Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 6805 of 2022

Orissa Administrative Tribunal Bar Association **…Appellant**

versus

Union of India & others **…Respondents**

And With

Civil Appeal No 6806 of 2022

J U D G M E N T

Dr. Dhananjaya Y Chandrachud, CJI

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1. IA No. 52385 of 2022 (application for intervention by Mr C Ravichandran Iyer) is allowed.

A. Background

i. Factual background

2. This appeal arises from a judgment of the Orissa High Court dated 7 June 2021 in a batch of writ petitions challenging the abolition of the Odisha Administrative Tribunal.[1] Before setting out the facts which gave rise to the issues in this appeal, it is necessary to understand the context in which they arose.

3. Parliament inserted Part XIV-A of the Constitution of India by the Constitution (Forty-second Amendment) Act 1976. Part XIV-A consists of two articles, Articles 323A and 323B. Article 323A empowers Parliament to provide for the adjudication of certain disputes by administrative tribunals. Disputes concerning the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government, may be adjudicated by administrative tribunals. Article 323B empowers the legislatures of states to provide for the adjudication of certain disputes (enumerated in clause 2 of Article 323B) by tribunals.

[1] "OAT"

4. In pursuance of the power conferred upon it by Article 323A(1), Parliament enacted the Administrative Tribunals Act 1985.[2] The Statements of Objects and Reasons of this legislation records that it was enacted in order to give effect to Article 323A, and also because:

> "a large number of cases relating to service matters are pending before the various courts. It is expected that the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of the various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons covered by the Administrative Tribunals speedy relief in respect of their grievances."

5. Section 4(1) of the Administrative Tribunals Act provides that the Central Government shall establish an administrative tribunal known as the "Central Administrative Tribunal"[3] to adjudicate disputes concerning the recruitment and conditions of service of persons in connection with posts under the Union or All-India Service,[4] including disputes with respect to remuneration, pension, tenure, leave, and disciplinary matters.[5]

In terms of Section 4(2) of the Administrative Tribunals Act, the Central Government may establish an administrative tribunal for a particular state, upon receiving a request in this regard from the concerned State Government. Once created, the state administrative tribunal[6] is charged with exercising exclusive jurisdiction over disputes concerning the recruitment and conditions of service of persons in connection with posts under the concerned state or

[2] "Administrative Tribunals Act"
[3] "CAT"
[4] Section 14 read with Section 3(q), Administrative Tribunals Act
[5] Section 3(q), Administrative Tribunals Act
[6] "SAT"

any civil service of that state,[7] including disputes with respect to remuneration, pension, tenure, leave, and disciplinary matters.[8]

6. The SAT is prohibited from exercising jurisdiction, authority, or power over a matter which the CAT's jurisdiction extends.[9] While Section 4(2) of the Administrative Tribunals Act governs the establishment of SATs, there is no corresponding provision which stipulates the procedure to be followed to discontinue or abolish them. In terms of Section 29 of the Administrative Tribunals Act, suits or other proceedings pending before courts or other authorities which would have been within the jurisdiction of the SAT if the cause of action in such suit or proceeding had arisen after the establishment of the SAT, stand transferred to the SAT on the date of its establishment. In other words, cases pending before other fora (including cases pending before the High Court of the relevant state but excluding those pending before the Supreme Court) stand transferred to the SAT upon its establishment.

Following the enactment of the Administrative Tribunals Act, various states including Andhra Pradesh, Himachal Pradesh, Karnataka, Madhya Pradesh, and Maharashtra requested the Central Government to establish an SAT, and the Central Government issued notifications establishing them. Odisha was one amongst these states. Upon receiving a request from the State of Odisha, the Central Government established the OAT on 4 July 1986 by issuing

[7] Section 15 read with Section 3(q), Administrative Tribunals Act
[8] Section 3(q), Administrative Tribunals Act
[9] Section 15(4), Administrative Tribunals Act

Notification No. GSR 934(E), which was published in the Gazette of India. The OAT commenced functioning soon thereafter.

7. At this time, Section 28 of the Administrative Tribunals Act was still in force. Section 28 excluded the jurisdiction of all courts except the Supreme Court or the Industrial Tribunal or Labour Court in relation to matters over which the CAT and the SAT exercised jurisdiction. Section 28 was enacted pursuant to the enabling provision in Article 323-A of the Constitution, namely clause 2(d) of Article 323-A. Clause 2(d) provided that Parliament may exclude the jurisdiction of all courts, except of the Supreme Court under Article 136 of the Constitution with respect to disputes which administrative tribunals were empowered to adjudicate under clause 1 of Article 323-A. The effect of Section 28 of the Administrative Tribunals Act, therefore, was that appeals from the OAT lay directly to the Supreme Court under Article 136 of the Constitution. However, this changed with the decision of this Court in **L. Chandra Kumar** v. **Union of India** (1997) 3 SCC 261. In its decision in that case, this Court *inter alia* ruled that:

   a. Clause 2(d) of Article 323-A and clause 3(d) of Article 323-B were unconstitutional to the extent that they excluded the jurisdiction of the High Courts under Articles 226 and 227 and of the Supreme Court under Article 32 of the Constitution;

   b. Section 28 of the Administrative Tribunals Act was unconstitutional as were ‘exclusion of jurisdiction’ clauses in all other legislation enacted under Articles 323-A and 323-B;

c. The jurisdiction conferred upon the High Courts under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution form a part of the basic structure of the Constitution; and

d. Other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution.

As a consequence of this decision, challenges under Article 226 of the Constitution to the decisions rendered by the SATs lay to Division Benches of the respective High Courts within whose jurisdiction the SATs operated. The Supreme Court's jurisdiction could be invoked under Article 136 against the decisions of the High Courts.

8. The decision in **L. Chandra Kumar** (supra) seems to have influenced the State of Odisha to request the Union Government to abolish the OAT. By a letter dated 16 September 2015, the Chief Secretary to the Government of Odisha requested the Secretary to the Government of India, Department of Personnel and Training to issue a notification under the Administrative Tribunals Act abolishing the OAT. The letter recorded the State Government's reason for making this request in the following terms:

> "Government of Odisha is of the view that the Tribunal is not able to serve its original objectives, particularly after the Hon'ble Apex Court gave the Judgment in L. Chandra Kumar case of 1997. As a result of this judgment, the very purpose of having a State Administrative Tribunal (SAT) for speedy redressal of the grievances of the State Government employees is not fulfilled as any way the aggrieved parties have to approach the Hon'ble High Court before approaching the Apex Court for a final verdict."

A note annexed to the letter dated 16 September 2015 elaborated on the State Government's rationale for seeking to abolish the OAT:

> "As a consequence of the landmark judgment of the Supreme Court [in L. Chandra Kumar], the objective of the establishment of the Tribunal to give quick justice to the government employees was defeated… The aggrieved parties are approaching the High Court against OAT orders and then the Supreme Court resulting in protracted litigation … Government is incurring a significant sum of expenditure on the OAT … The abolition of the Tribunal will reduce the burden of litigation for the Government and will also reduce the time for resolution of disputes / litigation."

Evidently, the State of Odisha was of the opinion that the raison d'etre of the OAT was defeated – the fact that the OAT's decisions were subject to two tiers of challenge (first before the High Court and then the Supreme Court) meant that speedy justice could not be delivered. The State Government proposed to transfer the cases pending before the OAT to the Orissa High Court.

9. On 12 January 2016, the Union Government requested the State of Odisha to provide information about the Orissa High Court's views on the proposal to abolish the OAT, the legal mechanism by which the cases pending before the OAT could be transferred to the Orissa High Court, and regarding the plan of action with respect to the employees of the OAT. Accordingly, on 1 February 2016, the State of Odisha solicited the Orissa High Court's views on the matter. Thereafter, the Union Government communicated its 'in-principle' approval of the proposal to abolish the OAT to the State of Odisha.

10. By a letter dated 5 February 2019 to the Union Government and the State of Odisha, the Orissa High Court conveyed that that it had resolved to accept the decision to abolish the OAT and the attendant proposals regarding the

transfer of employees and pending cases. On 22 February 2019, the State of Odisha wrote to the Union of India, intimating it that the employees of the OAT would be "*suitably adjusted in other heads of the department under the Government of Odisha depending upon the vacancies in equivalent cadre and post.*" The letter also stated that the State Government had decided to transfer the cases pending before the OAT to the Orissa High Court and that the latter had accepted this decision.

11. The Union Government took recourse to Section 21 of the General Clauses Act 1897[10] and abolished the OAT by issuing Notification GSR 552(E) on 2 August 2019. The relevant portion of this notification is extracted below:

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

ii. <u>The impugned judgment</u>

12. In 2019, each of the appellants filed a Writ Petition before the Orissa High Court for quashing the notification dated 2 August 2019 (as well as the decision of the Cabinet of the State Government dated 9 September 2015 to abolish the OAT). After considering the rival submissions, the Orissa High Court dismissed the Writ Petitions by its common judgment dated 7 June 2021, for the following reasons:

[10] "General Clauses Act"

13.

a. Article 323-A is an enabling provision. It does not make it mandatory for the Union Government to establish administrative tribunals or refrain from abolishing them once they are established;

b. The decision to abolish the OAT is an administrative decision. There is therefore no bar to the Union Government invoking Section 21 of the General Clauses Act read with Section 4(2) of the Administrative Tribunals Act to rescind the notification establishing the OAT;

c. The invocation of Section 21 of the General Clauses Act does not result in a denial of justice because the cases pending before the OAT will be heard by the Orissa High Court. Hence, litigants are not prejudiced by the invocation of Section 21;

d. The proposition that what cannot be done directly cannot be done indirectly is not applicable because neither Article 323-A of the Constitution nor Section 4(2) of the Administrative Tribunals Act prohibits the Union or State Government from abolishing an SAT;

e. The Union Government was not rendered *functus-officio* after it established the OAT because it was exercising an administrative function and not a judicial or quasi-judicial function;

f. The jurisdiction of the Orissa High Court was neither created nor enlarged as a consequence of the notification dated 2 August 2019. Rather, the High Court's jurisdiction was revived;

g. The decision-making process of the Union and State Governments was not arbitrary, irrational, or unreasonable, and it did not violate Article 14 of the Constitution;

h. There is no factual foundation for the allegation that the decision to abolish the OAT was motivated by government servants seeking to avoid contempt proceedings before the OAT. In any event, all cases including contempt proceedings would be heard by the Orissa High Court; and

i. The notification dated 2 August 2019 was not vitiated for the reason that it did not state that it had been issued in the name of the President of India.

The High Court also observed that the procedure adopted by the Union Government may have been rendered arbitrary if it had failed to ensure that the High Court was consulted prior to abolishing the OAT because such a decision would directly impact the functioning of the High Court.

B. Submissions

14. Mr. Ashok Panigrahi and Dr. Aman Hingorani, learned counsel led arguments on behalf of the appellants. They were joined by Mr. C Ravichandran Iyer, Advocate-on-Record, who is an intervenor in this appeal.

