# IN THE HIGH COURT OF DELHI

Civil Writ No.1335 of 2004

Date of Decision:-April 12 , 2004

Shri Saroj Kumar Shukla.....Petitioner

Through: Mr.JatinderKumar, Advocate

Versus

Union of India and others.....Respondents

Through: Mr.Maninder Singh with
Mr.Karan Bharioke,Advocates.

Coram:-

THE HON'BLE MR. JUSTICE B.C.PATEL, C.J.
THE HON'BLE MR. JUSTICE BADAR DURREZ AHMED.

i) Whether Reporters of local papers may be allowed to see the judgment.

ii) To be referred to the reporter or not?

iii) Whether the judgment should be reported in the Digest?

B.C.PATEL, C.J.

For orders see Civil Writ No. 7606 of 2003.

Sd/-
CHIEF JUSTICE

Sd/-
April 12, 2004 BADAR DURREZ AHMED, J.
As

Detailed signed order placed
In the file of CW.7606 of 2003.

(Amrik Singh)
PS to HCJ
12.4.2004

# IN THE HIGH COURT OF DELHI

Civil Writ Nos.7606/2003 and 1335, 1336, 1337, 1344 and 1345 of 2004

Date of Decision:-April 12, 2004

S.Srinivasan.....Petitioner

Through: Mr.V.Sudeer with Ms.S.Sunita, Advocate in CW.7606 of 2003
Mr.Jatinder Kumar, Advocate in CWs.1335,1336,1337,1344 and 1345 of 2004.

Versus

Union of India and others.....Respondents

Through: Mr.Maninder Singh with Mr.Karan Bharioke, Advocates.

Coram:-

THE HON'BLE MR. JUSTICE B.C.PATEL, C.J.
THE HON'BLE MR. JUSTICE BADAR DURREZ AHMED.

i) Whether Reporters of local papers may be allowed to see the judgment.

ii) To be referred to the reporter or not?

iii) Whether the judgment should be reported in the Digest?

B.C.PATEL, C.J.

1. In any civilized society rendering justice to its citizens is an elementary function of the State. Particularly, democracy would be on paper if

the country does not have an *independent, adequate and effective* judiciary. It is also an accepted principle that there should be separation of the judiciary from the executive. Unfortunately, attempts are being made to have inroads effecting independence of judiciary by establishment of various tribunals and forums, which are under direct control of the executive. Now, the persons from executive are being posted as members of the Tribunals or as their Chairpersons. The whole purpose envisaged by the Constitution of having an independent separate judiciary is frustrated by taking away functions which are to be discharged by the civil courts and assigning the same to government departments or to Tribunals which are directly under the control of the executive and to make persons working in executive departments as part of the judiciary. It is required to be avoided for giving ample protection to the citizens under the law for saving the foundation of democracy. Let

there by no unison (combination) of the executive and the judiciary.

2. All the aforesaid petitions raise common questions and hence are disposed of by this common judgment.

Status of the petitioner

3. The petitioner, S.Srinivasan, (in CWP 7606/2003) is a practicing Advocate in the Supreme Court for the last 23 years and for the proper functioning of the institutions, has filed this petition. He has specifically stated that he has no personal interest or grievance against any of the members of the Tribunal. However, he submitted that he is seriously concerned with the efficient functioning of the Appellate Tribunal for Foreign Exchange as a dispenser of justice to those charged under the said Act and strongly believes that gross violation of the provisions of the Act in the appointment of Members of the Appellate Tribunal for Foreign Exchange will, instead of leading to dispensation of justice in

accordance with law, result in miscarriage of justice to those approaching it for justice.

Subject matter of a challenge

4. In C.W.No. 7606/2003, the petitioner has prayed to quash 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") as being ultra vires the Foreign Exchange Management Act, 1999 (hereinafter referred to as "the Act"); to quash a notification No. F.No. A.11011/1/2000-Admn.IV (LA) dated 21.3.2001 (Annexure-P.2) issued by the Government of India, Ministry of Law, Justice and Company Affairs appointing respondent No.3, D.P. Sharma, a part-time member, in exercise of powers under Rule 5 of the Rules; to quash a notification No. F.No. A.11011/1/2000-Amn.IV (LA) dated 22.3.2001 (Annexure-P.3) issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs appointing

respondent No.4, O.P. Nahar, as a part-time member, in exercise of powers under Rule 5 of the Rules; and to quash an Order No. 197 [No. F.No. A.11011/1/2000-Admn.IV (LA)] dated 21.5.2003 (Annexure-P.4) issued by the Government of India, Ministry of Law, Justice and Company Affairs appointing respondent No.3, D.P.Sharma, as a part-time member to act as a Chairperson.

