SUPREME COURT OF INDIA

Union of India

Vs.

S.Srinivasan

C.A.No.3185 of 2005

(Dr. B.S. Chauhan and Dipak Misra JJ.)

21.05.2012

JUDGMENT

DIPAK MISRA, J.

1. Calling in question the legal penetrability of the order dated April 12, 2004 passed by the Division Bench of the High Court of Judicature of Delhi in Writ Petition Nos. 7606 of 2003, 1335, 1336, 1337, 1344 and 1345 of 2004 by a common judgment, the present batch of appeals by way of special leave under Article 136 of the Constitution has been filed.

2. Though prayers in different writ petitions were couched differently, yet the three basic reliefs which were sought before the High Court are – Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 (hereinafter referred to as 'the Rules') is ultra vires the Foreign Exchange Management Act, 1999 (for brevity 'the Act); for quashment of certain notifications issued by the Government of India, Ministry of Law, Justice and Company Affairs, appointing part time Members of the Appellate Tribunal by issue of a writ of quo warranto as they did not satisfy the eligibility criteria as stipulated in the Act; and further to quash the appointment of respondent No. 3 to act as the Chairperson as he was a part time Member and also was not eligible to hold the post.

3. It was urged before the High Court that the Rule travels beyond the scope and ambit of the Act and, in fact, directly runs counter to the provisions in the Act and, therefore, deserves to be declared as ultra vires. It was canvassed that when the Act

did not conceive of part time Members, even a person meeting the eligibility criteria could not be appointed as a part time Member. It was further propounded before the High Court that a part time Member who was disqualified to hold the post could not have been allowed to act as the Chairperson as that would destroy the spirit of the Act. To bolster the said submissions, the petitioners before the High Court placed reliance onChander Mohan v. State of Uttar Pradesh and others[1], Shri Kumar Padma Prasad v. Union of India and others[2] and State of Maharashtra v. Labour Law Practitioners' Association and others[3].

4. The contentions raised by the petitioners before the writ court were resisted by the respondent on the ground that the Members of Indian Legal Services were only required to hold the post of part time Member and, therefore, the rule does not really run counter to the Act in question; that as a stopgap arrangement, a part time Member could be appointed as the Chairperson of the Appellate Tribunal and hence, no facet could be found fault with such an appointment; and that a writ of quo warranto could not be issued as the persons, who were meeting the eligibility criteria had been appointed by a High Level Committee. Reliance was placed on the decision in Union of India and another v. Delhi High Court Bar Association and others[4].

5. The High Court declared the first and second proviso to Rule 5 of the Rules as ultra vires Section 21(1)(b) of the Act and quashed the appointments of respondent Nos. 3 and 4 who were appointed as part time Members and further quashed the appointment of respondent No. 3 as the acting Chairperson of the Appellate Tribunal.

6. We have heard Mr. R.P. Bhatt, learned senior counsel appearing for the appellants, and Mr. Mahabir Singh, learned senior counsel appearing for the contesting respondent.

7. The Parliament enacted the Foreign Exchange Management Act, 1999 repealing the Foreign Exchange Regulation Act, 1973 as a result of which the Appellate Board constituted under Section 52 of the 1973 Act stood dissolved. Thereafter, the new Appellate Board was to be constituted and, accordingly, it was constituted. Regard being had to the principal issue whether the Rule runs contrary to the main provision, it is condign to refer to Section 20 of the Act which deals with the composition of the Appellate Tribunal. It reads as under: -

> "20. Composition of Appellate Tribunal.-

(1) The Appellate Tribunal shall consist of a Chairperson and such number of Members as the Central Government may deem fit.

(2) Subject to the provisions of this Act, -

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson with one or more Members as the Chairperson may deem fit;

(c) the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, notify;

(d) the Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction.

(3) Notwithstanding anything contained in sub-section (2), the Chairperson may transfer a Member from one Bench to another Bench.

(4) If at any stage of the hearing of any case or matter it appears to the Chairperson or a 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 Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit."

On a perusal of the aforesaid provision, it is quite clear that the Appellate Tribunal shall consist of Chairperson and such number or Members as the Central Government may deem fit.

8. Section 2(s) defines a Member as follows: -

" "Member" means a Member of the Appellate Tribunal and includes the Chairperson thereof;"

On a studied scrutiny of the aforesaid provision, it is manifest that there is no conception of a part time Member under the scheme of the Act.

