REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 1072 OF 2013

MADRAS BAR ASSOCIATION .....PETITIONER(S)

VERSUS

UNION OF INDIA & ANR. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

This writ petition filed by the petitioner, namely, the Madras Bar Association, is sequel to the earlier proceedings which culminated in the judgment rendered by the Constitution Bench of this Court in ***Union of India*** v. ***R. Gandhi, President, Madras Bar Association***[1] (hereinafter referred to as the '2010 judgment'). In the earlier round of litigation, the petitioner had challenged the constitutional validity of creation of National Company Law Tribunal ('NCLT' for short) and National Company Law Appellate Tribunal ('NCLAT' for short), along with certain other provisions pertaining thereto which were incorporated by the Legislature in Parts 1B and 1C of the Companies Act, 1956 (hereinafter referred to as the 'Act, 1956') by Companies (Second Amendment) Act,

[1] (2010) 11 SCC 1

2002.

2) Writ petition, in this behalf, was filed by the petitioner in the High Court of Madras which culminated into the judgment dated 30.03.2004. The High Court held that creation of NCLT and vesting the powers hitherto exercised by the High Court and the Company Law Board ('CLB' for short) in the said Tribunal was not unconstitutional. However, at the same time, the High Court pointed out certain defects in various provisions of Part 1B and Part 1C of the Act, 1956 and, in particular, in Sections 10FD(3)(f)(g)(h), 10FE, 10FF, 10FL(2), 10FR(3), 10FT. Declaring that those provisions as existed offended the basic Constitutional scheme of separation of powers, it was held that unless these provisions are appropriately amended by removing the defects which were also specifically spelled out, it would be unconstitutional to constitute NCLT and NCLAT to exercise the jurisdiction which is being exercised by the High Court or the CLB. The petitioner felt aggrieved by that part of the judgment vide which establishments of NCLT and NCLAT was held to be Constitutional. On the other hand, Union of India felt dissatisfied with the other part of the judgment whereby aforesaid provisions contained in Parts 1B and 1C of the Act, 1956 were perceived as suffering from various legal and Constitutional infirmities. Thus, both Union of India as well as the petitioner filed appeals against that judgment of the Madras High Court. Those appeals were decided by the

Constitution Bench, as mentioned above.

3) The Constitution Bench vide the said judgment put its stamp of approval insofar as Constitutional validity of NCLT and NCLAT is concerned. It also undertook the exercise of going through the aforesaid provisions contained in Parts 1B and 1C of the Act, 1956 and in substantial measure agreed with the Madras High Court finding various defects in these provisions. These defects were listed by the Court in para 120 of the judgment which reads as under:

> "120. We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:
>
> (i) Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.
>
> (ii) As the NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered

for appointment as Technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.

(iii) A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law cannot be considered as "experts" qualified to be appointed as technical members. Therefore clauses (a) and (b) of sub-section (3) are not valid."

(iv) A `Technical Member' presupposes an experience in the field to which the Tribunal relates. A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as `experts' qualified to be appointed as Technical Members. Therefore Clauses (a) and (b) of sub-section (3) are not valid. (v) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 15 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as technical members.

(vi) In regard to category of persons referred in clause (g) of sub-section (3) at least five years experience should be specified.

(vii) Only clauses (c), (d), (e), (g), (h), and latter part of clause (f) in sub-section (3) of section 10-FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as technical members of the Tribunal.

(viii) Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);

(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;

(c) Secretary in the Ministry of Finance and Company Affairs - Member; and

(d) Secretary in the Ministry of Law and Justice - Member.

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(x) The second proviso to Section 10FE enabling the President and members to retain lien with their parent cadre/ministry/department

while holding office as President or Members will not be conducive for the independence of members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.

(xi) To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(xii) The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.

(xiii) Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members."

4) On the basis of the aforesaid, partly allowing the appeals, the same were disposed of in the following terms:

"57. We therefore dispose of these appeals, partly allowing them, as follows:

(i) We uphold the decision of the High Court that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional.

(ii) We declare that Parts 1B and 1C of the Act as presently structured, are unconstitutional for the reasons stated in the preceding para. However, Parts IB and IC of the Act, may be made operational by making suitable amendments, as indicated above, in addition to what the Union Government has already agreed in

pursuance of the impugned order of the High Court."

5) Though the verdict came in the year 2010, upholding the creation of NCLT and NCLAT, these two bodies could not be created and made functional immediately thereafter and the matter got stuck in imbroglio of one kind or the other. It is not necessary to trace out those factors as some of those are the subject matter of Writ Petition No.267/2012 which writ petition is also filed by this very petitioner and is pending consideration. Said writ petition was listed before this Bench along with the present writ petition and arguments to some extent were heard in petition as well. However, since the issues raised in the said petition necessitate further response from the Union of India, with the consent of the parties, it was deemed proper to defer the hearing in that petition, awaiting the response. Insofar as the present writ petition is concerned, though somewhat connected with writ petition No.267/2012, prayers made in this writ petition are entirely different and there was no handicap or obstruction in proceeding with the hearing of the instant writ petition. For this reason, the arguments were finally heard in this case.