5. In another petition being C.W.No. 1335/2004, it is prayed to quash Rules 1, 2, 3 and 5 of the Rules (Annexure-P.4) as ultra vires the rule making powers conferred under Section 46 of the Act as also contrary to the provisions of Section 20 of the Act; to quash the Standing Order No. 530 (E) dated 1.6.2000 known as the Foreign Exchange Management (Removal of Difficulties) Order, 2000 (Annexure-P.7) as ultra vires the powers conferred under Section 45 of the Act; to issue a writ of quo warranto or any other appropriate writ to quash an order No. 197 dated 21.5.2003, which is in violation of the provisions of Section 25 of the

Act; to quash notifications dated 21.3.2001 and 22.3.2001 (Annexures P-2 and P-3) and has also prayed for certain directions.

Case Law relied upon by the parties

6. The learned counsel for the petitioner drew our attention to the reported decisions of the Apex Court in case of Shri Kumar Padma Prasad v. Union of India and others reported in (1992) 2 S.C.C. 428; Chander Mohan v. State of Uttar Pradesh and others reported in (1967) 1 S.C.R.77; State of Maharashtra v. Labour Law Practitioners' Association and others reported in (1998) 2 S.C.C. 688 and Salwan Public School v. D.K.Dass and others decided by a Division Bench of this Court, reported in 1982 D.R.J.397. On behalf of the respondents, the decision of the Supreme Court reported in the case of Union of India and Another *v.* Delhi High Court Bar Association and others reported in (2002) 4 SCC 275 was pressed into service.

Relevant Provisions

7. Section 17 of the Act provides for an appeal to Special Director (Appeals). Section 18 of the Act empowers to establish an Appellate Tribunal to be known as the Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authority and the Special Director (Appeals) under the Act. It is this authority, which has to act as the First Appellate Authority to hear the appeals against the orders of the Adjudicating Authorities. Section 20 of the Act refers to composition of Appellate Tribunal. Clause (b) of sub-section (2) of Section 20 makes a provision for a bench which may be constituted by the Chairperson with one or more Members as the Chairperson may deem fit. Member is defined in sub-clause (s) of Section 2 of the Act, which reads as under:-

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

8. Section 21 of the Act prescribes the qualifications for appointment of Chairperson,

Member and Special Director (Appeals). The said section reads as under:-

> "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.
>
> (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.

9. Rule 2(1)(b) of the Rules reads as under:

> "2.Qualification for recruitment—(1) A person shall not be qualified for appointment as Chairperson or a Member unless he :-
>
> (a) xxx xxx xxx
>
> (b) in the case of a Member, is or has been or is qualified to be a district Judge."

10. Rule 5 of the Rules reads as under:

> "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 fulfill the qualifications prescribed under clause (b) of sub-rule (1) of rule 2 of these rules."

Section 21 and Rules 2,3 and 5

11. In view of the language of Section 21 of the Act, it is very clear that a person who is or has been or is qualified to be a District Judge can be appointed as a Member. So far as the appointment as a Special Director (Appeals) is concerned, if one is a member of Indian Legal Service and has held a post in Grade I of that Service can be appointed as the Special Director (Appeals), in view of clause (a) of sub-section (2) of Section 21.

12. The learned counsel for the petitioner, reading the provisions contained in Section 21 of the Act, submitted that a person who is a Member of Indian Legal Service and has held a post in Grade I in that Service, then he can be appointed only as the Special Director (Appeals) and not as a Member or a part-time member.

13. Learned counsel drew our attention to Section 46 of the Act, which empowers the Central

Government to make rules to carry out the provisions of this Act. Reading the rules, learned counsel for the petitioner submitted that rule making authority is entitled to make the rules to carry out the provisions of this Act and not otherwise.

