

(2013) 12 DEL CK 0310

In the Delhi High Court

Case No : Writ Petition (C) No's. 7112 and 7114 of 2013

Union of India

APPELLANT

Vs

Ramesh Nair

RESPONDENT

Date of Decision : 02-12-2013

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 220, 226, 309, 311
Customs Act, 1962 — Section 129, 129(6)

Citation : (2013) 205 DLT 598 : (2014) 303 ELT 206

Hon'ble Judges : V. Kameswar Rao, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Rajeeve Mehra, ASG instructed by Mr. Ankur Chibber and Mr. Aashish Gumber, for the Appellant; Atul Nanda instructed by Ms. Rameeza Hakeem and Mr. Parinay T. Vasandani, for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—By a common order dated February 27, 2013 the Central Administrative Tribunal has quashed two letters dated November 12, 2012 and December 06, 2012 sent by the petitioner to the respondent while allowing Original Application No. 4006/2012 and Original Application No. 4283/2012. The respondent, a practising Advocate at Indore was offered appointment as Member (Judicial) of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). It was indicated that the respondent would be on probation for a period of one year and upon confirmation shall hold office for a term of 5 years extendable by another term of 5 years. It was indicated in the letter that if respondent accepts the offer his first posting would be at CESTAT Chennai Bench. The respondent was required to submit his acceptance on the terms and conditions as per the letter offering appointment. It was indicated that the term of the office would be subject to the upper age limit of 65 years. Vide corrigendum dated September 19, 2012 the age 65 years was corrected to be 62 years.

2. On September 27, 2012 the respondent sent a letter accepting the offer of

appointment as per the letter dated September 13, 2012 read with the corrigendum dated September 19, 2012 but requested that he may be posted at a place nearby Indore, preferably at Mumbai, indicating reasons why respondent was seeking posting near Indore.

3. Since an issue arose, as would be evident from the facts noted hereinafter, whether respondent unconditionally accepted the terms of his appointment as per the letter of offer dated September 13, 2012 read with the corrigendum dated September 19, 2012, we note the contents of respondent's letter dated September 27, 2012. It reads as under:-

Sub: Appointment as Member (Judicial) in CESTAT

Please refer your Office Memorandum F. No. A-12026/1/2011-Ad. IC (CESTAT) dated 13.09.2012 received on 19.09.2012 and corrigendum dtd. 19.09.2012 received on 25.09.2012, wherein I have been offered an appointment as Member (Judicial) in the Customs, Excise and Service Tax Appellate Tribunal.

First of all, I am very grateful to the Selection Committee, especially to the Hon'ble President, who has considered me for such a prestigious and responsible position, of Member (Judicial). In CESTAT, I am glad to accept this offer of appointment. However I humbly request you for kind consideration on my following submissions-

In the said Appointment Offer my first posting has been given at CESTAT, Chennai Bench. In this connection I would like to make a humble submission that my posting in Chennai, will disrupt my family to a great extent. I along with my wife and three children are permanently settled in Indore having my own house. My three children are 13 years, 11 years and 9 years of age are studying since beginning in the schools at Indore. They are acclimatized with the prevailing condition and environment of Indore. My wife being an advocate is also practicing and running her own office at Indore. Therefore, it will not be possible for me to shift my family from Indore to any other place. Due to these reasons I am required to visit Indore very frequently to take care of my family. In these circumstances, if, I am posted in Chennai, it will not be possible to visit Indore in quick intervals, mainly because there is no direct regular train for Chennai-Indore-Chennai, and the travelling time is more than thirty hours.

In view of above difficulties, I humbly request that my posting may kindly be made in any nearly place from Indore, preferably in Mumbai, so that, I would be also to pay visit to Indore, frequently by making overnight train/bus journeys on Holidays. It may also kindly be noted that during my past practice I do not have more than 2 to 3 cases pending in CESTAT Mumbai, which were filed through me.

In view of the above, I humbly request to kindly consider my posting in CESTAT Mumbai or in nearby place instead of CESTAT, Chennai.

