

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

**WRIT PETITION (CIVIL) Nos.13789, 16422, 24577,
5736, 6152 of 2019 and 1626 of 2020**

(Applications under Articles 226 & 227 of the Constitution of India)

In W.P.(C) No.13789 of 2019

O.A.T. Bar Association, Cuttack,
represented by its Secretary Sri Prakash **Petitioner**
Kumar Rout

Mr. Budhadeb Routray, Senior Advocate
Mr. Asok Mohanty, Senior Advocate
Mr. S.K. Pattanaik, Senior Advocate
Mr. B.B. Mohanty, Advocate

-versus-

Union of India and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General
For Opposite Party No.1
Mr. A.K. Parija, Advocate General along with
Mr. M.S. Sahoo, Additional Government Advocate
For the Opposite Party Nos.2 to 4 (State)
Mr. Ravi Iyer, Advocate
For the Intervener

In W.P.(C) No.16422 of 2019

Jadunath Dash **Petitioner**
Mr. B.B. Mohanty, Advocate

-versus-

State of Odisha and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General
For Opposite Party No.2
Mr. A.K. Parija, Advocate General along with
Mr. M.S. Sahoo, Additional Government Advocate
For Opposite Party (State)

In W.P.(C) No.24577 of 2019

The Odisha Retired Police Officers' Welfare Association **Petitioner**

Mr. Santosh Kumar Pattanaik
Senior Advocate

-versus-

Union of India and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General
For Opposite Party No.1
Mr. A.K. Parija, Advocate General along with
Mr. M.S. Sahoo, Additional Government Advocate
For Opposite Party (State)

In W.P.(C) No.5736 of 2019

Sri Ras Bihari Mohapatra **Petitioner**
In-Person

-versus-

Union of India and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General
For Opposite Party No.1
Mr. A.K. Parija, Advocate General along with
Mr. M.S. Sahoo, Additional Government Advocate
For Opposite Party (State)

In W.P.(C) No.6152 of 2019

O.S.A.T. Bar Association,
Bhubaneswar, represented by its Secretary Sri Pramoda Kumar Dash **Petitioner**

Mr. B.B. Mohanty, Advocate

-versus-

Secretary to Government of India and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General
For Opposite Party No.1
Mr. A.K. Parija, Advocate General along with
Mr. M.S. Sahoo, Additional Government Advocate
For Opposite Party (State)

In W.P.(C) No.1626 of 2020

Sri Saroj Kumar Sahoo and Others **Petitioners**

Mr. B.B. Mohanty, Advocate

-versus-

Union of India and Others **Opposite Parties**

Mr. P.K. Parhi, Assistant Solicitor General

For Opposite Party No.1

Mr. A.K. Parija, Advocate General along with

Mr. M.S. Sahoo, Additional Government Advocate

For Opposite Party (State)

CORAM:

THE CHIEF JUSTICE

JUSTICE B. P. ROUTRAY

JUDGMENT

07.06.2021

Dr. S. Muralidhar, C.J.

1. The abolition of the Odisha Administrative Tribunal (OAT) by a notification dated 2nd August, 2019 issued by the Department of Personnel and Training (DoPT), Ministry of Personnel, Public Grievances and Pension, Government of India has been challenged in these six writ petitions.

2. Two of these petitions i.e. W.P. (C) No.13789 of 2019 and W.P. (C) No. 6152 of 2019 are by the Bar Associations of the OAT in Cuttack and Bhubaneswar respectively, W.P. (C) No.24577 of 2019 is by the Odisha Retired Police Officers' Welfare Association. The remaining three petitions are by individuals.

The Background

3. The background to these writ petitions is that by the Constitution (42nd Amendment) Act 1976, Article 323-A was inserted in the

Constitution of India. Article 323-A (1) states that Parliament, by law, may provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Article 323-A (2) spells out what such a law made by the Parliament should provide for. Article 323-A (3) contains a *non obstante* clause that states that the said provision would have effect notwithstanding anything contained in any other provision in the Constitution, or in any other law, for the time being in force. The Statement of Object and Reasons (SOR) appended to the 42nd Amendment Bill explained the objects of the insertion of Article 323-A of the Constitution of India being, *inter alia*, the reduction of "mounting arrears in High Court" and "to secure the speedy disposal of service matters".

4. In terms of Article 323-A (1) and (2) of the Constitution of India, the Parliament enacted the Administrative Tribunals Act, 1985 ('AT Act') and it came into effect on 27th February, 1985. The AT Act envisaged the creation of a Tribunal, both for the Centre and the States, which was expected to supplant/substitute the jurisdiction of the High Court under Article 226 of the Constitution. Against the decision of such Tribunal, the aggrieved party could file a Special Leave Petition in the Supreme Court of India under Article 136 of the Constitution.

5. While Section 4 (1) of the AT Act talks of the establishment of the Central Administrative Tribunal (CAT), Section 4 (2) provides for the establishment of the State Administrative Tribunal (SAT). In terms thereof, on the receipt of a request in that behalf from the State concerned, the Central Government may by notification establish an SAT, which would thereafter exercise “the jurisdiction, powers and authority” conferred on it by the AT Act.

6. As far as the State of Odisha is concerned, the Central Government established the OAT, by a notification dated 4th July, 1986 published in the Gazette of India. The OAT began functioning as such with effect from 14th July, 1986.

7. Pursuant to the AT Act, five Benches of the CAT were established on 1st November, 1985. Even before the said Benches could be established, several writ petitions were filed in the High Court as well as the Supreme Court of India challenging the constitutional validity of Article 323-A as well as the provisions of AT Act.

8. By an interim order dated 31st October, 1985 reported in *S.P. Sampath Kumar v. Union of India (1985) 4 SCC 458*, the Supreme Court directed certain amendments to be carried out in the AT Act with a view to ensuring the functioning of the CAT “along constitutionally sound principles”. Pursuant to an undertaking given in that behalf by the then Attorney General for India (AG) to

the Supreme Court at the interim stage, the Administrative Tribunal (Amendment) Act, 1986 was enacted to bring about the changes suggested by the Supreme Court. Thereafter when the cases were finally heard by the Supreme Court, it had before it the AT Act as amended by the Act of 1986. A Constitution Bench of the Supreme Court in its final judgment in *S.P. Sampath Kumar v. Union of India AIR 1987 SC 386* concluded that the AT Act, even after the amendment, did not measure up to the requirement of an effective substitute to the High Courts and to achieving that end suggested further amendments to the provisions governing the form and content of the CAT. The amendments as suggested by the Supreme Court were given effect to by a further Administrative Tribunal (Amendment) Act, 1987 (Act 51 of 1987).

9. Between the amendment to AT Act in 1987 and the decision of the seven-Judge Constitution Bench of the Supreme Court delivered on 18th March, 1997 in *L. Chandra Kumar v. Union of India AIR 1997 SC 1125*, several decisions had been rendered by different Division Benches (DBs) of the Supreme Court interpreting various aspects of the AT Act. These included *J.B. Chopra v. Union of India AIR 1987 SC 357*, *M.B. Majumdar v. Union of India AIR 1990 SC 2263*; *Amulya Chandra Kalita v. Union of India, 1991 (1) SCC 181* and *Dr. Mahabal Ram v. Indian Council of Agriculture Research (1994) 2 SCC 401*.

10. Another development was that in the meanwhile eight States had set up SATs which were functioning on the date that the

decision in *L. Chandra Kumar* was rendered. In para 21 of the judgment in *L. Chandra Kumar* the dates of the establishment of the SATs were noted as under:

"Andhra Pradesh (1st November, 1989)
Himachal Pradesh (1st November, 1986)
Karnataka (6th October, 1986)
Madhya Pradesh (2nd August 1988)
Maharashtra (8th July 1989)
Orissa (14th July, 1986)
Tamil Nadu (12th December, 1988) and
West Bengal (16th January, 1995)"

11. Yet another development, as has been noted in the judgment in *L. Chandra Kumar* was that a Full Bench of the Andhra Pradesh High Court in *Sakinala Harinath v. State of Andhra Pradesh (1994 (1) APLJ (HC) 1* declared Article 323A (2) (d) of the Constitution as unconstitutional to the extent it empowered Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the AT Act was held to be unconstitutional to the extent it divested the High Courts of jurisdiction under Article 226 of the Constitution in relation to service matters. Additionally it was held that the Constitutional Courts i.e. the High Courts and the Supreme Court were alone competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. Accordingly, the decision of the Supreme Court in *S.P.Sampath Kumar (supra)* was held to be '*per incuriam*' and not

binding on the High Courts. The Full Bench of the AP High Court noted that in any event the issue of constitutionality of Article 323-A (2) (d) was not in question in *Sampath Kumar* (*supra*) and, therefore, the said decision could not be held to be an authority on that aspect. The Full Bench of the AP High Court in *Sakinala Harinath* (*supra*) further held that the remedy of an SLP under Article 136 to the Supreme Court was not a real safeguard and the jurisdiction of the Supreme Court under Article 32 of the Constitution was also not a help in such matters. Accordingly, the AP High Court held that although the judicial power could be vested in a Court or a Tribunal, the power of judicial review of the High Courts under Article 226 of the Constitution could not be excluded even by the Constitution.

12. As a result of the above post *Sampath Kumar* decisions of the Supreme Court and the A.P. High Court, a doubt arose as to the correctness of the decision in *Sampath Kumar*. This issue was raised by a two-Judge DB of the Supreme Court in *L. Chandra Kumar v. Union of India* (1995) 1 SCC 4 (order dated 2nd December, 1995) which *inter alia* included a challenge to the validity of Section 5 (6) of the AT Act.

13. The questions formulated for consideration by the seven-Judge Bench of the Supreme Court in *L. Chandra Kumar* were as under:

- (1) Whether the power conferred upon Parliament or the State Legislatures, as the case may be, by Sub-clause (d) of Clause (2) of Article 323-A or by Sub-clause (d) of Clause (3) of Article 323-B of the

Constitution, to totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of Article 323-A or with regard to all or any of the matters specified in Clause (2) of Article 323-B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether the Tribunals, constituted either under Article 323-A or under Article 323-B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their founding objectives?

14. By a unanimous judgment in *L. Chandra Kumar* (dated 18th March, 1987), the seven-Judge Constitution Bench of the Supreme Court concluded as under:

"91.all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

xx xx xx

93.The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts

and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

15. The other conclusion as regards the constitutional validity of Section 5 (6) of the AT Act was that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a single Member Bench of the Administrative Tribunal, the proviso to Section 5 (6) would

automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This would ensure that questions involving the vires of a statutory provision or rule would never be adjudicated by a single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5 (6) of the AT Act would no longer be susceptible to charges of unconstitutionality.

16. Ultimately, the Supreme Court in *L. Chandra Kumar* held that Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution was held to be "part of the inviolable basic structure of our Constitution". While the said jurisdiction could not be ousted, "other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution".

Abolition of the MPAT

17. One fall out of the judgment in *L. Chandra Kumar* was that some of the SATs were abolished. As far as the Madhya Pradesh

Administrative Tribunal (MPAT) is concerned, with the reorganization of State of Madhya Pradesh (M.P.) under the Madhya Pradesh Reorganization Act, 2000 (MPR Act), the State of M.P and the State of Chhatisgarh, under a mutual agreement in terms of Section 74 (1) of the MPR Act, decided to abolish the MPAT and a notification dated 25th July, 2001 was issued to that effect.

18. The writ petitions challenging the abolition of the MPAT were disposed of by the High Court of Madhya Pradesh by a judgment dated 14th May, 2002 in W.P.(C) No.3531 of 2001 (*Madhya Pradesh High Court Bar Association v. Union of India*). It was held that Section 74 (1) of the MPR Act empowered the States of MP and Chhatisgarh to abolish a Tribunal constituted under a Central Act. However, the State Governments would still have to request the Central Government to issue a notification to abolish the MPAT and the Central Government would be bound to do so. Sections 74 (2) and (3) of the MPR Act were held to be ultra vires Articles 14, 16 and 21 of the Constitution. One of the reasons put forth before the High Court by the State of M.P to abolish the MPAT was that after the decision of the Supreme Court in *L. Chandra Kumar*, the MPAT remained only an "additional tier" in the administration of justice with there being no finality to its decision as was envisaged under the AT Act. The State of M.P. was of the view that the MPAT failed to fulfil the objects of its establishment since its decisions would be subject to the writ/supervisory jurisdiction of the High Court.

19. The decision of the High Court of MP was challenged before the Supreme Court. By a decision dated 17th December, 2004 in *M.P. High Court Bar Association v. Union of India, (2004) 11 SCC 766* (hereafter ‘the *MPAT Abolition case*’) the Supreme Court affirmed the decision of the High Court of MP and held as under:

"73..... from the record of the case, it is amply clear that relevant, germane, valid and proper considerations weighed with the State Government and keeping in view development of law and the decision of the larger Bench of this Court in *L. Chandra Kumar*, a policy decision has been taken by the State Government to abolish State Administrative Tribunal. Parliament also empowered the State Government to take an appropriate decision by enacting sub-section (1) of Section 74 of the Act of 2000 and in exercise of such power, the State Government had taken a decision. The decision, in our opinion, cannot be regarded as illegal, unlawful or otherwise objectionable.