6) Adverting to the present writ petition, it so happened that the Parliament has passed new company law in the form of Indian Companies Act, 2013 (hereinafter referred to as the 'Act, 2013') which replaces the earlier Act, 1956. In this Act, again substantive provisions have been made with regard to the establishment of NCLT and NCLAT. It is obvious that with

the constitution of NCLT and NCLAT, the provisions relating to the structure and constitution of NCLT and NCLAT, the provisions relating to qualifications for appointment of President/Chairperson and Members (judicial as well as technical) of both NCLT and NCLAT, and also provisions relating to the constitution of the Selection Committee for selection of the said Members have also been incorporated in the Act, 2013. These are analogous to Section 10FD, 10FE, 10FF, 10FL, 10FR and 10FT which were introduced in the Act, 1956 by Companies (Amendment) Act, 2002. The cause for filing the present petition by the petitioner is the allegation of the petitioner that notwithstanding various directions given in 2010 judgment, the new provisions in the Act, 2013 are almost on the same lines as were incorporated in the Act, 1956 and, therefore, these provisions suffer from the vice of unconstitutionality as well on the application of the ratio in 2010 judgment. It is, thus, emphasized by the petitioner that these provisions which are contained in Sections 408, 409, 411(3), 412, 413, 425, 431 and 434 of the Act, 2013 are *ultra vires* the provisions of Article 14 of the Constitution and, therefore, warrant to be struck down as unconstitutional. The precise prayer contained in the writ petition reads as under:

> "(i) a WRIT, ORDER OR DIRECTION more particularly in the nature of WRIT OF DECLARATION declaring that the provisions of Chapter XXVII of the Companies Act, 2013, more particularly Sections 408, 409, 411(3), 412, 413, 425, 431 and 434 of the Act as *ultra vires* the provisions of Article 14 of the Constitution and accordingly striking down the said provisions as unconstitutional;

(ii) Pass any order or such further order or orders as may be deemed fit and proper in the facts and circumstances of the present case."

7) Before we proceed further, we would like to set down the aforesaid provisions of the Act, 2013 along with Section 2(4), Section 2(90) and Section 407 which contained certain definitions that are relevant in the context of controversy raised in the present petition:

> "2(4) "Appellate Tribunal" means the National Company Law Appellate Tribunal constituted under section 410;
>
> "2(90) "Tribunal" means the National Company Law Tribunal constituted under section 408;
>
> 407. In this Chapter, unless the context otherwise requires,—
>
> (a) "Chairperson" means the Chairperson of the Appellate Tribunal;
>
> (b) "Judicial Member" means a member of the Tribunal or the Appellate Tribunal appointed as such and includes the President or the Chairperson, as the case may be;
>
> (c) "Member" means a member, whether Judicial or Technical of the Tribunal or the Appellate Tribunal and includes the President or the Chairperson, as the case may be;
>
> (d) "President" means the President of the Tribunal;
>
> (e) "Technical Member" means a member of the Tribunal or the Appellate Tribunal appointed as such.
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> 408. **Constitution of National Company Law Tribunal**
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> The Central Government shall, by notification, constitute, with effect from such date as may be

specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

409. **Qualification of President and Members of Tribunal**

(1) The President shall be a person who is or has been a Judge of a High Court for five years.

(2) A person shall not be qualified for appointment as a Judicial Member unless he—

(a) is, or has been, a judge of a High Court; or
(b) is, or has been, a District Judge for at least five years; or
(c) has, for at least ten years been an advocate of a court.

Explanation.—For the purposes of clause (c), in computing the period during which a person has been an advocate of a court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he become an advocate.

(3) A person shall not be qualified for appointment as a Technical Member unless he -

(a) has, for at least fifteen years been a member of the Indian Corporate Law Service or Indian Legal Service out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or

equivalent or above in that service; or

(b) is, or has been, in practice as a chartered accountant for at least fifteen years; or

(c) is, or has been, in practice as a cost accountant for at least fifteen years; or

(d) is, or has been, in practice as a company secretary for at least fifteen years; or

(e) is a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies; or

(f) is, or has been, for at least five years, a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947.

410. **Constitution of Appellate Tribunal**

The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against the orders of the Tribunal.

411. **Qualifications of chairperson and Members of Appellate Tribunal**

(1) The chairperson shall be a person who is or has

been a Judge of the Supreme Court or the Chief Justice of a High Court.

(2) A Judicial Member shall be a person who is or has been a Judge of a High Court or is a Judicial Member of the Tribunal for five years.

(3) A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of not less than twenty-five years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies.

412. **Selection of Members of Tribunal and Appellate Tribunal**

(1) The President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal, shall be appointed after consultation with the Chief Justice of India.

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—

(a) Chief Justice of India or his nominee—Chairperson;

(b) a senior Judge of the Supreme Court or a Chief Justice of High Court—Member;

(c) Secretary in the Ministry of Corporate Affairs—Member;

(d) Secretary in the Ministry of Law and Justice—Member; and

(e) Secretary in the Department of Financial Services

in the Ministry of Finance—Member.

(3) The Secretary, Ministry of Corporate Affairs shall be the Convener of the Selection Committee.

