IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.12.2008

C O R A M :

THE HONOURABLE MR. JUSTICE K. CHANDRU

W.P.No.37252 of 2007
and
M.P.No.1 of 2007

Dr.E.Muralidharan .. Petitioner

-vs-

1.Union of India, rep.by
Secretary, Higher Education,
Ministry of Human Resources
Development, Government of India,
New Delhi-110 001.

2.Dr.M.S.Ananth
Director, I.I.T, Madras,
Chennai-600 036.

3.Dr.A.E.Muthunayagam,
Chairman, Board of Governors,
I.I.T. Madras,
No.A-33, Pandit Colony,
Kowdiar (P.O.),
Tiruvananthapuram-695 003.

4.Dr.Usha Titus
Former Registrar, I.I.T.Madras,
Director Social Welfare Department,
Government of Kerala,
Kerala State Secretariat,
Tiruvananthapuram-695 001. .. Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of quo warranto to the first respondent to show on what authority the second respondent can hold the post of the Director of Indian Institute of Technology, Madras.

For petitioner : Dr.E.Muralidharan,
Petitioner-in-person

For respondents : Mr.K.M.Venugopal, SCGSC(R1)
Mr.Vijay Narayan, SC for
Mr.Karthik Mukundan (R2&4)
Mr.R.Parthiban (R3)

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O R D E R

Heard the arguments of Dr.E.Muralidharan, the petitioner appearing in person; Mr.K.M.Venugopal, learned Senior Central Government Standing Counsel appearing for the first respondent Union of India; Mr.Vijay Narayan, learned Senior Counsel leading Mr.Karthik Mukundan for respondents 2 and 4 and Mr.R.Parthiban, learned counsel appearing for the third respondent and perused the records.
2. This writ petition is filed questioning the authority of the second respondent to hold the post of the Director of Indian Institute of Technology, Madras (for short, 'I.I.T.(M)'). When the matter came up for admission, it was placed before a Division Bench treating it as a public interest litigation. However, the Division Bench, by its order dated 17.12.2007, observed as follows:-

''As the matter relates to appointment of the Director of I.I.T. Madras, it cannot be termed to be ''Public Interest Litigation''. However, it is open for the petitioner to confine the prayer for issuance of a writ of quo warranto as an adversary litigation.
Let the matter be placed as a general writ petition before appropriate Court after necessary orders of the Hon'ble the Chief Justice".

3. Therefore, the matter was placed before the Single Bench. The Single Bench, by an order dated 12.8.2008, directed that the appointment of the second respondent will be subject to the result of the writ petition. Subsequently, the matter was taken up for final hearing. This Court by an order dated 22.9.2008 dismissed the writ petition as not maintainable in the light of the petitioner having moved the Honourable Supreme Court under Article 32 of the Constitution.

4. As against the same, the petitioner moved a writ appeal being W.A.No.1242 of 2008. The matter came up before the Division Bench presided by A.K.Ganguly, C.J. (as he then was) and the writ appeal was allowed by a judgment dated 28.11.2008. Paragraphs 13 and 14 of the said judgment reads as follows:-

''13. Following the principles laid down by the Supreme Court, this Court is of the opinion that the bar of res judicata does not operate in this case. The reasoning discussed in the aforesaid cases should apply herein a reverse situation namely, where a petition under Article 32, dismissed as withdrawn without any discussion on the merits of the case, that cannot bar the petitioner's access to a writ court under Article 226.

14. Therefore, the writ petition is maintainable and the impugned judgment of the learned Single Judge is accordingly set aside. The matter is remanded for fresh consideration on merits before K.Chandru, J. Since the matter is pending in this Court for some time, we hope and expect that the matter is disposed of by the learned Judge as early as possible, but preferably within a period of two months from date. We make it clear that we have not made any pronouncements on the merits of the case. The writ appeal is accordingly allowed. The interim order which was granted during the pendency of the writ petition, that the holding of office by the Director of I.I.T. viz., the fourth respondent herein, will abide by the result of the writ petition, continues. There shall be no order as to costs. Consequently, M.P.No.1 of 2008 is closed."
The matter thus came to be listed before this Court.

5. Though the learned Senior Counsel appearing for the I.I.T.(M) submitted that they intend to prefer a SLP against the order of the Division Bench, no such proof was forthcoming. Further, since the Division Bench had also fixed a time limit for disposal of the writ petition, parties were directed

to address arguments on the merits of the case, which they were kind enough to do.