14. Our attention was drawn to Rule 2, which refers to qualification for recruitment. Clause (b) of sub-rule (1) of Rule 2 refers to appointment of a Member. Reading the language, learned counsel submitted that it is in consonance with the provisions of Section 21(1)(b) of the Act. He invited our attention to method of recruitment indicated in Rule 3. Rule 5 refers to composition of the Appellate Tribunal, which states that the Tribunal shall have one Chairperson and Members not exceeding four. However, the first proviso states that number of either full time member or part time member shall not exceed two. The second proviso of Rule 5 states that part time member shall be appointed from amongst officers belonging to Indian Legal Service, who

fulfills the qualifications prescribed under clause (b) of sub-rule (1) of Rule 2 of these Rules. According to learned counsel, proviso 1st and 2nd both are contrary to the Act.

15. The rule making authority has traveled beyond the authority under the Act while making this rule. Learned counsel for the petitioner submitted that the concept of full time and part time member together has been incorporated for the first time. The Act does not provide the appointment of Member of Indian Legal Service as a Member of the Tribunal under clause (b) of sub-Section (1) of S. 21 of the Act. Section 21(2)(a) provides that a member of the Indian Legal Service who is holding a post in Grade I of that Service can be appointed as a Special Director (Appeals) but it does not say that such a person can be appointed as a Member. Clause (b) of sub-section (1) of Section 21 prescribes the qualification of a member. According to learned counsel, a person who is not qualified to be appointed as a Member, as indicated in

clause (b) of sub-section (1) of Section 21 of the Act, then such person cannot be appointed as a member and if the appointment is so made, it is required to be quashed. He further submitted that under the shelter of rules, which are ultra vires, if the appointment is made, the same is required to be quashed. He further submitted that the rules, which are contrary to the provisions contained in the act, must be quashed.

16. The learned counsel for the petitioner submitted that the Legislature's intention was that a person who is or has been or is qualified to be a District Judge be appointed as a member and if the rule making authority in contravention of this provision has made rules, then the rules must be struck down as ultra vires the Act.

17. The Act does not provide for a full time as well as part time member. How the rule making authority can say that there shall be two full time members and two part time members and

that the part time members shall be appointed from amongst the officers belonging to Indian Legal Service, who fulfill the qualifications prescribed under clause (a) of sub-Section (2) of Section 21 of the Act, in contradistinction to the provisions contained in clause (b) of sub-rule (1) of Rule 2 as also clause (b) of sub-Section(1) of Section 21 of the Act. A person who is qualified to be appointed only as a special Director (Appeals) cannot be appointed as a member of the Tribunal by back door entry with the aid of Rule 5 which is ultra vires the provisions contained in Section 21(1)(b) of the Act and contrary to Rule 2(1)(b) of the Rules. One who is or has been or is qualified to be a District Judge, alone can be appointed as a member.

18. It is at this juncture, learned counsel for the petitioner submitted that who could be a person qualified to be appointed as a District Judge? Our attention was drawn to Articles 233, 234 and 236 of the Constitution of India.

27

19. The fact is that there are three independent wings, namely, judiciary, legislative and executive. It is in view of the scheme of the Constitution of India, judicial independence is required to be maintained. Persons so recruited as subordinate judicial officers under Article 234 of the Constitution can be posted by way of promotion to the cadre of District Judge in the manner laid down in Article 233 of the Constitution of India or persons qualified as indicated in clause (2) of Article 233, can be appointed to the cadre of District Judge.

20. On behalf of Union of India, Mr.Jashwant Singh, Under Secretary to the Government of India, Ministry of Law and Justice, Shastri Bhawan, New Delhi has filed an affidavit. In paragraph 15, it is pointed out that respondent No. 3 was enrolled as an advocate with the Bar Council of Delhi with effect from 5.5.1972 and practiced as an advocate up to February, 1973. Thereafter he served as a Lecturer in Law, University of Delhi till June, 1976.

Thereafter was working as Assistant Director, Institute of Company Secretaries of India up to 1978. From April 1978 to September, 1981, respondent No. 3 worked as Deputy Director, Institute of Company Secretaries of India. From September, 1981 to September, 1982, respondent No. 3 worked as Assistant Company Secretary, DLF. From September, 1982 to August, 1990, respondent No. 3 worked as Law Officer, Employees Provident Fund Department. After August, 1990, respondent No. 3 started rendering his service as Additional Legal Advisor, Joint Secretary and Legal Advisor and Additional Secretary in the Department of Legal Affairs.