(4) The Selection Committee shall determine its procedure for recommending persons under sub-section (2).

(5) No appointment of the Members of the Tribunal or the Appellate Tribunal shall be invalid merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

413. **Term of office of President, chairperson and other Members**

(1) The President and every other Member of the Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years.

(2) A Member of the Tribunal shall hold office as such until he attains,—

(a) in the case of the President, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years:

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member:

Provided further that the Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such for a period not exceeding one year.

(3) The chairperson or a Member of the Appellate

Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for anonther term of five years.

(4) A Member of the Appellate Tribunal shall hold office as such until he attains,—

(a) in the case of the Chairperson, the age of seventy years;

(b) in the case of any other Member, the age of sixty-seven years:

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member:

Provided further that the Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such for a period not exceeding one year.

414. **Salary, allowances and other terms and conditions of service of Members**

The salary, allowances and other terms and conditions of service of the Members of the Tribunal and the Appellate Tribunal shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Members shall be varied to their disadvantage after their appointment.

425. **Power to punish for contempt**

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and

> may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—
>
> (a) the reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and
>
> (b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf."

8) In the prayer clause, constitutional validity of Sections 415, 418, 424, 426, 431 and 434 have also been questioned. At the time of hearing, no arguments were addressed by Mr. Datar, learned senior counsel for the petitioner on the aforesaid provisions. Therefore, in respect of these provisions, we are eschewing our discussion.

9) On the reading of the aforesaid provisions and having regard to the arguments advanced at the Bar, we can conveniently categorise the challenge in three compartments, as under:

(i) Challenge to the validity of the constitution of NCT and NCLAT;

(ii) Challenge to the prescription of qualifications including term of their office and salary allowances etc. of President and Members of the NCLT and as well as Chairman and Members of the NCLAT;

(iii) Challenge to the structure of the Selection Committee for appointment of President/Members of the NCLT and Chairperson/

Members of the NCLAT.

Incidental issues pertaining to the power given to these bodies to punish for contempt as mentioned in Section 425 and giving power to Central Government to constitute the Benches are also raised by the petitioner.

As would be discussed hereinafter, all these issues stand covered by Madras Bar Association (supra) and answer to these questions is available therein. In fact, after detailed discussion on each issue, the Court pronounced the verdict. Therefore, while doing a diagnostic of sorts of the issues raised, we shall be administering the treatment that is prescribed in that judgment.

ISSUE NO.1

Re.: Constitutional validity of NCT and NCLAT

Section 408 of the Act, 2013 deals with the constitution of NCLT. By virtue of this Section, Central Government is empowered to issue notification for constituting a Tribunal to be known as 'National Company Law Tribunal'. This Tribunal would consist of President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it. By Notification dated 12.09.2013, the Central Government has constituted the NCLT. Likewise, Section 410 of the Act, 2013 arms the Central Government with power to constitute NCLAT by notification. This NCLAT is also to consist of a Chairman and such number of Judicial and Technical

Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification. By the aforesaid Notification dated 12.09.2013, NCLAT has also been constituted by the Central Government.

10) It is pertinent to point out that in the prayer clause, though challenge is laid to the vires of Section 408, it conspicuously omits Section 410 and, thus, in essence, there is no challenge to the constitution of NCLAT insofar as relief claimed is concerned. Moreover, as pointed out above, the entire writ petition takes umbrage under the Constitution Bench judgment in 2010 judgment. However, at the time of arguments, Mr. Datar primarily challenged the Constitutional validity of NCLAT without making any serious efforts to challenge the constitution of NCLT. As far as NCLT is concerned, he almost conceded that validity thereof stands upheld in 2010 judgment and there is not much to argue. In respect of NCLAT, though he conceded that validity thereof is also upheld in the aforesaid judgment, his endeavour was to demonstrate that there is no discussion in the entire judgment insofar as NCLAT is concerned and, therefore, conclusion which is mentioned in the said judgment at the end, should not be treated as binding or to be taken as having decided this issue. His submission was that in view of the subsequent Constitution Bench judgment of this Court in ***Madras Bar Association*** v.

Union of India[2], wherein establishment of National Tax Tribunal has been held to be unconstitutional, Section 410 should also be meted out the same treatment for the reasons recorded in the said judgment pertaining to National Tax Tribunal. It is difficult to digest this argument for various reasons, which we record in the discussion hereafter.

11) First of all the creation of Constitution of NCLAT has been specifically upheld in 2010 judgment. It cannot be denied that this very petitioner had specifically questioned the Constitutional validity of NCLAT in the earlier writ petition and even advanced the arguments on this very issue. This fact is specifically noted in the said judgment. The provision pertaining to the constitution of the Appellate Tribunal i.e. Section 10FR of the Companies Act, 1956 was duly taken note of. Challenge was laid to the establishments of NCLT as well as NCLAT on the ground that the Parliament had resorted to tribunalisation by taking away the powers from the normal courts which was essentially a judicial function and this move of the Legislature impinged upon the impartiality, fairness and reasonableness of the decision making which was the hallmark of judiciary and essentially a judicial function. Argument went to the extent that it amounted to negating the Rule of Law and trampling of the Doctrine of Separation of Powers which was the basic feature of the Constitution of India. What we are emphasising is that the petitions

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[2] (2014) 10 SCC 1

spearheaded the attack on the constitutional validity of both NCLT as well as NCLAT on these common grounds. The Court specifically went into the gamut of all those arguments raised and emphatically repelled the same.

