

*** THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on : 13.04.2009

WP(C) No. 6710/2007

P.C. JAIN **Petitioner**

versus

UOI & Anr. **Respondent**

WP(C) No. 6711/2007

V.K. AGGARWAL **Petitioner**

versus

UOI & Anr. **Respondent**

WP(C) No. 6712/2007

N.K. BAJPAI **Petitioner**

versus

UOI & Anr. **Respondent**

WP(C) No. 6792/2007

K.L. REKHI **Petitioner**

versus

UOI & Anr. **Respondent**

Advocates who appeared in this case:

For the Petitioner : Mr C. Hari Shankar, Mr S. Sunil & Mr Manish Pushkarna,
Advocates

For the Respondent : Mr P.P. Malhotra, Additional Solicitor General with Ms
Monika Garg, Advocate

CORAM :-

HON'BLE MR JUSTICE VIKRAMAJIT SEN
HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

It is often said that the law acts ex-post facto. In the instant case, the legislature has acted in pursuance of what is perceived as undesirable - which is the right of a member/president/ vice-president of the Customs Excise Service Tax Appellate Tribunal (hereinafter referred to as the 'CESTAT') to appear, act and/or plead on their demitting office before the very same Tribunal. The legislature has sought to debar all such like persons, by insertion of sub-section (6) to Section 129 of the Customs Act, 1962 (hereinafter referred to as the 'Custom Act'). The said provision was introduced by Section 110 of the Finance Act, 2007 w.e.f. 11.05.2007.

1.1 The petitioners being aggrieved, have laid a challenge to the said provision, broadly on two grounds. The first being, that Section 129(6) of the Customs Act is ultravires Articles 14, 19(1)(g) and 21 of the Constitution of India. The second, that, in any event, Section 129(6) of the Act has no applicability to the petitioners in view of the fact that at the time when they were appointed to CESTAT and also at a point in time when they demitted the office, the said provision was not on the statute book. In sum and substance, the petitioners contend

that both on a plain reading of the provision, as also otherwise, it cannot apply to the petitioners as they cannot be bound by a conditionality of which they had no notice.

1.2 The petitioners have towards this end made the following prayers which are common to each of the captioned writ petitions:

- “(i) To strike down Section 129(6) of the Customs Act, 1962, as being arbitrary, illegal and unconstitutional.
- (ii) Consequently, to issue a writ of mandamus, or other writ, order or direction in the nature of mandamus, directing the Tribunal to permit the petition to appear and plead before it.”

1.3 In addition, in writ petition 6712/2007 entitled N.K. Bajpai vs UOI & Ors. the following prayer has been made:

- “(i) To issue a writ of certiorari, or other order or direction in the nature of certiorari, quashing and setting aside the impugned Misc Order dated 09.07.2007 passed in Service Tax Appeal No. 260 of 2007, whereby the Tribunal has held that the petitioner is not eligible to appear and plead for the appellant in the said appeals.”

1.4 Similarly, in writ petition 6710/2007, entitled P.C. Jain vs UOI & Ors., an additional prayer has been made:

“(i) To issue a writ of certiorari, or other order or direction in the nature of certiorari, quashing and setting aside the impugned Misc order dated 16.07.2007 and 26.07.2007 passed by the Hon’ble CESTAT in (Excise Appeal No. E/1722-23/07-Ex) & (E/2844, 2469, 3034 of 2000 and E/251,252 of 2001) respectively, whereby the Tribunal has held that the petitioner is not eligible to appear and plead for the appellant in the said appeals.”

2. The challenge to the miscellaneous order dated 09.07.2007 in writ petition no. 6712/2007 arises on account of the fact that the CESTAT had relieved the petitioner from appearing in the appeal filed by his client before CESTAT in view of the provisions of Section 129(6) of the Customs Act. Similarly, in writ petition No. 6710/2007, the petitioner has challenged the order dated 16.7.2007 and 26.07.2007 passed by two different benches of the CESTAT, whereby the petitioner was prevented from appearing for his client before CESTAT, again, on account of the bar incorporated in Section 129(6) of the Customs Act. In passing the order dated 26.07.2007, the CESTAT relied upon the order dated 09.07.2007 referred to hereinabove passed in the case of Madhya Pradesh Consultancy Organisation Ltd vs CCE, Bhopal being Service Tax Appeal No. 260 of 2007.

2.1 In view of commonality of cause and almost similar facts obtaining in the case of each of the petitioner(s) except for a minor difference, in respect of, facts pertaining to the petitioner in writ petition 6792/2007 to which we will advert as we go along with the narration of facts, we have decided to pen a common judgment in respect of the captioned writ petitions. With this, the facts relevant to each of the petitioners are noted hereinafter.

2.2 In so far as the petitioner, Sh. K.L. Rekhi in writ petition 6792/2007 is concerned, he joined Indian Customs and Central Excise Service, Class – I (later called Group ‘A’) (in short the ‘service’) on 10.01.1957. On 29.09.1982 he assumed the charge as Member (Technical) Customs Excise and Gold (Control) Appellate Tribunal (in short ‘CEGAT’) (as it was then known). On 01.02.1989, he was promoted in his parent cadre as Chairman, Central Board of Excise and Customs (in short ‘CBEC’), which is when, he relinquished charge as Member, CEGAT. On 31.01.1991 Sh. K.L. Rekhi superannuated as the Chairman of CBEC.

