

NATIONAL COMPANY LAW TRIBUNAL BAR ASSOCIATION A

v.

UNION OF INDIA

(Writ Petition (Civil) No. 180 of 2022)

AUGUST 01, 2022 B

**[DR. DHANANJAYA Y CHANDRACHUD AND SUDHANSU
DHULIA, JJ.]**

Companies Act, 2013: s.413 – Appointment of Members – Modification of tenure – On 20 September 2019, Ministry of Corporate Affairs issued Notification appointing 28 candidates as members of NCLT for tenure of three years – NCLT Bar Association filed writ petition seeking modification of tenure of appointment of the Members of NCLT from three to five years – Plea of petitioner that the Notification was contrary to provisions of s.413 which prescribes for a term of five years – The Union government stated that the appointment of the Members for a period of three years was approved by the Appointments Committee of the Cabinet and before appointment, the Members were given an offer of appointment for three years – Pursuant to the offer, the Members joined the NCLT – Hence, it was urged that the Bar Association can have no locus to question the term of appointment when the Members have not raised a grievance – On 29 March 2022, the President of the NCLT addressed a communication to the Union Government recording that the tenure of 23 Members would come to an end in June-July 2022 and that the resultant vacancies would create difficulties in the “pan-India functioning” of the NCLT – The President of the NCLT requested that the probable vacancies may be factored in during the course of the deliberations in the selection process – The meeting of the Selection Committee was convened and a report was obtained from the President of the NCLT about the “work performance and suitability” of 23 Members – The Selection Committee then opined that there was no specific provision which empowered it to consider the issue of revising the term of office of the Members of the NCLT – The Committee however observed that considering the sensitive nature of the functions and duties of the Members of the NCLT, and considering the verification reports bearing on the character, antecedents, performance and H

- A *suitability of the Members, the Union government may take “appropriate action in the matter” – Pursuant to the above process, a notification was issued on 14 June 2022 by the Union government by which approval was granted for revising the tenure of two Judicial Members and six Technical Members for a period of five years or till they attain the age of 65 in consonance with the provisions of s.413 of the Act 2013 – Selection Committee initiated the process of selection – The vacancies which are being processed for selection include those arising upon the end of the three-year term of the members who were appointed on 20 September 2019 – The grant of any relief would interfere with the ongoing selection process – Plea of petitioner that the Notification was contrary to provisions of s.413 which prescribes for a term of five years cannot be accepted as petition was filed by those who are not the members of the NCLT – The prayer for extension was asked at a belated stage when the tenure of the Members was nearing its end – Not only had the Members consciously accepted the post for a duration of three years, the Selection Committee also already directed the government to take appropriate action on basis the performance report – Accordingly, Union Government had issued the notification dated 14 June 2020 extending the tenure of two judicial and six technical members – Furthermore, in the present circumstances, the selection process for fresh appointments of Members of the NCLT has already begun and is partially at an advanced stage – Hence, no interference warranted – Directions issued to make the further appointments in accordance with the provisions u/s.413 of the Companies Act.*
- B *suitability of the Members, the Union government may take “appropriate action in the matter” – Pursuant to the above process, a notification was issued on 14 June 2022 by the Union government by which approval was granted for revising the tenure of two Judicial Members and six Technical Members for a period of five years or till they attain the age of 65 in consonance with the provisions of s.413 of the Act 2013 – Selection Committee initiated the process of selection – The vacancies which are being processed for selection include those arising upon the end of the three-year term of the members who were appointed on 20 September 2019 – The grant of any relief would interfere with the ongoing selection process – Plea of petitioner that the Notification was contrary to provisions of s.413 which prescribes for a term of five years cannot be accepted as petition was filed by those who are not the members of the NCLT – The prayer for extension was asked at a belated stage when the tenure of the Members was nearing its end – Not only had the Members consciously accepted the post for a duration of three years, the Selection Committee also already directed the government to take appropriate action on basis the performance report – Accordingly, Union Government had issued the notification dated 14 June 2020 extending the tenure of two judicial and six technical members – Furthermore, in the present circumstances, the selection process for fresh appointments of Members of the NCLT has already begun and is partially at an advanced stage – Hence, no interference warranted – Directions issued to make the further appointments in accordance with the provisions u/s.413 of the Companies Act.*
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- F **HELD:** 1. These proceedings under Article 32 of the Constitution have been instituted by the National Company Law Tribunal Bar Association against the Union government in the Ministry of Corporate Affairs. The petitioner contends that the notification dated 20 September 2019 issued by the Ministry of
- G **Corporate Affairs appointing 28 candidates as Members of the National Company Law Tribunal for a tenure of three years is contrary to the provisions of Section 413 of the Companies Act 2013. Pursuant to the above process, a notification was issued on 14 June 2022 by the Union government in the Ministry of**

