IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **20.09.2019**

CORAM:

THE HONOURABLE MR.JUSTICE **S.MANIKUMAR**
and
THE HONOURABLE MR.JUSTICE **SUBRAMONIUM PRASAD**

W.P.Nos.21147, 21148 and 14919 of 2018
and
WMP Nos.24826, 24827, 17635 & 17636 of 2018

WP Nos.24117 & 24118 of 2018

Revenue Bar Association,
New No.115 (First Floor)
Luz Church Road, Mylapore,
Chennai - 600 004
Represented by its Secretary,
Mr.Duwari Anand ... Petitioner in both WPs.

Vs

1. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue,
No.137, North Block, New Delhi - 110 001.

2. Union of India,
Represented by its Secretary,
Ministry of Law & Justice,
4th Floor, 'A' Wing,
Rajendra Prasad Road,
Shastri Bhavan, New Delhi - 110 001.

3. The Goods and Services Tax Council,
Represented by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Connaught Place, New Delhi - 110 001.

4. The State of Tamil Nadu,
Represented by its Chief Secretary,
St. George Fort, Chennai - 600 009 ... Respondents in both WPs.

Prayer in WP No.21147 of 2018: Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of declaration, to declare Chapter XVIII of the Tamil Nadu Goods and Services Tax Act, 2017, more particularly, Sections 109 and 110 of the Tamil Nadu Goods and Services Tax Act, 2017 relating to constitution of the Appellate Tribunal and qualification, appointment and condition of services of its members as void, defective and unconstitutional, being violative of Articles 14, 21, 50 of the Constitution of India, and doctrines of separation of powers and independence of judiciary, which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in Union of India Vs. R.Gandhi (2010) 11 SCC 1.

Prayer in WP No.21148 of 2018: Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of declaration, to declare Chapter XVIII of the Central Goods and Services Tax Act, 2017, more particularly, Sections 109 and 110 of the Tamil Nadu Goods and Services Tax Act, 2017 relating to constitution of the Appellate Tribunal and qualification, appointment and condition of services of its members as void, defective and unconstitutional, being violative of Articles 14, 21, 50 of the Constitution of India, and doctrines of separation of powers and independence of judiciary, which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in Union of India Vs. R.Gandhi (2010) 11 SCC 1.

For Petitioner in both Wps. : Mr.Arvind Datar, Sr. Counsel
For M/s.Rahul Unnikrishnan,
Karthik Sundaram

For Respondents : Mr.G.Rajagopalan,

in both Wps. Additional Solicitor General
Assisted by Mrs.Aparna Nandakumar
CGSC (for R1 to R3)
Mr.Mohammed Shaffiq (for R4)
Spl. Govt. Pleader (Taxes)

WP No.14919 of 2018

V.Vasanthakumar ... Petitioner

Vs

1. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue,
No.137, North Block, New Delhi - 110 001.

2. Union of India,
Represented by its Secretary,
Ministry of Law & Justice,
4th Floor, 'A' Wing,
Rajendra Prasad Road,
Shastri Bhavan, New Delhi - 110 001.

3. The Goods and Services Tax Council,
Represented by its Secretary,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Connaught Place, New Delhi - 110 001.

4. The State of Tamil Nadu,
Represented by its Chief Secretary,
St. George Fort, Chennai - 600 009 ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of declaration, to declare Section 109 of the Central Goods & Service Tax Act, 2017 and Tamil Nadu Goods & Service Tax Act, 2017, constituting Appellate Tribunal and Section 110 of the CGST Act and TNGST Act

relating to qualification, appointment and condition of services of its members as ultra vires of Article 14 and 50 of the Constitution of India, and being violative of the doctrine of separation of powers and independence of judiciary, which are parts of the basic structure of the Constitution and further contrary to the principles laid down by the Hon'ble Supreme Court in Union of India Vs. R.Gandhi (2010) 11 SCC 1 and Kesavananda Bharati Vs. State of Kerala [(1973) 4 SCC 225].

For Petitioner : Mr.Vasanthakumar
Petitioner-in-Person

For Respondents : Mr.G.Rajagopalan,
Additional Solicitor General
Assisted by Mrs.Aparna Nandakumar
CGSC (for R1 to R3)
Mr.Mohammed Shaffiq (for R4)
Spl. Govt. Pleader (Taxes)

COMMON ORDER

(Order of this Court was made by **SUBRAMONIUM PRASAD, J.)**

Challenge in these writ petitions is to declare Sections 109 and 110 of the Central Goods and Services Tax Act, 2017 **[in short CGST Act, 2017]** and Tamil Nadu Goods and Services Tax Act, 2017 **[in short TNGST Act, 2017]**, relating to the constitution of the Goods and Services Tax Appellate Tribunal and the qualification and appointment of members, as void, defective and unconstitutional, being violative of Articles 14, 21 and 50 of the Constitution of India and various judgments of the Hon'ble Supreme Court.

2. Article 246-A (Special provision with respect to goods and service tax) was inserted in the Constitution of India, by the Constitution (One Hundred and First Amendment) Act, 2016. As per Article 246-A(1), notwithstanding anything contained in Articles 246 and 254, Parliament, and subject to clause (2), the Legislature of every State has the power to make laws with respect to goods and services tax imposed by the Union or the State.

3. Article 246-A(2) gives Parliament its exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

4. Article 366(12-A), which was also inserted by the Constitution (One Hundred and First Amendment) Act, 2016 defines, "goods and services tax" to mean any tax on supply of goods, or services or both, except taxes on the supply of alcoholic liquor for human consumption.

5. Chapter XVIII of the Central Goods and Services Tax Act, 2017 **[in short CGST Act, 2017]** and Chapter XVIII of the Tamil Nadu Goods and Services Tax Act, 2017 **[in short TNGST Act, 2017]** provides for hierarchy of authorities to adjudicate the disputes relating to Goods and Services Tax.

6. Sections 109 & 110 of the CGST Act, 2017 and **TNGST Act, 2017** which are under challenge reads as under.

109. Constitution of Appellate Tribunal and Benches thereof.

(1) The Government shall, on the recommendations of the Council, by notification, constitute with effect from such date as may be specified therein, an Appellate Tribunal known as the Goods and Services Tax Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

(2) The powers of the Appellate Tribunal shall be exercisable by the National Bench and Benches thereof (hereinafter in this Chapter referred to as "Regional Benches"), State Bench and Benches thereof (hereafter in this Chapter referred to as "Area Benches").

(3) The National Bench of the Appellate Tribunal shall be situated at New Delhi which shall be presided over by the President and shall consist of one Technical Member (Centre) and one Technical Member (State).

(4) The Government shall, on the recommendations of the Council, by notification, constitute such number of Regional Benches as may be required and such Regional Benches shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State).

(5) The National Bench or Regional Benches of the Appellate Tribunal shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases where one of the issues involved relates to the place of supply.

(6) The Government shall, by notification, specify for each State or Union territory, a Bench of the Appellate Tribunal (hereafter in this Chapter, referred to as "State Bench") for exercising the powers of the Appellate Tribunal within the concerned State or Union territory:

Provided that the Government shall, on receipt of a request from any State Government, constitute such number of Area Benches in that

State, as may be recommended by the Council:

Provided further that the Government may, on receipt of a request from any State, or on its own motion for a Union territory, notify the Appellate Tribunal in a State to act as the Appellate Tribunal for any other State or Union territory, as may be recommended by the Council, subject to such terms and conditions as may be prescribed.

(7) The State Bench or Area Benches shall have jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than those referred to in sub-section (5).

(8) The President and the State President shall, by general or special order, distribute the business or transfer cases among Regional Benches or, as the case may be, Area Benches in a State.

(9) Each State Bench and Area Benches of the Appellate Tribunal shall consist of a Judicial Member, one Technical Member (Centre) and one Technical Member (State) and the State Government may designate the senior most Judicial Member in a State as the State President.

(10) In the absence of a Member in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or, as the case may be, the State President, be heard by a Bench of two Members:

Provided that any appeal where the tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in any order appealed against, does not exceed five lakh rupees and which does not involve any question of law may, with the approval of the President and subject to such conditions as may be prescribed on the recommendations of the Council, be heard by a bench consisting of a single member.

(11) If the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or

points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

(12) The Government, in consultation with the President may, for the administrative convenience, transfer—

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

(13) The State Government, in consultation with the State President may, for the administrative convenience, transfer a Judicial Member or a Member Technical (State) from one Bench to another Bench within the State.

(14) No act or proceedings of the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Appellate Tribunal.

110. President and Members of Appellate Tribunal, their qualification, appointment, conditions of service, etc.

(1) A person shall not be qualified for appointment as—

(a) the President, unless he has been a Judge of the Supreme Court or is or has been the Chief Justice of a High Court, or is or has been a Judge of a High Court for a period not less than five years;

(b) a Judicial Member, unless he—

(i) has been a Judge of the High Court; or

(ii) is or has been a District Judge qualified to be appointed as a Judge of a High Court; or

(iii) is or has been a Member of Indian Legal Service and has

held a post not less than Additional Secretary for three years;

(c) a Technical Member (Centre) unless he is or has been a member of Indian Revenue (Customs and Central Excise) Service, Group A, and has completed at least fifteen years of service in Group A;

(d) a Technical Member (State) unless he is or has been an officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State goods and services tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with at least three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in the field of finance and taxation.

(2) The President and the Judicial Members of the National Bench and the Regional Benches shall be appointed by the Government after consultation with the Chief Justice of India or his nominee:

Provided that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office:

Provided further that where the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes his duties.

(3) The Technical Member (Centre) and Technical Member (State) of the National Bench and Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such persons and in such manner as may be prescribed.

(4) The Judicial Member of the State Bench or Area Benches shall be appointed by the State Government after consultation with the Chief Justice of the High Court of the State or his nominee.

(5) The Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be prescribed.

(6) No appointment of the Members of the Appellate Tribunal shall be invalid merely by the reason of any vacancy or defect in the constitution of the Selection Committee.

(7) Before appointing any person as the President or Members of the Appellate Tribunal, the Central Government or, as the case may be, the State Government, shall satisfy itself that such person does not have any financial or other interests which are likely to prejudicially affect his functions as such President or Member.

(8) The salary, allowances and other terms and conditions of service of the President, State President and the Members of the Appellate Tribunal shall be such as may be prescribed:

Provided that neither salary and allowances nor other terms and conditions of service of the President, State President or Members of the Appellate Tribunal shall be varied to their disadvantage after their appointment.

(9) The President of the Appellate Tribunal shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of seventy years, whichever is earlier and shall be eligible for reappointment.

(10) The Judicial Member of the Appellate Tribunal and the State President shall hold office for a term of three years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment.

(11) The Technical Member (Centre) or Technical Member (State) of the Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for

reappointment.

(12) The President, State President or any Member may, by notice in writing under his hand addressed to the Central Government or, as the case may be, the State Government resign from his office:

Provided that the President, State President or Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government, or, as the case may be, the State Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is

the earliest.

(13) The Central Government may, after consultation with the Chief Justice of India, in case of the President, Judicial Members and Technical Members of the National Bench, Regional Benches or Technical Members (Centre) of the State Bench or Area Benches, and the State Government may, after consultation with the Chief Justice of High Court, in case of the State President, Judicial Members, Technical Members (State) of the State Bench or Area Benches, may remove from the office such President or Member, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of such Government involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, State President or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, State President or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, State President or the Member shall not be removed on any of the grounds specified in clauses (d) and (e),

unless he has been informed of the charges against him and has been given an opportunity of being heard.