21. So far as respondent No. 4 is concerned, it is submitted on behalf of the Union of India that he worked as a Metropolitan Magistrate in the Delhi Judicial Service from May, 1977 to March, 1978. Thereafter he worked as Junior/ Assistant Law Officer in the Law Commission, Ministry of Law and Justice till about January,

1983. Since thereafter he is in Indian Legal Service.

22. In view of what is stated above, it was submitted on behalf of the Union of India that these two respondents are qualified to be appointed as Judges of the High Court and hence can be appointed as a Chairperson or as a Member of the Appellate Tribunal in view of Section 20 of the Act.

23. When a legislature made a specific provision for appointment of a member of Indian Legal Service and who has held a post in grade I, as a special director ( Appeals), it is incorrect to say that such a person can be appointed as a member of the Tribunal. In view of specific provision being made, it is not open to read the same as per one's convenience.

24. On behalf of the respondent, it was submitted that the Indian Legal Service is constituted in accordance with the Rules and under Article 309 of the Constitution of India. Both the respondents No. 3 and 4 are Members of the Indian Legal Service. It was further submitted

that in view of the decision of the Apex Court in Delhi High Court Bar Association and others' case (Supra), the members of Indian Legal Service would be eligible for appointment to the Debt Recovery Tribunal. It is in view of this as well as in view of the Explanation (a) and (aa) to Article 217, the Members of Indian Legal Service fulfill the eligibility criteria for appointment of a High Court Judge. In Delhi High Court Bar Association's case (Supra), the Apex Court observed as under:-

> "It will be seen that that for a persons to be appointed as a Presiding Officer of the Appellate Tribunal he is, or has been, qualified to be a Judge of a High Court or has been a member of the Indian Legal Service who has held a post in Grade 1 for at least three years."

25. It is in view of these observations, it was submitted that there is no need that a person qualified to be a District Judge should be strictly in accordance with the provisions contained in the Constitution of India.

26. So far as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Recovery Act") is

concerned, Section 5 provides qualifications for appointment as Presiding Officer. According to that section a person shall not be qualified for appointment as the Presiding Officer of a Tribunal unless he is, or has been, or is qualified to be, a District Judge. Parliament also provided qualifications for appointment as a Chairperson of the Appellate Tribunal in section 10 of the Recovery Act, which reads as under:-

> "Qualifications for appointment as Chairperson of the Appellate Tribunal – A person shall not be qualified for appointment as the Chairperson of an Appellate Tribunal unless he –
>
> (a) is, or has been, or is qualified to be, a Judge of a High Court; or
> (b) he has been a member of the Indian Legal Service and has held a post in Grade 1 of that service for at least three years; or
> (c) has held office as the Presiding Officer of a Tribunal for at least three years."

27. In the present Act, a Member of Indian Legal Service, who has held post in Grade 1 in that service can be appointed as a Special Director (Appeals) while in the Recovery Act, a person who has been a Member of Indian Legal Service and has held a post in Grade 1 of that service for at least three years, can be

appointed as the Presiding Officer of the Appellate Tribunal. Thus reading the two Statutes, it is very clear that in one Statute a person who is Member of Indian Legal Service is held to be qualified for appointment as the Presiding Officer of the Tribunal, it does not mean that in other Statute when he is qualified to be appointed as Special Director (Appeals), he should be also held to be qualified for being appointed as a Member. It is required to be noted that in the Recovery Act, the functions of the trial court are discharged by the Debt Recovery Tribunal and the qualification prescribed for such a Tribunal is that of a District Judge. So far as the Appellate Tribunal is concerned, the qualification is prescribed in Section 10 of the Recovery Act while in the present Act, there is an adjudicating authority, the Special Director (Appeals), the First Appellate Authority and the Appellate Tribunal, Thus the provisions of both the Acts cannot be put at par.

28. On behalf of the respondent, it was further submitted that Rule 5 of the Rules if perused, it becomes clear that it provides for appointment of a Member as also Part Time Member. It is for the appointing authority to consider whether that person should be appointed as part time, full time or on a contract basis. It is required to be noted that the Act does not provide the rule making authority with any right to prescribe different type of appointment than indicated in the Act.

29. It was submitted that the part time member was appointed as the Chairperson on account of administrative exigencies. It was stated that selection process is not complete. If the appointment is quashed, then the Tribunal will have to be closed. It may be noted that the appointment must be in accordance with law and if the appointment is not in accordance with law, the same is required to be quashed.

