

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.42223 and 43744 of 2017

COMMON ORDER:

Since these two writ petitions are similar and arise out of a common order passed by the Competition Commission of India and as the contentions are also the same, this Court deems it appropriate and apposite to dispose of these two writ petitions by way of this common order.

2. Challenge in these two writ petitions is to the order dated 28.11.2017 passed by the Competition Commission of India/second respondent herein in Case No.47 and 48 of 2017 under sub-Section (2) of Section 26 of the Competition Act, 2002 (hereinafter called the Act.)

3. Petitioners herein, alleging contravention of the provisions of Sections 3 and 4 of the Act on the part of the National Institute of Indian Technology Limited/third respondent herein, approached the second respondent-Competition Commission of India, by way of filing the above said cases under Section 19 of the Act.

4. When the matters are taken up, a preliminary objection as to the maintainability of the writ petitions is taken by Sri C.V.Mohan Reddy, learned Senior Counsel, appearing for Sri M.Srikanth, learned counsel for the third respondent and Smt.Sundari, appearing for the respondent No.2, by contending that in view of effective and efficacious alternative remedy available to the petitioners under Sections 53-A and 53-B of the Act, the present writ petitions are liable to be dismissed.

5. Emphatically, resisting the said submissions, it is maintained by Sri Major Pankaj Roy, petitioner in W.P.No.42223 of 2017, who is appearing as party-in-person and Sri P.Ravi Kiran, learned counsel for the petitioner in

W.P.No.43744 of 2017 that despite the availability of the said alternative remedy, the present writ petitions are maintainable before this Court under Article 226 of the Constitution of India as the impugned orders are violative of the principles of natural justice and completely bereft of fair play and they directly effect the fundamental rights of the petitioners herein and that the alternative remedy is not a bar for this Court to entertain the writ petitions under Article 226 of the Constitution of India.

6. Elaborating the said contention, it is submitted that the learned counsel who appeared for the opposite party is a Managing Associate of Competition Law at TT & A Advocates and Solicitors and have their office at 1114-1115, DLF Tower B, Jasola, New Delhi – 110 025; that TT & A works in collaboration with Mr.Vinod Dhall, who worked as First Chairman of the second respondent/Competition Commission of India till 2008; that he set up the framework of policies, draft regulations, analytical models and organized initial training; that Mr.Dhall by virtue of his background has an insider knowledge of respondent No.2; that Mr.Dhall had represented Fx Enterprise Solutions India Private Limited, one of the winning parties in Hyundai case; that the third respondent submitted its response through Mr.Dhall before the second respondent on 10.10.2017.

7. It is further submitted that after hearing the cases on 12.10.2017, but before the second respondent Commission passed the impugned orders on 28.11.2017, petitioner received a letter from the Office of M/s. K.K.Sharma, Law Offices, who was the first Director General of the second respondent/Commission and built a successful practice, representing clients before the second respondent and that the petitioner got astonished at first as to how Mr.K.K.Sharma obtained his address, but quickly realized that he would have got the petitioners address from the

second respondent because of his influence and that the said letter was received by the petitioner in W.P.No.42223 of 2017 on 25.10.2017; that by way of Ex.P.16 Emails the said aspects were brought to the notice of the second respondent, but no reply was received; that response submitted by the third respondent through Mr.Dhall had vital information and that certain information contained therein was not furnished to the petitioners and that the said information would have established that the third respondent is a dominant player in view of Section 19 (4) (b) of the Act; that the second respondent should have specified the date till when the information would be kept confidential which was not done; that Mr.Dhall and Sharma appeared before the second respondent and Mr.Dhall won case Nos.19/2016 and 20/2016 and Sharma represented St.Anthony's Cars Private Limited in a matter before the second respondent and it was decided in favour of Mr.Sharma; that the impugned order is contrary to the order in Case Nos.36 and 82 of 2014 passed in identical circumstances and that the winning parties were represented by Mr.Sharma and Mr.Dhall in Case Nos.36 and 82 of 2014 dated 14.06.2014.

To bolster their submissions and contentions, petitioner in W.P.No.42223 of 2017, who is appearing as a party-in-person and Sri P.Ravi Kiran, learned counsel for the petitioner in W.P.No.43744 of 2017 place reliance on the judgments of the Hon'ble Apex Court in *HARBANSLAR SAHNIA AND ANOTHER v. INDIAN OIL CORPORATION LIMITED AND ORS*¹, *SURYA DEVI RAI v. RAM CHANDER RAI AND OTHERS*², *RADHEY SHYAM AND ANOTHER v. CHHABI NATH AND OTHERS*³, *M/ S. GUJAAT POTTILING CO. LTD &*

¹ AIR 2003 SC 2120

² (2003) 6 SCC 675

³ (2009) 5 SCC 616

*ORS v. THE COCA COLA CO. & ORS*⁴ and *N.L.BAJPAI v. UNION OF INDIA*⁵ and the judgment of the Delhi High Court in *V.K.AGGARWAL v. UNION OF INDIA AND ANOTHER*⁶ and the judgment of the Bombay High Court in *CELLUR OPERATOR ASSOCIATION v. COMPETITION COMMISSION OF INDIA*⁷ and the judgment of this Court in *MEGACITY BUILDERS v. A.P. STATE CONSUMER DISPUTE*.⁸

9. Sri C.V.Mohan Reddy, learned Senior Counsel, appearing for the counsel on record for the third respondent, contends that the present writ petitions, filed under Article 226 of the Constitution of India are not maintainable in view of the availability of effective and efficacious alternative remedy of appeal under Section 53-A and 53-B of the Competition Act, 2002; that the said Appellate Tribunal is headed by Hon'ble Supreme Court Judge and consists of two other retired judges of the High Court; that there is no violation of the principles of natural justice nor it can be contended that the orders of the Commission are a violation of the fundamental rights; that neither Mr.Dhall nor Mr.K.K.Sharma appeared before the second respondent nor they are arrayed as respondents in the present cases, as such, it is not open for the petitioners herein to make any allegations against the said persons before this Court; that the appellate Tribunal has power and jurisdiction to go into such aspects also; that Competition Commission is a Multi-Member Body and it cannot be argued that all the members of the second respondent were biased and influenced; that the counter field by the third respondent was

