goverment of India.

33. A reference to the provisions in section 10A introduced in the Companies Act, 1956 by the Amendment Act 53 of 1963, will show that when it had ben envisaged tha as Tribunal would be constituted to exercise the powers and functions conferred on the court by or u/s 155, section 203 in so far as it relates to the granting to leave under that section, and sections 240 and 397 to 407 of the Companies Act it was in the opinion of the Central goverment adequate knowledge of, and exerieence in (a) law, or (b) matters of accountancy, or (c) administration o management of companies and aw relating thereto, but the chairman would be one who had been a judge of a HIgh Court or was qualified for appointment as judge of a HIgh Court and no other erson. when the very same powers are foing to be conferred upon the Compnay Law Board, it is said under the impugned rules, that the Chairmand, to be appointed, shall be aperson who is eligible to be appointed as an Additional /secretary to the Goverment of Aindia; or who has at least for three yuears held office of the member, the second art having sme semblance of experience at leas for a period of three years n dealing with the maters hitherto dealt with by the courts of such matters fallling under sections 155, 203, 240 and 397 to 407 of the Company Law but not enough to inspire confidence like a person who had been a judge of a HIgh Court or a person who isnqualified for appointment as judge of a High Court and the first, i, e., a person who isneligible to be appointe as an Additional Secretary to the Goverment of India without having any working experience even of the kind the other category personnel may acquire.

34. The Supreme court observe in S. P. Sampath KUMar's case, AIR 1987 SC

386,390 :

"... We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objective."

35. Of course, the Supreme Court said that there was no intention to cast any reflection on the members of the Civil Services because ( at page 390),

" fortunately, we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to solve and overcome administrative problems of great complexity, But what is needed is a judicial tribunal which is intended to supplant the High Court is real training and experience."

36. Before we say further in this regard, a word about the method of recruitment is necessary. the impugned rule 5 reads.

" 5. Method of recruitment.-

(1) There shall be a Selection Board consisting of -

(i) The Secretary to the Government of India, Ministry of Industry, Department of Company Affairs ;

(ii) The Secretary to the Government of India, Ministry of Law and justice, Department of legal Affairs ;

(iii) Any Secretary to the government of India, nominated by the Minister in-charge of the Department of Company Affairs; and

(iv) The Chairman, if in office and he not being considered for reappointment.

(2) The Selection Board shall recommend persons for appointment as members from amongst the persons on the list of eligible candidates prepared by the Department of company Affairs after inviting applications therefore by advertisement.

(4) The Central government shall, after taking into consideration the recommendations of the Selection Board, appoint persons out of the panel so recommended. However, it shall be open to the Central Government to reject any or all the names on the panel.

(5) Nothing in this rule shall apply to the appointment of any member of the Company Law Board functioning as such immediately before of commencement of these rules , in case he is otherwise eligible for such appointment as per these rules."

37. There can be no objection to the preparation of a list of eligible candidates by the Department of Company Affairs after inviting applications thereof by

advertisement or the discretion left with the Central Government to appoint persons out of the panel recommended by the Selection Board or to reject any or all of the names on the panel. But who should constitute the Selection Board? The Secretaries to the Government of India in different departments of ministries or persons who are not independent of such executive control of the Government which, if allowed to prevail, will always affect their description. The Supreme Court noticed in *S. P. Sampath Kumar's case*, AIR 1987 SC 386, that if anything is done to create an additional forum from where parties could go to the High Court that would be a retrograde step. We have already noticed that a right of appeal against the decision of the Board to the High Court is provided for and besides the High Court's powers under articles 226 and 227 are not impaired or affected. Yet, the powers hitherto exercised by the High Court are transferred to the Board and then the Board is packed with members, who need not have any judicial experience at all. Appointment of such persons as members of the Board without due weightage to the judicial experience and selection by a Board consisting of the Secretaries to the Government of India will not only undermine the faith of the litigants but will also create doubts as to the efficacy, objectivity and independence and effectiveness of the Board. In the long period of about six scores of years, the litigants in this country, as noticed by the Supreme Court in *S. P. Sampath Kumar's case*, AIR 1987 SC 386, have seasoned themselves to look up to the High Courts as the unfailing protector of their persons, property and honour... Disciplined, independent in an unattached and objective manner have ensured dispensation of justice over the years. According to the Supreme Court, however, (at page 396): "Aggrieved people approach the court- the social mechanism to act as the arbiter - not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the court. It is, therefore, of paramount importance that the substitute institution - the Tribunal - must be a worthy successor of the High Court in all respects." We feel, and feel strongly, that in the process of selection there should be concern for the selecting persons of proven integrity and sufficient legal training. There can always be an adequate number of administrative members of members who will otherwise be of help in dispensation of justice with respect to such disputes, as referred to above, but then without there being an adequate number of judicial members the Board shall have no such composition as the aforementioned Commissions desired or will be desirable in the interests of the litigants and / or the State. As the Supreme Court said in *S. P. Sampath Kumar's case*, AIR 1987 SC 386, we reiterate that instead of weighted in favour of administrative members the Tribunal should be weighted in favour of judicial members and the Chairman should be none but one who is qualified to be a judge of a High Court or had been a judge of a High Court.

