

ITEM NO.5

COURT NO.1

SECTION PIL-W

**S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S**

Writ Petition(s)(Civil) No(s). 1018/2021

MADRAS BAR ASSOCIATION

Petitioner(s)

VERSUS

UNION OF INDIA & ANR.

Respondent(s)

(IA No. 135683/2021 - APPROPRIATE ORDERS/DIRECTIONS IA No.22310/2023 - APPROPRIATE ORDERS/DIRECTIONS IA No. 19936/2023 - CLARIFICATION/DIRECTION IA No. 36823/2022 - CLARIFICATION/DIRECTION IA No. 36816/2022 - INTERVENTION/IMPLEADMENT IA No. 135688/2021 - INTERVENTION/IMPLEADMENT IA No. 22307/2023 - INTERVENTION/IMPLEADMENT)

WITH

**MA 948/2022 in W.P.(C) No. 502/2021 (PIL-W)
(IA No.82039/2022 ARISING OUT OF C.P. (C) 708/2021
IA No. 82039/2022 - APPROPRIATE ORDERS/DIRECTIONS)**

Date : 06-04-2023 These matters were called on for hearing today.

**CORAM : HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE J.B. PARDIWALA**

**For Petitioner(s) Mr. Arvind P Datar, Sr. Adv.
Mr. T. V. S. Raghavendra Sreyas, AOR
Mr. Rahul Unikrishnan, Adv.
Mr. Naveen Hegde, Adv.
Mr. Siddharth Vasudev, Adv.**

By Courts Motion, AOR

**For Respondent(s) Mr. R Venkatramani, Attorney General for India
Mr. Balbir Singh, A.S.G.
Mr. K M Natraj, A.S.G.
Mr. Vikramjit Bannerjee, ASG
Mr. Raj Bahadur Yadav, AOR
Mr. Kanu Agarwal, Adv.
Mr. Saurabh Mishra, Adv.
Ms. Vanshja Shukla, Adv.**

Mr. Priyanka Das, Adv.
Mr. Chinmayee Chandra, Adv.
Mr. Ankur Talwar, Adv.
Mr. Rajat Nair, Adv.
Mrs. Suhasini Sen, Adv.
Mr. Siddhant Kohli, Adv.
Mr. Shradha Deshmukh, Adv.
Mr. Shashank Bajpai, Adv.

Mr. Archit Upadhyay, AOR

Ms. Garima Bajaj, AOR
Mr. Agnish Aditya, Adv.

M/S. Chambers Of Kartik Seth, AOR

Mr. Sidharth Luthra, Sr. Adv.
Ms. Sakshi Kakkar, AOR
Mr. Anmol, Adv.
Mr. Shakti Singh, Adv.
Mr. Kumar Kashyap, Adv.

Mr. Jasmeet Singh, AOR

Mr. Mukul Rohatgi, Sr. Adv.
Mr. Paramjit Singh Patwalia, Sr. Adv.
Mr. Rupesh Kumar, AOR
Ms. Pankhuri Shrivastava, Adv.
Ms. Neelam Sharma, Adv.
Mr. Rajeev Sharma, Adv.
Mr. Ninad Laud, Adv.

Mr. Siddharth Sangal, AOR
Ms. Nilanjani Tandon, Adv.
Mr. Chirag Sharma, Adv.
Mr. Lalit Allawadhi, Adv.
Ms. Richa Sharma, Adv.

Mr. R Venkataramani, Attorney General for India
Mr. Tushar Mehta, Solicitor General
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Mr. Rajat Nair, Adv.
Mr. Mayank Pandey, Adv.
Ms. Monica Benjamin, Adv.
Mr. Saurabh Mishra, Adv.
Mr. Anandh Venkataramani, Adv.
Mrs. Vijayalakshmi Venkataramani, Adv.
Mr. Vinayak Mehrotra, Adv.
Ms. Mansi Sood, Adv.
Mr. Chitvan Singhal, Adv.
Ms. Sonali Jain, Adv.
Mr. Abhishek Kumar Pandey, Adv.
Mr. Raman Yadav, Adv.
Mr. Arvind Kumar Sharma, AOR

Mr. Paramjit Singh Patwalia, Sr. Adv.
Mr. Mahesh Thakur, AOR
Mr. Mahesh Thakur, Adv.
Ms. Shivani, Adv.
Mrs. Vipasha Singh, Adv.
Mr. Ranvijay Singh Chandel, Adv.
Ms. Manmeet Kaur Sareen, Adv.

Mr. Bhagabati Prasad Padhy, AOR
Mr. Achintya Dvivedi, Adv.
Mr. Rahul Sharma, Adv.

Ms. Radhika Gautam, AOR

**UPON hearing the counsel the Court made the following
O R D E R**

- 1 The facts as they pertain to four Judicial Members of the Customs, Excise and Service Tax Appellate Tribunal have been set out in the previous order dated 3 March 2023. Their tenures are due to end respectively on 18 April, 1 May, 3 May and 9 May 2023.
- 2 All the four Judicial Members have applied for selection to the CESTAT in 2016. The submissions which has been urged on their behalf by Mr Mukul Rohatgi, Mr

PS Patwalia and Mr. Siddharth Luthra, senior counsel are that :