12) The Court specifically rejected the contention that transferring judicial function, traditionally performed by the Courts, to the Tribunals offended the basic structure of the Constitution and summarised the position in this behalf as under:

> "We may summarize the position as follows:
>
> (a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.
>
> (b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.
>
> (c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals

> should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.
>
> (d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/ eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive."

13) Thereafter, the Constitution Bench categorically dealt with the Constitutional validity of NCLT and NCLAT under the caption "Whether the constitution of NCLT and NCLAT under Parts 1B & 1C of Companies Act are valid", and embarked upon the detailed discussion on this topic. It becomes manifest from the above that the question of validity of NCLAT was directly and squarely in issue. Various facets of the challenge laid to the validity of these two fora were thoroughly thrashed out. No doubt, most of the discussion contained in paras 107 to 119 refers to NCLT. However, on an insight into the said discussion contained in these paragraphs, would eloquently bear it out that it is inclusive of NCLAT as well. In para 121 of the judgment, which is

already extracted above, the Court specifically affirmed the decision of the High Court which held that creation of NCLT and NCLAT was not unconstitutional. In view of this, it is not open to the petitioner even to argue this issue as it clearly operate as *res judicata.*

14) Frankly, Mr. Datar was conscious of the aforesaid limitation. He still ventured to attack the setting up of NCLAT on the ground that insofar as this appellate forum is concerned, there are no reasons given in the said judgment and thereafter this aspect has been dealt with in more details in the NTT judgment wherein formation of National Tax Tribunal has been held to be unconstitutional. This adventurism on the part of the petitioner is totally unfounded. In the first instance, as mentioned above, insofar as NCLAT is concerned, its validity has already been upheld and this issue cannot be reopened. Judgment in the case of 2010 judgment is of a Constitution Bench and that judgment of a co-ordinate Bench binds this Bench as well.

15) Secondly, reading of the Constitution Bench judgment in the matter of National Tax Tribunal would manifest that not only 2010 judgment was taken note of but followed as well. The Court spelled out the distinguishing features between NCLT/NCLAT on the one hand and NTT on the other hand in arriving at a different conclusion.

16) Thirdly, the NTT was a matter where power of judicial review hitherto

exercised by the High Court in deciding the pure substantial question of law was sought to be taken away to be vested in NTT which was held to be impermissible. In the instant case, there is no such situation. On the contrary, NCLT is the first forum in the hierarchy of quasi-judicial fora set up in the Act, 2013. The NCLT, thus, would not only deal with question of law in a given case coming before it but would be called upon to thrash out the factual disputes/aspects as well. In this scenario, NCLAT which is the first appellate forum provided under the Act, 2013 to examine the validity of the orders passed by NCLT, will have to revisit the factual as well as legal issues. Therefore, situation is not akin to NTT. Jurisdiction of the Appellate Tribunal is mentioned in Section 410 itself which stipulates that NCLAT shall be constituted 'for hearing appeals against the orders of the Tribunal'. This jurisdiction is not circumscribed by any limitations of any nature whatsoever and the implication thereof is that appeal would lie both on the questions of facts as well as questions of law. Likewise, under sub-section (4) of Section 421, which provision deals with 'appeal from orders of Tribunal', it is provided that the NCLAT, after giving reasonable opportunity of being heard, 'pass such orders thereon as it thinks fit, forming, modifying or set aside the order appealed against'. It is thereafter further appeal is provided from the order of the NCLAT to the Supreme Court under Section 423 of the Act, 2013. Here, the scope of the appeal to the

Supreme Court is restricted only 'to question of law arising out of such order'.

17) Fourthly, it is not unknown rather a common feature/practice to provide one appellate forum wherever an enactment is a complete Code for providing judicial remedies. Providing one right to appeal before an appellate forum is a well accepted norm which is perceived as a healthy tradition.

18) For all these reasons, we hold that there is no merit in this issue.

ISSUE NO.2

19) Qualifications of President and Members of NCLT are mentioned in Section 409 of the Act, 2013 and that of Chairperson and Members of NCLAT are stipulated in Section 411 of the Act, 2013. The petitioner has no quarrel about the qualifications mentioned for the President and Judicial Members of the Tribunal as well as Chairperson and Judicial Members of the Appellate Tribunal. However, it is argued that insofar as technical Members of NCLT/NCLAT are concerned, the provision is almost the same which was inserted by way of an amendment in the Act, 1956 and challenge to those provisions was specifically upheld finding fault therewith. In order to appreciate this argument, we show the comparative provisions contained in Act, 1956 as well as in the Act, 2013:

ACT 1956	**ACT 2013**
(1) **10-FD (3) (a) (b) (c) and (d)**	(1) **Section 409 (3)**
(3) A person shall not be qualified for appointment as Technical Member unless he-	(*3*) A person shall not be qualified for appointment as a Technical Member unless he-
(a) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that Service]; or	(*a*) has, for at least fifteen years been a member of the Indian Corporate Law Service or Indian Legal Service out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service; or
(b) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or	(*b*) is, or has been, in practice as a chartered accountant for at least fifteen years; or
(c) is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or	(*c*) is, or has been, in practice as a cost accountant for at least fifteen years; or
(d) is, or has been, for at least fifteen years in practice as a cost accountant under, the Costs	(*d*) is, or has been, in practice as a company secretary for at least fifteen years; or

and Works Accountants Act, 1959 (23 of 1959); or

(*e*) is a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies; or

(*f*) is, or has been, for at least five years, a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947.

