

THE INTERNATIONAL ASSOCIATION FOR PROTECTION A
OF INTELLECTUAL PROPERTY (INDIA GROUP)

v.

UNION OF INDIA

(Miscellaneous Application No.2219 of 2020) B

In

(W.P.(C) No.1431 of 2019)

FEBRUARY 12, 2021

**[L. NAGESWARA RAO, HEMANT GUPTA C
AND S. RAVINDRA BHAT, JJ.]**

Trademarks Act, 1999 – s.89A – Finance Act, 2017 – s.184 – Continuation of the incumbent Chairperson – Application for – Applicant sought directions for continuation of the incumbent Chairperson of the Intellectual Property Appellate Board (IPAB), till a new Chairperson is appointed – It was urged that s.89A inserted in the TM Act stipulates that after the commencement of the Finance Act, 2017, the term of office of appointments to the board would be governed by the provisions of s.184 – In terms of s.184 of the 2017 Act, the outer limit prescribed the age limit of the Chairperson of the board as 70 years – Applicant also relied on s. 84(2) of the TM Act and urged that there could be no bench without a judicial member – Held: On 26.07.2017, the present incumbent was given the additional charge of the Chairman in the IPAB, i.e. the Board, in terms of the then 2017 Rules, for a period of three years – However, it was later amended for a period upto 21.09.2019 by the Central Government – The Judgment in Roger Mathew was delivered on 13.11.2019 and it quashed the 2017 Rules – In terms of the interim arrangement directed by the majority judgment in Rojer Mathew, the appointments to Tribunals/Appellate Tribunals were to be “in terms of the respective statutes before the enactment of the Finance Bill, 2017..”, the amendments brought about through s.184, in terms of the maximum age up to which any Member or Chairperson can hold office in a Tribunal could not apply in the case of the Board – The 2017 Rules had fixed the tenure limits of Chairpersons and members – In terms of those Rules of 2017 the tenure of the present

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- A *incumbent ended on 21.09.2019 – As the rules were later struck down only on 13.11.2019 – At that time the prevailing interim orders and clarifications in Kudrat Sandhu stated that the maximum tenure of such members or chairpersons would be as stipulated in the parent enactments, before the coming into force of the Finance Act, 2017, or were expressed to be for a maximum of 3 years, in the case of Chairpersons – The period had ended, so far as the applicant is concerned, on 21.09.2019 – As far as submission that there could be no bench without the judicial member is concerned, the s.85 of the TM Act reveal that there is no bar for technical member to be appointed as a regular Chairperson, provided she or he has for*
- B *“at least two years, held the office of a Vice-Chairperson” – In the instant case, the incumbent five technical members all hold legal qualifications – These members has practical legal experience of ten to fifteen years – Therefore, the argument that the technical members, in their position at the board as of now, cannot function without a Chairperson, is unsustainable.*

D **Dismissing the application, the Court**

- HELD:** 1. **The present incumbent to the office of Chairperson of the Board was appointed as the Chairman, Appellate Tribunal for Forfeited Property (ATFP). On 26.07.2017, he was also given the additional charge of the Chairman in the IPAB, i.e. the Board, in terms of the then extant 2017 Rules, for a period of three years – or until further orders, whichever was earlier. The order of appointment – as Chairperson of the Board – was amended on 29.12.2017 by the Central Government. This later order stated that the tenure of his appointment as Chairman of the Board was upto 21.09.2019 or till further orders, whichever was earlier. [Paras 17 and 18][812-B-C; 813-A-B]**

2. **The arguments advanced on behalf of the applicant that the incumbent chairperson continued to remain in office in view of the declaration of law by Rojer Mathew, is insubstantial and cannot be countenanced. The other reason for not accepting this contention is that if, for a moment it were to be assumed that in terms of the interim arrangement directed by the majority judgment in Rojer Mathew, the appointments to Tribunals/**