15. Their submissions were:

a. Article 323-A of the Constitution is in the nature of a mandate. It requires the Union Government to establish SATs and does not empower the Union Government to abolish a SAT, once established;

b. Section 21 of the General Clauses Act cannot be invoked to abolish the OAT. The power to abolish a SAT must flow from the same legislation that vests the Union Government with the power to establish SATs. The Administrative Tribunals Act does not vest either the Union Government or the State Government with the power to abolish SATs. In any event, the conditions for the invocation of Section 21 of the General Clauses Act are not satisfied. The abolition of the OAT was therefore without legal basis;

c. The Administrative Tribunal (Amendment) Bill 2006 was introduced to provide an enabling provision for the abolition of SATs and for the transfer of pending cases from the abolished SAT to the relevant High Court. This bill was not enacted into law and therefore the Union Government and the State Governments do not have the power to abolish SATs;

d. The State Government's interpretation of the decision in **L. Chandra Kumar** (supra) as reducing the efficiency of the adjudication process for service matters is incorrect and unreasonable;

e. The OAT has two regular benches and two circuit benches but the High Court has a single bench in Cuttack. The abolition of the OAT makes the court system less accessible to litigants and violates the fundamental right of access to justice;

f. The Union and State Governments have violated the principles of natural justice by failing to provide the OAT Bar Association and the litigants before the OAT with an opportunity to be heard before abolishing the OAT. This is also violative of Article 14 of the Constitution;

g. The notification dated 2 August 2019 by which the OAT was abolished is invalid because it is not expressed in the name of the President of India in terms of Article 77 of the Constitution;

h. The Constitution does not envisage a transfer of cases from any court to a particular High Court except as specified in Article 228 of the Constitution;

i. The State Government is trying to take advantage of its own wrong by failing to fill the vacancies in the OAT and creating the conditions for the abolition of the OAT. The failure of the State Government to fill the vacancies is also a breach of Article 256 of the Constitution;

j. The abolition of the OAT has the effect of enlarging the jurisdiction of the Orissa High Court but Parliament alone has the power to create or enlarge jurisdiction;

k. The real reason for the abolition of the OAT is that officials in Odisha faced charges of contempt before the OAT and sought to avoid these proceedings by having the OAT abolished;

l. A judicial impact assessment ought to have been carried out before abolishing the OAT;

m. Once the Union Government established the OAT, it became *functus officio*; and

n. The Union Government ought to have obtained the permission of this Court before issuing the notification dated 2 August 2019.

16. The submissions urged on behalf of the appellants have been opposed by the Union of India and the State of Odisha. Mr. Balbir Singh, Additional Solicitor General made the following submissions for the Union of India:

a. Section 4(2) of the Administrative Tribunals Act enables the Union Government to establish an SAT upon receiving a request in this behalf from the State Government. Consequently, it is the prerogative of the State Government to establish, continue, or abolish the relevant SAT;

b. Section 21 of the General Clauses Act may be pressed into service to abolish an SAT. Neither the Constitution nor the Administrative Tribunals Act is required to be amended to give the Union Government the power to abolish an SAT;

c. The fundamental right to justice has not been violated because the cases pending before the OAT were transferred to the Orissa High Court;

17. Mr. Ashok Kr Parija, learned Advocate General for the State of Odisha supplemented the arguments put forward by the Union of India. He urged that:

a. The Writ Petitions before the Orissa High Court which led to the impugned judgment were not maintainable because the rights of the petitioners were not affected by the abolition of the OAT. Litigants cannot claim a fundamental right to access the OAT;

b. The State Government took a policy decision to abolish the OAT, in light of the low rate of disposal of cases by the OAT. The State Government is also of the view that the purpose of the OAT (to ensure speedy disposal of cases) is not served subsequent to the decision of this Court in **L. Chandra Kumar** (supra);

c. The word “may” in Section 4 of the Administrative Tribunals Act is unambiguous and must be interpreted strictly.

d. An intra-court appeal is different from an appeal to a separate forum and the former streamlines the process of adjudication. It cannot be said that there is no advantage to be had by abolishing the OAT;

e. The principles of natural justice were not violated;

The abolition of the OAT does not make the court system less accessible to litigants because they would have been required to travel to Cuttack in any event in order to participate in the writ proceedings before the Orissa High Court. The number of cases transferred from the Circuit Benches of the OAT at Berhampur and Sambalpur to the Orissa High Court are 275 and 235 respectively. The Principal Bench at Bhubaneswar and the regular Bench at Cuttack, on the other hand, had 11,483 and 32,911 cases respectively, which were transferred to the Orissa High Court. Financial hardships faced by litigants can be alleviated through compensation schemes which exist for this purpose; and

f. It was not mandatory for the government to conduct a judicial impact assessment test before abolishing the OAT.

18. In its counter affidavit, the Orissa High Court detailed the action taken to transfer the cases pending before the OAT to the High Court – nodal officers were appointed to monitor the transfer, a committee was constituted to oversee the transfer, the committee devised a methodology for shifting pending cases, and a dedicated branch called the 'OA Branch' was created to deal exclusively with transferred matters.

C. Issues

19. Based on the submissions which have been canvassed by the parties, the issues which arise for determination are:

a. Whether the Writ Petitions instituted by the appellants before the Orissa High Court were maintainable;

b. Whether Article 323-A of the Constitution makes it mandatory for the Union Government to establish SATs;

c. Whether Section 21 of the General Clauses Act can be invoked to rescind the notification establishing the OAT, thereby abolishing the OAT;

d. Whether the abolition of the OAT is arbitrary and therefore violative of Article 14 of the Constitution;

e. Whether the abolition of the OAT is violative of the fundamental right of access to justice;

f. Whether the Union and State Governments have violated the principles of natural justice by failing to provide the OAT Bar Association and the litigants before the OAT with an opportunity to be heard before arriving at a decision to abolish the OAT;

g. Whether the notification dated 2 August 2019 is invalid because it is not expressed in the name of the President of India;

h. Whether the transfer of cases from the OAT to the Orissa High Court has the effect of enlarging the jurisdiction of the latter;

i. Whether the State Government took advantage of its own wrong by ceasing to fill the vacancies in the OAT;

j. Whether the failure of the Union Government to conduct a judicial impact assessment before abolishing the OAT vitiates its decision to abolish the OAT; and

k. Whether the Union Government became *functus officio* after establishing the OAT.

D. Analysis

i. An overview of the proceedings arising from the abolition of the Madhya Pradesh Administrative Tribunal[11] and the Tamil Nadu Administrative Tribunal[12]

20. The parties to this appeal have advanced some arguments in relation to decisions arising from the abolition of certain other SATs. It is therefore necessary to understand the decisions of this Court in relation to the abolition of those SATs. To this end, the abolition of the MPAT and the TNAT as well as the legal proceedings arising from those decisions are briefly discussed. The effect of these proceedings on the decision in this case is also examined.

a. The abolition of the MPAT

21. The State of Madhya Pradesh was reorganized into the State of Madhya Pradesh and the State of Chhattisgarh with the enactment of the Madhya Pradesh Reorganization Act 2000. Section 74(1)(ii) of this legislation vested the State Governments of these two states with the power to abolish "*every*

[11] "MPAT"
[12] "TNAT"

Commission, Authority, Tribunal, University, Board or any other body constituted under a Central Act, State Act or Provincial Act and having jurisdiction over the existing State of Madhya Pradesh."

22. The State of Madhya Pradesh issued a notification abolishing the MPAT pursuant to a decision taken by it along with the State of Chhattisgarh. This notification was challenged before the Madhya Pradesh High Court. The petitioners in that case also challenged the constitutionality of Section 74 of the Madhya Pradesh Reorganization Act 2000.

23. The High Court upheld the constitutional validity of sub-clause (1) of Section 74. It held that sub-clauses (2) and (3) of Section 71 (concerning the termination of employees and the compensation for the unexpired period of their tenure respectively) were *ultra vires* the Constitution. The High Court also held that the State Government could not have abolished the MPAT by issuing a notification. Rather, it was required to request the Union Government to issue a notification abolishing the MPAT because the MPAT was established by the Union Government. It held that the Union Government would have no choice but to accept such a request and issue a notification to this effect. The High Court accordingly quashed the notification issued by the State of Madhya Pradesh by which the MPAT was abolished.

24. On appeal, this Court upheld the interpretation accorded to the Madhya Pradesh Reorganization Act 2000 by the Madhya Pradesh High Court. The

decision of this Court was reported as **M.P. High Court Bar Assn.** v. **Union of India** (2004) 11 SCC 766.[13]

As seen from a discussion of the facts, the **MPAT Abolition Case** (supra) concerned the powers of the State of Madhya Pradesh under the Madhya Pradesh Reorganization Act 2000 as well as the constitutional validity of certain provisions of that enactment. This Court was not called upon to adjudicate whether Section 21 of the General Clauses Act would be applicable to Section 4(2) of the Administrative Tribunals Act. A decision on the abolition of an SAT by the exercise of special powers under a legislation enacted for the reorganization of a state does not have any bearing on whether an SAT may be abolished in exercise of powers under the Administrative Tribunals Act. The **MPAT Abolition Case** (supra) is therefore not germane to the issue of whether Section 21 of the General Clauses Act would be applicable to Section 4(2) of the Administrative Tribunals Act. However, the issue whether the decision to abolish the MPAT was arbitrary, unreasonable and therefore violative of Article 14 of the Constitution was decided in that case. A similar issue is before us in the present case and this aspect of the decision in the **MPAT Abolition Case** (supra) may be instructive.

b. The abolition of the TNAT

Between 1994 and 2004, the Government of Tamil Nadu requested the Union Government to abolish the TNAT. Thereafter, it stopped appointing the

[13] "MPAT Abolition Case"

Chairperson, the Vice Chairperson and the Members of the TNAT, which was rendered inoperative as a result. Approximately 30,000 cases were pending before it at this time. Various parties instituted writ petitions before the Madras High Court seeking directions to the State Government of Tamil Nadu to fill the vacancies in the TNAT to enable it to function until it was abolished. These writ petitions culminated in the decision of the Madras High Court in **Tamil Nadu Government All Department Watchman and Basic Servants Association** v. **Union of India**[14].

25. In its decision in the above case, the Madras High Court held that the Union Government had the power to rescind a notification establishing an SAT, under Section 21 of the General Clauses Act. It relied on the **MPAT Abolition Case** (supra) to hold that it was open to the State Government to take a "policy decision" to abolish the SAT and request the Union Government to abolish it. It further held that the latter would have no option but to issue a notification in this regard. On this basis, it directed the Union Government to issue a notification abolishing the TNAT "*as there is no necessity for the Central Government to wait for the amendment before the Parliament and the mere issuance of Notification would suffice for abolition of the Tribunal*."