Abolition of the TNAT

20. In the meanwhile, as far as Tamil Nadu Administrative Tribunal (TNAT) is concerned, the Government of Tamil Nadu by its letters dated 10th June 1994, 12th June 2001 and 10th August, 2004 requested the Government of India to abolish the TNAT through an amendment. After the judgment of the Supreme Court in the *MPAT Abolition case*, the Chief Secretary, Government of Tamil Nadu sent another letter dated 11th February, 2005 requesting the Central Government for abolition of the TNAT through a notification.

21. It must be noted at this stage that even while the Union of India's appeal against the judgment of M.P. High Court was pending, the Government of India appears to have accepted the decision of M.P. High Court and issued a notification on 17th April, 2003 abolishing the MPAT.

22. According to the Government of Tamil Nadu, there was no option for the Central Government but to accept the request of the State government to issue such a notification. Accordingly, the Government of Tamil Nadu stopped appointing the Chairman and the Administrative Members of the TNAT after their retirements in 2002. Thereafter the TNAT was manned by the sole Vice Chairman, who also retired on 2nd June, 2004. Subsequently, no one was appointed and the TNAT became defunct with 30,000 cases pending for disposal.

23. It was in those circumstances that writ petitions were filed by the Tamil Nadu Government All Department Watchman and Basic Servants Association; the Administrative Tribunal's Bar Association and the Tamizhaga Village Administrative Officers' Association before the Madras High Court for a mandamus to the State of Tamil Nadu to fill up the vacancies in TNAT and allow it to function effectively until it stood abolished by the Central Government through a proper procedure which would take a long time.

24. The stand of the Central Government before the Madras High Court was that though the Government of Tamil Nadu had sent a proposal for abolition of the TNAT, it could not be done by a notification but only by a law made by the Parliament. It was pointed out that Section 74 of the MPR Act provided for abolition through notification but such a provision was not available as far as the State of Tamil Nadu was concerned and therefore, a suitable Parliamentary amendment to the AT Act was necessary. It was stated that such a proposal was in fact contemplated.

25. A DB of the Madras High Court by a judgment dated 25th April 2005 in Writ Petition No.1724 of 2005 and batch (*Tamil Nadu Government All Department Watchman and Basic Servants Association v. Union of India*) dismissed the writ petitions holding that in light of the judgment of the Supreme Court in the *MPAT Abolition case* once a policy decision was taken by the Government of Tamil Nadu to abolish the TNAT, and the said policy decision was accepted by the Central Government, the latter was obliged to issue a notification rescinding the earlier notification by which the TNAT was established. Invoking Section 21 of the General Clauses Act, 1897 (GC Act), the Madras High Court concluded that since no mode to rescind the notification establishing the TNAT had been provided in the AT Act, Section 21 of the GC Act will have to be invoked for rescinding the notification earlier issued establishing the TNAT. The Madras High Court held that there was no necessity for the Central Government to await the amendment to the AT Act by the Parliament, and the

mere issuance of the notification was sufficient to abolish the TNAT.

26. Upon this there were two developments. One was that a SLP(C) No.16449 of 2005 filed by the Tamizhaga Village Administrative Officer's Association in the Supreme Court against the above judgment of the Madras High Court was dismissed in limine by a three-Judge Bench of the Supreme Court on 16th August 2005, by a one-line order which read: "The Special Leave Petition is dismissed." The second development was that the Union of India filed a separate Special Leave Petition against the said judgment which came to be numbered as Civil Appeal No.951 of 2006, upon leave being granted by the Supreme Court. No interim order was passed therein by the Supreme Court staying the operation of the judgment of the Madras High Court.

27. The Government of India appeared to have accepted the judgment of the Madras High Court and issued a notification on 17th February 2006, abolishing the TNAT. In other words, by invoking Section 21 of the GC Act read with Section 4 (2) of the AT Act, the Central Government implicitly accepted the interpretation of those provisions by the Madras High Court and rescinded the earlier notification establishing the TNAT without waiting for the amendment to the AT Act.

Bill to amend the AT Act

28. Nevertheless, consistent with the stand of the Central Government before the Madras High Court, the Administrative

Tribunals (Amendment) Bill, 2006 was tabled in Parliament on 16th March, 2006. This also contemplated amendments to the AT Act consistent with the decision in *L. Chandra Kumar*. The S.O.R. appended to the Bill noted the fact that three of eight State Governments viz., Himachal Pradesh (H.P), M.P and Tamil Nadu had requested the Central Government for abolition of the respective SATs and that there was therefore a need for amendment of the AT Act "in order to provide for an enabling provision for abolition of the Tribunal and also for transfer of pending cases to some other authority after the Tribunal is abolished." The Bill proposed introduction of Chapter IV-A in the AT Act titled "Abolition of Tribunals" and Chapter IV-B titled "Appeal to the High Courts".

29. The said Bill was referred to the Rajya Sabha Standing Committee of Personnel, Public Grievances, Law and Justice. The Committee submitted its 17th report on 5th December, 2006 *inter alia* recommending that the power to abolish an SAT should not be granted to the executive and that the proposal for such abolition should invariably have the concurrence of the Parliament. The Committee further recommended that appeals from the order of the SAT should be provided only to the Supreme Court and not to the High Courts since "High Courts are already overburdened with a huge number of pending cases". It also recommended that "if statutory provisions of appeal to the Supreme Court cannot be envisaged, a clarifying amendment should be made that the order of a Tribunal finally disposing of an application will not be called

in question in any Court, except by way of Special Leave Petition in the Supreme Court”. Another recommendation of the Committee was that “when a legislation is made the Judicial Impact Statement and financial commitment should be anticipated and measured”. It was further noted that the nodal Ministry for ATs should be the Ministry of Law and Justice and not the Ministry of Personnel, Public Grievances and Pensions. Specific to the TNAT, the Committee did not approve granting retrospective effect to the notification of the Government of India abolishing the TNAT "since it would not be proper to validate the notification till the judgment is given by the Apex Court in the SLP filed challenging the abolition".

Abolition of some SATs

30. For reasons that are not very clear, nothing further was heard of the aforementioned Bill. The proposed amendments to the AT Act, therefore, did not come about. On the other, hand the Central Government appears to have acceded to the requests by State Governments by issuing notifications abolishing the SATs. A pattern appears to have been established which involved the Central Government requiring the State Government to obtain the concurrence of the High Court concerned before making a request for abolition of the SAT. This fact was mentioned in the notification dated 8th July 2008 abolishing the HPAT, where the second paragraph states "And whereas the Government of Himachal Pradesh, after obtaining the concurrence of the High Court of the Himachal Pradesh, has now made a request for

abolition of Himachal Pradesh Administrative Tribunal (HPAT)." The notification expressly stated that this was being done in exercise of power conferred under Section 4(2) of the ATA read with Section 21 of the GC Act. As regards the Andhra Pradesh Administrative Tribunal (APAT), an identically worded notification was issued by the Government of India on 14th January 2020 abolishing it.

31. In light of the above developments, when Civil Appeal No.951 of 2006 filed by the Union of India against the judgment of the Madras High Court upholding the decision to abolish the TNAT was taken up for hearing by the Supreme Court on 28th March 2017, it was informed that the appeal had been rendered infructuous. The appeal was disposed of as such leaving the question of law open.

32. It may be noted here that subsequently the HPAT was again established under Section 4(2) of the ATA by the Government of India by a notification dated 29th December 2014. Five years thereafter, for a second time, by another notification 26th July 2019, the Government of India again abolished the HPAT.

33. Thus, of the eight SATs that were functional as of 18th March 1997, when the Supreme Court delivered its judgment in *L. Chandra Kumar*, five of them viz., the MPAT, the TNAT, the HPAT, the OAT and the APAT have since been abolished.

Abolition of the OAT

34. Now turning to the OAT, it had started functioning with effect from 14th July 1986 with one Chairman and three Members. An additional Bench was set up in Bhubaneswar, comprising a Vice Chairman and a Member, with effect from 1st July, 1994. On 15th January 2014, the State Government took a decision to create one more Bench of the OAT at Cuttack with two Members i.e. one Judicial and another Administrative, thus bringing the total number of Members including the Chairman to eight. By this time, there were two circuit Benches of the OAT, one at Sambalpur and the other at Berhampur.

35. It appears that on 17th July 2013, the State of Odisha Cabinet met to consider abolition of the OAT, but this was not considered expedient at that point in time. However, when it met on 9th September 2015, the State Cabinet approved in principle the proposal for abolition of the OAT with the following observations:

"(i) Since this proposal will lead to an increased work load for the High Court, it was decided in principle that the entire establishment of the Tribunal could be transferred to the High Court.

(ii) Government of India will also be moved after discussing with the High Court for creating a few more judgeships in the High Court to deal with the extra work. The State Government will be totally supportive to the proposal for increasing judgeship of our High Court. Discussions will also be held with the High Court regarding the pending cases in the Tribunal."

36. In a press release issued soon thereafter, the Government of Odisha gave its reasons for the decision as under:

"(1) Odisha Administrative Tribunal was established on 14th July, 1986 under the Administrative Tribunal Act, 1985 by Government of India on the request of Government of Odisha. The Tribunal under the Act was to have similar jurisdiction as the High Court. The objective of the formation of the Tribunal was to enable quick disposal of the grievances of the government employees.

(2) However, with the decision of the Hon'ble Supreme Court in L. Chandra Kumar (1997) the provision of the Act that the aggrieved parties could appeal before the Supreme Court against the orders of the Tribunal was held unconstitutional, as it was deemed to be inconsistent with the basic structure of the Constitution. Hence the parties aggrieved with the orders of the Tribunal may approach the High Court first. Thus, the very objective of the establishment of the Tribunal to give quick justice to the government employees could not be achieved. Accordingly, the proposal for abolition of Odisha Administrative Tribunal was considered by the Cabinet and was approved in principle.

(3) After approval of the Cabinet, the proposal will be sent to the Government of India for issue of the notification for abolition of the Odisha Administrative Tribunal. In view of increased workload for the High Court after approval of the proposal, it has been decided to move Government of India after discussion with the High Court for creating more Judgeships in the High Court if necessary, to discuss with High Court as to how the pending cases will be dealt."

37. On 16th September 2015, the Chief Secretary, Government of Odisha wrote to the Secretary, DoPT, Government of India stating

that as a result of the judgment in *L. Chandra Kumar*, the very purpose of having an SAT for speedy redressal of the grievances of the employees of the State Government was not fulfilled as "any way the aggrieved parties have to approach Hon'ble High Court before approaching the Apex Court for final verdict." While enclosing a note explaining the reasons for the decision arrived at by the State Government, the Chief Secretary intimated the Central Government that "appropriate measures would be taken to deal with the pending cases and regarding redeployment of the staff and pending cases before the SAT so that the transition becomes smooth to the extent possible." The Chief Secretary accordingly requested the Central Government to issue the necessary notification under the AT Act for abolition of the OAT.

38. The enclosed note set out the statistics regarding the workload of the OAT and the pendency of cases. Set out in the note was a chart showing in a tabular form the institution, disposal and pendency of the cases before the OAT. At the end of 2014 there were 54, 334 pending cases. It was noted that during 2014 there were four Members of the OAT (including the Chairman) and the disposal per Member came to 8.91 cases per day and that "as an institutional mechanism it seemed the Tribunal was not able to provide a speedy decision to the aggrieved parties".

39. Conscious that there would be an additional load on the High Court Judges, the Government of Odisha in the aforesaid letter to the DoPT stated that it would take "appropriate action to further

strengthen Hon'ble High Court of Orissa including increase in judgeships to deal with the additional workload at the level of the Hon'ble High Court after abolition of the OAT. It is stated that the arrangement has also been made regarding existing staff and resources provided to the OAT so that the High Court would be able to deal with cases presently pending before the OAT.”

40. In response to the above letter of the Government of Odisha, the DoPT on 12th January 2016 wrote to the Chief Secretary, Government of Odisha stating that the matter had been considered in consultation with the Department of the Legal Affairs and that the Legal Adviser there had advised that prior to seeking the opinion of the AG, the following information/clarification were required:

"(i) "The views of the concerned High Court with regard to the proposal of abolition of OAT, transfer of cases of the OAT to the High Court and also the transfer of employees from the OAT to High Court.

(ii) The Administrative Tribunal (AT) Act contemplates transfer of cases from the High Court to the Administrative Tribunals on its constitution vide Section 29 of the Act. However, there is no provision for transfer of cases to the High Court on abolition of the Administrative Tribunal. As such, we would like to know what will be the legal basis of transfer of the cases pending with OAT Odisha on its abolition to the High Court.

(iii) Whether in the past there is any precedent regarding transfer of cases from OAT to High Court, if so, the same may be provided."