30. It was submitted on behalf of the petitioner in reply to the submissions made by the Union of

India that a person who is not qualified to be appointed as District Judge, can he be appointed as a High Court Judge? Learned counsel for the petitioner submitted that in the Government of India Act, 1935, there was a provision, namely, Section 220(3). However, the framers of the Constitution thought it proper to provide different provisions for the appointment of a District Judge, a High Court Judge and a Judge of the Supreme Court. It was submitted that a distinguished jurist can be appointed as a Judge in the Supreme Court but such is not the position for appointment in the High Court. He drew our attention to Section 220 of the Government of India Act, 1935. Clause (b) of sub-section (3) of Section 220 of the said Act reads as under:-

> "(3) A person shall not be qualified for appointment as a Judge of a High Court unless he –
>
> (a) .....
>
> (b) is a member of the Indian Civil Service of at least ten years standing, who has for at least three years served as, or exercised powers of a district judge; or
>
> (c) ..... "

31. It was submitted that the framers of the Constitution were of the opinion that judiciary and executive being separate, a person from executive cannot be brought in judiciary and, therefore, no similar provision has been made for appointment as a Judge of the High Court. Learned counsel for the petitioner drew our attention to the Draft Constitution Article 193 and the proceedings dated 6.7.1949 of the Constituent Assembly of India. A proposal was made to add sub-clause (e), which reads as under:-

> "(e) is a distinguished jurist." This was with a view to see that a distinguished jurist may be appointed as a High Court Judge.

32. At page 662 of the proceedings of the Constituent Assembly of India with regard to this aspect, it is pointed out as under:-

> "I have also made provision for the appointment of a distinguished jurist. When we have made this provision in the case of the Supreme Court, I do not see why we should not provide that a distinguished jurist should be appointed as a Judge of the High Court also. I think, Sir that in view of the fact that the principle has already been accepted, this amendment will prove acceptable to the House."

33. This was so stated by Professor Shibban Lal Saksena. The aforesaid amendment was

negatived. Again there was a proposal for the amendment of Article 217. It was proposed that the following clause be inserted:-

> "(c) is, in the opinion of the President, a distinguished jurist."

34. However, the same was later on omitted with effect from 20.6.1979. It was submitted that a person qualified for appointment as a Judge of the Supreme Court may not be qualified for appointment as a Judge of the High Court. This was so submitted as learned counsel for the Union of India submitted that if the person is qualified for appointment as a Chairperson, he can be appointed as a Member. If the law does not contemplate, the same is not permissible.

35. It was stated that when the Act is silent for appointment as a part time member, it is not permissible to assume the power. If there is a specific provision for appointment as a part time member, one can exercise that power. But in the absence thereof, it is not permissible. Even considering Sections 15 and

16 of the General Clauses Act, 1897, this is not permissible.

36. It was further submitted by learned counsel for the petitioner that Section 46(1) of the Act enables the making of rules to carry out the provisions of the Act and not the purpose of the Act. From the contention raised by learned counsel for the petitioner, it appears that to carry out the purpose of the Act, the change is made in the mode of appointment. However, if the rules are made not to carry out the provisions of the Act, then the same are beyond the scope of the Act and it is not permissible for the rule making authority to make such rules.

37. It was submitted by the respondent that a list was prepared wherein the name of Justice Sahai as well as Mr.D.P.Sharma came to be included. It is in view of this oral submission made by the respondent, on behalf of the petitioner, it was submitted that after the appointment of Justice Sahai, the said list is no more operative and the person from that

list cannot be appointed. When Justice Sahai was appointed as the Chairperson, respondent No. 3, Mr.D.P.Sharma, was appointed as a Part Time Member and it was submitted that there is no question of lien on the post of Chairperson.

38. On behalf of the petitioner in an other petition, namely, C.W.No. 1335/2004, it was pointed out that the Foreign Exchange Management (Removal of Difficulties) Order 2000, the copy of which is produced on record as Annexure-P.7, is contrary to the provisions contained in Section 20 of the Act. Learned counsel submitted that there is no provision for appointment on ad hoc basis to discharge the functions of a Chairperson and Members of the Appellate Tribunal. Therefore, the provision could not have been made under the aforesaid order (Annexure-P.7). This section does not permit any ad hoc appointment. The Central Government could not appoint any one on that basis, particularly when a person is not qualified to hold the post. It was further

submitted that for the purpose of appointment of D.P.Sharma as a part time member of the Appellate Tribunal, no exercise was undertaken by the Select Committee and no material whatsoever has been placed on the record. It was submitted that the appointment is required to be made under the Act and for the said purpose notification is required to be issued after the person is appointed by the President. When a person is appointed as a member or a Chairperson, his appointment is required to be made under the provisions contained in the Act. Method of recruitment is provided under Rule 3 of the Rules. There is nothing to show that after following the procedure, the appointment was made. Therefore, the appointment is required to be quashed.