Two appeals against the decision in the **TNAT Abolition Case** (supra) were preferred before this Court. The first was dismissed *in limine* by an order dated 16 August 2005. The second was an appeal filed by the Union of India. Before this appeal could be adjudicated on merits, the Union Government issued a

[14] 2005 SCC OnLine Mad 333- "TNAT Abolition Case"

notification on 17 February 2006 abolishing the TNAT. On 28 March 2017, this Court dismissed the appeal for having become infructuous. It observed that the question of law had been kept open.

26. The **TNAT Abolition Case** (supra) does not hence constitute a precedent which binds this Court. The proceedings arising from the **TNAT Abolition Case** (supra) in appeal before this Court, too, do not have a bearing on the approach to be adopted while deciding the merits of the issues before us because the question of law was expressly kept open.

ii. <u>The Writ Petitions instituted before the Orissa High Court were maintainable</u>

27. The State of Odisha has interrogated the maintainability of the Writ Petitions instituted by the appellants before the Orissa High Court (which led to the impugned judgment) on the ground that the rights of the petitioners were not impacted by the abolition of the OAT.

28. The appellants are the OAT Bar Association, Cuttack and the Odisha Retired Police Officers' Welfare Association. Both associations are registered under the Societies Registration Act 1860. Section 6 of the Societies Registration Act 1860 authorizes registered societies to sue and be sued. Both the appellants are therefore organizations which are entitled to approach the High Court under Article 226 of the Constitution.

29. Both appellants have also alleged that an existing legal right of theirs was violated. As held by this Court in **Ghulam Qadir** v. **Special Tribunal** (2002)

1 SCC 33, the existence of a legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under Article 226:

> "38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. **The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article.** The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hypertechnical grounds. **If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his not having the locus standi**. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."
>
> (emphasis supplied)

30. In **State of Orissa** v. **Ram Chandra Dev** AIR 1964 SC 685, a Constitution Bench of this Court held that the existence of a right is the foundation of a petition under Article 226:

> "8. … Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or

> threatened. **The existence of a right is thus the foundation of a petition under Article 226**."
>
> (emphasis supplied)

31. In this case, the Odisha Retired Police Officers' Welfare Association alleged that its right to speedy redressal of grievances (a facet of the fundamental right of access to justice) was violated. The OAT Bar Association joined the Odisha Retired Police Officers' Welfare Association in alleging that the state's action of abolishing the OAT violated its right under Article 14 of the Constitution. Having alleged that these rights were violated by the abolition of the OAT, they were entitled to invoke the High Court's jurisdiction under Article 226 of the Constitution. Whether there is substance in the grievance is a separate matter which has to be analysed.

iii. Article 323-A does not preclude the Union Government from abolishing SATs

32. In order to assess whether it is mandatory for the Union Government to establish SATs, it is necessary to advert to Article 323-A of the Constitution of India:

> *"*323A. Administrative tribunals.—(1) Parliament **may**, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
>
> (2) A law made under clause (1) **may**—
>
> (a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

> (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
>
> (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
>
> (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);
>
> (e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
>
> (f) repeal or amend any order made by the President under clause (3) of article 371D;
>
> (g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
>
> (3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force."
>
> (emphasis supplied)

33. Clauses (1) and (2) of Article 323-A use the expression "may," indicating that Article 323-A does not compel Parliament to enact a law to give effect to it. Parliament is entrusted with the discretion to enact a law which provides for the adjudication of certain disputes by administrative tribunals. It is a permissive provision. The provision is facilitative and enabling.

34. However, in certain cases, the power to do something may be coupled with a duty to exercise that power. In **Official Liquidator** v. **Dharti Dhan (P) Ltd.** (1977) 2 SCC 166, this Court expounded on when the word "may" carries with

it an obligation to exercise the power conferred by that word in a particular manner:

> "8. Thus, the question to be determined in such cases always is whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfilment of certain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are fulfilled … **It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it.**
>
> …
>
> 10. The principle laid down above has been followed consistently by this Court whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner or direction. **In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner**."
>
> (emphasis supplied)

35. In **Dhampur Sugar Mills Ltd.** v. **State of U.P.**[15], this Court held that the intention of the legislature must be discerned while determining whether a provision is directory or mandatory:

> "36. … In our judgment, mere use of word "may" or "shall" is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the

[15] (2007) 8 SCC 338

> provision is read one way or the other and many more considerations relevant to the issue."

36. In order for the word "may" to acquire the character of the word "shall", the following aspects of the provision or legislation (or in this case, the Constitution) must be analysed:

    a. The legal and factual context of the conferment of the power;

    b. The purpose of the power;

    c. Whether the statute (or the Constitution) specifies the conditions in which the power is to be exercised; and

    d. The intention of the legislature discerned *inter alia* from the scheme of the enactment, the purpose and object of the provision, the consequences of reading the provision one way or another, and other relevant considerations.

This is not an exhaustive list of factors which will aid courts in interpreting whether a provision is directory or mandatory.

37. Article 323-A does not specify the conditions in which the power to enact laws providing for the adjudication of certain disputes by administrative tribunals must be exercised. It therefore cannot be said that Parliament was obligated to exercise this power upon the fulfilment of certain conditions.

38. The legal and factual context of the power to enact laws providing for administrative tribunals may be understood from the Statement of Objects

and Reasons appended to the Constitution (Forty-fourth Amendment) Bill 1976. The Statement of Objects indicates that the object was

> "To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under article 226."

The Statement of Objects and Reasons also sheds light on the purpose of the power to provide for administrative tribunals i.e., to reduce mounting arrears in the High Courts and to secure the speedy disposal of service matters. The purpose and the legal and factual context of the power conferred by Article 323-A do not have the effect of narrowing the scope of the discretion afforded to Parliament by the word "may." The purpose of reducing arrears in the High Courts or securing the speedy disposal of service cases is not of a nature as to cast an obligation upon Parliament to enact laws providing for administrative tribunals. This is because the same purpose can be achieved through other routes. Article 323-A merely provides for the enactment of legislation as of one of many routes. It is open to Parliament to choose any legally acceptable method to reduce arrears in the High Courts and secure the speedy disposal of service matters, including but not limited to creating administrative tribunals. Article 323-A does not deprive Parliament of the power to choose an alternate course of action to reduce arrears or ensure speedy justice, by any other modality, including by strengthening other

adjudicatory mechanisms. The intention of Parliament could not have been to mandate the establishment and continuation of administrative tribunals. Besides the purpose of the provision discussed above, nothing in the scheme of Article 323-A indicates that it is a mandatory provision. The consequences of reading Article 323-A as mandating the creation of administrative tribunals, would be to foreclose the possibility of the adoption of an alternate course of action to achieve the desired objective of reducing arrears and ensuring speedy justice. This, too, indicates that it could not have been the intention of Parliament to mandate the establishment of administrative tribunals as the only remedy to mounting arrears or as the only manner in which speedy justice could be secured.

39. Another important consequence of interpreting Article 323-A as being mandatory is that it prevents Parliament and the State Governments from evaluating the manner in which administrative tribunals function by *inter alia* accounting for:

a. The rate of disposal of cases;

b. The quality of the judgments;

c. How often the decisions of the SAT are overturned in the writ jurisdiction, appeal or review;

d. Whether the tribunals are functioning independently;

e. The availability of qualified and suitable candidates for the posts of members and chairpersons of the tribunals;

f. Whether SATs do indeed reduce arrears in the High Courts and streamline the justice delivery mechanism;

g. The cost incurred by the state; and

h. The costs (monetary and otherwise) to litigants.

The Orissa High Court refers to some of these factors in paragraphs 70 to 75 of the impugned judgment albeit in a slightly different context. The intention of Parliament could not have been to prevent the Union or State Governments from evaluating the efficiency and desirability of administrative tribunals once they were established. However, the effect of reading Article 323-A as a mandatory provision would be to do precisely that.

40. The appellants have relied on the decision of this Court in **Dilip K Basu** v. **State of West Bengal** (2015) 8 SCC 744 to argue that it is mandatory for the Union Government to establish SATs. In that case, this Court was required to interpret Section 21 of the Protection of Human Rights Act 1993 which stipulated that State Governments "may" constitute a State Human Rights Commission. The question was whether the word "may" ought to be read as the word "shall." This Court noted that the Protection of Human Rights Act 1993 enjoined the State Human Rights Commissions to promote human rights, prevent their violation, and provide redressal. It held that this legislative intent would be negated if State Human Rights Commissions were not established in every state. This Court reasoned that the consequence of this was that Section 21 of the Protection of Human Rights Act 1993 not only conferred State Governments with the power to set up State Human Rights

Commissions but also imposed on them the duty to do so. In the present case, the intention of Parliament in enacting Article 323-A of the Constitution (i.e., to reduce arrears and provide speedy justice) would not necessarily be negated in the absence of SATs in each state, for the reasons discussed above.

41. We also note that in **Dilip K Basu** (supra), the fact that victims or complainants would not have access to an efficacious remedy in the absence of State Human Rights Commissions weighed heavily with this Court. They would be required to approach the National Human Rights Commission, which this Court noted could prove inaccessible to people living in places far away from New Delhi where it is headquartered. Here, the absence of SATs does not leave litigants without an efficacious remedy. The High Courts or other forums already designated for the purpose of adjudicating service matters continue to be operational in each state and the absence of SATs does not inconvenience litigants any more than they otherwise would have been.

42. Hence, the word “may” in Article 323-A of the Constitution is not imparted with the character of the word “shall.” Article 323-A is a directory, enabling provision which confers the Union Government with the discretion to establish an administrative tribunal. The corollary of this is that Article 323-A does not act as a bar to the Union Government abolishing an administrative tribunal once it is created.

iv. <u>Applicability of Section 21 of the General Clauses Act</u>

43. The Union Government invoked Section 21 of the General Clauses Act read with Section 4(2) of the Administrative Tribunals Act to rescind the notification establishing the OAT. Section 21 of the General Clauses Act, which is a rule of construction, is extracted below:

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

44. The appellants contend that the Union Government could not have taken recourse to Section 21 of the General Clauses Act. A two-step analysis must precede the answer to the question posed by the appellants.

a. There is no bar to the applicability of Section 21 of the General Clauses Act to the administrative order establishing the OAT

45. In **Indian National Congress (I)** v. **Institute of Social Welfare**[16], this Court held that Section 21 of the General Clauses Act cannot be pressed into service to vary, amend, or review a quasi-judicial order or notification. It is important to note that a quasi-judicial order or notification cannot be rescinded by relying upon Section 21 of the General Clauses Act. The notification dated 2 August 2019 rescinded the notification dated 4 July 1986 by which the OAT was established. It is therefore the notification dated 4 July 1986 which established the OAT which must be analysed to determine whether it is a quasi-judicial notification, and not the notification dated 2 August 2019, the

[16] (2002) 5 SCC 685

effect of which was to abolish the OAT. If the answer is that the decision to establish the OAT was indeed a quasi-judicial decision, Section 21 of the General Clauses Act cannot be relied on to reverse this decision. As a consequence, the notification dated 2 August 2019 will be invalid, being improperly issued. If, however, the decision to establish the OAT was administrative , there would be no bar to the invocation of Section 21 of the General Clauses Act to rescind the notification establishing the OAT.