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Corporate Affairs by which approval was granted for revising the tenure of two Judicial Members and six Technical Members for a period of five years or till they attain the age of 65 in consonance with the provisions of Section 413 of the Companies Act 2013. [Paras 1, 2, 12][1124-C-D; 1127-A-D]

2. In the present case, there is no challenge to the Rules or the provisions of the statute itself. The petitioners have instead sought an extension of the tenure of the retiring Members, who are not petitioning parties to the proceedings before this Court. The prayer for extension is also at a belated stage when the tenure of the Members is nearing its end. Not only had the Members consciously accepted the post for duration of three years, the Selection Committee also already directed the government to take appropriate action basis the performance report. The Union Government has accordingly issued the notification dated 14 June 2020 extending the tenure of two judicial and six technical members. Furthermore, in the present circumstances, the selection process for fresh appointments of Members of the NCLT has already begun and is partially at an advanced stage. Accordingly, this Court's orders at the present stage would interfere with the selection process. Hence, the appropriate course of action to be followed in the present case would be to allow the selection process which has been initiated to continue so that it can be concluded at an early date. The interest of the Bar Association which has moved these proceedings is that the vacancies in the Tribunal should be filled in on an expeditious basis so that work does not suffer and the functioning of the Tribunal is not hampered. The Bar Association cannot have a choice in regard to who should be a Member of the Tribunal. However, this Court directed that in making appointments to the NCLT in the future, the Union Government shall be bound by the statutory provisions embodied in Section 413 of the Companies Act 2013. [Paras 24, 26, 27][1130-E-G; 1131-C-D]

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 180 of 2022.

Under Article 32 of The Constitution of India

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A Dr. V. K. Chaudhary, Sanjeev Sen, Sr. Advs., Saurabh Kalia, Sikhil Suri, Manusmyer Singh, Sameer Chaudhary, Ms. Manisha Chaudhary, S. Swarup, Ms. Supriya Juneja, Advs. for the Petitioner.

Balbir Singh, ASG, Ankur Talwar, Rajat Nair, Ms. Chinmayee Chandra, Rajan Kr. Chourasia, Arvind Kumar Sharma, Kumar Anurag

B Singh, Anando Mukherjee, Ms. Tulika Mukherjee, Zain A. Khan, Ms. Ekta Bharati, Pawanshree Agrawal, Shaubhik Gupta, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

C 1. These proceedings under Article 32 of the Constitution have been instituted by the National Company Law Tribunal Bar Association against the Union government in the Ministry of Corporate Affairs.

D 2. The petitioner contends that the notification S.O. 3412 (E) dated 20 September 2019¹ issued by the Ministry of Corporate Affairs appointing 28 candidates as Members of the National Company Law Tribunal² for a tenure of three years is contrary to the provisions of Section 413 of the Companies Act 2013. Sub-section (1) of Section 413 of the Companies Act 2013 stipulates that:

E “413 Term of office of President, Chairperson and other Members.- (1) The President and every other Member of the Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years.”

F Reliance is also placed on the decisions of this Court in *Madras Bar Association v. Union of India*,³ *Madras Bar Association v. Union of India*,⁴ and *Rojer Mathew v. South Indian Bank Limited*.⁵

G 3. According to the petitioner, the advertisements issued by the Union government inviting applications for appointment of Judicial and Technical Members of the NCLT prescribed a tenure of five years. However, the impugned notification which was issued on 20 September

¹ “impugned notification”

² “NCLT”

³ (2021) SCC Online SC 463; “**Madras Bar Association (2021)**”

⁴ 2021 (7) SCC 369; “**Madras Bar Association (2020)**”

H ⁵ 2018 (16) SCC 341

2019, prescribed a tenure of three years or until the attainment of age of A
65 years, whichever is earlier.

