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IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.(C) 8341/2017

Reserved on: 12th January, 2018

Date of Decision: 12th March, 2018

TALLURI SRINIVAS

.....Petitioner

Through Mr. A.N. Haksar, Sr. Advocate with
Mr.R. Sudhinder, Ms. Perna Amitabh and
Mr.Anurag Tripathi, Advocates.

versus

**UNION OF INDIA, MINISTRY OF CORPORATE AFFAIRS &
ANR.**

..... Respondent

Through Mr. Vijay Joshi, Sr. Panel Counsel for
Respondent No.1.

Ms. Pooja M. Saigal, Adv. for Respondent No.2.

Mr. Kirtiman Singh, Waize Ali Noor, Mr. Prateek
Dhanda and Mr. Saeed Qadri, Advocates for
Respondent No.3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

Talluri Srinivas, a chartered accountant, by the present writ petition impugns and seeks quashing of the order dated 26th July, 2017 passed by the Appellate Authority, rejecting his plea and contention of lack of quorum as his appeal was being heard by four (4) members on recusal of one of the appointed members. Petitioner submits that the Appellate Authority constituted under Section 22A of the Chartered Accountants Act, 1949 (CA

Act, for short) must consist of five (5) members. Petitioner seeks directions for constitution of the Appellate Authority of five members and a restraint order against the four member Appellate Authority from proceeding with Appeal No.01/ICAI/2014, till reconstitution. Petitioner has also challenged validity of Rules 13 and 16 of the 'Procedure to be Followed for Appeals by the Appellate Authority, 2013' being repugnant to the provisions of the CA Act.

2. Petitioner has filed aforesaid appeal before the Appellate Authority constituted under Section 22A of the CA Act challenging the order dated 21st October, 2013 of the Disciplinary Committee holding him guilty of professional misconduct within the meaning of clauses (5) to (9) of the Second Schedule to the CA Act.

3. Order dated 26th July, 2017 passed by the Appellate Authority holds that absence or recusal of one or more members for justifiable reasons does not create any temporary or permanent vacancy and four members of the Appellate Forum could hear and decide the appeal. Plea of non-quorum was rejected. We have to examine correctness and validity of the said order. In case we uphold the order with reference to legal position and on interpretation of 22A of the CA Act, we need not examine validity of impugned Rules, for challenge on the ground of repugnance would then fail.

4. As the issue relates to interpretation of Section 22A of the CA Act, we would like to reproduce Section 22A and other relevant provisions relating to Appellate Authority, which read:-

“22A. Constitution of Appellate Authority.-(1) The Central Government shall, by notification, constitute an Appellate Authority consisting of-

(a) a person who is or has been a judge of a High Court, to be its Chairperson;

(b) two members to be appointed from amongst the persons who have been members of the Council for at least one full term and who is not a sitting member of the Council;

(c) two members to be nominated by the Central Government from amongst persons having knowledge and practical experience in the field of law, economics, business, finance or accountancy.

(2) The Chairperson and other members shall be part-time members.

22B. Term of office of Chairperson and members of Authority.-- (1) A person appointed as the Chairperson shall hold office for a term of three years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

(2) A person appointed as a member shall hold office for a term of three years from the date on which he enters upon his office or until he attains the age of sixty-two years, whichever is earlier.

22D. Procedure to be regulated by Authority.-- (1) The office of the Authority shall be at Delhi.

(2) The Authority shall regulate its own procedure.

(3) All orders and decisions of the Authority shall be authenticated by an officer duly authorised by the Chairperson in this behalf.

22E. Officers and other staff of Authority.-- (1) The Council shall make available to the Authority such officers and other staff members as may be necessary for the efficient performance of the functions of the Authority.

(2) The salaries and allowances and conditions of service of the officers and other staff members of the Authority shall be such as may be prescribed.

22F. Resignation and removal of Chairperson and members.--

(1) The Chairperson or a member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or a member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is earlier.

(2) The Chairperson or a member shall not be removed from his office except by an order of the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by such person as the Central Government may appoint for this purpose in which the Chairperson or a member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges.

22G. Appeal to Authority.-- (1) Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of section 21A and subsection (3) of section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority:

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary

Committee to the Authority, if so authorised by the Council, within ninety days:

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

(2) The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of section 21A and sub-section (3) of section 21B and may-

- (a) confirm, modify or set aside the order;
- (b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;
- (c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of the case; or
- (d) pass such other order as the Authority thinks fit: Provided that the Authority shall give an opportunity of being heard to the parties concerned before passing any order.”

5. Section 22A of the CA Act requires and mandates that the Central Government by notification would constitute an Appellate Authority consisting of a person, who is or has been a Judge of a High Court as its Chairperson and four other members. Two members nominated by the Central Government should be from persons who have been members of the Council for at least one full term and were not sitting members of the Council. The Central Government has to nominate two members from persons having knowledge and practical experience in the field of law, economics, business, finance or accountancy.