(14) Without prejudice to the provisions of sub-section (13),--

(a) the President or a Judicial and Technical Member of the National Bench or Regional Benches, Technical Member (Centre) of the State Bench or Area Benches shall not be removed from their office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government and of which the President or the said Member had been given an opportunity of being heard;

(b) the Judicial Member or Technical Member (State) of the State Bench or Area Benches shall not be removed from their office except by an order made by the State Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the concerned High Court nominated by the Chief Justice of the concerned High Court on a reference made to him by the State Government and of which the said Member had been given an opportunity of being heard.

(15) The Central Government, with the concurrence of the Chief Justice of India, may suspend from office, the President or a Judicial or Technical Members of the National Bench or the Regional Benches or the Technical Member (Centre) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (14).

(16) The State Government, with the concurrence of the Chief Justice of the High Court, may suspend from office, a Judicial Member or Technical Member (State) of the State Bench or Area Benches in respect of whom a reference has been made to the Judge of the High Court under sub-section (14).

(17) Subject to the provisions of article 220 of the Constitution, the President, State President or other Members, on ceasing to hold their

office, shall not be eligible to appear, act or plead before the National Bench and the Regional Benches or the State Bench and the Area Benches thereof where he was the President or, as the case may be, a Member.

Sections 109 & 110 of the TNGST Act, 2017 reads as under

109. Appellate Tribunal and Benches thereof. *(1) Subject to the provisions of this Chapter, the Goods and Services Tax Tribunal constituted under the Central Goods and Services Tax Act shall be the Appellate Tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority under this Act.*

(2) The constitution and jurisdiction of the State Bench and the Area Benches located in the State shall be in accordance with the provisions of section 109 of the Central Goods and Services Tax Act or the rules made thereunder.

110. President and Members of Appellate Tribunal, their qualification, appointment, conditions of service, etc.: *The qualifications, appointment, salary and allowances, terms of office, resignation and removal of the President and Members of the State Bench and Area Benches shall be in accordance with the provisions of section 110 of the Central Goods and Services Tax Act.*

7. Section 109 of CGST Act, 2017 and TNGST Act, 2017 lays down the constitution of the Appellate Tribunal and the benches thereof and Section 110 prescribes the qualification of the President and the members of the Appellate Tribunal.

8. Section 109 of CGST Act, states that the Government shall, on the recommendations of the Council, constitute an Appellate Tribunal, known as the Goods and Services Tax Appellate Tribunal, for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

9. An Appellate Authority hears appeals under Section 107 of the Act and such appeals are filed against any decision or order passed under CGST Act, 2017 or TNGST Act, 2017 or the Union Territory Goods and Services Tax Act, by an adjudicating authority. The powers of the Revisional Authority are laid down in Section 108 of the Act. The Goods and Services Tax Appellate Tribunals have been constituted to hear appeals against the orders passed by the Appellate Authority constituted under Section 107 of the CGST Act, 2017 or TNGST Act, 2017, as the case may be, or the Revisional Authority which is constituted under Section 108 of the CGST Act, 2017 or TNGST Act, 2017, as the case may be.

10. Section 109(2) provides that the powers of the Appellate Tribunal shall be exercised by the National Bench or the Regional Benches. Under the TNGST Act, the Appellate Tribunal is the State Bench or the Area Benches. The National Bench of the appellate tribunal is situated at Delhi, which will be presided over by the President and shall have two members viz., one Technical Member (Centre) and one Technical Member (State). The Government can also constitute the Regional Benches which shall consist of a Judicial Member, one Technical

Member (Centre) and one Technical Member (State).

11. Section 109(5) provides that the National Bench and the Regional Benches of the Appellate Tribunal has the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply.

12. Section 109(7) provides that the State Bench or the Area Benches shall have the jurisdiction to hear appeals against the orders passed by the Appellate Authority or the Revisional Authority in the cases involving matters other than the issue relating to the place of supply.

13. Section 109(11) provides that if the Members of the National Bench, Regional Benches, State Bench or Area Benches differ in opinion on any point or points, it shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President or as the case may be, State President for hearing on such point or points to one or more of the other Members of the National Bench, Regional Benches, State Bench or Area Benches and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

14. Section 110 of the Act prescribes the qualification, appointment and conditions of service, etc., of the President and the members of the Appellate Tribunal. The President of the Appellate Tribunal, is a retired judge of the Supreme Court of India or a sitting or retired Chief Justice of any High Court or a Judge of a High Court or a retired Judge of a High Court, with not less than five years of service.

15. The qualification of the Judicial Member has been prescribed as a Judge of the High Court or a sitting or retired District Judge, qualified to be appointed as a Judge of a High Court or a member of the Indian Legal Service and has held a post not less than Additional Secretary for not less than three years.

16. The Technical Member (Centre) is a serving or a retired member of the Indian Revenue (Customs and Central Excise) Service, Group-A, who has completed atleast fifteen years of service in the Group-A.

17. The qualification of the Technical Member (State) is such a member, who is a serving or a retired officer of the State Government not below the rank of Additional Commissioner of Value Added Tax or the State Goods and Services Tax or such rank as may be notified by the concerned State Government on the recommendations of the Council with atleast three years of experience in the administration of an existing law or the State Goods and Services Tax Act or in

the field of finance and taxation.

18. Section 110(2) prescribes that the President and the Judicial Members of the National Bench and Revisional Benches shall be appointed by the Government of India after consultation with the Chief Justice of India or its nominee.

19. Section 110 (2) further provides that in the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or otherwise, the senior most Member of the National Bench shall act as the President until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, resumes office. Second proviso to Section 110(2) provides that if the President is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member of the National Bench shall discharge the functions of the President until the date on which the President resumes office.

20. As stated supra, these writ petitions challenges the validity of Sections 109 and 110 of the CGST Act, 2017 and TNGST Act, 2017, more particularly the composition and qualification of the members to the Goods and Services Tax Appellate Tribunal.

21. The first challenge is to the vires of Section 110 (1)(b) of the CGST Act, on the ground of exclusion of lawyers from being eligible to be appointed as a Judicial Member of the tribunal. According to the petitioners, exclusion of lawyers from zone of consideration as a Judicial Member, is violative of Article 14 of the Constitution of India. It is the contention of the petitioners that the exclusion of lawyers from being considered to hold the post of Judicial Member of the tribunal is a departure from the existing practice. It is the case of the petitioners that Advocates are eligible to be considered as members of various tribunals and there is no justification or reason as to why they should be excluded from the zone of consideration of being appointed as Judicial Members under the CGST and TNGST Act. The petitioners state that in the Income Tax Appellate Tribunal, which is the oldest tribunal of India, CESTAT, the Sales Tax /VAT Tribunals, Advocates having more than ten years of experience were being considered for selection as Judicial Members. It is therefore stated that there is no valid explanation as to why the CGST Act, 2017 and the TNGST Act, 2017 excludes Advocates having more than 10 years of experience, from being considered as Judicial Members of the tribunal.

22. It is the case of the petitioner that the Hon'ble Supreme Court in ***R.K.Jain Vs. Union of India***, reported in **1993 (4) SCC 119** and some other cases has held that the tribunal members must have a judicial approach and expertise in that particular branch of Constitution, administrative and tax laws. It is

therefore submitted that lawyers having more than ten years of experience in that branch of law should be considered for appointment as judicial members, as they have the legal expertise and judicial experience and are legally trained to understand, examine and adjudicate upon complex question of law, which would arise for consideration.

23. The petitioners in particular rely on an observation, at paragraph No.76 of ***R.K.Jain's case*** [cited supra] wherein the Hon'ble Supreme Court emphasis the need to recruit the members of the Bar to man the Tribunals. Similarly, it is contended that the Hon'ble Supreme Court in ***Madras Bar Association Vs. Union of India***, reported in **2014 (10) SCC 1**, also emphasises the need for the advocates to be eligible to be considered as Judicial Members. The petitioners state that lawyers having more than ten years experience, practising in the tax bar in the various tribunals are more competent to adjudicate the issues arising under the CGST Act. In fact it is submitted that they are more experienced than a District Judge, who might not have dealt with any tax case during his entire tenure.

24. Petitioners also challenge the consideration of a Member of the Indian Legal Services who is eligible for being appointed as a member of the Appellate Tribunal. It is the submitted that Members of the Indian Legal Services have been held not to be eligible for being appointed as members of NCLT and other

tribunals in ***Union of India Vs. R.Gandhi*** reported in **2010(11) SCC 1**, wherein the Hon'ble Supreme Court at para 120 (i) has observed as under.

> *"Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial members. Persons who have held a Group A post or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) **and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in sub-sections (2) (c) and (d) of Section 10-FD.** The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as technical members."*
>
> *(emphasis supplied)*

25. The next challenge is to the composition of the Appellate Tribunal. The composition of the Appellate Tribunal of CGST or TNGST, as the case may be, under Section 109(3) and 109(9) of the CGST Act, 2017 prescribes that the tribunal will consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State). Thus, there are two Technical Members as against one Judicial Member. The two Technical Members therefore can overrule the Judicial Member who will be in minority.

26. The submission of the petitioner is that any tribunal where the Judicial Member is in the minority in a Bench, is violative of Articles 14 and 50 of the Constitution of India. It is the plea that for independence, impartiality and to ensure public confidence in the justice delivery system, it is essentially incumbent that the administrative members should not be in majority in a Bench. The petitioners rely on Article 50 of the Constitution of India, which states that the State shall take steps to separate the judiciary from the executive, in the public services of the State. According to the petitioners, administrative members would only be the mouth piece of the Government and this will not instil confidence in the minds of the litigant. It is therefore contended that any tribunal in which the Government is always the party against whom the relief is sought for, the number of administrative members cannot be more than the judicial member in the Bench. Simply put, bureaucrats cannot overrule a Judicial Member, who is or has been a Judge. It is stated that the proceedings in the tribunal are judicial proceedings and the administrative members cannot overrule a Judge.

27. The next submission is that while for appointing a Judicial Member, the Chief Justice of the State has to be consulted, but, there is no provision for consultation with the Chief Justice of the State for appointment of the administrative members, who will be none other than the nominees of the Government and in such a scenario, the administrative members who are the

nominees of the Government, cannot be more than the judicial member(s) on the Bench.

28. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would submit that Section 110(1)(b) of the CGST Act, 2017 which lays down the qualification for appointment of a Judicial Member for Appellate Tribunal excludes advocates. Sub sections (i) (ii)and (iii) of Section 110 (1)(b) provides that only a Judge of a High Court or a sitting or retired District Judge, qualified to be appointed as a Judge of a High Court or a member of the Indian Legal Service and has held a post not less than Additional Secretary for not less than three years alone are qualified to be appointed as a Judicial Member of the tribunal. Mr.Arvind Datar, learned Senior Counsel would submit that it is a departure from the existing practice of making Advocates with ten years experience at Bar and Advocates qualified for appointment as a Judge of a High court, being considered as a Judicial Member of the tribunal. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would rely on the Constitution of the Income Tax Appellate Tribunal, CESTAT and other Sales Tax / VAT tribunals in all the States in the Country, where lawyers with 10 years of practice or Lawyers eligible to be appointed as Judge of the High Court are being considered for selection and are also selected as Judicial Members. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would submit that advocates who are practicing in that particular branch are experts in the field

and would be very valuable and their experience will become very handy if they are selected as Judicial Members.

29. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners also places reliance on paragraph No.76 of the judgment of the Hon'ble Supreme Court in ***R.K.Jain Vs. Union of India***, reported in **1993 (4) SCC 119**, wherein the Hon'ble Supreme Court emphasis on the need for recruitment of members of the Bar to man the tribunal which reads as under.

> *"Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Art. 136 to this Court also proves to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would as usage a growing feeling of injustice of those who can ill effort to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would make an indepth study in this behalf including the desirability to bring CEGAT under the control of Law and*

Justice Department in line with Income-tax Appellate Tribunal and to make appropriate urgent recommendations to the Govt. of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

30. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would state that a lawyer with 10 years experience in the subject would be in a better place to understand, appreciate and adjudicate the matters, which would be placed before the tribunal compared to a District Judge, who would not have experience at all for selection as a Judicial Member. He would place reliance on the judgment of the Hon'ble Supreme Court in ***Madras Bar Association Vs. Union of India***, reported in **2014 (10) SCC 1**, wherein the Hon'ble Supreme Court at paragraph No.97 has observed as under.

*"This issue was also considered in **S.P.Sampath Kumar v. Union of India (1987) 1 SCC 123** and it was held that where the prescription of qualification was found by the court, to be not proper and conducive for the proper functioning of the Tribunal, it will result in invalidation of the relevant provisions relating to the constitution of the Tribunal. If the qualifications/eligibility criteria for appointment fail to ensure that the members of the Tribunal are able to discharge judicial functions, the said provisions cannot pass the scrutiny of the higher Judiciary."*

31. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners, would say that apart from the fact that the legislation has not appreciated the need of the hour and the guidelines, as given by the Hon'ble Supreme Court, he would state that Section 110(1)(b) which excludes lawyers from being considered eligible for appointment as Judicial Member of the Tribunal is arbitrary of Article 14 of the Constitution of India. He would state that confining the eligibility of Judicial Member, to retired High Court Judges and retired District Judges who are qualified to be appointed as High Court Judges and Officer of the Indian legal Services, is not a valid classification. He would state that exclusion of Advocates and especially those Advocates who have good experience in the said subject does not have any nexus with the objects sought to be achieved and there is no need to depart from the existing practice, wherein lawyers are considered for being appointed as Judicial Members in the tribunal. As stated earlier, Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would reiterate that a District Judge even though be fit to be a Judge of High Court, might not be as oriented to deal with subjects, without having any expertise in the taxation laws. He would state that an officer of the Indian Legal Services would also have no training in law or judicial expertise. Excluding lawyers from the ambit of consideration without any reason whatsoever makes the Section 110(1)(b) as violative of Article 14 of the Constitution of India.

32. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would place reliance on the judgment of the Hon'ble Supreme Court in ***Shayara Bano Vs. Union of India, reported in (2017) 9 SCC 1***, wherein the Hon'ble Supreme Court held that a law can be struck down for manifest arbitrariness. He would state that the Hon'ble Supreme Court has said that manifest arbitrariness, therefore, must be something done by the legislature, capriciously, irrationally and / or without adequate determining principle. It is urged by Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners that the practice of considering advocates for appointment to specialised tax tribunals have been continued without break from 1941 with the advent of the Income Tax Appellate Tribunal. He would state that denying the Advocates even the right of being considered will fall foul of the constitutional protection under Article 14 of the Constitution of India, as it would be capricious and irrational and more so, when there is no reason forthcoming from the respondents as to why lawyers are being excluded and why is there a departure from the norm of considering lawyers eligible to be appointed as Judicial Members of the tribunal.

33. The next challenge of Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners is to the eligibility of a member of the Indian Legal Service for being considered as Judicial Member. Reliance has been placed on paragraph No.120(i) of the judgment of the Hon'ble Supreme Court in ***Union of India Vs. R.Gandhi*** reported in **2010(11) SCC 1 [quoted supra],** to state that

persons who have held a Group A post under Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members while dealing with Section 10-FD(2)(c) and (d) of the Companies Act, 2013. He would state that Section 110(b)(iii) is per se contrary to the law laid down by the Hon'ble Supreme Court in the said judgment and must be struck down.

34. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would state that the composition of the Benches in which the Technical Members would be majority is unconstitutional and he would state that Section 109 of the CGST Act, 2017, which prescribes that the tribunal shall consist of One Judicial Member, one Technical Member (Centre) and one Technical Member (State) i.e., two administrative members as against one judicial member is contrary to mandate of Article 50 of the Constitution of India and such a composition would seriously affect the independence of judiciary.

35. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would rely on a judgment passed by a Hon'ble Division Bench of this Court in ***S.Manoharan Vs. The Deputy Registrar, Central Administrative Tribunal, Principal Bench, New Delhi & Others, reported in 2015 (2) Law Weekly 343,*** wherein this Court has considered the correctness of the judgment passed by the

Central Administrative Tribunal, where the full bench consists of two Administrative Members and one Judicial Member and held that in a Bench of more than two members, the number of administrative members should not exceed the number of judicial members.

36. Mr.Arvind Datar, learned Senior Counsel appearing for the petitioners would further submit that the Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India reported in 2017 SCC online Bom 9302***, also came to the same conclusion and at paragraph no.339 held that two member bench of the Tribunal constituted under the Real Estate (Regulation and Development) Act, 2016 (in short the 'RERA'), shall always consists of a judicial member and that in the constitution of the Tribunal, majority of the members shall always be judicial members. He would state that the judgment of the Bombay High Court and the Madras High Court would be binding and that the composition of tribunal as prescribed in 109(3) and 109(9) of the GSTAT, is completely contrary to the said judgments. Mr.Arvind Datar, also relied on para 338 of the Bombay High Court in ***Neelkamal Realtor's*** case [cited supra], wherein it is held that the qualification for appointment of a Judicial Member as prescribed in Section 46(1)(b) in RERA as unconstitutional and was struck down.

37. Mr.Arvind Datar, would rely on Article 50 of the Constitution of India, which provides that State shall take steps to separate the judiciary from the

executive in the public services of the State. He would state that if the majority of the tribunal consists of administrative members who are/were government servants, then there will be no confidence on the independence of such tribunal. He would further state that in all the cases, which come to the tribunal, the revenue is either respondent or the appellant and that any assessee would not be confident of getting justice because the composition of the tribunal is such, it would give a genuine impression that the tribunal might not be an independent body and that it will only carry out the orders of the Government. He would state that it is for the first time that a statute provides for a composition of a tribunal where the administrative members exceeds the judicial members. He would argue that this would be in direct contravention of the spirit of Article 50 of the Constitution of India. The purpose of Article 50 has to separate the judiciary from the executive in the public services of the State. The underlying concept being that the executive must be kept away from discharging judicial functions. Mr.Arvind Datar, would place reliance on the judgment of the Hon'ble Supreme Court in ***Supreme Court Advocates on Record Association Vs. Union of India, reported in 1993 (4) SCC 441,*** wherein at paragraph No.81, Hon'ble Supreme Court has observed as under.

> *"According to this Article, the definition of the expression "the State" in Article 12 shall apply throughout Part IV, wherever that word is used. Therefore, it follows that the expression "the State" used in Article 50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and the*

Legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India. When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an analamous position that the Constitution does not emphasise the separation of higher judiciary from the executive. Indeed, the distinguished Judges of this Court, as pointed out earlier, in various decisions have referred to Article 50 while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principle and values underlying Article 50 in safeguarding the independence of the judiciary."

38. Mr.Arvind Datar, would also rely on the decision of the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd., Vs. Union of India, reported in 2019(4) SCC 17*** wherein, the Hon'ble Supreme Court at paragraph No.29, 30, 31 and 36 observed as under.

***29**. Shri Rohatgi has argued that contrary to the judgments in Madras Bar Assn. (1)[Union of India v. Madras Bar Assn., (2010) 11 SCC 1] and Madras Bar Assn. (3) [Madras Bar Assn. v. Union of India, (2015) 8 SCC 583] , Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two judicial members of the Selection Committee get outweighed by three bureaucrats.*

***30**. On 3-1-2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:*

*"**412. Selection of Members of Tribunal and Appellate Tribunal.**—*

*(1) * * **

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—

(a) Chief Justice of India or his nominee— Chairperson;

(b) a Senior Judge of the Supreme Court or Chief Justice of High Court—Member;

(c) Secretary in the Ministry of Corporate Affairs—Member; and

(d) Secretary in the Ministry of Law and Justice—Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote."

***31**. This was brought into force by a Notification dated 9-2-2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of NCLT in the year 2015 itself. Thus, by an order dated 27-7-2015, (i) Justice Gogoi (as he then was), (ii) Justice Ramana, (iii) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (iv) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22-2-2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10-8-2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of NCLT and Nclat have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi.*

***36**. It is obvious that the rules of business, being mandatory in nature, and having to be followed, are to be so followed by the executive branch of the Government. As far as we are concerned, we are*

bound by the Constitution Bench judgment in Madras Bar Assn. (1)[Union of India v. Madras Bar Assn., (2010) 11 SCC 1] . This statement of the law has been made eight years ago. It is high time that the Union of India follow, both in letter and spirit, the judgment of this Court.

39. Mr.Arvind Datar, would state that Section 111 (4) of the CGST Act, 2017 makes it clear that the proceedings before the GSTAT are judicial proceedings. He would state that in such a scenario the administrative members who are government servants should not be in majority. Mr.Arvind Datar, would state that if the majority members in the bench are administrative members then Article 50 stands diluted. He would state that the expert members or the technical members are there only to aid and assist the Judicial Members, in coming to a just conclusion which is legally sustainable. He would state that the Judicial Member ensures impartiality, fairness and reasonableness in consideration. The Technical Member provides the expertise in technical aspects. He would state that a majority of the Technical Member who are/were essentially government servants, would erode the impartiality of the tribunal or atleast the assessee will not be confident that the tribunal would be impartial.

40. Mr.Arvind Datar, would therefore state that as per Section 110(3) of the CGST Act, 2017 the Technical Member (Centre) and Technical Member (State) of the National Bench and the Regional Benches shall be appointed by the Government on the recommendations of a Selection Committee consisting of such

persons and in such manner as may be prescribed. He would further state that as per Section 110 (5) of the Act, the Technical Member (Centre) of the State Bench or Area Benches shall be appointed by the Central Government and Technical Member (State) of the State Bench or Area Benches shall be appointed by the State Government in such manner as may be prescribed.

41. Mr.Arvind Datar, would submit that the revenue, which is a party to all tax litigation therefore appoint its technical members who will be majority in the tribunal and thus would completely erode the impartiality, which is expected from the tribunal.

42. On the other hand, Mr.G.Rajagopalan, the learned Additional Solicitor General and Mrs.Aparna Nandakumar, appearing for the Union of India, would contend that there is no fundamental right for an Advocate to be considered for appointment as a Judicial Member of the tribunal. The Advocates Act, 1961 permits only an advocate to practice in any Court. The Advocates Act, 1961 does not give any right to an Advocate, to be considered to be appointed as a Judge in a Tribunal and it is for the Government to decide as to whether an Advocate must or must not be considered to be eligible to be appointed as Judicial Member of the tribunal. In the absence of any right, no duty is cast on the government to consider the eligibility of advocates for being appointed as a member of the tribunal. It is stated that it is for the employer to decide the

qualification and mere right to be considered cannot be a statutory or constitutional right, in the absence of any rule, which makes advocates eligible to be considered for appointment. It is also stated that just because the Administrative Members are more in number in the bench, it does not mean that the composition of the tribunal is bad. It is contended that the entire argument of the petitioners proceeds on an apprehension that the judgment of an Administrative Member while overruling the Judicial Member would be wrong and therefore the Administrative Members at no point of time can outnumber the Judicial Member.

