

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION***

WRIT PETITION NO. 7972 OF 2013

M/s.Jagati Publications Ltd.,
a Company incorporated under the
Companies Act, 1956, having its
registered office at 6-3-249/1,
Sakshi Towers, Road No.1,
Banjara Hills, Hyderabad – 500 034.

... Petitioner

v/s

- 1 The president,
Income Tax Appellate Tribunal,
through the Registrar,
Old CGO Building, 4th floor,
101, Maharshi Karve Marg,
Mumbai – 400 020.
- 2 The Member (A & J),
Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance, North Block,
New Delhi – 110001.
- 3 The Union of India,
through the Secretary,
Department of Revenue,
Ministry of Finance, North Block,
New Delhi.

... Respondents

Mr. J. D. Mistri, senior advocate with Mr.Atul Jasani for the
petitioner.

Mr. A. J. Rana, senior advocate with Mr. P. S. Jetley and Mr. M. S.

Bhardwaj for Resp. No.1.

Mr.Girish Dave with Mr.Suresh Kumar for Resp. Nos.2 and 3.

***CORAM: M.S. SANKLECHA &
N.M. JAMDAR, JJ.***

JUDGMENT RESERVED ON :13 JULY 2015

JUDGMENT DECLARED ON:10 AUGUST 2015

JUDGMENT (Per N.M. Jamdar, J.):

The president of the Income Tax Appellate Tribunal, on 5 March 2013 exercising his powers under Section 255(3) of the Income Tax Act, has constituted a special bench of three members to hear the appeal filed by the Petitioner. The Petitioner, by this writ petition has challenged this order of the president.

2. Before we proceed, it will be useful to advert to the legal provision regarding constitution of a special bench of the Income Tax Appellate Tribunal. The Central Government under Section 252 of the Income Tax Act, 1961 (the Act), is empowered to constitute an Appellate Tribunal to hear the appeals arising under the Act. The Appellate Tribunal consists of judicial and accountant members. The Central Government is also empowered to appoint a president and senior vice president. The Appellate Tribunal exercises and discharges powers through benches constituted by the president of the Appellate Tribunal as per Section 255 of the

Act. Section 255 reads as under:

“255.(1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the president of the Appellate Tribunal from among the members thereof.

(2) Subject to the provisions contained in sub-section (3), a Bench shall consist of one judicial member and one accountant member.

(3) The president or any other member of the Appellate Tribunal authorized in this behalf by the Central Government may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the Assessing Officer in the case does not exceed (five hundred thousand rupees), and the president may for the disposal of any particular case, constitute a special bench consisting of three or more members, one of whom shall necessarily be a judicial member and one an accountant member.

(4) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it.

(5) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of

the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(6) The Appellate Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the income tax authorities referred to in section 131, and any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1989 (5 of 1898)."

(emphasis supplied)

The proceedings before the Appellate Tribunal are deemed judicial proceedings. The Appellate Tribunal is empowered to regulate its own procedure by framing regulations. The bench normally consists of one judicial and one accountant member. The president or the other members can dispose of the case sitting singly, if the monetary value is below a particular limit. Section 255(3), which is subject of the present controversy empowers the president, for disposal of any particular case, to constitute a special bench, consisting of three or more members, one of whom shall necessarily be judicial and one accountant member. If the members of the bench differ on any point, they can refer to the president to refer the point of difference for decision by one or more members of the appellate tribunal. The decision of the special bench and the position of law decided are binding on the regular two member bench. Regulation 98-A and the proforma appended thereto,

specifies the procedure for referring cases for constitution of a special bench. The Regulation is as under:-

“Regulation 98(A):

With a view to bring about uniformity in the procedure for reference of cases to the president, Income Tax Appellate Tribunal for constitution of the special benches consisting of three or more members instructions have been issued from time to time. For making such reference the concerned Bench should pass the order similar to order of Tribunal 'the reference shall be made by the Bench as far as possible' in the pro-forma as appended in XIX(B).

APPENDIX XIX (B)
INCOME TAX APPELLATE TRIBUNAL

Proforma for making reference by a Bench to the president, Income Tax Appellate Tribunal for constitution of the .

'We the members Bench (es) at (station) are of the opinion that the appeal(s) No.(s) in the matter of which were posted for hearing before us on is/are fit and proper appeal(s) which should be heard by a special bench consisting of three/or members of the Tribunal. We accordingly forward the records of the appeal(s) mentioned above to the president of the Tribunal and request him to constitute a special bench for the reasons given below :

Reasons in brief :

Signatures : (1)
(2)

Note: 1. *This form should be sent to the president of the Tribunal in duplicate, along with the observations of the Vice president of the concerned zone.*

Note: 2. *Document/materials in support of the reasons for constitution of a should be enclosed.”*

These are the basic provisions governing how the appellate tribunal functions and how special benches are constituted.

3. The Petitioner-Jagati Publications, is an enlisted Public Limited Company. The Petitioner was incorporated in the year 2006. It publishes a Telugu newspaper called '*Sakshi*', from Hyderabad, Andhra Pradesh. *Sakshi* started publication from 24 March 2008. One of the promoter of the Petitioner is Y.S. Jagan Mohan Reddy. He is the son of late Y.S. Rajashekhar Reddy, former chief minister of Andhra Pradesh. Y.S. Jagan Mohan Reddy was also a member of the Parliament. The other shareholders and employee directors are - Harish C. Kamarthy, J. Jagan Mohan Reddy, Y.E. Prasad Reddy, S. Ramakrishna Reddy, K. Raja Prasad Reddy and P. Venkata Krishna Prasad. The Respondent no.1 is the president of the Income Tax Appellate Tribunal through the registry. The Respondent no.2 is the Central Board of Direct Taxes which is constituted under the Central Board of Revenue Act, 1963 and is the highest authority controlling and directing the officers of the revenue in implementing the Act of 1961. The Respondent no.3 is the Department of Revenue, Union of India.

4. In view of the grievance of the Petitioner that the Petitioner was kept in dark about the decision making process, the narration of facts is in two parts. First, the facts as the petitioner knew them when the Petitioner filed the petition. Then the facts as revealed from the replies and the documents from the tribunal which were

produced in this Court pursuant to the orders of the Court.

5. First, the facts which were within the knowledge of the Petitioner. Petitioner filed a return of income for the Assessment Year 2008-09 on 29 September 2008, declaring a total income of ₹909151382. The returns were processed on 9 March 2010. The Revenue picked up the case for scrutiny and a notice was issued to the Petitioner. The Petitioner appeared before the Assistant Commissioner of Income Tax, Circle-2(1), Hyderabad. The assessment by order dated 31 December 2010 under Section 143(3) of the Act was completed and the total income of ₹2726537270 was determined. An amount of ₹2775688650 was added under Section 28(iv) of the Act for share premium received by the Petitioner from the subscribers to the paid up capital. An amount of ₹150000000 was added under Section 68 as unexplained cash credit towards capital contribution.

6. Petitioner challenged the order passed by the Assessing Officer on 31 December 2010, by way of an appeal to the Commissioner of Income Tax (Appeals-3), Hyderabad. Petitioner took up various contentions. It contended that the share premium, which was received during the relevant financial year 2007-08, was of capital nature and could not be treated as an income in terms of Section 28(iv) of the Act. It contended that, only non-monetary benefit or perquisites can be taxed under Section 28(iv) and the section did not apply to capital receipt. The levy of tax of ₹150000000 was also challenged. It was urged that the order of

the Assessing Officer was in contravention of the law laid down by the Apex Court and also decisions of the Tribunal. The Commissioner (Appeals), vide order dated 30 December 2011, dismissed the Appeal filed by the Petitioner.