6. The petitioner appearing in person submitted that the I.I.T.(M) is governed by the Institutes of Technology Act, 1961 (for short, 'the IT Act'). Section 17(1) of the IT Act provides that a Director of each Institute will be appointed by the Council with the prior approval of the Visitor. Therefore, he submitted that there was neither an appointment by the Council nor was there a proper approval by the Visitor, who is none other than the President of India. He also submitted that the term ''Council" as defined under Section 3(d) of the IT Act means the Council established in terms of Section 31(1) of the said Act. Section 31 of the IT Act reads as follows:-

''31.(1) With effect from such date as the Central Government may, by notification in the Official Gazette, specify in this behalf, there shall be established a central body to be called the Council.

(2) The Council shall consist of the following members, namely:-

(a) The Minister in charge of technical education in the Central Government, ex officio, as Chairman;

(b) The Chairman of each Institute, ex-officio;

(c) The Director of each Institute, ex-officio;

(d) The Chairman, University Grants Commission, ex-officio;

(e) The Director-General, Council of Scientific and Industrial Research, ex-officio;

(f) The Chairman of the Council of the Indian Institute of Science, Bangalore, ex-officio;

(g) The Director of the Indian Institute of Science, Bangalore, ex-officio;

(h) Three persons to be nominated by the Central Government, one to represent the Ministry concerned with technical education, another to represent the Ministry of Finance and the third to represent any other Ministry;

(i) One person to be nominated by the All India Council for Technical Education;

(j) Not less than three, but not more than five persons to be nominated by the Visitor, who shall be persons having special knowledge or practical experience in respect of eudcation, industry, science or technology;

(k) Three Members of Parliament, of whom two shall be elected by the House of the People from among its members and one by the Council of States from among its members.

(3) An officer of the Ministry of the Central Government concerned with technical education shall be nominated by that Government to act as the Secretary of the Council."

7. Section 35 of the IT Act empowers the Central Government to make rules to carry out the purposes of Chapter III. The petitioner also referred to the statutes which are framed under Section 15 of the IT Act. The Statute No.15 refers to appointment on contracts and it reads as follows:-

''15. Appointment on Contracts:
(1) Notwithstanding anything contained in these Statutes, the Board may, in special circumstances,

appoint an eminent person on contract for a period not exceeding five years, with a provision of renewal for further period, provided that every such appointment and the terms thereof shall be subject to the prior approval of the Visitor.
(2) Subject to the provisions contained in the Act, the Board may appoint any person on contract in the prescribed scales of pay and on the terms and conditions applicable to the relevant post for a period not exceeding five years with a provision of renewal for further period. For making such appointments, the Chairman may, at his discretion, constitute such ad hoc Selection Committees, as the circumstances of each case may require.
(3) Notwithstanding anything contained in these Statutes, the Council may appoint an eminent person as Director on contract for a period not exceeding five years, with a provision for renewal for further periods provided that every such appointment and terms thereof shall be subject to the prior approval of the Visitor."
(Emphasis Added)

8. A perusal of Statute No.15 will show that while for making appointments in terms of Statutes 15(1) and (2), the Board of Governors of the Institute have been empowered to make appointments. But the appointment of the Director under Statute 15(3) should be done by the Council.

9. Schedule 'A' prescribes the form of contract that has to be signed between the I.I.T. and its Director, who is appointed on contract. Para (2) of the Contract of Services set out in Schedule A of the Statutes reads as follows:-

''(2) The appointee shall be on service under the agreement for a period of ..... years with effect from ..... that is date of joining the post. ''Provided that if the appointee on conclusion of the period of service mentioned above is below 60 years of age, his service shall continue till the 30th June of the academic year in which the appointee concludes the said period of service or till he attains the age of 60, whichever is earlier."

Statute No.7(3) makes it obligatory that the Institute and the Director appointed must enter into a contract of service in terms of Schedule 'A' and it shall be executed by the Chairman of the respective I.I.T.

10. The second respondent came to be appointed on 25.1.2002 with retrospective effect from 24.12.2001. Since it was a contractual appointment that too for a period of five years, it had to come to an end by 23.12.2006. The second respondent did not go out of office in terms of his contract on 23.12.2001. On the contrary, the fourth respondent Registrar issued an Office Order, that too, long after the expiry of the contract on 23.12.2006 stating that the second respondent will continue in office till 30.6.2007 in terms of his contract or till he attained the age of 62 years whichever is earlier. The authority for issuing such a retrospective order that too by the fourth respondent Registrar has not been explained by the respondent properly. Only a reference was made to the terms of agreement dated 24.12.2001. The agreement said to have been signed on 24.12.2001 was signed actually on a stamp paper purchased on 25.4.2001 (eight months prior to his appointment) as found from the stamp paper. It was purchased somewhere from Vellore which is 110 kms. away from Chennai.