⁴ (AIR 1995 2372)

⁵ (2012) 4 SCC 653

⁶ W.P (C) No.6710 of 2007,
dated 13.04.2009 (Delhi High Court)

⁷ W.P.No.8594 of 2017,
dated 21.09.2017 (Bombay High Court)

⁸ AIR 2004 AP 49

served on the petitioners on 10.10.2017 and the matter was heard on 12.10.2017, but before the Commission on the said date petitioner herein did not take any plea about Mr.Dhall and K.K.Sharma, as such, the petitioners are estopped and precluded from taking the said plea now before this Court for the first time; that as per Regulation 35 of the Competition Commission of India (General) Regulations, 2009, the third respondent is entitled for confidentiality and the third respondent availed the same in accordance with the Regulations and the petitioners herein did not avail the opportunity as provided under Regulation 37 of the said Regulations and that all these aspects are afterthoughts of the petitioners herein, invented for the purpose of filing the present writ petitions.

Learned Senior Counsel in support of his submissions and contentions, takes the support of the judgments of the Hon'ble Apex Court in *TITAGHUR PAPER MILLS CO. LTD., AND ANR v. STATE OF ORISSA AND ORS*⁹, *MADHYA PRADESH SPECIAL POLICE ESTABLISHMENT v. STATE OF MADHYA PRADESH AND ORS*¹⁰, *COMPETITION COMMISSION OF INDIA v. STEEL AUTHORITY OF INDIA LIMITED AND ANOTHER*¹¹, the Judgment of this Court in *DR. S.A.HAKEEM AND OTHERS v. N.T.R. UNIVERSITY OF HEALTH SCIENCES, VIJAYAWADA AND OTHERS*¹², judgment of the Madras High Court in *NISSAN MOTORS INDIA PRIVATE LIMITED (NMPL) v. THE COMPETITION COMMISSION OF INDIA (CCI)*¹³, Judgment of the Delhi High Court in *SOMI CONVEYOR BELTINGS LTD. & ANR v.*

⁹ (1983) 2 SCC 433)

¹⁰ (2004) 8 SCC 788)

¹¹ (2010) 10 SCC 744),

¹² (2000 (5) ALD 733

¹³ 2014 ComplLR 187 (Madras)

*UNION OF INDIA & ORS*¹⁴ and the Judgment of Bombay High Court in *VODAFONE INDIA LIMITED AND ORS. V. THE COMPETITION COMMISSION OF INDIA AND ORS*¹⁵.

10. Smt.Sundari, learned counsel representing the Competition Commission of India contends that the order impugned in these writ petitions is appealable under Section 53-A and 53-B of the Act, as such, the writ petitions are not maintainable. It is further contended that adequate and sufficient opportunity was given to the petitioners before passing the impugned order by the second respondent Commission; that except requesting for disposal of the cases before the second respondent, no allegation of bias was made in the earlier W.P.No.36397 of 2017. It is further submitted that initially on 21.10.2003 Mr.Dhall was appointed as a Member (Admn) and held office till 18.07.2008 and the members functioning before the Competition Commission of India now have been appointed much later to such dates, as such, no bias can be attributed. It is further submitted that Mr.Dhall did not appear in the cases on hand and Mr.Ram Kumar is an associate of the firm in which Mr.Dhall was only a partner and Mr.K.K.Sharma has nothing to do with the present cases.

In support of her submissions/contentions, learned counsel places reliance on the judgments of the Hon'ble Apex Court in *COMMISSIONER OF INCOME TAX AND ORS. V. CHHABIL DASS AGARWAL*¹⁶, *STATE OF PUNJAB v. DAVINDER PAL SINGH BHULLAR AND ORS. ETC.*¹⁷, *COMPETITION COMMISSION OF INDIA (supra 11)*, *FLEMINGO*

¹⁴ (W.P. (C) 1416/2016 dated 11.04.2017, Delhi High Court)

¹⁵ (W.P.Nos.8594 of 2017 and Batch dated 21.09.2017, Bombay High Court)

¹⁶ (2014) 1 SCC 603

¹⁷ (2011) 14 SCC 770

(DFS) PRIVATE LIMITED v. THE COMMISSIONER OF CUSTOMS¹⁸, SCHWING STETTER INDIA PRIVATE LIMITED v. THE COMMERCIAL TAX OFFICER¹⁹.

11. In view of the objection taken by the learned counsel for the respondents as to the maintainability of the writ petition and as the petitioners in W.P.No.42223 of 2017 who has appeared as party-in-person and Sri P.Ravi Kiran, learned counsel for the petitioner in W.P.No.43744 of 2017 have argued extensively on the said issue of maintainability, this Court deems it appropriate and apposite to decide the said issue of maintainability as a preliminary issue as the further process of going into other aspects depends on the outcome of the said preliminary issue.

12. In order to consider and resolve the issue of maintainability of the writ petitions under Article 226 of the Constitution of India, this Court feels it appropriate and apposite to refer to certain important and relevant provisions of Competition Act, 2002. The object of this central legislation is to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in our country and for matters connected therewith or incidental thereto.

13. Section 2 (e) of the Competition Act, 2002 defines Commission which means the Competition Commission of India established under sub-Section (1) of Section 7. According to Section 2 (b) (a) which came into effect with effect from 12.10.2007, the Appellate Tribunal means the Competition Appellate Tribunal established under sub-Section (1) of Section 53-A. As per Section 2 (h) "enterprise" means a person or a department of the

¹⁸ (W.P.No.26968 of 2010, dated 30.12.2010)

¹⁹ (W.P.No.7339 of 2014 dated 04.04.2014)

Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

14. As per Section 2 (p) "public financial institution" means a public financial institution specified under Section 4A of the Companies Act, 1956 (1 of 1956) and includes a state Financial, Industrial or Investment Corporation. As per Section 2 (q) "regulations" means the regulation made by the Commissioner under Section 64. According to Section 3 (1) no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India and any agreement entered into in contravention of the provisions contained in sub-Section (1) of Section 3 shall be void.

