Reportable

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

Contempt Petition (Civil) No 708 of 2021
in
Writ Petition (Civil) No 502 of 2021

Advocate Association Bengaluru ... **Petitioner(s)**

Versus

Anoop Kumar Mendiratta and Anr ... **Respondent(s)**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1 The contempt proceedings relate to appointments to the Income Tax Appellate Tribunal[1].

2 On 6 July 2018, an advertisement was issued for 37 vacant posts in the ITAT. Of them, 21 were for Judicial Members and 16 for Accountant Members. The selection process was set in motion. The Search cum Selection Committee[2] was chaired by Hon'ble Mr Justice A M Khanwilkar, Judge, Supreme Court of India.

3 On 21 September 2019, the SCSC recommended the names of 41 persons for appointment as members of the ITAT. The reply which has been filed by the Secretary to the Department of Legal Affairs indicates that the SCSC had

1 "ITAT"
2 "SCSC"

recommended 28 persons (16 as Judicial Members and 12 as Accountant Members) in the main list and an additional 13 persons in the wait list. The recommendations were received by the Department of Legal Affairs on 3 October 2019 and were submitted on 16 October 2019 for consideration and approval of the Appointments Committee of the Cabinet[3]. The ACC approved 13 persons for appointment on 11 September 2021 and 9 persons on 1 October 2021. Thus, appointments of a total of 22 candidates were approved. Offers of appointment were issued by the Department of Legal Affairs on 11 September 2021 and 1 October 2021.

4. Out of 28 recommendations in the main list and 13 in the wait list, the ACC selected 16 persons from the main list and 6 from the wait list. Since the SCSC had recommended the names of 41 persons for appointment (28 in the main list and 13 in the wait list) and 22 persons have been selected, 19 persons remain to be appointed.

5. On 16 December 2021, this Court, while issuing notice in these proceedings, observed thus:

> "We are informed by the learned Attorney General that 37 vacancies were advertised in the Income Tax Appellate Tribunal. The Search-cum-Selection Committee of the Supreme Court recommended 28 names, out of which 16 persons are being considered for appointment as Members – Judicial and 6 persons as Members-Technical. The learned Attorney General assures us that the appointments would be made by the end of this month.
>
> So far as the remaining recommended names are concerned, the learned Attorney General submits that the Government has not yet cleared the names due to certain inputs received from IB Report(s) as also Medical Report(s) which are still being examined.
>
> In view of the same, we direct the learned Attorney General

3 "ACC"

to produce the concerned file on the next date of hearing and place the same before the Bench for its perusal.

The Respondents are at liberty to file a counter affidavit in the meantime, if necessary."

6. In pursuance of the above directions, Mr K K Venugopal, Attorney General for India has tendered copies of the file pertaining to the appointment of the members of the ITAT, pursuant to the recommendations of the SCSC for perusal by the Court.

7. We have heard Mr R Basant, senior counsel appearing on behalf of the petitioner and Mr K K Venugopal, Attorney General for India for the Respondents. Mr Arvind Datar, senior counsel has assisted the Court as *amicus curiae*.

8. Mr R Basant submitted that:

(i) Though 41 persons were recommended by the SCSC (28+13), 22 persons were selected by the ACC leaving 19 persons yet to be appointed;

(ii) 19 new vacancies have since arisen as a consequence of which 38 vacancies remain unfilled in the ITAT;

(iii) 22 persons who have been selected by the ACC have been selectively appointed both from the main list and the wait list, as a consequence of which only 16 out of 28 in the main list have been appointed and 6 out of 13 have been appointed from the wait list; and

(iv) In making its selection, the ACC has placed reliance on certain reports and feedback obtained subsequent to the recommendations of the SCSC, none of which have been placed before the SCSC which was chaired by a

Judge of the Supreme Court.

