

EDITORIAL NOTE

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I. INTRODUCTION

Tribunals were created as administrative adjudication bodies with the objectives of expediting the process, reducing the workload on the courts, and ensuring that both experts and judicial members would form part of the forum.¹ On March 31, 2017, the Finance Bill, 2017 which aimed at merging as many as eight tribunals with other tribunals received the assent of the President, thus giving birth to the Finance Act, 2017,² one of the most controversial pieces of legislations in the recent times. When the Bill was tabled before the Lok Sabha, it was voted to be a money bill and was approved by the Lok Sabha.³ The Finance Act, 2017 made amendments to the Companies Act, 2013, Competition Act, 2002, Industrial Disputes Act, 1947, Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, Copyright Act, 1957, Trademarks Act, 1999, National Green Tribunal Act, 2010 among other legislations so as to provide for merger of certain tribunals and lay down the conditions of service of members of such merged tribunals.⁴ The Finance Act has provided for the merger of Competition Appellate Tribunal (‘COMPAT’) with the National Company Law Appellate Tribunal (‘NCLAT’).⁵ The provisions regarding this amalgamation of tribunals were made effective from May 26, 2017 through a notification of Ministry of Finance.⁶ Further, on June 1, 2017, the Ministry of Finance also notified The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017⁷ (‘Rules’) which gives undue power to the government for the appointment, control and disqualification of the members of the merged tribunals.⁸

¹ M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, Vol.1 713 (6th edn., 2007).

² The Finance Act, 2017.

³ Sruti Radhakrishnan, *The Finance Bill, 2017: the far-reaching Consequences of a Lok Sabha Majority*, THE HINDU, March 25, 2017, available at <http://www.thehindu.com/news/national/the-finance-bill-2017-a-brute-majority-and-its-far-reaching-consequences/article17663444.ece> (Last visited on September 11, 2017).

⁴ The Finance Act, 2017, Part XIV.

⁵ *Id.*, §171..

⁶ Ministry of Finance, Department of Revenue, Notification, S.O. 1696 (E) (Notified on May 26, 2017) available at <http://dor.gov.in/sites/default/files/Commencement%20of%20Finance%20Act.pdf> (Last visited on September 11, 2017).

⁷ Ministry of Finance, Department of Revenue, Notification, G.S.R. 514 (E) (Notified on June 1, 2017) available at <http://dor.gov.in/sites/default/files/Rules%202017.pdf> (Last visited on September 11, 2017).

⁸ *See generally* The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017.

Many legal practitioners and academicians have expressed their reservations against this merger of tribunals on constitutional and practical grounds.⁹ Additionally, this Act has also been challenged before the Supreme Court of India ('SC'),¹⁰ as well as several High Courts including Madras High Court,¹¹ Delhi High Court, and the Punjab and Haryana High Court.¹²

This note is an attempt to analyse the practical, constitutional and procedural implications of the Finance Act, 2017. Part II of the note analyses the flawed approach of the government in classifying the Finance Bill, 2017 as a money bill. In Part III of this note, we discuss the constitutional challenge to the Finance Act on the ground of separation of powers doctrine. By focusing on the amalgamation of the COMPAT with the NCLAT in Part IV, we will attempt to analyse the practical implications of such move and assess whether this amalgamation would risk the effectiveness of adjudication of competition law disputes in India.

II. CLASSIFICATION AS MONEY BILL: PROCEDURAL ILLEGALITY

On more than one instance, the Government has faced wrath for pushing laws as money bills when they were clearly not one. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 was also voted by the Lok Sabha to be a money bill.¹³ This classification of a law such as Aadhaar Bill as money bill was challenged by Mr. Jairam Ramesh through a writ petition before the SC.¹⁴

