

## The trouble with tribunals

**The history of judiciary-executive fight might impact the setting up of the National Company Law Tribunal and the National Company Law Appellate Tribunal**

**Sudipto Dey** October 05, 2014 Last Updated at 22:36 IST

The shadow of the recent Supreme Court judgment striking down the constitutional validity of the National Tax Tribunal (NTT) Act, 2005, is likely to loom large over the setting up of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT), under the Companies Act, 2013, legal experts say.

In a separate case, a petition challenging the validity of the NCLT and the NCLAT is pending before the apex court.

In March 2012, the government had proposed setting up the NCLT and the NCLAT as specialised quasi-judicial bodies. The move was aimed at helping reduce the pendency of winding-up cases, shortening the winding-up process, and avoiding multiplicity and levels of litigation before high courts, the Company Law Board and the Board for Industrial and Financial Reconstruction.

In the NTT case, a five-judge Constitution Bench of the Supreme Court held that though constitutional conventions didn't debar Parliament from vesting judicial powers in tribunals, it should have the trappings of a court. Otherwise, the court said, it would be in violation of the basic structure of the Constitution. The court struck down the constitutionality of the NTT Act, on the grounds that the tribunal didn't have the salient characteristics of courts, which it sought to replace.

The apex court said tribunals couldn't decide "questions of law", adding these could only be decided by constitutional courts.

The petitioner in the NTT case and the NCLT case are same - the Madras Bar Association. And, the sections struck down by the apex court in the NTT case were similar to those in the case of the NCLT and the NCLAT, under the Companies Act, 2013, said Lalit Kumar, partner in law firm J Sagar Associates. "Since sections five, six, seven, eight and 13 were challenged and found unconstitutional in the NTT case, this could have a strong bearing on the pending petition against NCLT and NCLAT," he added

Corporate lawyers say the Supreme Court (in the Union of India vs the Madras Bar Association) held the constitutional validity of the NCLT and the NCLAT, in an order in May 2010. It had suggested modifications in the constitution of these tribunals. Also, it didn't strike down the important sections or provisions applicable to setting up and functioning of the NCLT and the NCLAT.

**A snapshot of shadow boxing over jurisdiction**

- Many important tribunals were, at some point, a matter of dispute before the Supreme Court. These include, the Debt Recovery Tribunal, the Administrative Tribunal, consumer courts, the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT)
- The bone of contention in all these disputes was whether Parliament was constitutionally empowered to abrogate or divest the core judicial appellate functions traditionally vested with the courts (high courts and the Supreme Court)
- In all these cases, the issue was whether such judicial functions given to a tribunal did away with the 'basic structure' enshrined in the Constitution. The cases were on the issues of 'separation of powers', the 'rule of law' and 'judicial review'

## KEY CASES

- *Union of India vs Delhi High Court Bar Association (2002)*  
(The case questioned the constitutional validity of the Debt Recovery Tribunal)
- *State of Karnataka vs Vishwabharathi House Building Cooperative Society & Ors (2003)*  
(The primary question was the constitutional validity of the Consumer Protection Act, 1986)
- *S P Sampath Vs Union of India (1987)*  
(Challenged the constitutional validity of the Administrative Tribunals Act, 1985)
- *Union of India Vs Madras Bar Association (2010)*  
(Questioned the constitutional validity of the NCLT and the NCLAT)

## KEY TAKEAWAY

- In all these cases, it was held tribunals weren't unconstitutional. In the *Minerva Mills Ltd vs Union on India (1980)* case, the Supreme Court said "effective alternative institutional mechanisms or arrangements for judicial review" could be made by Parliament. Therefore, for a judicial review, it is possible to set up an alternative institution in place of a high court
- However, the tribunal should be a real substitute for a high court. The alternative arrangement has to be effective and efficient, as well as capable of upholding constitutional limitations
- Judgments in almost all the cases maintained Parliament did not have the power to amend the 'basic structure' of the Constitution

Kumar says another point of departure between the NTT and NCLT cases was the apex court said in all matters of litigation before the NTT, one of the litigating parties would be the government of India. "The court did not find it appropriate that the government should decide the composition and other terms of the NTT," says Kumar. However, that might not be the case for the NCLT and the NCLAT. In this case, the Centre might or might not be one of the parties in a matter before the NCLT and the NCLAT.

M S Ananth, senior member of the regulatory and dispute resolution team, Nishith Desai Associates, says the apex court has held that tribunals are constitutional and the legislature can take away certain jurisdictions from high courts. "However, powers under articles 226 and 227 cannot be negated by statute," he says. In other words, a tribunal which is to take the place of high courts must be of such stature and nature, with a comparable system of appointment and power of punishing contempt for it to be an effective replacement. "Any factor which adversely affects the administration of justice can be struck down as affecting fundamental rights and being in violation of the basic structure doctrine," says Ananth.

Rajan Vora, Partner in a member firm of Ernst & Young Global, has a different take over the issue. The Supreme Court's ruling on NTT Act may not have a bearing on NCLT case, he says. "The apex court will

examine the powers of the National Company Law Tribunal, and whether the provisions violate the jurisdiction of the state high courts," says Vora. Legal experts say going forward the government should adopt a more collaborative approach to involve all stakeholders before introducing dispute resolution mechanism. Otherwise, cases that involve setting up of tribunals would continue to feed judiciary-executive fights over jurisdiction.

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### **Why the NTT ruling matters**

- Article 323-A of the Constitution empowers Parliament to provide for tribunals to adjudicate disputes relating to public service commissions. Article 323-B empowers the relevant legislature-state or central-to provide for tribunals to adjudicate disputes pertaining to certain matters, including those relating to tax, rent and foreign exchange

### **Disputes over NTT**

- The National Tax Tribunal (NTT), proposed to be set up under the NTT Act, 2005, was to replace high courts to hear appeals from appellate tribunals set up under direct tax (income tax) and indirect taxes (customs, excise and service taxes)
- The NTT was aimed at: (a) Reducing the pendency of huge arrears, (b) addressing the tax recovery held up in litigation before various high courts, (c) ensuring uniformity in the interpretation of tax laws and (d) resolving the issue of judges dealing with tax cases being from civil courts and, as such, not being well versed to decide complicated tax issues
- The NTT Act proposed to shift the forum for appeal from high courts to the NTT and do away with provisions that provided for hearing appeals by high court benches comprising at least two judges
- It provided that on admission of an appeal from an appellate tribunal, the NTT would formulate the substantial question of law for hearing the appeal

### **Why SC struck down the NTT**

- According to the NTT Act (section 5), the tribunal would be in Delhi, without regional benches; benches of the tribunal would relate to different jurisdictions. This provision was said to be ineffective, inconvenient to litigants, and not a satisfactory alternative adjudicatory authority to high courts
- The tribunal is to hear or adjudicate 'substantial questions of law' and, as such, chartered accountants aren't qualified to appear before the tribunal, as their qualifications or specialisation relate to accounts. A representation by chartered accountants could affect administration of justice
- Sections seven (appointment) and eight (tenure) were struck down, as the process of appointment wasn't similar to that of high court judges and there was no security of tenure, which would guarantee independence
- Section 24 excluded appeals to high courts and the appointment of chairpersons and members were not in accordance with the law laid down by the Supreme Court

*Courtesy: An analysis by J Sagar Associates & Nishith Desai Associates*