7. The Petitioner thereafter filed a further Appeal No.ITA/18/H of 2012 before the Appellate Tribunal, (B-Bench) at Hyderabad. The Petitioner prayed for stay of recovery of tax demanded. The Appellate Tribunal by an order dated 25 January 2012, granted a conditional stay of the demand, on deposit of tax by payment of installment in the aggregate of ₹12,00,00,000. In the appeal, the Petitioner contended that as regards the addition of share premium and addition under Section 68, the Commissioner of Income Tax (Appeals) did not follow settled position of law and the binding decisions. When the appeal was posted for hearing, it was adjourned at the instance of revenue on various grounds on 11 April 2012, 8 May 2012, 20 June 2012, 5 September 2012, 17 September 2012, and 1 November 2012.

8. The Petitioner received a notice dated 27 November 2007 informing the Petitioner that the appeal is fixed for hearing on 14 December 2012 under the caption 'Other matters' for hearing as 'Special Bench Reference'. A copy of the letter of the Board dated 15 November 2012 was annexed to the notice. This letter by the Central Board of Direct Taxes (the Board) - Respondent No.2 made a request to the president of the Tribunal (the president) – Respondent No.1 for constitution of the special bench of the

Tribunal in the case of Petitioner's appeal pending before the Tribunal at Hyderabad. The letter is reproduced as under :

*“F.No.279/Misc./M-99/2012-13
Government of India, Ministry of Finance,
Department of Revenue,
Central Board of Direct Taxes*

15 November 2012

To,

*The president,
Income Tax Appellate Tribunal,
Pratishtha Bhawan, 4th floor,
101, Maharshi Karve Road,
Mumbai – 400 020.*

Sir,

*Sub: Proposal for constitution of a special bench of ITAT
u/s 255(3) of I.T. Act in the case of M/s.Jagathi
Publications Pvt. Ltd. - A.Y. 2008-09 – Appeal
pending before ITAT 'B' Bench, Hyderabad in
ITA No.18/Hyd/2012- reg.*

2. *M/s.Jagathi Publications Pvt. Ltd., incorporated in the year 2006, is engaged in publishing a Telugu Newspaper by the name 'Sakshi'. The assessment in the case of assessee company for A.Y. 2008-09 was completed on a total income of Rs.272.65 crores against the returned loss of Rs.19,91,51,380/-. The additions made by the AO were confirmed by the CIT (A). The assessee filed an appeal against the same which as of now is pending before 'B' bench, ITAT, Hyderabad and the case is posted for hearing before the ITAT on 19.12.2012.*

3. *The main promoter of the assessee company is Shri Y.S. Jagan Mohan Reddy, Member of Parliament and son of Late Shri Y.S. Rajasekhar Reddy, former Chief Minister of Andhra Pradesh. The assessee had allotted shares at a premium of*

Rs.350/- per share (face value Rs.10/-) to several persons or entities who received benefits from the Government of Andhra Pradesh for allotment of land at concessional rates, grant of licences, allotment of Special Economic Zones, license for construction of hotel, reduction of Green belt, provision of water and other facilities, regularization of urban land, permission for transfer of land, permission for establishment of ports, etc. During the course of assessment, the AO established that the Investment in shares at high premium was made as a matter of “Quid Pro Quo” for extending the official favours. The total quantum of share premium involved from a.Y. 2008-09 to A.Y. 2010-11 is a sum of Rs.1140 crores.

4. Similar to the above “Quid Pro Quo” arrangement, another company promoted by Shri Y.S.Jagan Mohan Reddy, M/s.Bharathi Cements Ltd. Has received share capital with share premium of Rs.430.71 crores. Total money received by various companies promoted by Shri Y.S. Jaganmohan Reddy, as a “Quid Pro Quo” arrangement is more than Rs.1700 crores.

5 Section 225(3) of the IT Act empowers the president of the ITAT to constitute a special bench consisting of 3 or more members for disposal of a particular case. The present case needs constitution of a special bench for the following reasons :

(i) The “Quid Pro Quo” arrangement is unique in nature.

(ii) The case is very complex involving legal issues having far reaching consequences for the revenue in this case and also in other cases.

(iii) In the entire group, huge tax effect is involved and identical transactions are involved in various cases and this case can set a precedent.

(iv) The modus operandi employed in bringing the illegal gratification into the books of account of the

companies without payment of taxes is unique and taxation of the share premium as a revenue receipt is under a serious challenge requiring an in-depth analysis of facts and evidences partly gathered by the CBI, by the members of I.T.A.T.

(v) On the same set of facts, prosecution had been launched by the CBI and recently a couple of charge-sheets have been filed under IPC and the Prevention of Corruption Act against Shri Y.S. Jagan Mohan Reddy. The Enforcement Directorate has also launched an investigation into the money laundering against Shri Y.S. Jagan Mohan Reddy. The decision of ITAT will have a serious impact on the prosecution proceedings launched by the CBI.

(vi) The issues involved need an in-depth analysis by a as it needs interpretation of Sec.56 and Sec.68 of I.T. Act on a complex set of facts.

(vii) This case shall set a trend in curbing the pernicious practice of conversion of black money into white and requires the attention of of ITAT.

6. In view of the above facts and circumstances of the case and in the interest of revenue, it is requested that a Special Bench of ITAT be constituted urgently u/s 255(3) of the I.T. Act for hearing the appeal in the case of Jagathi Publications Pvt. Ltd. For A.Y. 2008-09 in ITA No.18/Hyd/2012, so that the next hearing takes places before such special bench.

*Sd/-
(Anita Kapur)
Member (A&J), CBDT.”*

Thus, the basis of request to constitute a special bench was that the main promoter of the Petitioner Y.S. Jagan Mohan Reddy, had allotted shares of the Petitioner at a premium to various persons,

who received benefits from Government of Andhra Pradesh in terms of allotment of lands, licenses, reduction of Green Belt, water and other facilities regularization of urban land, etc. According to the Board, these investments in shares were a matter of “*quid pro quo*” and the amounts involved were very large and the legal issue was complex and of far reaching consequences for the revenue.

9. The matter was taken up for hearing on 14 December 2012 by the members of the Appellate Tribunal (the Regular Bench). At the hearing, the Petitioner objected to the constitution of a special bench submitting that the special bench can be constituted only in the case of conflict of decisions and none of the factors mentioned by the Board were germane to constitute a special bench. It contended that the constitution of a special bench would prejudice the petitioner as the petitioner was entitled to the benefit of the settled law in its favour.

10. After the hearing before the Regular Bench concluded, the Petitioner did not receive any communication regarding the constitution of the special bench, nor the opinion reached by the Regular Bench was informed to the Petitioner. The Petitioner only received a notice dated 19 March 2013 fixing the date of hearing of the appeal on 29 April 2013, calling upon the Petitioner to file one more set of paper-book. The Petitioner, by this direction to file one additional set, became aware that a special bench of three members was constituted to hear its appeal. Since the Petitioner was not

informed of the order of the president constituting a special bench, the Petitioner addressed a letter dated 30 June 2013 to the president to furnish the terms of reference. The Petitioner received a reply from the Registry of the Tribunal referring to an extract of the office manual. The Registry replied as under :

*“The Director (Finance & Admin),
Jagati Publications Ltd.
6-3-249/1, Sakshi Towers, Road #1,
Banjara Hilla, Hyderabad – 500 034.*

Sir,

Sub.: Orders of Constitution of special bench in the case of M/s.Jagati Publication Private Limited, Hyderabad, in ITA No.18/H/2012 – request for copy – reg.

Ref. : Your letter dated 30.06.2013.