15. As per Section 4 of the Act, there shall be no abuse of dominant position by any enterprise or group. Section 7 of the Act deals with establishment of Commission. Sub-Section (1) of Section 7 enables the Central Government to constitute a Competition Commission by way of a

notification. As per sub-Section (2) of Section 7, the Commission shall be a body corporate. Section 8 deals with the composition of the Commission and according to which the Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government. Section 12 imposes restriction on employment of Chairperson or members for a period of two years after cessation from the Commission.

16. Chapter IV of the Act deals with the duties and powers and functions of the Commission. Section 18 imposes duty on the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Section 19 deals with the enquiry into alleged contraventions. Section 22 deals with the meetings of the Commission. As per sub-Section (3) of Section 22 all questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding shall have a second or/casting vote.

17. Another important, relevant and crucial provision of law, which is essential for determination of the issues in these writ petitions is Section 26 of the Act, which reads as follows:

[Procedure for inquiry under section 19]

26. (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter: Provided that if the subject matter of an information received is, in the opinion of the Commission,

substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information. (2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section(3) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(6) If, after consideration of the objections and suggestion referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.]”

18. Chapter VIII-A, which deals with Competition Appellate Tribunal, came into being effect by virtue of Act 39 of 2007. Section 53-A of the Act deals with the establishment of Appellate Tribunal by the Central Government by way of a notification. Section 53-B provides for filing of appeal before the appellate Tribunal against the orders of the Commission.

19. In the instant writ petitions, filed against the orders of the Competition Commission of India under sub-Section 2 of Section 26 of the Act, without admittedly availing the above mentioned statutory alternative remedy of appeal before the appellate Tribunal under Sections 53-A and 53-B, it is the contention of the writ petitioners that the said alternative remedy of appeal is not a bar on invocation of the jurisdiction of this Court under Article 226 of the Constitution of India in view of factual scenario and the violation of the principles of natural justice and fair play.

20. On the contrary, it is the categorical contention of the learned Advocates appearing for the respondents that the writ petitions are liable to be dismissed on the ground of maintainability in view of the availability of efficacious alternative remedy of appeal to the appellate Tribunal under

Sections 53-A and 53-B of the Act. It is also their submission that despite the absence of any provision for affording opportunity of hearing at the time of consideration of the issue under Section 26 (2) of the Act, the second respondent Competition Commission obviously keeping in view the principles of natural justice, afforded the opportunity to the petitioners herein, as such, it is not open for the petitioners herein to make a complaint as to the violation of the principles of natural justice against the second respondent Commission. On the confidentiality, it is their submission that the third respondent acted strictly in accordance with the provisions of 2009 Regulations.

21. The above said contentions are required to be considered and examined in the light of the provisions of the Act and the Judgments cited by both the sides in order to come to a just and reasonable conclusions in these matters.

22. The second respondent/Competition Commission of India, on receipt of information under Section 19 of the Act, passed the impugned order under Sub-Section 2 of Section 26 of the Act. The said provision of law empowers the Competition Commission to close the matter if the Commission finds no *prima facie* case. Sections 53-A and 53-B, which came into being by virtue of Act 39/2007 provide for statutory appeal against the orders passed by the Competition Commission under sub-Section (2) of Section 26 of the Act. Section 53-O and 53-P deals with the procedure and powers of the appellate Tribunal and execution of the orders of the Appellate Tribunal and 53-Q deals with the consequences and the contravention of the orders of the appellate Tribunal. Section 53-T provides for further appeal to the Hon'ble Supreme Court and Section 53-U confers contempt jurisdiction also on the appellate Tribunal.

23. While pointing out the above said provisions of law, it is the submission of the learned Advocates for the respondents that in view of complete mechanism created under the statute, it is incumbent on the part of the petitioners herein to avail the remedy of appeal under the Act.

24. The petitioners herein relied upon the following judgments in order to sustain their arguments in favour of maintainability of the writ petitions:

25. In *HARBANSLAR SAHNIA AND ANOTHER (supra 1)*, the Hon'ble Apex Court while dealing with the case of termination of petroleum dealership on irrelevant grounds, at paragraph 7 held as under:

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

26. In *SURYA DEVI RAI (supra 2)*, the Hon'ble Apex Court at paragraph 38, held as under:

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the

subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

27. The contingencies as set out at sub-paragraphs 3,5, 7 and 8 of paragraph 38 of the above said Judgment do not find place in the present writ petitions, as such, the said judgment would not be helpful to the petitioners.

28. In *RADHEY SHYAM AND ANOTHER (supra 3)*, the Hon’ble Apex Court at paragraphs 31 and 32, held as under:

31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.

32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in *Surya Dev Rai* and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in *Surya Dev Rai* that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in *Surya Dev Rai*, is contrary to the ratio in *Mirajkar* and the ratio in *Mirajkar* has not been overruled in *Rupa Ashok Hurra* [2002 (4) SCC 388].”

29. The above said judgment obviously dealt with the scope of Articles 226 and 227 of the Constitution of India and in the considered opinion of

this Court, the said Judgment also would not render any assistance to the petitioners herein.

30. The judgment of the Hon'ble Apex Court in *M/S. GUJAAT POTTILING CO. LTD & ORS (supra 4)*, in the considered opinion of this Court, has no relevance to the facts of the present case. Therefore, this judgment is also not helpful to the petitioners herein.