6. In terms of the aforesaid power, the Central Government by notification dated 31st December, 2016 read with notification dated 3rd November, 2015, had constituted an Appellate Authority of Mr. Justice Mool Chand Garg, Judge (Retd.), Dr. Navrang Saini, Mr. Praveen Garg, Mr. Kamlesh S. Vikamsey and Mr. Sunil Goyal.

7. Controversy which has arisen is on account of the fact that Mr. Sunil Goyal has recused and declined from participating and deciding the appeal preferred by the petitioner, as he has appeared as an expert witness in the criminal proceedings initiated by the Central Bureau of Investigation in a matter relating to audit of accounts of M/s. Satyam Industries Ltd. The petitioner is an accused in the said case. Recusal is justified and is not questioned or disputed. As noticed above, the petitioner submits that in view of the recusal of Mr. Sunil Goyal, the quorum of the Appellate Authority is incomplete for want of quorum of five members and therefore the appeal cannot be heard and decided.

8. Section 22A of the CA Act constitutes the Appellate Authority as a five-member body empowered to hear appeals under Section 22G filed by any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing penalties. Appellate Authority is empowered to call for records of the case, revise any order made by the Board of Discipline or the Disciplinary Committee and confirm, modify or set aside the order, enhance or reduce any penalty, pass order of remit etc. The proviso to Section 22G of the CA Act states that the Authority shall give an opportunity of being heard to the parties concerned before passing any order.

9. Section 22F of the CA Act deals with resignation and removal of Chairperson and members. The Chairperson or members by notice in writing under his hand to the Central Government can resign from office. This has not happened in the present case. Recusal to hear a particular appeal by one member of the Appellate Authority does not mean, and it has not been contended, amounts to resignation. Upon resignation, the person appointed ceases to be a member of the Appellate Authority. Recusal is case specific and the person continues and remains a member of the Appellate Authority. Mr. Sunil Goyal has not resigned and would participate as a member of the Appellate Authority and decide appeals in other cases.

10. Proviso to sub-section (1) to Section 22F states that the Chairperson or members, unless permitted by the Central Government to relinquish their office earlier, would continue to hold office until expiry of three months from the date of receipt of resignation letter or till a new successor is appointed at his place or till expiry of the term of office, whichever is earlier. Thus, Mr. Sunil Goyal continues and remain a member of the Appellate Authority in spite of his recusal in the present case. His term has not come to an end. Mr. Sunil Goyal has not been removed by recourse to procedure under Section 22F(2) of the CA Act. A Chairperson or a member, as per sub-section (2), cannot be removed except by the Central Government on the ground of proved misbehavior or incapacity after an inquiry made by such person as the Central Government may appoint for this purpose. For removal, the Chairperson or the member has to be informed of the charges and he has to be given a reasonable opportunity of being heard. The said position does not arise in the present case.

11. Aforesaid provisions reflect the legislative intent in constituting the Appellate Authority as a body of five nominated members for a fixed tenure with protection against removal except on the ground of misbehaviour or incapacity after inquiry. This ensures independence, fairness and objectivity in the decisions taken. Appointments of members of the Appellate Authority if made selectively in each appeal would necessarily affect integrity, independence and consequently reputation of the Appellate Authority. It extenuates chances of bias, partiality in selection and fear of consequences.

12. Given the aforesaid statutory provisions, it is not possible and it would be contrary to the statute, i.e. CA Act, if the Central Government appoints another person as a member of the Appellate Authority on recusal of one of the member of the Appellate Authority. There is no vacant post either on resignation or removal that can be filled up by appointment notification by the Central Government. This is impermissible and would be contrary to the CA Act.

13. In the context of the statutory position, we will now examine case law on the subject of valid quorum in view of recusal and absence of a member of a multi member tribunal.

14. Similar situations have arisen earlier. In ***Kwality Restaurant & Ice-Cream Co. Vs. The Commissioner of VAT, Trade and Tax Department and Ors.***, (2012) 194 DLT 195, functioning of Appellate Tribunal, Value Added Tax, was challenged and questioned. Appellate Tribunal as constituted was a three member body of Chairman, Administrative Member and Judicial Member. However, in respect of certain appeals on six dates

one of the members was absent and was not a part of the Bench, which had heard the appeals. Later on the third member joined the Bench after leave of absence. Objection to the presence of this member was raised. Procedure to be followed in such cases and questions relating to proper quorum were raised and answered. The assessee had argued and objected to the third member joining mid-stream in a part heard matter. Revenue's argument was that the Appellate Tribunal as constituted being a composite body of three members, appeals could have been heard during absence of one member, but the moment the member returned, she was entitled participate in the hearings so long as the arguments had not concluded. Court noticed absence of power or stipulation for constitution of benches and hearing of appeals in composition of benches of less than three members. The Division Bench upon due consideration held:-