2.2 Sh. P.C. Jain, petitioner in writ petition 6710/2007, joined service in July, 1963. On 01.05.1986 he assumed charge as Member (Technical) in CEGAT. On 28.09.1999, when the petitioner demitted office, he was the vice-chairman of CEGAT. In the interregnum, the

petitioner had also obtained a bachelors degree in law, in 1991, from University of Delhi.

2.3 Similarly, Shri. V.K. Aggarwal, the petitioner in writ petition no. 6711/2007, joined service on 13.11.1967. Shri. Aggarwal assumed charge as Member (Technical) CEGAT on 02.03.1998. On 13.05.2005 Shri. Aggarwal demitted office as a member CESTAT. Unlike others, Shri. Aggarwal had won a bachelors degree in law even before he entered service, having passed out, from Lucknow University in 1965.

2.4 As in the case of other petitioners, Sh N K Bajpai, the petitioner in writ petition 6712/2007 entered service on 24.05.1960 with a bachelors degree in law having passed out from Allahabad university in 1956. He assumed charge as Member (Technical) CEGAT on 01.11.1990, and on 07.03.1993, he demitted office as Member CEGAT.

3. A perusal of the facts, adverted to above, would show that except for Sh. K.L. Rekhi, the other three petitioners, that is, P.C. Jain. V.K. Aggarwal, and N.K. Bajpai are law graduates. On demitting office, it is stated that Sh. Rekhi had been appearing for litigants before the CEGAT and thereafter, the CESTAT, as it is presently known, as an authorised representative of his clients, in accordance with, the provisions of the relevant Act and the Rules enacted

thereunder. We shall advert to the relevant provisions in the course of our judgment.

4. Since reliefs claimed by the petitioners are pivoted on the challenge laid to the provisions of Section 129(6) of the Customs Act and/or its applicability, for the sake of convenience, it would be relevant to extract the said section in its entirety.

129 Appellate Tribunal –

(i) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.

(2) A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years.

Explanations: For the purposes of this sub-section,

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(i) In computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) In computing the period during which a person has been an advocate, there shall be included any period during which the person has held a judicial office, or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

(2A) A technical member shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.

(3) The Central Government shall appoint –

(a) a person who is or has been a judge of a High Court; or

*(b) one of the members of the Appellate Tribunal,
to be the President thereof,*

(4) The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof.

(5) A Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.

(6) On ceasing to hold office, the President, Vice-President or other Member shall not be entitled to appear, act or plead before the Appellate Tribunal.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

5. In the context of the aforesaid provision, that is, sub-section (6) of Section 129 of the Customs Act, (in short the ‘impugned provision’), it is contended on behalf of the petitioners that the sub-section can have no applicability to the petitioners who were appointed as member, vice-president and president before the insertion of the said provision in the Act and, therefore, they had not subjected themselves to the bar or the limitation contained therein, at a point in time when they entered service. As a matter of fact, the petitioners contend that the provision was not on the statute book even when they

demitted office as a member/vice-president of CESTAT. Reliance in this regard is placed on the judgment of the Supreme Court in **Sukumar Mukherjee vs State of West Bengal & Anr. (1993) 3 SCC 723.** The petitioners also contend that a bare perusal of the language of sub-section (6) of section 129 of the Customs Act would show that it is applicable prospectively. To drive home this point, the petitioners have referred to the language in Article 124(7) and Article 220 of the Constitution of India, wherein the expression found is “has held office” as against “ceasing to hold the office” as found in Section 129(6) of the Customs Act.

6 The petitioners on the aspect of the Constitutional invalidity of the provision have laid challenge by invoking provisions of Article 14, Article 19(1)(g) and Article 21 of the Constitution of India. The challenge on the basis of the violation of Article 14 of the Constitution of India is rested on the submission that there is no discernable reason for enacting such a provision as there is no ‘Statement Of Object And Reasons’ accompanying the enactment nor do the ‘Notes to clauses’ or the counter affidavit filed by the respondent delve on the evil or mischief which was sought to be remedied by the impugned provision. It was contended at the bar that members of other Tribunals, such as, the Income Tax Appellate Tribunal and Appellate Tribunal for Foreign Exchange are not disabled from appearance or from acting or pleading for their clients before their respective Tribunals, even though the

provisions relating to their recruitment, method of appointment, selection procedure are almost similar. The petitioners contend that this is discriminatory and hence violative of Article 14.

7 The violation of Article 19(1) of the Constitution is alleged on the ground that even though 3 out of 4 petitioners are enrolled with the Bar Council Of Delhi, they are prevented from practising their profession by virtue of the impugned provision, which is directly in conflict with their rights to practice as an advocate; before any court including the Supreme Court or any Tribunal or any person legally authorised to take evidence - as encapsulated in Section 30 of the Advocates Act, 1961 and Section 14 of the Indian Bar Councils Act, 1926. Here it is relevant to point out that the petitioners have submitted that even if it is conceded that Section 30 of the Advocates Act has not been brought into force and is thus not available to the petitioners, the provisions of Section 14 of the Indian Bar Councils Act, 1926, which is *pari materia* with Section 30 of the Advocates Act, 1961, provides a sufficient plank on which their challenge to the impugned provisions can be sustained. Reliance in this regard is placed on a Full Bench Judgment of the Punjab & Haryana High Court in the case of **Smt. Jaswant Kaur & Anr. Vs State of Haryana AIR 1977 P&H 221.** It is thus contended that the restriction contained in the impugned provision is not reasonable within the meaning of Article 19(6) of the Constitution.