9. At this juncture, it is profitable to refer to Section 21 of the Act that provides for qualification for appointment of Chairperson, Member and Special Director (Appeals). Regard being had to the controversy, it is apt to reproduce the provision in entirety: -

> "21. Qualifications for appointment of Chairperson, Member and Special Director (Appeals). –
>
> (1) A person shall not be qualified for appointment as the Chairperson or a Member unless he –
>
> (a) in the case of Chairperson, is or has been, or is qualified to be, a Judge of a High Court; and
>
> (b) in the case of a Member, is or has been, or is qualified to be, a District Judge.
>
> (2) A person shall not be qualified for appointment as a Special Director (Appeals) unless he –
>
> (a) has been a member of the Indian Legal Service and has held a post in Grade I of that Service; or
>
> (b) has been a member of the Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India."

10. On a scanning of the aforesaid provision, it is quite clear that a person, in order to be qualified for appointment as the Chairperson, is required to be or has been qualified to be a Judge of the High Court and a person to be a Member is required to be or has been qualified to be a district judge and to be appointed as a Special Director (Appeal), he has to be a member of the Indian Legal Service and is required to have held a post of Grade I or that service or a member of the Indian Revenue Service as a post equivalent to Joint Secretary to the Government of India. Thus, a member of the Indian Legal Service who is qualified as per Section 21 (2) (a) is entitled to be appointed as a Special Director (Appeal).

11. Section 16 of the Act provides for appointment of the Adjudicating Authority. Section 17 provides for appeal to the Special Director (Appeals). Section 18 provides for establishment of the Appellate Tribunal to hear the appeals against the order of the Adjudicating Authorities and the Special Director (Appeals) under the Act. Section 19 provides for appeal to the Appellate Tribunal and lays down the postulates as to what categories of appeals can be preferred. From the aforesaid provisions, it is quite clear that there are three distinctive forums for adjudication and there is a hierarchical system. We have already referred to Section 20 which deals with the composition of the Appellate Tribunal. As is indicated hereinabove, Section 21(1) clearly lays a postulate as to what is the qualification for a Chairperson and that of a Member. Sub-section (2) of Section 21 provides for the qualification of a Special Director (Appeals). At this juncture, we may refer to Section 46 which provides for the rule making power. It stipulates that the Central Government by notification makes rules to carry out the provisions of the Act. Section 46(2) states the nature of the rules to be framed by the Central Government. We think it appropriate to reproduce Section 46 of the Act as under:-

> "46. Power to make rules. –
>
> (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.
>
> (2) Without prejudice to the generality of the foregoing power, such rules may provide for, --
>
> (a) the imposition of reasonable restrictions on current account transactions under section 5;
>
> (b) the manner in which the contravention may be compounded under sub-section (1) of section 15;
>
> (c) the manner of holding an inquiry by the Adjudicating Authorities under sub-section (1) of section 16;
>
> (d) the form of appeal and fee for filing such appeal under sections 17 and 19;
>
> (e) the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of

the Appellate Tribunal and the Special Director (Appeals) under section 23;

(f) the salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal and the office of the Special Director (Appeals) under sub-section (3) of section 27;

(g) the additional matters in respect of which the Appellate Tribunal and the Special Director (Appeals) may exercise the powers of a civil court under clause (i) of sub-section (2) of section 28;

(h) the authority or person and the manner in which any document may be authenticated under clause (ii) of section 39; and

(i) any other matter which is required to be, or may be, prescribed."

12. Emphasis has been laid on the rule making power by Mr. Bhatt, learned senior counsel, to build an edifice that there lies the source for framing the rules which has been erroneously declared by the High Court to be ultra vires.

13. At this juncture, we may refer with profit to Rule 2(1)(b) which reads as follows: -

"2. Qualification for recruitment –

(1) A person shall not be qualified for appointment as Chairperson or a member unless he:-

a) xx xx xx

b) in the case of a Member, is or has been or is qualified to be a District Judge."

Rule 5 of the Rules reads as follows:-

"Composition – The Appellate Tribunal shall have one Chairperson and Members not exceeding four:

Provided that the number of either full time Members or part time Members shall not exceed two;

Provided further that the part time Members shall be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualifications prescribed under clause (b) of sub- rule (1) of Rule 2 of these rules."