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Appellate Tribunals were to be “*in terms of the respective statutes before the enactment of the Finance Bill, 2017..*”, the amendments brought about through Sections 184, in terms of the maximum age up to which any Member or Chairperson can hold office in a Tribunal could not apply in the case of the Board. This is because the Rules of 2017 had fixed the tenure limits of chairpersons and members of tribunals, including that of the chairperson of the board. In terms of those Rules, (i.e., the rules of 2017) the tenure of the present incumbent ended on 21.09.2019. As noticed earlier, the rules were ultimately struck down only on 13.11.2019. At that time, the only order prevailing, which had directed *status quo* with respect to tenure and age limits for members and chairpersons of various tribunals, were the interim orders and clarifications in *Kudrat Sandhu*, dated 09.02.2018; 20.03.2018; 16.07.2018 and 21.08.2018. These had stated that the maximum tenure of such members or chairpersons would be as stipulated in the parent enactments, before the coming into force of the Finance Act, 2017, or were expressed to be for a maximum of 3 years, in the case of chairpersons. The period had ended, so far as the applicant is concerned, on 21.09.2019. [Para 22][814-F-H; 815-A-C]

3. Another argument urged by the applicant was that the Finance Act, 2017 had inserted Section 89A of the TM Act, (introduced by Section 161 of the former Act) which states that the tenure of office and maximum age of retirement would be governed by the terms of the said Finance Act and, consequently, the pre-existing tenure and age limits did not apply. Undoubtedly, the purport of Section 89A was to overbear or supersede the pre-existing age and tenure limits (the existing tenure and age limits have been indicated in Section 86 of the TM Act). However, the Finance Act merely stipulates the potential maximum age limits and tenure limits. In the case of Chairpersons, the maximum age limit prescribed was seventy years (by virtue of second proviso to Section 184 [1]). However, by virtue of the first proviso to Section 184 (1), members or chairpersons could be appointed “*for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office*”. Thus, the outer limit of the tenure was five

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- A years. As noticed earlier, the Central Government had fixed the tenure of chairperson of the board to be three years. By the time this rule was held unconstitutional, the tenure of the incumbent holding office of chairperson, of the board ended, on 21.09.2019. The final judgment in *Royer Mathew*, could not have *per se* been applied to the facts of this case. The applicant's contentions in this regard are of no avail; it is after the judgment in *Madras Bar Association* that the tenure has been mandated to be five years. It is to be noticed that even the 2020 Rules did not prescribe the maximum tenure; it rather confined the tenure to four years. In the facts of this case, even if that were to be applied – assuming such a course to be available, the four-year period too ended on 21.09.2020. [Para 23][815-D-H; 816-A-B]
- 4. The submissions of the applicant that the Board cannot function without a judicial member are meritless. Section 84 (2) of the TM Act no doubt states that a bench of the board shall consist of a judicial and a technical member. However, it is “*subject to other provisions*” of the TM Act. Section 84(3) commences with a *non obstante* clause and stipulates, by Section 84(3)(a) that a chairperson may, “*in addition to discharging the functions of the Judicial Member or Technical Member of the Bench to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Technical Member, of any other Bench.*” Thus, in the absence of any member, the chairperson may, if the occasion so arises, act as technical or judicial member. Section 87 enables a vice-chairperson, or as the case may be the senior-most member of the board to act as chairperson in the event of a vacancy to that position, or in the event of the incumbent's inability to function in the post. Furthermore, significantly, Section 85 *inter alia* stipulates the qualifications for the post of chairperson or vice-chairperson. The relevant provisions of this section reveal that there is no bar for a technical member to be appointed as a regular chairperson, provided she or he has for “*at least two years, held the office of a Vice-Chairperson*”. In fact, the incumbent five technical members all hold legal qualifications (three of them holding masters in law, including one who holds a post-doctoral qualification). Four of

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these incumbent members were practising advocates in specialized fields of intellectual property (trademarks, and copyright) and one technical member (patents) had experience in the Patent Office. These members had practical legal experience of ten to fifteen years. The fact that they were appointed as technical members cannot obfuscate the fact that they are legally trained and qualified. Therefore, the argument that the technical members, in their position at the board as of now, cannot function without a chairperson, is unsustainable. [Para 25][816-F-H; 817-A-D; 818-A-B]

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Royer Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1 : [2019] 16 SCR 1 – followed.

Madras Bar Association v Union of India (2020) SCC OnLine SC 962; Kudrat Sandhu v Union of India 2018 SCC Online 1335; Kudrat Sandhu v Union of India 2018 (18) SCC 796 – referred to.