39. It was submitted on behalf of the petitioner that reading Annexure-P.6 at page 61, it is very clear that the Government of India has come out with a device to appoint the officers working in the department on the post of a

Chairperson or as a member of the Appellate Tribunal. The circular (Annexure-P.6) refers to recruitment to the post of Chairperson and Member in the Appellate Tribunal for Foreign Exchange. The qualifications indicated therein are as under:-

(a) For the post of Chairperson a candidate has to be or has been, or is qualified to be appointed as a Judge of a High Court.

(b) For the post of a Member a candidate has to be or has been or is qualified to be appointed as a District Judge.

40. The circular further states that officers who fulfill the eligibility criteria and are interested to apply for the said posts may submit their application in the attached proforma separately for each post by 30.4.2003. It is in view of this circular and the proforma, it was submitted that despite the Apex Court's judgments, which are referred to hereinabove, the executive is keen to appoint persons of the department as a Member or a Chairperson of the Tribunal. It was further submitted that the Constitution of India prescribe the qualification for a District Judge. The Apex

Court has pointed out the meaning of "service" and yet the Government is keen to appoint executives for judicial functions. So far as the appointment of these persons to the post of Appellate Officers, as envisaged in Section 17 of the Act is concerned, it was submitted that persons who are qualified as indicated in sub-section (2) of Section 21 may be considered. However, a person who has been a member of Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India or a person who has been a member of the Indian Legal Service and had held a post in Grade I of that service, cannot be appointed as a Member of the Tribunal but can be appointed only as a Special Director (Appeals). Thus, by this circular the executive is trying not only to by-pass the provisions of the law but to get an entry in the judicial service. According to the petitioner, the same is required to be deprecated.

41. Reading the provisions contained in Section 20, it is very clear that there is no determination as to what number of members are to be appointed as members of the Appellate Tribunal. However, it was never contemplated that there will be appointment of part time members. Reading the general terms of the provisions, it envisages appointment of full time members only. In view of this, it is very clear that Rule 5 when it provides that either full time or part time members shall not exceed two is contrary to the provisions of the Act. Therefore, the rule made by the rule making authority is beyond the scope of the Act. The rule making authority is only entitled to make the rules to carry out the provisions of the Act. When a provision is specific, then the rule making authority has no business to interpret it in a different manner and to appoint persons as part time members and, therefore, first proviso to Rule 5 being contrary to Section 20 of the Act or inconsistent with

Section 20 of the Act is required to be quashed and set aside.

42. Second proviso to Rule 5, which provides for appointment of part time members from amongst the officers belonging to Indian Legal Service, who fulfill the qualifications prescribed in clause (b) of sub-rule (1) of Rule 2 of the Rules is also not in consonance with the provisions contained in the Act. Clause (b) of sub-section (1) of Section 21 of the Act prescribes the qualifications for a member. A person who is not qualified to be appointed as a District Judge, he cannot be appointed as a member. A person belonging to Indian Legal Service and who is qualified, as indicated in clause (a) of sub-section (2) of Section 21 of the Act, can be appointed as the Special Director (Appeals) and not as a Member. In view of this, the officers belonging to Indian Legal Service cannot be appointed as members or even as part time members and, therefore, second proviso is also contrary to the provisions of the Act and particularly Section

21 of the Act, hence the same is required to be quashed.

Full time/Part-time member.

43. It is required to be noted that respondents No. 3 and 4 were appointed as part time members vide annexures P.2 and P.3 dated 21.3.2001 and 22.3.2001 respectively. If a person cannot be appointed as a part-time member, then there is no question of considering the person to be appointed to act as a Chairperson being senior most member or to continue as a part time member. The appointment of respondents No. 3 and 4 initially as part time members is challenged by the petitioner.