11. Para 2 of the said agreement stipulated that the second respondent will be continuing in service for a period of five years with effect from 24.12.2001 and if the appointee on completion of the period of service is below 62 years, his service shall continue till 30th June of the Academic Year in which the appointee concludes the said period of service or till he attained the age of 62 years whichever is earlier. It is claimed that on the strength of this agreement, the second respondent continued in service till 30.6.2007 and as per the notification issued by the Registrar, the fourth

respondent herein.

12. In the meanwhile, since the post of Director must fell vacant on 24.12.2006, i.e. the date on which the second respondent had completed his tenure, the first respondent Union of India sent a Circular dated 06.2.2007 to many persons who are supposed to be Academicians, Prominent Educationists and Prominent Scientists/Technologists of I.I.Ts/IISc, etc. Since it is the starting point of the present litigation, it is necessary to extract the Circular, dated 06.2.2007 sent by the Joint Secretary, Ministry of Human Resource Development (HRD), Department of Higher Education, New Delhi:

''I wish to bring to your kind notice that we have initiated the process for selection of a new Director of Indian Institute of Technology (I.I.T.) Madras. The post of Director of an I.I.T. is in the consolidated scale of pay of Rs.25,000/- per month. The appointment is on contractual basis for a period of five years as per terms and conditions laid down in The Institutes of Technology Act, 1961 and the Statutes thereunder.

I shall be grateful if you kindly suggest a few names of eminent persons, preferably not more than 57 years of age, to be considered for appointment to the post of Director, I.I.T., Madras. You may kindly send their names along with their detailed bio-data to me preferably before 26th February, 2007."

(Emphasis Added)

13. It is claimed that according to the said requisition, several names were nominated including the name of the second respondent. It is also claimed that his name was sponsored by the Director of I.I.T., Bombay. But it is not clear that despite the Circular of the Central Government prescribing that a candidate should not have preferably completed 57 years of age, still the name of the second respondent who had already completed 62 years was nominated by the Director of I.I.T., Bombay. Either he had not seen the Circular or that there was a determined effort to push the name of the second respondent for the said post.

14. The nominations thus received were altogether 18 in number and were shortlisted. The summary of the report prepared by the Joint Secretary was forwarded to the President of India, namely, Visitor of I.I.T.s. In the Summary for the Visitor prepared by the Joint Secretary dated 25.6.2006 (a copy of which was obtained by the petitioner by invoking the Right to Information Act) after referring to Statute No.15(3), it was stated that they were following the past procedure and that the composition of the Search-cum-Selection Committee was approved by the Honourable Minister for Human Resource Development, who himself is the ex-officio Chairman of the said Committee. The Committee had in its first meeting held on 16.5.2007, shortlisted seven candidates including the second respondent and called them for a personal discussion. Subsequently, at its next meeting, three other names were not considered because they had already appeared for selection to the post of Director, I.I.T., Kharagpur. It was also stated that one Prof.Madhusudan Chakraborty, who was called for personal discussion was out of country and the personal discussion with the six candidates including the second respondent was supposed to have taken place on 04th June 2007 at New Delhi. Thereafter, based upon the performance of the candidates during the personal discussion and the professional career and credentials of the candidates and their suitability for the post, the Search Committee recommended the name of the second respondent, viz., Dr.M.S.Ananth, for his re-appointment as Director, I.I.T.(M) for a period of five years or till he completes the age of 65 years, whichever is earlier.

15. Since the prior approval of the Visitor is required, the papers were sent to the Honourable President of India recommending the name of the second respondent. It was also indicated that the

President's Secretariat, by a communication dated 28.6.2007, approved the proposal of the Search-cum-Selection Committee. In view of the approval given by the Visitor, the third respondent was informed about the approval of the re-appointment of the second respondent as Director, I.I.T.(M) and he was authorised to give a formal offer to the second respondent.