“9. Facially, the provisions of the Act and Regulations suggest that the Tribunal, whenever it consists of a plurality of members has to hold sittings en-banc. However, at the same time, Sections 73 (4) contemplates a situation where a vacancy might arise in the membership of the Tribunal. This is not perceived to be an impediment in its functioning or cause such a hiatus as to require a separate provision, to enable the existing members to continue with their functioning. Nor does the statute ordain a minimum quorum for the hearing of appeals. It, therefore, appears that the statute is neutral about the consequences which follow in the event of a member's absence from the Tribunal for a temporary period, as in this case. This aspect is important, because the absence of any prohibition either in the negative form, enjoining members from functioning and hearing appeals during the absence of one of them, or absence of a provision mandating a minimum quorum, implies that the Legislature did not contemplate a logjam, in the Tribunal's functioning. The argument of the revenue about a restrictive class of cases which deals with absence of a member, i.e. in terms of Regulation 35, is

insubstantial. For one, that Regulation is not part of the statute; secondly, it states an obvious rule, which all members of judicial and quasi judicial bodies have to follow. Its absence would in no whit undermine the principle it gives shape to. It would be useful to recollect that every Tribunal is clothed with incidental and ancillary powers to effectuate its orders, and carry out its functions effectively (Ref. Union of India v Paras Laminates (P) Ltd AIR 1991 SC 696). Thus, a temporary absence of one of the members of the VAT Tribunal can, by no stretch of the imagination, result in its becoming dysfunctional, or being unable to function.”

(emphasis supplied)

After referring to the case law relevant for deciding the issue under consideration, it was directed that two members of the Appellate Tribunal who had partly heard the appeal, shall continue with the hearing and the third member shall not participate. Third member was entitled to sit and hear all other cases in which she was a participant, either before her leave or absence, or after her rejoining the Tribunal, except the part heard matters, which had been heard by two members of the Appellate Tribunal.

15. In W.P. (C) No. 2674/2012, ***Kavita Meena & Ors. Vs. Government of National Capital Territory of Delhi & Ors.*** and other connected matters decided on 22nd May, 2012, challenge was regarding composition of Selection Committee, which as per column 13 of the Recruitment Rules, was to consist of Chairman, SCERT, Director, SCERT, Director of Education and representative of SC/ST to be nominated by Chairman, SCERT. It had transpired that the Chairman, SCERT and Director Education, Department of Education had not participated in some of the meetings when interviews were held. Issue was whether the Selection

Committee was duly constituted in view of the Rule position. It was held as under:-

"5. The learned counsel appearing on behalf of the petitioners contended that once the majority of the members of the Selection Committee were present in the interviews held for selecting candidates, the selection process cannot be said to have been vitiated. It was also contended that as no quorum has been prescribed under the Recruitment Rules, the only requirement was that the majority of the members of the Committee should be present. In the present case, there were actually 4 to 5 members present in each of the interviews held during the period from 08.07.2010 to 28.07.2010. Therefore, the majority of the members of the Selection Committee were present in each and every interview meeting which was held. It was also submitted on behalf of the petitioners that the absence of the Chairman of SCERT did not make any difference inasmuch as the members present could nominate one amongst them to chair the meetings. In the present case, all the meetings were chaired by the Director, SCERT. The learned counsel for the petitioners placed reliance on two decisions of the Supreme Court in the case of *Ishwar Chandra v. Satyanarain Sinha & Ors* (1972) 3 SSC 383 and *People's Union for Civil Liberties v. Union of India and Anr.* (2005) 5 SCC 363 in support of the aforesaid contention.

6. The learned counsel for the respondents, who were applicants before the Tribunal, reiterated their stand before the Tribunal and supported the decision of the Tribunal. In addition, they referred the decision in the case of *State of Andhra Pradesh & Anr. v. Dr. Mohanjit Singh and Ors.* 1988 (Supp) SCC 562. It was contended that because of the said decision, the absence of a person from the Selection Committee vitiated the selection process.

7. Having heard the learned counsel for the parties, we are of the view that the decision rendered by the Tribunal is not in accordance with law and has to be set aside. The reason is that the two Supreme Court's decisions cited by the learned counsel for the petitioners clearly hold the field and in so far as the decision

cited by the learned counsel for the respondents is concerned, that is clearly distinguishable.