46. This Court discussed the meaning and contours of a quasi-judicial act in **Province of Bombay** v. **Khushaldas S. Advani**[17], where SR Das, J. in his concurring opinion held:

> "80.1.(*i*) that if a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and
>
> 80.2.(*ii*) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.
>
> 81. In other words, while the presence of two parties besides the deciding authority will prima facie, and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

47. In **Indian National Congress (I)** (supra), this Court held that:

[17] (1950) SCC 551

> "29. … another test which distinguishes administrative function from quasi-judicial function is, the authority who acts quasi-judicially is required to act according to the rules, whereas the authority which acts administratively is dictated by the policy and expediency."

48. In **Board of High School and Intermediate Education** v. **Ghanshyam Das Gupta**[18], this Court expounded upon when an authority is required to act judicially:

> "8. … Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the right affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."

49. From the above decisions, it emerges that:

a. The decision of an authority is *prima facie,* and in the absence of any other factor, a quasi-judicial act when there is a *lis* before it, with two parties with competing claims;

b. When the authority has the power to do something which will prejudicially affect the subject, the decision it takes is a quasi-judicial act even in the absence of a *lis* and two parties with competing claims, when the authority is required by the statute in question to act judicially. The express provisions of the statute, the nature of the right affected, the manner of disposal, the objective criterion (if any) to be adopted while

[18] AIR 1962 SC 1110

deciding one way or the other, the effect of the decision, and other signs in the statute may be considered when evaluating whether there is a duty to act judicially; and

c. The decision of an authority is quasi-judicial when it is made in accordance with rules. The decision is administrative when it is dictated by policy and expediency.

50. Having laid down the above principles, it must be realised that the distinction between quasi-judicial and administrative acts is not always well defined and its application is not always certain. Doctrine and practice are not necessarily happy partners. The instant case evidently does not involve a *lis* or two parties with competing claims appearing before an authority who will determine their respective rights. Further, the act of the Union Government establishing the OAT did not prejudicially affect the subject in any manner. Litigants or other citizens were not left without a forum. They could continue to pursue their remedies before the OAT when it was first established, instead of before the Orissa High Court.

51. The Union Government was not acting in a judicial capacity when it set up the OAT. On the establishment of the OAT, pending cases before the High Court were transferred to the OAT. Indeed, the decision to establish an SAT is based on policy and expediency. It is up to each State Government to evaluate the need for an SAT within their state, to consider the advantages and disadvantages as well as the financial, administrative, and other practical aspects of establishing an SAT. The Union Government may then establish

the SAT upon receiving a request, in terms of Section 4(2) of the Administrative Tribunals Act. The decision to establish an SAT is undoubtedly an administrative decision. Administrative decisions, unlike quasi-judicial decisions, may be reversed by the application of Section 21 of the General Clauses Act. The applicability of Section 21 of the General Clauses Act does not stand excluded in the present case.

52. The appellants' reliance on **Industrial Infrastructure Development Corpn. (Gwalior) M.P. Ltd.** v. **CIT**[19] is misplaced for similar reasons. In that case, Section 21 of the General Clauses Act was found to be inapplicable to the order because it was a quasi-judicial order. For the reasons discussed above, the order establishing the OAT is an administrative order.

53. We clarify that the distinction between quasi-judicial and administrative decisions has been invoked for the purpose of determining whether Section 21 of the General Clauses Act may be invoked to reverse the decision to establish an SAT. Administrative orders continue to be amenable to judicial review in accordance with law.

b. Section 21 of the General Clauses Act is otherwise applicable to the Administrative Tribunals Act

54. Having decided that there is no threshold bar to the applicability of Section 21 of the General Clauses Act, we now consider whether it applies in the present

[19] (2018) 4 SCC 494

case. The *locus classicus* on this subject is **State of Bihar** v. **D N Ganguly**[20], where this Court held:

> "9. … It is well settled that this section embodies a rule of construction and the question whether or not it applies to the provisions of a particular statute would depend on the subject-matter, context, and, the effect, of the relevant provisions of the said statute. In other words, it would be necessary to examine carefully the scheme of the Act, its object and all its relevant and material provisions before deciding whether by the application of the rule of construction enunciated by Section 21, the appellant's contention is justified that the power to cancel the reference made under Section 10(1) can be said to vest in the appropriate government by necessary implication. If we come to the conclusion that the context and effect of the relevant provisions is repugnant to the application of the said rule of construction, the appellant would not be entitled to invoke the assistance of the said section. We must, therefore, proceed to examine the relevant provisions of the Act itself."

55. In **Kamla Prasad Khetan** v. **Union of India**[21], a Constitution Bench of this Court held that:

> "10. … Section 21 of the General Clauses Act embodies a rule of construction, and that rule must have reference to the context and subject-matter of the particular statute to which it is being applied"

56. Section 21 of the General Clauses Act can be invoked when its application would not be repugnant to the subject-matter, context, and effect of the statute and when it is in harmony with its scheme and object. The court may refer to the provisions of the statute in question to determine whether Section 21 of the General Clauses Act will be applicable.

57. The scheme of the Administrative Tribunals Act is briefly analysed below:

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[20] 1959 SCR 1191
[21] 1957 SCR 1052

a. Section 4 enables the Union Government to establish an SAT upon receipt of a request in this behalf from the concerned State Government;

b. Section 5 provides for the composition of SATs. Sections 8 and 10B stipulate the term of office of the Chairperson and the Members;

c. Section 15 governs the jurisdiction of SATs;

d. Chapter IV sets out the procedure to be followed before the Tribunal as well as the powers exercisable by it; and

e. Section 29 provides that every suit or proceeding pending before any court or authority immediately before the date of establishment of a tribunal under the Administrative Tribunals Act which would have been within the jurisdiction of the tribunal if the cause of action in such suit or proceeding had arisen after the establishment of the tribunal, stands transferred to the tribunal on the date of its establishment.

58. The Administrative Tribunals Act does not contain a provision and a corresponding procedure for the abolition of an SAT once it is established. However, this does not mean that the abolition of an SAT, once it is set up, is impermissible. First, the Administrative Tribunals Act does not proscribe the abolition of an SAT by the Union Government, upon the latter receiving a request from the concerned State Government. Second, nothing in the scheme of the statute implies or suggests that such an abolition would be incompatible with the objective sought to be achieved. To the contrary, if the concerned State Government is of the considered view that the SAT is failing

to meet the objectives of the Administrative Tribunals Act or that an alternate route for meeting the same objectives is preferable to that of operating an SAT, it is free to act upon its view and request the Union Government to abolish the SAT. An amendment to the Administrative Tribunals Act is not a prerequisite for the State Government to make a request to the Union Government.

59. As noticed above, the object of the Administrative Tribunals Act is to reduce arrears and enable the provision of speedy justice to litigants. Abolishing an SAT would not frustrate this objective because SATs are not the only method by which the object is capable of being achieved. Further, the effect of such an abolition would not be to deprive litigants of a remedy because the cases before the SAT would stand revived in the forum in which they were pending prior to the establishment of that SAT. The subject matter and the context of the Administrative Tribunals Act, too, do not militate against the application of Section 21 of the General Clauses Act. There is therefore nothing in the Administrative Tribunals Act which is repugnant to the application of Section 21 of the General Clauses Act. The relevant State Government has the implied power to issue a request to abolish the SAT in its state to the Union Government. The Union Government in turn has the implied power to rescind the notification by which that SAT was established, thereby abolishing the SAT.

PART D

60. The appellants have relied on decisions of this Court in **Lt. Governor of H.P.** v. **Avinash Sharma**[22] and **State of M.P.** v. **Ajay Singh**[23] to support their case. In **Avinash Sharma** (supra), this Court held that after the Government takes possession of land pursuant to a notification under Section 17(1) of the Land Acquisition Act 1894, the land vests with the Government and the notification cannot be cancelled under Section 21 of the General Clauses Act. Further, the notification could not be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act 1894, once possession of the land was taken. The present case does not concern the acquisition of land, making the decision in **Avinash Sharma** (supra) irrelevant to the question at hand. Moreover, Section 48 of the Land Acquisition Act 1894 had a specific provision governing a withdrawal from acquisition and hence the conditions contained in the statutory provision could not be obviated by taking recourse to Section 21 of the General Clauses Act. The scheme of the Land Acquisition Act 1894 and the scheme of the Administrative Tribunals Act are different and the scheme and context of each enactment must be considered on its own merits.

61. In **Ajay Singh** (supra), this Court held that the rule of construction embodied in Section 21 of the General Clauses Act did not apply to the provisions of the Commissions of Inquiry Act 1952 because the subject-matter, context and effect of its provisions were inconsistent with the application of Section 21. In that case, the State of Madhya Pradesh had constituted a single-member high

[22] (1970) 2 SCC 149
[23] (1993) 1 SCC 302

powered committee to investigate an issue of public importance that had arisen within its territory. It later attempted to reconstitute the high-powered committee by replacing the single member. The question in **Ajay Singh** (supra) was whether the state government could rely on Section 21 of the General Clauses Act to rescind the notification by which it had appointed the member at the first instance.

62. This Court answered in the negative because Section 3 of the Commissions of Inquiry Act 1952 provided for the power to fill any vacancies whereas Section 7 provided for the only situation in which a Commission which was already constituted would cease to exist. This Court observed that the Commissions of Inquiry Act 1952 did not provide for the power to reconstitute a Commission or replace its members. The scheme of the enactment and its context indicated that Section 21 of the General Clauses Act could not be invoked. Further, the object of the Commissions of Inquiry Act 1952 would be frustrated if the appropriate government were permitted to reconstitute a Commission midway through the task that it was charged with completing because it made it possible for an independent agency to exist, free from governmental control. In the present case, there is no such impediment to the application of Section 21 of the General Clauses Act. The object of the Administrative Tribunals Act would not stand frustrated if an SAT is created and then abolished. The Union and State Governments may take alternate routes (some of which may have already been in operation, supplementing SATs) towards achieving the same objective. Hence, the decision in **Ajay Singh** (supra) does not assist the appellants' case.

63. The appellants have also argued that the Union Government's power to abolish SATs must flow from the same legislation that vests it with the power to establish them. It is their contention that the Union Government does not have the power to abolish SATs because the Administrative Tribunals Act does not provide for it. This argument fails for the simple reason that the very purpose of Section 21 of the General Clauses Act is to provide for contingencies such as the instant case when the statute in question does not explicitly provide for the power to add to, amend, vary, or rescind a notification (or order, rule, or by-law) which has been issued. Of course, the application of Section 21 of the General Clauses Act is subject to the test laid down in **D N Ganguly** (supra) as discussed previously as well as the other requirements mentioned in the provision itself.