⁹Pratik Datta, Shefali Malhotra & Shivangi Tyagi, *Judicial Review and Money Bills*, 10(2) NUJS LAW REVIEW (2017); Varun Marwah, *Finance Act: The Issues Surrounding De-tribunalisation*, BAR & BENCH, March 25, 2017, available at <https://barandbench.com/finance-act-2017-tribunals/> (Last visited on September 11, 2017); Rahul Goel, *Spanner in the Works? Judicial Challenge to the Finance Act, 2017*, COMPETITION ACT – CYRIL AMARCHAND MANGALDAS BLOG, June 28, 2017, available at <http://competition.cyrilamarchandblogs.com/2017/06/spanner-works-judicial-challenge-finance-act-2017/#more-1950> (Last visited on September 11, 2017); Manas Kumar Chaudhuri, *New Challenge to Competition Regime of India*, LINKEDIN BLOG, December 9, 2016, available at <https://www.linkedin.com/pulse/new-challenge-competition-regime-india-manas-kumar-chaudhuri> (Last visited on September 11, 2017) (Mr. Chaudhuri is a Partner at Khaitan & Co. Ltd. specialising in Competition Law Practice of the firm).

¹⁰The Indian Express, *Supreme Court Notice to Centre on Plea Challenging Finance Act*, July 29, 2017, available at <http://indianexpress.com/article/india/supreme-court-notice-to-centre-on-plea-challenging-finance-act-4772155/> (Last visited on September 11, 2017).

¹¹Bar & Bench, *Finance Act Provisions on Tribunals Challenged; Madras High Court Issues Notice to Centre*, June 17, 2017, available at <https://barandbench.com/madras-high-court-finance-act/> (Last visited on September 11, 2017).

¹²Bar & Bench, *Rules on Tribunals Challenged in Two More High Courts*, August 6, 2017, available at <https://barandbench.com/finance-act-tribunals-challenge-delhi-punjab-haryana/> (Last visited on September 11, 2017).

¹³ Amber Sinha, *The Aadhaar Act is Not a Money Bill*, THE WIRE, April 24, 2016, available at <https://thewire.in/31297/the-aadhaar-act-is-not-a-money-bill/> (Last visited on September 11, 2017); The Indian Express, *Aadhaar as Money Bill: If Speaker is Wrong, Court Can Set It Right, says SC*, February 14, 2017, available at <http://indianexpress.com/article/india/aadhaar-as-money-bill-if-speaker-is-wrong-court-can-set-it-right-says-sc-4523507/> (Last visited on September 11, 2017).

¹⁴ Pratik Datta, Shefali Malhotra & Shivangi Tyagi, *Judicial Review and Money Bills* (NIPFP Working Paper Series, Paper No. 192 of 2017) available at http://www.nipfp.org.in/media/medialibrary/2017/03/WP_2017_192.pdf (Last visited on September 11, 2017).

The scope of money bills, which are a genre of financial bills, is limited by Article 110(1) of the Constitution of India. Article 110(1) provides that a bill would be considered to be a money bill “only” if it deals with taxation, financial obligations of the government, custody and appropriation of money from the Consolidated Fund of India, declaration of an expenditure to be charged under the Consolidated Fund of India, receipt of money on account of Consolidated Fund of India or the public account of India or such matters which are incidental.¹⁵ Additionally, Article 110(3) mandates that in cases of a question regarding a Bill being a money bill, the decision of the Speaker of the Lok Sabha would be final.¹⁶ Any ordinary bill or constitutional bill has to be approved by both the Lok Sabha and the Rajya Sabha. However, the only exception to this rule is a money bill which can be enacted as a law without the approval of the Rajya Sabha.¹⁷