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Case Law Reference

[2019] 16 SCR 1	followed	Para 3
2018 (18) SCC 796	referred to	Para 21

CIVIL ORIGINAL JURISDICTION : M.A. No. 2219 of 2020 in E
Writ Petition (Civil) No. 1431 Of 2019

(Under Article 32 of The Constitution Of India)

K K Venugopal, AG, Balbir Singh, ASG, A.S.Chandhiok, Siddharth Luthra, R Balasubramanium, Sr. Advs., Hemant Singh, Ms. Mamta R. Jha, Waseem Shuaib Ahmed, Sambhav Jain, Ms. Simran Kohli, Ritesh Kumar, Ayush Kaushik, Ms. Ankita Tiwari, Lakshay Mehta, Mohit D. Ram, Mohammed Sadique TA, Abraham Mathews, Ms. Anu K Joy, Alim Anvar, Mohit D. Ram, Ms. Shradha Deshmukh, Ms. Chinmayee Chandra, Shyam Gopal, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

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S. RAVINDRA BHAT, J.

1. This judgement will dispose of an application by which directions are sought that till a new chairperson of the Intellectual Property Appellate Board (hereafter referred to as “the board” or “IPAB”), is appointed,

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- A the incumbent (whose tenure had been extended by interim orders of this court, up to 31.12.2020) should continue to function as Chairperson.
 - 2. The applicant (the International Association for Protection of Intellectual Property [India Group]) had preferred a Writ Petition (WP(C) 1431/2019), which was disposed of by this court by a judgement along
- B with a batch of other petitions and applications on 27th November 2020, in the judgement reported as *Madras Bar Association v Union of India*¹. The applicant seeks extension of the term of the incumbent Chairperson of the board stating that his appointment was made under section 89A of the Trademarks Act, 1999 (“TM Act” hereafter). The
- C applicant urges that Section 184 of the Finance Act, 2017, prescribes the term of office and the conditions of service of Chairperson and members of various tribunals including that of the Board. Section 161 of the Finance Act inserted Section 89A to the TM Act-which stipulates that the term of office of appointments to the board after the date of commencement of the Finance Act would be governed by the provisions of the Section
- D 184 of the said Finance Act. The outer limit prescribing the age limit of the chairperson of the board is 70 years, in terms of Section 184.

- 3. It is contended that in the judgement in *Royer Mathew*² this court had directed that appointments made to the board preceding the rules framed in 2020 under the Finance Act within (hereafter the 2020 Rules) were governed by the parent enactment. Reliance is placed on the relevant extract of the main judgement of this court in this regard (para 53 [xv]). It is stated that the parent Act in this case is the Trademarks Act (hereafter the ‘TM Act’). In this context, it is contended that since the outer limit of the tenure of the chairperson is 70 years under the parent Act, i.e. the TM Act, the age of 65 years contemplated under Section 86 of that Act no longer applies.

- 4. Learned counsel contrasts Section 86 and Section 89 of the TM Act and contends that though Section 86 on the one hand prescribes the outer age limit (for the tenure of chairperson) as 65 years, that is over borne by the provisions of section 89A, which states that the terms and conditions hitherto applicable would no longer be so and that in matters of conditions of service and tenure of appointment, the provisions of section 184 of the Finance Act would apply. It is contended by senior

¹(2020) SCC OnLine SC 962.

H ²*Royer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1.

counsel that the Rules were originally framed with effect from 01.06.2017, under which the present incumbent was appointed. These rules were set aside by *Royer Mathew*, in which all sitting members and chairpersons of various tribunals were protected, till new rules were framed. The Rules framed in 2020, have now been substantially read down or quashed. The clarification that the present incumbent, in fact, would continue to hold office in spite of attaining the age of 65 years, logically flows from the ruling in *Madras Bar Association (supra)*. A clarification of this is essential, given that in law, the outer limit has now been extended to 70 years. The attention of this court is also drawn to para 53 (ix) of the judgement of this court dated 27th November 2020.

5. Learned counsel relied upon the said judgement. It was argued that the orders made by this court during the pendency of that case, till final judgment, i.e. dated 27th of November, 2020 protected the tenures of all incumbent tribunal members and their chairpersons. Specific reliance was placed upon the order dated 16th September 2020, which had extended the tenure of office of all incumbent members of all tribunals, to 31st December, 2020. The applicant also urged that it is essential that there is continuity and that taking into consideration the workload of the board, it is absolutely essential that it is headed by a properly qualified chairperson.

6. The learned senior counsel for applicant particularly relies on Section 84(2) of the TM Act and urges that there can be no bench without a judicial member. It is submitted that at the moment none of the members of the board are judicial appointees, but rather are technical members. It is submitted that the board does not even have a Vice-Chairman, who can in the absence of the Chairperson officiate as the acting Chairperson. Therefore, it is imperative that the clarifications and directions sought should be granted.