This office has been directed by the Assistant Registrar, ITAT, Mumbai, with reference to your letter dated 30.06.2013, on the above subject in relation to appeal, ITA No.18/H/2012 for A.Y. 2008-2009, to inform you as under :

“..... according to Office Manual, when a special bench is constituted by the order of the president, a notice is displayed on the notice board and a copy is also sent to the Secretary, Bar Association of every Bench indicating the points involved for decision by the special bench. There is no provision to furnish copies of the order constituting special bench as well as reference order of the Hon'ble Bench to the concerned parties.

This issues with the approval of the Hon'ble president, Income Tax Appellate Tribunal.

*Yours faithfully,
Sd/-
for Assistant Registrar.”*

Thus, according to the Registry, office manual provided that since the point to be considered by the special bench is widely made known and there is no provision to supply a copy of the reference.

11. The Petitioner, repeated its request by letter dated 29 July 2013. There was no response to this letter. Since the matter was fixed for hearing before the special bench on 16 September 2013, the Petitioner filed the present petition on 26 August 2013 praying that that the order passed by the president of the Tribunal under Section 255(3) of the Act, constituting the special bench be quashed and set aside. This was the factual position in the knowledge of the Petitioner when it filed the petition.

12. When the Petition came up for hearing on 3 September 2013, the counsel for the Respondent No.1 furnished a copy of the intimation issued of Assistant Registrar of the Tribunal dated 19 December 2012 regarding constitution of the bench. It was taken on record and leave was granted to amend the petition. Hearing of the Petition was adjourned and in the meanwhile, by way of an ad-interim relief, the proceedings before the special bench were stayed. Thereafter the matter was adjourned from time to time at the request of the parties.

13. During the hearing on 1 September 2014, the Petitioner

made a grievance that the order passed by the president constituting a special bench was not furnished to the Petitioner and what was furnished was only a communication from the Assistant Registrar. A direction was sought that the Respondents place the order of the president on record. The Respondent No.1, on the ground that it was an administrative order and not subject to judicial review, opposed this prayer. The Respondent No.1 was directed to place the order passed on record, keeping the rights and contentions of the parties regarding the judicial review open. Accordingly, the order dated 5 March 2013 was placed on record. It is in the form of a handwritten remark. The respondents also filed their respective affidavits in replies, and the Petitioner its rejoinder. Correspondence was also placed on record.

14. Now, to the second part of the factual narration as it emerged after the record was brought before the Court. After the Board made a request on 15 November 2012 to the president for constitution of the special bench, the president made a handwritten endorsement on the letter on 19 November 2012 as “*VP Hyd. Zone for comments*”. Thereafter, the letter of the Board with the endorsement of the president was placed before the concerned Vice president. The Vice president on 27 November 2012 addressed a letter to the members of the Regular Bench at Hyderabad. The letter needs to be reproduced in full. The Vice president wrote as under:

“Dear Brother,

“Please find enclosed a copy of the letter addressed by the Member CBDT to the Hon'ble president, which in turn was marked to me for my comments. I have gone through the contents therein. The Special counsel, who was to be engaged by the Revenue in this matter, explained the facts in brief in support of Revenue's request for constitution of special bench in the case of M/s.Jagati Publications Pvt. Ltd. Bearing in mind the political sensitivity in this matter and also the tax implication, apart from the complexity of the issues, as stated in the letter dated 15th November 2012, I am of the view that you need to go through the file along with Shri Saktijit Dey, and report to me as to whether it is a fit case for constituting a special case. After examining the file, if both of you are of the view that it requires hearing on this preliminary issue, the same may be posted on any convenient date and then the views of the Bench may be forwarded to the Hon'ble president to enable him to consider as to whether it is a fit case for constituting special bench in exercise of the powers vested under Section 255(3) of the Income Tax Act, 1961. This may be treated as urgent.”

Sd/-.

(emphasis supplied).

15. On 27 November 2012, the Regular Bench sent a notice to the Petitioner annexing a copy of the letter of the Board dated 15 November 2012 stating that the hearing before the Tribunal was fixed on 14 December 2012. The Regular Bench heard the Petitioner and the Revenue in respect of the proposal to constitute a special bench by the president. The copy of the opinion of the Regular Bench is placed on record. During the hearing, the Departmental Representative contended that the constitution of a

special bench is a purely administrative matter and there is no need to hear either side. He reiterated the grounds raised by the Board in its letter dated 15 November 2012. According to the Departmental Representative the president, in the appropriate case, can constitute a special bench and it is not necessary that there must exist conflicting judicial pronouncements. According to the Departmental Representative, since the issue involved in the Appeal was of national importance, having large scale of ramifications, the matter was required to be resolved by a special bench. According to him, Y.S. Jagan Mohan Reddy who was the main promoter had misused his political position and various prosecutions were lodged against him under different Acts. The Petitioner contended that there is no conflict of decisions and the attempt on the part of the Revenue to seek constitution for special bench is *malafide* and part of a political vendetta. It was contended that the law was settled in favour of the Petitioner and formation of special bench of three members was an attempt to secure a favourable decision by unfair means. It was contended that in the case of Ramojirao Group, with similar allegations, no steps to constitute special bench were taken.

16. The Regular Bench forwarded its opinion to the Vice president with a request to forward the same to the president. The Regular Bench opined that most of the appeals that come before the tribunal involve complex facts and intricate questions of law and if the argument of Revenue is accepted, almost all matters will have to be referred to a special bench. Similarly, huge revenue

implications are also not a ground for constitution of a special bench as many cases have such implications. As regard the impact of the decision of the tribunal on the pending prosecutions, the Bench observed that the Central Bureau of Investigation and the Directorate of Enforcement Department are investigating agencies, the tribunal is a quasi-judicial body, and its decisions are rendered upon consideration of facts and material before it. The Bench observed that, however, there is political sensitivity involved in the Appeal filed by the Petitioner and decision by the Tribunal on this issue would have widespread ramifications. The Bench then observed that hearing of the appeal at Hyderabad may generate widespread attention of local media and avoidable heated debate and considering the sensitivity of this case, may affect the hearing of the Bench. The Bench accordingly opined that the president may constitute an Appropriate Bench outside Andhra Pradesh to remove any doubt and apprehension in the mind of any party to the litigation as regard fairness and ultimate decision-making. The Bench accordingly forwarded its proposal with its comments to the Vice president on 19 December 2012 with a request to place the same before the president.

17. The file was thereafter placed before the Vice president. The Vice president forwarded the opinion of the Bench to the president on 9 January 2013. The Vice president communicated his opinion as under:

“Respected Brother,

*Sub.: Proposal for constitution of special bench in
the case of M/s.Jagathi Publications Pvt. Ltd.*

I have gone through the Tribunal order passed by the division Bench of ITAT Hyderabad as well as the appeal papers in the case of M/s.Jagathi Publications Pvt. Ltd. Since these papers were forwarded to me for my comments by your goodself, I have gone through the papers to appreciate if it is a fit case for reference to special bench. Considering the complexity of the issues involved, as detailed in the order passed by the Division Bench, I am of the prima facie view that it deserves to be referred to a special bench consisting of three Members to decide the entire appeal in exercise of the powers vested in you under section 255(3) of the Income Tax, 1961, sub-section (3) to that extend reads under :

'The president may, for the disposal of any particular case, constitute a Special Bench consisting of three or more Members, one of whom shall necessarily be a and one Accountant Member.”

*Yours sincerely,
Sd/-*

*Hon'ble president,
Income Tax Appellate Tribunal, Mumbai.”*

(emphasis supplied).

The Vice president did not mention about the recommendation of the Regular Bench that an Appropriate Bench be constituted for the hearing outside Andhra Pradesh.