By way of the Finance Act, 2017, the government is amending specific statutes which deal with the creation of tribunals and are entirely unrelated to the budget or even financial matters. The Finance Act has amended legislations such as National Green Tribunal Act, 2010, Companies Act, 2013, Competition Act, 2002, Industrial Disputes Act, 1947, Employees’ Provident Funds and Miscellaneous Provisions Act, 1952, Copyright Act, 1957, Trademarks Act, 1999. These amendments have not only led to the elimination of many tribunals and creation of new merged ones, but has also revised the conditions of services and terms of appointment and disqualification of the members of the various merged tribunals. The subject matter of these provisions of the Finance Act, 2017 does not fall under the scope of Article 110(1) of the Constitution. Neither does it affect any of the fiscal statutes. This practice is an attempt to circumvent the amendments made by the Rajya Sabha and a clear contravention of the Constitution and parliamentary process.¹⁸ Hence, it can be inferred that the Finance Act is subject to judicial review as it is hit by procedural illegality. The SC has distinguished procedural irregularity from procedural illegality by holding that the latter is satisfied when there is a breach of constitutional provisions.¹⁹ Since the wrong classification of the Finance Bill as a money bill is in clear violation of the Constitution, it can be inferred that the Finance Act should be struck down on account of procedural illegality.

III. VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS

As soon as the Finance Act was notified, there were concerns raised that it violates the separation of powers doctrine and impinges upon the judiciary's independence.²⁰ §417A has been introduced in the Companies Act, which provides for the qualifications and terms and conditions of services of the Chairperson and Members to be governed by §184 of the Finance Act. Therefore, according to the new legal position as per §184 of the Finance Act and the Rules framed thereunder, the Government has the power to “make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and

¹⁵The Constitution of India, 1950, Art. 110(1).

¹⁶ *Id.*, Art. 110(3).

¹⁷ *Id.*, Art. 109(5).

¹⁸ Datta, Malhotra & Tyagi, *supra note* 9.

¹⁹ Special Reference No. 1 of 1964, 1965 SCR (1) 413.

²⁰ Hindustan Times, *Finance Bill: Govt Merges ‘Autonomous’ Tribunals, Assumes Power to Appoint Chiefs*, April 14, 2017, available at <http://www.hindustantimes.com/india-news/finance-bill-2017-govt-merges-top-tribunals-assumes-power-to-appoint-chiefs/story-ZWwZId9GgPW50u0KYxbTnN.html> (Last visited on September 11, 2017).

conditions of service”²¹ for the tribunal members. Therefore, the Government has primacy over all appointments to tribunals.

In the writ petition filed by Mr. Jairam Ramesh before the SC, he has argued that §184 of the Finance Act and the Rules framed thereunder giving the Government unrestricted power with respect to the determination of service conditions of members of tribunals, specifically the National Green Tribunal, violates the doctrine of separation of powers, a part of the basic structure of the Constitution.²²

In a similar manner, by way of a writ petition instituted by the Madras Bar Association, the merger of tribunals has been challenged before the Madras High Court in *Madras Bar Association v. Union of India*.²³ One of the contentions of the petitioner is that §184 of the Finance Act and the relevant Rules are unconstitutional as they violate the basic structure doctrines of separation of powers and the independence of judiciary. According to the petitioner, by empowering the Government to make rules related to the appointment, qualification, removal, and other conditions of services of tribunal members, an excessive delegation of judicial functions takes place without there being any guidelines for the same.²⁴ Therefore, the same would violate Article 50 of the Constitution, as the executive gets wide powers in respect of bodies that essentially perform judicial functions.

In an interim order passed on June 28, 2017, the Court has held the Rules to be *prima facie* violative of the directives issued by the SC in *Union of India v. R. Gandhi, President, Madras Bar Association*,²⁵ (‘R. Gandhi’) followed by itself in *Shamnad Basheer v. Union of India*^{26,27} (‘Shamnad Basheer’). The Court also held that the appointments made by the Government under the Rules would be subject to its final decision.

In these cases relied on by the Court, the courts unequivocally held that appointments to tribunals must be made by committees that predominantly consist of members of the judiciary.²⁸ The rationale behind this is that tribunals are considered to be almost on par with high courts in terms of the powers and functions, and tribunal appointments by the judiciary would secure the independence of tribunals and protect them from government interference. This principle of non-intervention by the executive was also upheld by the SC in the recent case of *Madras Bar Association v. Union of India*.²⁹

²¹ The Finance Act, 2017, §184.