2. *In view of the above, it is requested to kindly obtain the views of Odisha High Court with regard to the proposal of abolition of OAT, transfer of cases of the OAT to the High Court and also the transfer of employees from the OAT to High Court and communicate the same to this Department within a week positively.*

3. *As regards observations of Legal Adviser as at sub paras ii) and iii) of para 3 above, it is requested to kindly furnish the requisite information/clarification to this Department within a week positively.*

4. *Further, necessary action on your proposal shall be taken on receipt of the above information/clarification from Government of Odisha and Hon'ble High Court. As such, the time-line of providing the requisite information/clarification within a week may kindly be adhered to."*

41. A copy of the above letter was sent to the Registrar General (RG) of the Orissa High Court as well as to the Registrar of the OAT along with the enclosures for information.

42. On the basis of the above letter of the DoPT, the Principal Secretary in the General Administration Department (GAD), Government of Odisha addressed a letter to the RG of this Court on 1st February, 2016 stating that the Government of Odisha was of the view that the OAT was not able to serve its objective particularly after the decision in **L. Chandra Kumar** and that the purpose of having an SAT for speedy redressal of the grievances of the State Government employees was not fulfilled since the aggrieved parties had to approach the High Court before approaching the Apex Court for a final verdict. According to the

Government of Odisha, as stated in its letter, the abolition of the OAT would reduce the burden of the litigation of the Government and also reduce the time for resolution of the disputes. The Government of Odisha stated that it would take appropriate action to further strengthen the High Court including increase of judgeship to deal with the additional workload at the level of the High Court after abolition of the OAT.

43. In its letter dated 1st February 2016, the Government of Odisha further pointed out that in response to its letter, the Government of India had sought the views of the High Court on the proposal to abolish the OAT, the transfer of the cases from the OAT to the High Court and transfer of the employees from the OAT to the High Court. The Secretary, GAD requested the RG to place before the High Court the issues on

- (i) arrangement for transfer of cases of the OAT to the High Court;
- (ii) transfer of employees from the OAT to High Court;
- (iii) modalities for disposal of service related cases in the High Court and
- (iv) creation of more judgeships to deal with the extra workload and further requested to communicate the views of the Hon'ble Court in the matter to the Department at an early date.

44. A communication dated 25th April 2018 was sent by the DoPT, Government of India to the Government of Odisha stating that the competent authority had "in principle" approved the proposal for abolition of the OAT subject to the following conditions:

"(i) Government of Odisha will suitably adjust the employees of the OAT as intimated by them;

(ii) Decision with regard to disposal of pending cases will be left to the Government of Odisha."

45. Thereafter it appears that by another letter dated 28th May, 2018 the DoPT informed the State Government that after receiving the comments on the points noted in its letter dated 25th April 2018, it would take three to four months time for the DoPT to finalise the abolition of the OAT.

46. The State Government then again wrote to the RG of this Court on 3rd July, 2018 for placing the matter before the High Court. On 5th July, 2018 the High Court sought the details of the assets and employees position in the OAT. The Deputy Registrar, OAT sent a request letter for information on 7th July, 2018 and this was placed before the RG of the High Court on 9th July, 2018.

47. On 5th February, 2019 the RG of this Court wrote a letter addressed to the DoPT, Government of India as well as the Principal Secretary, GAD, Government of Odisha stating as under:

“In adverting to the Letters referred to above on the above subject, I am directed to say that the court after due deliberation have been pleased to resolve to accept the decision to be taken by the Central Government and State Government in this regard.

This is for favour of information.”

48. It may be noted at this stage, that after the decision of the Government of Odisha to abolish the OAT became public, it ceased to make appointments to fill up the vacancies in the OAT. This led to the OAT Bar Association, Cuttack filing W.P.(C) No.15693 of 2017 in this Court seeking a mandamus to the Government of Odisha to fill up the vacancies in the OAT. Another W.P.(C) No.22635 of 2017 was filed by the OSAT Bar Association, Bhubaneswar in this Court on 27th October, 2017 seeking a similar relief.

49. In response to both the writ petitions the Government of Odisha filed replies disclosing its proposal to abolish the OAT. It appears that in the said writ petitions an order was passed on 10th January, 2019 by this Court directing the State Government to appoint a Chairperson (Judicial), OAT on ad hoc basis for a period of one year. This order was challenged by the Government of Odisha by filing SLP (C) Nos.4701 and 4702 of 2019 in the Supreme Court. However, on 21st February, 2019 the Government of Odisha decided to implement the above order while simultaneously writing to the Government of India seeking abolition of the OAT.

50. In the meanwhile even before the notification was issued by the Central Government, W.P. (C) No.5362 of 2019 was filed by the OAT Bar Association, Cuttack in this Court questioning the decision dated 9th September, 2015 and the subsequent decisions of the Government of Odisha and the 'in principle' approval of the proposal by the Government of India vide its letter dated 25th April,

2018 to abolish the OAT. In the said writ petition, notice was issued on 11th April, 2019 by this Court.

The impugned notification

51. While the said writ petitions were pending, the DoPT published in the Official gazette dated 2nd August, 2019 the impugned notification which reads as under:

“G.S.R.552 (E)-Whereas, in exercise of the powers, conferred by sub-section (2) of section 4 of the Administrative Tribunals Act, 1985 (13 of 1985) and on receipt of the request from the Government of the State of Odisha in this behalf, the Central Government has established the Odisha Administrative Tribunal with effect from the 14th July, 1986 vide notification of the Government of India in the Ministry of Personnel, Public Grievance and Pensions (Department of Personnel and Training), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number GSR 934 (E), dated the 4th July, 1986.

And whereas, the Government of the State of Odisha, after obtaining the concurrence of the High Court of Orissa, has now made a request for abolition of the said Odisha Administrative Tribunal;

Now, therefore, in exercise of the powers conferred by sub-section (2) of section 4 of the Administrative Tribunals Act, 1985, read with section 21 of the General Clauses Act, 1897 (10 of 1897), the Central Government hereby rescinds the said notification number G.S.R. 934 (E), dated the 4th July, 1986, except as respects things done or omitted to be done before such rescission, with effect from the date of publication of this notification in the Gazette of India.

(F.No.A-11014/10/2015-AT)
SRINIVAS R. KATIKITHALA, Addl. Secy.”

The present petitions

52. W.P. (C) No.13789 of 2019 was filed by the OAT Bar association at Cuttack challenging the constitutional validity of the above notification. The said writ petition was listed for hearing first on 7th August, 2019. The DB passed a detailed order noting the contentions of both the counsel for the Petitioners as well as the Advocate General appearing for the State of Odisha and directed notice to issue in the petition. This Court further while adjourning the case to 5th September, 2019 directed as under:

“In the meantime, it is made clear that the State Government will not transfer any proceeding to any other authority or any other Court. The State Government will also file their response.

However, it will be open for the applicant to move for transfer of his Original Application to this Court in case of exigency, which shall be subject to the result of the writ petition.”

53. Thereafter apart from petitions filed to challenge the same notification, other writ petitions were filed in this Court praying that applications pending in the OAT be transferred to this Court. Many such writ petitions have been disposed of by this Court granting that relief.

54. Pursuant to the notice issued in the petitions challenging the abolition of the OAT, a reply was filed by the GAD, Government of Odisha on 28th August, 2019. An additional counter affidavit was filed on 23rd September, 2019. The Petitioners filed their

rejoinder to the said counter affidavit to which again a reply was filed by the State of Odisha on 25th November, 2019. The Union of India filed a separate affidavit on 4th September, 2019, *inter alia*, adopting the same stand as the State of Odisha to the effect that in terms of Section 21 of the GC Act, the Central Government has the power to rescind the notification in terms of which the OAT had been established. The Petitioners filed a rejoinder to the said affidavit as well. The pleadings in the accompanying petitions are more or less on the same lines and are, therefore, not being discussed in detail here.

55. This Court heard the submissions of Mr. B. Routray, learned Senior counsel, Mr. Asok Mohanty, learned Senior counsel, Mr. S.K. Patnaik, learned Senior counsel, Mr. U.C. Mohanty, learned counsel, Mr. R.K. Sahoo, learned counsel, Mr. B.B. Mohanty, learned counsel, Mr. R.B. Mohapatra, learned counsel appearing in person for the Petitioners. They also filed detailed written submissions. Mr. R. Iyer, learned counsel, was allowed to intervene in W.P. (C) No.13789 of 2019 in his individual capacity. He made detailed oral arguments and also submitted a written note.

56. On behalf of the Opposite Parties, the Court heard the submissions of Mr. A.K. Parija, learned Advocate General for the State of Odisha, Mr. M.S. Sahoo, learned Additional Government Advocate and Mr. P.K. Parhi, learned Assistant Solicitor General on behalf of Union of India.

Submissions on behalf of the Petitioners

57. The submissions on behalf of the Petitioners and the intervener may be summarised thus:

(i) Having an SAT is an administrative necessity in terms of Article 323-A (1) of the Constitution of India given the object behind its insertion by the Constitution (42nd Amendment) Act and particularly in light of Clause 5 of the SOR accompanying its corresponding Bill. Adopting the rule of purposive construction, the word ‘may’ in Article 323-A (1) should be read as ‘shall’ in acknowledgment of the overflowing docket of the High Court as well as the Supreme Court. Reliance is placed on the decisions in ***Sampath Kumar, L. Chandra Kumar, Madras Bar Association v. Union of India (2014) 10 SCC 1, Gujarat Urja Vikas Nigam Ltd. v. Union of India (2016) 9 SCC 103 and Rojer Mathew v. Union of India (2020) 6 SCC 1.*** Reference is also made to the decisions in ***Mahaluxmi Rice Mills v. State of U.P. (1998) 6 SCC 590, Smt. Bachahan Devi v. Nagar Nigam, Gorakhpur (2008) 12 SCC 372 and Dillip Kumar Basu v. State of West Bengal (2015) 8 SCC 744.***

(ii) The impugned notification dated 2nd August, 2019 issued by the DoPT, Government of India is invalid as it is not expressly stated to have been taken in the name of the President of India. In other words it is not in compliance with the requirement of Articles 77 (1) and (2) of the Constitution of India. Reliance is placed on the decisions in ***State of Uttaranchal v. Sunil Kumar Vaish (2011) 8***

SCC 670 and *Bachhittar Singh v. State of Punjab* AIR 1963 SC 395.

(iii) A mere noting in the file cannot be said to be the decision of the Government unless it is sanctified by issuing an order in accordance with Article 77 (1) and (2) or Articles 166 and 192 of the Constitution of India. The decision in the file culminates in an order affecting the rights of the parties only when it is expressed in the name of the President or the Governor. In the present case no material has been placed on record to show that the order dated 2nd August, 2019 has been expressed in the name of the President in the manner envisaged under Article 77 (2) of the Constitution of India. Reliance has been placed in the decisions of *State of Bihar v. Kripalu Shankar* (1987) 3 SCC 34, *Rajasthan Housing Board v. Krishna Kumari* 1993 (2) SCC 84, *M/s. Sethi Auto Service Station v. Delhi Development Authority* (2009) 1 SCC 180, *Shanti Sports Club v. Union of India* (2009) 15 SCC 705 as well as *Gulf Goans Hotels Co. Ltd. v. Union of India* (2014) 10 SCC 673.

(iv) Neither under Article 323-A (1) of the Constitution of India nor under the AT Act has the High Court been assigned any specific role in the matter of establishment or abolition of an SAT. Consequently, the so-called ‘concurrence’ obtained of the High Court for the decision to abolish the OAT is *non est*.

(v) Unlike Article 371-D of the Constitution, the Parliament has not provided in Article 323-A, for the abolition of an SAT and without

such an express provision, the executive cannot by a mere notification abolish the OAT. Power has been granted to the Parliament to make a law only for 'establishing' an AT and not for its abolition. The impugned notification is therefore in excess of the powers granted to the executive and is illegal and unconstitutional.

(vi) With the impugned notification bringing to an end the disputes pending before the OAT, the litigants are left without a similar forum as mandated by the Parliament to be established. In such circumstances, the power under Section 21 of the GC Act to rescind the notification establishing the OAT is not available either to the Government of Odisha or the Government of India. When viewed in light of the subject matter and the context of Section 4 (2) of the AT Act read with Article 323A (1) of the Constitution which contemplates only the establishing of a SAT, Section 21 of the GC Act cannot be invoked to bring to an end disputes pending in the OAT. Reliance is placed on the decisions in *State of Bihar v. DN Ganguly AIR 1958 SC 1018*, *Lt. Governor of Himanchal Pradesh v. Avinash Sharma AIR 1970 SC 1576* and *State of Madhya Pradesh v. Ajay Singh (1993) 1 SCC 302*.

(vii) In this context, it is further submitted that since the decision to establish an SAT is quasi-judicial in nature, in the absence of an express provision in that behalf in the AT Act, such a decision cannot be nullified by resorting to Section 21 of the GC Act. What cannot be done directly cannot be sought to be done indirectly. The decisions in *Samundra Devi v. Narendra Kaur (2008) 9 SCC 100*;

Ram Chandra Singh v. Savitri Devi (2004) 12 SCC 713; Indian National Congress v. Institution of Social Welfare (2002) 5 SCC 685 and Industrial Infrastructure v. CIT (2018) 4 SCC 494 are referred to.