64. If the argument of the appellants were to be accepted, Section 21 of the General Clauses Act would be rendered otiose. It would not apply to any statute which does not explicitly provide for the power to add to, amend, vary, or rescind notifications, orders, rules or bye-laws. On the other hand, if the statute itself conferred the power to add to, amend, vary, or rescind notifications, orders, rules or by-laws, there would be no need to rely on Section 21 of the General Clauses Act. This is not a conceivable position because courts must interpret statutes so as to give effect to their provisions rather than to render them futile.[24]

[24] M. Pentiah v. Muddala Veeramallappa (1961) 2 SCR 295

65. The appellants have also submitted that what cannot be done directly cannot be done indirectly. For the reasons discussed above, neither Article 323-A of the Constitution nor the Administrative Tribunals Act prohibit the abolition of SATs. Hence, it cannot be said that the Union Government is barred from abolishing the SATs "directly" and that it has resorted to Section 21 of the General Clauses Act to evade such a ban and "indirectly" abolish the OAT. The Union Government's reliance on Section 21 of the General Clauses Act to abolish the OAT is legally permissible.

66. The appellants have urged that the Administrative Tribunal (Amendment) Bill 2006 was introduced in Parliament to provide an enabling provision for the abolition of SATs and for the transfer of pending cases from the abolished SAT to the relevant High Court. This bill was referred to the Rajya Sabha Standing Committee on Personnel, Public Grievances, Law and Justice, which submitted its report on 5 December 2006. The report recommended that the power to abolish an SAT should not be granted to the executive. It is argued that the Union Government does not have the power to abolish SATs because this Bill was not enacted into law because of the recommendations contained in the report of the Standing Committee.

67. The appellants seem to be implying that Parliament was of the opinion that the Union Government did not have the power to abolish SATs in the absence of an enabling provision. It may also be the case that Parliament introduced the Administrative Tribunal (Amendment) Bill 2006 in order to **clarify** the power of the Union Government to abolish SATs rather than to **confer** it with

that power. This Court cannot possibly enter into a discussion or analysis of all the potential reasons for a proposed amendment.

68. The appellants have put forth another argument on similar lines. It is their case the Union Government's stance before the Madras High Court in the **TNAT Abolition Case** (supra) must influence this Court's decision on whether the Union Government has the power to rescind a notification establishing SATs. The Union Government's stance was recorded in paragraph 4 of the **TNAT Abolition Case** (supra):

> "4. On the other hand, the stand taken by the Central Government, the first respondent herein, is that though the Government of Tamil Nadu has sent a proposal to the Central Government for abolition, this cannot be done through Notification. The appropriate legislation for this proposal has to be brought in the Parliament and the same is being contemplated by the Law Department which after due processing and approval will be brought before the Parliament. Mere Notification of the Central Government would not suffice in this case, since Section 74 of the Madhya Pradesh Reorganisation Act, 2000 would specifically provide for the abolition through Notification. But, such a provision is not available in this State. Therefore, suitable Parliamentary amendment to the Administrative Tribunal Act is necessary to consider such proposal. The necessary steps for the same are being taken by the Central Government."

69. The Union Government's stance on a question of law before a court in another case or for that matter, any party's position on a question of law, does not preclude this Court from interpreting the law. In **Zakir Abdul Mirajkar** v. **State of Maharashtra**[25], a two-judge Bench of this Court (of which one of us, Dr. DY Chandrachud, J. was a part) held:

> "36. … A submission which is made on a question of law by counsel appearing for a party (in this case, the state) cannot bind that party

[25] (2022) SCC OnLine SC 1092

> or for that matter, preclude this Court from correctly interpreting the law."

The Union Government's stance before the Madras High Court in the **TNAT Abolition Case** (supra) will therefore not steer this Court's exegesis of the law.

70. At this juncture, we may also deal with three interrelated arguments put forward by the appellants with respect to the transfer of cases from the abolished OAT to the Orissa High Court:

a. The Constitution of India (including Article 323-A) does not envisage a transfer of cases from any court or tribunal to a particular High Court except in terms of Article 228 of the Constitution;

b. While Section 29 of the Administrative Tribunals Act provides for the transfer of cases from the High Courts (or other courts and authorities) to the relevant SATs, there is no provision which enables the transfer of cases from the abolished SATs back to the forum in which they would have been heard if not for the establishment of SATs; and

c. The abolition of the OAT has the effect of enlarging the jurisdiction of the Orissa High Court but Parliament alone has the power to create or enlarge jurisdiction. Reliance is placed on **A.R. Antulay** v. **R.S. Nayak** (1988) 2 SCC 602.

71. The response to the three arguments is that the transfer of cases from the OAT to the Orissa High Court is, properly characterized, a revival of the latter's jurisdiction. We agree with the impugned judgment that the Orissa

High Court's jurisdiction in relation to matters pending before the OAT is not being created or enlarged by the abolition of the OAT. It previously exercised such jurisdiction and is merely resuming its jurisdiction over the same subject matter. It is for this reason that the decision in **A.R. Antulay** (supra) is not applicable to the facts of the present case.

72. The natural consequence of the Union Government rescinding the notification establishing the OAT would be to restore the *status quo ante*. Nothing in either Article 323-A of the Constitution or the Administrative Tribunals Act prevents such a revival. Further, the absence of a provision in the Constitution which explicitly permits a revival does not act as a barrier to such a revival. For the reasons discussed above, we hold that the Union Government's reliance on Section 21 of the General Clauses Act is in accordance with law.

v. <u>The notification dated 2 August 2019 is not violative of Article 14 of the Constitution</u>

a. The notification dated 2 August 2019 is not based on irrelevant or extraneous considerations

73. The appellants have urged that the notification dated 2 August 2019 is based on an incorrect understanding of the decision in **L. Chandra Kumar** (supra) and is arbitrary, unreasonable and violative of Article 14 of the Constitution.

74. The principle that Article 14 strikes at arbitrariness and that arbitrary action by the state violates the fundamental guarantee of equality has been recognized as a basic postulate since the decision in **E.P. Royappa** v. **State of T.N.**[26]:

> "85. … equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. **Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14** … Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. **They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.**"
>
> (emphasis supplied)

The State Government's decision to abolish the OAT will therefore have to be scrutinized with a view to understanding whether any extraneous or irrelevant considerations intruded into the decision.

75. The phrase 'arbitrary' is often used synonymously with the phrase 'unreasonable.' The test as to whether an action is reasonable was formulated by the Court of Appeal in **Associated Provincial Picture Houses, Limited** v. **Wednesbury Corporation**[27]:

> "It is true the discretion must be exercised reasonably. Now what does that mean? … For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

[26] (1974) 4 SCC 3
[27] [1948] 1 K.B. 223

This Court has consistently assessed the validity of executive action on the anvil of the test laid down in **Wednesbury Corporation** (supra), including in **G.B. Mahajan** v. **Jalgaon Municipal Council**[28], **Tata Cellular** v. **Union of India**[29], **Punjab Communications Ltd.** v. **Union of India**[30] and **Union of India** v. **International Trading Co.**[31].

76. The reasons for the State Government's decision to abolish the OAT are recorded in a document titled '*A note indicating the rationale*' with the subject '*Abolition of Odisha Administrative Tribunal*.' This note was prepared by the General Administration Department, Government of Odisha and is dated 16 September 2015. The relevant parts of the note are extracted below:

> "1. Background
>
> Odisha Administrative Tribunal (OAT) was established on 14th July, 1986 under the Administrative Tribunal Act, 1985 by Government of India on the request of Government of Odisha. The Tribunal under the Act was to have similar jurisdiction as the High Court. **The applicants were supposed to be freed from the requirement of having to approach the High Court for disposal of their grievances.** In lieu of the High Court the aggrieved government employees could go to the Tribunal and from there on to the Supreme Court directly …
>
> 2. Supreme Court Landmark Judgment (18th March, 1997)
>
> However, with the decision of the Supreme Court in L Chandra Kumar (1997) the provision of the Act that aggrieved parties could appeal before the Supreme Court against the orders of the Tribunal was held unconstitutional … **it was held that the parties aggrieved with the orders of the Tribunal may approach the High Court first before going to the Supreme Court** …
>
> 3. Impact of the Supreme Court Judgment

[28] (1991) 3 SCC 91
[29] (1994) 6 SCC 651
[30] (1999) 4 SCC 727
[31] (2003) 5 SCC 437

> As a consequence of the landmark judgment of the Supreme Court, the objective of the establishment of the Tribunal to give quick justice to the government employees was defeated and several States felt that the existence of the Tribunal was rendered futile."
>
> (emphasis supplied)

The State Government enclosed this note with its letter dated 16 September 2015 to the Union Government, requesting it to abolish the OAT. The relevant portion of the letter is extracted below:

> "This is to state that the State Administrative Tribunal has been functioning in Odisha since 14.07.1986. Government of Odisha is of the view that the Tribunal is not able to serve its original objectives, particularly after the Hon'ble Apex Court gave the Judgment **in L. Chandra Kumar case of 1997. As a result of this judgment, very purpose of having a State Administrative Tribunal (SAT) for speedy redressal of the grievances of the State Government employees is not fulfilled as any way the aggrieved parties have to approach the Hon'ble High Court before approaching the Apex Court for a final verdict.**
>
> Government of Odisha, after taking into account this, have decided to recommend to the Government of India to abolish the Odisha Administrative Tribunal. A note indicating the rationale adopted by the State Government in arriving at this decision is enclosed herewith for your ready reference."
>
> (emphasis supplied)

77. Similar reasons have been recorded in various other documents of the State Government which relate to the abolition of the OAT. The State Government requested the Union Government to establish the OAT with a view to creating an alternate forum to the Orissa High Court. The State Government envisioned a structure of litigation whereby appeals from the OAT would lie directly to the Supreme Court, and would exclude the High Court both as the court of first instance as well as a forum of appeal. In the State Government's view, the structure of litigation under the Administrative Tribunals Act would ensure that the dispute achieved quietus in a maximum of **two** tiers of

litigation. However, the decision of this Court in **L. Chandra Kumar** (supra) held that the jurisdiction of High Courts could not be ousted. This resulted in the creation of **three** tiers of litigation under the Administrative Tribunals Act – first, before the OAT, followed by the High Court, and culminating with the Supreme Court. The State Government was consequently of the opinion that the "speedy redressal of grievances" was no longer possible in view of the additional rung of litigation. It was of the opinion that its reason for establishing the OAT no longer survived.

78. The appellants contend that the State Government has misinterpreted the decision in **L. Chandra Kumar** (supra). It is their submission that the number of tiers of litigation remains the same even if the OAT is abolished and that there is therefore no advantage to be obtained by abolishing the OAT. Instead of parties instituting a case before the OAT at the first instance and preferring a petition under Article 226 before a Division Bench of the High Court and a Special Leave Petition under Article 136 before the Supreme Court, they will institute a case directly before the High Court. This will be heard by a single judge and parties have the remedy of a writ appeal before a Division Bench of the High Court and a further challenge before this Court. There are hence, three tiers of litigation, regardless of the forum in which the proceedings are conducted. The appellants also contend that the Orissa High Court is itself burdened with a large number of pending cases and that an increase in its workload would not result in efficiency in the disposal of cases.

