Central Administrative Tribunal
Principal Bench
New Delhi

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O.A. No. 1917/98 & other connected O.As Decided on 9.8.99

Babu Ram Jain

.... Applicant

(By Advocate: Shri R. Venkatramani
Shri P.C. Jain, Mrs. Meera Chhiber
& Shri G.D. Gupta

Versus

Union of India & Others .... Respondents

(By Advocate: Shri C.S. Vaidyanathan, ASG
Shri N.S. Mehta, Shri V.S.R. Krishna, Shri H.Chandrasheka
Shri H. Chandrashekharan, Shri C. Hari Shankar &
Shri Rupesh Kumar Sharma

CORAM

HON'BLE MR. S.R. ADIGE, VICE CHAIRMAN (A)

1. To be referred to the Reporter or Not? YES

2. Whether to be circulated to other outlying benches of the Tribunal or not ? No.

(S.R. Adige)
Vice Chairman (A)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

(40)

New Delhi, dated this the 9th AUGUST 1999

HON'BLE SHRI S.R. ADIGE, VICE CHAIRMAN (A)
HON'BLE MRS. LAKSHMI SWAMINATHAM, MEMBER (J)

O.A. No. 1917 of 1998

Babu Ram Jain,
Member,
Income Tax Appellate Tribunal,
S/o Shri Siri Ram Jain,
R/o Flat No. 8, House No. 9,
Pusa Road,
New Delhi. .... Applicant

Versus

1. Union of India,
through its Secretary
Ministry of Law and Justice
Dept. of Legal Affairs
Shastri Bhawan
New Delhi.

2. The President
ITAT
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020.

3. The Registrar
Income Tax Appellate Tribunal
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020. Respondents

2. O.A. No. 1918/98

Kishore Kumar Gupta
Shri Chand Biharilal Gupta,
R/o Flat No. 11, G-41 Connaught Place
New Delhi-110001. Applicant

Versus

Union of India,
through Secretary,
Ministry of Law & Justice,
Department of Legal Affairs,
Shastri Bhawan,
New Delhi-110 001. Respondnets

3. O.A. No. 1923/98

Balwant Rai Mittal,
S/o Late Shri R.D. Mittal,
R/o 1975 Kucha Chalan,
Khari Baoli,
Delhi-110006. Applicant

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Versus

1. Union of India,
through its Secretary
Ministry of Law and Justice
Dept. of Legal Affairs
Shastri Bhawan
New Delhi.

2. The President
ITAT
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020.

3. The Registrar
Income Tax Appellate Tribunal
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020. Respondents

4. O.A. No. 1924/98

Girish C. Gupta
S/o Shri Mitthan Lal Gupta,
R/o A-43 South Extention, Part II,
New Delhi.

Applicant

Vs.

1. Union of India,
through its Secretary
Ministry of Law and Justice
Dept. of Legal Affairs
Shastri Bhawan
New Delhi.

2. The President
ITAT
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020.

3. The Registrar
Income Tax Appellate Tribunal
Old CGO Building
Maharashi Karve Road
Mumbai - 400 020. Respondents

5. O.A. No. 1944 of 1998

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Devender Kumar Tyagi,
S/o Shri R.S. Tyagi,
Member, Income Tax Appellate Tribunal,
F-143, Sarita Vihar,
New Delhi-110044. .. Applicant

Versus

1. Union of India through
its Secretary,
Ministry of Law and Justice,
Dept. of Legal Affairs,
Shastri Bhawan,
New Delhi.

2. The President,
Income Tax Appellate Tribunal,
Old CGO Building,
Maharishi Karve Road,
Mumbai-400020.

3. The Registrar,
Income Tax Appellate Tribunal,
Old CGO Building,
Maharishi Karve Road,
Mumbai-400020. ... Respondents

Advocates: Shri R. Venkatramani, Sr. Counsel for applicant in OA-1917/98, Shri P.C. Jain, Sr. Counsel for applicant in OA-1918/98, Mrs. Meera Chhibber for applicant in OA-1923/98 and OA-1024/98 and Shri G.D.Gupta with Shri Suman Doval for applicant in OA-1944/98.

Shri C.S. Vaidyanathan, Addl. Solicitor General along with Shri N.S. Mehta and Shri VSR Krishna for Respondent No.1
Shri H. Chandrashekharan with Shri C. Hari Shankar and Shri Rupesh Kumar Sharma, Sr. Counsel for Redspondent No. 2 & 3.

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ORDER

By Hon'ble Shri S. R. Adige, Vice-Chairman (A):

1. As these five OAs involve common questions of law and facts, they are being disposed of by this common order.

2. In each of these OAs, applicants impugn Departmentof Legal Affair's order dated 30.9.1998 (specimen copy of F.No. A-12023(25)/97-Admn. III(LA) dated 30.9.1998 at Annexure 'X' of OA No. 1917/98) terminating their services as Members, Income Tax Appellate Tribunal (IIAT) with immediate effect for being in excess of the advertised vacancies, upon payment of a sum equivalent to the amount of their pay and allowances for a period of one month, calculated at the same rate at which they were drawing the same immediately before termination of their appointment.