(viii) Once the Central Government took a decision to establish the OAT, it became *functus officio* and was incompetent to issue any further notification under Section 21 of the GC Act rescinding the earlier notification. Reference in this regard is made to the decisions in *State Bank of India v. S.N. Goyal (2008) 8 SCC 92* and *Government of Uttar Pradesh v. Raja Mohammad Amir Ahmad Khan AIR 1961 SC 787*.

(ix) Since the impugned notification has adverse civil consequences for the concerned stakeholders, they were required to be heard before the decision was taken and, therefore, the impugned notification violates the principles of natural justice. Reliance is placed on the decisions in *State of Orissa v. Dr. (Miss) Binapani Dei, AIR 1967 SC 1269, S. L. Kapoor v. Jagmohan, AIR 1981 SC 136, Sahara India v. CIT, (2008) 14 SCC 151 and Siemens Engineering v. Union of India, AIR 1976 SC 1785*.

(x) It is not open for the State Government or the Government of India to simply decide that the jurisdiction which has been vested by Parliament in the SAT should now vest in the High Court and that cases pending before the OAT could *ipso facto* stand transferred to the High Court. It is submitted that the power to

create or enlarge jurisdiction is legislative in character so also the power to confer a right of appeal or to take away a right of appeal and that this can be done only by the Parliament. Reliance is placed on the decision in *A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 1531.

(xi) The decision to abolish the OAT on the basis of the decision in *L. Chandra Kumar* is attacked as being perverse, irrational, unreasonable and violative of Article 14 of the Constitution. It is stated that the ratio of *L. Chandra Kumar* which was concerned with reducing the workload of the Supreme Court of India has been wrongly understood by the Government of Odisha as providing the reason for abolishing the OAT. Nowhere in the decision in *L. Chandra Kumar* is any opinion expressed by the Supreme Court that the SATs are redundant. On the contrary, the decision in *Rojer Mathew* (*supra*) reveals that the need for Tribunals is still felt. No judicial impact assessment as contemplated either by the Parliamentary Standing Committee or the decision of the Supreme Court in *Rojer Mathew* (*supra*) has been undertaken to justify the abolition of the OAT for the purpose of rendering speedy justice to Government servants. The report of the Parliamentary Standing Committee which has rejected the proposal to abolish the SATs through mere notifications of the government is admissible in evidence and can be relied upon. Reliance is placed on the decision in *Kalpna Mehta v. Union of India*, (2018) 7 SCC 1.

(xii) The irrationality is writ large when it is understood that even after abolition of the OAT, there would be a three-tier litigation

which a Government employee has to face - first before the Single Judge of the High Court, then before the DB and thereafter before the Supreme Court under Article 136 of the Constitution. This has been completely lost sight of both by the Government of Odisha as well as the Government of India.

(xiii) Moreover, the OAT was functioning with two regular benches at Bhubaneswar and Cuttack and two circuit benches at Sambalpur and Berhampur. This provided easy, speedy and affordable access to the aggrieved Government servants. All these advantages would be lost if all of the Government servants had to approach only the High Court in Cuttack for redressal of their grievances.

(xiv) The figures of pendency of cases in the High Court and the number of unfilled vacancies of High Court Judges over the last 20 years make it clear that far from ensuring speedy disposal of the 70,000 and odd applications pending before the OAT which would stand transferred to the High Court as a result of the abolition of the OAT, the disposal of such pending cases, not to speak of the fresh ones, would get interminably delayed. The very rationale is questionable. The decision to abolish the OAT is, in the circumstances, against the larger interests of the Government employees and defeats their constitutional rights to speedy and fair justice under Articles 14, 21 read with 39A of the Constitution.

(xv) Out of the 70,000 odd cases, only 1453 have been transferred thus far and over the past 19 months not one of the transferred

cases has been taken up for hearing in the High Court. In the absence of a provision like Section 29 of the AT Act, the transfer of the petition to the High Court is without legal basis. Mere creation of additional post of High Court Judges may not solve the problem given the delay in filling up even the existing vacancies.

(xvi) There has been no specific denial in the reply filed by the Government of Odisha to the averment in para 7 of the writ petition that the decision to abolish the OAT was triggered by the prospect of the top-ranking officials of the State of Odisha facing charges of contempt. The OAT was abolished only with a view to avoiding such proceedings. The principle of "non-traverse" is invoked in support of the plea that the impugned notification is an instance of mala fide exercise of power for extraneous considerations. Reliance is placed on the decisions in *Controller of Court of Ward v. G.N. Ghorpade (1973) 4 SCC 94* and *Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673*.

(xvii) There has been a deliberate misconstruing of the decisions of the Supreme Court in the *L. Chandra Kumar* and *the MPAT Abolition case* and the decision of the Madras High Court in *TNAT Abolition case*. A case is an authority only for what it actually decides and not for what may logically follow from it. Reliance is placed on the decisions in *State of Orissa v. Md. Illiyas AIR 2006 SC 258*, *State of Haryana v. M.P. Mohla (2007) 1 SCC 457* and *Sreenivasa General Traders v. State of Andhra Pradesh AIR 1983 SC 1246*.

(xviii) The decision to abolish the OAT cannot be termed as a policy decision only to avoid judicial review. Reliance is placed on the decision in *Centre for Public Interest v. Union of India*, (2003) 7 SCC 532.

Submissions on behalf of the Opposite Parties

58. The submissions on behalf of the Opposite Parties i.e. Union of India as well as the State of Odisha may be summarized as under:

(i) Article 323-A (1) is only an enabling provision. It vests the Parliament with the power to enact laws for the establishment of the CATs and the SATs for adjudication of disputes/complaints relating to recruitment and conditions of service of Government servants. Since the very procedure for establishing an SAT envisages a request being made by the State Government through the Central Government and only thereafter for the Central Government to issue a notification establishing an SAT, Article 323-A (1) is not a self-executing provision

(ii) Even the law made by Parliament in terms of Article 323-A (1) by itself does not establish an SAT. It also only enables the establishing of an SAT. The word 'may' under Article 323-A (1) has therefore to be read in the above context. It cannot, therefore, be said to be mandatory in the sense that it gives no option to the Central or State Government on the establishing an Administrative

Tribunal. It is only a permissive provision. Reliance is placed on the decision in the *MPAT Abolition Case*

(iii) The establishment or abolition of an SAT is a decision in the domain of the respective Governments and is an essentially a policy decision. The scope of judicial review of such policy decision is extremely limited.

(iv) After the judgment in *L. Chandra Kumar*, one more tier of litigation has been added with all decisions of the OAT being reviewable judicially by the High Court under Articles 226 / 227 of the Constitution. Therefore, as a policy, it was decided by State of Odisha that no useful purpose would be served in continuing with the OAT since it no longer subserves the object of speedy justice. Such a policy decision cannot be said to be arbitrary or unreasonable or mala fide. As pointed out in the *MPAT Abolition case*, the question is not of advisability or propriety but the legality or rationality, reasonability and constitutionality thereof.

(v) The impugned policy decision was based on relevant germane and valid reasons, and does not call for interference by the High Court under Article 226 of the Constitution. Reference is made to both the *L. Chandra Kumar* and the *MPAT Abolition case*.

(vi) All the relevant materials were taken into account by the Government of Odisha while deciding to abolish the OAT. In particular, the impact it was likely to have on the High Court was

taken into account and therefore it was decided to support the move for increasing the judge strength in the High Court of Odisha. Simultaneously, it was decided to increase the strength of the administrative staff of the High Court by making the staff of the OAT available to the High Court to deal with the additional workload. The correspondence with the Central Government reveals that the factum of pendency of cases, the rate of disposal of such cases by the OAT and the time taken for disposal of cases generally were all taken into account. It cannot therefore be said that the decision is arbitrary or irrational.

(vii) The consultation with the High Court was in furtherance of the need to take into account the impact the decision to abolish the OAT would have on the functioning of the High Court. For the same reason, the Central Government also felt it necessary for the High Court to be consulted. If without consulting the High Court, the State and Central Government had unilaterally decided on the transfer of the cases pending in the OAT to the High Court that would have been improper and also would have rendered the decision arbitrary. Therefore, there is nothing illegal in such a procedure.

(viii) The power to rescind the notification flows from a reading of Section 4 (2) of the AT Act read with Section 21 of the GC Act. The establishment of the OAT was by a process of a request by the State Government to the Central Government, based on the State Government's assessment of the need for the OAT. On that basis a

notification was issued by the Central Government. At a subsequent stage, if the State Government for valid reasons decides as a policy to not continue with the OAT then it certainly has the power to withdraw the request and ask that the OAT be abolished. If it is conceded that the establishment of an SAT requires a subjective satisfaction of the concerned State government before proceeding to make a request to the Central Government under Section 4 (2) of the AT Act and then as a logical corollary, as is implicitly recognized in Section 21 of the GC Act, due to a change in the circumstances the process can be reversed and upon the request of the State Government, the Central Government can rescind the earlier notification. There is no statutory or constitutional prohibition against such a procedure being adopted, particularly since it again involves a process of consultation between the State Government and the Central Government based on a policy decision. The power to rescind the notification is inherent to the power to issue it. Reliance is placed on the decision of Madras High Court in the *TNAT Abolition case* as well as the decision of the Supreme Court in the *MPAT Abolition case*.

(ix) The Central Government has in any event accepted the legal proposition that for abolishing an SAT a mere notification by the Central Government is sufficient for the purpose of Section 4 (2) of the AT Act read with Section 21 of the GC Act and does not require an amendment by Parliament to the AT Act. The question of law left open by the Supreme Court therefore does not survive for consideration in view of the subsequent development where the

SATs for M.P, H.P, A.P, and Tamil Nadu have been abolished by the Central Government by notifications invoking Section 21 of the GC Act read with Section 4 (2) of the AT Act. The decisions in *D.N. Ganguli (supra)* and *Ajay Singh (supra)*, are distinguishable on facts and have no relevance in the context of the present case.

(x) Neither Article 166 nor Article 77, which requires orders to be expressly passed in the name of the Governor of a State or the President of India is a mandatory provision. Reliance is placed on the decision in *R. Chitrlekha v. State of Mysore 1964 (6) SCR 368*, which in turn relied upon on the decision in *Dattatreya Moreshwar Pangarkar v. State of Bombay 1952 SCR 612*. Reliance is also placed on the observations in *Narmada Bachao Andolan v. State of M.P. (2011) 12 SCC 333*.

(xi) Article 371D inserted in the Constitution of India by the 32nd Amendment Act of 1974, confers a special status on Andhra Pradesh and is a Code in itself. It provides both for the establishment and the abolition of the APAT by the President of India. This is very different from Article 323-A, which was inserted subsequently. In fact, after the enactment of the AT Act under Article 323A (1), the APAT was abolished and re-established under the AT Act with effect from 1st November, 1989. It was finally abolished by a notification of the Government of India on 14th January, 2020.

(xii) Although Section 29 of the AT Act does not envisage transfer of cases from the SAT to the High Court but only the other way around, the practice that has consistently been followed in abolition of the SATs is to transfer all the pending cases before the SATs to the corresponding High Courts. This is because with the abolition of the SATs, the position that was in existence prior to the establishment of the SATs would revive. So the pending cases before the SATs would naturally have to be adjudicated by the High Court. This is also reflected in the order dated 7th August, 2019 passed by the High Court in these cases.

(xiii) Moreover, the proposal put forth by the State Government in this regard has been accepted by the High Court on its administrative side. Through judicial orders passed by the High Court under Article 226 of the Constitution some of the pending OAs before the OAT have already been transferred to the High Court. Therefore, it is incorrect for the Petitioners to contend that there is no forum available for the adjudication of the cases pending before the OAT.

(xiv) It cannot possibly be contended that adjudication of a writ petition in the High Court is not preferable to adjudication in the first instance by the OAT. There is no empirical data to show that the cases in the OAT were being disposed of faster than similar cases by the High Court. The litigant is therefore in one sense better off with the abolition of the OAT.

Issues for consideration

59. On the basis of the above submissions, the following issues arise for consideration before this Court:

(i) Under Article 323-A (1) of the Constitution, is it mandatory for an SAT to be established?

(ii) Can the abolition of an SAT be brought about by a notification issued by the Government of India under Section 4 (2) of the AT Act read with Section 21 of the GC Act or does it require a specific provision in that regard both in Article 323A of the Constitution and in the AT Act?

(iii) In the context of (ii) above is the impugned notification in a nature of a quasi-judicial decision? Inasmuch as it has been made without affording the stakeholders a hearing, is it violative of the principles of natural justice?

(iv) Is the impugned notification abolishing the OAT arbitrary, irrational and unreasonable, inasmuch as, it is based on an incorrect understanding of the ratio of the decision of the Constitution Bench of the Supreme Court of India in ***L. Chandra Kumar*** and in any event not based on relevant material but extraneous considerations? In other words, is it violative of Article 14 of the Constitution?

(v) Given the huge pendency of the cases in the High Court, and there being no prospect of filling up of all the vacancies of Judges, and the fact that there would be in any event two tiers of litigation in High Court itself as a result of the transfer to the High Court of cases pending in the OAT upon its abolition, is not the impugned notification arbitrary, irrational and unsustainable in law as it does not subserve the object of speedy justice for Government servants?