(2) **10-FR**

(2) **Section 411(3)**

10FR. Constitution of Appellate Tribunal: (1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

411(3) A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of not less than twenty-five years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies.

(2) The Chairperson of the Appellate Tribunal shall be a

person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

20) It was pointed out that in the 2010 judgment, the Constitution Bench took the view that since the NCLT would now be undertaking the work which is being performed, *inter alia,* by High Court, the technical Members of the NCLT/NCLAT should be selected from amongst only those officers who hold rank of Secretaries or Additional Secretaries and have technical expertise. These aspects are discussed by the Court in the following paragraphs:

> "108. The legislature is presumed not to legislate contrary to the rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaningful only if there is an independent and impartial judiciary to render

justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment of Judicial Members.

109. A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done.

xx xx xx

111. As far as the technical members are concerned, the officer should be of at least Secretary Level officer with known competence and integrity. Reducing the standards, or qualifications for appointment will result in loss of confidence in the Tribunals. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different

from experience, maturity and status required for the post. As, for example, for the post of a Judge of the High Court, 10 years' practice as an Advocate is prescribed. There may be Advocates who even with 4 or 5 years' experience, may be more brilliant than Advocates with 10 years' standing. Still, it is not competence alone but various other factors which make a person suitable. Therefore, when the legislature substitutes the Judges of the High Court with Members of the Tribunal, the standards applicable should be as nearly as equal in the case of High Court Judges. That means only Secretary Level officers (that is those who were Secretaries or Additional Secretaries) with specialized knowledge and skills can be appointed as Technical Members of the tribunal.

xx xx xx

118. Parts IC and ID of the Companies Act proposes to shift the company matters from the courts to Tribunals, where a `Judicial Member' and a `Technical Member' will decide the disputes. If the members are selected as contemplated in section 10FD, there is every likelihood of most of the members, including the so called `Judicial Members' not having any judicial experience or company law experience and such members being required to deal with and decide complex issues of fact and law. Whether the Tribunals should have only judicial members or a combination of judicial and technical members is for the Legislature to decide. But if there should be technical members, they should be persons with expertise in company law or allied subjects and mere experience in civil service cannot be treated as Technical Expertise in company law. The candidates falling under sub-section 2(c) and (d) and sub-sections 3(a) and (b) of section 10FD have no experience or expertise in deciding company matters.

119. There is an erroneous assumption that company law matters require certain specialized skills which are lacking in Judges. There is also an equally erroneous assumption that members of the civil services, (either a Group-A officer or Joint Secretary level civil servant who had never handled any company disputes) will have the judicial experience or expertise in company law to be appointed either as Judicial Member or Technical

> Member. Nor can persons having experience of fifteen years in science, technology, medicines, banking, industry can be termed as experts in Company Law for being appointed as Technical Members. The practice of having experts as Technical Members is suited to areas which require the assistance of professional experts, qualified in medicine, engineering, and architecture etc. Lastly, we may refer to the lack of security of tenure. The short term of three years, the provision for routine suspension pending enquiry and the lack of any kind of immunity, are aspects which require to be considered and remedied."

21) On the basis of the aforesaid discussions, parts 1C and 1D of the Act, 1956 as they existed were treated as invalid and in order to bring these provisions within the realm of Constitutionality, the Court pointed out the corrections which were required to be made to remove those anamolies. Para 120 of the judgment is most relevant to answer the issue at hand and, therefore, we reproduce the said para in its entirety:

> "120. We may tabulate the corrections required to set right the defects in Parts IB and IC of the Act :
>
> (i) Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and Indian Legal Service (Grade-1) cannot be considered for appointment as judicial members as provided in sub-section 2(c) and (d) of Section 10FD. The expertise in Company Law service or Indian Legal service will at best enable them to be considered for appointment as technical members.

(ii) As NCLT takes over the functions of High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as Technical members of the National Company Law Tribunal. Clauses (c) and (d) of sub-section (2) and Clauses (a) and (b) of sub-section (3) of section 10FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in Central or State Government, being qualified for appointment as Members of Tribunal is invalid.

(iii) A `Technical Member' presupposes an experience in the field to which the Tribunal relates. A member of Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of Company Law cannot be considered as `experts' qualified to be appointed as Technical Members. Therefore Clauses (a) and (b) of sub-section (3) are not valid.

(iv) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 20 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as Technical Members in Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/ revival of companies and therefore, eligible for being considered for appointment as Technical Members.

(vi) In regard to category of persons referred in clause (g) of sub-section (3) at least five years experience

should be specified.