14. As far as Rule 2(1)(b) is concerned, there can be no trace of doubt that it is in consonance with the provisions contained in the Act inasmuch as Section 20 (1) confers power on the Central Government to constitute the tribunal consisting of one Chairperson and such number of Members. The said fixation of the number is in accord with the Act. Rule 5 provides that there would be one Chairperson and Members not exceeding four. As far as the number is concerned, the Act does not provide the number of Members and, therefore, as we have stated above, the Central Government under the Rules has the power to fix the number. There cannot be any kind of cavil over the same. The High Court has perceived, as we have seen from the impugned judgment, difficulty in accepting the validity of the two provisos of the said Rule. The first proviso lays a postulate that the number of full time Members or part time Members shall not exceed two. The concept of part time Member has been introduced by the rule making authority. The second proviso states that the part time Members shall be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualifications prescribed under clause (b) of sub-rule (1) of Rule 2 of these Rules. The submission of Mr. Bhatt, learned senior counsel, is that when Rule 2(1)(b) clearly lays down that a Member is or has been qualified to be a district judge and that has been referred to in the second proviso for the part time Members, the same could not have been declared as ultra vires by the High Court. The learned senior counsel would further submit that the term 'Member' would include a part time Member and for the sake of convenience, the Central Government has framed the Rules to carry out the purposes of the Act.

15. In oppugnation, Mr. Mahabir Singh, learned senior counsel for the respondent, would contend that when the specific meaning has been given to the term 'Member' by the Act and the existence of a part time Member is conceptually absent under the scheme of the Act, the introduction by the rule is totally impermissible. Mr. Singh would further submit that a member of Indian Legal Service can only be appointed as a Special Director (Appeals) and, therefore, the

rule providing that a member of Indian Legal Service can be appointed a Member runs counter to the provisions in the Act.

16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav[5], wherein it has been held as follows:-

> ".....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

17. In Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram[6], it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

18. In Sukhdev Singh v. Bhagat Ram[7], the Constitution Bench has held that the statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed.

19. In State of Karnataka and another v. H. Ganesh Kamath etc.[8], it has been stated that it is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

20. In Kunj Behari Lal Butail and others v. State of H.P. and others[9], it has been ruled thus:-

> "13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act... "

21. In St. Johns Teachers Training Institute v. Regional Director[10], it has been observed that a regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limit of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.

22. In Global Energy Ltd. and another v. Central Electricity Regulatory Commission[11], this Court was dealing with the validity of clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed thus:-

> "It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

23. In the said case, while discussing further about the discretionary power, delegated legislation and the requirement of law, the Bench observed thus:-

> "The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law

has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."

24. In this context, it would be apposite to refer to a passage from State of T.N. and another v. P. Krishnamurthy and others[12] wherein it has been held thus:-

> "16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

25. In Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh and others[13], while discussing about the conferment of extensive meaning, it has been opined that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court.

26. Keeping in view the aforesaid enunciation of law, we think it appropriate to consider the nature, object and scheme of the enabling Act, the power conferred under the rule, the concept of purposive construction and the discretion vested in the delegated bodies. Before bringing the legislation in the year 1994, a task force was constituted to have an overall look on the subjects relating to foreign exchange and foreign trade to suggest the required changes. Considering the significant

developments, namely, substantial increase in the foreign exchange reserve, growth in foreign trade, rationalization of tariffs, current account convertibility, liberalization of Indian investments abroad, increased access to external commercial borrowings by Indian Corporates and participation of foreign institutional investors in our stock markets and the spectrum of world economy, the Act was brought into force to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of the foreign exchange market in India. To have a balance in the field of economic growth, the Parliament provided the hierarchical system under the Act itself. Section 20 deals with the composition of the Appellate Tribunal, the highest tribunal under the Act. Section 21 deals with the qualification for appointment of Chairperson, Member and Special Director (Appeals). Section 22 provides that the Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon office. Section 25 deals with resignation and removal. The removal can only take place by order of the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. Section 26 provides the Member to act as a Chairperson in certain circumstances. The senior most Member has been empowered to act as Chairperson until the date on which a new Chairperson is appointed in accordance with the provisions of the Act.

27. On a scrutiny of the objects and reasons, the purpose and various provisions of the Act, it is graphically clear that the Appellate Tribunal has been conferred jurisdiction to decide an appeal from the Appellate Tribunal and it has to deal with matters relating to foreign exchange. A fixed tenure has been stipulated for the Chairperson and Members. A Chairperson can continue upto the age of 65 years and the age of retirement of a Member is 62 years. They are entitled to resign subject to certain conditions and they can be removed on proven misbehaviour or incapacity. Thus, if the object and purpose of the Act is to confer power on the Appellate Board to deal with the issue of economy under the scheme of the Act, it is well nigh impossible to conceive of the appointment of a part time Member. Section 20, the enabling provision, empowers the Central Government to fix such number of persons as the Government may deem fit. The main part of Rule 5 provides that a tribunal shall have one Chairperson and Members not exceeding four. To that extent, it is in consonance with the Act and it comes within the framework of the provision.