(vi) Is the impugned notification dated 2nd August, 2019 issued by the DoPT, Government of India, bad in law since it is not a decision expressly stated to be in the name of the President of India in terms of Article 77 of the Constitution?

Issue (i): Under Article 323-A (1) of the Constitution, is it mandatory for an SAT to be established?

60. When Parliament passed the Constitution (42nd Amendment) Bill, 1976 by which it introduced, *inter alia*, Articles 323-A and 323-B in the Constitution under Part XIV A titled 'Tribunals', the SOR appended to the Bill explained the reasons for its introduction as under:

"5. To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the

Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under Article 226."

61. It can be seen straightaway that there are two types of Tribunals envisaged in Part XIV-A of the Constitution. Article 323-A (1) is exclusively for Administrative Tribunals i.e. Tribunals to deal with complaints and disputes with respect to recruitment and conditions of service of persons appointed to public services and posts under the Union or State Government or any local authority. Article 323B deals with the Tribunals for "other matters".

62. Article 323-A (1) of the Constitution consciously uses the word 'may' while describing the power of the Parliament and it reads as under:

"323A. Administrative Tribunals

(1) Parliament **may**, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government." (emphasis supplied)

63. There is merit in the contention of the Opposite Parties that in the context in which it occurs, the word 'may' denotes that the power under Article 323-A (1) vested in the Parliament to make a law is an enabling one. In other words, the Court is unable to accept the plea put forth by learned counsel for the Petitioners that

the word 'may' in the context in which it occurs in the provision has to be read as 'shall', thereby giving no option to the Governments of the Centre and the States to establish Administrative Tribunals.

64. This interpretation gets further strengthened when one examines Article 323-A (2), which talks of the contents of such a law made by Parliament and reads as under:

"(2) A law made under clause (1) **may** —

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of article 371D;

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals." (emphasis supplied)

65. Therefore, the word 'may' is used both in Articles 323A (1) as well as Article 323A (2), underscores the nature of the provision being directory and not mandatory. Again, this gets reflected in the wording of Sections 4 (1) and 4 (2) of the AT Act which read thus:

“4. Establishment of Administrative Tribunals.—

(1) The Central Government **shall**, by notification, establish an Administrative Tribunal, to be known as the Central Administrative Tribunal, to exercise the jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act.

(2) The Central Government **may**, on receipt of a request in this behalf from any State Government, establish, by notification, an Administrative Tribunal for the State to be known as the.....(name of the State) Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for the State by or under this Act.” (emphasis supplied)

66. While Section 4 (1) of the AT Act, by using the modal verb “shall” gives no choice to the central government in setting up a CAT, Section 4 (2) of the AT Act uses another modal auxiliary verb ‘may’ to denote a discretion available to the central government in the matter of setting up an SAT. This also explains why it is not as if for every State in the Union of India there is an SAT. By 1997, i.e. roughly eleven ten years since the AT Act, as amended in 1986, became effective, only eight of the States had

established SATs. This was taken note of by the Supreme Court in *L. Chandra Kumar*. As of date, five of the said SATs stand abolished. These are the MPAT, the TNAT, the HPAT, the OAT and the APAT. This is another indication of the legal position that the provisions of Article 323A (1) have not been understood as making it mandatory for an SAT to be established.

67. While the decisions in *Sampath Kumar* and *L. Chandra Kumar* do discuss the efficacy of the CAT and the SATs, there is nothing in those decisions to say that an SAT, once established, cannot be abolished. In other words, the decisions in *Sampath Kumar* and *L. Chandra Kumar* do not suggest that a State Government, which may have initially felt the need to establish an SAT, cannot subsequently decide to re-visit that decision and ask for its abolition.

68. The other decisions cited by counsel for the Petitioners are also not supportive of the propositions advanced by them on the interpretation of Article 323-A (1) of the Constitution. The decision in *Madras Bar Association (supra)* focused on the independence and efficacy of the National Company Law Tribunal, as an adjudicatory body, insofar as it was expected to take over the jurisdiction and functions of a Company Court in the High Court in the matter of winding up of, and mergers and amalgamations of companies. The question whether a statutory Tribunal set up in terms of a law under Article 323-A (1) could be abolished was not an issue that arose there. The decisions in *Gujarat Urja Vikas*

Nigam Limited (*supra*) or even *Roger Mathew* (*supra*) are also not helpful in understanding the scope and ambit of Article 323A (1) of the Constitution of India vis-à-vis the issue of the abolition of the Tribunals established thereunder. The central question in the latter two decisions was whether it was desirable to have provisions in the statutes creating such Tribunals which envisage a direct appeal to the Supreme Court from the decisions of those Tribunals. The question there was not whether the word 'may' in Article 323A (1) was directory or mandatory or whether under Section 4 (2) of the AT Act a State Government which had requested the Central Government to establish an SAT could at a subsequent point in time withdraw such request and ask for rescinding the notification establishing the SAT.

69. The deployment of the device of 'purposive interpretation' to decide whether a particular provision is mandatory or directory has been explained in several decisions including *Bachchan Devi v. Nagar Nigam, Gorakhpur* (*supra*) and *Dillip Kumar Basu* (*supra*). The rule was explained in *Bachchan Devi v. Nagar Nigam, Gorakhpur* (*supra*) as under:

“12. Mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience

likely to result if the provision is read one way or the other and many more considerations relevant to the issue.”

70. Examining the scheme of Article 323-A (1) of the Constitution, the purpose and object underlying the provision and the consequences likely to ensue or the inconvenience likely to result if the word “may” occurring therein is to be read as ‘shall’, the Court is not persuaded that it should be so read. It cannot be said that merely because the High Courts are overburdened with pending cases that the word ‘may’ should be read as ‘shall’. While the burden on the High Courts or the Supreme Court may be one factor informing the decision of the Central Government or the State Government to establish a Tribunal, it cannot be the only factor. As pointed out by the Supreme Court in the above decision there are “many more considerations relevant to the issue.” These would include examining the data of institutions and disposal of cases by the Tribunal, the rate of such disposal, the quality of the decisions being rendered, how often they are overturned on appeal or review by a superior judicial forum and so on. It must be recalled here that the question of satisfaction about the quality of adjudication by the Tribunals generally was adverted to by the Supreme Court not only in *L. Chandra Kumar* but also in *Madras Bar Association (supra)* and *Roger Mathew (supra)*. This has also been extensively discussed in the reports of the Law Commission of India.

71. The experiment of creating Tribunals, to hive off many of the areas over which disputes are pending in the High Courts and civil

Courts to alternative dispute resolution bodies, is a work in progress. Professor Marc Galanter felicitously refers to Tribunals as the ‘bypasses’ created to manage the case bottlenecks in the regular courts which he likens to the ‘highways.’ In a piece titled ‘*To the Listed Field...’*: *The Myth of Litigious India* (2009) Vol. 1:65 *Jindal Global Law Review* (at 75) he notes:

“For large sectors of society and large areas of conduct, courts afford no remedies or protections. When pressure builds up to provide useable remedies for a particular sort of grievance, the solution, understandably, is not to undertake the Sisyphean task of reforming the lower courts but to bypass them....The typical bypass is the establishment of a tribunal with exclusive jurisdiction over cases on a particular topic, such as those that deal with motor vehicle accidents, consumer complaints or labour disputes. The Central Administrative Tribunal, for example, has jurisdiction over ‘service matters’ including disputes about government employment, promotions, pensions and the like.”

In the same piece Prof. Galanter notes that “many of these tribunals are plagued by overcrowded dockets, similar to those in the regular courts.” Further he presciently notes that such tribunals “frequently display similar deficiencies – crowding, excessive formalism, expense, delay and truncated remedies.”

72. Then there are a host of other less-acknowledged factors that defeat the object for which the Tribunal is established in the first place. These include the failure to promptly fill the vacancies in the posts of Chairpersons, Vice Chairpersons and Members, both Judicial and Technical, in these Tribunals. The OAT was no

exception to this as two of the companion petitions in this batch reveal. Then there is the problem of proper and complete staffing of the Tribunals.

73. The question of the independent functioning of some of the Tribunals, from the point of view of the tenure and conditions of service of their Members, is yet another issue that recently engaged the attention of the Supreme Court in *Rojer Mathew (supra)*. Earlier, pursuant to the directions issued by the Supreme Court in *Gujarat Urja Vikas Nigam (supra)*, the Law Commission of India (LCI) submitted its 272nd Report on 'Assessment of Statutory Frameworks of Tribunals in India' on 27th October, 2017. It recommended, *inter alia*, that if the possibility of every order of a statutory Tribunal being challenged in the High Court is to be avoided then an Appellate Tribunal, on par with the High Court, should be provided for in the statute under which a Tribunal is established.

74. The decision to continue a Tribunal which has failed to meet some or many of its objectives has to be informed by a variety of factors some of which have been discussed hereinbefore. Since it is a work in progress, India is to witness to both the creation of and dismantling of Tribunals for a variety of reasons. The most recent instance is the issuance of the Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 which resulted in the dismantling, with effect from 4th April 2021, of nearly 11 Appellate Boards and Tribunals under various statutes including the

Intellectual Property Appellate Board, the Copyright Appellate Board, the Film Certification Appellate Board and so on. One of the reasons cited by the government in bringing forth the Ordinance is empirical data which reveals that the Tribunals have not been able to ensure speedy justice and that they invariably constitute an ‘additional tier’ of litigation leading to costs and delays.

75. Tribunalisation is a work in progress also because of the degrees of specialisation that are required in niche areas and where the Tribunals have to necessarily comprise both technical and judicial members. The Telecom Disputes Settlement and Appellate Tribunal and the National Green Tribunal fall in this category. While some of the Tribunals may not be able to effectively discharge their adjudicatory functions without the participation of such technical members, the same may not hold true for certain other Tribunals, like for instance Administrative Tribunals. Further, attempts at getting the Tribunals to substitute the High Court is fraught with problems associated with ensuring the independence of such tribunals from the executive, as the decision in *Rojer Mathew* (*supra*) shows. The essential reason for this is that judicial review by the High Courts under Article 226 of the Constitution has been recognized as a basic feature of the Constitution by the decision in *L. Chandra Kumar*.

76. In the above context, the abolition of an SAT, resulting in the revival in the High Court of the petition pending before the SAT,

can hardly be said to contradict the original purpose and intent, which was to have High Courts adjudicate disputes involving Government servants in the area of their employment and service conditions. Further, considering that there are SATs still functioning only in three or four States in the country, the government employees in a majority of the States have to approach the concerned High Court in the first instance for redressal of their grievances. It cannot therefore be argued that the abolition of the OAT, resulting in either the transfer of the pending petitions to the High Court, or institution of fresh petitions there as a Court of first instance, undermines access to justice as was sought to be contended. In other words, a parallel cannot be drawn between pursuing a writ petition in the High Court before a Single Judge with pursuing an original application in the OAT. The former remedy would any day be the preferred one for a litigant. Therefore, the contention that by abolition of the OAT there will be denial of access to justice to the litigant is not an acceptable proposition.

77. All of the above factors have to be kept in view while interpreting the word 'may' occurring in Article 323A (1) of the Constitution. When viewed in that context it cannot be said that Article 323A (1) was intended to make it mandatory for either the Central Government or the State Government to establish an SAT irrespective of the actual need for such a tribunal and for it to be effective in achieving the object of securing fair and speedy justice.

Issue (ii): Can an SAT be abolished by a Central Government Notification issued under Section 21 GC Act?

Issue (iii): Is the impugned notification quasi-judicial in nature?

78. Issues (ii) and (iii) are in a sense inter-linked as will be noticed hereafter. They are accordingly being dealt with together. The central question that arises for consideration is whether there is an inherent power under Section 4 (2) of the AT Act read with Section 21 of the GC Act enabling a State Government or the Central Government to rescind a notification establishing an SAT? This question arises from the principal contention in these petitions that the impugned notification dated 2nd August 2019 could not have been issued by the DoPT, Government of India without an enabling provision in Article 323-A of the Constitution and the AT Act.

79. Since both sides have relied extensively upon the decisions in the *MPAT Abolition Case* and the *TNAT Abolition Case*, the Court takes up those cases for an elaborate discussion.

80. As far as *MPAT Abolition case* is concerned, it is evident from a reading of the background facts set out in the decision that the decision to abolish the MPAT did not flow from Section 21 of the GC Act but Section 74 (1) of the MPR Act. It was the latter provision that envisaged both the Governments of Madhya Pradesh and Chhattisgarh by mutual agreement deciding to discontinue the MPAT even though it was established under the AT Act, a central Act. In other words, although Article 323A (1) itself did not expressly provide for abolishing an SAT, as far as the MPAT was

concerned, the MPR Act, which was also a law made by Parliament empowered the M.P and Chhattisgarh Governments to decide to abolish the MPAT. This is an important distinction to be kept in view while examining this decision.