²² The Times of India, *Finance Act 2017 Emasculates the National Green Tribunal : PIL in SC*, August 5, 2017, available at <http://timesofindia.indiatimes.com/india/finance-act-2017-emasculates-the-national-green-tribunal-pil-in-sc/articleshow/59928357.cms> (Last visited on September 11, 2017).

²³ *Madras Bar Association v. Union of India*, W.P. 15147 and 15148 of 2017 (Madras H.C.) (Pending).

²⁴ *Madras Bar Association v. Union of India, Affidavit on behalf of the Madras Bar Association*, W.P. 15147 and 15148 of 2017, ¶24.B (Madras H.C.) (Pending).

²⁵ *Union of India v. R. Gandhi, President, Madras Bar Association*, (2010) 11 SCC 1.

²⁶ *Shamnad Basheer v. Union of India*. MANU/TN/0501/2015 (Madras H.C.).

²⁷ *Madras Bar Association v. Union of India*, W.P. 15147 and 15148 of 2017 (Madras H.C.) (Pending) (Order of the Court passed on June 28, 2017).

²⁸ SpicyIP, *Breaking News: Madras High Court Cautions Government Against Tribunal Appointments!*, June 28, 2017, available at <https://spicyip.com/2017/06/breaking-news-madras-high-court-cautions-government-againsttribunal-appointments.html> (Last visited on September 11, 2017).

²⁹ *Madras Bar Association v. Union of India*, (2014) 10 SCC 1.

Dealing with the question of appointment of tribunal members, R. Gandhi struck down the provisions related to the National Company Law Tribunal because there was only one member from the judiciary in the selection committee out of five members, with the remaining four belonging to the executive.³⁰ In addition to the requirement of at least an equal number of members from the judiciary and the executive in the selection committees, the Court directed that the nominee of the Chief Justice on the committee should have a casting vote.³¹ Following the decision of R. Gandhi, the Madras High Court in *Shannad Basheer* struck down selection committees in charge of making appointments to the Intellectual Appellate Property Board.³² Basing the decision on the basic structure doctrine, Chief Justice Kaul held that the selection of members of tribunals performing judicial functions cannot be left to the executive.³³

Apart from this, the petitioners are arguing that the Finance Act flouts other guidelines issued by the Court in R. Gandhi. One of these relates to the removal of tribunals members. The parent statutes establishing several tribunals provide for the removal of tribunal members only after an inquiry is conducted by a judge of the SC.³⁴ For example, under §10(2), National Green Tribunal Act, 2010, it is provided that

“The Chairperson or Judicial Member shall not be removed from his office except by an order made by the Central Government after an inquiry made by a Judge of the Supreme Court in which such Chairperson or Judicial Member has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.”³⁵

Even though the ultimate decision lies with the Government, an inquiry by a judge of the SC serves as an appropriate check on the Government's powers.³⁶

However, Rules 7 and 8 of the Rules eliminate the inquiry by a judge, and vests the power of removal solely with the Government. According to Rule 8, on a complaint being received by the Government against any tribunal member, the ministry under which the tribunal is established is supposed to scrutinise the complaint.³⁷ If the ministry believes that there are reasonable grounds for making an

³⁰ Umakanth Varottil, *Supreme Court Paves the Way for Company Law Tribunal*, IndiaCorpLaw, May 15, 2015, available at <https://indiacorplaw.in/2015/05/supreme-court-paves-way-for-company-law.html> (Last visited on September 11, 2017).

³¹ *Id.*

³² SpicyIP, *Tribunals in Troubled Waters: Highlights of the IPAB Decision*, March 16, 2015, available at <https://spicyip.com/2015/03/tribunals-in-troubled-waters-highlights-of-the-ipab-decision.html> (Last visited on September 11, 2017).

³³ *Id.*

³⁴ *Madras Bar Association v. Union of India, Affidavit on behalf of the Madras Bar Association*, W.P. 15147 and 15148 of 2017, ¶24.J (Madras H.C.) (Pending).