16. Thereafter, by a Circular dated 09.7.2007, it was informed to all that the President of India, in his capacity as Visitor of I.I.T.s, has approved the appointment or re-appointment of Prof.M.S.Ananth, Director, I.I.T.(M), with effect from 01.7.2007 for a period of five years or till he attains the age of 65 years, whichever is earlier. In the same Circular it was also informed that the second respondent had assumed office with effect from 01.7.2007. By virtue of this largesse conferred on the second respondent, the second respondent is expected to be in service till 14.11.2010, as his date of birth was 15.11.1945 and he will be attaining the age of 65 years on 14.11.2010. Thus he will barely be in office for a period of 3 = years and not five years as mentioned in the order.

17. It is important to note that even though the approval by the Visitor was communicated by the President's Secretariat only by a communication dated 28.6.2007, the agreement signed between the Chairman of the I.I.T.(M) and the second respondent was typed in a stamp paper purchased on 25.6.2007. It throws a considerable suspicion on the conduct of the second and third respondents. An argument was also advanced by the petitioner that many documents in the present case have been fabricated and were prepared only after coming to know that there will be challenge to his appointment before this Court. In the light of this factual background, the petitioner pleaded that the appointment of the second respondent was illegal as it was not done by the Council as required under law.

18. The learned Senior Counsel also agreed that the matter was yet to be placed before the Council and no meeting of the Council had taken place in the last 2 years. In the light of the same, the petitioner contended that the second respondent was an usurper of the office of Director of I.I.T. and this Court must issue the writ in the nature of quo-warranto against the second respondent.

19. Per contra, Mr.Vijay Narayan, learned Senior Counsel stated that the very same appointment was questioned by an other person and a Division Bench had dismissed the writ petition. The said writ petition was filed by one P.G.Samy @ Iraiyanar being W.P.No.25949 of 2007. Though it was a petition for issuance of a writ of quo warranto, the Division Bench proceeded to deal with it as if it was a public interest litigation. Thus, relying upon the decision reported in (1998) 7 SCC 273 (Dhuriyodana Sahu -vs- Jijendra Kumar Misra dismissed the said writ petition vide its order dated 23.8.2007. The following passage found in para 3 may be usefully extracted below:-

''3. The very reference to the contents of the affidavit filed by the petitioner in support of the writ petition does not show any illegality in the appointment of the first respondent. Even if it is a tenure post of the first respondent as a Director of I.I.T. by extending the tenure, it is not known as to how a writ of quo warranto will lie. There is absolutely no public interest involved in this case which purely relates to the service condition of the first respondent. The Supreme Court has held in Dhuriyodana Sahu -vs- Jijendra Kumar Misra reported in 1998 7 SCC 273 that no public interest litigation shall be entertained in respect of service matters."
(Emphasis Added)

20. He also submitted that a challenge was made by an Ex-Member of Parliament against appointment of the previous Director of I.I.T. in W.P.No.12128 of 1998. A Division Bench dismissed the said writ petition vide its order dated 14.2.2000 after referring to the provisions of the IT Act and the Statutes framed thereunder. Paragraphs 19 to 22 of the said judgment may be usefully

reproduced below:-

''19. Though the submission of the learned counsel appearing for the petitioner that the appointment of the first respondent as Director was not made by the Council and thereby the procedure prescribed has not been followed in letter is correct, in substance the appointment of the first respondent as Director has been made with the concurrence of the Council. Though the petitioner has originally raised an objection to the effect that no prior approval was obtained from the Visitor, the learned counsel has not pressed the said objection, in view of the fact that prior approval had been obtained from the Visitor. So, the said submission of the learned counsel that the appointment of the first respondent to the post of Director, without following the procedures contemplated under the Act, cannot be sustained, cannot be countenanced.

20. The only submission of the learned counsel appearing for the petitioner is that the procedures contemplated under the Act have not been strictly followed. It is not the case of the petitioner that the first respondent is not a fit or competent person for the said post.

21. While considering the objections regarding the appointment of the Chief Justice of India on the ground that the mandatory consultations comprehended were not made and the rule of seniority was not followed, the Full Bench of the Delhi High Court in the decision in P.L.Lakhanpal -vs- A.N.Ray, AIR 1975 Delhi 66 viewed that if the law requires that the appointment is to be made after fulfilling certain conditions and if such conditions are incapable of being fulfilled, then only the writ of quo warranto has to be issued, and, if any procedure has not been followed which can be followed, and after following such procedure, re-appointment can be made, then writ of quo warranto cannot be issued. .. .. "
(Extracted portion of the judgment omitted)

22. In the present case, as no dispute was raised regarding competency of the first respondent to occupy the said post, he can be re-appointed by the Council. Merely because the said procedure of appointment by the Council was not followed, the Council has approved the said appointment by accepting the changes in the Council, and so this Court need not issue a writ of quo warranto. Moreover, the Chairman of the Council exercising power delegated to him the Council under Rule 5 of the Rules has passed the order. So, if such writ is issued, it would be futile, as the defect if any, can be cured by immediate re-appointment. As quo warranto is not a writ of right, and it is in the discretion of the Court, to refuse or grant it is according to the facts and circumstances of the case. In view of the above, we find it difficult to accept the submission of the learned counsel appearing for the petitioner, with respect to the appointment of the first respondent to the post of Director, I.I.T., Madras."