3. These OAs which had initially been filed when applicants were apprehending termination of their services, came up before a Division Bench of the Tribunal on 5.10.1998 on which date notices were ordered to be issued to the respondents returnable within four weeks, with 2 weeks for rejoinder thereafter. A prayer was made in the OAs for an interim direction to restrain respondents from taking any adverse action against applicants and to maintain status quo. A short notice was also issued to the respondents on the prayer of interim relief, returnable within 2 weeks. Meanwhile they were directed to maintain status-quo as of 5.10.1998. That interim order was extended from time to time. Thereafter official respondents filed MAs No. 2151/98 in OA No. 1917/98; MA 2153/98 in OA 1918/98; MA 2152/98 in

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OA 1923/98: MA 2154/98 in OA 1924/98 and MA 2155/98 in OA-1944/98 praying for vacation of interim o9rder. These MAs came up before another Division Bench of Tribunal on 30.10.98 who after hearing both parties dismissed these MAs for vacation of interim order, vide detailed order dated 6.11.98.

4. Against that order, the Union of India filed Civil Writ Nos. 5786 and 6604/98 in Delhi High Court, who by their orders dated 9.4.99 set aside the impugned order dated 6.11.98, by which the prayer made in the aforesaid MAs for vacation of the interim order was dismissed. Against that order the present applicants filed SLPs in the Hon'ble Supreme Court, who on 29.4.99 while dismissing the SLPs, directed that all these OAs be heard and disposed of on merit preferably within 2 months.

5. Meanwhile as respondents prior to the Tribunal's order dated 5.10.1998 had issued the impugned order dated 30.9.1998 terminating applicants' services, they filed MAs praying to be allowed to amend the OAs to impugn the order dated 30.9.1998 and to bring certain additional facts on record, which after hearing both parties, were allowed.

6. Respondents have filed their replies to the OAs, and applicants their rejoinder to those replies.

7. Admittedly Government of India in the Law Ministry (Department of Legal Affairs) have framed the ITAT Members (Recruitment & Conditions of Service) Rules, 1963 under Article 309 of the Constitution which have been amended from time to time. Rule 2 defines a Member to be either an

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Accountant Member (A.M.) or a Judicial Member (JM). Rule 3 lays down the qualifications for appointment as a Member and Rule 4 lays down the method of recruitment of Members. This recruitment is to be on the recommendation of a High Level Selection Board, whose composition is itself prescribed in the Rules.

8. In September, 1996 Respondent No.1 advertised 18 vacancies of Members in ITAT including 8 vacancies of JMs and 10 of AMs. Out of the 8 vacancies of JMs, 2 were reserved for SC; 1 for ST and 1 for OBC. Similarly out of 10 vacancies of Ams, 2 were reserved for SC; 2 for ST and 1 for OBC. As per avermentns of Respondent No.1, this advertisement had taken into consideration all vacancies, existing as well as anticipated uptil 31.12.98. The existing vacancies in respect of JMs and AMs were 4 each respectively, while the anticipated vacnaices uptil 31.12.98 in respect of JMs and AMs were 4 and 6 respectively. The advertisement, however, mentioned that the number of vacancies was approximate and was liable to alteration.

9. As per prescribed procedure, the High Level Selection Board made its recommendations which are contained in its report dated 27.8.97. This Selection Board was headed by Hon'ble Mr. Justice M.M. Punchhi, Judge, Supreme Court of India (as he then was) and had as its members, the Law Secretary, the President, ITAT and a member of the Law Commission of India. A perusal of the report reveals that the Selection Board noticed that Respondent No.1 had issued advertisement inviting applications for filling up 8 posts of JMs and 10 posts of AMs which included vacancies anticipated during the calendar years 1997 and 1998. It also noticed that out of 8 posts of J.Ms 2 were reserved for SC; 1

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for ST and 1 for OBC while out of 10 posts of AMs: 2 were reserved for SC; 2 for ST and 1 for OBC. It also noticed that the number of vacancies were liable to alternation.

10. The Selection Board recommended 14 candidates (8 as JMs and 6 as AMs) in the select list under different categories against the fixed number of 18 advertised vacancies. It could not find suitable candidates in respect of 4 reserved vacancies in the category of Accountant Member. In addition it prepared a panel or waiting list of 11 candidates (5 as JMs and 6 as AMs) as is clear from Appendix 1 to 8 of the report. The combined inter se seniority of those on the select list as well as those on the panel was given in Appendix 9 of the Report.

11. The recommendations contained in Appendix 1 to 8 (Supra) are reproduced below in chart form.

JUDICIAL MEMBER (8)

SC (2)	ST (1)	OBC (1)	General (4)
1. Ram Bahadur 2. N.K.Karnail	1. Dharam Raj Singh	1. Sardar Akhtar	1. Ramesh Tolani 2. Satish Chandra 3. M.L. Sahni 4. Swatantra Singh

SC Panel	ST Panel	OBC Panel	General Panel
NIL	H. Sausarkar	NIL	1. T.K. Sharma 2. Girish Chand Gupta 3. B.R. Mittal 4. D.K. Tyagi

ACCOUNTANT MEMBER (10)

SC (2)	ST (2)	OBC (1)	General (5)
1. Mohan Singh	None appeared	sole candidate	1. O.K. Narayanan 2. Mrinal K. Debnath

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		not found fit	3. N.B. Sankar 4. T.J. Joice 5. T.N. Chopra
Panel	Panel	Panel	Panel
NIL	NIL	NIL	1. Parveen Kumar Bansal 2. V.D.Wakharkar 3. Kishore Kumar Gupta 4. Ved Kumar Jain 5. Manoj K. Sarkar 6. Babu Ram Jain

12. Meanwhile owing to the increased workload in the ITAT, which the 38 existing Benches were finding difficult to cope with, a proposal for creation of additional Benches had been under Respondents' consideration for some time. Eventually upon receiving Government's approval, 15 additional Benches were sanctioned w.e.f. 1.4.97 vide Legal Affairs' Department letter dated 5.3.97.