43. The Union of India would rely on the judgment of the Hon'ble Supreme Court in All India Bank Employees' Association Vs. National Industrial Tribunal & Others, reported in AIR 1962 SC 171, and submit that there can be a right to be considered only if there are rules, which permits such consideration. He would further submit that the fact that the lawyer has been kept out the scope of consideration cannot make the section bad. The fact that the lawyers have been considered for being appointed as Judicial Members in other tribunals would not mean that a right has been created in the lawyers to be considered for appointment. He would state that the present tribunal, is not a substitute for the High Court.

44. The Union of India would also state that no citizen can claim as to who

should be the Judge in his case. The fact that lawyers have been kept out form the eligible candidates to be appointed as a member of the GST Appellate Tribunal, it does not make the Section bad. In the absence of any rights to be considered laid down by in statutory rules, prior practice cannot amount to be a right to be considered for being appointed as a Judicial Member of the tribunal.

45. The Union of India states that there is no provision for advocates to become Member of the Tribunal. He further submitted that this is a prerogative of the Parliament. A Judge of Hon'ble High Court and a District Judge qualified to be appointed as a High Court judge are eligible to become Judicial member. The law prior to GST also had provision of Member of Indian Legal Service with the similar qualification to become Member (Judicial) in the CESTAT. It is also emphasised that for reaching the level of Additional Secretary in the Ministry of Law, an Officer would have worked for 25-30 years and so he would be sufficiently trained on legal matters. Also, the cadre of Indian Legal Service has Advocates with experience of 7 years or more and sometimes district Judges also joined as an officer of the Indian Legal Service. The officers of the rank of Additional Secretaiy in Indian Legal Service are also discharging quasi-judicial function as Members of several other tribunals and are also working as arbitrators. The guideline that "A Technical Member' presupposes an experience in the field to which the Tribunal relates", has been followed. The qualifications are the minimum qualifications, and during the process of selection, the

Competent Authority would ensure that the officers of sufficient seniority and high level of competence are selected as members. It is also emphasised that the same qualification has been prescribed for the Member Technical (Accountant Member) in Income Tax Appellate Tribunal and this system has been smoothly functioning there, from many years.

46. The Union of India would state that the GSTAT is a creature of Article 246-A of the Constitution of India. The Appellate Tribunal constituted under Section 109 of the CGST Act, 2017 and the TNGST Act, 2017, have been created by virtue of the powers conferred on the parliament under Article 246-A of the Constitution of the India. They are not substitute to High Court and are therefore, not tribunal under Article 323 A and B of the Constitution of India. The Union of India would therefore submit that the judgments of the Hon'ble Supreme Court in ***S.P.Sampath Kumar and Ors. Vs. Union of India (UOI) and Ors, reported in 1987 (1) SCC 124, L.Chandrakumar Vs. Union of India, reported in 1997(3) SCC 261, Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India,*** **reported in 2014 (10) SCC 1,** would not apply to the facts of this case, as all these decisions pertain to those tribunals, which have been created under Articles 323 A and B of the Constitution of India, wherein the powers of the High Court have been vested with the tribunal. The present tribunal not being a tribunal under Article 323 B cannot be equated to the tribunals under Article 323 A and B of the Constitution

of India. It has been contended that where the legislature proposes to substitute a tribunal in the place of a High Court to exercise the jurisdiction which the High Court is exercising, the standards applied for appointment of such members should be as nearly as possible as those applicable to High Court Judges and in such cases, the legislature must take care to ensure that the qualifications are not diluted. For Specialised tribunals which are not substitute of High Courts and which are technical in nature, qualification can be prescribed by the legislature. The Union of India would contend that the composition of the tribunal, cannot be found fault with. Learned Additional Solicitor General, would state that the fact the administrative members are more in number, cannot lead to an automatic conclusion that the orders of the tribunal will not be just and fair. The mere apprehension of the petitioner cannot be a ground to strike down Section 109 (9) of the CGST Act.

47. Union of India would submit that the GSTAT is not a Tribunal established under Article 323A and Article 323B of the Constitution. It is also not a Judicial Tribunal which is a substitute for the High Court. The GSTAT is one established under Section 109 of the GST Act whose source of power is Article 246A read with Article 279A of the Constitution of India. It is submitted that both GSTAT and CESTAT are creatures of statutes. Unlike GSTAT and CESTAT, Administrative Tribunals, have been established under Article 323A of the Constitution of India and an aggrieved person entitled to invoke the jurisdiction

of the Hon'ble High Court under Article 226 of the Constitution of India can move the Administrative Tribunal instead of High Court. Similarly, NCLT/NCLAT, were also clothed with the jurisdiction which were exercised by the High Court. These GSTAT therefore, cannot be equated to NCLT or the Administrative Tribunal. It is submitted that time and again it has been held in the case of Appellate Tribunals created under statute like FEMA, Central Excise Act/ Customs Act, VAT Acts that the remedy available to the High Court or to the Apex court is available only as a statutory appeal on a question of law, wherein the High Court or Supreme Court is a statutory forum of appeal and these tribunals do not exercise original jurisdiction. The Union of India, relies upon the decisions of the Hon'ble Supreme Court in ***Raikumar Shivhare Vs. Assistant Director, Directorate of Enforcement and ors.***, reported in **(2010) 4 SCC 772,** wherein, while answering a question as to whether a Writ Petition was maintainable as against the order of the Appellate Tribunal established under the Foreign Exchange Management Act, 1992 (FEMA), it was held that the right of appeal being always a creature of statute has to be determined to the statute itself. The Hon'ble Apex Court further held that:-

> *"34. When a statutory forum is created by law for redressal of grievance and that too in a fiscal state, a writ petition should not be entertained ignoring the statutory dispensation. In this case High Court is a statutory forum of appeal on a question of law. That should not be abdicted and given a go bye by a litigant for invoking the forum of judicial review of the High Court under Writ Jurisdiction. "*

48. Reliance was also placed on the decision of the Division Bench of Hon'ble Bombay High Court in ***Sales Tax Tribunal Bar Association and Ors v. The State of Maharashtra and Ors*** reported in **[2018] 50 GSTR 417 (Bom).** In this case Section 11 of the Maharashtra VAT Act which provided for the establishment of the Tribunal and Rule 6 of the Maharashtra VAT Rules which provided for the qualification of the members of the Tribunals was under challenge. It is stated that the contentions raised in that Writ Petition are similar to the contention raised in the present Writ Petition. The Hon'ble High Court of Bombay has held that the VAT Tribunal is not a Tribunal under the Article 323B and that the decisions of the Apex Court in the case of ***S.P.Sampath Kumar, L.Chandrakumar and Madras Bar Association*** [cited supra] may not have relevance as far as the challenge to the constitutional validity of Maharashtra VAT Tribunal is concerned. Having said that the Hon'ble High Court of Bombay upheld the provisions of the MVAT Act with regard to appointment of Administrative Member of the Tribunal. In para 30 of the judgment, the Hon'ble High Court of Bombay has observed that in the appointment of administrative member not below the rank of Joint Commissioner it will be necessary that such Joint Commissioner should be legally qualified and judicially trained in the sense that they have a long experience of dealing with a quasi judicial proceedings involving adjudication of proceedings. In the concluding portion at para 41, the Hon'ble High Court has laid down that

1. A Bench of two or more members of MVAT Tribunal shall always be headed Judicial Member.

2. The matters to be required to be heard by the member sitting single should be placed only before the Judicial Member and if none of the judicial member is available in case of emergency, in which an interim relief is sought for, it can be placed before the single administrative member.

3. That in selection of Administrative member covered by clause d,e,f of Rule 6(1) of the Maharashtra VAT Rules, the State Government should constitute a proper Selection Committee headed by a retired judge.

4. The Administrative member eligible for appointment under clauses d,e,f should also be legally qualified and judicially trained in the sense that they have long experience in dealing with quasi judicial proceedings and with adjudication proceedings.

49. It is therefore contended on behalf of Union of India that the reliance made on the judgment of the Hon'ble Supreme Court in the case of ***Union of India Vs. R.Gandhi*** reported in ***2010(11) SCC 1***, ***Madras Bar Association Vs. Union of India***, reported in ***2014 (10) SCC 1*** and ***L.Chandrakumar Vs. Union of India***, reported in ***1997(3) SCC 261***, is misplaced.

50. The Union of India would state that just because Section 111(4) states that all proceedings shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the

Indian Penal Code, and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973, that does not lead to a conclusion that the tribunal is a Court. It is submitted that on a proper reading of Section 111 it is clear that the Appellate Tribunal is not bound by the procedure laid down in Civil Procedure Code but can regulate its own procedure. Further for the purpose of discharging its functions under the Act it has the power enumerated in clauses (a) to (h) of Sub Section 2 of Section 111 of the CGST Act. Section 193 and 228 of the Indian Penal Code are extracted below:-

> *"193. Punishment for false evidence.—Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.*
>
> *Explanation 1.—A trial before a Court-martial2 ***is a judicial proceeding.*
>
> *Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.*
>
> *Illustration A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A as given false evidence.*
>
> *Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a*

Court of Justice.

Illustration A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence"

228. Intentional insult or interruption to public servant sitting in judicial proceeding - whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extent to six months, or with fine which may extend to one thousand rupees, or with both. "

51. It is therefore submitted that all forums in which the proceedings are deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the IPC, do not become Courts. It is submitted that Section 111(4) is only to ensure that the evidence given either oral or documentary have to bear the semblance of truth in it and to ensure cooperation during investigations and enquiry. It is submitted that likewise Section 111(4) of the CGST Act lays down that the proceedings are deemed to be "judicial proceedings" only in the circumstances mentioned in Section 111(4) of the CGST Act and have limited powers of a Civil Court, as exhaustively laid down in Section 111(2) of the CGST Act. The GSTAT is only an appellate body placed in the second tier in the appeal hierarchy of the GST which discharges judicial functions and cannot be placed on par with a Court of law and definitely, they are not substitutes of the High Court. The respondents place reliance on the decisions of the Hon'ble Supreme Court in

Harinagar Sugar Mills Ltd. V. Shyam Sundar Jhunjhunwala reported in (1962) 2 SCR 339 have laid down following principles:-

a) All Tribunals are not Courts, though all Courts are Tribunals". The word "Courts" is used to designate those Tribunals which are set up in an organized state for the administration of justice.

b) Tribunals are very similar to Courts, but are not Courts. When the Constitution speaks of 'Courts' in Art. 136, 227, or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts.

c) The main and the basic test is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function.

d) Courts and Tribunals act "judicially" in both senses, and in the term "Court" are included the ordinary and permanent Tribunals and in the term "Tribunal" are included all others, which are not so included.

e) Tribunals are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which in described as judicial process.

f) But the authority to reach decision conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by quasi judicial bodies are similarly distinct and separate in character from judicial decisions pronounced by courts.