(vii) Only Clauses (c), (d), (e), (g), (h), and later part of clause (f) in sub-section (3) of section 10FD and officers of civil services of the rank of the Secretary or Additional Secretary in Indian Company Law Service and Indian Legal Service can be considered for purposes of appointment as Technical Members of the Tribunal.

(viii) Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee - Chairperson (with a casting vote);

(b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;

(c) Secretary in the Ministry of Finance and Company Affairs - Member; and

(d) Secretary in the Ministry of Law and Justice - Member.

(ix) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the concerned field. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(x) The second proviso to Section 10FE

> enabling the President and members to retain lien with their parent cadre/ ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as members should be prepared to totally disassociate himself from the Executive. The lien cannot therefore exceed a period of one year.
>
> (xi) To maintain independence and security in service, sub-section (3) of section 10FJ and Section 10FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.
>
> (xii) The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.
>
> (xiii) Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members."

22) What gets revealed from the reading of para 120, particularly, sub-para (ii) thereof that only officers who are holding the ranks of Secretaries or Additional Secretaries alone are to be considered for appointment as technical Members of NCLT. Provisions contained in clauses (c) and (d) of sub-section (2) and Clause (a) and (b) of sub-section (3) of Section 10FD which made Joint Secretaries with certain experience as eligible, were specifically declared as invalid. Notwithstanding the same, Section 409(3) of the Act, 2013 again makes Joint Secretary to the Government

of India or equivalent officer eligible for appointment, if he has 15 years experience as member of Indian Corporate Law Service or Indian Legal Service, out of which at least 3 years experience in the pay scale of Joint Secretary. This is clearly in the teeth of dicta pronounced in 2010 judgment.

23) In the counter affidavit, the respondents have endeavored to justify this provision by stating that this variation was made in view of the lack of available officers at Additional Secretary level in Indian Companies Law Service. It is further mentioned that functionally the levels of Additional Secretary and Joint Secretary are similar. These officers have knowledge of specific issues concerning operations and working of companies and their expertise in company law which is expected to benefit NCLT. Such an explanation is not legally sustainable, having regard to the clear mandate of 2010 judgment.

We would like to point out that apart from giving other reasons for limiting the consideration for such posts to Secretary and Additional Secretary, there was one very compelling factor in the mind of the Court viz. gradual erosion of independence of judiciary, which was perceived as a matter of concern. This aspect was demonstrated with specific examples in certain enactments depicting gradual dilution of the standards and qualifications prescribed for persons to decide cases which were earlier being decided by the High Court. We, thus, deem it

apposite to reproduce that discussion which provides a complete answer to the aforesaid argument taken by the respondents. The said discussion, contained in para 112, with its sub-paras, reads as under:

> "112. What is a matter of concern is the gradual erosion of the independence of the judiciary, and shrinking of the space occupied by the Judiciary and gradual increase in the number of persons belonging to the civil service discharging functions and exercising jurisdiction which was previously exercised by the High Court. There is also a gradual dilution of the standards and qualification prescribed for persons to decide cases which were earlier being decided by the High Courts. Let us take stock.
>
> 112.1 To start with, apart from jurisdiction relating to appeals and revisions in civil, criminal and tax matters (and original civil jurisdiction in some High Courts). The High Courts were exercising original jurisdiction in two important areas; one was writ jurisdiction under Articles 226 and 227 (including original jurisdiction in service matters) and the other was in respect to company matters.
>
> 112.2 After constitution of Administrative Tribunals under the Administrative Tribunals Act, 1985 the jurisdiction in regard to original jurisdiction relating to service matters was shifted from High Courts to Administrative Tribunals. Section 6 of the said Act deals with qualifications for appointment as Chairman, and it is evident therefrom that the Chairman has to be a High Court Judge either a sitting or a former Judge. For judicial member the qualification was that he should be a judge of a High Court or is qualified to be a Judge of the High Court (i.e. an advocate of the High Court with ten years practice or a holder of a judicial office for ten years) or a person who held the post of Secretary, Govt. of India in the Department of Legal Affairs or in the Legislative Department or Member Secretary, Law Commission of India for a period of two years; or an Additional Secretary to Government of India in the Department of Legal Affairs or Legislative Department for a period of five years.

112.3 For being appointed as Administrative Member, the qualification was that the candidate should have served as Secretary to the Government of India or any other post of the Central or State Government carrying the scale of pay which is not less than as of a Secretary of Government of India for atleast two years, or should have held the post of Additional Secretary to the Government of India or any other post of Central or State Government carrying the scale of pay which is not less than that of an Additional Secretary to the Government of India at least for a period of five years. In other words, matters that were decided by the High Courts could be decided by a Tribunal whose members could be two Secretary level officers with two years experience or even two Additional Secretary level officers with five years experience. This was the first dilution.

112.4 The members were provided a term of office of five years and could hold office till 65 years and the salary and other perquisites of these members were made the same as that of High Court Judges. This itself gave room for a comment that these posts were virtually created as sinecure for members of the executive to extend their period of service by five years from 60 to 65 at a higher pay applicable to High Court Judges. Quite a few members of the executive thus became members of the "Tribunals exercising judicial functions".