13. Offers of appointment were issued to all the 14 candidates in the select list and the 11 in the panel (specimen copy dated 20.11.97 at Annexure II in O.A. No. 1917/98). Upon acceptance by them and completion of pre-joining formalities, including medical examination etc. appointment letters were issued to all of them (specimen copy dated 10.12.97 at Ann. III in O.A. No. 1917/98). From the aforementioned chart it is clear that out of 8 candidates in select list for JM, 4 were general candidates, and similarly out of 6 candidates in select list for AM, 5 were general candidates. The candidates appointed were however 24 in all including 12 JMs of whom 8 were general candidates and 12 AMs of whom 11 were general candidates (Shri V.K. Jain at Sl. No.4 in the panel of AMs had resigned).

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14. Upon receipt of appointment letters the appointees reported at the designated Benches for their two months orientation/training upon which their posting orders were issued (specimen copy dated 16.2.98 at Annexure 5 of O.A. No. 1944/98).

15. It is not denied that pursuant to those posting orders, applicants commenced discharging their statutory functions under the relevant provisions of the Income Tax Act, and continued to do so till their services were terminated by impugned orders dated 30.9.98. Meanwhile respondents had also issued a composite seniority list of all Members of ITAT on 17.4.98 which included the names of applicants.

16. Before we discuss the grounds taken by applicants to challenge the impugned orders, it would be useful to summarise the notes and orders leading upto the appointment of applicants as Members, ITAT and the subsequent termination of their services, as contained in relevant files maintained by respondents, which we have perused.

17. The notings in Legal Affairs Department's file No. F No. A-12023(11)/97-Admn. III (LA) reveal that a note was submitted to the then MOS (LJ) on 9.9.97, in which after recalling that a Selection Board had been constituted for selecting suitable candidates for appointment as JMs and AMs in ITAT, attention was invited to the Selection Board's recommendations (a copy of whose report dated 29.8.97 was placed on that file)and acceptance was recommended of the

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report before submission of the papers to Appointments Committee of the Cabinet. Furthermore the note recommended as follows:

> "It may please be recalled the while issuing the advertisements for these selections, the question of creation of 15 additional Benches in the Tribunal was under active consideration of the Government. However, necessary approval of the Cabinet was obtained and sanction orders for the creation of these additional Benches was issued subsequent to the issue of the advertisement. In view of this and considering the fact that the next Selection Board may take considerable time for presenting its report, we may operate the present panel of names (to the extent candidates are available) for filling up the newly created vacancies also. The remaining vacancies are being advertised separately.
>
> MSLJ may kindly see for approval".

18. Upon approval of the aforesaid note on 10.9.1987, approval of Appointments Committee of the Cabinet was sought for and obtained for appointment of the candidates as JMs/AMs.

19. Upon receiving ACC's clearance, and upon completion of other prejoining formalities individual offers of appointment were issued to the selected candidates, and they were asked to convey their willingness to join on the terms and conditions contained therein.

20. A perusal of ITAT file No. P/45/97 (I & II) reveals that Legal Affairs Department sent letter dated 24.11.97 to the President ITAT informing him that 8 of the appointees including applicants S/Shri B.R. Jain, B.R.Mittal, G.C. Gupta and D.K. Tyagi were ready to join as Members, ITAT and proposed that these appointees be posted at Delhi for their 2 months orientation/training before posting orders were issued by President ITAT, and he was requested to

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confirm. However, in his reply dated 27.11.97 the President ITAT drew attention to the Bombay High Court's interim order dated 6.3.97 in WP No. 2350/96 directing that in respect of the first posting of a newly appointed Member, the President ITAT would intimate to Respondent No.1 (UOI) and Respondent No.2 (Law Secretary) as to which Bench such Member was to be posted, on receipt of which Respondents No.1 and 2 would pass orders accordingly. He further stated that this interim order of the Bombay High Court had been adopted by the Hon'ble Supreme Court in their own orders dated 31.3.97 and 9.5.97 and requested for intimation of the names of the appointees who had accepted the offer of AM/JM to enable him to intimate to the Deptt., the Benches to which they were to be assigned for their 2 months' orientiation/training, followed by their posting. The President ITAT followed this up with another letter dated 10.12.97. Meanwhile upon receiving information of the acceptance of the appointment offer from time to time from the appointees themselves, or from the Deptt. and completion of their pre-joining formalities (Medical exam., police verification, vigilance clearance etc.) roughly between early November, 1997 and late January, 1998, the President ITAT intimated to the Deptt. as to which Bench they had been assigned for their 2 months' orientiation/training followed by posting, on receipt of which the Department informed the appointees to report for duty accordingly at the designated Bench for which an outer time limit was also set.

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21. ITAT File No. P/45/97(11) further reveals that the President ITAT received a petition on 13.2.98 purportedly signed by one R.C. Sharma, Advocate levelling serious allegations in the matter of appointment of AM's/JM's in excess of the advertised vacancies.