8 In the same vein, it was also submitted that the impugned provision violates the Article 21 of the Constitution, in as much as, it deprives a person of his right to livelihood.

9 To buttress their submissions, the petitioners have also referred to the provisions of Section 146A(2)(c) of the Customs Act and identical provision, that is, contained in Section 35Q(2)(c) of Central Excise Act, 1944 (in short the 'Excise Act') as also in Section 83 of the Finance Act, 1994, which by incorporation, refers to, amongst others, to section 35Q of the Excise Act. The said provisions entitles a legal practitioner to appear as an authorized representative before an officer of the customs/excise/service tax or the Appellate Tribunal (i.e., the CESTAT) in any proceeding under the concerned Act, that is, the Customs Act, the Excise Act or even the Finance Act, 1994.

10 In so far as the fourth petitioner, Shri Rekhi, is concerned, it is contended that he was entitled to appear, act or plead before CESTAT in his capacity as an authorised representative, by virtue of the provisions of Section 146A(2)(d) read with Rule 9(e) of the Customs (Appeals) Rules, 1982; Section 35Q(2)(d) read with Rule 12(e) of the Central Excise (Appeals) Rules, 1982 and the Rule 2(C)(i) & (ii) of Customs Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. It is contended that the right to practice before CESTAT stood vested in the petitioners which could not have been taken away

without the affected persons having knowledge of such a prohibition as contained in the impugned provision at the time when they accepted appointment to the CESTAT.

11 The petitioners attempted to demonstrate the anomaly in the amendment brought about by the Finance Act, 2007 by submitting that the provisions of sub-Section (1) to sub-section (5) of Section 129 deal essentially with the manner in which the Central Government would go about constituting the CESTAT, and the qualifications which would be required for being appointed as the judicial/ technical members, vice-president and the president of the CESTAT. Therefore, the impugned provision, that is, sub-section (6) to Section 129, which was, brought on to the statute book by virtue of the Finance Act, 2007 w.e.f. 11.05.2007 could not by incorporation or otherwise transpose the bar of the impugned provision into the definition of ‘Appellate Tribunal’ as set out in Section 2(aa) of the Excise Act and Section 65(5) of the Finance Act, 1994 which were inserted in the respective statute much prior in point of time. In other words, the arguments made is as follows:

(i) The definition of Appellate Tribunal which is contained in section 2(aa) of the Excise Act was inserted in the Excise Act by Act 44 of 1980 Section 50 and Schedule V w.e.f 11.10.1982. The said definition was amended to attain its present form by substitution of the

expression “service tax” in place of “Gold(Control)” by Act 32 of 2003 by Section 135 w.e.f. 14.05.2003. Similarly, the definition of Appellate Tribunal as contained in Section 65(5) was part of the parent statute, which was brought into force w.e.f. 01.07.1994. Given this position, the insertion of sub-section (6) in Section 129 of the Customs Act in May 2007 could not have telescoped, in manner of speaking, into the definition of Appellate Tribunal contained in Section 2(aa) of the Excise Act and Section 65(5) of the Finance Act, 1994, which have been on the statute book since 1982 and 1994 respectively.

(ii) The petitioner thus contended that, in substance, the incongruity stands out, in as much as, the assuming without admitting that the provision is valid the petitioner will be barred for appearing before the CESTAT with respect to the matters arising out of the Customs Act only, and not in respect of those matters which pertain to the Excise Act and the Finance Act, 1994. They submitted that the said situation is not cured even if the regard is had to section 12 and Section 35D of the Excise Act.

(iii) The learned counsel for the petitioners also sought to place reliance on the parliamentary debates with respect to the amendment brought about in Article 220 of the Constitution by the 7th Amendment Act of 1956, whereby the said Article was amended to restrict the bar on a permanent judge of a High Court to plead or act in any court or

before any authority in India, except the Supreme Court, to the court of which he was a permanent judge and the authorities over which that High Court exercised supervisory jurisdiction.

(iv) The learned counsel for the petitioners submitted that the onus was on the respondents, that is, the State, to demonstrate the reasonableness of the restriction. It was also submitted that the respondents had failed to discharge this onus. In this regard, reliance was placed on judgment of the Supreme Court in *Municipal Corporation of the City of Ahmedabad & Ors vs Jan Mohammed Usmanbhai & Anr. (1986) 3 SCC 20*, *Saghir Ahmed & Anr. Vs State of U.P. & Ors. AIR (1954) SC 728* and *M/s Laxmi Khandsari & Ors. vs State of U.P. & Ors (1981) 2 SCC 600*.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