7. The application was opposed on behalf of certain third parties who urge that this court should not grant the relief which the applicant seeks. In this regard, it is pointed out that the tenure of office in terms of the order of appointment of the present incumbent to the office of chairperson of the board clearly stipulated that the tenure for which he could continue to serve on the board was till 21st September 2019. It is contended in this context that the original appointment was made when the incumbent chairperson of the board was holding another office as chairperson of a quasi-judicial body. The order of appointment, originally

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- A made in 2017, no doubt did not indicate a tenure; however according to applicable law (i.e. the Rules of 2017) the maximum tenure was 3 years. However, that order was amended to specifically read that the order that the appointment would cease upon completion of a specific date, i.e. 21.09.2019.
- B 8. The third-party objectors also opposed the interpretation given to Section 86 and 89A. It was contended that the change brought about by section 89A was merely to indicate that the tenure of office of the chairperson and members would thenceforth (i.e. after the enactment and coming into force of the Finance Act of 2017) be in accordance with Section 184 of the Finance Act. It is urged in this context that
- C Section 184 does not *ipso facto* prescribe or indicate any term of appointment or tenure, except to enumerate outer limits of tenure terms and maximum age for members or chairpersons of tribunals to hold office. The legislation leaves the matter to the rules that were to be framed under the said Finance Act. It is submitted in other words that, the Act
- D *per se* does not prescribe any terms, but rather indicates outer limits. Since the entire conditions of service, including the indicative tenure of office was to be prescribed in respect of each tribunal by the rules, even if for a moment, the applicant's contentions were to be understood as meaning that the incumbent was appointed first under the old rules of 2017, his term of office nevertheless ended in September 2019. This
- E was before the judgement in *Royer Matthew* was delivered. This court in *Royer Matthew* specifically stated that as the then existing rules framed in 2017 were held to be unconstitutional, a window of continuing in office, in terms of the parent enactment, was applicable. It is submitted that in the context of the present incumbent of the board, the tenure of office
- F obviously could not have been extended since the outer limit under the parent act was 65 years.

Relevant provisions

- G 9. By virtue of the provisions of Part XIV of the Finance Act 2017, 25 (twenty-five) central enactments were amended so that, from the appointed date, *firstly*, provisions relating to terms and conditions of service of the members of those tribunals were substituted with provisions allowing the Central Government to specify the same with rules under the Finance Act. *Secondly*, eight existing tribunals established under different legislations (specified in the Ninth Schedule) were abolished
- H and their respective jurisdictions and powers were incorporated into seven

existing tribunals, reducing the number of tribunals from 26 to 19. *Thirdly*, under Section 184 of the Finance Act, the Central Government was authorized to frame delegated legislation (rules) spelling out the eligibility criteria, selection process, removal, salaries and allowances, tenure and other terms and conditions of service for the remaining 19 tribunals (specified in the Eighth Schedule). The constitutional validity of Section 184 and the Tribunal, Appellate Tribunal and Other Authorities (Qualifications, Experience & Other Conditions of Service of Members) Rules, 2017 Rules (hereafter “the 2017 Rules”) was considered in a batch of writ petitions and appeals, of which judgment was rendered in *Royer Mathew v South Indian Bank Ltd. (supra)*. The judgment, delivered by a bench of five judges, upheld Section 184. However, the 2017 Rules were held to be contrary to the constitutional scheme as interpreted by several previous rulings of Constitution Benches. As a result of that judgment, the Central Government framed fresh rules in 2020 (hereafter “2020 Rules”) which were again questioned in the *Madras Bar Association* case. The *Madras Bar Association* case is a sequel (to *Royer Mathew*), by which this court considered and pronounced upon the validity of the 2020 Rules, and read down several of them.