18. The proposal for constitution of special bench in the case of the Petitioner was placed before the president by way of a note, which stated that, if approved, may be placed before the president for perusal and constitution of special bench. The Registry of the president called for the original papers in the case of the Petitioner. The papers in the appeals filed by the Petitioner were accordingly sent to the president. The president thereafter, on the proposal made a handwritten endorsement/order stating ,

*“I constitute a special bench consisting of following members:
(i) R.S.Syal, A.M., (ii) P.A. Jagtap, A.M. (iii) N.U. Vasudevan,
J.M., to hear and decide the entire appeal.”*

This order dated 5 March 2013 is the subject matter of challenge in this petition.

19. We have heard Mr.J.D. Mistri, learned senior advocate for the Petitioner, Mr.A.J. Rana, learned senior advocate for respondent No.1 and Mr.Girish Dave, learned advocate for respondent Nos.2 and 3.

20. Mr.J.D.Mistri, learned senior advocate for the petitioner contended: Irrespective of any other aspect of the matter, the impugned order needs to be set aside as the decision making process was vitiated by clear attempt on the part of the Board to influence the decision-making. The Special Counsel, who was to be engaged by the revenue, meeting the Vice president privately and

explaining the facts in support of revenue's request for constitution of special bench, was grossly improper. The decision making process is opaque as the fact of the meeting between the counsel and the Vice president was concealed from the Petitioner and in spite of replies being filed, the respondents have chosen not to disclose the details. The Vice president showed extra interest, devised his own methodology, and misinterpreted the opinion of the Bench before forwarding it to the president. The fact that the respondents have chosen not to clarify the identity of the counsel creates serious doubt about the decision-making. It is troubling as to how the special counsel knew that the matter was sent to the Vice president for comments. The Board could not have requested the president to constitute a special bench and the president could not have done so as the regular bench was seized of the matter. The request made by the Board was for collateral purpose and was not *bonafide*. No reason is shown as to why a special bench was required in the present case. The request was made by the Board only to ensure that the binding decisions of the tribunal and the law of precedents, according to which the Petitioner's appeal would have been allowed, will be circumvented. The claim of the Board that there was *quid pro quo*, which made a departure from settled law, is fallacious, as the matter of the order of the tribunal in the case of PVP Ventures Ltd. that was relied upon, does not lay down this proposition. If so, it is open to the Revenue to distinguish the decision before the Regular Bench. There are no compelling reasons as to why the Board could not have moved the Regular

Bench and followed the procedure laid Regulation 98A framed by the tribunal. The order passed by the president is amenable to judicial review and it must pass the test of fairness and non-arbitrariness. There are several issues, which raise more questions than answers and make the entire procedure suspect. The Regular Bench had not recommended constitution of a special bench and all that the Bench had opined was an Appropriate Bench outside Andhra Pradesh be constituted. The president was in receipt of this opinion, but there are no reasons disclosed as to why he did not accept the opinion of the Regular Bench. There is breach of principles of natural justice, as the president himself ought to have given hearing to the Petitioner, which he has not. Therefore, the impugned order be quashed and set aside.

21. Mr.A.J.Rana, learned senior advocate appearing for the president submitted: The power of the president to constitute a special bench under Section 255(3) is administrative and not amenable to judicial review unless it is *malafide* or purely arbitrary. It is not necessary that when the regular bench is seized of the appeal, one must approach the Regular Bench to refer and the president is not denuded of his powers to constitute a special bench. The president can exercise the *suo-moto* powers in a given case to constitute a special bench. The Regular Bench gave full opportunity of hearing to the Petitioner. Therefore, principles of natural justice were complied. The observations of the Regular Bench that the case would have widespread ramifications and their

opinion that an Appropriate Bench be constituted were sufficient for the president to exercise his administrative power. The Regular Bench, in fact, had recommended a special bench when it opined that an Appropriate Bench be constituted. All the files and the opinion of the Regular Bench were before the president when he passed the order and in absence of any *malafides* the order of the president ought not to be interfered with. Even though the Regular Bench, in the earlier part of the opinion negatived some of the contentions of the Revenue, it used the phrase, “however” to hold that there will be widespread ramifications, which means that it expressed a view contrary to its earlier observations. The principle that, one who hears must decide, cannot apply to exercise of administrative powers. No prejudice would be caused to the Petitioner if the matter is heard by a special bench or it is heard by the Regular Bench, and the petition be dismissed.

22. Mr.Girish Dave, learned counsel appearing for Respondent Nos.2 and 3 submitted: The request made by the Board was *bonafide*. It was made in view of judicial orders. In various orders, the Andhra Pradesh High Court and the Supreme Court have observed that there is a *prima facie* case against Y.L. Jagmohan Reddy, the Chief Promoter of indulging in *quid pro quo* to distribute state largesse in return for paying premium to acquire shareholding of the Petitioner Company. The Andhra Pradesh High Court in a Public Interest Litigation has issued directions to the Central Bureau of Investigation to investigate the case. In view of the

various directions issued by the High Court and the Apex Court, the Board *bonafide* believed that the case being complex and of greater magnitude, requires to be heard by a special bench. There is nothing *malafide* about the request made by the Board. After the request was so made to the president, a methodology was followed whereby both the parties submitted their points of views and thereafter a special bench was constituted. The petition is devoid of merits and be rejected.

23. First the scope of judicial review against the order of the president constituting a special bench under Section 255(3) of the Act. The learned counsel for the parties have accepted the position that a judicial review of the order passed by the president constituting a special bench is maintainable, but it lies in extremely narrow compass. There was however considerable debate at the bar as regard the nature power of the president to constitute a special bench. According to Mr.Rana, the power of the president under Section 255(3) is purely administrative. According to Mr.Mistry, the manner in which the power is exercised by the president to constitute a special bench in the present case is not purely administrative and it seriously infringes on the rights of the petitioner.

24. Both the parties have heavily relied upon the decision of the Apex Court in the case of *Income Tax Appellate Tribunal v/s Dy. Commissioner of Income Tax (Assessment) & ors.*¹. Learned

1 (1990) 218 ITR 275 (SC).

counsel for the parties informed that this decision is one of the very few, if at all any, arising from challenge to the order passed by the president of the Tribunal, constituting a special bench and requires detailed discussion.

25. In the case of *I.T.A.T.*¹ some companies called Surana Steels Pvt. Ltd., Binjusaria Metal Box Co. (Pvt) Ltd. and Agroha Extraction Ltd. were the assesseees and appellants in three income tax appeals before the Income Tax Appellate Tribunal at Hyderabad. The Tax Bar Association of Andhra Pradesh addressed a letter to the president of the Tribunal on 25 July 1992 requesting him to refer the issue of interpretation of Section 115(j) to a special bench to have uniformity in legal position. After receipt of the letter, the president forwarded the same to the senior member of the Income Tax Appellate Tribunal asking him to contact the members of the Bar and give a feedback as regard the need to constitute a special bench. The senior member after consultation with the Bar suggested constitution of special bench and made a reference forwarding the same to the president. In the reference, the senior member and accountant member recorded their opinions that, to seek uniformity in judicial decision and avoid uncertainties on vital point of public importance, constitution of special bench was necessary. They also formulated questions to be resolved. The president accepted the reference and constituted a special bench. After the special bench rendered the decision, the appeals were disposed of. The revenue challenged the decision by filing three

1 (1990) 218 ITR 275 (SC)

writ petitions before the High Court of Andhra Pradesh. The Division Bench allowed the petitions and answered the reference in favour of the revenue. The High Court set aside the order passed by the president constituting a special bench by holding, amongst other grounds, that such constitution can be done only by virtue of a judicial order. The High Court took a view that, in the facts and circumstances of the case the president was not justified in constituting a special bench and there was no reason to constitute a special bench. The High Court also disapproved the procedure adopted by the tribunal. The assessee's thereafter filed special leave petitions. The Income Tax Appellate Tribunal in the Apex Court challenged the finding of the High Court regarding the power of the president. The proceedings filed by the Income Tax Appellate Tribunal were delinked from other matters filed by the assessee and was decided by the decision of the Apex Court in the case of *I.T.A.T.*