8. In *Ishwar Chandra* (supra), the case before the Supreme Court was concerning the appointment of the Vice-Chancellor of Saugar University. For the purpose of the appointment of the Vice-Chancellor, a Selection Committee was to be constituted under Section 13(2) of the University of Saugar Act, 1946. The Committee to be constituted was to consist of three persons; two of whom were to be elected by the Executive Council by single transferable vote from amongst persons not connected with the University or a College and the third was to be nominated by the Chancellor who was also empowered to appoint one of them as Chairman of the Committee. The two persons elected by the Executive Council of the University were Mr G.K. Shinde, a former Chief Justice of a High Court and Justice T.P. Naik of the Madhya Pradesh High Court while the third member, Shri C.B. Agarwal, a former Judge of the Allahabad High Court, was nominated by the Chancellor. Justice Naik was, however, unable to attend the meeting which was slated to be held on 04.04.1970 and in his absence the other two persons, namely, Shri Shinde and Shri Agrawal met as a Committee and submitted a panel of names from which the Chancellor appointed the appellant before the Supreme Court as Vice-Chancellor. The question that arose was whether only two members of the Committee, who were present, could have validly selected the appellant as a Vice-Chancellor. The Supreme Court, after considering the various facts and circumstances of the case, came to the following conclusion:-

“If for one reason or the other one of them could not attend, that does not make the meeting of others illegal. In such circumstances, where there is no rule or regulation or any other provision for fixing the quorum, the presence of the majority of the members would constitute it a valid meeting and matters considered there at cannot be held to be invalid”.

9. The Supreme Court in arriving at this conclusion has placed reliance on the said proposition as stated in Halsbury's Laws of

England, Third Edition (Vol. IX, page 48, para 95), which reads as under:-

“95. Presence of quorum necessary. The acts of a corporation, other than a trading corporation, are those of the major part of the corporators, corporately assembled. In other words, in the absence of special custom or of special provision in the constitution, the major part must be present at the meeting, and of that major part there must be a majority in favour of the act or resolution contemplated. Where, therefore, a corporation consists of thirteen members, there ought to be at least seven present to form a valid meeting, and the act of the majority of these seven or greater number will bind the corporation. In considering whether the requisite number is present, only those members must be included who are competent to take part in the particular business before the meeting. The power of doing a corporate act may, however, be specially delegated to a particular number of members, in which case, in the absence of any other provision, the method of procedure applicable to the body at large will be applied to the select body.

If a corporate act is to be done by a definite body alone, or by a definite body coupled with an indefinite body, a majority of the definite body must be present.

Where a corporation is composed of several select bodies, the general rule is that a majority of each select body must be present at a corporate meeting; but this rule will not be applied in the absence of express direction in the constitution, if its application would lead to an absurdity or an impossibility. Thus, where such a select body is composed of four members and two of them happen to vacate their offices at the same time, an election will be valid although only the remaining two are present at it.”

10. The second decision relied upon by the learned counsel for the petitioner was that of *People's Union for Civil Liberties (supra)*. In that case, the appointment of a member of the National Human Rights Commission was in question. Section 4 of the Protection of

Human Rights Act, 1993, stipulated that the appointment of Chairperson and other Members of the National Human Rights Commission has to be made, after obtaining recommendations of a Committee comprising:-

The Prime Minister

- The Speaker of the House of People
- The Minister Incharge of the Ministry of Home Affairs in the Government of India
- Leader of Opposition in the House of People
- Leader of Opposition in the Council of States
- Deputy Chairman of the Council of States

It so happened that the selection in the case before the Supreme Court took place by a Committee in which the Leader of Opposition in the House of People was absent. Therefore, the selection was under challenge. The Supreme Court held as under:-

“15. It is nextly argued by the learned counsel for the petitioner that there was no proper consultation amongst the members of the Selection Committee. This is based on the fact that one of the members who was then the leader of the Opposition in the Council of the States did not respond to the intimation sent to him in regard to the selection of the members since he was in the hospital at that point of time. A perusal of the Act does not show that there is any quorum fixed for the selection nor does it provide for any meeting nor any particular procedure has been provided. Under the Act consultation by circulation is not impermissible. In such a situation, if one out of six did not respond, it would not vitiate the opinion of the other five Members. On the contrary Subclause 2 of Section 4 specifically says that no appointment of a Chairperson or a member shall be invalid merely by reason of any vacancy in the Committee. In the instant case the Prime Minister, the Speaker of the House of the People, Minister Incharge of the Ministry of Home Affairs in the Government of India, Leader of Opposition in the House of People and Deputy Chairman of the Council of States having agreed on the

appointment of the second respondent, we find no statutory error in the appointment of the second respondent.”

16. The aforesaid quotation refers to two decisions of the Supreme Court in *Ishwar Chandra v. Satyanarain Sinha & Ors.* (1972) 3 SSC 383 and *People's Union for Civil Liberties v. Union of India and Anr.* (2005) 5 SCC 363. In *Ishwar Chandra* (supra) issue arised related to the validity of constitution of the Selection Committee constituted under the statute. It was held that if for one reason or the other, one of the members of the Selection Committee did not attend a meeting, it would not make the meeting of others illegal. This was stated as the correct position in law, unless there was a rule or regulation to the contrary fixing a specified quorum to constitute a valid meeting. Thus, in the absence of a specific stipulation prescribing and fixing a minimum quorum, majority of the members present would constitute a valid quorum. Reference was specifically made to Halsbury's Laws of England, Third Edition (Vol. IX, page 48, para 95), that if a corporate act is to be done by a definite body along or a definite body coupled with an indefinite body, a majority of the definite body must be present.