52. The Union of India would further state that the Appellate Tribunals like the VAT Tribunal, CESTAT and GSTAT can at best be described as forums meant for deciding assessment proceedings. The revenue places reliance on a Full bench decision of this Court in the case of ***State of Tamil Nadu v, Arulmurugan***

and Company reported in (51 STC 381) 1982. The Full bench, while holding that the statutory 'C' Forms could be filed even at the second appellate stage viz the Appellate Tribunal has held that the function of the appellate authority is co existing with the assessing authority and the appellate proceedings are continuation of the assessment proceedings/adjudication proceedings. The Union of India therefore submits that the GSTAT is only an Appellate body discharging judicial functions and it is not a Court or Judicial Tribunal which has substituted the power of High Court. It has only the powers conferred by the statute.

53. The Union of India submitted that, since the minimum quorum of two members has already been prescribed under the GST Act, the apprehension entertained by the petitioner herein that there would be preponderance of technical members over judicial member is wholly untenable; That too in circumstances when the President or State President who are essentially judicial members have a say in the matter.

54. The Union of India further states that Section 110(3) of the CGST Act provides that the Technical Member of the National Bench/Regional Benches would be appointed by the Central Government on recommendation by Selection Committee. It is submitted that the President, Judicial Members and the Technical Members are yet to be appointed, the Selection Committee has also

not being formed. It is therefore submitted that the apprehension entertained by the petitioner herein at this stage is premature and unwarranted. The revenue places reliance on a judgment of the High Court of Bombay in ***Sales Tax Tribunal Bar Association and Ors vs. The State of Maharashtra and Ors [2018] 50 GSTR 417 (Bom)*** which held that if the Technical Member are legally qualified and judicially trained in the sense that they have long experience dealing with quasi judicial proceeding/and or adjudication proceedings, the proceeding of the Tribunal would well qualify as judicial proceedings.

55. It is urged by the revenue that as per Section 110(2) of the CGST Act, the Judicial Members of the National Bench and the Regional Benches shall be appointed by the consultation with the Chief Justice of the High Court of the State or his nominee. As per Section 110(4) of the CGST Act, the Judicial Memebr of the State Bench or Area Benches shall be appointed by the State Government after consultation with the consultation with the Chief Justice of the High Court of the State or his nominee. It is stated that the Judicial Member are necessarily appointed after consultation with the Chief Justice of India or the Chief Justice of the High Court as the case may be. Therefore, to say that there is complete control and discretion of the Government in the process of these appointments, is devoid of merits. Under Section 109(12) of the CGST Act, the Government, in consultation with the President may, for the administrative convenience, transfer—

(a) any Judicial Member or a Member Technical (State) from one Bench to another Bench, whether National or Regional; or

(b) any Member Technical (Centre) from one Bench to another Bench, whether National, Regional, State or Area.

56. Mr.Mohammed Shaffiq, learned Special Government Pleader (Taxes) appearing for the 4th respondent more or less adopted the arguments of the Union of India and stated that the judgment of the Hon'ble Supreme Court both the Madras Bar Association cases, is not applicable to tribunals which have not been constituted under Article 323-A and B of the Constitution of India. He would also submit that the tribunals in a tax legislation are co-extensive/co-terminus with that of the assessing authority, in the exercise of quasi-judicial functions and thus may not be governed by Article 50 which deals with separation of judiciary from the executive. He would state that the limitation that the number of technical members shall not exceed the judicial members as laid down in the first Madras Bar Association case, is not an inviolable rule in law. He would argue that the constitution of the tribunal ought to be examined keeping in view the nature of the issues that may have to be adjudicated by the tribunal. He would state that if the nature of issues that are to be adjudicated are highly specialized requiring more technical members it may permissible to have greater number of technical members than judicial. He would submit

that the composition of the tribunal would depend upon the nature of disputes that is to be adjudicated and there cannot be any straight jacket formula applied as suggested by the Petitioner. He would state that the GST is an amalgam of all the above fiscal legislations and the members need to be experts in the branch of taxation and therefore, the composition of the tribunal having more experts than the judicial member cannot be found fault with. It is therefore stated that in view of checks and balances in the form of appellate jurisdiction exercised by the High Court under Section 117 and by the Supreme Court under Section 118 of CGST Act and also the fact that the orders of the tribunal are subject to judicial review under Article 226 there are adequate safeguards and thus a mere existence of more numbers of nonjudicial members may not by itself result in invalidating the legislation.

57. Heard the learned counsel for the parties and perused the materials available on record.

58. The issues therefore, which arise for consideration are

(i) whether the exclusion of advocates from being considered for appointment as a Judicial Member in GST Appellate Tribunal, is violative of Article 14 of the Constitution of India.

(ii) Whether Section 110 (b)(iii) which makes a member of the Indian Legal

Service, eligible to be appointed as a Judicial Member of the appellate tribunal, contrary to the law laid down by the Hon'ble Supreme Court in ***Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1.**

(iii)whether the composition of the National Bench, Regional Benches, State Bench and Area Benches of the GST Appellate Tribunal, which consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), by which the administrative members outnumber the judicial member is violative of Articles 14 and 50 of the Constitution of India and the judgments of the Hon'ble Supreme Court of India.

59. The submission of Mr.Arvind Datar, learned senior counsel for the petitioners that since Section 110(1)(b) of the CGST Act, 2017 excludes the Advocates, from being considered for appointment as judicial member, Section 110 is violative of Article 14 of the Constitution of India, in as much as it even takes away the right of the Advocates from being considered to be appointed as a member of a tribunal, cannot be accepted. The Hon'ble Supreme Court has time and again held that the right to be considered arises only when the rules provide for the same. The right to be considered emanates from being eligible by virtue of an Act or any rule which gives such a right. In the absence of any right, one cannot contend that a person's right to be considered is taken away. The fact that Advocates were being considered for appointment to various tribunal does not mean that they have a constitutional / legal right to be considered for

appointment as a member of any tribunal. The observations made in R.K.Jain's case were made only because the Act provided that the Advocates will be eligible to be considered for appointment as members of the tribunal. In the absence of any constitutional right, the vires of a section 110 (1)(b) cannot be struck down, because it does not include Advocates to be eligible to be appointed as Judicial Members. As stated earlier, there is no vested right for being considered for appointment to a post. Right to be considered is always subject to eligibility conditions prescribed from time to time. In ***P.Suseela Vs. UGC (2015 (8) SCC 129)***, the Hon'ble Supreme Court at paragraph No.16 has observed as under.

> "16. Similar is the case on facts here. A vested right would arise only if any of the appellants before us had actually been appointed to the post of Lecturer/Assistant Professors. Till that date, there is no vested right in any of the appellants. At the highest, the appellants could only contend that they have a right to be considered for the post of Lecturer/Assistant Professor. This right is always subject to minimum eligibility conditions, and till such time as the appellants are appointed, different conditions may be laid down at different times. Merely because an additional eligibility condition in the form of a NET test is laid down, it does not mean that any vested right of the appellants is affected, nor does it mean that the regulation laying down such minimum eligibility condition would be retrospective in operation. Such condition would only be prospective as it would apply only at the stage of appointment. It is clear, therefore, that the contentions of the private appellants before us must fail. "

60. The submission of the Union of India that the right of Advocates is only

to practice in a Court or tribunal and the Advocates Act, 1961 does not guarantee any right to be considered for appointment. It is for the legislature to decide as to who should be considered as eligible for being appointed, as a member of any tribunal.

61. Even though the constitutional validity of Section 110(1)(b) cannot be struck down on the ground of non-inclusion of advocates as being eligible for being considered for appointment as Judicial Member to the Appellate Tribunal under the CGST or TNGST, yet this court is of the opinion that the Union of India must evaluate as to why it is making a departure from the existing practice. Advocates are eligible to be appointed as Judicial Members in the ITAT which is the oldest Tribunal in the country. Lawyers are eligible for appointment as Judicial Member in the Customs Excise Service Tax Appellate Tribunals. Mr.Arvind Datar is justified in contending that when the constitution provides that lawyers are eligible to be appointed as Judges of the High Court, then there is no reason to exclude them from being considered for appointment as Judicial Members. The Hon'ble Supreme Court in **R.K. Jain vs. Union of India's** case supra in paragraph 67 has held that the Members of the Tribunal must have a judicial approach and also knowledge and expertise in the particular branch of Law. A lawyer practising for 10 years in Taxation would definitely be well-equipped to grapple with the legal issues arising under the Act. It is to be noted that there is no reason given by the Union of India in their counter as to why lawyers have been excluded from

the zone of consideration. For deciding the issues arising under the CGST Act and more particularly under Chapter III, it is necessary that the Judicial Member must have knowledge of various legal topics for which purpose a lawyer with sufficient experience and particularly with experience in Taxation Laws will be ideal to be appointed as a Judicial Member. Keeping in mind the existing practice in appointing lawyers to various Tribunals as Judicial Members and the various issues that are likely to arise while adjudicating disputes under the CGST Act, we recommend that the Parliament should reconsider the issue regarding the eligibility of lawyers to be appointed as Judicial Members in the Appellate Tribunal.

62. The challenge to appointment of a person, who is or has been a member of Indian Legal Service and has held a post not less than Additional Secretary for a period of three years, is no longer res integra. The issue stands settled. Paragraph No.120 in ***Union of India Vs. R.Gandhi*** reported in **2010(11) SCC 1**, categorically states that a person who has held a position under the Indian Legal service cannot be considered for appointment as judicial members. The Hon'ble Supreme Court in paragraph No.112.6 and 112.7 observed as under.

> *"112.6. The next dilution is by insertion of Chapters 1B in the Companies Act, 1956 with effect from 1.4.2003 providing for constitution of a National Company Law Tribunal with a President and a large number of Judicial and Technical Members (as many as 62). There is a further dilution in the qualifications for members of National*

Company Law Tribunal which is a substitute for the High Court, for hearing winding up matters and other matters which were earlier heard by High Court. A member need not even be a Secretary or Addl. Secretary Level Officer. All Joint Secretary level civil servants (that are working under Government of India or holding a post under the Central and State Government carrying a scale of pay which is not less than that of the Joint Secretary to the Government of India) for a period of five years are eligible. Further, any person who has held a Group-A post for 15 years (which means anyone belonging to Indian P&T Accounts & Finance Service, Indian Audit and Accounts Service, Indian Customs & Central Excise Service, Indian Defence Accounts Service, Indian Revenue Service, Indian Ordnances Factories Service, Indian Postal Service, Indian Civil Accounts Service, Indian Railway Traffic Service, Indian Railway Accounts Service, Indian Railway Personal Service, Indian Defence Estates Service, Indian Information Service, Indian Trade Services, or other Central or State Service) with three years' of service as a member of Indian Company Law Service (Account) Branch, or who has `dealt' with any problems relating to Company Law can become a Member. This means that the cases which were being decided by the Judges of the High Court can be decided by two-members of the civil services - Joint Secretary level officers or officers holding Group `A' posts or equivalent posts for 15 years, can now discharge the functions of High Court. This again has given room for comment that qualifications prescribed are tailor made to provide sinecure for a large number of Joint Secretary level officers or officers holding Group `A' posts to serve up to 65 years in Tribunals exercising judicial functions.