9. Mr Arvind Datar, amicus curiae, urged the following submissions:

(i) Since the SCSC had recommended 28 persons in the main list and 13 in the wait list, no person in the wait list could be or ought to have been appointed unless the main list was exhausted;

(ii) The ranking which has been indicated in the recommendations of the SCSC should not be deviated from and must be followed;

(iii) Section 184(7) of the Tribunal Reforms Ordinance 2021 contained a provision requiring the SCSC to recommend two candidates for each vacancy and though this provision was struck down in the judgment of the three-Judge Bench of this Court dated 14 July 2021, the same provision has been re-enacted in Section 3(7) of the Tribunals Reforms Act, 2021; and

(iv) Any inputs obtained subsequent to the recommendations of the SCSC from any other source must be placed before the SCSC in order to enable it to consider whether any modification in its recommendations is necessitated on the basis of tangible material which has come to the knowledge of the competent authority subsequent to the recommendations of the SCSC.

10. On the other hand, Mr K K Venugopal, learned Attorney General for India submitted that:

(i) The SCSC has recommended 28 candidates in the main list and 13 candidates in the wait list. Appointment of candidates in the wait list is legitimate where appointments are not made from the main list or persons in the main list have not accepted appointment;

(ii) Section 3(7) of the Tribunals Reforms Act 2021 contemplates that two names have to be recommended against each vacancy and, hence, the names in the wait list have been considered by the competent authority, together with the list of names which were submitted in the main list;

(iii) In some cases, it has come to the notice of the competent authority that there are penalty proceedings against the candidate under the provisions of the Income Tax Act, 1961.

(iv) No case for the exercise of the contempt jurisdiction has been made out since:

(a) The Finance Secretary is not concerned with the appointment of the Members of the ITAT under the Allocation of Business Rules 1961; and

(b) The then Secretary, Department of Legal Affairs has since been appointed as a Judge of the High Court on 25 February 2022.

11 The Attorney General, however, has fairly submitted that where subsequent inputs have been drawn to the attention of the competent authority after the submission of the recommendations by the SCSC, it is fair and proper that these comments, together with the original Intelligence Bureau[4] report, are remitted

4 "IB"

back to the SCSC to enable it to apply its mind to the material which is placed before it. Along the same lines, it has been stated by the learned Attorney General that, in the future, it would be ensured that:

(i) All inputs which are available with the Government whether from the IB or from any other source including the Central Board of Direct Taxes[5] should be placed before the SCSC in advance, before it makes its recommendations, so that these inputs are duly borne in mind in an appropriate manner before the recommendations are finalized; and

(ii) In the present case, the objections of the competent authority to some of the recommendations made by the SCSC should be placed for consideration by the SCSC.

12 In pursuance of the order dated 16 July 2021, the relevant file has been placed before the Court. It would not be appropriate for this Court to discuss or refer to individual names of candidates from the recommendations which have been made by the SCSC or from the file note. It would suffice, however, to note that the file contains a feedback sheet for candidates recommended by the SCSC for Members of the ITAT; there being two separate sheets dated 8 September 2021 and 29 September 2021. Against the name of each candidate recommended for appointment either as Judicial Member or, as the case may be, Accountant Member, there is a column which tabulates the "IB Report"; another column which reads as "Feedback" and a final column containing "Remarks". The real bone of contention would pertain to the column which is titled as "Feedback". The file note does not indicate the underlying material on the basis of which the feedback is formulated or the process which is followed before arriving at the

5 "CBDT"

feedback. In many cases, we find from the tabulation that the feedback is diametrically at variance with the contents of the IB report. The IB report under the extant procedure is placed before the SCSC before the process of shortlisting takes place and candidates are called for interview. Hence, the candidates who are recommended by the SCSC are those who had been cleared by the IB after verifying their credentials, integrity, character and other relevant aspects. Evidently, many of the comments which are contained in the feedback column are of a subjective nature without any disclosure of underlying material. This would substantially detract from the fairness of the process. If, in an exceptional case, subsequent to the formulation and submission of recommendations of the SCSC, any tangible material comes to the knowledge of the competent authority, it is only proper and appropriate, as the Attorney General submits, that such material should be placed before the SCSC. We are in agreement with the submission of the Attorney General that as a general practice, all inputs bearing on the candidature of each prospective applicant under consideration, whether the inputs emanate from the IB or from any other source, ought to be placed by the Union Government on the record of the SCSC in advance, before the recommendations are formulated. For instance, in the case of a few candidates in the process which forms the subject matter of the dispute, the objection was on the ground that penalty proceedings have been initiated by the CBDT. In this context, Mr Arvind Datar submitted that the provisions of Section 270A of the Income Tax Act 1961 result in the automatic initiation of penalty proceedings where the income tax, as assessed, is higher than the income as reported by the assessee in the income tax return resulting in the invocation of proceedings for the imposition of a penalty. Having regard to these and other aspects, it would, in our view, be appropriate if such material which has come to the knowledge of the competent authority must be drawn to the attention of the SCSC which