28. The first proviso stipulates that the number of either full time Members or part time Members shall not exceed two. This proviso introduces the concept of part time Member. There can be no trace of doubt that it travels beyond the enabling provision and is totally inconsistent with it. The rule does not conform to the main enactment. Therefore, in our opinion, the High Court is justified in declaring the said provision as ultra vires.

29. The second proviso, if we allow ourselves to say so, is an innovative one. It provides for qualification of a part time Member who can be appointed from amongst officers belonging to the Indian Legal Service who fulfil the qualification prescribed under Clause (b) of sub-rule (1) of Rule 2 of the Rules. Clause (b) of sub-rule (1) of Rule 2 spells out that a person shall not be qualified for appointment as a Member unless he is or has been or is qualified to be a district judge. As far as the word 'is' or 'has been' is concerned, there can be no cavil. The core of the controversy is the qualification associated with part time Member. Article 233 of the Constitution deals with the appointment of district judges. It provides for the qualification to be a district judge. It reads as follows:-

> "233. Appointment of district judges
>
> (1)Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State
>
> (2)A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

30. To understand the real purport of the said Article in the present context, it is appropriate to refer to the decision in Satya Narian Singh v. High Court of Judicature at Allahabad and Others.[14] In the said case, a contention was advanced before a three-Judge Bench that there was no constitutional inhibition against members of any Subordinate Judicial Service seeking to be appointed as district judges by direct recruitment provided that they had completed 7 years' practice at the bar. It was also urged that if a construction is placed on Article 233 of the Constitution which would render a member of Subordinate Judicial Service ineligible for appointment to the Higher Judicial Service because of the additional experience gained by him as a Judicial Officer, the same would be both unjust and

paradoxical. Their Lordships referred to Article 233 and came to hold that the first clause of Article 233 deals with "appointment of persons to be, and the posting and promotion of, district judges in any State" while the second clause is confined in its application to persons "not already in the service of the Union or of the State". The Bench opined that the service of the Union or of the State has been interpreted to mean "Judicial Service". It was further stated therein in the case of candidates who are not members of Judicial Service that they must be advocates and pleaders for not less than 7 years and they have to recommended by the High Court before they may be appointed as district judges, while in the case of candidates who are members of Judicial Service, the seven years' rule has no application but there has to be consultation with the High Court. Thereafter, the Bench referred to the decisions in Chandra Mohan v. State of Uttar Pradesh[15] and Rameshwar Dayal v. State of Punjab[16] and eventually held as follows:-

> 5. Posing the question whether the expression the service of the Union or of the State meant any service of the Union or of the State or whether it meant the judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression the service in Article233(2)could only mean the Judicial Service. But he did not mean by the above statement that persons who' are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary contrary to Article14and Article16of the Constitution."

31. In Shri Kumar Padma Prasad v. Union of India and Others[17], a three- Judge Bench adverted to the concept of Judicial Service and observed as follows:-

> "Article 236(b) defines 'judicial service' to mean District Judges and Judges subordinate thereto. Under Article 234 the Governor of the State makes appointments of persons other than District Judges to the judicial service in accordance with the Rules made by him in consultation with the High Court. Article 235 vests control over district courts and courts subordinate thereto in the High Court. The judicial service whether at the level of district courts or courts subordinate thereto is under the control of the High Court in all respects. The subordinate judiciary which means the courts subordinate to the district courts consists of judicial officers who are recruited in consultation with the High Court. The district judges are recruited from amongst the members of the bar and by promotion from the subordinate judiciary. The judicial service in a State is distinct and separate from the other services under the executive. The members of the judicial service

perform exclusively judicial functions and are responsible for the administration of justice in the State.

Thereafter, their Lordships referred to Articles 233, 235, 236 and further referred in extenso to the Constitution Bench Judgment in Chandra Mohan (supra) and ultimately proceeded to state thus:-

"This court has thus authoritatively laid down that the appointment of district judges under Article 233 (2) can only be from the judicial service of the State as defined under Article 236 (b) of the Constitution."