- (i) The advertisements in pursuance of which these judicial members applied for selection stipulated that the age of retirement would be 62 years;
- (ii) The governing age of retirement for members of the CESTAT in terms of the parent legislation at the relevant time provided that the age of retirement would be 62 years;
- (iii) Interim orders were passed by this Court on 9 February 2018, 20 March 2018, 16 July 2018 and 21 August 2018, the essence of which, insofar as the CESTAT is concerned, is that persons who were recruited at the material time when the age of retirement was 62 years, would continue to be governed by the original date of retirement under the parent legislation;
- (iv) Despite the decisions of this Court in ***Roger Mathew Vs South Indian Bank Limited represented by its Chief Manager & Ors¹, Madras Bar Association (1) Vs Union of India & Anr²*** and ***Madras Bar Association (2) Vs Union of India & Anr³***, the Union Government has successively come out with a legislation which is identical to previous enactments which were struck down by this Court; and
- (v) Out of the four judicial members, two, namely, those at serial nos 3 and 4 of the previous order dated 3 March 2023 had resigned from judicial

1 (2020) 6 SCC 1

2 (2021) 7 SCC 369

3 2021 SCC Online 4363

service to join the CESTAT since the age of retirement stood at 62 years whereas one Judicial Member (serial no.2) was a practising Advocate who took up the assignment based on the prevailing age of retirement of 62 years at the material time under the parent legislation.

3 Mr R Venkataramani, the Attorney General for India, on the other hand, has submitted that a limited vacancy circular was brought out by the Union Government and except Mr P Dinesha, Judicial Member (serial no.1 of the previous order), all the other members have applied for selection. Hence, it has been submitted that the Union Government would apprise this Court on the result of the selection process and in the event that any of them is selected, they will have a tenure of a further period of four years. As regards Mr P Dinesha, it has been submitted that since he chose not to respond to the limited vacancy circular, there would be no reason to continue his tenure which is to end on 18 April 2023.

4 *Prima facie*, at this stage, it appears uncontroverted that the selection of the above members of the CESTAT was in pursuance of a selection process which took place in 2016. At the material time, the parent legislation stipulated that the age of retirement would be 62 years.

5 In the most recent of the judgments in ***Madras Bar Association (2)*** (supra), Justice L Nageswara Rao in the course of the judgment has observed as follows :

“58. Insofar as the proviso to Section 184(11) is concerned, the Ordinance sets the maximum tenure at five years even with respect to the appointment orders passed between 26.05.2017 and 04.04.2021 provide for a higher tenure. In the process, interim directions given by this Court in Kudra

Sandhu (supra) are also nullified. It would be relevant to refer to the directions issued by this Court in S.R. Bhagwat v Kudrat Sandhu (supra) on 09.02.2018. After taking the consent of the learned Attorney General and making modifications incorporating his suggestions, this Court held that all selections to the post of Chairperson/ Chairman, Judicial/ Administrative Members shall be for a period as provided in the Act and the Rules in respect of all tribunals. On 16.07.2018, this Court directed that persons selected as Members of ITAT can continue till the age of 62 years and persons who were holding the post of President till 65 years. By an order dated 21.08.2018, this Court clarified that a person selected as Member, CESTAT shall continue till the age of 62 years while a person holding the post of President can continue till the age of 65 years. Though, there is nothing wrong with the proviso to Section 184(11) being given retrospective effect, the appointments made pursuant to the interim directions passed by this Court cannot be interfered with. This Court in Virender Singh Hooda (supra) upheld the retrospectivity of the legislation which had been challenged but the appointment of the petitioners therein pursuant to a direction of the Court were saved. It was held that the law does not permit the legislature to take back what has been granted in the implementation of the Court's decision and such a course is impermissible. Similarly, in S.R. Bhagwat (supra), it was declared that a mandamus against the respondent-State giving financial benefits to the petitioners therein cannot be nullified by a legislation. It is also relevant to point out that even interim orders passed by this Court cannot be overruled by a legislative act, as discussed above. While making it clear that the appointments that are made to the CESTAT on the basis of interim orders passed by this Court shall be governed by the relevant statute and the rules framed thereunder, as they existed prior to the Finance Act, 2017, we uphold the retrospectivity given to the proviso to Section 184 (11). To clarify further, all appointments after 04.04.2021 shall be governed by the Ordinance, as modified by the directions contained herein."

6 Likewise, the following principle has been set out in the concurring judgment of Justice S Ravindra Bhat :

"171. In my opinion, like in P. Venugopal (supra) the curtailment of tenure to five years, of these few individuals appointed as members of tribunals, who were entitled to continue in office in terms of the pre-existing enactments (upto the age of 62 years etc.) is arbitrary. Apart from the fact that the Union wishes to curtail their tenure despite the finality of

directions of this court in Roger Mathew and MBA-III, there is no conceivable rationale. Nor has any overriding public interest been espoused as a justification for this. The divesting of judicial office by legislative fiat, in this court's opinion, directly affects the independence of the judiciary. It also amounts to naked discrimination, because all other members of the same tribunals would enjoy longer tenure, in terms of the pre-existing conditions of service, which prevailed at the time of their appointment.

7 In view of the above circumstances, we are of the considered view that it would be wholly unjust to allow the tenures of the four judicial members to lapse between 18 April 2023 and 9 May 2023. Though some of them have applied for selection in pursuance of the limited vacancy circular, this cannot deprive them of the right to assert that they are entitled to continue until the age of 62 years particularly in view of the order of this Court dated 21 August 2018.

8 We accordingly direct that the four Judicial Members, whose names are set out in the tabulated statement in the order dated 3 March 2023, shall continue to remain in service pending final disposal of the Writ Petition.

9 The Writ Petition shall be listed for hearing and final disposal on 11 July 2023.

10 Mr Arvind Datar, Amicus Curiae has filed a short note of submissions.

11 All the counsel shall file written submissions to facilitate the final disposal of the Writ Petition at least a week before the date on which the final hearing is to take place.

(GULSHAN KUMAR ARORA)
AR-CUM-PS

(SAROJ KUMARI GAUR)
ASSISTANT REGISTRAR