4. The petitioner urges that on the other hand, on 28 July 2016, 11 September 2021 and 10 October 2021, notifications were issued by the Union government for the appointment of members of NCLT, each for a term of five years or until the attainment of age of 65 years, which is earlier, in line with the provisions of Section 413 of the Companies Act 2013. B

5. In essence, therefore the submission which has been urged on behalf of the petitioner is that the impugned notification prescribing a tenure of three years is contrary to the provisions of Section 413(1) of the Companies Act 2013. The petitioner therefore seeks a modification of the tenure of appointment of the Members of the NCLT from three years to five years by correcting the notification of appointment. C

6. Notice was issued in these proceedings on 5 April 2020.

7. On 20 June 2022, the petition came up before a Bench of this Court when the following order was passed:

“After hearing learned senior counsel appearing for the petitioner and learned Solicitor General of India, we are of the considered view that inter alia, two issues call for consideration in this matter.

Firstly, it is with respect to the question of locus standi of the petitioner Bar Association to challenge the Notification dated 20.09.2019 whereby 23 persons were appointed, which is now raised by the respondent. The second issue is with respect to the right of the appointees to continue in the post beyond the term of appointment when they, without any demur, accepted it in the year 2019 and till date did not raise any challenge against restriction of period of appointment of three years. The petitioner Association would contend that if the matter is not taken up and interim order(s) is not passed, at least some of the appointees would have to demit office owing to the expiry of the period of appointment. F

Taking into account the fact that none of the appointees under the impugned Notification so far challenged the same and accepted it with open eyes, no interim order can be passed now. We are of the view that matter relating their right to continue beyond the period of three years on the strength of the aforesaid notification G

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- A can also be considered in the Writ Petition itself, provided the issue of locus standi is answered in favour of the petitioner.
List the matter before the appropriate Bench on 20th July, 2022.”
8. The Union government has filed an affidavit in these proceedings seeking to explain its position on the matter.
- B 9. A preliminary objection has been raised to the maintainability of the petition. The Union government has stated that the appointment of the Members of the NCLT for a period of three years was approved by the Appointments Committee of the Cabinet and before appointment, the Members were given an offer of appointment for three years.
- C Pursuant to the offer, the Members joined the NCLT in pursuance of the impugned notification. Hence, it has been urged that the Bar Association can have no locus to question the term of appointment when the Members have not raised a grievance.
10. A Selection Committee was constituted for the selection of
- D Members of the NCLT. The Selection Committee was chaired by the Chief Justice of India. On 29 March 2022, the President of the NCLT addressed a communication to the Union Government recording that the tenure of 23 Members would come to an end in June – July 2022 and that the resultant vacancies would create difficulties in the “pan-India functioning” of the NCLT. The President of the NCLT requested that the probable vacancies may be factored in during the course of the deliberations in the selection process. The meeting of the Selection Committee was convened on 20 April 2022. The minutes pertaining to Agenda Item No 2 are extracted below:
- F **“Agenda Item No. 2**
- G D.O. letter No. 1/1/2022-NCLT addressed by the President of the National Company Law Tribunal (NCLT) to the Secretary, Ministry of Corporate Affairs was placed before the Selection Committee in terms of the request made by him. The President of NCLT in the said letter has pointed out that 3 year fixed tenure of 23 Judicial and Technical Members of NCLT would be expiring in June/July 2022 by efflux of time and the resultant probable vacancies would create hardship in the working of Benches of NCLT all over the country. The latest character and antecedents verification reports of said 23 Members were also placed before the Committee by the Convener.”

The Selection Committee convened again on 6 June 2022. Agenda Item No 2 pertained to the continuation of 23 Members of the NCLT whose three year term was to come to an end. The minutes pertaining to Agenda Item No 2 are extracted below:

“Agenda Item No.2

In pursuant to the resolution of last meeting of the Committee held on 20th April, 2022, Secretary, Ministry of Corporate Affairs obtained a report from President, NCLT about work performance and suitability of 23 Members and placed it before the Committee during the meeting. Considering all aspects of the matter, the Committee observed that there is no express provision in the rules, which empowers the Committee to consider the issue of revision of the term of office of Members, NCLT.”