112.7. The dilution of standards may not end here. The proposed Companies Bill, 2008 contemplates that any member of Indian Legal Service or Indian Company Law Service (Legal Branch) with only ten years service, out of which three years should be in the pay scale of Joint Secretary, is qualified to be appointed as a Judicial Member. The

speed at which the qualifications for appointment as Members is being diluted is, to say the least, a matter of great concern for the independence of the Judiciary."

No doubt, the said observations have been made while deciding the qualifications of the members of NCLT & NCLAT, which exercises jurisdiction, previously exercised by the High Court. This dictum of the Hon'ble Supreme Court would apply to the appellate tribunal constituted under the CGST and TNGST also. The Members of Indian Legal Service cannot be considered for appointment as Judicial Members.

63. A perusal of the issues that are likely to arise with the tribunal shows that they are not merely technical matters, wherein which does not involve interpretation of law or adjudication on the basis of legal principles. The said tribunal is an appellate body against which an appeal, lies to Hon'ble Supreme Court. In this scenario it cannot be said that there is any difference from the standard applied to eligibility of members to be appointed to the NCLT / NCLAT and those members who have to be appointed to the GSTAT. In fact, the submission of the Union of India that the judgments of ***Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India*****, reported in 2014 (10) SCC 1,** would apply only to a tribunal which are formed under Articles 323 and 323 B, cannot be accepted.

64. The submissions made by Mr.Arvind P.Datar, learned senior counsel

that even tribunals, which are not constituted under Article 323-B of the Constitution of India, there cannot be any difference in matters of appointment of members. All the tribunals regardless of the fact that they are tribunals constituted under Article 323-A, 323-B or under any statute, are a part of justice delivery system and for effective justice delivery system, there is a need of an independent impartial tribunal. As stated earlier all the cases coming before the CGSTAT or TNGSTAT deals with adjudication of cases against the State. In such circumstances to have more number of members who are expert members (not Judges) will raise a reasonable apprehension in the minds of the assessee that they might not get fair justice and that the decision making, might be more oriented towards the State.

65. The Hon'ble Supreme Court of India, in ***R.K.Jain Vs. Union of India***, reported in **1993 (4) SCC 119**, ***Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and** ***Madras Bar Association Vs. Union of India***, **reported in 2014 (10) SCC 1,** more or less echoed the same feelings.

66. Mr.Arvind Datar is correct in his submissions that the GSTAT, is replacing the CESTAT, Sales Tax / VAT Tribunals. The composition of GSTAT therefore, has to be on the same lines. In fact, Article 50 of the Constitution of India which provides for separation of the judiciary from the executive, must be interpreted in such a way that the dominance of the departmental / technical

members, cannot overwhelmingly outweigh the judicial members.

67. The Court can take judicial notice of the fact that now the tribunals are taking over the subjects which were initially being dealt with / adjudicated by Courts. These subjects were adjudicated by Judicial Officers. Viewed in this angle, tribunals which primarily decide disputes between State and citizens cannot be run by a majority consisting of non-judicial members.

68. The Hon'ble Supreme Court in ***L.Chandrakumar Vs. Union of India, reported in 1997(3) SCC 261,*** after analysing the provisions in S.P.Sampath Kumar Vs. Union of India, reported in 1987 (1) SCC 124 and M.B.Majumdar Vs. Union of India, reported in 1990 (4) SCC 501, went on to hold that the tribunals created under Articles 323 and 323-B would not be a substitute for the High Court for the purpose of exercising Articles 226 & 227 of the Constitution of India. If that being so, then and in such of those cases, in order to maintain independency of judiciary, the expert members cannot outnumber the judicial members. Paragraph No.80 of the said judgment reads as under.

> *"80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is*

contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:

32. Remedies for enforcement of rights conferred by this Part.--

(1)..

(2) ..

(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2). Emphasis supplied)"

69. The Hon'ble Supreme Court in ***L.Chandra Kumar's case*** [quoted supra], has adverted to the Report of the Arrears Committee (1989-90), popularly known as and the Manlimath Committee, which has made recommendations regarding functions of tribunals. Para Nos.8.63 and 8.64 and 8.65 of the Report, has been reproduced in paragraph No.88 of the said judgment. It is specifically stated that the tribunals have not inspired confidence in the public mind and the foremost reason being lack of competence, objectivity and judicial approach. The next reason which is given by the Committee is the constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The committee has also stated that men of calibre are not being appointed as Presiding Officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. The Committee

therefore has insisted that the tribunals must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. The Committee states that when a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members and value-discounting the judicial members would render the tribunals less effective and efficacious than the High Court. Paragraph 8.65 reads as under.

> *8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision making process, especially when the Government is a litigant in most of the cases coming before such tribunal. See S.P. Sampath Kumar v. Union of India reported in : (1987)ILLJ128SC. The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the Writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such*

tribunals, ought not to overlook these vital and important aspects. It must not be forgotten that what is permissible to be supplant by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the frame work of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid."

70. A perusal of the said paragraph though deals with tribunals, the said paragraph cannot be restricted only to the tribunals which substitute the High Court. As observed earlier, ***L.Chandrakumar's*** case [quoted supra] itself an authority for proposition that all the tribunals must be subject to the superintendence power of the High Court under Article 227 of the Constitution of India.

71. If that being so, the observations made in paragraph No.8.65, observed above, must also be applied to all the tribunals and more so such of the tribunals, whose decisions could be only challenged in the Hon'ble Supreme Court.

72. The tribunal consists of three members. Out of the three members, only one is a judicial member. The other two members are technical members, who would ordinarily possess little experience in law, though they might be otherwise adept in the understanding of the taxing statute. In these circumstances in a bench of 3 members, two of which would be technical members, there exists the possibility of the two technical members, arriving at a view, different from that of the Judicial member. Undoubtedly, mere possibility of the malafide exercise of power is no ground to strike down an enactment, (Refer D.K. Trivedi & Sons, v State of Gujarat (1986) Supp SCC 20.), but in the instant case, the appropriateness of the tribunal discharging judicial function was in question. Naturally, in all GST related issues, the litigation shall be between an Assessee and the Govt. and this is yet another reason, that the presence of two members from the Govt. would create a further apprehension of bias, and lead an Assessee to believe, that perhaps the remedy itself is non-existent. This is of greater importance in view of the fact, that the Tribunal is discharging Judical Function.

73. It would be useful to refer to the provisions of the Income Tax, Act, 1961, qua a bench of the ITAT, which is extracted below:

> ***255. Procedure of Appellate Tribunal.*** *— (1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President of the Appellate Tribunal from among the members thereof.*

> ***(2) Subject to the provisions contained in sub-section (3), a Bench shall consist of one judicial member and one accountant member.***
>
> [Emphasis Supplied]

74. Thus, even under the Income Tax Act, 1961, the Parliament consciously chose to create a tribunal, which would comprise of a single judicial member, and a single accountant member. This would ensure that the matter before the ITAT, would have both a Judicial mind and an accountant mind applying to it, and both would have equal weight in the matter.

75. The position is that the Impugned Act, is different. The issue regarding dominance of the technical members and constitutional validity of the same shall have to be examined keeping in mind the Judgements of the Hon'ble Supreme Court, relating to the importance of the independence of the Judiciary, as well as the manner in which the Parliament could establish Tribunals, to discharge what is essentially a Judicial Function.

76. In the case of ***Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1***, Justice K.K. Mathew, observed as under:

> ***318****. The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and, the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever-shifting tangle of human affairs. A large part of the effort of man over centuries has been expended*

in seeking a solution of this great problem. ***A region of law, in contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of the Government.If the lawmakers should also be the constant administrators and dispensers of law and justice, then, the people would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy****. And, in this age-old search of political philosophers for the secret of sound Government, combined with individual liberty, it was Montesquieu who first saw the light. He was the first among the political philosophers who saw the necessity of separating judicial power from the executive and legislative branches of Government. Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional principle which was universally valid. The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three watertight compartments.* ***Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation.***

319*. There can be no liberty where the legislative and executive powers are united in the same person or body of Magistrates, or, if the power of judging be not separated from the legislative and executive powers. Jefferson said:*

> *"All powers of Government — legislative, executive and judicial — result in the legislative body. The concentration of*

these powers in the same hands is precisely the definition of despotic Government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy-three despots would surely be as oppressive as one."

And, Montesquieu's own words would show that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted. In Federalist No. 47, James Madison suggests that Montesquieu's doctrine did not mean that separate departments might have "no partial agency in or no control over the acts of each other". His meaning was, according to Madison, no more than that one department should not possess the whole power of another.

[Emphasis Supplied]

77. Similarly, the Supreme Court in the case of, ***Union of India v. SankalchandHimatlalSheth, (1977) 4 SCC 193***, has explained the need for the independence of Judiciary, especially in a country like India, where the largest litigants are the States, as under:

50.Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document*. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for anyone to think otherwise. But this has been accomplished after a long fight culminating in the Act of*

Settlement, 1688. Prior to the enactment of that Act, a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the Judge did not deliver judgments to his liking. No less illustrious a Judge than Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ de non procedendo regeinconsulto commanding him to step or to delay proceedings in his Court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a Judge at pleasure by substituting "tenure during good behaviour" for "tenure at pleasure". The Judge could then say, as did Lord Bowen so eloquently:

> *"These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice."*

The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. *Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from*

executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution-makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end.

[Emphasis Supplied]

78. In the case of ***Ministry of Health & Welfare, Government of Maharashtra v. S.C. Malte, (2012) 13 SCC 118,*** the Hon'ble Supreme Court observed as under.

*"**30**. It is a known fact that a large part of the litigation in courts is generated from people being aggrieved against the governance, action and inaction of the Government including the executive and/or its instrumentalities. Thus, the courts must be kept free from any influence that the executive may be able to exercise by its actions, purely executive or even by its power of subordinate legislation. Where this Court refers to independence, fairness and reasonableness in decision-making as the hallmarks of judiciary, there it also states impartiality as one of its essentials. **Though, what is most important is the independence of judiciary, its freedom from interference and pressure from other organs of the State. The courts and Judges, thus, must be provided complete freedom to act, not to do what they like but to do what they are expected to do, legally and constitutionally and what the public at large expects of administration of justice**. If the State is able to exercise pressure on the Judges of the High Court by providing arbitrary or unreasonable conditions of service or altering them in an arbitrary manner, it would certainly be an act of impinging upon the independence of judiciary. Of course, what is put forward as part of the basic structure must be justified by reference to the provisions of the Constitution. When one looks into the scheme of our*

Constitution and the doctrine of separation of powers, there are many Articles, some of which I have already referred to, which clearly show that independence of the judiciary was of utmost concern with the Framers of the Constitution. Such intent of the Framers is not only ingrained into the ethos of our Constitution but is also explicitly provided for, even in the directive principles of the Constitution. Reference in this regard can usefully be made to Article 50 of the Constitution, which requires the State to separate the judiciary from the executive in public services of the State. This Article, with the passage of time, has turned into a constitutional mandate rather than a mere constitutional directive.

***31**. For the judiciary to be impartial and independent and to serve the constitutional goals, the Judges must act fairly, reasonably, free of fear and favour. The term "fear" as explained in various dictionaries, means "an unpleasant emotion caused by threat of danger, pain or harm; a feeling of anxiety regarding the likelihood of something unwelcome happening". (Concise Oxford English Dictionary, 11th Edn., Revised.) On the other hand, "favour" means "approval or liking; unfair preferential treatment, inclination, prejudice, predilection" (Concise Oxford English Dictionary, 11th Edn., Revised and Black's Law Dictionary, 8th Edn.).*

[Emphasis in Original]

79. In the case of ***Brij Mohan Lal v. Union of India, (2012) 6 SCC 502,*** **at page 547,** it is observed as under

*"**105**. The independence of the Indian judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. **It has to be***

clearly understood that the State policies should neither defeat nor cause impediment in discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively.