79. It was not the State Government's case that it was obliged to abolish the OAT as a result of the decision in **L. Chandra Kumar** (supra) or that the abolition of the OAT would result in fewer tiers of litigation. Rather, the State Government evaluated the effect of the decision in **L. Chandra Kumar** (supra) on the purpose that it intended to achieve with the establishment of the OAT. Tribunals, including administrative tribunals, may be set up for any number of reasons. All the reasons which could possibly or theoretically have had a bearing on the State Government's decision to establish the OAT are not relevant. Only the State Government's actual reason for establishing the OAT is relevant in considering whether it misinterpreted **L. Chandra Kumar's case** (supra). The State Government's reason for setting up the OAT was to achieve speedy justice. A crucial factor (to its mind) was the **elimination of a tier of litigation**. The State Government was of the opinion that the creation of the OAT would not fulfil the purpose of a speedy redressal of grievances because there was no improvement to the justice delivery system through the elimination of a tier of litigation.

80. As for the submission that the Orissa High Court's pendency will increase if the cases pending before the OAT are transferred to it, the State Government is entitled to structure its justice delivery systems within the parameters defined by law. Its decision may be set aside only if it is unconstitutional or without the authority of law.

81. In addition to the impact of the decision in **L. Chandra Kumar** (supra), the State Government considered other factors related to the functioning of the

OAT. In the note dated 16 September 2015, the State Government furnished other reasons for its decision to abolish the OAT:

> "Government is incurring a significant sum of expenditure on the OAT as is exhibited in the table given below:

Table 1: Plan and Non-Plan Provision for OAT (Rs in Lakhs)

Head of Expenditure	**2014-15**	**2015-16**
Plan	205.59	200
Non-Plan	616.24	697.69
Total	**821.83**	**897.69**

The following table represents the institution and disposal of OA and MP cases in OAT month wise from January 2014 to December 2014:-

Table 2: Institution, Disposal, Pendency of cases for the year 2014

Sl. No.	Month	Carried Forward		Instituted during month		Disposal during month		Pendency at the end of month	
		OA Case	Misc Case	OA Case	Misc Case	OA Case	Misc Case	OA Case	Misc Case
1	2	3	4	5	6	7	8	9	10
1	Jan, 14	28712	18907	747	337	790	93	28669	19151
2	Feb, 14	28669	19151	671	359	543	127	28797	19383
3	Mar, 14	28797	19383	774	551	642	167	28929	19767
4	Apr, 14	28929	19767	417	234	461	91	28885	19910
5	May, 14	28885	19910	653	306	718	82	28820	20134
6	June, 14	28820	20134	426	155	393	63	28853	20226
7	July, 14	28853	20226	687	562	442	132	29098	20656
8	Aug, 14	29098	20656	832	474	302	142	29628	20988
9	Sept, 14	29628	20988	1173	486	552	99	30249	21375
10	Oct, 14	30249	21375	531	271	370	44	30410	21602
11	Nov, 14	30410	21602	908	386	468	134	30850	21854
12	Dec, 14	30850	21854	1141	742	436	126	31820	22514
	Total			8960	4863	6117	1300		

Table 2 shows that there were 47,619 cases pending at the beginning of 2014. During the calendar year 2014, 7417 cases were

> disposed whereas 13,823 fresh cases were instituted. At the end of the year 2014, the number of pending cases went up to 54,334 … As an institutional mechanism it seems the Tribunal has not been able to provide speedy decisions …"
>
> (emphasis in original)

The State Government was therefore concerned not only with the additional tier of litigation at the Orissa High Court but also with the expenditure incurred to operate the OAT as well as the rate at which the OAT disposed of cases. It was persuaded to abolish the OAT due to a combination of all these factors.

82. From the above discussion, the following conclusions emerge:

a. While arriving at the decision to abolish the OAT, the State Government considered relevant reasons. It considered whether the OAT was capable of fulfilling the purpose for which it was established after the decision in **L. Chandra Kumar** (supra). It placed in the balance the expenditure incurred to operate the OAT as well as the rate of disposal of cases. These reasons were not irrelevant to the decision as to whether a tribunal ought to be continued;

b. The State Government's act of consulting the Orissa High Court (upon receiving a request to this effect from the Union Government) before deciding to abolish the OAT was not irrelevant or extraneous. The cases before the OAT were to be transferred to the Orissa High Court and the opinion of the latter was relevant to State Government's decision;

c. The State Government did not consider factors which were irrelevant or extraneous to its decision; and

d. The decision to abolish the OAT was not one which was so absurd that no reasonable person or authority would ever have taken it. The decision to abolish a tribunal which it had established, based on an analysis of relevant factors is, by no stretch of imagination, an absurd or unreasonable decision.

83. This Court reached a similar conclusion in the **MPAT Abolition Case** (supra). The appellants in that case argued that the decision to abolish the MPAT was arbitrary, unreasonable, and violative of Article 14 of the Constitution. This Court rejected their argument in the following terms:

> "57. … The notification was issued by the Central Government in 1988 and the State Administrative Tribunal was established for the State of Madhya Pradesh. At that time, as per well-settled legal position, decisions rendered by the Administrative Tribunals constituted under the Act of 1985 were "final" subject to jurisdiction of this Court under Article 136 of the Constitution. … If, in view of subsequent development of law in *L. Chandra Kumar* [(1997) 3 SCC 261 : 1997 SCC (L&S) 577 : AIR 1997 SC 1125] the State of Madhya Pradesh felt that continuation of State Administrative Tribunal would be "one more tier" in the administration of justice inasmuch as after a decision is rendered by the State Administrative Tribunal, an aggrieved party could approach the High Court under Articles 226/227 of the Constitution and, hence, it felt that such Tribunal should not be continued further, in our opinion, it cannot be said that such a decision is arbitrary, irrational or unreasonable. From the correspondence between the State of Madhya Pradesh and the Central Government as well as from the affidavit-in-reply, it is clear that the decision of this Court in L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577 : AIR 1997 SC 1125] had been considered by the State of Madhya Pradesh in arriving at a decision to abolish State Administrative Tribunal. Such a consideration, in our opinion, was relevant, germane and valid."

The decision to abolish the MPAT was based on similar considerations as the decision to abolish the OAT. For these reasons, the abolition of the OAT is not arbitrary or unreasonable. It does not violate Article 14 of the Constitution.

84. Our choice of the test articulated in **Wednesbury Corporation** (supra) must not be understood to mean that no other yardstick may be utilized to test the constitutional legitimacy of executive action, under Article 14. This Court has previously approved of the use of the proportionality test to evaluate the validity of certain kinds of executive action, including in **Om Kumar** v. **Union of India**[32] and **Teri Oat Estates (P) Ltd.** v. **UT, Chandigarh**[33]. The proportionality test may well be applicable to other cases where executive overreach is alleged.

b. The principles of natural justice have not been violated

85. The appellants submit that the Union and State Governments have violated the principles of natural justice by failing to provide the OAT Bar Association and the litigants before the OAT with an opportunity to be heard before abolishing the OAT. They argue that this violates Article 14 of the Constitution.

86. The decision to establish, continue or abolish the OAT is in the nature of a policy formulated and implemented by the State Government (acting with the Union Government under the Administrative Tribunals Act). The public at large does not have a right to be heard before a policy is formulated and implemented. The process of consultation with the public, with experts, and with other stakeholders may be desirable and would facilitate a participatory democracy. However, each member of the class that would be impacted by a

[32] AIR (2000) SC 3689
[33] (2004) 2 SCC 130

policy decision cannot be afforded an opportunity of hearing. This would not only be time consuming and expensive, but deeply impractical.

87. **BALCO Employees' Union (Regd.)** v. **Union of India**[34] concerned the validity of the decision of the Union of India to disinvest and transfer 51% shares of Bharat Aluminium Company Limited. The petitioner in that case (the union of the company's employees) *inter alia* submitted that it had a right to be heard before and during the process of disinvestment. This Court rejected this argument, observing that:

> "57. … As a matter of good governance and administration whenever such policy decisions are taken, it is desirable that there should be wide range of consultations including considering any representations which may have been filed, but there is no provision in law which would require a hearing to be granted before taking a policy decision. In exercise of executive powers, policy decisions have to be taken from time to time. It will be impossible and impracticable to give a formal hearing to those who may be affected whenever a policy decision is taken. One of the objects of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that a reasonable opportunity may have to be granted before passing of an administrative order. In case of the policy decision, however, it is impracticable, and at times against the public interest, to do so, but this does not mean that a policy decision which is contrary to law cannot be challenged. … If the decision is otherwise illegal as being contrary to law or any constitutional provision, the persons affected like the workmen, can impugn the same, but not giving a pre-decisional hearing cannot be a ground for quashing the decision."
>
> (emphasis supplied)

Although the decision in **BALCO Employees' Union (Regd.)** (supra) was rendered in the context of a policy decision with economic implications, it would be applicable in the present case. The principle enunciated in that case

[34] (2002) 2 SCC 333

is equally applicable to other categories of policy decisions. This is because it is impractical to hear every member of the class impacted by a policy decision.

88. The absence of a right to be heard before the formulation or implementation of a policy does not mean that affected parties are precluded from challenging the policy in a court of law. What it means is that a policy decision cannot be struck down on the ground that it was arrived at without offering the members of the public at large (or some section of it) an opportunity to be heard. The challenge to a policy may be sustainable if it is found to vitiate constitutional rights or is otherwise in breach of a mandate of law.

89. For the reasons discussed above, the decision to abolish the OAT cannot be assailed on the ground that there was a violation of the principles of natural justice. Article 14 of the Constitution has not been violated.

vi. <u>The Union Government did not become *functus officio* after establishing the OAT</u>

90. P Ramanatha Aiyer's *The Law Lexicon* (1997 edition) defines the term *functus officio* as:

> "A term applied to something which once has had a life and power, but which has become of no virtue whatsoever … One who has fulfilled his office or is out of office; an authority who has performed the act authorised so that the authority is exhausted"

91. *Black's Law Dictionary* (5th edition) defines the term as follows:

> "Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority … an

> instrument, power, agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

92. The doctrine of *functus officio* gives effect to the principle of finality. Once a judge or a quasi-judicial authority has rendered a decision, it is not open to her to revisit the decision and amend, correct, clarify, or reverse it (except in the exercise of the power of review, conferred by law). Once a judicial or quasi-judicial decision attains finality, it is subject to change only in proceedings before the appellate court.