22. On 16.2.98 the President ITAT wrote to the Department of Legal Affairs seeking certain clarifications. He pointed out that in the advertisement inviting applications for 8 posts of Judicial Members and 10 posts of Accountant Members in the ITAT, it had been stated that the number of vacancies were approximate and were liable to alteration, but no notification altering the number of vacancies had been issued. It was not known at the time of issue of the advertisement whether Govt. was going to sanction any additional posts by increasing the number of Benches. Such sanction for increase in the number of Benches by 15, in addition to the existing strength of 38 Benches came only pursuant to the letter dated 5.3.97 effective from 1.4.97. The letter went on to add that consequent to the sanction of 15 additional Benches w.e.f. 1.4.97, a fresh advertisement had been issued on 3.9.97 inviting applications for six general posts of JM's and five general posts of AM's (11 in all) in ITAT, and by another letter dated 12.9.97, applications had been invited for 7 reserved posts of JM's Members and 11 reserved posts of AM's (18 in all) in ITAT. The letter stated that after the sanction of 15 additional Benches w.e.f. 1.4.97, a total of 29 vacancies of AM's/JM's were advertised as aforesaid, for being filled up, and the selection process had been initiated, but it still remained to be completed. The letter added that appointment of 24 members had been communicated to him 21.11.97 and 21.1.98

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through 4 references, but the total number of vacancies existing out of 76 posts sanctioned in 1972, was only 18 as of that date. One more post of A.M. would fall vacant consequent to a retirement on 11.3.98, raising the number of vacancies to 19. Thus, there was an excess of 5 candidates and he sought an immediate clarification as to how these additional Members were to be treated. Were they to be appointed in the likely vacancies which may arise among the 76 members which was the sanctioned strength of 1972 or were they to be posted against 29 members for which advertisements were issued vide letters dated 3.9.97 and 12.9.97 ?

23. A copy of this D.O. letter dated 16.2.98 was also sent by President ITAT with a covering letter dated 23.2.98 to the P.S. to Law Minister enclosing therewith a copy of a letter from one Shri Hira regarding his alleged non inclusion from the select list.

24. On 2.3.98 the President ITAT sent a reminder to the Department.

25. On 5.3.98 the Sr. Vice President ITAT recorded a note that he had met the then Law Secretary in the matter of clarification regarding appointment of new Members and their first posting at different places. The note recorded that the Law Secretary had stated that the appointment of new Members had been made in the light of the recommendations of the Selection Board and the panel of Members drawn up by it, and the posting of these Members was to be done by the President at the stations where there were existing

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vacancies. The note further recorded that it had been made clear that no clarifications were being sent in this regard as there was no need for the same.

26. The President ITAT recorded his initials on the note on 9.3.98.

27. On 30.3.98 the President ITAT addressed a detailed letter to the Cabinet Secretary. In this letter he pointed out that when selection took place for the 18 posts advertised by letter dated 9.9.96, there was no inkling that the number of Benches were going to be increased. The Selection Board as usual prepared a panel in which not only were selections made for the 18 advertised posts, but also 4-5 candidates were kept in the waiting list so that in case any of the regularly selected candidated for whatever reason failed to take up the appointment, the wait listed persons could be absorbed. He pointed out that the strength of the posts of Members had increased by 30 against which two notification had been issued, one dated 3.9.97 inviting applications for 6 general posts of JM's and 5 general posts of AM's and the other dated 12.9.97 for 7 reserved posts of JM's and 11 reserved posts of AM's i.e. 29 in all. Thus it was clear that the posts sanctioned for these 15 addl. Benches was intended to be separately treated by Govt. and no mixup of the old and new posts were allowable. The letter went on to add that against the 18 old vacancies, more than 18 persons could not be taken, unless some of the newly created vacancies (i.e. these posts created by letter dated 5.3.97 w.e.f. 1.4.97) were added to the 18 old vacancies but this exercise was never done. The letter pointed out that adjusting 24 persons against 18 vacancies which existed in

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the old sanctioned strength of 76 posts of Members was not possible, but in order to show compliance of the Bombay High Court's interim order dated 6.3.97, he was obliged to show the places of training and posting of all the 24 persons who had been appointed by Govt. The letter went on to add that he had sought clarification from the Department of Legal Affairs vide his letter dated 16.2.98, but no clarification had been given, and when he had deputed the Sr. Vice President ITAT to contact the Department for clarification, he had been given the reply already extracted in para 25 above. He requested the Cabinet Secretary to call for the file and send necessary clarifications immediately. A copy of this letter was also sent to the Sr. Vice President ITAT, New Delhi with the request to call on the Cabinet Secretary, explaining the urgency of the matter and report back to him.