11. From the above narration, it appears that following the meeting of the Selection Committee on 20 April 2022, a report was obtained from the President of the NCLT about the “work performance and suitability” of 23 Members. The Selection Committee then opined that there was no specific provision which empowered it to consider the issue of revising the term of office of the Members of the NCLT. The Committee however observed that considering the sensitive nature of the functions and duties of the Members of the NCLT, and considering the verification reports bearing on the character, antecedents, performance and suitability of the Members, the Union government may take “appropriate action in the matter”.

12. Pursuant to the above process, a notification was issued on 14 June 2022 by the Union government in the Ministry of Corporate Affairs by which approval was granted for revising the tenure of two Judicial Members and six Technical Members for a period of five years or till they attain the age of 65 in consonance with the provisions of Section 413 of the Companies Act 2013.

13. During the course of the hearing, this Court has been apprised by Mr Balbir Singh, Additional Solicitor General appearing on behalf of the Union government that for the purpose of filling up 30 vacancies in the NCLT, the Selection Committee held a personal interaction with short listed candidates on 20, 21 and 22 June 2022 and has made its recommendations in respect of 15 vacancies. The Additional Solicitor General stated that the process is expected to be completed and orders of appointment would be issued in four to six weeks.

- A 14. As regards the second tranche of 15 vacancies, the Selection Committee chaired by a Judge of the Supreme Court has directed that an advertisement be issued for filling up the vacancies. The last date for submitting applications is 12 August 2022. The above vacancies would include the vacancies which have arisen as a result of the expiry of the three-year term of the Members who were appointed pursuant to the impugned notification. As a matter of fact, it has been stated by the Additional Solicitor General that some of the Members who were appointed in pursuance of the impugned notification have applied for selection and their candidatures would also fall for consideration.
- B 15. Section 413(1) of the Companies Act 2013 stipulates that the term of a Member of the Tribunal shall be five years from the date on which he enters upon office. A Member is eligible for reappointment for another term of five years. For a Member of the NCLT, the upper age limit for holding office is prescribed as 65 years by sub-section 2(b) of Section 413.
- C 16. The petitioner seeks the issuance of a writ by this Court for the modification of the term of appointment of the 23 Members governed by the impugned notification, whose terms were expiring in June/July 2022, from three years to five years.
- D 17. Appointment of persons as members of the NCLT for a period of three years is not contemplated by the provisions of Section 413(1). An administrative notification for appointment has to be consistent with the statute which governs appointments to the Tribunal.
- E 18. The issue, however, which needs to be considered at this stage is whether this Court should in the exercise of its jurisdiction under Article 32 of the Constitution entertain a petition filed by the Bar Association and direct the extension of tenures, especially in view of the supervening developments which have taken place in the meantime.
- F 19. Two facets of the supervening developments need to be recapitulated. First, the Selection Committee constituted for the appointment of Members of the NCLT has initiated the process of selection. The vacancies which are being processed for selection include those arising upon the end of the three-year term of the members who were appointed on 20 September 2019. In respect of one tranche of 15 Members, as the Court was apprised, the process of selection has been concluded by the Selection Committee and recommendations have been
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made. The appointment process shall be concluded within a period of four to six weeks. For the second tranche of 15 vacancies, a notification inviting applications has already been issued with 12 August 2022 being the last date for application. In this backdrop, the grant of any relief would interfere with the ongoing selection process.

20. That apart, it is evident that when the incongruity in the term of office of three years was drawn to the attention to the Selection Committee chaired by the Chief Justice of India, a report was called from the President of the NCLT on the “work performance and suitability” of the Members. After the initial meeting of 20 April 2022, the Selection Committee at its meeting on 6 June 2022 adverted to the sensitive nature of the functions and duties of the Members, the verification carried out with regard to character and antecedents and the report on performance and suitability. The Union Government was, therefore, directed to take appropriate action. It is in pursuance of these minutes that the Union Government has issued a notification dated 14 June 2022 extending the tenure of two judicial and six technical members for a period of five years or until they attain the age of sixty-five.

21. The submission which has been urged on behalf of the petitioner is that Section 417 of the Companies Act 2013 provides a procedure for the removal of Members and, if any of the Members who were appointed on 20 September 2019 are unfit for continuance, the procedure for removal should be adopted.