10. The relevant provisions of the Finance Act, 2017 are as follows:

“Section 161. In the Trade Marks Act, 1999—

(a) for the word “Chairman” or “Vice-Chairman”, wherever it occurs, the word “Chairperson” or “Vice-Chairperson” shall be substituted;

(b) in section 83, after the words “under this Act”, the words and figures “and under the Copyright Act, 1957” shall be inserted;

(c) after section 89, the following section shall be inserted, namely: —

“89A. Notwithstanding anything in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chairperson, Vice-Chairperson and other Members of the Appellate Board appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall be

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- A *governed by the provisions of section 184 of that Act: Provided that the Chairperson, Vice-Chairperson and other Members appointed before the commencement of Part XIV of Chapter VI of the Finance Act, 2017, shall continue to be governed by the provisions of this Act, and the rules made thereunder as if the provisions of section 184 of the Finance Act, 2017, had not come into force.”.*
- B 11. Sections 183 and 184 occur in Part S of the Finance Act, 2017 and read as follows:

C **“S.—CONDITIONS OF SERVICE OF CHAIRPERSON AND MEMBERS OF TRIBUNALS, APPELLATE TRIBUNALS AND OTHER AUTHORITIES**

- D *183. Notwithstanding anything to the contrary contained in the provisions of the Acts specified in column (3) of the Eighth Schedule, on and from the appointed day, provisions of section 184 shall apply to the Chairperson, Vice-Chairperson, Chairman, Vice- Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the said Schedule:*

- E *Provided that the provisions of section 184 shall not apply to the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or, as the case may be, Member holding such office as such immediately before the appointed day. Qualifications, terms and conditions of service of Chairperson and Member.*

- F *Qualifications, terms and conditions of service of Chairperson, Judicial Member and Expert Member.*

- G *184. (1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authorities as specified in column (2) of the Eighth Schedule:*

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Provided that the Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or other Authority shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment: A
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Provided further that no Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed— C

(a) *in the case of Chairperson, Chairman or President, the age of seventy years;*
(b) *in the case of Vice-Chairperson, Vice-Chairman, Vice-President, Presiding Officer or any other Member, the age of sixty-seven years:* D

(2) Neither the salary and allowances nor the other terms and conditions of service of Chairperson, Vice-Chairperson, Chairman, Vice-Chairman, President, Vice-President, Presiding Officer or Member of the Tribunal, Appellate Tribunal or, as the case may be, other Authority may be varied to his disadvantage after his appointment” E

12. In *Royer Mathew* after pronouncing that the 2017 Rules were unsustainable, and quashing them, with a direction to the Central Government to frame new Rules, this court also directed as follows: F

“Interim relief

224. *As the Tribunal, Appellate Tribunal and Other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2017 have been struck down and several directions have been issued vide the majority judgment for framing of fresh set of rules, we, as an interim order, direct that appointments to the Tribunal/Appellate Tribunal and the terms and conditions of appointment shall be in terms of the respective statutes before the enactment of the Finance Bill, 2017. However, liberty is granted to the Union of India to* G
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- A *seek modification of this order after they have framed fresh rules in accordance with the majority judgment. However, in case any additional benefits concerning the salaries and emoluments have been granted under the Finance Act, they shall not be withdrawn and will be continued. These would equally apply to all new Members.”*
- B 13. The board has been set up by Section 83 of the TM Act to exercise the jurisdiction, powers and authority conferred on it by or under that enactment. Section 84 prescribes the composition of the board, which consists of a chairperson, a vice chairperson “*and such number of other Members, as the Central Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Appellate Board may be exercised by Benches thereof.*”
- C 14. Sections 84 (2) and (3) are of some relevance in the present context; they read as follows:
- D “*(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Technical Member and shall sit at such place as the Central Government may, by notification in the Official Gazette, specify.*
- E *(3) Notwithstanding anything contained in sub-section (2), the 2 [Chairperson]—*
- F *(a) may, in addition to discharging the functions of the Judicial Member or Technical Member of the Bench to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Technical Member, of any other Bench;*
- G *(b) may transfer a Member from one Bench to another Bench;*
- H *(c) may authorise the Vice-Chairperson, the Judicial Member or the Technical Member appointed to one Bench to discharge also the functions of the Judicial Member or the Technical Member, as the case may be, of another Bench.*
15. Sections 86 and 87 read as follows:
- “86. Term of office of Chairperson, Vice-Chairperson and other Members.—The Chairperson, Vice-Chairperson or other**

Members shall hold office as such for a term of five years from the date on which he enters upon his office or until he attains,— A

(a) *in the case of Chairperson and Vice-Chairperson, the age of sixty-five years; and*

(b) *in the case of a Member, the age of sixty-two years, whichever is earlier.* B

87. Vice-Chairperson] or senior-most Member to act as 1 [Chairperson] or discharge his functions in certain circumstances—