26. The Apex Court in *I.T.A.T.* framed two points for consideration, first, as to whether the special bench had committed breach of principles of natural justice and whether the president of the Tribunal was legally competent to constitute a special bench. As regard the first point, the Apex Court concluded it did not arise in the facts of the case. The Apex Court thereupon proceeded to consider the second point that has relevance for the case at hand i.e. the nature of the power exercised by the president to constitute a special bench. The Apex Court, after considering the provisions

of the Act and the regulations, proceeded to hold as under:

“..... As we have already noted above special benches can be constituted by the president both in exercise of his administrative powers under section 255(1) read with section 255(3) as also on the basis of a judicial order passed by any Bench of the Tribunal making a reference to the president in that connection under regulation 98(A) by passing a judicial order is the only mode and manner in which the president can be moved to constitute a special bench. Even independent of such a reference on the judicial side the president can, in an appropriate case even suo motu move in the matter and can constitute a special bench of course on appropriate and germane grounds. It is, however, true that the president in exercise of its administrative powers under section 255(3) cannot just constitute a special bench without any rhyme or reason. Such an administrative exercise can be demonstrated to be unreasonable, capricious or mala fide on a given set of facts. But, in our view, the present case was not of that type. There was a conflict of opinion between the two Benches of the Tribunal, namely, the Madras and Hyderabad Benches. It is, however, true that the Madras Bench decision was by a single member while the Hyderabad Bench decision was by a Division Bench. Still it could not be said that there was no conflict of decisions between the two benches of the Tribunal. That itself constituted a rational and valid grounds for the president to act in exercise of his administrative powers to constitute a special bench if he thought it fit to do so. Such an exercise, on the facts of the present case, cannot be styled as an arbitrary or whimsical or fanciful one as wrongly and uncharitably assumed by the Division Bench of the High Court.”

(emphasis supplied)

27. The Apex Court held that the Bench that is seized of the matter may in exercise of its judicial function make a reference to constitute a special bench. The president can also, *Suo moto*, if it is

brought to his notice that if any important point is pending for decision, constitute a special bench. The Apex Court did not approve the finding of the Andhra Pradesh High Court that reference can only be made by way of a judicial order. The Apex Court also held that, when the president exercises its *suo moto* powers on the ground that the matter is of all India importance, such order being an administrative order except in extraordinary grounds, such as, *malafides*, it is not open to scrutiny under Article 226 of the Constitution of India. Keeping this dictum of the Apex Court in mind, the rival contentions will have to be assessed.

28. The Petitioner has assailed the order of the president broadly on three counts. Firstly, that the Counsel for the Revenue meeting the Vice president privately vitiates the entire decision-making. Secondly, the president could not have exercised his *suo moto* powers to constitute a special bench when the regular Bench was seized of the matter and without giving hearing himself to the Petitioner. Thirdly, the president completely disregarded that Regular Bench did not recommend a special bench, and did not give any reason of his own.

29. According to Mr.Rana, it is not necessary to consider any of these points as the Regular Bench had suggested constitution of a special bench and the observations made by the Regular Bench were sufficient for the president to constitute a special bench. However, the order of the president discloses no reason. If it is to

purely base on the opinion of the Regular Bench, then the opinion must be clear and unequivocal. We reproduce the relevant observations of the Regular Bench:

“16. The main reason for which the Department seeks reference of of this case to a special bench is that the issues involved are complex, and involves interpretation of the provisions of S.56 and 68 of the Act and the decision of the Tribunal would have far reaching consequences in similar matters. It is also the case of the Revenue that the case of the assessee is very sensitive and involves peculiar features of quid pro quo and so on and the view that the Tribunal may take in this appeal, would have its impact on the investigation being carried out by CBI and Enforcement Directorate and so on. Last but not the least, the Revenue impact on the appeal is also very huge and the matter requires in depth and exhaustive consideration.

17. In this context, we observe that most of the appeals coming before the Tribunal, involve complex facts and intricate questions of law. If we go by the argument of the Department, then every such appeal has to be decided by a special bench. In all such cases, any one of the parties to the litigation will seek resolving the issue by constituting a special bench. This would create serious impediment in the functioning of the Tribunal. Similarly, the contention of the learned Departmental Representative that a decision of the division Bench of the Income Tax Appellate Tribunal is not followed by another Bench of Income Tax Appellate Tribunal and, therefore, the appeal has to be heard by a special bench is also not correct. The decision of a Division Bench certainly has a binding effect and is generally followed by other division benches of the ITAT unless it is factually distinguishable or there is a contrary decision of a higher court. Huge revenue impact also cannot be a reasonable ground for constitution of a special bench to hear the appeal. So far as the contention of the learned

Departmental Representative that the decision of the Tribunal will have serious on the proceedings before the CBI and Enforcement Directorate, we are to say that while the CBI and Enforcement Directorate are investigating and prosecuting agencies, the Tribunal is a quasi judicial body adjudicating on disputes arising out of assessments made under direct tax laws. The decisions of the Tribunal rendered upon considering the facts and materials on record, the statutory provisions and the law laid down by the Supreme Court and High Courts and also different benches of the Tribunal. The degree of appreciation of evidence varies between the proceedings before the Tribunal and the proceedings initiated by the CBI and Enforcement Directorate.

18. At the same time, however, there is enormous political sensitivity involved in the present appeal filed by a company, whose chief promoter is a Member of Parliament and son of former Chief Minister, facing serious charges of quid pro quo and so on, with the ongoing investigations by CBI and Enforcement Directorate. In the circumstances, any decision of the Tribunal on the issues involved in the appeal – one way or the other- may have wide spread ramifications in similar matters across the country.

19. It is also worthwhile to point out at this juncture that the hearing of the appeal at Hyderabad Bench may generate widespread attention of the local media as well as certain sections of the general public, and may even generate avoidable heated debate over the subject, because of the sensitivity of the case and the personalities involved, which would, in turn, may have an effect on the smooth hearing and decision making by a regular bench of the Tribunal.

20. For this reason, and considering totality of facts and circumstances of the case, we are of the considered view that in order to ensure wide spread consideration of the matter before any decision is rendered on the issues involved in this appeal by the Tribunal, and to ensure the continued

trust of the tax payers, tax administrators and people at large that this Tribunal has been enjoying over the decades as to the impartiality of its decisions, the Hon'ble president may constitute an appropriate Bench outside Andhra Pradesh, specifically at Head Office level, for the hearing and adjudication on this appeal. Such a step would snuff out even a slightest doubt and apprehension in the mind of any of the party to the litigation with regard to the fairness of the proceedings and the ultimate decision making process.

21. With the above comments, this proposal is forwarded to the Hon'ble Vice president, to place the same with his comments, before the Hon'ble president, for appropriate decision in the matter.”

(emphasis supplied)

Based on those observations Mr.Rana submitted that when the Regular Bench stated that an 'Appropriate Bench' may be constituted outside Andhra Pradesh, it meant a 'special bench'. Mr.Mistri submitted that the Regular Bench had categorically opined that a 'special bench' is not necessary and all that it recommended was that the matter be heard outside Andhra Pradesh.