44. The Apex Court in Chander Mohan's case (supra) at page 87 pointed out as under:-

> "The Indian Constitution, though it does not accept the strict doctrine of separate of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realized that "it is the Subordinate Judiciary

> in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch.VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control."

45. The Apex Court also pointed out the history of the aforesaid provisions; notification issued in 1922 by Governor-General-in-Council empowering the local government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or from the members of the Bar. The Court also pointed out as under:-

> "Till India attained independence, the position was that district judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence

> in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district judge. If that was the factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Art.233 (2) can only mean the judicial service."

46. In view of the provisions contained in the Constitution of India there is separation of judiciary from executive. It is clear that independence of judiciary is to be maintained. No indirect mode of entry by exectuve in judiciary is permissible.

Tribunals.

47. The Tribunals while discharging its duties as that of the Court, are under supervision of the High Court under Article 227 of the Constitution of India and when the Tribunal is discharging quasi judicial functions or a

judicial function, the persons holding the position must be independent and should be coming only from judicial service or must be qualified for appointment in judiciary.

48. Keeping this aspect in mind, even under the Act, adjudication by the adjudicating authority and the appeals to Special Director (Appeals) are provided separately. Subject relates to foreign exchange with an object to facilitate extraordinary trade and payment and to perform development and maintenance of foreign exchange market in India and looking to the object of the Act, the Legislature provided that so far as the Special Director (Appeals) is concerned, the officers can be appointed as Appellate Officers from Indian Legal Service or Indian Revenue Service holding particular post. However, legislature did not permit the authorities to appoint such persons as members of the Tribunal. This aspect must be borne in mind.

49. The question came to be examined by the Apex Court where *Assistant Commissioners of*

*Labour were appointed as Judges of Labour Court* at Pune and Sholapur under a notification issued by the Government of Maharashtra dated 8.3.1979 in the case of State of Maharashtra v. Labour Law Practitioners' Association and others reported in 1998(2) S.C.C.688. It was held as under:-

> "Labour Courts have been constituted in the State of Maharashtra under the Industrial Disputes Act, the Bombay Industrial Relations Act and also under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act. Prior to 1974, the qualifications of a person to be appointed as a judge of the Labour Court under the Industrial Disputes Act as laid down in Section 7 were as follows:
>
> (a) that he was or had been a Judge of a High Court; or
>
> (b) that he had for a period of not less than three years been a District Judge or an Additional District Judge; or
>
> (c) that he had held the office of the Chairman or any other Member of the Labour Appellate Tribunal or of any Tribunal for a period of not less than two years; or
>
> (d) that he had held any judicial office in India for not less than seven years; or
>
> (e) that he had been the Presiding Officer of a Labour Court constituted under any provincial Act for not less than five years.
>
> By the Industrial Disputes (Maharashtra Amendment) Act, 1974, Section 7 was amended and three more sources of recruitment to the post of a judge of the Labour Court were added. These are:

(d-1) he has practised as an advocate or attorney for not less than seven years in the High Court, or any court, subordinate thereto, or any Industrial Court or Tribunal or Labour Court, constituted under any law for the time being in force; or

(d-2) he holds a degree in law of a University established by law in any part of India and is holding or has held an office not lower in rank than that of a Deputy Registrar of any such Industrial Court or Tribunal for not less than five years; or

(d-3) he holds a degree in law of University established by law in any part of India and is holding or has held an office not lower in rank than that of Assistant Commissioner of Labour under the State Government for not less than five years."

XXX XXX XXX

Under Section 6 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, the State Government is entitled to constitute one or more Labour Courts and appoint persons having prescribed qualifications as judges of these courts. The proviso to Section 6 lays down that no person shall be appointed unless he possesses the qualification other than the qualification of age, prescribed under Article 234 of the Constitution for being eligible to enter the judicial service in the State of Maharashtra and is not more than 60 years of age. This provision remains unamended. However, in view of the amendments carried out in the Industrial Disputes Act and the Bombay Industrial Relations Act, the State Government felt that it was open to the State Government to appoint Assistant Commissioners of Labour working under the State Government for a period of not less than five years and holding a law degree, to the office of the presiding officers of Labour Courts. The impugned notification of 8-3-1979, therefore, was issued appointing two such persons as presiding officers of Labour Courts at Sholapur and Pune which has been challenged in these proceedings. According to the first respondent-Association, appointments as presiding officers of Labour Courts are appointments to the judicial

service of the State and are, therefore, governed by Article 234 of the Constitution."