It is not clear as to how these two decisions will have any bearing over the present case.

21. Though several contentions were raised by the petitioner and also an attempt was made to make the appointment of the second respondent being shrouded in mystery, this Court is concerned as to whether the second respondent was appointed by a competent authority.

22. The learned Senior Counsel for the I.I.T.(M) submitted that the Central Government had framed Rules, viz., The Council (Institutes of Technology) Rules, 1962 (for short, 'the Rules') dated 02.6.1962 in terms of Section 35 of the IT Act. Rule 5 of the Rules on which reliance is placed upon reads as follows:-

''5. Functions and manner of exercising thereof. -
(a) The Council shall exercise such powers and perform such duties as are assigned to it by the Act.

(b) The Council may exercise its functions either directly or delegate such of its functions as considered necessary to the Chairman of the Council. The actions taken by the Chairman of the Council, in exercise of such a delegation shall be reported to the Council at its next meeting.
(c) Where it is not expedient to convene a meeting, the Secretary may with the approval of the Chairman of the Council, circulate such item or items as are considered necessary, among the members and obtain their comments to enable the Chairman of the Council to take decisions thereon. Such matters shall be reported to the Council at its next meeting.
(d) The Council may set up such Committee or Committees, standing or ad hoc, with definite terms of reference as are considered necessary. The report or reports of such committee or Committees shall be placed for consideration and decisions of the Council at its meeting."
(Emphasis Added)

23. According to the learned Senior Counsel that after the Rules were framed, the first Council had its meeting on 25.5.1962 and also laid down the procedure for appointment to the post of Director in terms of Section 17(1) of the IT Act. As the Act had come into force only in 1961. There were already Directors appointed in Bombay, Madras and Kanpur I.I.T.s in terms of Section 5(d) of the Act, and they were continuing as Directors under the I.I.T.s, which were functioning as Societies registered under the Societies Registration Act, 1860. This subject was set forth in Item No.7 of the Agenda for the first meeting of the I.I.T. Council held on 25.5.1962. In the meeting it was resolved as follows as regards Item No.7.:-
''Item No.7 – TO CONSIDER THE QUESTION WHETHER ANY PROCEDURE SHOULD BE LAID DOWN FOR APPOINTMENT TO THE POST OF DIRECTOR (SECTION 17(1).

_____

The Council decided that for regular appointments to the post, it should be advised by a Selection Committee consisting of: the Chairman of the Council as Chairman, the Chairman of the concerned Board of Governors, Chairman of the University Grants Commission, and one Expert to be nominated by the Chairman of the Council as members.
In the case of short-term vacancies or appointment on an officiating basis pending selection as per above procedure, the Chairman of the Council should make the appointment in consultation with the Chairman of the concerned Board of Governors."
(Emphasis Added)

24. It is not clear as to how this resolution of the first Council will help the case of respondents 1 and 3. The first Council only wanted a Search Committee to advise it. That does not mean there is any authorisation to appoint a Director by the said Committee. Further, the IT Act clearly sets out under Section 17 that a Director of each institute should be appointed by the Council with the prior approval of the Visitor. Section 31 deals with establishment of Council. Section 33(2)(f) enables it to perform such other functions as are assigned to it by or under the IT Act. It is not clear how the function to select and appoint a Director can be delegated to any further body. Though a reference was made to Section 35(2)(f) of the IT Act and rules have been framed in terms of Section 35 of the said Act, those rules do not delegate the power to any other Committee. The Act enables delegation of some powers as are necessary to the Chairman of the Council. Such a power does not take within it a power to appoint the Director of an I.I.T.. Even the minutes of the meeting held on 25.5.1962 generally talks about a Search-cum-Selection Committee advising the Council with regard to making a regular appointment to the post.