(1) *In the event of or any vacancy in the office of the Chairperson by reasons of his death, resignation or otherwise, the Vice-Chairperson and in his absence the senior-most Member shall act as Chairperson until the date on which a new 1 Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.* C

(2) *When the Chairperson is unable to discharge his functions owing to his absence, illness or any other cause, the Vice-Chairperson and in his absence the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duty.”* D E

16. Section 89A of the TM Act reads as follows:

“89A. Qualifications, terms and conditions of service of Chairperson, Vice-Chairperson and Member.— F
Notwithstanding anything in this Act, the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chairperson, Vice-Chairperson and other Members of the Appellate Board appointed after the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), G shall be governed by the provisions of section 184 of that Act:

Provided that the Chairperson, Vice-Chairperson and other Members appointed before the commencement of Part XIV of

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- A *Chapter VI of the Finance Act, 2017 (7 of 2017), shall continue to be governed by the provisions of this Act, and the rules made thereunder as if the provisions of section 184 of the Finance Act, 2017, had not come into force”*
- B 17. The present incumbent to the office of Chairperson of the Board was appointed as the Chairman, Appellate Tribunal for Forfeited Property (ATFP). The terms and conditions under which he was appointed have not been placed on record; however, it appears that the appointment was soon after he demitted office as Judge of the Delhi High Court, sometime after September 2016. On 26.07.2017, he was also given the additional charge of the Chairman in the IPAB, i.e. the Board, in terms of the then extant 2017 Rules, for a period of three years – or until further orders, whichever was earlier. The said order of 20.07.2017 is extracted below:

F. No.P-24017/44/2017-IPR-I

- D *Government of India
Ministry of Commerce & Industry
Department of Industrial Policy & Promotion
IPR – I section*
- E *Udyog Bhawan, New Delhi – 110 011*

ORDER

- F *The President of India is pleased to appoint Justice (Retd.) Manmohan Singh, Chairman, Appellate Tribunal for Forfeited Property to the post of Chairman, in the Intellectual Property Appellate Board (IPAB), Chennai, in the scale of pay as prescribed in the Tribunal, Appellate Tribunals and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, for a period of three years with effect from the date of assumption of charge to the post, or until further orders, whichever is the earlier.*

(B.S. Nayak)

*Under Secretary to the Govt. of India
Tel: 23061257"*

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18. The order of appointment – as Chairperson of the Board – A was amended on 29.12.2017 by the Central Government. This later order stated that the tenure of his appointment as Chairman of the Board was upto 21.09.2019 or till further orders, whichever was earlier. The later order of 29.12.2017 reads as follows:

“No. P-24017/44/2017-IPR-I B

Government of India

Ministry of Commerce & Industry
Department of Industrial Policy & Promotion
(IPR – Establishment Section) C

Udyog Bhavan, New Delhi-110 011,

Dated 29th December, 2017

ORDER D

In supersession of this Department's earlier order dated 20th July, 2017, the President of India is pleased to entrust the additional charge of the post of Chairman, Intellectual Property Appellate Board (IPAB) to Justice (Retd.) Manmohan Singh, Chairman, Appellate Tribunal for Forfeited Property (ATFP) in addition to his current duties from the date of assumption of charge of the post up to 21.09.2019 i.e. till his tenure on the post of chairmen, ATFP or until further orders, whichever is earlier.” E

(B.S. Nayak) F

Under Secretary to the Govt. of India

Tel: 23061257”

19. The judgment in *Royer Mathew* by the five judge Constitution Bench was delivered on 13.11.2019. That judgment pronounced upon the validity of the 2017 Rules and quashed them. However, before the 2017 Rules were declared unconstitutional, the tenure of the incumbent to the office of the Chairperson of the Board ended on 21.09.2019. This Court recollects that the operation of the 2017 Rules had not been suspended during the pendency of the petitions challenging them (i.e. G H

A *Royer Mathew* batch of cases). During the pendency of the said batch of petitions, this court had occasion to issue a series of interim orders. The order dated 20.03.2018 clarified a previous order (dated 09.02.2018 (in *Kudrat Sandhu v. Union of India* WP 279/2017) as follows:

B “(iii) *The tenure of the Chairperson and the Judicial/Administrative/Expert/Technical Members of all the Tribunals shall be for a period of five years or the maximum age that was fixed/determined under the old Acts and Rules;*”