17. Decision in *People's Union for Civil Liberties* (supra) related to appointment of a member of the National Human Rights Commission as per and under the Protection of Human Rights Act, 1993. As per the statute selection was mandated to be by a Committee in which the Leader of Opposition in the House of People was a member. In the selection under question, leader of the opposition was absent and had not responded to the intimation sent to him, for he was hospitalized. The Supreme Court held that the Act in question had not fixed a minimum quorum for selection nor

did it provide for a particular procedure to be followed. Therefore in the absence of one member out of six members would not vitiate the opinion of the other five members.

18. Three of the aforesaid decisions, which relate to Selection Committee, albeit would be relevant and germane for the purpose of deciding the present writ petition, for the ratio and precept would be equally applicable to the statutory position in the present case. The CA Act does prescribe that the Appellate Authority will be a body constitute of five persons, but does not prescribe and does not fix a minimum quorum. The statute is silent on the procedure to be followed and adopted when one or more members cannot participate. In absence of a provision and stipulation to the contrary, quorum in such cases is in order and complete when majority of the members are present and participate. Therefore, if one of the members of the Appellate Authority for valid and good reason has recused and does not want to participate, hearing in the appeal can proceed and would not suffer invalidity on the ground of lack of quorum.

19. In the present case no vacancy has arisen which can be filled up as the said fifth member has neither resigned nor has been removed. There is no provision in the enactment to fill up "vacancy" by recusal in a particular case by any other mode. Temporary absence or recusal of a member in a particular appeal, would not make the Appellate Tribunal dysfunctional till a new member is appointed, which as recorded above as per the CA Act is impermissible.

20. In ***Ram Autar Santosh Kumar vs. State of Bihar & Ors.***, AIR 1987 Patna 13, a Full Bench of the Patna High Court had examined the question

whether a rule prescribing quorum for Assessment Sub-Committee constituted under Section 27-A(1) of the Bihar Agricultural Produce Market Act, 1961 was ultra vires the main provision or the rule making power. Section 27A(1) had stipulated that an Assessment Sub-Committee shall consist of Chairman, Vice Chairman and Secretary of the Market Committee for the purpose of assessment of levy and fee. It did not prescribe any minimum quorum. Quorum for Assessment Sub-Committee prescribed by Rule 88 was two members who had the discretion to refer the case to a Bench of all members of the Sub-Committee. For several reasons, the challenge was rejected. What is of importance for the present decision are the observations in paragraph 20 of the said judgment which reads :

“20. In this context one may perhaps equally highlight the anomalous result which must flow herein from holding that each and every member of the Assessment Sub-Committee must always attend throughout each and every proceeding of an assessment. Would it be necessary that all the three members must sit together like a regular Full Bench of a Court of Law to hear and decide every case of the assessment of Market fee? Would it be even possible or practicable to do so? If one of the members of the Assessment Sub-Committee was taken ill or otherwise becomes unable to attend for some time the whole proceedings in all the existing cases be stalled and the other members of the Committee debarred from functioning or deciding the cases by themselves. If such were to be the situation, each member can stall the function of the Assessment Sub-Committee to the state of total paralysis. The Assessment Sub-Committee would be eventually rendered nugatory during the period of absence of any of its members. Identical situation would arise in the case of illness, or failure to attend even one of the many meetings for one or the other reasons for each one of its members. An interpretation which would lead to such anomalous, if not

mischievous, results has, therefore, to be avoided even on the larger canons of construction.”

Observations and reasoning above is cogent and we respectfully agree. In an earlier paragraph, the Full Bench had rejected the contention that the question of quorum of the Sub-Committee must be decided on the same parameters as quorum of a Court, i.e. the quorum of a Division Bench or quorum fixed for the Larger Bench. It was held that the said analogy should not and cannot be drawn for determining the question of quorum of statutory bodies performing quasi-judicial functions. The contention that in case the third member had participated, he may have taken a contrary view and may have converted the other two members to his view was rejected as an assumption based upon surmises and conjectures. This contingency, it was observed, was basic and inherent in every statutory body for which quorum has been lawfully prescribed. Indeed when minimum quorum of members is prescribed, in fact it becomes the committee/ authority, itself. For arriving at the said finding, the Full Bench referred to the decision in ***Ishwar Chandra*** (supra) and the ratio that when no quorum was prescribed and majority members were present, the meeting would be legal and valid. Reference was also made to the judgment in ***Punjab University, Chandigarh vs. Vijay Singh Lamba***, AIR 1976 SC 1441 wherein the majority view taken by the Full Bench of the Punjab & Haryana High Court in judgment reported as ***Vijay Singh Lamba vs. Punjab University***, AIR 1976 P&H 143 was reversed approving the minority opinion and holding that if the quorum consists of two members then any two out of three can perform functions of the Standing Committee. Referring to the requirement of unanimity in the Regulation, it was observed that it refers to unanimity of

the members who for the time being were sitting in the Committee and were the quorum.