12 The learned Additional Solicitor General, Sh. P.P. Malhotra who appeared on behalf of the respondents took us through the brief history which led to the insertion of the impugned provision in the Customs Act. It was pointed out that in 1986 the Parliament enacted the Customs and Excise Revenue Appellate Tribunal Act of 1986 (in short the ‘CERAT Act’) for the purposes of setting up a Tribunal in consonance with the power contained in Article 323B of the Constitution of India. The CERAT Act not only contained a provision whereby jurisdiction of all courts (including the High Court) save and

except the Supreme Court was excluded, but also Section 11(c) which barred the president or a member from appearing, acting or pleading before the Appellate Tribunal or the CEGAT. The Supreme Court in the case of *L. Chandrakumar vs UOI: (1997) 3 SCC 261* declared as an unconstitutional Clause 2(d) of Article 323A and Clause 3(d) of Article 323B of the Constitution which, inter alia, vested power in the Central and the State Governments to constitute Tribunals over which the Supreme Court's jurisdiction under Article 32 and that of the High Court jurisdiction under Articles 226 and 227 of the Constitution stood excluded. This led to the recommendation for repeal of CERAT Act, which was eventually brought about in 2004.

13. The learned ASG took us through the file notings of the Government of India which established that the issue of appearance by president/vice-president/members of CESTAT on demitting before the CESTAT was discussed at highest level through out 2005 till the insertion of the impugned provision in May, 2007. Towards this end, the Government of India had also sought the input of the president of the CESTAT, Justice R.K. Abhichandani, who recommended that the provisions of Section 11(c) in the repealed CERAT Act should be brought into force immediately. Inputs were also sought from the Ministry of Law as well as the Department of Personnel and Training.

14. The learned ASG also brought to our notice an inter-departmental letter dated 20.09.2007 exchanged between the Ministry of Law and Justice, Department of Legal Affairs and the Department of Revenue' which suggested that the Government was in principle agreed that steps should be initiated to bring about a suitable amendment so that similar bar could be incorporated in the Income Tax Act, in respect of, members of the Income Tax Appellate Tribunal.

15. The submission of the learned ASG was, in a nut shell that, this was an aspect which was pending consideration since 1986 and for one reason or the other, it could not be brought on the statute book. His submission was that this was not as if it was a complete bolt from the blue as sought to be portrayed by the petitioners. As a matter of fact, the Government, according to him, was contemplating such like amendment in other *pari materia* statutes, in consonance with, the provisions of Section 129(6) of the Customs Act. He also drew our attention to the provisions of Section 11(f) of the Administrative Tribunal Act, 1985 and submitted that the terms and conditions of the Railway Tribunal contained similar provisions which barred members and the chairman of such tribunals from appearing, acting or pleading before the tribunal of which a person was a chairman or a member.

16. The learned ASG submitted that the right to practice a profession can be regulated and a regulation by itself unless completely unreasonable, would not be violative of any fundamental rights of the petitioner. In this regard, he placed reliance on the judgment of the Supreme Court in *Devata Prasad Singh Chaudhuri & Ors vs Hon'ble the Chief Justice and the Judges of the Patna High Court AIR (1962) SC 201*.

17. It was thus contended that the bar against the appeals before the CESTAT could not be held to be unreasonably restrictive in view of the fact that the petitioners on account of their expertise were free to appear before superior forums all over the country, that is, the High Court to which an appeal under the respective statutes' lies against the orders of the CESTAT, as also, the Supreme Court.

18 It was also submitted on behalf of the respondents that the contention of the petitioners' that the provision could not be made applicable to them in view of the fact that it was not on the statute book at the time of their appointment and at the time when they demitted office, was untenable for the reason that the bar applied to the right to practice. It was contended that the right to practice was not a condition of service, and assuming without admitting that it was, it is well-settled that a condition of service in respect of a government servant can be changed unilaterally, as after entering service the legal

relationship of a Government Servant is in the nature of a ‘status’, the terms of which are fixed by law and not governed by the ordinary law of contract of service subsisting between a master and servant. Reliance in this regard was placed on the judgment of the Supreme Court in the case of *Roshan Lal Tandon vs UOI AIR (1967) SC 1889*. It was submitted that the submission of the petitioner that the impugned provision could not have retrospective operation was not tenable in view of the fact that the expression “on ceasing to hold office” in the impugned provision could only mean that henceforth those to whom the bar applied would not be allowed to practice before the CESTAT.

19. The learned ASG laid great stress on the fact that in the present time, the insertion of the impugned provision was desirable. He submitted that the impugned provision endeavours to fulfil a greater public good, that is, administration of justice as against less significant private interest of the petitioner. Hence, the latter would have to give way to the former.

OUR ANALYSIS

20. There was a time when a son would appear in the court presided over by his father and no questions were asked. It is said Boswell earned most part of his income at the Scottish Bar appearing before his father Lord Auchinleck (see *Natural Justice*, 2nd Edition Paul Jackson).