31. In *N.L.BAJPAI (supra 5)*, the Hon'ble Apex Court at paragraphs 28 and 32, held as under:

"28. Rule 7 of Chapter III of the said Rules is quite in pari materia with Section 129(6) of the Act and it reads as under :

"7. An officer after his retirement or otherwise ceasing to be in service for any reasons, if enrolled as an Advocate shall not practice in any of the Judicial, Administrative Courts/Tribunals/Authorities, which are presided over by an officer equivalent or lower to the post which such officer last held.

32. For two different reasons, we are unable to hold that the restriction imposed under Section 129(6) of the Act is unreasonable or ultra vires. Firstly, it is not an absolute restriction. It is a partial restriction to the extent that the persons who have held the office of the President, Vice--President or other Members of the Tribunal cannot appear, act or plead before that Tribunal. In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardize the interests of any hardworking and upright advocate. The right of such advocate to practice in the High Courts, District Courts and other Tribunals established by the State or the Central Government other than the CESTAT remains unaffected. Thus, the field of practice is wide open, in which there is no prohibition upon the practice by a person covered under the provisions of Section 129(6) of the Customs Act. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and

standards of advocacy in the country. In fact, it would add further to public confidence in the administration of justice by the Tribunal, in discharge of its functions. Thus, it cannot be held that the restriction has been introduced without any purpose or object. In fact, one finds a clear nexus between the mischief sought to be avoided and the object aimed to be achieved."

32. In the instant case, Mr.Dhall and Mr.K.K.Sharma never appeared in these cases on hand nor they are shown as parties to the present writ petitions, as such, the said judgment also would not render any assistance to the petitioners herein.

33. In *V.K.AGGARWAL (supra 6)*, the High Court of Delhi at paragraphs 22, 23, 27, 29 to 32, held as under:

"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.

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.

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."

34. The Judgment of the Bombay High court in *CELLUR OPERATOR ASSOCIATION (supra 7)* dealt with the provisions of Section 26 (1) of the Act, as such, the same is also not helpful to the petitioners.

35. In *MEGACITY BUILDERS (supra 8)*, this Court at paragraph 45 of the judgment, held as under:

"45. In *Managing Director, Hindustan Aeronautics Limited, Hyderabad v. Ajit Prasad Tarway*, , the Supreme Court once again reiterated the said principle and observed that the High Court in exercise of its jurisdiction under Section 115 CPC may interfere with the order passed by the subordinate Court only when the subordinate Court exercised its jurisdiction either illegally or with material irregularity. The order of the subordinate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; the High Court cannot interfere unless it comes to the conclusion that the Subordinate Court exercised its jurisdiction either illegally or with material irregularity."

36. In the above said Judgment on the ground that the order passed under the Consumer Protection Act suffered from inherent lack of jurisdiction, this Court interfered with the impugned order in the said judgment. In the instant case, there is no such contingency. Therefore,

the said judgment would not render any assistance to the petitioners herein.

37. Coming to the judgments cited by the learned Senior Counsel Sri C.V.Mohan Reddy_ the Hon'ble Apex Court in *TITAGHUR PAPER MILLS CO. LTD., AND ANR (supra 9)*, at paragraph 12, held as follows:

"12. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of s. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of s. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under s. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Water Works Co. v. Hawkesford*(1) in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

38. In *MADHYA PRADESH SPECIAL POLICE ESTABLISHMENT (supra 10)*, the Hon'ble Apex Court at paragraphs 28 and 29, held as follows:

"28. Mr. Soli J. Sorabjee has not placed any material to show as to how the Council of Ministers collectively or the members of the Council individually were in any manner whatsoever biased. There is also no authority for the proposition that a bias can be presumed in such a situation. The real doctrine of likelihood of bias would also not be applicable in such a case. The decision was taken collectively by a responsible body in terms of its constitutional functions. To repeat only in a case of 'apparent bias', the exception to the general rule would apply.

29. On the same analogy in absence of any material brought on records, it may not be possible to hold that the action on the part of the Council of Ministers was actuated by any malice. So far as plea of malice is concerned, the same must be attributed personally against the person concerned and not collectively. Even in such a case the persons against whom malice on fact is alleged must be impleaded as parties."

39. In *COMPETITION COMMISSION OF INDIA (supra 11)*, the Hon'ble Apex Court at paragraph 69, held thus:

"69. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1),

we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously.

40. In *DR. S.A. HAKEEM AND OTHERS (supra 12)*, this Court, at paragraphs 7, 8 and 9, held as under:

"7. To appreciate the submission of the learned Counsel for the petitioners one need to, at the out set, seek answer to the question while conducting examination at the end of educational course and awarding degrees/diplomas in proof of successful completion of the course whether the university performs judicial function, quasi-judicial function or administrative function. The examining body or board of examiners or an individual examiner/evaluator certainly does not perform judicial functions. It is doubtful whether the Board of Examiners performs quasi-judicial function while evaluating the examination papers and declaring the results. Thus, when the knowledge of a student after completion of the course is tested by the examiners which results in awarding of pass certificate the function is akin to that of a selection committee selecting an eligible, suitable and meritorious candidate for being appointed to a job. The Board of Examiners, therefore, performs an administrative function leading to an administrative decision. The fact that the examiners are not under legal obligation to give reasons as to

how they evaluated the papers in certain manner lends support to such view. It is settled that administrative authority is under no legal obligation to record reasons in support of its decision and that the only requirement is that the administrative authority should follow 'Fairness or fair' procedure. (See National Institute of Mental Health v. Kalyana Roman,), Therefore, if there is a lone examiner and he acts with proven malice or bias in a given case the same can be challenged before appropriate university authority. But, in my considered opinion when a body of persons takes a decision resulting in 'collectively of opinion', the aggrieved person cannot complain bias or malice. That is to say ordinarily it cannot be heard that the Board of Examiners acted with bias or malice.