would then be in a position to determine as to whether any modification of its original recommendation is necessitated by such facts as have come on the record subsequent to its recommendations. This can happen only in exceptional situations. In the generality of cases, all material must be placed in advance before the SCSC. It must be emphasized that the SCSC, which is chaired by a Judge of the Supreme Court also consists of two Secretaries of the Union Government. A comprehensive exercise is conducted by the Committee, *inter alia*, involving calling for inputs from the IB, verifying the record of each candidate and conducting personal interaction. Hence, all such inputs, as are available with the Government, must be placed before the SCSC in advance. In an exceptional situation, where certain material comes to light after the submission of the recommendations, that must also be drawn to the attention of the SCSC so as to enable it to consider whether any modification of its recommendations is necessary.

13. In view of the above discussion, we are of the considered view that the feedback which has been tabulated in the file note before the competent authority must be placed before the SCSC so as to enable it to consider whether any modification in the terms of its recommendations is warranted. If the feedback is based on any tangible underlying material, such material should be placed before the SCSC. The Union Government shall carry out this exercise and place all the relevant material before the SCSC within a period of one week from the date of this judgment. We would request that a meeting of the SCSC may be convened thereafter so that a final decision can be arrived at on whether any modification in the terms of the recommendations is warranted. The recommendations of the SCSC shall be processed by the Union Government and the court shall be apprised of the decision which has been taken.

14. Before concluding, it would be necessary to refer to one other aspect. In the affidavit which has been filed by the Secretary to the Department of Legal Affairs, the following tabulation of the pendency position before the ITAT has been adverted to:

"Year (April to March)	Institution	Disposal	Pendency at the end of year
2016-17	48800	48385	92386
2017-18	50222	49791	92817
2018-19	51154	51766	92205
2019-20	45842	50031	88016
2020-21	9515	30971	66560
2021-22	16254	32388	50426"

15. The Attorney General, while placing the above tabulation during the course of the submission, has adverted to the fact that the pendency before the ITAT which stood at 92,386 at the end of 2016-2017 has witnessed a reduction to 50,426 at the end of 2021-2022.

16. Responding to the above tabulation, both Mr R Basant and Mr Arvind Datar have submitted that the above reduction is largely due to the following reasons:

(i) Disposal of appeals attributable to the Vivad Se Vishwas Scheme;

(ii) Withdrawal of appeals as a result of the enhancement of the tax threshold; and

(iii) Nearly 5.5 lakh appeals are pending before the CIT (Appeals) and once these appeals are disposed of, the transient reduction in the pendency figures of the ITAT will undergo a substantial change.

17 At this stage, since no decision has been taken by the Union Government on the appropriate strength for the ITAT, it is not necessary for the Court to render any finding, on this aspect.

18 Having devoted our anxious consideration to the issue as to whether the exercise of contempt jurisdiction is warranted, we are of the view that it would not be expedient in the interests of justice to pursue proceedings under the contempt jurisdiction. The Contempt Petition shall, however, be re-numbered as an interlocutory application. The vacancies in the ITAT shall be duly filled up so as to enable the ITAT to function effectively.

19 These proceedings be listed before the Court on 12 July 2022 so that the Court can be apprised of the final decision which has been taken by the competent authority after the submission of the recommendations of the SCSC and the appointment orders which have been issued.