28. From a perusal of Deptt. of Legal Affairs File No. F.No. A-12023 (ii)/97-Admn.III (LA) it is clear that upon receipt of copy of President, ITAT's letter dated 30.3.98 addressed to Cabinet Secretary, vide J.S. Cabinet Secretary's D.O. Letter dated 17.4.98, and further Memo dated 20.4.98 calling for a note on the subject, the matter was examined in that Department and a note was submitted in which it was stated that the advertisement issued in September, 1996 inviting applications for certain (number was not specified) vacant posts of J.M. and A.Ms in ITAT had taken into consideration all vacancies existing and anticipated upto end December, 1998 and also at the time of issue of the said advertisement a proposal for the creation of 15 additional Benches was under active consideration. This proposal involved creation of 15 posts each of J.Ms and AMs

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and since no final decision had been taken by Govt. at the relevant time, the advertisement categorically stated that the number of vacancies was only approximate and was liable to alteration. Subsequently the Cabinet had approved the creation of 15 additional Benches in January, 1997 and orders for creation of these 15 additional Benches (15 additional posts each of J.Ms and A.Ms) were issued on 5.3.97 effective from 1.4.97. Meanwhile the President, ITAT had been separately advised by way of a confidential letter about Govt's approval for the creation of the new Benches and was also requested to take advance action so that these Benches could be operative from the begining of the financial year 1997-98 i.e. from 1.4.97. After referring to the constitution of the High Level Selection Board, the note went on to add that the names of the candidates recommended by it were placed before the ACC, and this time also the fact of creation of 15 additional Benches was brought to the notice of Law Minister and Appointments Committee of the Cabinet, and Government had taken a conscious decision to operate the panel of names to the extent candidates were available for filling up the newly created vacancies, and for advertising the remaining vacancies separately. Thus a total number of 24 candidates as recommended by the Selection Board were approved by A.C.C for appointment. The remaining vacancies along with the vacancies anticipated during the years 1998 and 1999 were advertised separately after completion of the aforesaid process. The note went on to add that in terms of the Bombay High Court's interim order dated 6.3.97 the question of determination of the strength of the Members in the Tribunal and the processing of appointments against vacant posts was exclusively within Govt's jurisdiction and the President, ITAT had no jurisdiction to interfere in the

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same. In conclusion it was stated that Cabinet Secretary could be informed accordingly and also requested to instruct President, ITAT from making infructuous and misleading representations to the Government.

29. This note was approved by the then Law Secretary on 29.4.98.

30. On 18.5.98 the President, ITAT met the new Law Minister and submitted to him a note seeking clarification as to how the 24 Members to whom appointment letters had been given could be adjusted. This note contained a recital of what had been stated by him before and invited attention to the earlier correspondence in this regard and mentioned that despite the urgency of the matter, he had not received any clarification so far.

31. On receipt of this note, the Legal Affairs Department put up a note to him in which after briefly recounting the facts of the case it was pointed out that out of the 18 posts of Members (8 J.M.s and 10 A.M.s) originally advertised, the reservation position was as follows :-

Category	SC	ST	OBC	General
J.M.	2	1	1	4
A.M.	2	2	1	5

As against this the number of candidates appointed against the various categories were

Category	SC	ST	OBC	General
J.M.	2	2	0	8
A.M.	1	0	0	11

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If the advertisement had originally been issued for filling up 24 posts as has been done (12 J.M.s and 12 A.M.s) the reservation position would have been

Category	SC	ST	OBC	General
J.M.	3	1	2	6
A.M.	2	2	2	6

The note went on to add that while it was true that the Selection Board could not recommend suitable candidates in respect of a number of reserved posts, especially in the category of A.M.s, it appeared that this aspect was not considered at the time of finalisation of these appointments, and no readvertisement of the reserved posts appears to have been issued seperately, before making appointments under general category. Thus there appeared to have been a procedural lapse in processing these appointments. (emphasis supplied). As regards the legality of appointments of six more candidates in excess of the 18 vacancies (existing and anticipated) originally advertised, attention was invited to the Hon'ble Supreme Court's ruling in Ashok Kumar and others Vs. Chairman, Banking Services Recruitment Board & Others JT 1995 (5) SC 276 in which it had been held that recruitment of candidates in excess of the notified vacancies was violative of Article 14 & 16 of the Constitution, and it was stated that there undoubtedly had been an irregularity and illegality in the matter of appointments of candidates in excess of the 18 advertised vacancies(emphasis supplied). However, as the appointments had already been made and the candidates had joined, the matter was placed before the Law Minister for such orders as may be considered appropriate.

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32. This note was approved by the Law Minister on 22.5.98.

33. Thereupon a referral note dated 7.7.98 was prepared by the Department of Legal Affairs for the opinion of the Attorney General of India, in which it was conceded that in view of the aforesaid ruling of the Hon'ble Supreme Court, the legality of appointments in excess of the advertised vacancies could be questioned (emphasis supplied). In this note two questions were framed for the Attorney General's opinion:

1) Whether the appointments of the candidates in excess of the advertised number of vacancies under various categories was legally tenable.

2) If not, whether any show cause notice was necessary to be given to them before their appointments were terminated.

34. Attorney General on 21.7.78 opined that:

1) The appointments made in excess of the advertised number of vacancies had been deprecated and was unconstitutional as held by the Hon'ble Supreme Court in Ashok Kumar's

case (supra) & since they were legally untenable, they were liable to be terminated.

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2) No show cause notice was necessary to be given to persons whose appointments were illegal. However they should be informed of the reason why their appointments were being terminated. In the present case there was no removal or dismissal from service but correction of an illegalities whose necessary consequence was termination of employment.

35. On receipt of this opinion a proposal was submitted by the Legal Affairs Department on 22.7.98 to the Law Minister, for seeking approval of the Appointments Committee of the Cabinet for termination of the appointment of those persons who had been appointed in excess of the advertised number of vacancies, including the 5 applicants before us. Approval was accorded by the Law Minister on 22.7.98 itself and upon securing approval of the Appointments Committee of the Cabinet their services were terminated by impugned order dated 30.8.98, against which these OAs have been filed.