25. It must be stated that the Statutes framed under the Act, namely, Statute 15 (3) clearly states that it is only the Council which can appoint an eminent person as the Director on contract for a period not exceeding five years. In the present case, the existing incumbent who had the previous

tenure of office for five years got his term ended on 23.12.2006. His mere continuance in the said post is only till the end of the Academic Year to enable him to carry on the academic activities since the studies of students may not be disrupted. Therefore, when a selection was notified by the first respondent, the second respondent cannot be said to be continuing in service de hors the statutory provisions.

26. In any event, the decision so taken by the Search-cum-Selection Committee approved by the Hon'ble Minister for HRD makes the whole issue illegal. When the I.I.T.s are supposed to enjoy autonomy from Governmental interference, it is unthinkable that a Minister for HRD can nominate or approve a Search Committee for the purpose of selecting the Director for I.I.T. Further, even the circular sent by the Joint Director only asked all the educationists to nominate candidates who are preferably not above 57 years. It is not clear as to how the name of the second respondent, who had completed 62 years, was nominated by the Director of I.I.T., Bombay, as claimed by the first respondent.

27. The respondents cannot take umbrage about the socalled past practice especially when the appointment of a Director is covered by the provisions of the IT Act, its Rules and the Statutes framed thereunder. When the Council had not appointed and even till date the Council was not even aware of the appointment of the second respondent as the Director, I.I.T. Madras, it is unthinkable as to how the second respondent can continue in the office of the Director, I.I.T.(M).

28. The learned Senior Counsel appearing for respondents 2 and 3 and the learned Senior Central Government Standing Counsel appearing for the first respondent strenuously contended that they have been following the past practice and that should not be disturbed. They also submitted that the prior approval of the Visitor has been obtained and there is no infirmity in the appointment of the second respondent. With reference to the Council not making the appointment and there being no delegation to any other smaller body either under the Act or under the Rules, both counsels have submitted that the Council under Section 31(2) is a wider body and it cannot be convened often. The learned Senior Counsel also submitted that there are ten I.I.T.s in this country and each year there may be one or two vacancies to the post of Director. Therefore, it will be difficult for the Council to meet often. Such an argument cannot be countenanced in the teeth of the statutory enactment made for the I.I.T.s in this country.

29. The only exception that has been carved out is under Rule 5 of the Rules framed under Section 35 of the IT Act. Rule 5(c) says that where it is not expedient to convene a meeting, the Secretary may with the approval of the Chairman of the Council, circulate such item or items, as are considered necessary, among the members and obtain their comments to enable the Chairman of the Council to take decisions. However, such matters shall be reported to the Council at its next meeting. Even Rule 5(d) only contemplates a Council to set up such Committee or Committees as are necessary and report of the Committee shall be placed for consideration and decisions of the Council at its meeting.

30. The minutes of the meeting held on 25.5.1962 only enables formation of a selection committee but not authorises the selection of the Director of I.I.T. as required under section 17(1) of the IT Act. Therefore, the entire procedure has been perverted and a small coterie approved by the Minister for HRD has been made responsible for selection of an important post, namely, the Director of I.I.T., who will be running the institute. It is well known in law that a delegate cannot further delegate any of the powers of the principal. In the absence of the parent statute, namely, the I.I.T. authorising the Council for any sub-delegation, (even assuming without admitting such delegation is permissible), in the present case, there is no such delegation to any smaller committee for making the appointment.

31. Though the I.I.T.s are founded by the Government and governed by an Act of Parliament, it is rather shocking that for the post of Director of the Institute, no public notice is given inviting applications. No advertisements were given in the newspapers thereby violating Articles 14 and 16 of the Constitution. The argument that the Ministry of HRD had a wider consultation in inviting nominations is unconvincing. Further, many persons found in the address list with the ministry were either dead or had gone away from the address found in the list. Even the nomination of the second respondent by the Director of I.I.T., Bombay was faulty, as admittedly, the second respondent had crossed the age of 62 years, though the letter of the Ministry had prescribed that the preferred age should not exceed 57 years. Past practice cannot be an estoppel against the statutory provisions. In today's world, the Indian Academics have spread over the world. There must be a wider publicity for filling up the prestigious post like the Director of the I.I.T.s.

32. The argument that the Visitor's prior approval was obtained does not advance the case of the respondents. Unless the Visitor has all the vital inputs and thereafter if a decision is taken, it may have some relevance. The note sent to the Visitor by the Ministry of HRD did not inform the Visitor that the decision was taken not by the Council but by a small coterie hand-picked by the Minister for HRD.