50. The Apex Court in paragraph 7 of the judgment examined the scheme of Part VI of Chapter VI of the Constitution of India, which deals with courts subordinate to the High Court. The Apex Court pointed out as under:-

> "The term "District Judge" should not be confined only to the judge of the Principal Civil Court in the hierarchy of general civil courts. The term would now have to include also the hierarchy of specialized civil courts, such as a hierarchy of Labour Courts and Industrial Courts The fact that the Chief Presidency Magistrate and the Sessions Judge were also included in the definition of "District Judge" indicates that a wide interpretation is to be given to the expression "District Judge". The extensive definition of a District Judge under Article 236 is indicative of the same."

51. The Court pointed out in paragraph 12 after considering Chander Mohan's case (supra) as under:-

> "In so interpreting judicial service in contradistinction to executive service where some executive officers may also be performing judicial or quasi judicial functions, this Court was at pains to emphasise the constitutional scheme for independence of the judiciary. It said that the acceptance of this (i.e. Government's) position would take us back to pre-independence days and would also cut across the well knit scheme of the Constitution providing for independence of the judiciary. This Court, therefore, defined judicial service in exclusive terms as consisting only of judicial officers discharging entirely judicial duties. It said that having provided for appointments to that

51

> service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a District Judge."

52. To preserve independence of the judiciary from the executive and making sure that the persons from non-judicial services, such as, the Police, Excise or Revenue were not considered as eligible for appointment as District Judges, the Apex Court has repeatedly cautioned.

53. In Salwan Public School's case (supra), Division Bench of this Court pointed out that the office of the Deputy Commissioner, which Mr.Dass held in the past or that of the Financial Commissioner, which he now holds are not judicial offices equivalent to the office of a District Judge. Those were administrative assignments. The key word in the proviso is "judicial". Judicial means pertaining to a judge or judges as distinguished from legislative and administrative offices. Mr. Dass has never been a judge. He is not, therefore, qualified to function as the Tribunal. In para

10, the Court pointed out that the legislative mandate is clear. The person to man the Tribunal must have a judicial standing. He must be a district judge or somewhat equal to him in ability and experience. He must come from judiciary to which we the judges have the honor to belong. This provision is a striking illustration of what is called "jurisdiction of the tribunals". So the presiding officer cannot be an executive officer, whatever be his rank or authority, position or power.

54. It was submitted on behalf of the petitioner that in the event of vacancy in the office of Chairperson or his inability to discharge his functions, then the senior most member shall discharge the functions of the Chairperson until the date on which the Chairperson assumes his duties. This is so provided in Section 26 of the Act. It is not in dispute before us that neither respondent No. 3 nor respondent No. 4 at any time were appointed as the Members but the case of the Union of India is that they are part time members.

Section 26 of the Act mandates to discharge the duties of a Chairperson in case of emergency, the person must be a senior most member and not a part time member and, therefore, also respondent No. 3 cannot act as a Chairperson and a request is made to quash Order No. 197 (Annexure-P.4). It is true that neither respondent No. 3 is qualified to be a member nor his appointment as part time member is in accordance with law. Therefore, when he is acting as a Chairperson, under the order, the same is also required to be quashed along with Annexure-P.2.

55. It was also submitted that when a duly appointed member is available, how a part time member is appointed is difficult to understand. It is a fact that a full time member is available. However, for the reasons best known to the respondent, a part time member is chosen to be placed as a Chairperson for the time being. We have already held that there is no provision for a part time member under the Act. A part time

member, thus, has no standing and cannot function as such. There was, therefore, no question of giving any preference to such a 'part time' member over a regular member for appointment as acting Chairperson. Therefore, also the appointment of a part time member as the Chairperson is bad.

Relief granted

56. In view of what is discussed hereinabove, proviso Ist and 2nd to Rule 5 of the Rules are held ultra vires Section 21(1)(b) of the Act and hence the same are quashed; consequently appointments of respondent Nos. 3 and 4 as part time members are liable to be quashed and stand quashed; and appointment of respondent No. 3 to act as a Chairperson stands quashed.

57. All the petitions are allowed to the aforesaid extent, with cost.

CHIEF JUSTICE

April 12, 2004
As

BADAR DURREZ AHMED, J.