32. In Sushma Suri v. Govt. of National Capital Territory of Delhi and Another[18], a three-Judge Bench was dealing with the issue about the eligibility of a person who is on the roll of any bar council and engaged either by the employer or otherwise of the Union or the State to be considered for the post of district judge as provided under Article 233 (2) of the Constitution. The Bench referred to the Rules framed by the High Court, the decisions in Chandra Mohan (supra) and Satya Narain Singh (supra). Section 2 (a) of the Advocates' Act and Rule 49 of the Rules framed by the Bar Council and posed the issue as follows:-
"If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

Eventually, the Bench did not accept the view taken by the Delhi High Court in Oma Shanker Sharma v. Delhi Administration in CWP No. 1961 of 1987 and affirmed by this Court in SLP (C) 3088 of 1988 decided on 13.1.1988 and ruled thus :-

"An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of

engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does – whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. ”

Thereafter, their Lordships opined that the expression used “from the bar” would only mean from the class or group of advocates practising in the courts of law. It does not have any other attribute.

33. We have referred to the aforesaid pronouncements to highlight who could be a person to be qualified to be a district judge. Rule 2 (1) (b) provides the qualification to be a Member. Needless to say, the same is in total accord with the Act. The first proviso to Rule 5 introduces part time Member. We have held that the said proviso, as far as it introduces the concept of part time Member, is contrary to the provision contained in the enabling Act. Section 46 of the Act nowhere envisages about the part time Members. The second proviso, we have already mentioned, is an innovative one. Thereafter, we have at length referred to the qualifications for a person to be a Member who is eligible to be a district judge. Once we have held that there cannot be a part time Member, a person who is qualified to be a district judge can be a Member if he meets the criterion laid down in the pronouncements of this Court. They are strictly followed. We really perceive no justification for the introduction of the second proviso to bring in officers from the Indian Legal Service who are qualified to become district judges to be part time Members. If the officer satisfies the requisite qualification, he can be appointed as a Member. Therefore, in our consideration, the second proviso has been incorporated to bring in only part time Members and once the introduction of part time Members is treated to be ultra vires the Act, the rest part of the Rule is absolutely redundant. To repeat at the cost of repetition, if the officer belonging to Indian Legal Services is qualified to be a district judge, he can compete and be selected for the post of Member and that qualification is to be in accord with the pronouncements of law of this Court.

34. The High Court, as we find, had quashed the appointment of part time Members and the appointment of Chairperson who was a part time Member once. As the appointment of part time Member was quashed, as a logical corollary, such a person could not be allowed to be appointed to the post of Chairperson. To elaborate; the disqualified Member cannot hold the post of a Chairperson as a stop gap arrangement. Thus, we do not find any error in that regard in the judgment passed by the High Court.

35. At this juncture, we are obliged to clarify the position further. This Court while issuing notice had granted stay on the operation of the judgment. We have been apprised by Mr. Bhatt that the Central Government, at present, has been scrupulously following the mandate of the Act and only qualified persons are appointed as Members and Chairperson. To avoid any confusion, we clarify that the judgments and orders passed by the Appellate Tribunal by the Chairperson or Members who were not qualified and whose appointments have been quashed shall not be treated to be null and void. In this regard we may refer with profit the decisions in Gokaraju Rangaraju v. State of Andhra Pradesh[19] and M.M. Gupta and others v. State of J. K. and others[20] wherein this Court, while quashing the appointments of the respondents, had clarified that the orders and judgments delivered by them during the period they had continued to function as district judges on the basis of invalid appointments could not be rendered as legally invalid and void. In the larger interest of justice, they are treated as valid and binding. Relying on the said dictum, we clarify the position accordingly.

36. The appeals stand disposed of without any order as to costs.

---

[1] (1967) 1 SCR 77
[2] (1992) 2 SCC 428
[3] (1998) 2 SCC 688
[4] (2002) 4 SCC 275
[5] AIR 1988 SC 876
[6] AIR 2000 SC 2143
[7] AIR 1975 SC 1331
[8] AIR 1983 SC 550
[9] AIR 2000 SC 1069
[10] AIR 2003 SC 1533
[11] (2009) 15 SCC 570
[12] (2006) 4 SCC 517
[13] (2011) 9 SCC 573
[14] (1985) 1 SCC 225
[15] AIR 1966 SC 1987
[16] AIR 1961 SC 816
[17] (1992) 2 SCC 428
[18] (1999) 1 SCC 330
[19] AIR 1981 SC 1473
[20] AIR 1982 SC 1579