33. The learned Senior Counsel submitted that there have been several cases against I.I.T. and complaints have been coming from several quarters, this Court is not concerned with such allegations. The learned counsel also submitted that the present case is an abuse of the process of Court and any person who appears before this Court should come with clean hands and they should not have any malafide motive.

34. In this regard, the learned counsel cited some decisions, which have no direct bearing on the present case. It must be stated that this case came to be posted before the Single Bench to consider it as a case for issuance of a writ in the nature of quo warranto. Therefore, the parameters for entertaining a quo warranto writ petition alone can be taken into consideration. The petitioner being an alumni of the institute and has shown keen interest in the affairs of the institute cannot be non-suited on the ground that he is a person with motives. The decision in Prof.Arun Nigavekar -vs- Dr.R.Natarajan reported in (2005) 3 MLJ 336 on which reliance was placed arose on a different context. There the issue arose under the provisions of the University Grants Commission Act. In construing the scope of Section 6 of the UGC Act, the Court held that both on merits as well as on the ground of delay, the said writ petition ought not to be entertained. In the present case, the writ petition was filed on time and there was no delay.

35. As contentions were raised regarding the maintainability of the writ petition, it is necessary to refer to some decisions of the Supreme Court regarding the issuance of the writ in the nature of quo warranto. A reference may be made to the judgment of the Supreme Court in University of Mysore -vs- Govinda Rao reported in AIR 1965 SC 491. The following passage found in para 7 of the judgment may be usefully extracted below:-
''7. As Halsbury has observed in Halsbury's Laws of England, 3rd Ed.Vol.II, p.145:
An information in the nature of a quo warranto took the place of the obsolate writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined.

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In

other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons, not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not".
(Emphasis Added)

36. The Supreme Court in State of Haryana -vs- Haryana Co-operative Transport Limited and others reported in (1977) 1 SCC 271 in paragraph 14 observed as follows:-

''14. ... . The rights conferred by Articles 226 and 227 can be abridged or taken away only by an appropriate amendment of the Constitution and their operation cannot be whittled down by a provision like the one contained in Section 9(1) of the Act. Accordingly, it is open to the High Courts in the exercise of their writ jurisdiction to consider the validity of appointment of any person as a chairman or a member of a Board or court or as a presiding officer of a Labour Court, tribunal, or National Tribunal. If the High Court finds that a person appointed to any of these offices is not eligible or qualified to hold that post, the appointment has to be declared invalid by issuing a writ of quo warranto or any other appropriate writ or direction. To strike down usurpation of office is the function and duty of High Courts in the exercise of their constitutional powers under Articles 226 and 227."
(Emphasis Added)

37. It is neither a case where the petitioner is canvassing for his own appointment, vis-a-vis the case of the second respondent nor the case has been filed as a public interest litigation. Therefore, it is necessary to refer to the judgment of the Supreme Court in R.K.Jain -vs- Union of India reported in (1993) 4 SCC 119. A reference may be made to paragraphs 73 and 74 of the said decision, which may be usefully reproduced below:-

''73. Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. Exercise of judicial review is to protect the citizen from the abuse of the power etc. by an appropriate Government or department etc. In our considered view granting the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of a Tribunal, we cannot sit over the choice of the selection, but it be left to the executive to select the personnel as per law or procedure in this behalf. In Shrikumar Prasad case K.N. Srivastava, M.J.S., Legal Remembrancer, Secretary of Law and Justice, Government of Mizoram did not possess the requisite qualifications for appointment as a Judge of the High Court prescribed under Article 217 of the Constitution, namely, that he was not a District Judge for 10 years in State Higher Judicial Service, which is a mandatory requirement for a valid appointment. Therefore, this Court declared that he was not qualified to be appointed as a Judge of the High Court and quashed his appointment accordingly. The facts therein are clearly glaring and so the ratio is distinguishable.

74. Shri Harish Chander, admittedly was the Senior Vice-President at the relevant time. The contention of Shri Thakur of the need to evaluate the comparative merits of Mr Harish Chander and Mr Kalyansundaram a seniormost member for appointment as President would not be gone into in a public interest litigation. Only in a proceedings initiated by an aggrieved person it may be open to be considered. This writ petition is also not a writ of quo warranto. In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public-spirited person."
(Emphasis Added)

38. Whether the second respondent could have continued in service beyond 23.12.2006 is also an issue which has to be seriously considered. The Act only provides for appointment of a Director for a period of five years. Whether such person can continue by way of an extended contract entered into between the parties is a doubtful proposition. In the present case, the stamp paper under which the agreement was signed was purchased even before the second and third respondents could know about the approval granted by the Visitor. In any event, when once a term of office is specified under a Statute, the same cannot be extended beyond a period.