81. Importantly, the passage in the *MPAT Abolition case*, which is relied upon by the Opposite Parties in the present case acknowledges that Section 74 (1) was not in the nature of a "delegated legislation" but a 'conditional legislation'. Referring to the decision in *Hamdard Dawakhana (Wakf) Lal v. Union of India 1960 (2) SCR 671*, the Supreme Court agreed with the conclusion of the High Court in that case that the power to abolish the MPAT could be validly traced to the legislative power flowing from Section 74 (1) of the MPR Act and not Section 4 (2) of the AT Act. There was no occasion therefore in the *MPAT Abolition Case* to discuss whether on a collective reading of Section 4 (2) of the AT Act read with Section 21 of the GC Act, the abolition of the MPAT could be justified. In fact Section 74 (1) of the MPR Act opened with a non-obstante clause that allowed the States of M.P and Chhattisgarh, notwithstanding the absence of a provision to that effect in the AT Act to take a decision to continue with or abolish the MPAT. This explains the conclusion in para 34 of the judgment of the Supreme Court in the *MPAT Abolition Case*, which reads as under:

"34.xxx A conjoint reading of Article 323-A of the Constitution, Section 4 of the Administrative Tribunals Act, 1985 and Sections 74 (1) and 85 of the Act of 2000, in our considered opinion, leaves no room for doubt that

Parliament authorised the State of Madhya Pradesh as well as the new State of Chhattisgarh to take an appropriate decision with regard to State Administrative Tribunals having jurisdiction over those States. Parliament empowered both the successor States to take an appropriate decision to continue such Tribunals, to abolish them or to constitute separate Tribunals. It cannot be said that by enacting such a provision, Parliament had violated any mandate or the Act of 2000 is *ultra vires* Article 323-A or any other part of the Constitution." (emphasis supplied)

82. Therefore, learned counsel for the Petitioners are right in their contention that the *MPAT Abolition case* cannot support the proposition that there is an inherent power in the Central Government and the State Government under Section 4 (2) of the AT Act read with Article 323A (1) of the Constitution and Section 21 GC Act to abolish an SAT by rescinding a notification that was issued to establish it in the first place.

83. However, the decision in the *MPAT Abolition case* supports the case of the Opposite Parties as regards certain other propositions which will be discussed hereafter.

84. Turning now to the *TNAT Abolition case*, it will be recalled there is no provision in the AT Act, parallel to Section 74 (1) of the MPR Act that enables the State Government to abolish an SAT. Specific to the TNAT, while the Government of Tamil Nadu kept writing to the Central Government to issue an appropriate notification for its abolition, the Central Government took the stand that till an amendment was made to the AT Act providing for such

abolition, it could not be brought about by a mere notification. This stand of the Central Government is noted by the Madras High Court in its decision as under:

"On the other hand, the stand taken by the Central Government, the first respondent herein, is that though the Government of Tamil Nadu has sent a proposal to the Central Government for abolition, this cannot be done through Notification. The appropriate legislation for this proposal has to be brought in the Parliament and the same is being contemplated by the Law Department which after due processing and approval will be brought before the Parliament. Mere Notification of the Central Government would not suffice in this case, since Section 74 of the Madhya Pradesh Reorganisation Act, 2000 would specifically provide for the abolition through Notification. But, such a provision is not available in this State. Therefore, suitable Parliamentary amendment to the Administrative Tribunal Act is necessary to consider such proposal. The necessary steps for the same are being taken by the Central Government."

85. It appears from the discussion that follows the above passage that the Madras High Court proceeded on the basis that after the decision of the Supreme Court in the *MPAT Abolition case*, the Central Government could straightaway issue a notification rescinding the earlier notification establishing the TNAT. The Madras High Court also referred to the observations of the Division Bench of M.P High Court which were referred to by the Supreme Court in the *MPAT Abolition Case*, which read thus:

"35. It was then contended that once the power to constitute a Tribunal had been exercised, Parliament was denuded of any power to make any legislation providing for abolition of such Tribunal. The

Division Bench negated the contention and observed:

"It is difficult to swallow that Parliament after enacting law on a particular subject shall have no power to amend, modify or repeal the same. The power of Parliament, in our opinion, does not exhaust by enactment of any law and we are of the considered opinion that Parliament can make law in relation to a subject for which it has as the legislative competence, notwithstanding the fact that law on a particular subject was enacted by Parliament earlier. The theory of exhaustion is unknown so far as the legislative powers are concerned. What Parliament has done, Parliament can undo."

86. It is necessary to bear in mind that the above passage draws a distinction between Parliament's power "to make legislation providing for abolition of such Tribunal", an example of which would be Section 74 (1) of the MPR Act, and the power of the central or state government to do so. The Madras High Court acknowledged that "the analogous provision of Section 74 (1) of the [MPR] Act was not available in the instant case" and that "similarly no specific procedure has been provided for abolition of a Tribunal in the Administrative Tribunals Act."

87. It is therefore not difficult to discern why the Madras High Court had to resort to Section 21 of the GC Act which reads thus:

"Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.—

Where, by any Central Act or Legislation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

88. After discussing the provision, the Madras High Court held as under:

"18. The above section would indicate that the power to create includes the power to destroy, and also the power to alter what is created. In other words, the power to rescind a notification is inherent in the power to issue the notification. As such, the specific provision regarding the power to vary, amend, or rescind notification etc. could also be made in the Act itself. It is also well settled that where the specific provision is made in the Act itself, the specific provision would prevail and in that case there is no need to invoke Section 21 of the General Clauses Act. Since there is no provision at all in the Administrative Tribunals Act regarding the mode of abolition of the Tribunal, in our opinion, the provisions of Section 21 of the General Clauses Act would apply. If any notification issued by the Government is to be rescinded by virtue of the powers given under Section 21 of the General Clauses Act, such power to rescind the notification must be exercised in like manner and subject to the like sanction and condition as in the case of issuing the notification.

19. In view of the above circumstances, we are of the considered opinion that since no mode to rescind the notification establishing the Tribunal has been provided in the Administrative Tribunals Act, the provisions of Section 21 of the General Clauses Act will have to be invoked for rescinding the Notification earlier issued establishing the Tribunal."

89. While it is true that the SLP filed by one of the Petitioners before the Madras High Court was dismissed by the Supreme Court *in limine* by a one-line order, clearly that cannot constitute an approval of the decision of the Madras High Court in the ***TNAT Abolition case***. This legal position has been explained by the Supreme Court in ***Kunhayammed v. State of Kerala (2000) 6 SCC 359*** which was recently re-affirmed by a three-Judge Bench of the Supreme Court in ***Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. (2019) 4 SCC 376***

90. Independent of the above SLP, a separate appeal was filed by the Union of India raising a question of law based obviously on its stand before the Madras High Court viz., that a suitable amendment to the AT Act is necessary for the Central government to consider the State Government's proposal for abolition of the TNAT. It was on this aspect that leave appears to have been granted. However, as already noticed the Government of India issued a notification on 17th February 2006 abolishing the TNAT by invoking Section 21 of the GC Act. This was done even before a Bill was tabled in Parliament on 16th March, 2006 to amend the AT Act by inserting Chapter-IVA titled: "Abolition of Tribunals". The SOR accompanying the Amendment Bill acknowledged the request made by the Government of Tamil Nadu as well as the Governments of H.P and M.P for similar of the corresponding SATs. It appears the Central Government was even at that stage of the view that without expressly amending the AT Act to provide for

abolition of an SAT, that result could not be achieved merely by issuing a notification invoking Section 21 of the GC Act. This also appears to have had the endorsement of the Parliamentary Standing Committee of the Rajya Sabha which examined the said Bill and submitted its report in December, 2006. It is not necessary at this stage to discuss the decision in *Kalpna Mehta (supra)* for the proposition that reports of Parliamentary Standing Committees can be considered as evidence. However, at the same time such reports cannot be said to be binding on the government.

91. The fact remains that the proposed amendments to the AT Act did not come about. In the meanwhile, the Central Government proceeded to issue notifications abolishing the MPAT, the HPAT, and the TNAT even while its appeal was pending in the Supreme Court. In doing so the Central Government appears to have followed a uniform pattern by which it required the State Government to consult the concerned High Court and seek its concurrence for the proposal to abolish the SAT. This was with the express purpose of acknowledging the burden that would be cast on the High Court if the SATs were to be abolished since all cases pending before the SAT would stand transferred to the High Court.

92. This also explains why when the appeal of the Union of India against the decision of the Madras High Court the *TNAT Abolition case* was taken up by the Supreme Court in 2017, it was rightly submitted that the appeal has been rendered infructuous. In fact it was rendered infructuous only because in the meanwhile the

Central Government had by invoking Section 21 of the GC Act issued notifications abolishing the SATs in the three States as noted hereinabove. Nevertheless the Supreme Court of India left the question of law open for decision. This is only meant that the decision of the Madras High Court in the *TNAT abolition case* ought not to be treated as a precedent. To this extent, the submission of learned counsel for the Petitioners is well-founded.

93. The result of the above discussion is that neither the decision of the Supreme Court in the *MP Abolition case* nor of the Madras High Court in the *TNAT Abolition case* can be relied upon by the Opposite Parties as precedents in support of the proposition that even without an enabling provision in the AT Act, the abolition of an SAT can be brought about by a notification being issued by the Central Government rescinding an earlier notification by which it was established.

94. Accordingly the above question of law requires a detailed examination. The major premise on which Section 21 of the GC Act operates is that what can be done can also be undone. In this context, the Court takes up for discussion first the decision in the *D.N. Ganguly case (supra)*. It was held therein that the question whether or not Section 21 of the GC Act applies to the provisions of a particular statute "would depend upon the subject matter, context and the effect of the relevant provisions of the said statute". In that context, it was examined whether a notification referring an industrial dispute to an Industrial Tribunal for adjudication by the

appropriate Government under Section 10 (1) of the Industrial Disputes Act, 1947 could be rescinded by the same Government? It was explained that once an order in writing is made by the appropriate Government referring the industrial dispute to the Tribunal for adjudication under Section 10 (1) of the I.D. Act, the proceedings before the Tribunal "are deemed to have commenced and deemed to have concluded on the day of the award made by the Tribunal becomes enforceable under Section 17(A)". It was noted by the Supreme Court that if the power claimed by the appellant is conceded to the appropriate Government, it would be open to the appropriate Government "to terminate the proceedings before the Tribunal at any stage and not refer the industrial dispute to any other industrial tribunal at all".

95. This appears to be a crucial distinguishing factor as far as the present case is concerned. While it could be argued that it would be possible for the State Government and the Central Government acting in tandem to bring an end to the adjudication of a particular dispute pending before the OAT by invoking Section 21 of the GC Act and abolishing the OAT itself, that is not what is sought to be done here. It is not as if upon the abolition of the OAT, the cases pending there are in limbo. The consequence of such abolition is that the cases pending before the OAT stand transferred to and would be heard by the High Court from the stage at which they were before the OAT. In that sense therefore, by invoking Section 21 of the GC Act, the Opposite Parties are not bringing all the disputes pending before the OAT for adjudication to an end.

Consequently the decision in the *D.N. Ganguly case (supra)* does not quite help the case of the Petitioners.

96. In *Ajay Singh (supra)*, the context was the reconstitution of the Commission set up under the Commission of Inquiries Act, 1952 by taking recourse to the power to amend under Section 21 of the GC Act. The Supreme Court negated the contention by holding as under:

"We have no doubt that the rule of construction embodied in Section 21 of the General Clauses Act cannot apply to the provisions of the Commissions of Inquiry Act 1952 relating to reconstitution of a Commission constituted thereunder since the subject-matter, context and effect of such provisions are inconsistent with such application. Moreover, the construction made by us best harmonises with the subject of the enactment and the object of the legislation. Restoring public confidence by constituting a Commission of Inquiry to investigate into a 'definite matter of public importance' is the purpose of such an exercise. It is, therefore, the prime need that the Commission functions as an independent agency free from any governmental control after its constitution. It follows that after appointment, the tenure of members of the commission should not be dependent on the will of the Government, to secure their independence. A body not so independent is not likely to enjoy the requisite public confidence any may not attract men of quality and self-respect. In such a situation, the object of the enactment would be frustrated. This aspect suggests that the construction made by us, apart from harmonising the provisions of the statute, also promotes the object of the enactment while the construction suggested by the appellant frustrates both."

97. In the instant case, the Opposite Parties are right in contending that the invocation of Section 21 of the GC Act to rescind the notification establishing the OAT does not militate against the scheme of the AT Act and in particular, Section 4 (2) thereof. In fact it results in the pending disputes standing transferred to the High Court for adjudication. Far from bringing the case to an end, an even more efficacious forum viz., the High Court will deal with the case. From the point of view of the litigant, this should be viewed as furthering the cause of justice and not hindering it. Consequently, the decision in *Ajaib Singh (supra)* also is of no assistance to the Petitioners.

98. In *Indian National Congress (I) (supra)* the Supreme Court viewed the decision of the Election Commission of India under Section 29-A (7) of the representation of the People Act, 1951 to be quasi-judicial in nature. Therefore, it was held that the registration could not be subsequently cancelled without a specific enabling provision in the RP Act itself. Recourse could not be taken to Section 21 GC Act for that purpose. In same vein in *Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd. v. Commissioner of Income Tax AIR 2018 SC 3560* the Supreme Court held that the order granting registration under Section 12-A of the Income Tax Act, 1961 was a quasi-judicial one and that, therefore, it could be withdrawn/cancelled only when there was an express power vested in the CIT under the Income Tax Act to do

so. Since there was no such express power, resort could not be had to Section 21 of the GC Act to bring about that result.