20 The submissions of the learned *amicus curiae* which remain to be debated upon shall be open for consideration at the final hearing.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[Pamidighantam Sri Narasimha]

New Delhi;
May 17, 2022
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ITEM NO.3 COURT NO.4 SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

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

MADRAS BAR ASSOCIATION **Petitioner(s)**

VERSUS

UNION OF INDIA & ANR. **Respondent(s)**

(WITH IA No 42931 of 2022)

(ONLY CONTEMPT PETITION (C) NO. 708 OF 2021 TO BE LISTED ON 17.5.2022 IN VIEW OF ORDER DTD. 11.05.2022.)

WITH
CONMT.PET.(C) No. 708/2021 in W.P.(C) No. 502/2021 (PIL-W)

(IA No. 125229/2021 - AMENDMENT OF THE PETITION)

Date : 17-05-2022 This petition was called on for hearing today.

CORAM :
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

Mr. Arvind P. Datar, Sr. Adv. (A.C.)
Mr. Rahul Unnikrishnan, Adv.
Mr. T. V. S. Raghavendra Sreyas, AOR
Mr. Naveen Hegde, Adv.

For Petitioner(s) **Mr. R. Basant, Sr. Adv.**
Mr. Mahesh Thakur, AOR
Mr. Ajay Kanojiya, Adv.
Mr. Vipasha Singh, Adv.
Mr. Akshay Sahay, Adv.

For Respondent(s) **Mr. K.K. Venugopal, AG**
Mr. Tushar Mehta, SG
Mr. K.M. Nataraj, ASG
Mr. Balbir Singh, ASG
Mr. Kanu Agrawal, Adv.
Mr. Saurabh Mishra, Adv.
Mr. Vanshaja Shukla, Adv.
Ms. Priyanka Das, Adv.
Ms. Chinmayee Chandra, Adv.
Mr. Ankur Talwar, Adv.

Mr. Rajat Nair, Adv.
Mr. Siddhanth Kohli, Adv.,
Ms. Suhashini Sen, Adv.
Ms. Shraddha Deshmukh, Adv.
Mr. Zoheb Hossain, Adv.
Mr. Arvind Kumar Sharma, AOR
Mr. Raj Bahadur Yadav, AOR

Mr. Kartik Seth, Adv.
Ms. Shriya Gilhotra, Adv.
Ms. Garima Saxena, Adv.
Mr. Sahil Nagpal, Adv.
For M/S. Chambers Of Kartik Seth, AOR

Ms. Sakshi Kakkar, AOR
Mr. Sakti Singh, Adv.
Mr. Anmol Srivastav, Adv.
Ms. Urvashi Arya, Adv.

Mr. Jasmeet Singh, AOR

Mr. Rupesh Kumar, AOR

Mr. Tarun Gupta, AOR

Mr. Anil Kumar Sangal, Sr. Adv.
Mr. Siddharth Sangal, AOR
Ms. Nilanjani Tandon, Adv.

Ms. Garima Bajaj, AOR

Mr. Vikas Jain, Adv.

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

CONMT.PET.(C) No. 708/2021 in W.P.(C) No. 502/2021

1 In terms of the signed reportable judgment, we are of the view that it would not be expedient in the interests of justice to pursue proceedings under the contempt jurisdiction. The Contempt Petition shall, however, be re-numbered as an interlocutory application. The vacancies in the ITAT shall be duly filled up so as to enable the ITAT to function effectively.

2 These proceedings be listed before the Court on 12 July 2022 so that the Court can be apprised of the final decision which has been taken by the competent authority after the submission of the recommendations of the SCSC and the appointment orders which have been issued.

3 The submissions of the learned *amicus curiae* which remain to be debated upon shall be open for consideration at the final hearing.

IA No 42931 of 2022 in Writ Petition (C) No 1018 of 2021

1 Mr Kartik Seth, counsel appearing on behalf of the applicant, seeks the permission of the Court to withdraw the application.

2 The application is accordingly dismissed as withdrawn.

(SANJAY KUMAR-I) **(MALEKAR NAGARAJ)**
DEPUTY REGISTRAR **COURT MASTER**
(Signed reportable judgment is placed on the file)