8. Another aspect of judicial review on the ground of bias is that bias resulting from malice in fact can be waived. A person, who waives bias, is estopped from challenging the action in a Court of law. In 'service jurisprudence' it is well settled that a prospective selectee who knowingly appears before the selection committee is seldom permitted to complain that one of the members of the selection committee is biased and hence selection is vitiated. In my considered opinion, there cannot be any objection to import the same principles in the case of evaluation of answer scripts by a board of examiners. In G. Sarana v. Lucknow University, AIR 1992 SC 1886 after referring to Manaklal v. Prem Chand, , A.K. Kraipak v. Union of India, and S. Parthasarathi v. State of Andhra Pradesh, , the Supreme Court held that a candidate, who knowingly voluntarily appears before the selection board cannot be heard to complain against the selection board. The observations and the law declared by the Supreme Court, which are apt for the purpose, are as under:

".....In a group deliberation and decision like that of a Selection Board, the members do not function as computers. Each member of the group or board is bound to influence the others, more so if the member concerned is a person with special knowledge.

His bias is likely to operate in a subtle manner.....We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of

the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee.

9. The petitioners admittedly knew that the fifth respondent is the Chief-Examiner. They did not object though before that date they had already gone on agitation against the fifth respondent. They voluntarily appeared in practical and viva voce before the Board of Examiners, which included two external examiners including the Chief-Examiner. The decision resulting in the declaration of results is collective decision, which cannot be challenged on the ground of bias. Be that as it may, having appeared before the Board of Examiners, including the fifth examiner without demur, the petitioners cannot be allowed to complain bias and malice in MS/DLO examinations.”

41. In *NISSAN MOTORS INDIA PRIVATE LIMITED (NMIPL) (supra 13)*, the Madras High Court at paragraphs 37 and 38 held as under:

“37. A writ petition under article 226 of the constitution of india should not be entertained when the statute itself provides for efficacious alternative remedy under the Act, unless exceptional circumstances, such as, violation of fundamental rights, violation of principles of natural justice and ultra vires the rule of law, are made out. In other words, the powers conferred upon the High Court under Article 226 are discretionary in nature, which can be invoked very sparingly, for the enforcement of any fundamental right or legal right, but not for any other rights, in view of the existence of efficacious alternative remedy. The Constitutional Court should insist upon the party to avail the same, instead of invoking the extraordinary writ jurisdiction of the High Court. This does not, however, debar the High Court from granting the appropriate relief to a citizen under peculiar and special facts, notwithstanding the existence of alternative remedy and the existence of special circumstances are required to be noticed before issuance of the direction by the High Court, while invoking the jurisdiction under Article 226. Also, when the issue relates to enforcement of a right or obligation under the statute and

specific remedy is provided under the statute, the High Court should not normally entertain a writ petition and interfere with the decision made by the authorities. Similarly, if a statute confers a right and in the same breath provides for a remedy for enforcement of such right, the remedy provided by the statute is an exclusive one. Therefore, if a statute imposes a duty on one party to do a certain thing, it creates a right in such persons, who would be injured by its contravention.

38. In the instant case, in the absence of any infringement of the fundamental rights or the principles of natural justice or the rule of law, the questions raised by the petitioners on merits, as to locus standi of the first respondent in passing the order impugned, dated 26.04.2011; unexplained delay by the second respondent in conducting the investigation; and competency of the quorum of the first respondent, are all matters, to be looked into by the Competition Appellate Tribunal under Section 53B of the Act, in the manner as contemplated.”

42. In *SOMI CONVEYOR BELTINGS LTD. & ANR (supra 14)*, a Division Bench of Delhi High Court, at paragraph 18 of the Judgment, held as under:

“18. It may also be added that Section 26 of the Act provides for the procedure for inquiry by CCI under Section 19 i.e., inquiry into anti competitive agreements and abuse of an enterprise of its dominant position. Section 36 further empowers CCI to regulate its own procedure for the purpose of discharging its functions under the Act however, CCI shall be guided by the principles of natural justice and in respect of the matters specified in sub section 2 of Section 36 relating to recording evidence, CCI is conferred with the same powers as are vested in a Civil Court under CPC, 1908 while trying a Suit. However, Section 57 of the Act makes it clear that no information relating to any enterprise being information which has been obtained by CCI for the purpose of the Act shall be disclosed otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force. Further, Regulation 35 of General Regulations 2009 expressly provides that the commission shall maintain confidentiality of the identity of an informant, a document or documents or a part thereof on a

request made by the informant. Such confidential treatment may be given by the CCI or DG, on being satisfied, to any other information or document or part thereof also in respect of which no request has been made by the informant or the party which has furnished such information or document. Though Regulation 37 enables a party to the proceedings to inspect the documents or records submitted during proceedings or to obtain copies of the same by making an application accompanied with the specified fees, the same is subject to the restriction on disclosure of information as provided under Section 57 of the Act. Thus, it is clear that the entitlement of a party to the proceedings to inspect the documents or to obtain copies of the same is not absolute and it is always open to CCI to reject permission for inspection or furnishing copies if it is of the view that the documents/information require confidential treatment."

43. In *VODAFONE INDIA LIMITED AND ORS. (supra 15)*, the High Court of Bombay, at paragraph 14, held as under:

"14. If the Commission is of the opinion that no prima facie case exists, it may close the case as contemplated under Section 26(2) of the Competition Act. The aggrieved person and/or parties, including informant **may** invoke the provisions of Appeal under Section 53(A) of the Competition Act. The Appeal, against the directions so issued under **Section 26(1)** on the basis of prima facie opinion by the Commission is not maintainable. However, the aggrieved party cannot be remediless. Therefore, the Writ Petition, as an alternative and effective remedy is only available."

44. Coming to the judgments cited by the learned counsel for the second respondent/Commission_ in *COMMISSIONER OF INCOME TAX AND ORS. (supra 16)* the Hon'ble Apex Court at paragraphs 19 and 20, held as under:

"19. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has

been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titagarh Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

20. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case."