The legislative wisdom ideally caters to times we live in and the social mores and norms that surround us. Alas! as is often found steps towards what the law makers consider a desirable goal, which is wisdom that courts accord to a legislature, are often agonisingly slow. The instant case is a prime example of the same. An exercise which started with enactment of CERAT Act in 1986 was given a complete go-by by the repeal of the statute in 2004. The ostensible reason for repeal was the judgment of the Supreme Court in the case of *L. Chandrakumar (supra)* which reversed the blatant usurpation of writ jurisdiction of the Supreme Court and the High Courts by declaring as unconstitutional the provisions of Clause 2(d) of Article 323A and Clause 3(d) of Article 323B of the Constitution which enabled the Centre and State Governments to enact such manifestly unjust legislation. But the repeal of 2004 did something more it threw the baby with the bath water. The salutary provision, such as Section 11(c) was also repealed. The provision was resurrected in 2005. From then, it took two years for the provision to be brought to the fore by the Finance Act, 2007. With the result, the petitioners today contend before us that both at the point in time when they entered service and when they demitted office, the impugned provision was not in place. The petitioners are aggrieved and perhaps justifiably as they have been in practice, since demitting office, for periods ranging from two(2) years in the case of Sh. V.K. Aggarwal to sixteen(16) years, in the case

Sh. K.L. Rekhi before the date on which the impugned provision was brought on to the statute book i.e. 11.05.2007. But the validity of a statute cannot be judged only on the basis rights of an individual when an individual's right are pitted against a greater public weal. Individual rights have to give way to a greater public interest. And who best knows the public interest but the legislature unless shown otherwise - while always bearing in mind that the courts as the sentinels of the Constitution are fully empowered to defend and protect an individual's fundamental rights, if an act of the Parliament trenches upon inalienable right of an individual which are in conflict with interest of the majority. The burden is heavy. There is a presumption of constitutionality in respect of an Acts of a legislature.

21. With the aforesaid preface, let us examine the nuts and bolts of the challenge of the petitioners to the impugned provision. The challenge to the impugned provision based on petitioners rights under Article 14, 19(1)(g) and 21 of the Constitution, on a close scrutiny, according to us, is untenable. The charge of violation of Article 14 is levelled on the ground that firstly, the respondents have been unable to demonstrate either by way of Statement of Objects And Reasons or Notes to clauses or even by way of averments in their counter affidavit the evil or mischief which is sought to be remedied by insertion of the impugned provision; and secondly, the impugned provision is discriminatory, in as much as members of other Tribunals,

such as, the Income Tax Appellate Tribunal and the Appellate Tribunal for Foreign Exchange are not barred from appearing, acting or pleading before Tribunals of which they have been members.

22. This submission, according to us, fails to take into account the common law principle, now well entrenched in our jurisprudence; which to borrow the words of Lord Hewart compel us to ensure that in ***“all fundamental matters justice should not only be done but the manifestly and undoubtedly be seen to be done”***. R vs Sussex JJ, Ex. P. McCarthy (1924) 1 K.B. 256 at page 259. This principle finds echo in the other well settled principle i.e., ‘real likelihood of bias’ or ‘a reasonable suspicion of bias’. In respect of pecuniary interest the bias is apparent and needs no further scrutiny. It is when there is a bias which has no pecuniary dimension that this rule is invoked. One would often wonder as to why such a rule is invoked which is based on nebulous premise of suspicion. The answer lies perhaps in the following in the statement of law encapsulated by Paul Jackson in his book on Natural Justice (2nd edition), which according to us, appropriately enunciates the *raison d’etre* for invoking the Rule of Bias to strike down a decision without actual proof of such bias:-

“The courts do not, normally, inquire whether a tribunal was, in fact, biased. In the case of a pecuniary interest disqualification is automatic; “the law does not allow any further inquiry as to whether

or not the mind was actually biased by the pecuniary interest”; per Bowen L.J., *Lesson v. General Medical Council* (1989) 43 Ch.D. 336, 384. *Such an attitude can be represented as revealing of the materialistic view of human nature taken by the common law and contrasts with allegations of bias arising from non-financial factors where it is necessary to satisfy a test which has been variously described as involving “a real likelihood of bias” or “a reasonable suspicion of bias.”* The explanation of this approach is two-fold. *First, the efficacy of the rule against bias would be greatly reduced if the complainant had to prove actual bias. Secondly, the law is concerned with public confidence in the administration of justice and the need to ensure that individuals feel that they have been given a fair hearing”* (emphasis is ours)

23. In our view, therefore, for the petitioners to contend that there should have been some kind of empirical data to suggest that there had been instances of misdemeanour which would have propelled the respondents to insert such a provision in the enactment is based on a misappreciation of a fundamental premises that a court’s authority is based on the public perception especially that of the litigants appearing before it, that the process of administration of justice is far removed, from even the remotest possibility of bias creeping into the decision making process. Therefore, to contend otherwise is to ignore the very edifice on which the administration of justice is built.

24. In our view, the purported discrimination claimed by the petitioners on account of the fact that members of tribunals such as the Income Tax Appellate Tribunal and the Appellate Tribunal for Foreign Exchange are not visited with such disability, is also untenable. The fact that a beginning has been made by incorporating such like provisions in respect of some tribunals, such as, the CESTAT, the Central Administrative Tribunal constituted under the Administrative Tribunal Act, 1985 (see Section 11(f)) would only lead us to conclude that the impugned provision is not discriminatory. In our opinion the step taken towards insertion of the impugned provision is reformatory and not discriminatory, as contended by the petitioners. At this point it would perhaps be important to note that before inserting the impugned provision, inputs were taken from various sources, including the sitting president who was none-else than a retired Judge of a High Court. The recommendation, in respect of which, we have no doubt must have been made by a high functionary, such as, the President of CESTAT with a keen sense of responsibility after taking into account his experience gained both on the judicial and administrative side in the working of CESTAT.