C 20. On 16.07.2018³, the following directions in regard to the age of the superannuation of Member of the Income Tax Appellate Tribunal (ITAT) were made:

D “*At this juncture, we may note that there is some confusion with regard to the Income Tax Appellate Tribunal (ITAT) as regards the age of superannuation. We make it clear that the person selected as Member of the ITAT will continue till the age of 62 years and the person holding the post of President, shall continue till the age of 65 years.*”

E 21. In the same petition, the court had occasion to again clarify the previous orders, in the context of the President and Members of the Customs Excise and Service Tax Appellate Tribunal (CESTAT). It was expressly stated that the tenure of members would be upto their attaining the age of 62 and, in the case of the President (of CESTAT) the tenure age limit would be 65 years.⁴

F 22. Given these circumstances, the arguments advanced on behalf of the applicant that the incumbent chairperson continued to remain in office in view of the declaration of law by *Royer Mathew*, is insubstantial and cannot be countenanced. The other reason for not accepting this contention is that if, for a moment it were to be assumed that in terms of the interim arrangement directed by the majority judgment in *Royer Mathew* (in para 224 extracted above), the appointments to Tribunals/Appellate Tribunals were to be “*in terms of the respective statutes before the enactment of the Finance Bill, 2017..*”, the amendments brought about through Sections 184, in terms of the maximum age up to which any Member or Chairperson can hold office in a Tribunal could

H ³ Reported as *Kudrat Sandhu v Union of India* 2018 SCC Online 1335 (SC)
⁴ This order is reported as *Kudrat Sandhu v Union of India* 2018 (18) SCC 796

not apply in the case of the Board. This is because the Rules of 2017 had fixed the tenure limits of chairpersons and members of tribunals, including that of the chairperson of the board.⁵ In terms of those Rules, (i.e., the rules of 2017) the tenure of the present incumbent ended on 21.09.2019. As noticed earlier, the rules were ultimately struck down only on 13.11.2019. At that time, the only order prevailing, which had directed *status quo* with respect to tenure and age limits for members and chairpersons of various tribunals, were the interim orders and clarifications in *Kudrat Sandhu*, dated 09.02.2018; 20.03.2018; 16.07.2018 and 21.08.2018. These had stated that the maximum tenure of such members or chairpersons would be as stipulated in the parent enactments, before the coming into force of the Finance Act, 2017, or were expressed to be for a maximum of 3 years, in the case of chairpersons. The period had ended, so far as the applicant is concerned, on 21.09.2019.

23. Another argument urged by the applicant was that the Finance Act, 2017 had inserted Section 89A of the TM Act, (introduced by Section 161 of the former Act) which states that the tenure of office and maximum age of retirement would be governed by the terms of the said Finance Act and, consequently, the pre-existing tenure and age limits did not apply. Undoubtedly, the purport of Section 89A was to overbear or supersede the pre-existing age and tenure limits (the existing tenure and age limits have been indicated in Section 86 of the TM Act). However, the Finance Act merely stipulates the potential maximum age limits and tenure limits. In the case of Chairpersons, the maximum age limit prescribed was seventy years (by virtue of second proviso to Section 184 [1]). However, by virtue of the first proviso to Section 184 (1), members or chairpersons could be appointed “*for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office*”. Thus, the *outer limit* of the tenure was five years. As noticed earlier, the Central Government had fixed the tenure of chairperson of the board to be three years. By the time this rule was held unconstitutional, the tenure of the incumbent holding office of chairperson, of the board ended, on 21.09.2019. The final judgment in *Royer Mathew*, could not

⁵By S. No. 12, Column 5 had fixed the tenure of Chairperson, Vice Chairman/Judicial Members of the Board at 3 years and indicated that the outer limit for the tenure of Chairperson would be 67 years whereas that of the Vice Chairman and Members would be 65 years.