36. We have heard learned counsel for the applicants as well as for the respondents (including those who appeared for the Union of India as well as on behalf of the ITAT) at considerable length, spread over several sittings. Both sides

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have also filed detailed written submissions of arguments pressed during hearing, which have been taken on record. We have given the matter our careful consideration.

37. The impugned orders dated 30.8.98 have been challenged as being illegal and arbitrary, both on grounds of substance as well as on ground of procedure. Furthermore the impugned order have been challenged on grounds of malafide, and also of being unfair and unequitable, and thus comprehensively violating Articles 14 & 16 of the Constitution, necessitating judicial intervention.

38. On grounds of substance, our attention has been invited to the advertisement issued in Sept. 1996 inviting applications for 18 vacancies of Members in ITAT. Much stress has been laid on the fact that this advertisement itself stated that this figure of vacancies was approximate, and was liable to alteration. It is emphasised that this provision in the advertisement was deliberately inserted by respondents, having regard to the past experience of difficulties faced by them in filling up vacancies for long periods of time, and provided them the necessary flexibility to make appointments in excess of the advertised figure against general vacancies that hade remained unfilled or had become available for one reason or the other during the 18 months life of the panel. It has been argued that with the creation of the 15 additional Benches w.e.f. 1.4.97 the question of availability of vacancies was not in issue and in fact these additional vacancies had been anticipated by the High Level Selection Board when it made its recommendations as well as by Government when it took a conscious decision to appoint candidates in excess of the figure of 18. In this connection

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it has been asserted that any distinction between the candidates in the select list and those in the panel is itself, illegitimate and the candidates named in the panel had an equal right to be appointed against available vacancies as those named in the select list. Reliance has been placed on various rulings to support those arguments, including R.S. Mittal Vs. U.O.I. 1995 Supp. 2 SCC 230; Prem Singh Vs. HSED 1996 (4) scc 319. Benny T.D. & ors. Vs. Registrar, Cooperative Societies 1998 (5) SCC 269 and U.O.I. Vs. I.S.Khatri 1992 Supp. 3 SCC 84.

39. It is true that the Sept. 1996 advertisement inviting applications for 18 vacancies of Members ITAT stated that this figure was approximate and was liable to alteration but the High Level Selection Board in its Report dated 27.8.97 while noticing this ~~sense~~ sentence, accepted the figure of 18 vacancies as inclusive of all existing and anticipated vacancies uptil 31.12.98. It is against this figure of 18 vacancies that the Selection Board ~~has~~ recommended placement of 14 candidates in the select list and 11 candidates in the panel or waiting list. This Selection Board was a very high level body and we have no reason to doubt that the figure of 18 vacancies correctly represented the number of existing/anticipated vacancies uptil 31.12.98. From the notings contained in respondents files referred to in earlier paras, it is clear that the candidates in excess of the advertised vacancies were appointed not against existing/anticipated vacancies, but against the vacancies created consequent to the setting up of the additional Benches w.e.f. 1.4.97. The fact that these additional vacancies were not anticipated either by the Selection Board, or indeed by Respondents when they issued the advertisement in September, 1996 is confirmed

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from the notings in respondents files already referred to, and indeed from the President, ITAT's own letter dated 16.2.98 who was a Member of the Selection Board. In this connection a perusal of the Selection Board's Report for 1995-96 is instructive. That report specifically mentioned that after the vacancies had been notified, the vacancy position had undergone a change, and then proceeded to make its recommendationsw in the light of the changed situation. No such exercise was made in the present Report, because the Selection Board did not include the vacancies created w.e.f. 1.4.97 consequent to the setting up of the additional Benches, when it made its recommendations, and neither in fact did Respondent No.1 when it issued its advertisement in September, 1996. This point is clinched by the fact that Respondent No.1 issued advertisements separately inviting applications for these vacancies created consequent to the setting up of 15 additional Benches w.e.f. 1.4.97 as pointed out by President, ITAT in his correspondence with the Legal Affairs Department.

40. We have therefore no doubt in our mind that the vacancies created w.e.f. 1.4.97, consequent to the setting up of the 15 addtional Benches, were neither anticipated by the Selection Board when it made its recommendations, and nor indeed by Respondent No.1 when it issued its advertisement in September, 1996. The number of vacancies advertised therein was 18, and manifestly applicants were appointed in excess of the 18 advertised vacancies which had taken into account all the existing and anticipated vacancies uptil 31.12.98. The law is well settled that appointments made in excess of the advertised vacancies is violative of Article 14 and 16 of the Constitution. Besides the Hon'ble Supreme Court's ruling in

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Ashok Kumar's case (Supra) upon which respondents rely heavily, other rulings cited by them include Madan Lal Vs. State of J & K (1995) 3 SCC 486: State of Haryana Vs. Ajay Walia (1995) 6 SCC 259 and State of Bihar Vs. M.B. Singh (1994) Supp. 3 SCC 308. In so far as the rulings relied upon by applicants are concerned, Prem Singh's case (Supra) relied upon by them, itself states that appointments could be made in excess of the advertised vacancies, only in rare, and emergent and exceptional case and in pursuance of a policy decision. This decision has been reiterated in Surinder Singh Vs. State of Punjab (1997) 8 SCC 488 and K.K. Sharma Vs. Y.K. Gupta (1998) 3 SCC 45. In the present cases before us, no such emergency or exceptional reasons have been brought to our notice.