25. This brings us to the challenge that the petitioners have made on the grounds of violation of their right under Article 19(1)(g) of the Constitution. The petitioner in order to buttress their argument have

relied upon the judgment of the Punjab & Haryana High Court in the case of *Jaswant Kaur (supra)* which was upheld by the Supreme Court in the case of *H.S. Srinivasa Raghavachar and Ors. vs State of Karnataka & Ors.* (1987) 2 SCC 692 (see paragraph 9 at page 242), in so far as issue with regard to prohibition on legal practitioners appearing in various proceedings before Land Tribunals was concerned. Justice O. Chinappa Reddy (as he then was) speaking for the Full Bench of the Punjab and Haryana High Court struck down Section 20A of the Haryana Ceiling of Land Holdings Act, 1972 on the ground of lack of legislative competence, for the reason that, both Section 30 of the Advocates Act, 1961 (which was found to be not in force) and Section 14 of the Indian Bar Councils Act, 1961 which entitled an advocate to practice before any court, Tribunal or person legally authorised to take evidence, were rights conferred by the Parliament by enactment of the said statutes in exercise of its powers conferred under entries 77 and 78 of List-I, which could not have been taken away by a Law enacted by the State. Justice Chinappa Reddy in *H.S. Raghavachar (supra)* while sitting in the Division Bench in the Supreme Court, once again speaking for the court applied the ratio of the judgment in the case of *Jaswant Kaur (supra)* and struck down a similar provision, that is, Section 48(8) of the Karnataka Land Reforms Act, 1961 which barred legal practitioners from appearing

before the Land Tribunals, functioning under the Karnataka Land Reforms Act, 1961.

26. In our view, the two cases cited by the petitioners are clearly distinguishable. In both the cases the court struck down the bar placed on the legal practitioners to practice before the Tribunal constituted under the concerned statutes on the ground that the prohibition was enacted by the State which trenched upon the right to practice conferred by a law enacted by the Parliament and hence the State law was bad in so far as it trenched upon the law enacted by the Parliament. In the instant case the impugned provision is incorporated in a central statute. Hence the said ratio of these aforementioned decision would not apply to the instant case.

27. The submission of the learned counsel for the petitioners that the restriction contained in the impugned provision is unreasonable and not in the interest of general public as contemplated under Article 19(6) of the Constitution, on account of the fact that petitioners who are experts in their respective fields would enhance public interest by making themselves available not only to further the cause of the assesseees but also that of the Revenue. In our view this submission misses the wood from the trees. The predominant rationale for introduction of this provision is to strengthen the cause of administration of justice. To remove what the legislature in its wisdom

feels is a perceived class bias. If that be so, then the restriction cannot be said to be unreasonable. It would pass the test of Article 19(6) of the Constitution. There is no gainsaying that the petitioners have acquired expertise in the field of law pertaining to customs, excise and service tax. That being said the impugned provision does not completely prohibit them from practicing their profession. The prohibition is with respect to a forum. The petitioners' expertise can and ought to be applied in superior forums, such as, the High Courts and also the Supreme Court. It would in our opinion help develop and foster entry of fresh blood and talent at the level of the tribunals and at the same time make available much needed expertise in the superior forums. There is no denying that there is paucity of lawyers who are experts in fields such as, customs, excise and service tax in superior courts. The amendment, according to us, meets various facets of public interests and hence cannot be dubbed as one which is unreasonably restrictive or one which completely fore-closes all opportunities available to the petitioners to exercise their profession calling.

28. There is another aspect of the matter, which is, as to whether it can be contended that the petitioners have an unregulated right of practice in the forums in which they chose to appear. A reading of provisions of Section 14 of the Indian Bar Councils Act, 1926 makes it clear that it is subject to the rules that a court before which an advocate

appears makes in that behalf. As rightly contended by the learned ASG the Supreme Court in the case of *Devatta Prasad (supra)* have held that the High Courts are empowered to regulate the right to practice. We may with profit extract the observations, of a three Judge Bench of the Supreme Court in the case *Lingappa Pochanna vs State of Maharastra: AIR 1985 SC 389* at pages 403 to 404 (Paragraphs 32 to 35). The Supreme Court in the said case, amongst others, answered the issue as to whether 9A of the Maharastra Restoration of Lands to Schedule Tribes Act, 1974, which barred advocates from appearing for any party in any proceeding under the said Act before the Commissioner, Collector or the Maharastra Revenue Tribunal.

“32. The next and the last question that arises is whether Section 9A of the Act is constitutionally void as it affects (i) the fundamental right of an advocate enrolled by the State Bar Council of Maharashtra to carry on his profession guaranteed by Article [19\(1\)\(g\)](#) of the Constitution and (ii) the right of the appellants who are non-tribals being prevented to be represented by a legal practitioner of their choice.