45. In *STATE OF PUNJAB v. DAVINDER PAL SINGH BHULLAR AND ORS. ETC.* (*supra* 17), the Hon'ble Apex Court while dealing with the aspect of bias, at paragraphs 21 to 25, held as follows:

"21. In *Manak Lal* (*Supra*), this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the

circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. "Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question."

Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias.

The issue of bias must be raised by the party at the earliest.

(See: M/s. Pannalal Binjraj & Ors. v. Union of India & Ors., AIR 1957 SC 397; and Justice P.D. Dinakaran (Supra))

22. In M/s. Power Control Appliances & Ors. v. Sumeet Machines Pvt. Ltd., (1994) 2 SCC 448 this Court held as under:-

"Acquiescence is sitting by, when another is invading the rights.... It is a course of conduct inconsistent with the claim... It implies positive acts; not merely silence or inaction such as involved in laches. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant....."

Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in P. John Chandy & Co. (P) Ltd. v. John P. Thomas, AIR 2002 SC 2057.

Thus, the Court has to examine the facts and circumstances in an individual case.

23. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to

assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide: Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish, AIR 1935 PC 79; Basheshar Nath v.

Commissioner of Income-tax, Delhi and Rajasthan & Anr., AIR 1959 SC 149; Mademsetty Satyanarayana v. G. Yelloji Rao & Ors., AIR 1965 SC 1405; Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh, AIR 1968 SC 933; Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors., (1992) Suppl 1 SCC 5; M/s. Sikkim Subba Associates v. State of Sikkim, AIR 2001 SC 2062; and Krishna Bahadur v. M/s. Purna Theatre & Ors., AIR 2004 SC 4282).

24. This Court in Municipal Corporation of Greater Bombay v.

Dr. Hakimwadi Tenants' Association & Ors., AIR 1988 SC 233 considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:

"In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case....."

There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights, by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition."

25. Thus, from the above, it is apparent that the issue of bias should be raised by the party at the earliest, if it is aware of it and knows its right to raise the issue at the earliest, otherwise it would be deemed to have been waived. However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias etc., surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another

is invading the rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create rights in other party. Needless to say that question of waiver/acquiescence would arise in a case provided the person apprehending the bias/prejudice is a party to the case. The question of waiver would not arise against a person who is not a party to the case as such person has no opportunity to raise the issue of bias."

46. In *COMPETITION COMMISSION OF INDIA (supra 11)*, the Hon'ble Apex Court at paragraph 21, held as follows:

"21. We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:

1) In terms of Section 53A(1)(a) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. For example taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.

2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter."

47. In *FLEMINGO (DFS) PRIVATE LIMITED (supra 18)*, this Court at paragraphs 7, 8, 10, 21, 26, 28 and 29, held as follows:

"7. The question of maintainability of the writ petition, having regard to Section 129A of the Customs Act and the question of violative of principles of natural justice, are interconnected. Therefore, both the issues need to be considered together.

Articles 226 and 227 of Constitution confer power of judicial review on the High Courts. The power includes issuing writs in the nature of certiorari, habeas corpus, mandamus, prohibition and quo warranto, as well as directions and orders. These are writs, which were issued at the discretion of the King's Courts in England to check excesses in the exercise of power by servants of the kingdom. The issue of writs; nay the exercise of judicial review power is subject to certain limitations, some imposed by the constitution or the statutes and others certain self-imposed limitations. One of these is the existence of alternative remedies. When the power conferred by the Constitution under Articles 226 and 227 of Constitution is exhaustive and wide enough, what is the justification for denying constitutional remedy?

Clive Lewis 'Judicial Remedies in Public Law' Sweet & Maxwell 2004, at pp.410, explains "the rationale for exhaustion of alternative remedies' as follows.

A two-fold justification has been put forward. First, that where Parliament has provided for a statutory appeals procedure, it is not for the courts to usurp the functions of the appellate body. The principle applies equally to bodies not created by statute which have their own appellate system. Secondly, the public interest dictates that judicial review should be exercised speedily, and to that end it is necessary to limit the number of cases in which judicial review is used. More generally, the courts now encourage parties to resolve disputes without resorting to the expense of litigation. To these reasons can be added the additional expertise that the appellate bodies possess. In tax cases, for example, the appellate body, the General or Special Commissioners, have wide experience of the complex and detailed tax legislation. In employment cases, for example, the system of employment and Employment Appeal tribunals may be better equipped to deal with industrial issues than the High Court. In the financial services field, specialist procedures and a specialist tribunal have been established to deal with certain matters. Similarly, where there is a further appeal to the courts, this may be to a division of the High Court particularly familiar with the area in question, as in tax cases, where the appeal is heard in the Chancery Division not the Queen's Bench Division. (emphasis supplied)

The decisions of Supreme Court of India and other High Courts are galore in this regard. The principle is well established that no writ would ordinarily lie if there is an effective and efficacious alternative remedy provided by the statute itself. This rule, however, has mainly four exceptions. These are

(i) When Constitutional validity of the statute is challenged (K.S.Venkataraman and Company (P) Limited v State of Madras¹ and Dhulabhai v State of Madhya Pradesh²);

(ii) Where the impugned action is in violation of fundamental right especially under Articles 14 and 19(1)(a) or (g) of Constitution;

(iii) Where the impugned order/action is in breach of natural justice; and

(iv) When challenge is to the action which is patently and ex facie without jurisdiction.

In Whirlpool Corporation v Registrar of Trade Marks, Mumbai³, the Supreme Court clarified this position. If a matter requires technical knowledge, which is available in the statutory appellate forum, ordinarily, the High Court would not be inclined to exercise discretion under Article 226 of Constitution of India. These principles are well settled.