³⁵ National Green Tribunal Act, 2010, §10(2).

³⁶ Prashant Reddy, *Has the Government Signed the Death Warrant for The Judicial Independence of 19 Tribunals?*, SCROLL, June 5, 2017, available at <https://scroll.in/article/839588/has-the-government-signed-the-death-warrant-for-the-judicial-independence-of-19-tribunals> (Last visited on September 11, 2017).

³⁷ The Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience and Other Conditions of Service of Members) Rules, 2017, Rule 8(1),.

inquiry, it can make a reference to the committee formed under Rule 7.³⁸ This committee is formed by the parent ministry under which the tribunal functions.³⁹ If the committee recommends removal, the Government would have the right to remove the member from the tribunal.⁴⁰ Therefore, the current legal position can lead to a situation where the Government can remove a judge who is the chairman of a tribunal on the recommendation of a committee formed by the parent ministry, which could be seen as a violation of the separation of powers doctrine, enshrined under Article 50 of the Constitution. For example, if a complaint is filed against a member of the Income Tax Appellate Tribunal, a scrutiny of the complaint will be conducted by the Ministry of Finance, which in itself is questionable because it is the function of the tribunal to hold the Ministry accountable by adjudicating disputes in which the Ministry is a litigant. In *R. Gandhi*, the SC expressed displeasure even at the dependence of tribunals on their respective parent departments for administrative support.⁴¹ This makes it very likely that the Court will not treat with deference provisions which vest the power of scrutinising complaints and removal of members with the government.

Therefore, given the past precedents of the SC and the recognition of the principle of separation of powers and the independence of judiciary under the basic structure doctrine, it is extremely likely that the relevant provisions and Rules in question would be struck down by the Court.

IV. COMPAT TO NCLAT: A WELCOME MOVE?

With the passing of the Finance Act, the appellate function conferred on the COMPAT under the Competition Act has ceased to exist, and the same has been vested with the NCLAT. This has been done through Part XIV of the Finance Act, which has replaced the COMPAT with the NCLAT by amending §§2(ba) and 53A of the Competition Act and §410 of the Companies Act.⁴² Correspondingly, various provisions relating to the COMPAT have been omitted from the Competition Act.⁴³

The amalgamation of the COMPAT, among other appellate tribunals, with NCLAT have raised many issues; primarily regarding the different approaches to be adopted for the regulation of disputes. NCLAT, which was constituted under the Companies Act, 2013, has been dealing with company law disputes since June 1, 2016 and insolvency and bankruptcy disputes since December 1, 2016.⁴⁴ Post the Finance Act, 2017, the appeals against the orders of the CCI also lie before the NCLAT with effect from May 26, 2017.⁴⁵ However, a common appellate tribunal for the two might not be beneficial for the stakeholders. This is due to the fact that the objectives of the Companies Act, 2013 and the Competition Act, 2002 are reasonably distinct. While Companies Act is a procedural domestic legislation, Competition Act deals with offences of economic nature which have potential ramifications on the

³⁸ *Id.*, Rule 8(2).

³⁹ *Id.*, Rule 7.

⁴⁰ *Id.*

⁴¹ *Union of India v. R. Gandhi*, President, Madras Bar Association, (2010) 11 SCC 1, ¶23.

⁴² The Finance Act, 2017, §§171(a), 171(c), 172(a).

⁴³ *Id.*, §§171(d), 171(e).

⁴⁴ National Company Law Appellate Tribunal, *About NCLAT*, available at <http://nclat.nic.in/about-nclat.html> (Last visited on September 11, 2017).

⁴⁵ The Companies Act, 2013, §410 as amended by §172 of the Finance Act, 2017.

public within and outside the country. Some practitioners have argued that such amalgamation is a welcome move since a transaction having both company law and competition law issues can be overseen by the same tribunal.⁴⁶ However, this rationale is flawed as even though certain aspects such as combinations and mergers might be similar to both, but horizontal and vertical anti-competitive practices and abuse of dominance by the companies is a completely distinct element of competition law. With this background in mind, it might be difficult for a common appellate board to harmonise the objectives of these two legislations.