[Emphasis Supplied]

80. In the case of ***S.P. Gupta v. Union of India, 1981 Supp SCC 87, the*** Hon'ble Supreme Court observed as under.

*"**334**. Dr Singhvi submitted that independence of judiciary comprises two fundamental and indispensable elements viz. **(1) independence of judiciary as an organ and as one of the three functionaries of the State, and (2) independence of the individual Judge.***

335.There can be no quarrel that this proposition is absolutely correct. Our Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method—

(1) by guaranteeing complete safety of tenure to Judges except removal in cases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one,

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive. Article 50 clearly provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. This important Directive Principle enshrined in Article 50 has been carried out by the Code of Criminal Procedure, 1973 which seeks to achieve complete separation of judiciary from the executive,

(3) so far as the subordinate judiciary is concerned the provisions

of Articles 233-36 vest full and complete control over them in the High Court. Only at the initial stage of the appointment of Munsifs or the District Judges, the Governor is the appointing authority and he is to act in consultation with the High Court but in all other matters like posting, promotion, etc., as interpreted by this Court in Samsher Singh case, the High Court exercises absolute and unstinted control over the subordinate judiciary. Promotion, holding of disciplinary inquiry, demotion, suspension of Sub-Judges lie with the High Court and the Governor has nothing to do with the same.

Hinting on the nature of the separation of powers brought about by our Constitution, this Court in Chandra Mohan v. State of U.P. made the following observations:

> *"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction."*

81. In the case of ***S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124 : (1987) 2 ATC 82, at page 128 ,*** Bhagwati C.J. (as he then was, remarked as under:)

> ***"3****. It is now well settled as a result of the decision of this Court in Minerva Mills Ltd. v. Union of India that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away.* ***If the power of judicial review is abrogated or taken away the Constitution***

will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question may arise as to what are the powers of the executive and whether the executive has acted within the scope of its power. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the rule of law which permeates every

provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. That is why I observed in my judgment in Minerva Mills Ltd. case at p. 287 and 288: (SCC p. 678, para 87)

> *"I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a*

constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of the Article 368 is unconstitutional and void as damaging the basic structure of the Constitution."

It is undoubtedly true that my judgment in Minerva Mills Ltd. case was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, ***Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court****. Then, instead of the High Court, it would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the rule of law.* ***Therefore, if any constitutional amendment made by***

Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.

82. Thus, law has been settled by the Hon'ble Supreme Court, insofar, as the creation of alternative institutions which would exercise judicial function, would be that the alternative institutional mechanism must not be less effective that the High Court. The Parliament, therefore only has the power to set up an alternative institutional mechanism, insofar as such institution offers an effective mechanism which is no less effective that a High Court. To be as effective as a High Court, would not be limited to having powers akin to High Court, it would also include the ability to exercise judicial function akin to a High Court, in the sense of being impartial and independent.

83. In the case of ***R.K. Jain v. Union of India, (1993) 4 SCC 119*, at** the Hon'ble Supreme Court laid emphasis on the importance on the presence of judicial approach, in Tribunals constituted under Articles 323-A and 323-B, and the observations, are extracted as under:

*"**67**. The tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the statute*

and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. ***So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage*** *and teeth would definitely* ***impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary*** *that those who adjudicate upon* ***these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different*** *and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.*

[Emphasis Supplied]

84. In the case of ***Union of India v. Madras Bar Assn., (2010) 11 SCC 1,*** the Hon'ble Supreme Court has remarked as under:

"90. But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from

courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional.

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93**. If the Act provides for a tribunal with a judicial member and a technical member, does it mean that there are no limitations upon the power of the legislature to prescribe the qualifications for such technical member? The question will also be whether any limitations can be read into the competence of the legislature to prescribe the qualification for the judicial member? The answer, of course, depends upon the nature of jurisdiction that is being transferred from the courts to tribunals. **Logically and necessarily, depending upon whether the jurisdiction is being shifted from a High Court, or a District Court or a Civil Judge, the yardstick will differ. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees.

******

We may summarise the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised

by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.

(c) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

(d) The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly, while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. ***If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere***

> ***to preserve the independence and standards of the judiciary***. *Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.*
>
> *****
>
> ***120***. *We may now tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:*
>
> ******
>
> ***(xiii) Two-member Benches of the Tribunal should always have a judicial member. Whenever any larger or special Benches are constituted, the number of technical members shall not exceed the judicial members.***
>
> ******

85. Thus, in the case of Madras Bar Association, one of the main defects found in the NCLAT by the Hon'ble Supreme Court, which ultimately had to be remedied by Parliament, was in respect of the Constitution of a Tribunal. It became necessary for the Tribunal to consist of at least one judicial member, and in the event that a larger bench was to be formed, such larger bench would necessarily require the present of judicial members at par, or in excess of the no. of technical members.

86. In the case of ***Madras Bar Assn. v. Union of India, (2014) 10 SCC 1,*** the Hon'ble Supreme Court observed as under.

124. *One needs to also examine sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act, with pointed reference to the role of the Central Government in determining the sitting of the Benches of NTT. The Central Government has been authorised to notify the area in relation to which each Bench would exercise jurisdiction to determine the constitution of the Benches, and finally to exercise the power of transfer of Members of one Bench to another Bench.* ***One cannot lose sight of the fact that the Central Government will be a stakeholder in each and every appeal/case which would be filed before NTT. It cannot, therefore, be appropriate to allow the Central Government to play any role, with reference to the places where the Benches would be set up, the areas over which the Benches would exercise jurisdiction, the composition and the constitution of the Benches, as also, the transfer of the Members from one Bench to another.*** *It would be inappropriate for the Central Government to have any administrative dealings with NTT or its Members. In the jurisdictional High Courts, such power is exercised exclusively by the Chief Justice in the best interest of the administration of justice. Allowing the Central Government to participate in the aforestated administrative functioning of NTT, in our view, would impinge upon the independence and fairness of the Members of NTT.* ***For the NTT Act to be valid, the Chairperson and Members of NTT should be possessed of the same independence and security as the Judges of the jurisdictional High Courts (which NTT is mandated to substitute). Vesting of the power of determining the jurisdiction, and the postings of different Members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the Members of NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting.*** *An unsuitable/disadvantageous Chairperson or Member could be easily*

moved to an insignificant jurisdiction or to an inconvenient posting. This could be done to chastise him, to accept a position he would not voluntarily accede to. We are, therefore of the considered view, that Section 5 of the NTT Act is not sustainable in law as it does not ensure that the alternative adjudicatory authority is totally insulated from all forms of interference, pressure or influence from coordinate branches of Government. ***There is therefore no alternative but to hold that sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act are unconstitutional.***

****

126*. This Court has declared the position in this behalf in L. Chandra Kumar case and in Union of India v. Madras Bar Assn. case, that Technical Members could be appointed to the tribunals, where technical expertise is essential for disposal of matters, and not otherwise.* ***It has also been held that where the adjudicatory process transferred to a tribunal does not involve any specialised skill, knowledge or expertise, a provision for appointment of non-Judicial Members (in addition to, or in substitution of Judicial Members), would constitute a clear case of delusion and encroachment upon the "independence of judiciary", and the "rule of law".It is difficult to appreciate how Accountant Members and Technical Members would handle complicated questions of law relating to tax matters, and also questions of law on a variety of subjects (unconnected to tax), in exercise of the jurisdiction vested with NTT****. That in our view would be a tall order. An arduous and intimidating asking. Since the Chairperson/Members of NTT will be required to determine "substantial questions of law", arising out of decisions of the Appellate Tribunals, it is difficult to appreciate how an individual, well-versed only in accounts, would be able to discharge such functions. Likewise, it is also difficult for us to understand how Technical Members, who may not even possess the qualification of law, or may have no experience at

all in the practice of law, would be able to deal with "substantial questions of law", for which alone, NTT has been constituted.

[Emphasis Supplied]

87. In the case of ***State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412,*** after analysing the provisions of the Consumer Protection Act, 1986, the Hon'ble Supreme Court upheld the validity of the Consumer Protection Act, for several reasons, including the fact that the tribunals had been established to provide consumers with an efficacious remedy, against big corporations. The Hon'ble Supreme Court however, after analysing the composition of the various fora, remarked as under:

*"**28.** Section 19 provides for an appeal from a decision of the State Commission to the National Commission. Section 20 deals with the composition of the National Commission, the President whereof would be a person who is or has been a Judge of the Supreme Court and such appointment shall be made only upon consultation with the Chief Justice of India. So far as the members of the National Commission are concerned, the same are also to be made on the recommendation of the Selection Committee, the Chairman whereof would be a person who is a Judge of the Supreme Court to be nominated by the Chief Justice of India. The tenure of the office of the National Commission is also fixed by reason of sub-section (3) of Section 20.*

29. By reason of the provisions of the said Act, therefore, independent authorities have been created.

[Emphasis Supplied]

88. The Hon'ble Supreme Court laid great emphasis on the need and importance of independence of the fora, and was one of the factors in upholding the validity of the Act.While the observation of the Court might not in the strict sense be the *ratio* of the case, it certainly does follow the long line of Judgements of the Hon'ble Supreme Court, which have laid great emphasis on the need for independence in Tribunals, which are meant to exercise Judicial Function.

89. The Hon'ble Supreme Court in ***Columbia Sportswear Company Vs. Director of Income Tax***, reported in ***2012 (11) SCC 224***, has observed as under:

> *"**9**. The meaning of the expression "tribunal" in Article 136 and the expression "tribunals" in Article 227 of the Constitution has been explained by Hidayatullah, J., in Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala [AIR 1961 SC 1669] in para 32, relevant portion of which is quoted hereinbelow: (AIR p. 1680)*
>
> > *"32. With the growth of civilisation and the problems of modern life, a large number of administrative tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. They are very similar to courts, but are not courts. When the Constitution speaks of 'courts' in Articles 136, 227 or 228 or in Articles 233 to 237 or in the Lists, it contemplates courts of civil judicature but not tribunals other than such courts. This is the reason for using both the expressions in Articles 136 and 227.*

By 'courts' is meant courts of civil judicature and by 'tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established."

***10**. Thus, the test for determining whether a body is a tribunal or not is to find out whether it is vested with the judicial power of the State by any law to pronounce upon rights or liabilities arising out of some special law and this test has been reiterated by this Court in Jaswant Sugar Mills Ltd. v. Lakshmi Chand [AIR 1963 SC 677] , Associated Cement Companies Ltd. v. P.N. Sharma [AIR 1965 SC 1595] and in the recent decision of the Constitution Bench in Union of India v. Madras Bar Assn. [(2010) 11 SCC 1] "*

90. The crux of the argument of the Union of India that since the Appellate Tribunal under CGST Act, 2017 and the TNGST Act, 2017 is not a substitute to the High Court, the principles laid down in ***L.Chandrakumar Vs. Union of India*, *reported in 1997(3) SCC 261*, *Union of India Vs. R.Gandhi*** **reported in 2010(11) SCC 1 and *Madras Bar Association Vs. Union of India*, reported in 2014 (10) SCC 1,** cannot be made applicable to the facts of this case, cannot be accepted in the light of the pronouncements of the Court quoted supra.