30. We have perused the observations carefully. In the context of the Act, special bench is not a term of common parlance. It is a statutory phrase. A special bench is constituted under Section 251(3). The Regular Bench was not expected to use this term in vague sense leaving the reader to debate as to whether when it said an Appropriate Bench it actually meant a 'special bench'. In fact, the reading of order shows that the Regular Bench negated almost all grounds urged by the Board for constitution of a special

bench. Thereafter it stated that since there was 'political sensitivity' and the decision would have widespread ramifications. The Regular Bench opined that it will be advisable to have the matter heard outside Andhra Pradesh. The Bench opined that, to ensure the continuous faith of taxpayers and tax administration and people at large that the Tribunal has been enjoying over decades, the president may constitute appropriate Bench outside Andhra Pradesh.

31. When the Regular Bench rejected all grounds of the Board for a special bench and made only one suggestion that the matter should be transferred out of Andhra Pradesh, its use of the phrase Appropriate Bench can only mean a bench outside Andhra Pradesh. special bench is a specific term under the Act and having made a reference to it throughout the opinion, the Regular Bench specifically recommended an 'Appropriate bench' and deliberately chose not to employ the phrase "special bench". We are not considering whether the Regular Bench was right in arriving at this conclusion but we are considering this opinion in the context of the submission of Mr. Rana that the opinion of the Regular Bench was so clear that there was nothing left for the president to do except to constitute a special bench. The opinion of the Regular Bench is far from clear as a recommendation for constitution of a special bench. If at all it points to the contrary. It would be a strained interpretation of the opinion to construe it as a recommendation for constitution of special bench and it is certainly not a clear and unambiguous recommendation.

32. According to Mr.Rana, the Regular Bench employed the phrase 'however' before stating 'widespread ramifications' and 'political sensitivity'. According to him, these grounds were sufficient for the president and it is not that no grounds exists. We are unable to agree. Having rejected the request for special bench the Regular Bench has not thereafter used the phrase special bench but consciously chose to use the phrase Appropriate Bench. These two are different. The words 'widespread ramifications' were in the context of 'political sensitivity'. 'Political sensitivity' was introduced by the Vice president, a concept alien to the Income Tax Act, This aspect we have dealt with in the subsequent paragraph. Thus, we do not find that the opinion of the Regular Bench was a sufficient basis for the president to pass the order and that no further scrutiny is required.

33. Having rejected the contention that the Regular Bench had recommended a special bench and that it constituted sufficient material for the president, we now come to the second material placed before the president, that is the recommendation of the Vice president.

34. This is the most distressing part. The president forwarded the letter of the Board to the Vice president for his comments. This was purely an internal movement of the file. It was not that the matter was judicially assigned to the Vice president and notified on his

board. There was no indication for any litigant to know that the file was now before the Vice president. In spite of this position, the Special counsel who was to be engaged by the Revenue met the Vice president and explained him the need for a special bench. How the Special counsel knew that the file of the matter was before the Vice president, is a mystery. This was a private meeting and the Petitioner was not informed. The matter was seized before the regular bench and the revenue was a contesting party. The Petitioner was completely unaware that any such private meeting had taken place between the counsel and the Vice president. Permitting a party to the litigation to meet privately in absence of other side in respect of an ongoing litigation and then base an opinion on such meeting, was most improper on the part of the Vice president. The Vice president did not even find it improper and he has proceeded to place the said private meeting on record as if nothing was wrong about the same. Not only holding such private meetings is opposed to judicial conduct, but not knowing that it is an improper judicial conduct, makes the matters worse.

35. Mr.Rana, with usual his forthrightness befitting a senior advocate, submitted that such private meeting cannot possibly be tolerated by any Court. He however contended that this factor should not ultimately influence this Court in testing the validity of the order of the president. With respect to Mr.Rana, we are unable to agree. The Vice president had played a major role in the decision making process to constitute the special bench. After he

received the file from the president for his opinion, he suggested that the Regular Bench should give their opinion. He asked them to consider formation of a special bench and for that purpose hold a hearing, if necessary. When the opinion was received from the Regular Bench, he gave his own comment that the Bench had recommended a special bench, omitting to mention that the Bench had recommended a bench outside Andhra Pradesh. The Vice president, therefore, was an integral part and in fact played a major role in a decision to constitute a special bench.

36. It is true that the final order of the president is not a judicial order. Nevertheless, even when a judicial body acts in administrative capacity, in midst of the litigation, which order will have effect on the ultimate outcome, the judicial body, must act with fairness, and not allow itself to be influenced. This is a fundamental principle. We will be failing in our duty if we do not uphold this most important principle. No attempts to influence a judicial body by non-judicial methods can be permitted and tolerated. If a litigant, be it the State, indulges in such acts, it shall not derive any benefit therefrom. Such tainted process must be obliterated and undertaken again. This course of action is necessary to retain the faith of litigants in the quality of justice rendered by the Tribunal. It is also necessary to send a strong signal to all the litigants, including the State, to make no attempts to influence a judicial body by non-judicial methods.

37. What is further troubling is that is the introduction of

'political sensitivity'. In fact, the request letter of the Board does not specifically invoke this concept. It is the Vice president who has introduced this concept. This concept is then carried forward by the Regular Bench and during the arguments before us. We fail to understand how 'political sensitivity' is relevant in a tax litigation. Tax is levied and collected under the sovereign power of the State. The Revenue is entrusted with collecting the tax and employ all legitimate methods to bring the tax evaders to book. The Tribunal is established to adjudicate disputes arising from the application of the Act. In the scheme of the Act, political affiliation of an assessee is irrelevant. The Vice president thought the case was politically sensitive. This was after the private meeting with the representative of the Board. So are we to presume that politics was discussed in the meeting? The Vice president has sown a seed of an irrelevant and potentially dangerous concept in the income tax litigation. Consider a converse scenario. There could be situation where an assessee may send its representative to hold a private meeting to refer the entire matter to special bench because the result before regular bench may affect his political career or that the issue in his case is politically sensitive. We therefore strongly deprecate the invocation of this criterion. The collection of tax and the adjudication must move unconcerned with political identity.

38. The Income Tax Appellate Tribunal is one of the oldest and most reputed tribunals in the country. The qualification for appointing a Judicial member broadly are at least 10 years in the

judicial office or advocate for at least 10 years. The qualification for appointment as an Accountant Members is broadly are that he should be a Chartered Accountant for at least 10 years, Member of Indian Income Tax Service with the post of Additional Commissioner of Income Tax or equivalent or higher. The qualification to be appointed as a president is a sitting or retired Judge of the High Court and who has completed not less than seven years as a Judge in the High Court or a Senior Vice president or Vice president of the Appellate Tribunal. Looking at its composition, high standards of conduct are naturally expected. It is of utmost importance that the faith of the litigants in the Tribunal is maintained.

39. Procedural justice is an important facet in the administration of justice. That justice must not only be done but also seen to have done, is not a cliché but is one of the most basic principle. The role of the Tribunal is emphasized by the former Chief Justice of India Mr.A.K. Sarkar in his speech, which is highlighted on the official website of the Tribunal. We quote -

“There may be people who feel that the Tribunal is not in the full sense a judicial body/venture to think that none of them is an assessee. I also venture to think that such a notion is superficial and stems from the want of knowledge of the actual working of the Tribunal. The judges who preside over the Tribunal are capable men, men of character and integrity. Anything that is unjudicial is quite foreign to them. The presiding Officers of the Tribunal are selected by a body of experienced men presided over for some years now

by a Judge of the Supreme Court. This should be a guarantee that the right type of men are selected. The Ministry of Finance which is in charge of the collection of taxes has no control over that body or the Tribunal. The Tribunal is under the Ministry of Law for the purposes of administrative control only. That Ministry is not interested in the collection of taxes and does not exercise any control over the judicial work of the Tribunal. The members of the Tribunal are divided into two classes, called Judicial and Accountant. They are selected from members of the legal profession who have specialized in tax matters, and also from the State Civil Judiciary. The present president of the Tribunal, Mr. T P, Mukerjee, before he joined the Tribunal, was an illustrious member of the State Judiciary of Bihar, having last held the office of a District and Sessions Judge in that State. I suppose people so selected can be expected to be as independent as anybody else. The Accountant Members of the Tribunal are selected from among the higher officers of the Income Tax Department, usually Commissioner and senior Appellate Assistant Commissioners and from the practising Chartered Accountants. So far as the later are concerned, there can be no reason to think that they cannot be independent. The independence of the members recruited to the Tribunal from the officers of the Income Tax Department is secured by so arranging things that they cannot look forward to anything from the Income Tax Department or the Ministry of Finance they cannot go back to higher posts in that Department. Their promotion and tenure of office are not controlled by the Ministry of Finance. These are in the hands of the Ministry of Law".