112.5 We may next refer to Information Technology Act, 2000 which provided for establishment of Cyber Appellate Tribunal with a single member. Section 50 of that Act provided that a person who is, or has been, or is qualified to be, a Judge of a High Court, or a person who is, or has been, a member of the India Legal Service and is holding or has held a post in Grade I of that service for at least three years could be appointed as the Presiding Officer. That is, the requirement of even a Secretary level officer is gone. Any member of Indian Legal Service holding a Grade-I Post for three years can be a substitute for a High Court Judge.

112.6 The next dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a National Company Law Tribunal with a President and a

large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of National Company Law Tribunal which is a substitute for the High Court, for hearing winding up matters and other matters which were earlier heard by High Court. A member need not even be a Secretary or Addl. Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years (which means anyone belonging to Indian P&T Accounts & Finance Service, Indian Audit and Accounts Service, Indian Customs & Central Excise Service, Indian Defence Accounts Service, Indian Revenue Service, Indian Ordnances Factories Service, Indian Postal Service, Indian Civil Accounts Service, Indian Railway Traffic Service, Indian Railway Accounts Service, Indian Railway Personal Service, Indian Defence Estates Service, Indian Information Service, Indian Trade Services, or other Central or State Service) with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has `dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil services - Joint Secretary level officers or officers holding Group `A' posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group `A' posts to serve up to 65 years in Tribunals exercising judicial functions.

112.7 The dilution of standards may not end here. The proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The speed at which the qualifications for appointment as Members is being

> diluted is, to say the least, a matter of great concern for the independence of the Judiciary."

24) Having regard to the aforesaid clear and categorical dicta in 2010 judgment, tinkering therewith would evidently have the potential of compromising with standards which 2010 judgment sought to achieve, nay, so zealously sought to secure. Thus, we hold that Section 409(3)(a) and (c) are invalid as these provisions suffer from same vice. Likewise, Section 411(3) as worded, providing for qualifications of technical Members, is also held to be invalid. For appointment of technical Members to the NCLT, directions contained in sub-para (ii), (iii), (iv), (v) of para 120 of 2010 judgment will have to be scrupulously followed and these corrections are required to be made in Section 409(3) to set right the defects contained therein. We order accordingly, while disposing of issue No.2.

ISSUE NO.3

25) This issue pertains to the constitution of Selection Committee for selecting the Members of NCLT and NCLAT. Provision in this respect is contained in Section 412 of the Act, 2013. Sub-section (2) thereof provides for the Selection Committee consisting of:

(*a*) Chief Justice of India or his nominee-Chairperson;

(*b*) a senior Judge of the Supreme Court or a Chief Justice of High Court—Member;

(*c*) Secretary in the Ministry of Corporate Affairs—Member;

(*d*) Secretary in the Ministry of Law and Justice—Member; and (*e*) Secretary in the Department of Financial Services in the Ministry of Finance—Member.

Provision in this behalf which was contained in Section 10FX, validity thereof was questioned in 2010 judgment, was to the following effect:

> "**10FX. Selection Committee:** (1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of:
>
> (a) Chief Justice of India or his nominee Chairperson;
>
> (b) Secretary in the Ministry of Finance and Member; Company Affairs
>
> (c) Secretary in the Ministry of Labour Member;
>
> (d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;
>
> (e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.
>
> (2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee."

26) The aforesaid structure of the Selection Committee was found fault with by the Constitution Bench in 2010 judgment. The Court specifically remarked that instead of 5 members Selection Committee, it should be 4 members Selection Committee and even the composition of such a Selection Committee was mandated in Direction No.(viii) of para 120 and

this sub-para we reproduce once again hereinbelow:

> "(viii) Instead of a five-member Selection Committee with Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in section 10FX, the Selection Committee should broadly be on the following lines:
>
> (a) Chief Justice of India or his nominee - Chairperson (with a casting vote);
>
> (b) A senior Judge of the Supreme Court or Chief Justice of High Court – Member;
>
> (c) Secretary in the Ministry of Finance and Company Affairs - Member; and
>
> (d) Secretary in the Ministry of Law and Justice – Member."

27) Notwithstanding the above, there is a deviation in the composition of Selection Committee that is prescribed under Section 412 (2) of the Act, 2013. The deviations are as under:

(i) Though the Chief Justice of India or his nominee is to act as Chairperson, he is not given the power of a casting vote. It is because of the reason that instead of four member Committee, the composition of Committee in the impugned provision is that of five members.

(ii) This Court had suggested one Member who could be either Secretary in the Ministry of Finance or in Company Affairs (we may point out that the word "and" contained in Clause (c) of sub-para (viii) of para 120 seems to be typographical mistake and has to be read as "or", as otherwise it won't make any sense).

(iii) Now, from both the Ministries, namely from the Ministry of Corporate Affairs as well as Ministry of Finance, one Member each is included. Effect of this composition is to make it a five members Selection Committee which was not found to be valid in 2010 judgment. Reason is simple, out of these five Members, three are from the administrative branch/bureaucracy as against two from judiciary which will result in predominant say of the members belonging to the administrative branch, is situation that was specifically diverted from.