21. We would at this stage refer to the decision in *Vijay Singh Lamba* (supra) wherein the Supreme Court held that ‘quorum’ denotes minimum number of members of any body or persons whose presence is necessary in order to enable that body to transact its business validly so that its acts may be lawful. Generally, it would be left to the Committees/Bodies themselves to fix the quorums for the meetings. However, in the said case, the syndicate which had appointed the Standing Committee had fixed the quorum, which it was held, was valid. Pertinently it was observed that it would be inappropriate to draw parallels between such cases and a court proceeding where a matter by law, the case was required to be heard by Benches of three Judges. Reliance placed by the petitioner on the said observations would be entirely fallacious and wrong, for the present case statutory provisions quoted above refer to constitution of the Appellate Authority consisting of five members, without the enactment specifically prescribing or fixing any quorum. The contention that by default or in the absence of any provision fixing statutory quorum, all five members of the Appellate Authority must sit to constitute a valid quorum, otherwise the proceedings before the Appellate Authority will be illegal and invalid, has to be rejected and refused as fallible and flawed. This contention has been repeatedly examined and answered in negative.

22. Observations of the Supreme Court in *Vijay Singh Lamba* (supra) are not relevant and do not assist and help us answer the question raised. For Court hearings quorum may be one, two, three or more Judges.

Obviously hearing cannot be by a bench of different strength. It would not be difficult to reject the contention, if we pose the right question, whether recusal by a Judge when reference is made to the entire court, would be invalid for want of quorum. Recusal of one or even more Judges would not render the decision as illegal or invalid for want of quorum. Similarly, recusal would not affect the quorum and validity of the decision of the Appellate Authority.

23. Petitioner has relied on decision of the Constitution Bench of seven Judges in ***The United Commercial Bank Ltd. vs. Their Workmen***, AIR 1951 SC 230. The said decision was cited and distinguished by a Division Bench of this Court in ***Bharat Bijlee Ltd. Versus Commissioner of Trade and Taxes***, ST. APPL. 74/2014, decided on 18th February, 2016 on the ground that the statutory provisions of Sections 7 and 8 of the Industrial Disputes Act, 1947 interpreted therein were different from the statutory provisions relating to Appellate Tribunal in Delhi Value Added Tax Act, 2004. We would like to elaborate and point out explicit and intelligible distinction between provisions under consideration in ***United Commercial Bank Ltd.***(supra) and the present statute. Majority judgment authored by Kania, CJ. on behalf of himself and three Hon'ble Judges in ***United Commercial Bank Ltd.***(supra), had drawn and highlighted the clear cut difference in the language of Section 7 relating to constitution of "Industrial Tribunal" viz. Section 5 relating to constitution of "Conciliation Board" and Section 6 relating to constitution of "Court of Inquiry" to hold that the Award pronounced was by an Industrial Tribunal improperly constituted and therefore not vested with jurisdiction. To understand the distinction and the ratio of the majority judgment, we would like to quote the relevant sections i.e., Sections 5 to 8:-

“5. (1) The appropriate Government may as occasion arises by notification in the official Gazette constitute a Board of Conciliation for promoting the settlement of an industrial dispute.

(2) A Board shall consist of a chairman and two or four other members, as the appropriate Government thinks fit.

(3) The chairman shall be an independent person and the other members shall be persons appointed in equal numbers to represent the parties to the dispute and any person appointed to represent a party shall be appointed on the recommendation of that party:

(4) A Board, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number.

Provided that if the appropriate Government notifies the Board that the services of the chairman or any other member have ceased to be available, the Board shall not act until a new chairman or member, as the case may be, has been appointed."

6. (1) The appropriate Government may as occasion arises by notification in the official Gazette constitute a Court of Inquiry for inquiring into any matter appearing to be connected with or relevant to an industrial dispute.

(2) A Court may consist of one independent person or of such number of independent persons as the appropriate Government may think fit and where a Court consists of two or more members, one of them shall be appointed as the chairman.

(3) A Court, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number.

Provided that, if the appropriate Government notifies the Court that the services of the chairman have ceased to be available, the Court shall not act until a new chairman has been appointed.

7. (1) The appropriate Government may constitute one or more Industrial Tribunals for the adjudication of industrial disputes in accordance with the provisions of this Act.

(2) A Tribunal shall consist of such number of members as the appropriate Government thinks fit. Where the Tribunal consists of two or more members, one of them shall be appointed as the chairman.

(3) Every member of the Tribunal shall be an independent person,

(a) who is or has been a Judge of a High Court or a District Judge, or

(b) is qualified for appointment as a Judge of a High Court:

Provided that the appointment to a Tribunal of any person not qualified under part (a) shall be made in consultation with the High Court of the Province in which the Tribunal has, or is intended to have, its usual place of sitting."