33. The problem before us has to be viewed from two angles: first, from the view point of the legal practitioner, and secondly from that of the litigants. Though the question for consideration as to whether Section 9A of the Act offends Art. [19\(1\)\(g\)](#) is of considerable importance to the litigant public in general, and the legal profession in particular it is no longer res integra, it being practically concluded by several decisions of the various High Courts, from both the view points noted above. Section 9A of the Act reads :

9A. Notwithstanding anything contained in this Act or any law for the time being in force, no pleader shall be entitled to appear on behalf of any party in any

proceedings under this Act before the Collector, the Commissioner or the Maharashtra Revenue Tribunal:

Provided the, where a party is a minor or lunatic, his guardian may appear, and in the Case of any other person under disability, his authorised agent may appear, in such proceedings.

*34. The contention that an advocate enrolled under the Advocates Act, 1961 has an absolute right to practise before all Courts and Tribunals can hardly be accepted. Such a right is no doubt conferred by Section 30 of the Advocates Act. But unfortunately for the legal profession, Section 30 has not been brought into force so far though the Act has been on the Statute Book for the last 22 years. **There is very little that we can do in the matter and it is for the Bar to take it up elsewhere. A person enrolled as an advocate under the Advocates Act is not ipso facto entitled to a right of audience in all Courts unless Section 30 of that Act is first brought into force. That is a matter which is still regulated by different statutes and the extent of the right to practise must depend on the terms of those statutes.** The right of an advocate brought on the rolls to practise is, therefore, just what is conferred on him by Section 14(1)(a), (b) and (c) of the Bar Councils Act, 1926. The relevant provisions reads as follows:*

14(1). An advocate shall be entitled as of right to practise :

(a) subject to the provisions of Sub-section (4) of Section 9, in the High Court of which he is an advocate, and

(b) save as otherwise provided by Sub-section (2) or by or under any other law for the time being in force in any other Court and before any other Tribunal or person legally authorized ' to take evidence, and.

(c) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

In view of the various authorities on the subject, we cannot but hold that Section 9A of the Act is not an unconstitutional restriction on advocates to practise their profession.

35. That brings us to the second aspect of the matter i.e. the so-called right of a litigant to be represented before the Collector in matters not covered by Sections 3(1) and 4 of the Act. Now it is well-settled that apart from the provisions' of Article [22\(1\)](#) of the Constitution, no litigant has a fundamental right to be represented by a lawyer in any Court. The only fundamental right recognized by the Constitution is that under Article [22\(1\)](#) by which an accused who is arrested and detained in custody is entitled to consult and be defended by a legal practitioner of his choice. In all other matters i.e. in suits or other proceedings in which the accused is not arrested and detained on a criminal charge, the litigant has no fundamental right to be represented by a legal practitioner. For aught we know, the legislature felt that for the implementation of the legislation, it would not subserve the public interest if lawyers were allowed to appear, plead or act on behalf of the non-tribal transferees. It cannot be denied that a tribal and a non-tribal are unequally placed and non-tribal transferee being a person belonging to the more affluent class, would unnecessarily protract the proceedings before the Collector under Ss. 3(1) and 4 of the Act by raising all kinds of pleas calculated to delay or defeat the rights of the tribal for restoration of his lands. The proceedings before the Collector have to be completed with sufficient despatch and the transferred lands restored to a tribal under Sub-section (1) of S. 3 and Section 4 of the Act without any of the law's delays. ”

Also see judgment of the Supreme Court in ***Paradip Port Trust vs Their Workmen: 1997 (1) SCR 537.***

29. The submission of the petitioners that impugned provision violates Article 21 of the Constitution is also untenable. As stated above, there is no deprivation of right to livelihood as contended by the petitioners. There are admittedly several avenues open to the petitioners to earn their livelihood. This submission is deserves to be rejected at the very threshold.

30. The other submission of the petitioners which is that the reading of sub-section (6) of Section 129 of the Customs Act when compared with Article 220 and 124(7) of the Act would show that the impugned provision could not possibly apply to the petitioners as the expression found in sub-section (6) of Section 129 of the Customs Act is “on ceasing to hold office”, which, according to the petitioners can only imply that the said provision is prospective. In our view such a submission is without merit. We agree with the submissions of the learned ASG that prohibition applies to the petitioners and all such like persons who have demitted their office both before the date of insertion of the impugned provision and thereafter as the prohibition is attached to the right to appear before the CESTAT. To this extent the argument that it seeks to take away a vested right is untenable. In any event as indicated by us above the right to practice before a forum is not an unbridled right which cannot be regulated.

31. The other submission of the petitioners that the impugned provision is incongruous, in as much as, the amendment has only been made in section 129 of the Customs Act by virtue of the Finance Act, 2007 with no corresponding amendments in Section 2(aa) of the Excise Act and Section 65(5) of the Finance Act, 1994, as on the date of the amendment brought about by Finance Act, 2007, the said provisions, that is, Section 2(aa) of the Excise Act and Section 65(5) of the Finance Act 1994 were already on the statute book. In our view

this argument, in the first instance seems to be attractive, but on a closer scrutiny, does not lend credence to case of the petitioners. There is no denial of the fact that there is a single tribunal, that is, CESTAT which adjudicates upon matters which pertain to customs, excise and service tax. There is also no dispute that the members, vice-president and president are the same persons who hear and adjudicate upon the matter involving the aforementioned three streams of law. That being the position, the prohibition contained in the impugned provision gets attracted no sooner the person who has held the office of the president/ vice-president or a member of the Appellate Tribunal which is a common tribunal, that is, the CESTAT seeks to appear, act or plead before the CESTAT. It makes no difference that corresponding amendments have not been brought about in the Excise Act or the Finance Act, 1994, because the prohibition is not attached to the stream of law which is practiced before CESTAT. The prohibition or the bar on appearance is vis-a-vis the forum and the trigger for invoking the bar is that the person concerned should have held the office of a member, vice-president or president of the said forum. Once the right to appear, act or plead is taken away and since the same forum hears and adjudicates upon matters concerning the three streams of law, the person concerned is automatically de-barred from acting, appearing or pleading before the said forum, that is, CESTAT.