91. The hierarchy of forums under the Act provides for an adjudicating

authority. The adjudicating authority is defined in Section 2(4) of the CGST Act, which reads as under.

> (*4*) "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal;

92. The appellate authority is defined in Section 2(8) of the CGST Act, which reads as under.

> (*8*) "Appellate Authority" means an authority appointed or authorised to hear appeals as referred to in section 107;

93. The appellate tribunal is defined in Section 2(9) of the CGST Act, which reads as under.

> (*9*) "Appellate Tribunal" means the Goods and Services Tax Appellate Tribunal constituted under section 109;

94. An appeal from the adjudicating authority lies to an appellate authority under Section 107 of the CGST Act. Section 107 (16) states that the order of the appellate authority, subject to the provisions of Section 108 or Section 113 or Section 117 or Section 118, is final.

95. The revisional authority is defined in Section 2(99) of the CGST Act, which reads as under.

(*99*) "Revisional Authority" means an authority appointed or authorised for revision of decision or orders as referred to in section 108;

96. The revisional authority subject to the provisions of Section 121 and any rules made thereunder, may, on his own motion or upon information received by him or on request from the Commissioner of State tax, or the Commissioner of Union Territory Tax, shall call for and examine the record of any proceedings, and if he considers that any decision or order passed under this Act or under the State Goods and Service tax Act or the Union Territory Goods and Services Tax Act, by any officer subordinate to him is erroneous and is prejudicial to the interest of revenue or it is illegal or improper or has not taken into account certain material facts, shall stay the operation of the order for such period as he deems fit and after giving the person concerned, an opportunity of being heard, can pass order as he thinks just and proper, including enhancing or modifying or annulling the said decision or order .

97. The order of the appellate authority and the order of the revisional authority, are taken to the appellate tribunal. The appellate tribunal is constituted under Section 109 of the CGST Act, quoted supra.

98. A perusal of Section 109 shows that it consists of a National Bench or

the Regional Benches and State bench or the Area Benches. Section 109(5) provides that the National Bench and the Regional Benches, shall hear the appeals against the orders passed by the Appellate Authority or the Revisional Authority in cases where one of the issues involved relates to the place of supply and order of the National Bench or the Regional Benches can be challenged only in the Hon'ble Supreme Court.

99. The orders of the National Bench or the Regional Benches are not subjected to any appellate jurisdiction of High Court. It is therefore similar to an order passed by a Central Administrative Tribunal. It is a different question as to whether such an order would be subjected to Article 227 of the Constitution of India or not and we are not going into the controversy. This Court is aware of the fact that the National Tribunal cannot adjudicate the vires of the notifications issued under the Act or the constitutional validity of the notifications / regulations and the very consequences of the Act, but nevertheless, it cannot be said that the National Bench is only an extension of the mechanism to determine only the quantum of tax, which is only a subject matter of experts. The quantum of tax is determined on the interpretation of various sections and notifications. It also involves adjudication upon the orders of the appellate authority. It has to be borne in mind that the decision making process has to be scrutinised by the tribunal. In doing so, judicial principles have to be kept in mind. The criticism of the Manlimath Committee, that any weightage in favour of the service

members or expert members and value- discounting the judicial members would render the tribunal less effective and efficacious than the High Court, would clearly apply to the Appellate Tribunal. It is well accepted that the tribunal must inspire confidence in the assessee for which purpose the members must have legal training, experience, judicial acumen, equipment and approach.

100. Similarly, even though the judgment of the State Bench or the Area Benches is subject to an appeal to High Court, it is well settled that while giving judicial decisions, Judges should be able to act impartially, objectively and without any bias. Infact the Hon'ble Supreme Court in ***Manak Lal (Shri), Advocate Vs. Prem Chand Singhvi and Others***, reported in **1957 SCR 575** has observed that when a tribunal or a Court decides the matter, the test is not whether in fact a bias has affected the judgment. The test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the tribunal.

101. The disputes which arise in these tribunals are between the assessee and the State. The technical members are nominees of the State government. In fact the Hon'ble Supreme Court in Manak Lal's case [quoted supra] has observed as under.

"4... In dealing with cases of bias attributed to members

*constituting Tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a Judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. "The principle", says Halsburry, "**nemo debet esse judex in causa propria sua** precludes a justice, who is interested in the subject-matter of a dispute, from acting as a justice therein". In our opinion, there is and can be no about about the validity of the principle and we are prepared to assume that this principle applies not only to the justices as mentioned by Halsbury but to all Tribunals and bodies which are given jurisdiction to determine judicially the rights of parties."*

102. Further as stated earlier, the appellate tribunal is constituted also to see whether the legal principles and the decision making process are correct and fair. The expert members who are not well trained in law, cannot be permitted to overrule the judicial member on these aspects.

103. A Hon'ble Division Bench judgment of this Court in ***S.Manoharan Vs. The Deputy Registrar, Central Administrative Tribunal, Principal Bench, New Delhi & Others, reported in 2015 (2) Law Weekly 343,*** while considering an issue as to whether the number of administrative members can be more than the judicial members in the Central Administrative Tribunal, compared the

composition of the National Green Tribunal constituted under the National Green Tribunal Act, 2010. Proviso to Section 4 (4)(c) of the National Green Tribunal Act provides that number of expert members shall be equal to number of judicial members. This Court in para 41 and 42 of the said judgment interpreted Section 21, Section 4(4) read with Section 35 of the National Green Tribunal Act, 2010 and Rule 3(1) of the National Green Tribunal (Practices and Procedure) Rules, 2011 and observed as under.

> *"41. But, Section 21 of the National Green Tribunal Act, 2010 contains a Catch-22 situation. It declares that the decision of the Tribunal by majority of members shall be binding. The First Proviso to Section 21 states that if there is a difference of opinion among the Members and the opinion is equally divided, the Chairperson shall hear such application and decide. The Second Proviso to Section 21 states that where the Chairperson himself has heard such application along with other Members and if the opinion among the Members is equally divided, he shall refer the matter to the other Members of the Tribunal. This is despite the fact that the Chairperson of the Tribunal, as per Section 5(1) of the Act, should have been either a Judge of the Supreme Court or the Chief Justice of a High Court. Perhaps, the situation contemplated by the Second Proviso to Section 21 of the National Green Tribunal Act, 2010 has not so far arisen, where it is possible for an Expert Member to tilt the balance in favour of the one contrary to what one set of Members including the Chairperson had decided.*
>
> *42. It appears that in exercise of the powers conferred by Section 4(4) read with Section 35 of the National Green Tribunal Act, 2010, the Central Government has issued a set of rules known as National Green Tribunal (Practices and Procedure) Rules, 2011. Rule 3(1) of these Rules empowers the Chairperson of the Tribunal to constitute a Bench of two or*

more Members consisting of at least one Judicial Member and one Expert Member. Under Rule 5(1), an application or appeal should be heard by the Tribunal consisting of at least one Judicial and one Expert Member. Sub-Rule (2) of Rule 5 makes it incumbent upon the Chairperson to constitute a Bench comprising of more than two Members, if a particular case is to be heard and decided by a Larger Bench. But, interestingly, Rule 5(2) is conspicuously silent about the ratio between Judicial and Expert Members. Therefore, one has to fall back upon the Proviso to Rule 4(4)(c) that mandates a Bench of more than two Members to be loaded with equal number of Judicial and Expert Members.

43. If we carefully analyse the scheme of Section 5(4)(d) of the Administrative Tribunals Act, 1985 and the Proviso thereunder, in the context of Section 4(4)(c) and the Proviso thereunder of the National Green Tribunal Act, 2010, in the backdrop of the development of law from S.P. Sampath Kumar to L. Chandra Kumar to R. Gandhi to Madras Bar Association, it will be clear that a Bench of more than three Members cannot be overloaded with Administrative Members. The Parliament itself appears to have understood the difficulty of allowing a Bench of any Tribunal to be overloaded with Administrative or Technical or Expert Members. That is why it sought to provide equality of representation between Judicial and Expert Members in the National Green Tribunal. If substantial questions of law, as per the decision in the National Tax Tribunals Act case, cannot be decided by Tribunals loaded with Administrative Members, it is incomprehensible that a reference made to a larger Bench of an Administrative Tribunal, which would ordinarily require an exposition of a substantial question of law, can be decided by two Administrative Members, making the Judicial Member a minority. What John Marshall said in Marbury v. Madison [2 L Ed 60 : 5 US (1) Crunch 137 (1803)] could be of assistance in resolving the issue on hand and hence, it is extracted as follows:

> *"It is emphatically the province and duty of the Judicial Department to say what the law is…. If two laws conflict with each other, the Courts must decide on the operation of each…"*

104. Ultimately, in paragraph no.44, the Hon'ble Division Bench came to the final conclusion and observed as under.

> *"44. The Proviso to Section 5(4)(d) of the Administrative Tribunals Act, 1985 cannot be understood to mean that the Parliament contemplated a single Judicial Member to be a decorative piece in a Bench of more than two. Therefore, we are of the considered view that in a Bench of more than two Members constituted by the Chairperson of the Administrative Tribunal, the number of Administrative Members cannot exceed the number of Judicial Members."*

105. The principle which emerges is that while deciding issues as to whether the decision making process by the adjudicating authority or the appellate authority was just, fair and reasonable and to decide issues regarding interpretation of notifications and sections under the CGST Act a properly trained judicially mind is necessary which the experts will not have. The number of expert members therefore cannot exceed the number of judicial members on the bench.

106. In the result,

(i) Section 110(1)(b)(iii) of the CGST Act which states that a Member of the Indian Legal Services, who has held a post not less than Additional Secretary for three years, can be appointed as a Judicial Member in GSTAT, is struck down.

(ii) Section 109(3) and 109(9) of the CGST Act, 2017, which prescribes that the tribunal shall consists of one Judicial Member, one Technical Member (Centre) and one Technical Member (State), is struck down.

(iii) The argument that Sections 109 & 110 of the CGST Act, 2017 and TNGST Act, 2017 are ultra vires, in so far as exclusion of lawyers from the scope and view for consideration as members of the tribunal, is rejected. However, we recommend that the Parliament must consider to amend section for including lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.

107. The writ petitions are allowed to the above said extent. No Costs. Consequently, the connected writ miscellaneous petitions are closed.

[S.M.K., J.] [S.P., J.]
20.09.2019

Index : Yes/No.
Internet : Yes
Speaking / Non-speaking Order
ars

To

1. The Secretary,
Union of India,
Ministry of Finance,
Department of Revenue,
No.137, North Block, New Delhi - 110 001.

2. The Secretary,
Union of India,
Ministry of Law & Justice,
4th Floor, 'A' Wing,
Rajendra Prasad Road,
Shastri Bhavan, New Delhi - 110 001.

3. The Secretary,
Goods and Services Tax Council,
Office of the GST Council Secretariat,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Connaught Place, New Delhi - 110 001.

4. The Chief Secretary,
State of Tamil Nadu,
St. George Fort, Chennai - 600 009

S.MANIKUMAR, J.
AND
SUBRAMONIUM PRASAD, J.

ars/asr

Pre-delivery order
in W.P.Nos.21147, 21148 and 14919 of 2018
and
WMP Nos.24826, 24827, 17635 & 17636 of 2018

20.09.2019