4. On October 08, 2012 the petitioner responded to respondent's letter dated September 12, 2012 informing that his request for posting at a place near Indore

and in particular at Mumbai has not been accepted. The respondent was requested to convey his unconditional willingness to accept the offer of appointment as Member (Judicial) within 10 days. The letter dated October 08, 2012 reads as under:-

Subject: Filing up of the post of Member (Judicial) in CESTAT-reg.

Sir,

I am directed to refer to your letter dated 27.09.2012 and to say that your request for posting at Mumbai or at any nearby place from Indore on appointment as Member (Judicial) in CESTAT, has been considered. However, the same has not been acceded to by the Competent Authority.

2. You are, therefore, requested to convey your unconditional willingness to accept the offer of appointment as Member (Judicial) within a period of 10 working days from the date of receipt of this communication, failing which action for cancellation of offer of appointment will be initiated without further notice.

5. The response of the respondent was as per a letter dated October 25, 2012. He wrote as under:-

Subject: Filling up of the post of Member (Judicial) in CESTAT-reg.

Please refer to your letter No. A. 12026/1/2011-Ad.IC (CESTAT) dated 08.10.2012 wherein I have been communicated that my request for change of posting from Chennai to Mumbai or any nearby place has not been acceded to by the Competent Authority and I was also asked to give my unconditional willingness to accept the offer of appointment.

I hereby give my unconditional willingness to accept the offer of my appointment as Member (Judicial) in Chennai subject to your kind clarification on my following queries:

In my appointment offer, in condition 3, it is mentioned that "A Member may be discharged from service at any time during the period of probation without assigning any reason." The maximum probation period is 3 years.

In this regard I would like to seek an important clarification that whether a Member is entitled to practice and appear in CESTAT after he is discharged from services for any reason given by either side during the period of probation.

I further like to refer to Section 129(6) of Customs Act, 1962 which is reproduced below:

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

In the above provision, it is not explicit that the restriction for appearing is applicable to those members also who cease to hold office during the probation period.

However it is pertinent to mention here that in Rule 9 of Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Condition of Service) Rules, 1987 certain provisions has been given in case if a person who is appointed as technical or judicial member from any post under the Union or State during the period of his probation he shall be reverted back to his original post. Rule 9 reads as under:

Rule 9.-Reversion or termination of the service of members. (1)-In case of a person appointed as a technical or a judicial member from any post under the Union or a State, unless such a person is confirmed, the Central Government may at any time revert him to his parent post without assigning any reason, after giving him one month's notice of such reversion and in case a technical or a judicial member wishes to revert to his parent post, he shall be required to give one month's notice to the Central Government.

Provided that in case such a technical or judicial member has already superannuated according to the relevant rules of his parent post, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such technical or judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

(2) In case of a person appointed as a judicial member directly from the Bar, unless he is confirmed, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

A harmonious reading of the said rule leads to unescapable conclusion that sub rule 2 which refers to judicial member directly appointed from the bar is also entitled to same treatment as is extended to employees to the Union or State. In this circumstances when a judicial member directly appointed from the bar is discharged or demits his office during the probation period, no condition can be attached to him that he cannot practice before the Appellate Tribunal. A member on probation cannot be equated with a permanent member and he cannot be deprived of his means of livelihood only for the reason that he acted temporarily as a member for a short period of time.

In absence of such clarity for the CESTAT Members, by drawing the inference of the above Rule 9(2), I am of the bonafide belief that even the same provision must mutatis mutandis apply to the CESTAT Members also directly appointed from the bar and if for any reason such Member is discharged from his services or he decides to demit his office for any reason whatsoever during the probation period, he is entitled for practice and appear before CESTAT.

In the above view, I humbly request you to clarify "Whether a Member of CESTAT after discharge from his services or he decides to demit his office for any reason,

whatsoever during his probation period, is entitled to appear, act or plead before the Appellate Tribunal (CESTAT).

It is also requested to kindly inform me the Authorized Hospital in Indore (MP) to get my medical fitness test done in order to comply with the requirement of any appointment.

6. The petitioners responded vide letter dated November 12, 2012 informing the respondent that the words "on ceasing to hold office" is applicable to all types of cessation; whether it is retirement or resignation or discharge during probation or by any other way.