Additionally, another issue that arises due to this commonality of tribunals is the fact that the members who are well trained in handling company law disputes might not be well conversant with the intricacies of competition law. While adjudicating competition law disputes, it is crucial that the adjudicating body comprise of at least a few experts. This is evident from the fact that the Competition Act mandates that the Chairperson and other members to be appointed to the CCI or the COMPAT should have specialised knowledge and professional experience in international trade, economics, commerce, and competition law matters among other things.⁴⁷ However, now that the NCLAT is bestowed with powers to adjudicate competition law disputes, it would become difficult for the members of the NCLAT who lack expertise in such areas to form opinion on this highly specialised area of law. This goes against the very purpose of the creation of tribunals, which was to ensure that there are experts, in addition to judicial members for dealing with highly specialised areas of law.⁴⁸

Moreover, due to merger of eight tribunals into the NCLAT, the NCLAT is likely to be overburdened with cases considering that it has already been burdened with the insolvency and bankruptcy disputes. However, presently, NCLAT has only two members, one retired SC judge as the Chairperson, and the other being a technical member.⁴⁹ This composition makes it impossible for an effective adjudication of disputes relating to highly specialised areas of law such as competition law. Considering that now NCLAT would be dealing with almost three different areas of law, more members should be appointed to the board.

Another major concern regarding this transition is that the National Company Law Appellate Tribunal Rules, 2016 provide for the procedural formalities to be followed by the NCLAT in dealing with corporate law matters.⁵⁰ These rules are however specific to Companies Act, 2013 and need to be amended to be in consonance with the Competition Act, 2002. For example, as per the present rules, the fee for appeal and the process fee has to be paid to the Ministry of Corporate Affairs.⁵¹ This stipulation would have to be amended duly for the cases of competition law disputes.

⁴⁶ The Hindu Business Line, Merger of Tribunals to Rationalise Working, March 23, 2017 available at <http://www.thehindubusinessline.com/economy/policy/merger-of-tribunals-to-rationalise-working/article9598534.ece> (Last visited on September 11, 2017).

⁴⁷ The Competition Act, 2002, §§8(2), 53D(2).

⁴⁸ Marwah, *supra* note 9.

⁴⁹ National Company Law Appellate Tribunal, *NCLAT Members*, available at <http://nclat.nic.in/members.html> (Last visited on September 11, 2017).

⁵⁰ National Company Law Appellate Tribunal Rules, 2016, available at http://www.mca.gov.in/Ministry/pdf/Rules_22072016.pdf (Last visited on September 11, 2017).

⁵¹ National Company Law Appellate Tribunal Rules, 2016, Rule 55(2).

Thus, these oversights of the legislature in dealing with the amalgamation of the COMPAT with NCLAT poses serious threats to the functioning and effectiveness of the tribunal adjudicating competition law disputes.

V. CONCLUSION

The Finance Act seeks to minimise the number of tribunals by providing for the merger of tribunals and the structuring of such merged tribunals. The objective of doing this has been stated as speeding up dispute resolution and curbing wasteful expenditure. This can be said to be speculative at best, with critics arguing that this would add to the already existing backlog of pending disputes. However, it is evident that the Finance Act falls foul of the Constitution, both in terms of its enactment as a legislation, as well as the substantive provisions it contains. The introduction of the Finance Act reflects the desire of the Government to exercise control over autonomous bodies performing judicial functions, which violates well-established principles of the Constitution. Further, as is demonstrated from the example of the merging of COMPAT and NCLAT, the adjudication of competition law disputes would be adversely affected because of the dilution of expertise. This would prove to be true for other tribunals as well, such as the merging of the Airports Economic Regulatory Appellate Authority with the Telecom Disputes Settlement and Appellate Tribunal ('TDSAT'), as it is unlikely for the TDSAT to have the technical competence to deal with issues pertaining to the pricing of airport services.