(emphasis supplied)

The expectations of the litigants echoed by the learned Chief Justice must be maintained. We are not prepared to permit any dilution of these expectations.

40. Now to examine the role of the Board. The Board has sought to project itself as an innocent party in the matter. Mr.Dave learned counsel appearing for the Board, placed before us various decisions of the Andhra Pradesh High Court and the Apex Court, in the cases of *P. Shankar Rao v/s The Govt. of Andhra Pradesh, Writ Petition Nos.794, 6604 and 6979 of 2011*, dated 10 August 2011; *M/s.Jagathi Publications Ltd. v/s Central Bureau of Investigation, Hyderabad, Criminal Petition No.4593 of 2012*, dated 2 June 2012; *Central Bureau of Investigation v/s V. Vijay Sai Reddy, Criminal Appeal No.729 of 2013*, dated 9 May 2013; and *Y.S. Jagan Mohan Reddy v/s Central Bureau of Investigation, Anti-Corruption Branch*, reported in (2013) 7 SCC 450. According to Mr. Dave, the observations made in these judgments would justify the request of the Board. All these decisions would show that the Courts have found some *prima facie* material against the promoter of the petitioner to launch investigation, prosecutions, etc. However, none of the prosecutions have ended in any conviction and we are informed are pending. Even assuming serious charges of misappropriation, embezzlement, and defrauding the State have been levied against its promoters, it does not mean that the Petitioner is not entitled to be treated fairly in the judicial proceedings. Judicial and quasi-judicial proceedings must be conducted in a manner that is fair and impartial. Ultimately, what is of a paramount importance is the Rule of Law.

41. In the replies the Revenue has taken completely evasive stand

and has tried to obfuscate the issue. Mr.Dave, during the course of hearing, went on to state that it is only the version of the Vice president. Then he tried to suggest that the Commissioner who appeared in the matter before the regular Bench could be the Special counsel. It is not the stand of the Board that they did not authorize the person who met the Vice president. The president and the Registry have not disowned the letter of the Vice president and, therefore, that somebody representing the revenue met the Vice president in connection of their request in a pending litigation is an established fact. The replies by the Board and the revenue are as vague as it can be. If the conduct of the Board was *bonafide* as sought to be urged, surely the Board would be candid with the Court. Instead, it has chosen to be vague.

42. The Board addressed a letter to the president citing various reasons. The underlined theme of the letter was that the Chief Promoter of the Petitioner was a politician who abused his position, indulged in *quid pro quo* and what the Department unearthed was a huge financial fraud. Except employing the word 'complex', nothing was shown how it was complex. If the fraud was complex, the Board would seek and request for a more investigating machinery. What may appear complex for investigation, may not, at the end of investigation remain complex for a judicial body to decide and vice-versa. The Regular Bench also did not find that the appeal contained any complex questions of law to be decided by a special bench. The letter of the Board was specially directed

against the Petitioner alone. The petitioner has levied a charge, which has gone unanswered, that similar allegations were made in the case of *Ramojirao Group*, but their matters were not referred to a special bench and only the Petitioner is singled out. Why the Board did not choose to invoke the judicial power of the Bench is not been informed to us in spite of our repeated queries. There is a clear methodology laid down under the Regulation 98(A) to make a reference by judicial order to the president. These regulations show a procedure is prescribed by which relevant material is placed on record. After the special bench is so constituted it is informed to the members of the bar the points on which the matter is referred to the special bench. Nothing stopped the Board from invoking this method that is judicial, transparent, and non-arbitrary to get a special bench constituted. Since the petitioner has put the conduct of the Board and the procedure adopted under challenge, the complete lack of explanation from the Board as to why it did not adopt this methodology is not an irrelevant point.

43. This only gives credence to the serious grievance made by the Petitioner that the entire attempt of the Board to get the special bench constituted was a part of political vendetta targeted at the Petitioner. We, therefore, cannot accept the contention of Mr.Dave that the Board acted in a *bonafide* manner and it had no personal interest in it. The Board has shown more than active interest in targeting the Petitioner and has crossed the permissible limits by

trying to influence the decision-making.

44. Having dealt with the material in form the recommendation of the Vice president and the role of the Board, we now take up the contention regarding the decision making by the president. The challenge to the order will have to be considered as a stand-alone without the letter of the Vice president and the opinion of the Bench. According to us, the findings on the private meeting itself will vitiate the decision. However, we proceed to consider whether the order of the president can be sustained otherwise. Mr. Mistri contended that, whenever an appeal bench is seized of the appeal, the president is precluded from exercising his administrative powers. In the present case, the appeals filed by the Petitioner were pending before the Regular Bench and they were adjourned from time to time at the request of the Revenue. The Bench had also passed interim orders in the matters. It was asserted by Mr. Mistri that when the president passed the order, the Regular Bench was seized of the Appeal and this assertion was accepted by Mr. Rana expressly. Thus, we will have to proceed that when the impugned order was passed, the Regular Bench was seized of the Appeal.

45. In the case of *I.T.A.T.*¹ the Apex Court has clarified that the reference can be made by a bench hearing the appeal by a judicial order following the Regulation 98(A) , and also *suo-moto* by the president under his administrative powers. The absolute proposition that is advanced by Mr. Mistri that moment the bench is

1 (1990) 218 ITR 275 (SC)

seized of the matter, the president is denuded of his powers to act independently, is not discernible from the scheme of the Act. There could be various situations where the president may be called upon to exercise his administrative powers. There is also no warrant for us to examine such an absolute proposition since all that we are concerned with is the exercise of the power by the president in the facts of the case. We have examined the challenge under the procedural aspects and not under lack of power. In each case when the challenge is laid to the order of the president, the exercise will have to be tested in the backdrop of facts of that case. We restrict the enquiry to the exercise of the powers by the president in the peculiar facts of this case.

46. Next facet is whether the president should have given hearing to the Petitioner. There was debate as to the extent of applicability of principles of natural justice. According to Mr.Rana, requirement of hearing the parties is not contemplated while exercising the power under Section 252(3) by the president, and even otherwise, the president, adopting a fair course of action, has permitted the parties to present their case before the Regular Bench. According to Mr.Mistri, in the peculiar facts of the present case, the principles of natural justice ought to have been strictly followed and the president ought to have given hearing to the petitioner, and such delegated hearing is impermissible.

47. Mr. Mistri relied upon the decision of the Apex Court in the

case of *A.K.Kraipak and ors. v/s Union of India & ors.*². He contended that it has been held by the Apex Court as far back as in 1970 in the decision of *Kraipak* that the dividing line between the administrative and quasi-judicial power has become thin and the principles of natural justice in given circumstances can apply even to administrative enquiries. The Apex Court in *Kraipak* has observed that, the distinction is being gradually obliterated. The requirement of acting judicially is a requirement to act justly and fairly. After the decision in *Kraipak*² the Courts have further leaned in favour of applying principles of natural justice in a situation where a party is affected even by an administrative decision.