93. For instance, Section 362 of the Code of Criminal Procedure 1973 provides that a court of law is not to alter its judgment once it is signed:

> "362. Court not to alter judgment.—Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

In **Hari Singh Mann** v. **Harbhajan Singh Bajwa**[35], this Court recognized that Section 362 was based on the doctrine of *functus officio*:

> "10. … The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error."

94. The doctrine of *functus officio* exists to provide a clear point where the adjudicative process ends and to bring quietus to the dispute. Without it, decision-making bodies such as courts could endlessly revisit their decisions.

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[35] (2001) 1 SCC 169

With a definitive endpoint to a case before a court or quasi-judicial authority, parties are free to seek judicial review or to prefer an appeal. Alternatively, their rights are determined with finality. Similar considerations do not apply to decisions by the state which are based entirely on policy or expediency.

95. Turning to the present case, the appellants' argument that the Union Government was rendered *functus officio* after establishing the OAT does not stand scrutiny. The decision to establish the OAT was administrative and based on policy considerations. If the doctrine of *functus officio* were to be applied to the sphere of administrative decision-making by the state, its executive power would be crippled. The state would find itself unable to change or reverse any policy or policy-based decision and its functioning would grind to a halt. All policies would attain finality and any change would be close to impossible to effectuate.

96. This would impact not only major policy decisions but also minor ones. For example, a minor policy decision such as a bus route would not be amenable to any modification once it was notified. Once determined, the bus route would stay the same regardless of the demand for, say, an additional stop at a popular destination. Major policy decisions such as those concerning subsidies, corporate governance, housing, education and social welfare would be frozen if the doctrine of *functus officio* were to be applied to administrative decisions. This is not conceivable because it would defeat the purpose of having a government and the foundation of governance. By their very nature, policies are subject to change depending on the circumstances

prevailing in society at any given time. The doctrine of *functus officio* cannot ordinarily be applied in cases where the government is formulating and implementing a policy.

97. In the present case, the State and Union Governments' authority has not been exhausted after the establishment of an SAT. Similarly, the State and Union Governments cannot be said to have fulfilled the purpose of their creation and to be of no further virtue or effect once they have established an SAT. The state may revisit its policy decisions in accordance with law. For these reasons, the Union Government was not rendered *functus officio* after establishing the OAT.

vii. <u>The notification dated 2 August 2019 is valid despite not being expressed in the name of the President of India</u>

98. The appellants challenge the notification dated 2 August 2019 on the ground that it does not comply with the requirements of clause (1) of Article 77 because it was not issued in the name of the President of India.

99. Article 77 of the Constitution of India indicates:

> "Conduct of business of the Government of India.—
>
> (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
>
> (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

> (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business"

Article 166 corresponds to Article 77. It states:

> "Conduct of Business of the Government of a State.—
>
> (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
>
> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion"

Clause (1) of Article 166 corresponds to clause (1) of Article 77. As a consequence, decisions of this Court with respect to clause (1) of Article 166 will be of persuasive value while interpreting clause (1) of Article 77.

100. In **Air India Cabin Crew Assn.** v. **Yeshaswinee Merchant**[36], a two-judge Bench of this Court held that the exercise of statutory power is not rendered invalid if it is not expressed to have been taken in the name of the President:

> "72. In our opinion, reference to Article 77 is wholly inappropriate. The exercise of statutory power under Section 34 by the Central Government, even though not expressed to have been taken in the name of President, does not render it invalid. Clause (2) of Article 77 insulates an executive action of the Government formally taken in the name of President from challenge on the ground that it is not an order or instrument made or executed by President. Even if an executive action of the Central Government is not formally expressed to have been taken in the name of President, Article 77

[36] (2003) 6 SCC 277

> does not provide that it would, therefore, be rendered void or invalid. … In **Major E.G. Barsay** v. **State of Bombay** (1962) 2 SCR 195, a two-judge bench of this Court held:
>
> "25. … Shortly stated, the legal position is this: Article 166(1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Article 166(1), it can be established by evidence aliunde that the order was made by the appropriate authority. **If an order is issued in the name of the Governor** and is duly authenticated in the manner prescribed in Rule (2) of the said Article, **there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non-compliance with the provisions of the said rule does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any party from proving by other evidence that as a matter of fact the order has been made by the appropriate authority. Article 77** which relates to conduct of business of the Government of India **is couched in terms similar to those in Article 166 and the same principles must govern the interpretation of that provision**."
>
> (emphasis supplied)

101. Similar principles govern the interpretation of Article 166 and Article 77. A notification which is not in compliance with clause (1) of Article 77 is not invalid, unconstitutional or non-est for that reason alone. Rather, the irrebuttable presumption that the notification was issued by the President of India (acting for the Union Government) is no longer available to the Union Government. The notification continues to be valid and it is open to the Union Government to prove that the order was indeed issued by the appropriate authority.

102. In the present case, the notification dated 2 August 2019 was not issued in the name of the President. However, this does not render the notification invalid. The effect of not complying with Article 77 is that the Union Government cannot claim the benefit of the irrebuttable presumption that the

notification dated 2 August 2019 was issued by the President. Hence, the appellants' argument that the notification dated 2 August 2019 is invalid and unconstitutional is specious.

103. Here, it is appropriate to note that the notification dated 4 July 1986 (by which the OAT was established) was also not issued in the name of the President. However, the appellants seek to preserve the establishment of the OAT by that notification while assailing the notification abolishing the OAT. If the arguments of the appellants were to be accepted, the notification dated 4 July 1986 would be invalid. We are therefore not inclined to entertain the argument that the notification dated 2 August 2019 is invalid and non-est.

104. We are satisfied that both the notification dated 4 July 1986 and the notification dated 2 August 2019 were, in substance, issued by the President (acting for the Union Government). The notifications were published in the Gazette of India in accordance with law and there is nothing on record to support the suggestion that an authority which is not empowered to issue the notification has issued it. To the contrary, Section 4 of the Administrative Tribunals Act empowers the Union Government to issue a notification establishing the OAT and as discussed previously, the attendant power to rescind a notification so issued is also available to the Union Government. The issuance of both notifications was an exercise of the Union Government's statutory power under the Administrative Tribunals Act.

105. The appellants place reliance on the decision of a Constitution Bench of this Court in **Dattatraya Moreshwar Pangarkar** v. **State of Bombay**[37] and specifically on the sentence in paragraph 24, which states:

> "24. …when the executive decision affects an outsider or is required to be officially notified or to be communicated it should normally be expressed in the form mentioned in Article 166(1) i.e. in the name of the Governor."

106. The appellants have failed to notice the very next sentence in paragraph 24, by which this Court accepts the argument that Article 166 is a directory provision:

> "24. … The learned Attorney General then falls back upon the plea that an omission to make and authenticate an executive decision in the form mentioned in Article 166 does not make the decision itself illegal, for the provisions of that article, like their counterpart in the Government of India Act, are merely directory and not mandatory … In my opinion, this contention of the learned Attorney General must prevail.
>
> 25. It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done."

107. Article 77 is a directory provision. Article 77(1) refers to the form in which the decision taken by the executive is to be expressed. This is evident from the phrase "expressed to be taken" in clause (1) of Article 77. It does not have any bearing on the process of decision-making itself. The public or the citizenry would stand to suffer most from the consequences of declaring an

[37] (1952) 1 SCC 372

order that is not expressed in the name of the President null and void. Hence, the appellants' reliance on **Dattatraya Moreshwar Pangarkar** (supra) is misplaced.

108. The appellants also seek to rely on **State of Uttaranchal** v. **Sunil Kumar Vaish**[38], where a two-judge bench of this Court observed:

> "23. … unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government."

In this case, no reference is made to the decision of the Constitution Bench in **Dattatraya Moreshwar Pangarkar** (supra), which would be binding on the two-judge bench in **Sunil Kumar Vaish** (supra). As noted above, **Dattatraya Moreshwar Pangarkar** (supra) held that the provisions of Article 166 were directory and not mandatory. This would apply squarely to the provisions of Article 77 as well. The decision in **Sunil Kumar Vaish** (supra) is of no assistance to the appellants' case.

109. Finally, the appellants have relied on **Gulf Goans Hotel Co. Ltd.** v. **Union of India**[39] to support their case. However, the decision in this case does not support the position urged by the appellants because it, too, holds that the consequence of non-compliance with Article 77(1) is that it deprives the Union Government of the immunity conferred by Article 77(2). It also notices that executive action exercised pursuant to powers conferred under a statute

[38] (2011) 8 SCC 670
[39] (2014) 10 SCC 673

stands on a different footing from executive action taken independent of a statute:

> "19. Article 77 of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article 77 provides that all executive action of the Government must be expressed to be taken in the name of the President. The celebrated author H.M. Seervai in Constitutional Law of India, 4th Edn., Vol. 2, 1999 describes **the consequences of government orders or instructions not being in accordance with clauses (1) or (2) of Article 77 by opining that the same would deprive the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden would be on the Government to show that they were, in fact, so made**. In the present case, the said burden has not been discharged in any manner whatsoever. **The decision in Air India Cabin Crew Assn. v. Yeshaswinee Merchant [(2003) 6 SCC 277, p. 311, para 72 : 2003 SCC (L&S) 840] , taking a somewhat different view can, perhaps, be explained by the fact that in the said case the impugned directions contained in the government letter (not expressed in the name of the President) was in exercise of the statutory power under Section 34 of the Air Corporations Act, 1953. In the present case, the impugned guidelines have not been issued under any existing statute.**"
>
> (emphasis supplied)

In the present case, the notification dated 2 August 2019 was issued in exercise of the statutory powers under the Administrative Tribunals Act.

110. For the reasons discussed in this segment, the notification dated 2 August 2019 is valid despite not being expressed in the name of the President of India.

viii. <u>The abolition of the OAT is not violative of the fundamental right of access to justice</u>

111. The appellants have urged that the abolition of the OAT has made the court system less accessible to litigants and that it is therefore violative of the fundamental right of access to justice. They have relied on the decision in **Anita Kushwaha** v. **Pushap Sudan**[40], where a Constitution Bench of this Court discussed the components of access to justice:

> "33. Four main facets that, in our opinion, constitute the essence of access to justice are:
>
> (i) the State must provide an effective adjudicatory mechanism;
>
> (ii) the mechanism so provided must be reasonably accessible in terms of distance;
>
> (iii) the process of adjudication must be speedy; and
>
> (iv) the litigant's access to the adjudicatory process must be affordable."

The appellants contend that the abolition of the OAT breaches the second and fourth facets of the right of access to justice. They argue that the OAT has two regular benches and two circuit benches but the Orissa High Court has one seat in Cuttack, thereby making the adjudicatory mechanism less accessible in terms of distance. They urge that the distance also makes the adjudicatory process less affordable because of the cost of travelling to Cuttack from different parts of the state.

112. The fundamental right of access to justice is no doubt a crucial and indispensable right under the Constitution of India. However, it cannot be interpreted to mean that every village, town, or city must house every forum of adjudication created by statute or the Constitution. It is an undeniable fact

[40] (2016) 8 SCC 509

that some courts and forums will be located in some towns and cities and not others. Some or the other litigants will be required to travel some distance to access a particular forum or court.