99. The above decisions are distinguishable on facts and are inapplicable to the case on hand for the reason that the Court is unable to accept the proposition put forth by the Petitioners that the decision of the State Government to establish the OAT was a quasi-judicial one. While the SAT by itself performs a judicial function, the decision of the State and Central Governments to either establish it under Article 323-A (1) read with Section 4 (2) of the AT Act, or to abolish it, cannot be said to be anything but an administrative one. The Court would hasten to add that this distinction becomes important only for the purpose of answering the question whether such a decision can be rescinded by invoking Section 21 of the GC Act.

100. The Court is at this stage not suggesting that because the decision may be an administrative one, it is not amenable to judicial review. After the decision in *A.K. Kraipak v. Union of India AIR 1970 SC 150*, the distinction between an administrative and a quasi-judicial power was obliterated in the context of the question whether an administrative order could also be tested on the touchstone of justness and fairness. The Supreme Court in the said decision explained:

“The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. 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 framework 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. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

101. Thus, even if the act of rescinding a notification establishing the OAT is termed as an administrative order, it can still be judicially reviewed on the known parameters in the realm of administrative law. That is not to say however, that it is an order to which Section 21 of the GC Act cannot apply. For that purpose it will still have to be seen whether in fact, as the Petitioners suggest, the impugned notification is a quasi-judicial order.

102. The distinctions between administrative and quasi-judicial orders have been attempted to be drawn in the past. In *Indian National Congress (I)* (*supra*) the Supreme Court observed that

“the presence of a *lis* or contest between contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is a quasi judicial authority. However, in the absence of a *lis* before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially.”

103. A clear example of what could be termed as a purely administrative function was the decision in *State of Bombay v. Kushaldas Advani AIR 1950 SC 222*. There, the Respondent was a tenant of a flat. On 26th February 1946, the Bombay Government requisitioned the flat under Section 3 of the Bombay Land Requisition Ordinance 1947, and allotted it to another refugee from Sind. On 4th March 4 1946, the Petitioner filed a petition for a writ of certiorari. The Bombay High Court granted it upon which the Government went in appeal to the Supreme Court. Section 3 of the Ordinance read as follows:

“Requisition of land—If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose:

Provided that no land used for the purpose of public religious worship or for any purpose which the Provincial Government may specify by notification in the Official Gazette shall be requisitioned under this section.

104. The Supreme Court in *State of Bombay v. Kushaldas Advani (supra)* by a majority of 4:2 agreed with the contention of the Appellant State that under S. 3 of the Ordinance the decision of the Provincial Government to requisition certain premises was “clearly a matter of its opinion and therefore not liable to be tested by any

objective standard.” It was held that the decision as to whether the premises were required for a public purpose was also a matter for the opinion of the Provincial Government, and not a matter for judicial investigation, and therefore the making of the order was in no sense a quasi-judicial decision, but an administrative or ministerial order. Therefore, the High Court could not have issued a certiorari to interfere with the decision.

105. In the present case too, the decision to establish the OAT in terms of Section 4 (2) of the AT Act, or the decision to dismantle it subsequently, cannot be characterised as a quasi-judicial order. It did not involve any *lis* or dispute between parties that required to be decided applying the principles of natural justice. The decision whether or not to have an SAT was based on a subjective satisfaction of the governments and was of universal application, not tailored to the facts of a particular case.

106. Viewed objectively since the very process of establishing the OAT involved a proposal by the State Government, without which it could never have been established, it is difficult to accept the proposition put forth by the Petitioners that the State Government cannot be, at a subsequent point in time, for valid reasons, withdraw such request. In other words, it is difficult to countenance the proposition that once the State Government agrees to activate the proposal to establish an OAT, and that proposal is accepted by the Central Government culminating in its establishment by a notification, it can at no point in time thereafter be abolished even

if the State Government feels that the circumstances do not warrant its continuation. Of course, the Court will have to ask whether the exercise of the power under Section 21 of the GC Act is inconsistent with the subject-matter, context and effect of the provisions of the AT Act? In this context, it requires to be observed that as long as the disputes which were pending adjudication before the OAT are not left in the lurch, and their continued adjudication by a competent judicial forum is ensured, there can be no legal objection to the exercise of the power under Section 21 of the GC Act to rescind the notification establishing the OAT.

107. To summarise the discussion thus far, the Court is of the view that the impugned decision to abolish the OAT not being a quasi-judicial one but an administrative decision, there is no bar on the State and Central Governments invoking Section 21 of the GC Act read with Section 4 (2) of the AT act to rescind the notification earlier issued establishing the OAT. The power to rescind the notification establishing the OAT is sustained also because no prejudice is being caused to the litigants whose cases are pending in the OAT. The pending cases, and the cases to be instituted hereafter, will be heard in the High Court. Therefore, the Court sustains the argument of the Opposite Parties in the instant case that the invocation of Section 21 of the GC Act does not result in either the extinguishment of the cases pending before the OAT without an alternative forum or any consequential denial of justice.

108. Tied to the argument of the Petitioners that the impugned notification is in the nature of a quasi-judicial order, are the incidental arguments that are required to be dealt with. In view of the conclusion reached by this Court hereinbefore that the impugned decision to abolish the OAT is administrative one and not quasi-judicial, the contention of the Petitioners that it had to be in compliance of the principles of natural justice requires to be rejected. With the litigants being assured of the continued adjudication of their cases by the High Court, there was no prejudice caused and therefore there was no requirement of the Governments of the State and the Centre having to afford a hearing to the 'stakeholders' before taking such decision. Consequently, the decisions in *Dr. (Miss) Binapani Dei*, *S.L. Kapoor*, *Sahara India* and *Siemens Engineering* (*supra*) have no applicability to the present case.

109. Equally, the proposition that what cannot be done directly, cannot be done indirectly does not have any applicability here nor do the decisions in *Samundra Devi* (*supra*) and *Ram Chandra Singh* (*supra*). For the reasons discussed elaborately it is plain that there is no prohibition in Article 323-A (1) of the Constitution or Section 4 (2) of the AT Act against the abolition of an SAT for reasons that are germane and valid once the continued need for it ceases to exist.

110. The contention that having once established the OAT, the Central Government was rendered '*functus officio*' and could not

have further exercised the power to abolish it does not impress the Court. The doctrine of *functus officio* is generally associated with judicial and quasi-judicial functions and not with administrative functions. For instance in ***Raja Mohammad Amir Ahmad Khan*** (*supra*) it was in the context of the Collector determining the duty as a quasi judicial body. Once he performed that function, he was rendered "functus officio". Likewise, in ***S.N. Goyal*** (*supra*), the conduct of disciplinary proceedings was a quasi-judicial function. In the present case, the decision to abolish the OAT was purely an administrative function.

111. The contention based on the decision in ***A.R. Antulay v. R.S. Nayak*** (*supra*) that the power to create or enlarge jurisdictions is legislative in character and Parliament alone can exercise it is inapposite in the context of the present case. Here, neither is the jurisdiction of the High Court being created nor enlarged. There is simply a revival of a jurisdiction that has always existed. In other words, the jurisdiction of the High Court to adjudicate disputes involving government servants has been revived by the Parliament by abolishing the OAT.

Issue (iv) and (v)

Is the impugned notification abolishing the OAT arbitrary, irrational, unreasonable and violative of Article 14?

112. The grounds of challenge to the impugned notification on the anvil of Article 14 are two-fold. One is that it is arbitrary,

unreasonable and irrational inasmuch as it is based on an incorrect understanding of the decision in *L. Chandra Kumar* and there existed no material to arrive at the conclusion that the OAT required to be abolished. The second is that relevant facts concerning the impact the decision would have on the functioning of the High Court, defeating the object of speedy justice, were overlooked.

113. In examining if a decision by the Government, whether quasi-judicial or administrative, satisfies the test of non-arbitrariness the Court has to apply the principles of *Wednesbury* reasonableness i.e. the tests set out in *Associated Provincial Picture Houses v. Wednesbury Corporation (1948) 1 KB 223*. The Court will examine if “the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken.” In 1983, Lord Diplock in *Council for Civil Services Union v. Minister of Civil Services, (1983) 1 AC 768 (the GCHQ case)* summarised the principles of judicial review of administrative action as based upon one or other of the following viz. illegality, procedural irregularity and irrationality.

114. The Supreme Court in *Om Kumar v. union of India AIR 2000 SC 3689* elaborated on the concept of ‘proportionality’ that was suggested as an additional factor to be accounted for by Lord Diplock in the *GHCQ case*. Justice M. Jagannadha Rao writing for the Court in *Om Kumar (supra)* explained:

“By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.”

115. The correspondence between the three main actors in the present case viz., the Government of Odisha, the Government of India and the High Court of Orissa reveals that several factors were taken into account in arriving at the conclusion that the OAT required to be abolished. The note dated 16th September, 1995 submitted by the Government of Odisha to the Central Government listed out the factors that were considered by the State Government. This included the effect of the decision in *L. Chandra Kumar*, the working of the OAT with reference to the expenditure incurred in the years 2014-15 and 2015-16 (both Plan and Non-Plan), the ‘institution, Disposal and Pendency of cases for the year 2014’, and the arrangements being contemplated to account for the impact the move would have on the functioning of the High Court. Therefore, there was sufficient material to support the view of the State

Government that OAT was not served the purpose of delivery of speedy justice to the litigants.

116. On its part when the Central Government responded to the request by the letter dated 12th January, 2016 it sought to know the views of the High Court on the proposal for the abolition of the OAT and what the legal basis would be for the transfer of the cases pending before the OAT to the High Court.

117. The procedure adopted by the Central Government which required the State Government to elicit the views of the High Court on the proposal for abolishing the OAT may not be one contemplated by Article 323-A (1) of the Constitution or Section 4 (2) of the AT Act. However, that does not make the procedure illegal or arbitrary. On the other hand, the failure to consult the High Court on a decision that would directly impact its functioning might have rendered the decision arbitrary and unreasonable. The prior consultation with the High Court on the administrative side was reflective of the fact that both the Central government and the State Government took into account a very relevant factor viz., the judicial impact the decision to abolish the OAT would have on the working of the High Court. Further, it is evident that the Central Government agreed to go ahead with notifying the rescinding of the earlier notification of the establishment of the OAT, thus bringing about its abolition, only after the High Court conveyed its concurrence and not otherwise. The Central Government appears to have followed a similar procedure in the matter of the abolition of

the HPAT and the APAT as well. The Court is, therefore, unable to accept the submission of the Petitioners that this procedure was extra-legal and invalidated the decision to abolish the OAT.

118. Also, the Court finds no illegality or impropriety attaching to the decision to transfer all the cases pending in the OAT to this Court. This is nothing but a restoration of the status quo ante the date of the commencement of the OAT. With its abolition, the litigants waiting before the OAT for adjudication of their cases cannot obviously be left in the lurch. If there was no OAT, they would have filed their petitions in the High Court. It is that very position that is sought to be achieved by the move to transfer all pending cases to the High Court. Further, the Full Court of the High Court on its administrative side had before it all the correspondence between the Governments inter se and with the High Court. The High Court, after considering all of the materials, conveyed its concurrence to the proposal to abolish the OAT. This was a necessary step furthering the ends of justice and with a view to ensuring that the litigants before the OAT were not left high and dry.

119. The process involved in the decision making, which alone is the scope and ambit of the judicial review being undertaken by this Court in these petitions, satisfies the legal requirements spelt out in *Wednesbury* viz., that relevant materials have been accounted for and those not relevant have been eschewed. Further, the test of proportionality expounded in the *GHCQ case* viz., ensuring that a

proper balance is maintained between the adverse effects which the “administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve” stands satisfied in the present case. The executive and judicial branches of the State have through active consultation ensured that the litigants before the OAT are not denied justice and that the pending cases stand transferred to the High Court to be heard by it.

120. The view taken by State Government that as a result of the decision of the Supreme Court in *L. Chandra Kumar* one more tier of litigation had been added thereby not subserving the need for speedy justice cannot be termed as being based on a misunderstanding of the said decision. It is interesting to note that this was a factor adverted to by the Law Commission of India (LCI) when it submitted to the Government of India in 1998 its 162nd Report on the ‘Functioning of the CAT’. The LCI observed (at p. 112):

“The Supreme Court has laid down in *L. Chandra Kumar’s case* (supra) that an aggrieved party can have recourse to the jurisdiction of the respective High Court under Article 226/227 of the Constitution of India, against the decision of the Central Administrative Tribunal. The repercussions of this development of law have already been felt. The Karnataka Government has sought to abolish the Karnataka State Administrative Tribunal. In the news items in the recent past, it has appeared that even the Central Government is proposing to abolish CAT. The remedy of judicial review by the High Court provided against the decision of the Administrative Tribunal and a possible further appeal to

the Supreme Court under Article 136 is not only time-consuming but also expensive. Besides this, the various High Courts may interpret differently any statutory provision concerning the service conditions governing the employees. Thus the lack of uniformity in the High Court decisions and consequently in CAT benches will create confusion in the mind of the litigant. It will further make the public lose faith in seeking justice through the judiciary, and thus undermine the democratic norms. The Commission is of the considered view that a National Appellate Administrative Tribunal be constituted on the lines of the National Consumer Disputes Redressal Commission under section 20 of the Consumer Protection Act, 1986. It shall be manned by a retired Chief Justice of a High Court or a retired Judge of the Supreme Court of India. An appeal, on substantial questions of law and fact may lie to the proposed Appellate forum, against the decision of the Central Administrative Tribunal. The proposed forum may have branches all over the country to reduce the cost of litigation to the litigant. The decision of the proposed Appellate court will be binding on all benches of CAT. The proposed forum will be of status higher than a High Court but below the Supreme Court. An appeal may lie against the decision of the proposed appellate forum to the Supreme Court.”