39. In L.P.Agarwal (Dr.) -vs- Union of India reported in (1992) 3 SCC 526 in paragraph 16, it is observed as follows:-

''16. We have given our thoughtful consideration to the reasoning and the conclusions reached by the High Court. We are not inclined to agree with the same. Under the Recruitment Rules the post of Director of the AIIMS is a tenure post. The said rules further provide the method of direct recruitment for filling the post. These service conditions make the post of Director a tenure post and as such the question of superannuating or prematurely retiring the incumbent of the said post does not arise. The age of 62 years provided under proviso to Regulation 30(2) of the Regulations only shows that no employee of the AIIMS can be given extension beyond that age. This has obviously been done for maintaining efficiency in the Institute services. We do not agree that simply because the appointment order of the appellant mentions that he is appointed for a period of five years or till he attains the age of 62 years, the appointment ceases to be to a tenure-post. Even an outsider (not an existing employee of the AIIMS) can be selected and appointed to the post of Director. Can such person be retired prematurely curtailing his tenure of five years? Obviously not. The appointment of the appellant was on a five years tenure but it could be curtailed in the event of his attaining the age of 62 years before completing the said tenure. The High Court failed to appreciate the simple alphabet of the service jurisprudence. The High Court's reasoning is against the clear and unambiguous language of the Recruitment Rules. The said rules provide 'Tenure for five years inclusive of one year probation' and the post is to be filled 'by direct recruitment'. Tenure means a term during which an office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure unless curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure. The question of prematurely retiring him does not arise. The appointment order gave a clear tenure to the appellant. The High Court fell into error in reading 'the concept of superannuation' in the said order. Concept of superannuation which is well understood in the service jurisprudence is alien to tenure appointments which have a fixed life span. The appellant could not therefore have been prematurely retired and that too without being put on any notice whatsoever. Under what circumstances can an appointment for a tenure be cut short is not a matter which requires our immediate consideration in this case because the order impugned before the High Court concerned itself only with premature retirement and the High Court also dealt with that aspect of the matter only. This Court's judgment in Dr Bool Chand v. Chancellor, Kurukshetra University (AIR 1968 SC 292) relied upon by the High

Court is not on the point involved in this case. In that case the tenure of Dr Bool Chand was curtailed as he was found unfit to continue as Vice-Chancellor having regard to his antecedents which were not disclosed by him at the time of his appointment as Vice-Chancellor. Similarly the judgment in Dr D.C. Saxena v. State of Haryana (1987) 3 SCC 251) has no relevance to the facts of this case." (Emphasis Added)

40. Once again the same question came up for consideration before the Supreme Court. This time in the context of a statutory amendment made to the Act. In P.Venugopal -vs- Union of India reported in (2008) 5 SCC 1, the Supreme Court after following the decisions in L.P.Agarwal's case (cited supra) in para 32, observed as follows:-

''32. From the above quotation, as made in para 16 of the said decision of this Court, it is evident that this Court has laid down that the term of 5 years for a Director of AIIMS is a permanent term. Service conditions make the post of Director a tenure post and as such the question of superannuating or prematurely retiring the incumbent of the said post does not arise at all. Even an outsider (not an existing employee of AIIMS) can be selected and appointed to the post of Director. The appointment is for a tenure to which principle of superannuation does not apply. Tenure means a term during which the office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said post begins when he joins and it comes to an end on the completion of tenure unless curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure''.

(Emphasis Added)

41. Therefore, as correctly contended by the petitioner the post had been kept warmed up for the second respondent to occupy. He must have also had a prior intimation about his selection for the second term, which can be seen from the purchase of the stamp paper much in advance to entering into the agreement. But such issues are not necessary to be gone into in detail since the very appointment of the second respondent was not by the Council but by a smaller body, which was not authorised to make the appointment either by the Act or by the Rules framed under the IT Act.

42. In the light of the above, the writ petition will stand allowed with costs. The petitioner is entitled for a cost of Rs.5000/- (Rupees five thousand only) to be paid by the second respondent. Consequently, the connected miscellaneous petition is closed.

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To

The Secretary to Government of India,
Higher Education, Ministry of Human Resources
Development, Government of India,
New Delhi 110 001