38. We are not aware whether the Board has been functioning as a whole or constituting Benches. If a bench is constituted with only administrative members and without a judicial member therein, and the decision of the bench is taken to be the decision of the Board, then even though there may be a judicial member as

the chairman of the Board, the whole purposes will be defeated. We are not suggesting and it has never occurred to our mind that in constituting a Bench the member to preside must be a judicial member because the Board ultimately, in our view, must have a judicial member as its chairman. But in the Bench as constituted unless there is a judicial member besides members who give to the Bench, benefit of their experience in the fields in which they practise and / or work, no purpose will be served.

39. Keeping the above in mind thus we examine whether the Selection Board can consist only of the Secretaries and find that this would be disastrous. Unless there is obligation cast upon the Central Government to select only those who are recommended by the Chief Justice of India or to follow a particular selection procedure in this behalf, that is to say take the opinion of one or more honorable judges of the Supreme Court or a Board consisting of the honorable judges of the Supreme Court as members, as well as some other highly independent persons, the selection will not be conducive to independence of the Board. The Secretaries may not carry a sense of obligation to the executive for having been appointed members of the Selection Board but their selections would always be doubted for the reason that it is generally accepted that public servants carry and obey the orders of the political executive and that one or the other of them does not carry a sense of obligation will be a matter that will require probe. In the words of the Supreme Court in *S. P. Sampath Kumar's case* AIR 1987 SC 386, there can be no doubt that the power of appointment and promotion vested in the executive can have prejudicial effect on the independence of the Chairman, vice-chairman and Members of the Administrative Tribunal. If such power is absolute and unfettered, we reiterate, the Selection Board unless replaced by a new mechanism of sort that would remain uninfluenced by the wishes of the promoters, i. e., the administrative authorities, shall always be under a cloud.

40. We are not advertent to other rules except one to which we shall make a reference later for, in our considered opinion rules 3, 4 and 5 cannot be saved as a whole and since it will be a task to save one part of the rules and remove another part, We think, unless a fresh exercise is made and rules are reframed nothing can be done under the truncated rules. In all fairness to learned counsel for the respondents it must be said that he made all endeavours to show that each part of the rules is clear and that it does not suffer from any legal infirmity. He has not however, been able to convince us that without these provisions to give some weightage to judicial members and insisting upon knowledge at least of the company law and other allied laws that always figure in the process of adjudication of the disputes of the type that are prescribed under sections 240 or 397 to 407 of the Companies Act, constitution of the Board will be proper. One of the rules of interpretation of a statute is that only that part of the statute should be quashed or declared *ultra vires* which is bad in law and the other part should be allowed to survive if it can survive at all without the other part with it. Since the rules aforesaid are so interlinked that unless reframed they will not give any comprehensive field of choice of the personnel for appointment as members of

the Board, We do not think that any part of the aforementioned rules can survive independently.

41. The position with regard to rule 4(3) and rule 5 is not better. the other rules also may require modification in the light of the new rules that may be framed.

42. Learned counsel for the petitioner has advanced some arguments upon the term of office of members as envisaged in rule 10. Rule 10 says :

" Term of office of members - Every member shall hold office for a term of five years at a time from the date of his assumption of office or until he attains,

(a) the age of fifty-eight years; and

(b) if he is the Chairman, the age of sixty years, whichever is earlier."

43. Not much is required to be said about it except to quote the passage from the judgment of the Supreme Court in S. P. Sampath Kumar's case AIR 1987 SC 386, speaking about similar provision in the Administrative Tribunals Act, the supreme court has said ( headnote) :

" Section 8 prescribes the term of office and provides that the term for chairman, Vice-chairman or members shall be of five years from the date on which he enters upon his office or until he attains the age of 65 in the case of chairman or Vice-Chairman and 62 in the case of members, whichever is earlier. The retiring age of 62 or 65 for the different categories is in accord with the pattern and fits into the Scheme in comparable situations. We would, however like to indicate that appointment for a term of five years may occasionally operate as a disincentive for well-qualified people to accept the offer to join the Tribunal there may be competent people belonging to a younger age group who would have more than five years to reach the prevailing age of retirement. the fact that such people would be required to go out on completing the five-year period but long before the superannuation age is reached is bound to operate as deterrent. those who come to be chairman, Vice-chairman or members resign appointments, if any, held by them before joining the tribunal and, as such, there would be no scope for their return to the place or places from where they come. A five year period is not a long one. ordinarily, some time would be taken for most of the members of get used to the service jurisprudence and when the period is only five years, many would have to go out by the time they are fully acquainted with the law and have a good grip over the Job. to require retirement at the end of five years is thus neither convenient to the person selected for the job nor expedient to the scheme."