121. The impact of the decision in *L. Chandra Kumar* on the functioning of the ATs prompted the LCI to submit its 215th report in 2008 exclusively on that topic. The report titled: ‘L. Chandra Kumar be revisited by Larger Bench of Supreme Court’ made a strong pitch for establishing an Appellate Tribunal by amending the AT Act. It recommended, *inter alia*, that:

“8.2 We feel that if there may be an impression that there has to be at least one appeal provided against the orders passed by the Tribunal before the matter may reach the Supreme Court, intra-tribunal appeal, similar to the one provided in every High Court either by way of letters

patent appeal or a writ appeal, can be provided under the Act of 1985 itself. By way of suitable amendment thus brought about in the Act of 1985, a provision for intra-tribunal appeal can be made so that an order passed by a single Member Bench would be amenable to appeal before a Division Bench, and the decision of a Division Bench can be challenged before a Bench consisting of three or more Members. Four zones in the country, viz., North, East, West, and South, can be made where the appeals from various Benches may be filed. This may only involve creation of, at the most, eight to ten posts of Members in the Tribunal. After the decision recorded by an appellate Bench, the matter can be taken to the Supreme Court by way of special leave petition.”

122. The above report was submitted in the wake of the report of the Parliamentary Standing Committee on the AT (Amendment) Bill 2006, which has been referred to earlier in this judgment. While these suggestions do not appear to have found favour with the Parliament, and the amendments did not see the light of the day, they do point to the fact that the ATs were being viewed as not subserving the object for which they were established viz., delivering speedy justice to the litigants whose cases were before them.

123. In this context, the observations of the Supreme Court in the ***MTAT Abolition case*** are relevant. There a similar contention put forth on behalf of the Appellant in that case viz., that the decision of the M.P and Chhatisgarh Governments was "illegal, irrelevant and ill-founded" was expressly negated by the Supreme Court. After quoting the passages from ***L. Chandra Kumar*** the Supreme Court in the ***MPAT Abolition case*** observed as under:

"57. From the discussion hereinabove, it is clear that after the Constitution (Forty-second Amendment) Act, 1976, the Administrative Tribunals Act, 1985 came to be enacted by Parliament. The position prevailed at that time was the law laid down by the Constitution Bench of this Court in *S.P. Sampath Kumar*. Invoking sub-section (2) of Section 4 of the Administrative Tribunals Act, 1985, the State of Madhya Pradesh requested the Central Government to constitute a Tribunal for civil servants in the State. It was also on the basis of pronouncement of law in *S.P. Sampath Kumar*. The notification was issued by the Central Government in 1988 and the State Administrative Tribunal was established for the State of Madhya Pradesh. At that time, as per well-settled legal position, decisions rendered by the Administrative Tribunals constituted under the Act of 1985 were "final" subject to jurisdiction of this Court under Article 136 of the Constitution. No person aggrieved by a decision of State Administrative Tribunal could approach the High Court of Madhya Pradesh in view of Clause (d) of Article 323-A (2) of the Constitution read with Section 28 of the Act of 1985 and the declaration of law in *S.P. Sampath Kumar*. If, in view of subsequent development of law in *L. Chandra Kumar*, the State of Madhya Pradesh felt that continuation of State Administrative Tribunal would be "one more tier" in the administration of justice inasmuch as after a decision is rendered by the State Administrative Tribunal, an aggrieved party could approach the High Court under Article 226/227 of the Constitution of India and, hence, it felt that such tribunal should not be continued further, in our opinion, it cannot be said that such a decision is arbitrary, irrational or unreasonable. From the correspondence between the State of Madhya Pradesh and Central Government as well as from the affidavit in reply, it is clear that the decision of this Court in *L. Chandra Kumar* had been considered by the State of Madhya Pradesh in arriving at a decision to abolish

State Administrative Tribunal. Such a consideration, in our opinion, was relevant, germane and valid. It, therefore cannot be said that the decision was illegal, invalid or improper."

124. Further, the Supreme Court in the *MPAT Abolition case* observed as under:

"71. Thus, from the correspondence between the State of Madhya Pradesh and the Central Government and from various letters and communications and also from the decision which has been taken by the Cabinet, it is clear that the State Government took into account a vital consideration that after the decision of this Court in *L. Chandra Kumar*, an aggrieved party could approach the High Court, the object for establishment of the Tribunal was defeated. In our opinion, in the light of the facts before the Court, it cannot be said that the decision to abolish State Administrative Tribunal taken by the State of Madhya Pradesh can be quashed and set aside as *mala fide*".

125. It was argued before the Supreme Court in the *MPAT Abolition case* that no survey had been conducted by the State Government and no reasons were recorded why the MPAT had been abolished. The Supreme Court in that context observed as under:

"73. We are unable to uphold even this argument. In our judgment, if a decision is illegal, unconstitutional or ultra vires, it has to be set aside irrespective of laudable object behind it. But once we hold that it was within the power of the State Government to continue or not to continue State Administrative Tribunal and it was open to the State Government to take such a decision, it cannot be set aside merely on the ground that such a decision was not advisable in

the facts of the case or that other decision could have been taken. While exercising power of judicial review, this Court cannot substitute its own decision for the decision of the Government."

126. The above observations are a complete answer to similar contentions advanced by the Petitioners before this Court. With there being sufficient materials on record to support the decision of the State of Odisha to seek the abolition of the OAT, it cannot be said that the said decision is arbitrary, irrational or violative of Articles 14, 19 and 21 of the Constitution. The submissions in this regard by the Petitioners are rejected.

127. Learned counsel for the parties have placed before this Court materials to demonstrate the mounting arrears in this Court over the past few years. At the same time, as against the sanctioned strength of twenty seven judges, the working strength has rarely exceeded twenty in the last twenty years. It is questioned therefore by the Petitioners, perhaps not without justification, whether the litigant before the High Court whose case has been transferred from the OAT can reasonably hope for a quicker disposal of her case? Further, it is pointed out that the transferred case is likely to be heard by a learned Single Judge of this Court with an appeal from that decision to the DB. Perhaps this was lost sight of by the State and Central governments when they concluded that by abolishing the OAT an additional tier of litigation could be avoided. There would in any event now be two tiers of litigation, in the High Court itself.

128. These are hard facts that cannot be disputed. At the same time, the question is whether the High Court can step into the shoes of the administrators and interfere with the decision only because another view is possible to be taken? To repeat the words of the Supreme Court in the *MPAT Abolition case*: “it cannot be set aside merely on the ground that such a decision was not advisable in the facts of the case or that other decision could have been taken. While exercising power of judicial review, this Court cannot substitute its own decision for the decision of the Government.”

129. The further fact is that the High Court was consulted on this issue and the Full Court of the High Court on the administrative side concurred with the proposal of the Central and State Government that the OAT was required to be abolished as it was not serving the purpose for which it was established. This was obviously with the expectation of the Bench strength increasing in due course. The performance of the Tribunals generally has come in for adverse comment by the Supreme Court in *L. Chandra Kumar* as well as *Madras Bar Association (supra)*. From the point of view of the litigant, when presented with a choice of going with her case first before the OAT or before the High Court, it would not be surprising if she opts for the latter course. If she is going to have to wait before the OAT, she might prefer waiting before the High Court even to begin with.

130. It appears that with passage of time in the experimental phase of ATs, a call had to be taken by many of the State Governments

about the efficacy of continuing with the SATs based on their performance and the outcomes. They have tried the experiment for over three decades and feel the need for a change. It may not be proper for the High Court to decide to overturn that decision only because a different view is possible. Again from the point of view of the litigant unless the ‘bypass’ of a Tribunal is as good as the ‘highway’ of a High Court, the assurance of equal and fair justice may be rendered illusory. This is reflected in the following recommendations of the LCI in its 272nd report submitted in 2017:

“8.21 The Commission is of the view that in order to achieve the goal for which the Tribunals have been established i.e., to reduce the burden of Courts, it is desirable that only in those cases where the Statute establishing the Tribunal does not have a provision for the establishment of an Appellate Tribunal for hearing an appeal from the decision of said Tribunal, the High Court may be allowed to be approached by way of an Appeal against the decision of a Tribunal. Every order emanating from the Tribunal or its Appellate Forum, wherever it exists, attains finality. Any such order may be challenged by the aggrieved party before the Division Bench of the High Court having territorial jurisdiction over the Tribunal or its Appellate Forum.

8.22 For the effective working of this idea, it will be necessary that the Appellate Tribunals established must act judiciously and that such Appellate Tribunals should be constituted at par with the High Courts and the members appointed in these Tribunals should possess the qualifications equivalent to that of the High Court Judges.

8.23 If appeals against the decision of Appellate Tribunals are brought before the concerned High Courts in a routine manner, then the entire purpose of establishing Tribunals will get frustrated. Therefore, the Commission is of the view that the aggrieved party

against the decision of such Appellate Tribunal should be able to approach the Supreme Court on the grounds of Public or National importance and not before any other authority.”

131. We appear to be far from elevating the status of the ATs to that of the High Courts by adopting the changes suggested by the LCI. The experiment that commenced in 1986, by establishment of the OAT, in the expectation of speedier justice for government servants, has stood belied by the passage of time. In the circumstances, the decision to discontinue the OAT in the expectation that revival of those cases before the High Court would offer a better deal to the litigant, cannot be termed an arbitrary or unreasonable. One expectation is replaced by another. These are difficult choices with which beyond a point the High Court cannot interfere. This expectation cannot be said to be unfounded at this stage. Only the passage of time will tell us whether this expectation was justified. It is too early in the day to reject it as unreasonable.

132. The proposition of ‘non-traverse’ does not impress this Court. There is nothing in the pleadings that lays a factual foundation for the allegation, in para 7 of the petition, that the decision to abolish the OAT was motivated by Government servants wanting to avoid contempt proceedings before the OAT. In any event, all the cases would be transferred to be heard by the High Court and those Government servants cannot avoid facing the contempt proceedings there. When the averment itself stands on non-existent foundation, its non-traverse does not advance the case of the

Petitioners that the impugned notification is an instance of malice in law or based on extraneous considerations. The reliance by the Petitioners on the decisions in *Ghorpade (supra)* or *Sushil Kumar (supra)* is, therefore, misplaced.

Issue (vi): Is the impugned notification bad in law since it is not expressly stated to be in the name of the President of India?

133. It was vehemently argued on behalf of the Petitioners that since the impugned notification dated 2nd August, 2019 is not expressed to be issued in the name of the President, it is invalid. Further, it was urged that a mere decision on the file, without it culminating in a properly issued order, was not a valid decision that could be acted upon.

134. The above submission overlooks the legal position that the requirement in Article 77 (1) [and correspondingly in Article 166] of the Constitution is not mandatory but directory. In *Dattatreya Moreshwar Pangarkar (supra)*, Justice Das speaking for the majority explained as under:

"Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore' all that the procedure established by law requires is that the appropriate Government

must take a decision as to whether the detention order should be confirmed or not under section 11(1)."

135. This was reiterated in *State of Bombay v. Purushottam Jog Naik (1952) SCR 674* and reaffirmed in *Ghaio Mall and Sons v. State of Delhi (1959) SCR 1424*. In *R. Chitralakha (supra)*, a Constitution Bench of the Supreme Court reiterated the proposition that the provisions of Article 166 of the Constitution are only directory and not mandatory in character and, even if they are not complied with their validity is not impaired as long as it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor.

136. Again in *Narmada Bachao Andolan (supra)*, it was held as under:

"27. The decision of any Minister or officer under the Rules of Business made under Articles 77(3) and 166(3) of the Constitution is the decision of the President or the Governor respectively and these articles do not provide for "delegation". That is to say, that decisions made and actions taken by the Minister or officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers."

137. Consequently, this Court is not persuaded that in the present case the failure to mention in the impugned notification that it has been issued on behalf of the President of India vitiates it.

Conclusion

138. For all of the aforementioned reasons, the Court is of the view that no ground has been made out for the Court to interfere with the impugned notification dated 2nd August 2019. Accordingly, all the writ petitions are dismissed. But in the circumstances, there shall be no order as to costs.

139. In light of the above conclusion, since all the pending cases before the OAT would automatically stand transferred to this Court, the interim order dated 7th August 2019 is no longer required to be continued. It is accordingly vacated.

140. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

K.C. Bisoi/Sr.Secy.
S.K. Jena/M. Panda/PA
S. Guin/Sr. Steno