Further, in tax matters, ordinarily Courts have declined to exercise writ jurisdiction. In C.A.Abraham v I.T.Officer⁴, the appellant along with another was partner in M/s.M.P.Thomas and Company engaged in food grains business. The firm submitted Returns to Income Tax Officer (ITO). On the ground that the firm was carrying transactions in fictitious names, and had suppressed income for AY 1948-1949, show cause notice was issued for imposing penalty under Section 28 of Income Tax Act, 1922. Explanation was submitted. ITO passed orders imposing penalty for AYs 1950-1951 and 1951-1952. Appeals were dismissed by the appellate authority. The same was assailed in Certiorari proceedings before the Kerala High Court. The Court rejected relying on a Judgment of the A.P.High Court in Mareddi Krishna Reddy v Income Tax Officer, Tenali⁵. In Appeal with Certificate of High Court, the Supreme Court considered two questions, namely, whether High Court could have entertained a

writ petition ignoring alternative remedy provided by the Act and whether the provisions imposing penalty can be interpreted by pointing out deficiencies. On the first question, it was held that, "assessee cannot abandon to resort to machinery provided under the Act and directly invoke remedy under Article 226 of Constitution of India". The observations are as follows (para 3).

8. In our view, the petition filed by the appellant should not have been entertained. The Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal.

9. In *Champalal Binani v The Commissioner of Income Tax, West Bengal*⁶ the Commissioner of Income Tax issued a notice to the appellant under Section 33-B of the Income Tax Act, 1922 to show cause as to why the orders of assessment for AYs 1953-1954 to 1960-1961 should not be revised. Copies of the notices were sent to the addresses disclosed in the IT Returns. On the date of hearing, none appeared for the assessee. The Commissioner set aside the orders and directed the ITO to make fresh assessment after enquiry and the investigation. Against the said order, the appellant moved the High Court of Calcutta by filing a writ petition. Holding that the notice under Section 33-B was not served on the assessee, the learned single Judge set aside the order of the Commissioner. The Division Bench reversed the order holding that notice was served. The Supreme Court dismissed the appeal and reiterated that when the Income Tax Act provides a complete and self-contained machinery for redressal of grievances, no party can be allowed to invoke the extraordinary remedy under Article 226 of Constitution of India. The relevant observations are as follows (para 5).

10. We deem it necessary once more to emphasize that the Income Tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse

to have recourse to that machinery and to approach the High Court directly against the action. ... A writ of certiorari is discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income Tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority, which is ex facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petitioner. (emphasis supplied) *Chanan Singh and Sons v Collector Central Excise*⁷ was a case where a writ petition was filed before the P&H; High Court challenging the order of the CEGAT (now CESTAT) allowing the department's appeal. The High Court dismissed the writ petition holding that there is a statutory alternative remedy available. Aggrieved by the same, appeal was carried to the Supreme Court. Confirming the order of the High Court, the Supreme Court observed (para 2) as under.

21. Unfortunately, the high Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the

remedies available under the relevant statute. (emphasis supplied)

The position in English Courts is also well accepted. In *R v IRC Ex parte Preston*¹³, Lord Scarman summed up the position in English Administrative Law, thus:

26. Therefore, the rule that whenever natural justice is violated, the judicial review Court should ignore the statutorily provided remedy of appeal or revision and entertain the writ petition is not acceptable absolutely. In all tax cases - judicial notice may be taken that the endeavour of the tax payer is to gain as much time as possible, and postpone payment probably to maintain financial liquidity in business operations. The Court, therefore, must strictly scrutinize in proceeding under Article 226 of Constitution with respect to the availability of remedy under the Statute. Further, there cannot be any doubt that all issues in tax matters are not simple questions of fact and law. The expert consideration by specialist tribunals may be necessary at the first instance before the judicial remedy is made available as provided in the statute. All the direct and indirect tax laws provide the remedy of appeal or revision to the High Court against specialist tribunals established under the law made under Article 323B of the Constitution of India. Ignoring the legislative intention behind creating such elaborate tax dispute resolution mechanisms the High Court may not ordinarily interfere with the show cause notices which are themselves issued in compliance with the statute and/or assessment orders passed after detailed consideration.

28. No doubt, alternative remedy is not an absolute bar to the filing of writ petitions, but at the same time it is well settled that writ jurisdiction is discretionary jurisdiction and when there is an alternative remedy, ordinarily a party must resort to that remedy first before approaching this court. Entertaining writ petitions straight away without insisting that a party should first avail of the alternative remedy is an over liberal approach which has caused immense difficulties to the High Courts in the country because they have added to the huge arrears. The Courts have already become overburdened by this over liberal approach instead of following the settled legal principle that a writ petition should ordinarily be dismissed if there is an alternative remedy.

The High Courts in India are already tottering and reeling under the burden of massive arrears which have flooded the dockets of the Court, and such kind of over liberal approach has only multiplied this problem manifold. If this approach is further continued a time will surely come when the High Courts will find it impossible to function. All this has happened because unfortunately some Courts have departed from well-settled legal principles. (emphasis supplied)

29. Even in cases where there is demonstrable breach of natural justice, as of right a petition for judicial review would not lie. The aggrieved can appear before a specialist agency, be it a departmental authority or a quasi-judicial tribunal - and agitate in matters like taxes, social security, distribution of benefits to poor wherein elaborate background facts need to be evaluated. The issue of natural justice can always be considered even by the appellate authority/tribunal. We may refer to two English cases viz., *Banin v Mackinlay (Inspector of Taxes)*³² and *R v Brentford General Commissioners Ex p. Chan*³³."

48. In *SCHWING STETTER INDIA PRIVATE LIMITED (supra 19)*, a Division Bench of this Court, at paragraphs 12, 14 to 17, held as under:

"12. *Chanan Singh and Sons v. Collector Central Excise* MANU/SC/1082/1999: (1999) 9 SCC 17 was a case where a writ petition was filed before the P&H High Court challenging the order of the CEGAT (now CESTAT) allowing the department's appeal. The High Court dismissed holding that there is a statutory alternative remedy available. Aggrieved by the same, appeal was carried to Supreme Court. Confirming the High Court, Supreme Court observed (para 2) as under:

"The appellant challenged before the High Court an order of the Tribunal allowing the appeal of the Revenue. The High Court simply said that the appellant had a statutory alternative remedy and the appellant had to avail that statutory remedy instead of filing writ petition. Accordingly, the High Court dismissed the writ petition. The appellant instead of challenging the order of the Tribunal by availing the statutory alternative remedy, has filed this appeal by

special leave challenging the order of the High Court. We are of the view that the High Court was right in dismissing the writ petition directing the appellant to avail the statutory alternative remedy."