8. (1) If the services of the chairman of a Board or the chairman or other member of a Court or Tribunal cease to be available at any time, the appropriate Government shall in the case of a chairman, and may in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Board, Court or Tribunal so reconstituted.

(2) Where a Court or Tribunal consists of one person only and his services cease to be available the appropriate Government shall appoint another independent person in his place, and the proceedings shall be continued before the person so appointed.

(3) Where the services of any member of a Board other than the chairman have ceased to be available, the appropriate Government shall appoint in the manner specified in sub-section (3) of section 5 another person to take his place, and the proceedings shall be continued before the Board so reconstituted."

Referring to the statutory position it was opined that in case of Conciliation Board or Court of Inquiry, meetings and deliberations could be held in absence of a member or even if there was a vacancy, provided there was prescribed quorum fixed by the Rules. However, if the appropriate

Government had notified the Conciliation Board that services of the Chairman or any other member had ceased to be available, the Conciliation Board was not to act until new Chairman or member was appointed. In the case of Court of Inquiry where the appropriate Government had notified that services of the Chairman had ceased, the Court was not to proceed until a new Chairman was appointed. However in the case of constitution of the Industrial Tribunal, Section 7 was conspicuously differently worded and had stipulated that the Tribunal would consist of two or more members, one of them would be appointed as the Chairman and each member would be an independent person. Section 8 had stated that services of the Chairman of the Conciliation Board or Chairman or member of the Court of Inquiry or the Tribunal if ceased to be available at any time, appropriate Government shall appoint another independent person to fill up the vacancy and the proceedings shall continue before the Conciliation Board, Court of Inquiry or Industrial Tribunal so constituted.

24. In *United Commercial Bank Ltd.(supra)*, the Government had constituted a three-member Industrial Tribunal by a notification dated 24.08.1949. However, one of the members could not participate in the meetings and deliberations of the Industrial Tribunal between 23.11.1949 and 20.02.1950 as his services had been placed at the disposal of Ministry of External Affairs as a member of the Indo-Pakistan Boundary Disputes Tribunal. During the period of his absence, several aspects were dealt with by two members of the Industrial Tribunal. The third member rejoined and had participated in the meetings held after 20.02.1950. Three members had thereafter signed and pronounced the final award. Apart from noticing the distinction between Section 7 read with Section 8 and Sections 5 and 6 of

the Industrial Disputes Act, 1947, the majority opinion held that the third member, on becoming a member of the Indo-Pakistan Boundary Disputes Tribunal, had ceased to be a member of the Industrial Tribunal. The vacancy therefore had arisen. This is not so in the present case. The fifth member Mr. Sunil Goyal has not ceased to be member of the Appellate Authority but has recused himself from the proceedings of the present case.

25. Secondly, in *United Commercial Bank Ltd.* (supra) the majority opinion on interpreting Section 7 had held that when services of third member had ceased to be available, the rest did not have any right to act as a tribunal. The legislature in Section 7 read with Section 8, had not postulated or provided that in case of temporary absence or permanent vacancy, remaining members of the Industrial Tribunal could proceed as in the case of the Conciliation Board or Court of Inquiry. In light of the provisions of Section 8, once a vacancy had occurred and the third member had ceased to be a member of the Industrial Tribunal, the Government had to notify constitution of the Tribunal which had undergone a change as per the statutory mandate. The majority decision referred to the subsequent notification issued in May, 1950 by which the third member was permitted to resume as a member of the Industrial Tribunal. This, it was held, was contrary to law as a third member had ceased to be a member of the Industrial Tribunal and therefore a fresh notification for appointment and constitution of the Industrial Tribunal was required.

26. Fazl Ali, J. gave a dissenting judgment holding that Award was valid. Patanjali Sastri, J. had agreed with Fazl Ali J. Mukherjea, J. in conclusion had concurred with the opinion expressed by Fazl Ali, J. for

different reasons. On several aspects Mukherjea, J. had concurred with the reasoning of Kania, CJ regarding the earlier Awards or matters dealt with by the Industrial Tribunal in the absence of the third member between January and February, 1950. Mukherjea J. had also accepted and agreed on the difference in language of Sections 5 and 6 that had empowered the Conciliation Board and the Court of Inquiry to continue with the proceedings in the absence of member(s) provided the prescribed quorum was present. Hon'ble Judge observed that such stipulation was deliberately omitted from Section 7 and had opined that having regard to language of section 7, members of the tribunal must act together. The legislature had made this exception in the case of Industrial Tribunal inferentially in view of difference in language of Section 5 and 6. However, section 8 did not lay down that proceedings could continue before the remaining members till the Industrial Tribunal was reconstituted by the Government under Section 7. In case of member of the Court of Inquiry or Industrial Tribunal, it was discretionary for the appropriate Government to fill or not to fill up the vacancy. In case a new member was appointed in place of the old, the reconstituted Conciliation Board, Court of Inquiry or Industrial Tribunal would continue. Change in constitution of Industrial Tribunal could only be made as per the provisions of sub-section (2) to Section 7 and not by a mere inaction on the part of the Government under Section 8 to make an alternate appointment. Mukherjea, J. however held that on the third member resuming duties on 20.02.1950, the Industrial Tribunal was duly constituted. He rejected the argument that once the vacancy had occurred, the Industrial Tribunal had become imperfectly constituted and a fresh constitution was necessary. In case the vacancy was not filled up and