- A have *per se* been applied to the facts of this case. The applicant's contentions in this regard are of no avail; it is after the judgment in *Madras Bar Association (supra)* that the tenure has been mandated to be five years. It is to be noticed that even the 2020 Rules did not prescribe the maximum tenure; it rather confined the tenure to four years.
 - B In the facts of this case, even if that were to be applied – assuming such a course to be available, the four-year period too ended on 21.09.2020. It is important to notice that the changes brought about in the tenure and age limits were not only through the Schedule to the Finance Act, 2017, but also through its substantive provisions - Sections 156 to 182.⁶ These provisions introduced changes relating to tenure and age limits for
 - C members and chairpersons of 19 tribunals (including the Income Tax Appellate Tribunal; Securities Appellate Tribunal, Competition Commission of India, CESTAT, Railway Claims Tribunal, Central Administrative Tribunal, Debt Recovery Tribunal, Debt Recoveries Appellate Tribunals, the IPAB -i.e. the Board, in this case, etc.). All
 - D these provisions, much like Section 89A of the TM Act, aligned Parliamentary intention to legislate uniform tenure limits and maximum age for members and chairpersons. Therefore, Section 89A is only part of the entire legislative design. However, that has no bearing on the circumstances of the present case.
24. The last contention which this court has to deal with is the
- E applicant's position that the Board cannot function without a judicial member, and that at present, only the incumbent Chairperson is a judicial member, and that if his tenure is not extended by a judicial order, the Board would be unable to function. Subsidiary to this argument is that no member can function as a Chairperson, as none of the existing members
 - F are judicial members, but are technical members.
25. The submissions of the applicant, in the opinion of this court, are meritless. Section 84 (2) of the TM Act no doubt states that a bench of the board shall consist of a judicial and a technical member. However, it is "*subject to other provisions*" of the TM Act. Section 84(3) commences with a *non obstante* clause and stipulates, by Section 84(3)(a) that a chairperson may, "*in addition to discharging the functions of the Judicial Member or Technical Member of the Bench*
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- H ⁶In a part entitled *PART XIV AMENDMENTS TO CERTAIN ACTS TO PROVIDE FOR MERGER OF TRIBUNALS AND OTHER AUTHORITIES AND CONDITIONS OF SERVICE OF CHAIRPERSONS, MEMBERS, ETC.*

to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Technical Member, of any other Bench." Thus, in the absence of any member, the chairperson may, if the occasion so arises, act as technical or judicial member. Section 87 enables a vice-chairperson, or as the case may be the senior-most member of the board to act as chairperson in the event of a vacancy to that position, or in the event of the incumbent's inability to function in the post. Furthermore, significantly, Section 85 *inter alia* stipulates the qualifications for the post of chairperson or vice-chairperson. The relevant provisions of this section (extracted below)⁷ reveal that there is no bar for a technical member to be appointed as a regular chairperson, provided she or he has for "*at least two years, held the office of a Vice-Chairperson*". In fact, the incumbent five technical members all hold legal qualifications⁸ (three of them holding masters in law, including one who holds a post-doctoral qualification). Four of these incumbent members were practising advocates in specialized fields of intellectual property (trademarks, and copyright) and one technical member (patents) had experience in the Patent Office. These members had practical legal experience of ten to fifteen years. The fact that they were appointed as

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⁷ 85. Qualifications for appointment as Chairperson, Vice-Chairperson, or other Members.

- (1) A person shall not be qualified for appointment as the Chairperson unless he—
(a) is, or has been, a Judge of a High Court; or
(b) has, for at least two years, held the office of a 3 [Vice-Chairperson].
- (2) A person shall not be qualified for appointment as the Vice-Chairperson, unless he—
(a) has, for at least two years, held the office of a Judicial Member or a Technical Member; or
(b) has been a Member of the Indian Legal Service and has held a post in Grade I of that Service or any higher post for at least five years.
- (3) A person shall not be qualified for appointment as a Judicial Member, unless he—
(a) has been a member of the Indian Legal Service and has held the post in Grade I of that Service for at least three years; or
(b) has, for at least ten years, held a civil judicial office.
- (4) A person shall not be qualified for appointment as a Technical Member, unless he—
(a) has, for at least ten years, exercised functions of a tribunal under this Act or under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or both, and has held a post not lower than the post of a Joint Registrar for at least five years; or
(b) has, for at least ten years, been an advocate of a proven specialised experience in trade mark law.

⁸ These particulars are available at the website of the Intellectual Property Appellate Board website https://www.ipab.gov.in/technical_members_page.php?id=2 (accessed at 23:35 hours on 04.02.2021)

- A technical members cannot obfuscate the fact that they are legally trained and qualified. Therefore, the argument that the technical members, in their position at the board as of now, cannot function without a chairperson, is unsustainable.
 - 26. In view of the above conclusions, this court holds that the applicant cannot be granted any relief. The application is accordingly dismissed; there shall, however, be no order on costs.

Ankit Gyan

Application dismissed.