14. In view of the principles laid down in the above judgments, when an effective efficacious alternative remedy is available, this Court cannot exercise its power of judicial review under Article 226 of Constitution of India.

15. In a recent judgment of the Apex Court in Commissioner of Income Tax and others v. Chhabil Das Agarwal MANU/SC/0802/2013,, it was held as follows:

"Non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. However, when a statutory forum is created by law for the assessment/respondents-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue authorities, and the assessee could not be permitted to invoke the writ jurisdiction when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). Assessee in the instance case neither described the available alternative remedy under the Act as ineffectual and non-efficacious nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. Writ Court

accordingly, as held, should not have entertained the Writ petition.”

16. In view of the principle laid down in the above judgment, the bar not to entertain a petition exercising power under Article 226 of Constitution of India is a self-imposed limitation to minimize burden. However, if extraordinary circumstance or statutory violation is shown, jurisdiction under Article 226 of Constitution of India can be exercised, if there is a material to show that the points which are urged before this Court cannot be urged in the appeal and that the remedy is non-eficacious and ineffective.

17. In the instant case on hand, no extraordinary circumstances are pleaded and brought to the notice of this Court in the entire affidavit and there is absolutely no pleading that alternative remedy by way of appeal under Section 31 is non-eficacious and ineffective that this ground regarding variation of percentage (%) of tax levyable on concrete mixers (transit mixers) cannot be urged before appellate authority. In the absence of any such allegation, in view of self-imposed limitation as observed by the Apex Court, we are not inclined to exercise our extraordinary power of judicial review under Article 226 of Constitution of India to grant relief. Therefore, on this ground the writ petition is not maintainable. Accordingly, point No.1 is held.”

49. In the instant cases, admittedly, the third respondent served counters on the petitioners on 10.10.2017 and the matter was heard by the Commissioner on 12.10.2017 and reserved for judgment. Admittedly, the petitioner in W.P.No.42223 of 2017 earlier filed W.P.No.36397/2017 on 30.10.2017 for the following relief:

“To issue writ, order, direction more particularly one in the nature of writ of mandamus declaring the action of Respondent No.2 in not conducting the enquiry/investigation into the information furnished by the Petitioner within the time frame as enunciated under Competition Act, 2002 as being illegal, unjust and improper and in violation of Article 21 of the Constitution and further directing Respondent No.2 to enquire and investigate into the information provided by the Petitioner about Respondent

No.3 within the time frame as prescribed under Competition Act, 2002.”

50. In the said writ petition, as evident from the relief portion set out *supra*, the petitioner sought enquiry/investigation into the information within the time frame. A copy of the petition and the affidavit filed in the said writ petition are placed on record by the learned counsel for the second respondent. A reading of the affidavit filed in support of the said writ petition clearly discloses that the petitioner in W.P.No.42223 of 2017 did not mention any aspects of bias and violation of the principles of natural justice which he seeks to make the foundation for the present writ petition. The fact remains that on 12.10.2017 matters were reserved. It is a fact that by way of e-mails dated 21.11.2017 and 29.11.2017 the petitioners herein objected the appearance of Mr.Dhall before the Commission. It is also the fact that in the e-mail dated 21.11.2017 he expressed concern about information received from K.K.Sharma. As mentioned *supra*, neither at the time of hearing before the Commission nor before this Court in the earlier W.P.36397 of 2017, the petitioner in W.P.No.42223 of 2017 raised such objection. On the other hand, as noted above, the petitioner in W.P.No.42223 of 2017 sought completion of the proceedings in an expeditious manner. Therefore, for the purpose of maintaining the present writ petitions the grounds taken in the writ petitions cannot form the foundation in view of the principles laid down in the judgments cited *supra* by the learned counsel for the third respondent and as referred to above.

51. It is also significant to note that the appellate Tribunal is headed by the Chair-person who is Hon'ble retired Judge of the Hon'ble Supreme Court. It is also required to be noted that there is an effective and alternative mechanism under the present legislation as observed in the preceding paragraphs.

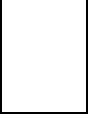
52. It is also to be noted that the contention of the petitioners about the confidentiality under Section 35 of the 2009 Regulations falls to the ground as they failed to avail the opportunity under Regulation 37 of the said Regulations. By any stretch of imagination, it cannot be said that the orders passed by the Competition Commission are violative of the principles of natural justice and suffer from unfairness. Therefore, this Court is of the opinion that necessarily the petitioners herein need to avail the alternative remedy of appeal to the appellate Tribunal under Sections 53-A and 53-B of the Competition Act, 2002.

53. In view of the law laid down in the Judgments cited by the learned counsel for the respondents and having regard to the complete mechanism created under the provisions of Competition Commission Act, 2002 and in view of the effective, efficacious and alternative remedy provided under Section 53-A and 53-B, this Court is not inclined to entertain the present writ petitions and exercise jurisdiction under Article 226 of the Constitution of India. This Court has absolutely no scintilla of hesitation nor any traces of doubt to hold that the present writ petitions are liable to be rejected on the ground of availability of the alternative remedy.

54. For the aforesaid reasons, the writ petitions are dismissed, keeping it open for the petitioners herein to avail the alternative remedy and to raise all the grounds before the appellate Tribunal. As a sequel, the miscellaneous petitions, if any, shall stand disposed of. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:14.02.2018
grk



THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.No.42223 and 43744 of 2017

Dated:14.02.2018

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