allowed to remain, it would automatically come to an end as soon as the member whose absence caused the vacancy had re-joined.

27. Ratio of the majority judgment in the case of ***United Commercial Bank Ltd.*** (supra) is therefore entirely distinguishable as the statutory provisions were different and the context in which the findings were arrived at were dissimilar. It would be appropriate at this stage to refer to the observations of Khehar, CJ in his judgment of the Constitution Bench, ***Supreme Court Advocates-On-Record Association & Anr. vs. Union of India***, (2016) 5 SCC 1. In paragraph 395 of the aforesaid citation, it has been held as under:

“395.In this behalf, it may be recorded that in case a statutory provision vests a decision-making authority in a body of persons without stipulating the minimum quorum, then a valid meeting can be held only if the majority of all the members of the body, deliberate in the process of decision-making.....”

28. In ***Election Commission of India & Anr. Vs. Dr.Subramaniam Swamy and Anr.*** (1996) 4 SCC 104, challenge was made to participation of the the Chief Election Commissioner as head of the three member Election Commission on the ground that conflict of interest and impartiality. In that context, issue had arisen whether under the law the three member Election Commission must sit *en banc* or not at all. In other words, the legal question was whether Constitution had made it imperative for the Chief Election Commissioner to be a participant in each and every decision of the three member Election Commission. The answer was in negative and against the contention. Constitution, it was observed, was silent on the said

aspect as it was thought unnecessary, perhaps improper to provide for the same having regard to the constitutional status of the Commission. Constitution had relied on sagacity and wisdom of the persons, who would man the Commission. Reference was made to the earlier decision, reported as *T.N. Seshan, Chief Election Commissioner of India Vs. Union of India & Ors.* (1995) 4 SCC 611 challenging conversion of one member election commission into a three member Commission. *T.N. Seshan* (supra) had affirmatively rejected the contention that the Election Commission must take decision in one voice or not at all and any decision by the majority would be inconsistent with scheme of Article 394. In *Dr.Subramaniam Swamy and Anr.* (Supra), the Supreme Court referred to the principle that will of a corporation or body could be expressed by whole or by majority of members. It was interpreted that all members of the Election Commission need not participate and would not constitute by law a necessary quorum. Majority could constitute a valid quorum. Reference was made to the doctrine of necessity and it was observed:

“16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the

validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.”

(emphasis supplied)

29. F. Pollock in A First Book of Jurisprudence for Students of the Common Law published in 1896 had referred to the rule of necessity to observe:

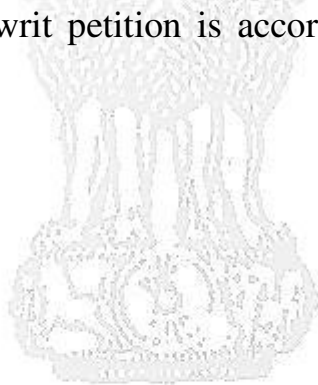
"The settled rule of law is that, although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may, but must do so if the case cannot be heard otherwise."

The rationale behind the Rule is that the litigation cannot be a *non sequitur*. In other words, there cannot be a litigation system in which it is impossible to litigate a given case. It is on the aforesaid principle that we have examined the statutory provisions of the CA Act and the effect of recusal of one member of the five-members of the Appellate Authority and held that recusal will not stall hearing and decision of the appeal. Contention of lack of quorum on account of recusal of one member of the

five member Appellate Authority for the aforesaid reasons fails and is rejected.

30. We are not, therefore, examining the last contention challenging *vires* of Rules 13 and 16 of the of the Procedure to be followed for Appeals by the Appellate Authority, 2013, for we are satisfied that the Appellate Authority of four members can hear and decide the appeal, in spite of recusal of one of the members, namely, Mr. Sunil Goyal, for he reasons set out above.

31. In view of the aforesaid discussion, we do not find any merit in the present writ petition and uphold the impugned order dated 26th July, 2017 passed by the Appellate Authority rejecting the plea of the petitioner of lack and want of quorum. The writ petition is accordingly dismissed, with no order as to costs.



(SANJIV KHANNA)
JUDGE

सत्यमेव जयते

(CHANDER SHEKHAR)
JUDGE

MARCH 12th, 2018
NA/pk