41. Nor indeed is there merit in the attempt on the part of applicants' counsel to argue that no distinction can be made between those 14 candidates who were placed by the Selection Board in the select list, and those 11 candidates who were placed in the Panel or waiting list. Respondents in our view are entirely correct when they argue that candidates from the panel could be considered for appointment only in the event of candidates in the select list not being appointed on account of non-clearance from vigilance angle, or on medical examination etc., or if they declined to join the Tribunal, or left the Tribunal immediately upon non-joining. Persons in the panel cannot be appointed against vacancies which arose subsequent to the advertised vacancies. In this connection Respondents rely on S. Dash Vs. Union of India 1991 (3) SCC 47 and Gujarat State Dy. Ex. Engineer Association Vs. State of Gujarat 1994 Supp. (2) SCC 591 which fully supports this view.

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42. In this connection applicants' counsel have argued strenuously that the life of the panel was for 18 months and would have expired only around mid January, 1999. They have relied upon certain instructions issued by the Govt. of India for Central Govt. Employees in the matter of DPCs and drawing up of select lists/panels. Respondents' counsel on the other hand have urged that these instructions have no relevance to the Select Lists/panels drawn up by the High Powered Selection Board presided over by a sitting Supreme Court judge, for vacancies of Members in ITAT and it is contended that if this argument was upheld it would lead to complications in regard to Select Lists/panles drawn by UPSC for services/posts where examinations are held annually. Indeed respondents have contended that the validity of the panel (waiting list) dated 27.8.97 came to an end when the next advertisement for 29 vacancies was issued in September, 1997 as pointed out in President, ITAT's letters referred in Paras 22 and 27 above. Respondents have sought support from the ruling in State of Bihar Vs. Mohd. Kalimuddin 1996 (2) SCC 7 wherein it has been held that where under the statutory rule, the period of life of a select list has already expired, it would be illegal to continue the select list and have contended that the same would be applicable for a panel, which in any case does not stand on a higher footing than a select list.

43. In our view applicants challenge to the impugned order dated 30.8.98 on grounds of substance fails because belonging as they all do to the general category, and with a place not in the select list but in the panel or waiting list, their appointment would have been legal only if they had been appointed in place of a person from the select list dated 27.8.97 within the same category (and as per their own panel

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position), who upon appointment either did not join the Tribunal or left soon after joining. Applicants have not succeeded in establishing that their appointments were made in the aforesaid circumstances.

44. We next come to the grounds of procedure taken by applicants' counsel. It has been argued by them that applicants should have been given an opportunity to show cause and be heard before terminating their services by impugned orders dated 30.8.98, and the failure of respondents to do so is fatal to the legality of these orders, on account of being violative of the principles of natural justice. Various rulings have been relied upon to support this argument including S.L. Kapoor Vs. Jagmohan & others (1980) 4 SCC 379; R.R. Verma & Others Vs. UOI 1980 (3) SCR 478; and Basudeo Tiwary Vs. Sikanku University & Others JT 198 (6) SC 644.

45. Respondents on the other hand have submitted that both in the advertisement as well as in the offers of appointment it was clearly specified that the appointments were temporary and the appointees were on probation. Rule 6(3) ITAT (Recruitment & Conditions of Service) Rules specifically provides that at any time during the period of probation and without any reason being assigned, such person may be discharged from service as Member. Reliance has also been placed by them on Rule 5 (1) CSS (Temporary Service) Rules which provide for termination in service of a temporary appointee by a notice in writing with one month's notice, or pay and allowances in lieu thereof, which in the cases before us was paid to appolicants. It is emphasised that the

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termination was not by way of punishment of any kind and it is not in dispute that applicants were undergoing probation.

46. We have already seen that the appointments of applicants which were temporary and on probation, were made in excess of the advertised vacancies and were therefore ab initio, illegal and void as was conceded by respondents themselves in their notings preceding the termination of applicants' services. The appointments themseves being illegal, it cannot be said that respondents have violated the principles of natural justice, in terminating those appointments without giving applicants an opportunity to show cause, because no discretion was available to respondents except to terminate those appointments. In this connection the follow Para in S.L. Kapoor's case (Supra) relied upon by applicants themselves is extremely relevant.

> "Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference. the admitted or indisputable facts speaking or themselves. Whereas on the admitted or indisputable facts only one conclusion is possible and under the law only penalty is permissible, this Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts donot issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly and penalties discretionary."

47. In the present case, applicants having been appointed in excess of the advertised vacancies, those

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appointments were ab initio vide Ashok Kumar's case (Supra) and the conclusion that those appointments had to be cancelled could not be in controversy. Respondents had no discretion except to terminate those appointments, and even had applicants been given an opportunity to show cause, the end result could legally have been no different. That being so, and further more applicants being only temporary and on probation at the time the impugned orders were passed, and the orders themselves being perfectly innocuous and without stigma, we are unable to hold that there has been any procedural infirmity while issuing the same.