32. In this context, it would be important to also take note of the fact that the petitioners have laid stress on the parliamentary debates whereby amendment was brought in Article 220 of the Constitution of India limiting prohibition on the right of a permanent Judge of a High Court to plead or act to the courts of which he has been a permanent judge or the Courts/tribunals/authorities over which the said High Court exercised supervisory jurisdiction. Even though it is trite law that parliamentary debates by themselves cannot be used to decide the interpretation, that is to be placed on the provisions of a Act, we considered the debates closely. The sense which was conveyed through the debates was that a complete bar on practice by permanent Judges of the High Court as it had been obtained prior to the 7th Amendment Act, 1956 could be put in place, if the incumbent was compensated adequately in pecuniary terms by making the pension equivalent to salary last drawn and increasing the retirement age to 65 years. The rationale supplied for bringing about the amendment was, that the appointment to the Bench of the High Court was brought about at a relatively late age and then to deprive a judge completely, a right to practice, in any High Court would act as a disincentive for getting the best talent to accept judgeship.

32.1. According to us, the petitioner cannot derive any benefit by adverting to the said debates which relate to the provisions of the Constitution which are applicable to the judges of the High Court and

the Supreme Court. On the contrary as stated above the debates seemed to indicate that a total ban on practice would have been acceptable to the legislatures, provided it was duly compensated. In the instant case the prohibition is decidedly partial. The prohibition is confined only to CESTAT. According to us, the legislature is best equipped to take a decision in this regard. Having taken a decision, which, according to us, is neither unreasonably restrictive nor violative of any of the fundamental rights of the petitioners as guaranteed by the Constitution, there is no reason for us to either strike down the impugned provision as being ultravires the Constitution or to read it in a fashion that makes it prospective in its application. To our minds there is no reason to draw a distinction between persons who have demitted office prior to the insertion of the impugned provision, that is, 11.05.2007 and those who would demit office thereafter. If the rationale for inserting the provision is that it would enhance public interest by strengthening the administration of justice, we would not impede the said pursuit of the legislature based on tenuous submission of the petitioners.

33. This leaves us with one petitioner, that is, Mr. K.L. Rekhi who, as indicated in the beginning, has not obtained a degree in law but was practicing before the CESTAT in his capacity as an authorised representative. As a matter of fact, the other petitioners have also made an incidental submission that no corresponding amendments

have been made in the provision adverted hereinabove pertaining to the right of the authorised representative to appear for a litigant before the CESTAT. The prohibition is clearly attracted to Sh. K.L. Rekhi who demitted office as the member of then CEGAT on 01.02.1989. The petitioner Sh. K.L. Rekhi, in our view, is not in any manner constrained in making use of the experience gained by him as a member of the then CEGAT like the other petitioners. If, however, he wishes to practice as a legal practitioner, he would be required to obtain a degree in law and then be free to appear before all such forums except the CESTAT. The fact that his right to appear as an authorised representative is hit by insertion of the impugned provision itself answers the issue that the fact that no amendment has been made to Section 146A of the Customs Act and the Rules framed thereunder or even in Section 35Q of the Excise Act and the Rules framed thereunder, in no way impinges upon the legal efficacy of the impugned provision, since the prohibition is with respect to the right of appearance before a forum by any person whether he is a legal practitioner or an authorized representative, in respect of a person who has been a member, vice-president or president of CESTAT.

34. For the reasons that we have given, the judgment of the Supreme Court in *Sukumar Mukherjee* (*supra*) has no application as it dealt with the right of private practice of doctors who were desirous of being a part of newly created service set up by the State of West Bengal,

without having to give up on their right of private practice which they had prior to the said service being constituted by the State Government. According to us, the ratio of the judgment has no applicability since in the instant case we are not dealing with a condition of service.

34. Similarly, the judgment of the Supreme Court in the case of ***B.P. Sharma vs Union of India (2003) 7 SCC 309*** will also have no application which essentially deals with the challenge to the purported prohibition under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and the rules made thereunder on the right of a person to seek renewal of his licence to act as ‘approved guides’ after the age of 60 years. The facts in the said case are entirely different.

35. In view of our discussion above, we are of the opinion that the challenge to the provisions of Section 129(6) of the Customs Act cannot sustained. In these circumstances, all four writ petitions, that is writ petition Nos. 6710/2007, 6711/2007, 6712/2007 & 6792/2997 are dismissed. However, there shall be no orders as to cost.

RAJIV SHAKDHER, J

April 13, 2009
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VIKRAMAJIT SEN, J