44. The supreme court noted that apart from the disincentive that the tenure of five could cause, the fact that those who come to be Chairman, vice-chairman or members resign appointments, if any, held by them before joining the tribunal and , as such, there would be no scope for their return to the place or places from where they came. the rules aforesaid show that officers presently in the services of the Government of India, or any judicial service of their respective

States, are eligible for appointment and in case they are selected they would hold office for a term of five years at a time or until the age of 58 years as member and in the case of chairman until the age of 60 years. There are quite a few services under the Government of India as well as the State Government whereunder no person can have two substantive appointments at the same time. It is well-settled that appointment to a tenure post is a substantive appointment. The Supreme Court, in the case of *State of Haryana and Others Vs. Rajendra Sareen*, approved the principles of law stated by the Delhi High Court in the case of *Rajendra Sareen Vs. The State of Haryana and Others*, that appointment for a fixed tenure is a permanent appointment and that termination of an appointment of a post, the appointment being coterminous with the continuance of the post, will attract article 311 of the Constitution of India. A reference to the fundamental rules and rules of some of the services which appear to provide the candidates for appointment as members of the Board and/ or Chairman, shows that there is a clear rule and a scheme envisaged under the rules for appointment to transfer or deputation to a foreign service and / or post, other than the service in which the officer concerned has got a substantive appointment. In the event of any such officer opting to go out to post other than the service to which he is concerned has got a substantive appointment. In the event of any such officer opting to go out to a post other than the service to which he belongs, his lien will exist only until the new appointment in a foreign service under the rules. The moment the appointment to the new service or post is made permanent or substantive, the lien in the original service shall cease. Realising this perhaps that appointment of officers belonging to some of the services which gave to the candidates eligibility under rule quoted above, in the advertisement issued for recruitment as members of the Board, it is said :

" Persons selected, if already in Government service, will be treated as on deputation and other will be on contract basis."

45. It is extremely doubtful whether such a promise in the advertisement would save the lien of the officers who are selected and appointed as members of the Board. Statutory rules governing the service conditions can be modified, altered or rescinded only by the rules made in this behalf. Executive discretion can be no substitute for a statute. Executive discretion can be used only when there is no statute occupying the field. We are not going into the details of this for, the directions that we propose to give in this case may finally protect the interest of such people but that would depend on the Union Government's deciding to implement and to amend the rules.

46. Learned counsel for the petitioner, however, contended that sub-rule (2) or rule 3 should be declared ultra vires for it contemplates the age of forty-five years for a person to be eligible for appointment as member. Since the respondents may consider in the light of our observations and directions to reframe the rules, they may accordingly consider to fix the age limit to do away with it. We, however, cannot find any infirmity in such a rule for it is well-

settled that in the matter of appointment to public officer a certain age of eligibility is introduced only to ensure that persons having sufficient maturity, experience and knowledge become available. Such rules may appear to cause discrimination and operate sometimes to deny to some exceptionally good candidates opportunity until they come of the qualifying age. But some hostility has to be found in every cut-off- date, whether it relates to the age of eligibility or the age of superannuation.

47. In our considered view thus, the aforementioned rules 3, 4(1) and (3) and 5 are arbitrary and unreasonable and accordingly violative of article 14 read with article 13(2) of the constitution of India.

48. Rule 10 aforementioned is also arbitrary to the extent it has fixed a term of five years at a time for the office of members of the Bd. the same is accordingly ultra vires article 14 and article 13(2) of the Constitution of India.

49. The Board, it appears, has since been constituted, It has come to exist, however during the pendency of this petition. those who have been selected and appointed to their respective offices, respondent to the call through the advertisements issued by the second respondent. The chairman and two members in any case were in the previous Board and they have been continued in their respective posts, for the reason of a provision in this behalf in the impugned rules. For the reason of the view that we have taken, we would have declared the constitution of the Board invalid but if we do so, we shall bring in the life of a Board already constituted, a premature end, Even that would not have bothered us much had we not noticed that those who have been appointed as members of the Board are not at fault. they have been selected and appointed in accordance with the existing rules.

50. Learned counsel for the petitioner has fairly stated that he does not have anything to say as to the ability, integrity and/ or suitability of the persons appointed as members of the new Board under the rules and/ or the Chairman of the Board. His contention has been against the rules and he has demonstrated how the rules are ultra vires. IN the circumstances as above, we refrain from giving and give no direction to terminate the appointments already made. We, however, feel constrained to observe that the respondents shall be duty-bound to reframe the rules as observed above and such reframed must be completed within a framework of a time-schedule. for the exercise in this behalf, a period of nine (9) months from the date of receipt of a copy of this order will be reasonable and proper. Accordingly, the respondents are given nine (9) months from the date of receipt of a copy of this order for the said purpose. It is, however, made clear that the respondents shall not fill in any existing vacancy or any that may be created within the period above until the rules are reframed.

51. In the result, the writ petition is allowed and disposed of with the observations and directions as above. there will, however, be no order.