48. Mr. Rana, relying upon the decision of the Apex Court in the case of *Gullapalli Nageswara Rao & ors. v/s Andhra Pradesh State Road Transport Corpn. & anr.*³, sought to contend that it is not necessary that some authority who has taken the decision must hear the parties and in the present case the regular Bench had heard the Petitioner. Firstly, the decision in the case of *G. Nageswara Rao* was rendered prior to the decision of *Kraipak*, which had added a new dimension regarding applicability of principles of natural justice. Secondly, the decision of *G. Nageswara Rao* arose from facts of a road transport corporation established under a statute implementing a scheme of nationalization by trying to take over the routes plied by the private

² A.I.R. 1970 SC 150.

²

³ A.I.R. 1959 SC 308.

bus operators. In fact this decision lays down contrary position of law to the argument advanced.

49. The present case is completely different. The president of a quasi-judicial tribunal in a pending litigation has passed the order. Constitution of the special bench of three members, which can overrule the law by which appellate tribunal – the regular bench is bound, is at the request of one party to the litigation. A particular question of law has not been crystallized but the entire appeal of the petitioner, an individual assessee, has been directed to be heard before the special bench. It is the grievance of the Petitioner that if the appeal filed by it to be heard by the regular bench, then it was entitled to favourable direction in its favour in view of law of precedent as there were binding decisions of the Tribunal. According to the Petitioner, by trying to place the matter before the special bench of three members, the Petitioner was systematically sought to be deprived of the position of law in its favour. Whether a special bench would continue with upholding the position of law in favour of the Petitioner or differ is not the question but the perception of the Petitioner of having suffered an order without hearing, would be the most relevant factor. The Apex Court in *I.T.A.T.* did refer to the order of the president as administrative but in the case of *I.T.A.T.* a representation was made by the entire bar and not by a party to the litigation and it was concurred with by the bench hearing the matter.

50. Section 255(3) as interpreted by the Apex Court contemplates two ways of establishing a bench. One by a judicial order by the regular bench and *sou-moto* by the president. Even though the power of the president in constituting a Bench *suo moto* is conferred by the Act, it will depend on facts of each case as to what is the shade of the power exercised as to whether it is purely an administrative exercise or has trappings of it being *quasi-judicial*. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the frame work of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised.

51. At the one end of the spectrum, there could be a fact situation as in the case of *I.T.A.T.* That is a request is received from the Bar to resolve a position of law, which concurred by the bench hearing the matter, and a crystallized question of law is referred to the special bench. When a reference is made by the bench under Regulation 98A by a judicial order, constituting a bench by the president is thus purely administrative and no hearing is required. Further the president may *sou moto* refer a pure question of law to be decided by a special bench, where other litigants who may wish to address the special bench can debate the question of law to be uniformly applied. Such an order is not targeted at a particular party, though in the end the a particular matter gets referred to a

special bench. The object is not to single out a party for a different treatment but to settle a position of law generally. Object in such case is to decide a question of law, which will then apply to all generally. Such exercise of powers by the president is then broad based and not individual centric.

52. The other end of the spectrum is the present case wherein the matter seized by the regular bench, and at the request of one party to the litigation, without crystallizing the position of law, entire matter only of a particular assessee is referred to the special bench by the president exercising *suo moto* powers. In such case both the object and effect is clearly to treat a party differently. In such cases when the power used by the president is focused on the entire appeal of one party, then principles of fairness and natural justice are attracted. Such order is passed *ad hominem*. If the entire appeal of the assessee is selected for hearing in the circumstances as in the present case, he must know why his case alone is being selected for a different treatment, that too at the instance of the rival. No litigant should carry an impression that the opposite side has been able to secure a march over it in a judicial proceedings through an order passed without affording an opportunity of hearing.

53 Today the order is passed on the application of the Board, tomorrow it could be on the application of the assessee. An assessee may, in midst of hearing, make an application to the president to constitute a special bench and the president may,

without hearing any party, constitute a special bench to hear the entire appeal of the assessee without formulating a question of law and without assigning any reason. Laying down that even such purely *ad-hominem* circumstances, the president is not obliged to give an opportunity to the concerned parties and pass unreasoned orders, will be conferring a non-transparent and uncorrectable power on the president. In such circumstances, in our opinion, it is in the interest of administration of justice that the president should give an opportunity of hearing to both the parties before referring the matter to a special bench.

54. Laying down such proposition will neither open floodgates of litigation nor place unnecessary burden on the president. During the course of hearing, which went over several adjourned dates, we had called upon Registry of the Tribunal to furnish data as to instances of exercise of power by the president in such circumstances i.e. on an application of a party to the litigation, in a seized matter the entire appeal has been referred to special bench. No such data was furnished nor was any explanation given for non-furnishing. We were informed that in some matters entire appeal is referred but we were not informed whether other two ingredients were present. We proceed to presume therefore that the case at hand is the only of its kind. In any case, it does not seem to be a regular practice of the Tribunal and it certainly is a deviation.

55. Mr.Rana submitted that, assuming hearing is required to be

given in the facts of the present case; opportunity of hearing was in fact given by the Regular Bench. It is true that before the Regular Bench, the Petitioner and the Revenue were heard and thereafter the opinion of the Bench was sent to the president. The president had received a request from a party to the litigation for constitution of the special bench. It was open to the president to call for opinion from the regular Bench as a material for consideration but since the ultimate decision-making was to be by the president, it was the president who ought to have given an opportunity to the parties, unless the reference had emanated by judicial order following the Regulation 98. Furthermore, the Regular Bench had not recommended a special bench. We therefore hold that the order of the president was vitiated on the count of breach of principles of natural justice and was lacking in fairness.

56. Mr.Mistri also sought to rely upon various entries in the record to bolster up an argument that the procedure adopted by the president was not transparent. Most of these issues raised by him are procedural and do not lead to any substantial grounds to set aside the order of the president. The argument such as communicating the order of the Vice president to the Regular Bench in a day, which is explained as having been sent by fax; an entry by the Registry 'if approved' before putting up the matter before the president, which appears to be a mere routine entry, are in the nature of suspicion. We do not wish to delve deeper in the files to find fault with the every step. According to us, on the major

issues, which we have discussed above, the impugned decision-making is vitiated.

57. To sum up, the president was under obligation to give hearing to the parties.. The Regular Bench had not unequivocally recommended constitution of the special bench and it had merely recommended that the matter be heard outside Andhra Pradesh. Since the Regular Bench had not recommended constitution of the special bench, no reason at all is found in the order of the president in constitution of the special bench. The president entertained a request in a matter which was seized by the Regular Bench, from a party to the litigation, passed an order without hearing the other side, without any reasons, and posted the entire matter before the special bench. This course of action was in breach of principles of natural justice and lacking in fairness. The Vice president, who played a dominant role in decision making, entertained the representative of one party to the litigation privately without notice to the other side, and introduced a completely irrelevant concept of 'political sensitivity' in the process, which by itself vitiates the decision making. Even otherwise, all the factors cumulatively, it has to be declared that the entire course of action adopted to constitute a special bench was opposed to the rule of law, fairness, transparency and cannot be sustained. We do so declare accordingly.

58. The writ petition, therefore, is allowed. The impugned order passed by the Respondent No.1 president dated 5 March 2013

constituting a special bench to hear the appeal of the Petitioner, is quashed and set aside.

59. It is however made clear that the impugned decision is set aside as the decision making process is vitiated. We have not set aside the impugned order on merits. It is therefore open to the parties to adopt such course of action as may be permissible in law in respect of the constitution of the special bench.

60. Rule is made absolute in above terms. No order as to costs.

(N. M. JAMDAR, J.)

(M.S. SANKLECHA, J.)