22. Such an argument cannot be acceded to at the request of the Bar Association when the Members themselves have not moved this Court. Entertaining such a plea is fraught with consequences for the members whose term has not been extended. Some have applied afresh in the selection process which is under way. Moreover, the Court is not dealing with a situation of removal, but one in which the term of office as per the impugned notification dated 20 September 2019 has come to an end. The issue in regard to the term of appointment being less than the term prescribed statutorily has only been raised towards the tail end of the tenure and by the Bar Association and not the Members themselves. Entertaining the submissions of the petitioner would incidentally lead the Court into an evaluation of the suitability, character and performance of individual Members in a petition to which they are not parties. Such an exercise would, in the circumstances, be wholly inappropriate.

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- A 23. In *Madras Bar Association (2020)* (supra), the challenge was to the constitutional validity of the Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020, which mandated that the Members be appointed to the Tribunals for a maximum four- year term or until they attain 65 years of age, whichever is earlier. Similarly, in *Madras Bar Association (2021)* (supra), the challenge was to Sections 12 and 13 of the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 and the amended Sections 184 and 186(2) of the Finance Act, 2017, which provided for a four- year term to the concerned Tribunal, with a maximum age of 70 years for the Chairperson and 67 years for the Members. *Rojer Mathew* (supra) dealt with the provisions of the Schedule to the Tribunals Rules 2017 which had a shorter tenure of three years. In all these cases, the Court reiterated its position, as it had also held earlier in *Union of India v. R. Gandhi*,⁶ that Rules which prescribe a short tenure, coupled with provisions of routine suspensions pending enquiry and lack of immunity adversely impact the impartiality of the Tribunals. Furthermore, shorter tenures in such Rules also preclude the cultivation of adjudicatory experience.
- B 24. In the present case, there is no challenge to the Rules or the provisions of the statute itself. The petitioners have instead sought an extension of the tenure of the retiring Members, who are not petitioning parties to the proceedings before this Court. The prayer for extension is also at a belated stage when the tenure of the Members is nearing its end. Not only had the Members consciously accepted the post for a duration of three years, the Selection Committee also already directed the government to take appropriate action basis the performance report.
- C F The Union Government has accordingly issued the notification dated 14 June 2020 extending the tenure of two judicial and six technical members. Furthermore, in the present circumstances, the selection process for fresh appointments of Members of the NCLT has already begun and is partially at an advanced stage. Accordingly, this Court's orders at the present stage would interfere with the selection process.
- D G 25. While the Notification dated 20 September 2019 prescribing a three year term was not in consonance with Section 413 of the Companies' Act 2013, we note that:

H ⁶(2010) 11 SCC 1

(i) the Members appointed under the notification failed to raise a A challenge;

(ii) a fresh process of selection has begun and some of the members have applied afresh; and

(iii) the Union Government has taken corrective action to extend the tenure of certain members after considering the report of the President of the NCLT on their performance and suitability. B

26. In the above backdrop, the appropriate course of action to be followed in the present case would be to allow the selection process which has been initiated to continue so that it can be concluded at an early date. The interest of the Bar Association which has moved these proceedings is that the vacancies in the Tribunal should be filled in on an expeditious basis so that work does not suffer and the functioning of the Tribunal is not hampered. The Bar Association cannot have a choice in regard to who should be a Member of the Tribunal. C

27. We however direct that in making appointments to the NCLT D in the future, the Union Government shall be bound by the statutory provisions embodied in Section 413 of the Companies Act 2013.

28. For the reasons which we have indicated above, we are not acceding to the prayer of the petitioner for the extension of the tenures of all the 23 persons who were appointed on 20 September 2019 from three years to five years, subject to the age cap of 65 years. This will, however, not affect the notification that was issued by the Union government on 14 June 2022 extending the tenure of eight Members for a period of five years or till they attain the age of sixty-five years, whichever is earlier. E F

29. The Petition is accordingly disposed of.

30. Counsel for the applicant in IA No 97722 of 2022 (for intervention) seeks permission of the Court to withdraw the Interlocutory Application. The Interlocutory Application is dismissed as withdrawn. G

31. Pending applications, if any, including the intervention/ impleadment applications, stand disposed of.