The composition of Selection Committee contained in Section 412(2) of the Act, 2013 is sought to be justified by the respondents by arguing that the recommended composition in the 2010 judgment was in broad terms. It is argued that in view of subsuming of BIFR and AAIFR which are in the administrative jurisdiction of Department of Financial Services, Secretary DFS has been included. No casting vote has been provided for the Chairman as over the period of time the selection processes in such committees have crystallized in a manner that the recommendations have been unanimous and there is no instance of voting in such committees in Ministry of Corporate Affairs. Moreover other similar statutory bodies/tribunals also do not provide for 'casting vote' to Chairperson of Selection Committee. Further, the Committee will be deciding its own modalities as provided in the Act. The following argument is also raised to justify this provision: (i) Robust and healthy

practices have evolved in deliberations of Selection Committees. Till now there is no known case of any material disagreement in such committees. (ii) The intention is to man the Selection Committee with persons of relevant experience and knowledge.

28) We are of the opinion that this again does not constitute any valid or legal justification having regard to the fact that this very issue stands concluded by the 2010 judgment which is now a binding precedent and, thus, binds the respondent equally. The prime consideration in the mind of the Bench was that it is the Chairperson, viz. Chief Justice of India, or his nominee who is to be given the final say in the matter of selection with right to have a casting vote. That is the ratio of the judgment and reasons for providing such a composition are not far to seek. In the face of the all pervading prescript available on this very issue in the form of a binding precedent, there is no scope for any relaxation as sought to be achieved through the impugned provision and we find it to be incompatible with the mandatory dicta of 2010 judgment. Therefore, we hold that provisions of Section 412(2) of the Act, 2013 are not valid and direction is issued to remove the defect by bringing this provision in accord with sub-para (viii) of para 120 of 2010 judgment.

29) We now deal with some other issues raised in the petition. It was feebly argued by Mr. Datar that power to punish for contempt as given to the NCLT and NCLAT under Section 425 of the Act is not healthy and should

be done away with. It was also argued that power given to the Central Government to constitute the Benches is again impermissible as such power should rest with President, NCLT or Chairman, NCLAT. However, we hardly find any legal strength in these arguments. We have to keep in mind that these provisions are contained in a statute enacted by the Parliament and the petitioner could not point out as to how such provisions are unconstitutional.

30) The upshot of the aforesaid discussion is to allow this writ petition partly, in the manner mentioned above.

31) Before we part, we must mention that the affidavit dated 07.05.2015 is filed on behalf of the respondents mentioning therein the steps that have been taken till date towards setting up of NCLT and NCLAT. It is pointed out that the approval for creation of one post of Chairperson and five posts of Members of NCLAT as well as one post of President and 62 posts of Members of NCLT and two posts of Registrar one each for NCLT and NCLAT and one post of Secretary, NCLT was obtained and the approval was also obtained for creation of 246 posts of supporting staff of NCLT and NCLAT. It is also mentioned that following draft Rules have already been prepared in consultation with the Legislative Department, Ministry of Law: (i) NCLAT (Salaries, Allowances and other terms and conditions of service of the Chairperson and other Members) Rules, 2014, (ii) NCLT (Salary, Allowances and other Terms and

Conditions of Service of President and other Members) Rules, 2013. Draft Recruitment Rules for the supporting staff were also prepared in consultation with Legislative Department, Ministry of Law. It is further mentioned that draft Rules with regard to manner of functioning of NCLT/NCLAT etc. were prepared in order to place them before the Chairperson/President of NCLAT/NCLT on their appointment for finalization as per the provisions of the Companies Act, 2013. These Rules cover provisions with regard to manner of functioning of NCLT/NCLAT; manner in which applications for various approvals shall be made by applicants and approved; and specific procedural requirements with regard to applications/matters relating to compromises/arrangements/ amalgamations; prevention of oppression and mismanagement; revival and rehabilitation of sick companies; winding up and other miscellaneous requirements. Space for Principal Bench and other Benches of NCLT, including a special Bench at Delhi to deal with transferred cases of BIFR and AAIFR had also been identified. Process initiated for renting space in some locations, which was discontinued in view of the pending petition, can be restarted at a short notice. Budget heads have been created for meeting the expenditure for NCLT and NCLAT. Allocated funds for 2014-2015 had to be surrendered in view of the delay in settling up the Tribunals.

32) From the aforesaid, it seems the only step which is left to make NCLT

and NCLAT functional is to appoint President and Members of NCLT and Chairperson and Members of NCLAT.

33) Since, the functioning of NCLT and NCLAT has not started so far and its high time that these Tribunals start functioning now, we hope that the respondents shall take remedial measures as per the directions contained in this judgment at the earliest, so that the NCLT & NCLAT are adequately manned and start functioning in near future.

34) Writ petition stands disposed of in the aforesaid manner.

.....CJI.
(H.L. DATTU)

.....J.
(A.K. SIKRI)

.....J.
(ARUN MISHRA)

.....J.
(ROHINTON FALI NARIMAN)

.....J.
(AMITAVA ROY)

NEW DELHI;
MAY 14, 2015.