113. To reiterate the ruling in **Anita Kushwaha** (supra), adjudicatory mechanisms must be **reasonably** accessible in terms of distance. The High Court of Orissa has creatively utilised technology to bridge the time taken to travel from other parts of Odisha to Cuttack. Indeed, other High Courts must replicate the use of technology to ensure that access to justice is provided to widely dispersed areas. This will ensure that citizens have true access to justice by observing and participating in the proceedings before the High Courts in cases of concern to them. The submission made on behalf of the State of Odisha that compensation schemes may be used to alleviate financial hardships must also be taken into account. Further, legal aid programs sponsored by the state are also useful in addressing any financial hardships, as observed by this Court in **Anita Kushwaha** (supra):

> "40. Affordability of access to justice has been, to an extent, taken care of by the State-sponsored legal aid programmes under the Legal Services Authorities Act, 1987. Legal aid programmes have been providing the much needed support to the poorer sections of the society in accessing justice in courts."

114. Significantly, the Orissa High Court has established benches which will operate virtually in multiple cities and towns across the state. This negates the appellants' argument that the Orissa High Court is less accessible than the OAT. In fact, the number of virtual benches of the High Court is greater than the number of benches of the OAT. Litigants from across the state can access the High Court with greater ease than they could access the OAT.

115. Litigants may therefore approach the Orissa High Court for the resolution of disputes. The abolition of the OAT does not leave litigants without a remedy or without a forum to adjudicate the dispute in question. It is therefore not violative of the fundamental right of access to justice.

ix. <u>The State Government did not take advantage of its own wrong</u>

116. The appellants have argued that the State Government tried to take advantage of its own wrong by failing to fill the vacancies in the OAT and creating the conditions for the abolition of the OAT.

117. In paragraph 85 of this judgment, a portion of the note prepared by the General Administration Department, Government of Odisha dated 16 September 2015 is extracted. The note details the State Government's reasons for requesting the Union Government to abolish the OAT. The extract in paragraph 85 reflects data on the institution, disposal, and pendency of cases before the OAT for the year 2014. The State Government had not ceased to make appointments to the OAT at the time at which this note was prepared. At that time, the OAT was functioning as it usually did. The State Government found the OAT's usual performance (i.e., rate of disposal of cases) to be unsatisfactory. This aspect of the OAT's functioning played a role in the State Government's decision to abolish the OAT.

118. As noticed in the impugned judgment:

> "48. … **after** the decision of the Government of Odisha to abolish the OAT became public, it ceased to make appointments to fill up the vacancies in the OAT. This led to the OAT Bar Association, Cuttack filing W.P.(C) No. 15693 of 2017 in this Court seeking a

> mandamus to the Government of Odisha to fill up the vacancies in the OAT."
>
> (emphasis supplied)

Therefore, the State Government discontinued appointments to the OAT as a result of its decision to abolish the OAT and not vice versa. The appellants' averment confuses the sequence of events on which their argument is based. The State Government based its decision on an evaluation of the OAT's functioning in the year 2014, which was prior to its decision to abolish the OAT. Hence, there is no "wrong" which the State Government took advantage of. Similarly, we do not agree with the argument of the appellants that the Union of India had systematically made the OAT non-functional.

119. A related argument put forth by the appellants is that the State Government's failure to fill the vacancies in the OAT is a breach of Article 256 of the Constitution. Article 256 *inter alia* stipulates that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament. It is not necessary for us to address ourselves to this argument because the prayers in the Writ Petitions which resulted in the impugned judgment did not seek an adjudication as to the violation of Article 256. The *lis* before the Orissa High Court was limited to the validity of the decision to abolish the OAT. We therefore confine our judgment on appeal to the same issue.

x. <u>The failure of the Union Government to conduct a judicial impact assessment before abolishing the OAT does not vitiate its decision to abolish the OAT</u>

120. The appellants contend that the Union Government ought to have mandatorily complied with the directions of a Constitution Bench of this Court (of which one of us, Dr, DY Chandrachud, J was a part) in **Rojer Mathew** v. **South Indian Bank Ltd.**[41] prior to abolishing the OAT. The intervenor in this matter has also advanced the argument that the Union Government ought to have taken the permission of this Court before abolishing the OAT.

121. In **Rojer Mathew** (supra), this Court directed the Union Government to conduct a judicial impact assessment of certain tribunals. The operative part of this judgment (from the majority opinion of Ranjan Gogoi, CJI) in relation to judicial impact assessments is extracted below:

> "223.7. There is a need-based requirement to conduct "judicial impact assessment" of all the Tribunals referable to the Finance Act, 2017 so as to analyse the ramifications of the changes in the framework of tribunals as provided under the Finance Act, 2017. Thus, we find it appropriate to issue a writ of mandamus to the Ministry of Law and Justice to carry out such "judicial impact assessment" and submit the result of the findings before the competent legislative authority."

122. The direction to conduct a judicial impact assessment, therefore, was of a general nature. It was not geared towards proposals to abolish specific tribunals such as the OAT. Rather, a need was felt to analyse the consequences of the restructuring of tribunals by the Finance Act 2017 and a writ of mandamus was issued in this regard to the Ministry of Law and Justice. The judicial impact assessment was also directed to be conducted in order to better understand the case load, efficacy, financial impact, and accessibility

[41] (2020) 6 SCC 1

of tribunals at large, in addition to the filling of vacancies.[42] We note that neither the majority opinion authored by Ranjan Gogoi, CJI nor the opinions of Dr. DY Chandrachud, J. or Deepak Gupta, J. contain a direction to the effect that a tribunal shall not be abolished in the absence of a judicial impact assessment. In the present case, the Union Government issued the notification dated 2 August 2019 in a valid exercise of its powers under Section 21 of the General Clauses Act. The failure to conduct a judicial impact assessment does not vitiate its decision to abolish the OAT. Nothing in the judgment in **Rojer Mathew** (supra) also indicates the need for the Union Government to obtain the permission of this Court before abolishing the OAT.

123. However, this is not to say that the Union Government and more specifically, the Ministry of Law and Justice may dispense with the directions of this Court in **Rojer Mathew** (supra). The judgment was delivered on 13 November 2019. More than three years have since passed and the Ministry of Law and Justice is yet to conduct a judicial impact assessment.

124. An assessment such as the one directed to be conducted would only shed light on the impediments faced in the delivery of justice. The lack of an assessment precludes any well-informed, intelligent action concerning tribunals in the country (as a whole). This, in turn, has cascading effects for the citizenry, which is deprived of a well-oiled machinery by which it can access justice. We therefore reiterate the directions of this Court in **Rojer**

[42] See paragraphs 185, 222, 223.7, 234, 387 – 390.

Mathew (supra) and direct the Ministry of Law and Justice to conduct a judicial impact assessment at the earliest.

xi. Miscellaneous contentions

125. A miscellaneous contention remains to be considered.

126. The appellants have submitted that the so-called real reason for the abolition of the OAT is that many top-ranking officials faced charges of contempt before the OAT, for the reason that they had failed to implement its orders. It is averred that these officials influenced the State Government to abolish the OAT. The appellants argue that the State and Union Governments did not deny this allegation in their counter affidavits before the Orissa High Court and that this allegation is true because of 'non-traverse.'

127. There is nothing on record which indicates the truth of the appellants' allegations or even points to a possibility of the truth of such an allegation. It is entirely unsubstantiated and appears to be a last-ditch attempt to sustain their challenge to the abolition of the OAT. In any event, the averment belies logic. All cases pending before the OAT would be transferred to the Orissa High Court, without exception. This includes contempt petitions. Hence, it would not be possible for officials or others to avoid contempt proceedings as a result of the abolition of the OAT.

E. Findings and conclusion

128. In view of the discussion above, we hold that the abolition of the OAT was constitutionally valid for the following reasons:

a. The Writ Petitions instituted before the Orissa High Court were maintainable because the appellants claimed that their constitutional rights had been violated. They were therefore entitled to invoke the jurisdiction of the High Court under Article 226 of the Constitution;

b. Article 323-A does not preclude the Union Government from abolishing SATs because it is an enabling provision which confers the Union Government with the power to establish an administrative tribunal at its discretion (upon receiving a request from the relevant State Government in terms of the Administrative Tribunals Act). The legal and factual context of the power to establish administrative tribunals, the purpose of this power and the intention of the legislature establish that there is no duty to exercise the power conferred by the Administrative Tribunals Act, such that the enabling provision becomes a mandatory provision;

c. The Union Government acted in valid exercise of its powers when it invoked Section 21 of the General Clauses Act read with Section 4(2) of the Administrative Tribunals Act to rescind the notification establishing the OAT because the decision to establish the OAT was an administrative decision and not a *quasi-judicial* decision. Moreover, Section 21 of the General Clauses Act is not repugnant to the subject-

matter, context and effect of the Administrative Tribunals Act and is in harmony with its scheme and object;

d. The notification dated 2 August 2019 by which the OAT was abolished is not violative of Article 14 of the Constitution. The State Government did not consider any irrelevant or extraneous factors while arriving at the decision to request the Union Government to abolish the OAT. The decision to abolish the OAT is itself not absurd or so unreasonable that no reasonable person would have taken it;

e. The principles of natural justice were not violated because the class of people who were affected by the decision to abolish the OAT did not have a right to be heard. The public at large (or some sections of it) did not have a right to be heard before the policy decision was taken;

f. The Union Government did not become *functus officio* after establishing the OAT because the doctrine cannot ordinarily be applied in cases where the government is formulating and implementing a policy;

g. The notification dated 2 August 2019 is valid though it is not expressed in the name of the President of India because non-compliance with Article 77 of the Constitution does not invalidate a notification or render it unconstitutional;

h. The abolition of the OAT is not violative of the fundamental right of access to justice because the Orissa High Court will hear cases which were pending before the OAT prior to its abolition;

i. The State Government did not take advantage of its own wrong because it stopped filling the vacancies of the OAT only after deciding to abolish it. It did not rely on the vacancies (and the consequent increase in pendency) created by its inaction to abolish the OAT; and

j. The failure of the Union Government to conduct a judicial impact assessment before abolishing the OAT does not vitiate its decision to abolish the OAT because the directions in **Rojer Mathew** (supra) were of a general nature and did not prohibit the abolition of specific tribunals such as the OAT in the absence of a judicial impact assessment. However, the Ministry of Law and Justice is directed to conduct a judicial impact assessment as directed by this Court in **Rojer Mathew** (supra).

129. The challenge to the constitutional validity of the impugned notification dated 2 August 2019 by which the OAT was abolished is rejected. The judgment of the High Court shall stand affirmed in terms of the conclusions recorded above. The appeals are dismissed.

130. Pending applications, if any, stand disposed of.

…….....CJI.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[Hima Kohli]

New Delhi;
March 21, 2023