48. Coming to grounds of malafide, it has been alleged in Para 4.27 of O.A. No. 1917/98 that the decision of termination had been taken under the cloak of some execuse relating to number of vacancies and strength of panel, but really owing to some extraneous considerations. It has been alleged that a glaring instance is the transfer is the transfer and termiantion of Members of Madras Bench who had heard and passed orders in the Ms. Jayalalitha group of cases. It is further alleged that the services of Shri P. Bansal, Member, Madras Bench who had heard these cases was terminated and another Member Shri A. Razzak was transferred to Guwahati after his short duration at Madras in place of Shri T.K. Sharma whose services were also terminated. Since he could not be singled out, an apparent cover of generality was devised to give an appearance of non-discriminating action.

49. Respondents have denied these allegations as

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being vague and based on conjections and sumises. They have pointed out that in K. Nagaraj Vs. State of Andhra Pradhesh 1985 (1) SCC 523 the Hon'ble Supreme Court has held that "the burden to establish malafides is a heavy burden to discharge - vague and casual allegations suggesting that a certain act was done with an ulterior motive cannot be accepted without proper pleadings and adequate proof". Respondents have further pointed out that the appeal of Shri V. Bhaskaran (in the Ms. Jayalalitha group of cases) was dismissed on 7.8.98 while the President, ITAT had pointed out the mistake of making appointments in excess of the advertised vacancies in November, 1997 itself and followed it up in February, 1998 well before the present Government with the AIADMK as one of its (erstwhile) allies took office in March, 1998. We hold that applicants have not succeeded in establishing malafides against respondents, more so when respondents have acted in implementation of the Hon'ble Supreme Court's judgment in Ashok Kumar's case (Supra) and rectified the mistake committed by them earlier.

50. Applicants have also challenged the impugned orders dated 30.8.98 on grounds of being unfair and unequitable. It has been contended that some applicants had left their lucrative practice as Chartered Accountants to join as Members, ITAT where they hoped to make a career, and they had altered their position. They had thus a legitimate expectation that they would continue as such. It has also been contended that applicants having been appointed as Members, ITAT and received training as such, and having discharged their statutory duties, and even drawn pay and allowances for some months as Members, ITAT respondents were

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estopped from terminating their services, under the doctrine ofr promissory estoppel.

51. Respondents in our view have correctly pointed out that there can be no plea either of legitimate expecation or of Promissory Estoppel against statute or even judge made law, which is binding under Article 141 of the Constitution and neither doctrine can be invoked to sustain an illegality. Several rulings have been cited by respondents in their written submissions in support of the aforesaid propositions, which it is not necessary to repeat here. Suffice it to say that while we sympathise with the applicants whose services as Members, ITAT have been terminated for no fault of their own, such sympathy cannot be at the cost of upholding the law.

52. In the facts and circumstances discussed above, we hold that the impugned orders dated 30.8.98 are neither illegal nor arbitrary, nor do they violate Articles 14 and 16 of the Constitution to warrant our judicial interference.

53. Before we conclude, we would, however, advert to one aspect of the matter which has not been discussed so far. In some of the cases before us it was contended that candidates from the select list dated 27.8.97 had left after joining the Tribunal and those amongst the panel of said date could be accommodated in their place. For instance applicant Shri G.C.Gupta (O.A. No. 1924/98) has contended that consequent to the resignation from the Tribunal of Shri M.L. Sahni on 1.6.98, who was at Sl. No. 3 of the Select List of

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Member (J), Shri T.K. Sharma who was at Sl. No.1 of the panel of Member (J) had been adjusted in his place, and hence consequent to Shri Swatantra Singh, who was at Sl. No. 4 of the select list of Member (J), leaving the Tribunal on 1.12.98 applicant Shri G.C. Gupta could be adjusted in his place. In this connection it was strongly urged that such adjustment would be well within the life of the panel, dated 27.8.97 and would also be in accordance with past practice. While respondents contend that the life of the panel dated 27.8.97 expired upon action being initiated to fill up the additional vacancies, that became available consequent to the creation of additional Benches, by issue of advertisement in September, 1997, they themselves admit that persons from the panel dated 27.8.97 could be appointed as per their category and panel position if persons from the select list dated 27.8.97 did not join, or left the Tribhunal soon after joining.

55. The difference between Shri T.K. Sharma's case (Supra) quoted by applicant Shri G.C. Gupta and his own case, is that while shri T.K. Sharma as per Shri Gupta's own averments was absorbed from the panel, well before the termination order dated 30.9.98 issued. applicant Shri G.C. Gupta is seeking absorption against a post said to have been vacated by Shri Swatantra Singh nearly two months after the issue of the impugned order. Nevertheless in the event that applicant Shri G.C. Gupta and any other similarly situated applicants can be so adjusted within their own category, and as per their panel position, in place of candidates from the Select List dated 27.8.97 without violating the legal

principles laid down by the Apex Court noted above as well as relevant rules, instructions and accepted past practice, we hold there would be no legal impediment for respondents to consider their cases afresh for appointment as Member ITAT. This action be taken within two months from the date date of receipt of a copy of this order.

56. These O.As are disposed of in terms of Paras 52 and 55 above. No costs.

57. Let copies of this order be placed in each O.A. case record.

(Mrs. Lakshmi Swaminathan)
Member (J)

(S.R. Adige)
Vice Chairman (A)

/Gk/

Court Officer
Central Administrative Tribunal
Principal Bench, New Delhi
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