7. The respondent challenged the letter dated November 12, 2012 seeking a direction to the petitioners to allow him to join as Member (J) in CESTAT without being subjected to embargo of Section 129(6) of the Customs Act, 1962 and Central Excise Act, 1944 (hereinafter referred as Act) in the event of his ceasing to hold office as Member (J) before the expiry of period of probation. This was as per Original Application No. 4006/2012.

8. During the pendency of Original Application No. 4006/2012 the petitioners issued a letter dated December 12, 2012 to the respondent withdrawing the offer of appointment on the ground that despite sufficient time granted to the respondent his unconditional willingness to accept the offer of appointment had not been received.

9. The respondent filed a second Original Application registered as Original Application No. 4283/2012 wherein he had questioned the withdrawal of the offer of appointment by the petitioners vide letter dated December 06, 2012.

10. It was the contention of the respondent before the Tribunal that the letter dated December 06, 2012 is unsustainable as it amounted to defeating the process initiated by him by filing an Original Application No. 4006/2012 wherein he had challenged the letter dated November 12, 2012. It was also his case that Section 129(6) of the Act does not debar a person who is discharged from service as Member (J) during the period of probation from appearing before the CESTAT. He also contended that the bar from practicing before the CESTAT is violative of Article 19(1)(g) of the Constitution of India. He further contended that Article 220 of the Constitution of India recognizes the concept that it is only a permanent judge of a High Court who is barred from practising in the same High Court and not one who demits the office as an Additional Judge.

11. The case of the petitioners as argued by their counsel was that since the respondent had failed to accept, unconditionally the offer of appointment the same was rightly withdrawn by them. According to them u/s 129(6) of the Act a Member of the CESTAT who demits the office is barred from practising in CESTAT.

12. The Tribunal decided both Original Applications by a common order posing three questions: (i) whether a person not confirmed as Member of CESTAT can be said to be holding the office as member of said Tribunal; (ii) whether the term

"ceasing to hold office as Member" would also include discharge of a probationer; (iii) whether "a request to seek clarification" of certain doubt of challenge to clarification so received before Court of law can be construed as conditional or/absence of willingness to accept the offer of appointment to a post.

13. Vide impugned decision dated February 27, 2013 the Tribunal took the view that the adjudication of issues at (i) & (ii) above would involve interpretation of the phrase "ceasing to hold office" and particularly the words "hold office" in Section 129(6) of the Customs Act.

14. On issues No. (i) and (ii), the Tribunal has relied upon on the following judgments:

(i) State of Bombay Vs. Sardar Venkat Rao Krishna Rao Gujar, wherein the Court while interpreting the word "building" viewed that the observations must be considered in the context of the Act which was being construed and in the context in which they were made.

(ii) Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, wherein the Court held that the primary principle of interpretation is that a constitutional or statutory provision should be construed "according to the intent of they that made it". The Court further held that if the words used in the provision are imprecise or ambiguous then the Court may go beyond the rigid rules of literal interpretation and take aid of other well recognized rules of construction such as its legislative history, basic scheme and framework of the statute as a whole. Furthermore, the Court held that where two alternative constructions are possible, the Court must choose harmonious rule of interpretation so as not to undermine or defeat the basic scheme of the statute.

(iii) Collector of Central Excise, Bombay-I and Another Vs. Parle Exports (P) Ltd., and K. Ramanathan Vs. State of Tamil Nadu and Another, both of which further throws light on the principles of interpretation which should be adopted by the Courts while construing the connotation of any impugned provision.

15. While keeping in mind the principles propounded in the aforementioned judgments, with regard to rules of interpretation, the Tribunal proceeded to interpret the term "hold office" used in Section 129(6) of the Act in order to determine whether a probationer can be said to be holder of office of Member CESTAT. The Tribunal had a glance at the meaning of the word "hold" provided in Concise Oxford Dictionary wherein the meaning of the said word has been inter alia given as "have in one's possession or occupy". On such basis the Tribunal concluded that only a person who keeps possession or lien on a job can be said to be holder of that office. Further, while interpreting the term "probationer", the Tribunal placed its reliance on the decision reported as Parshotam Lal Dhingra Vs. Union of India (UOI), wherein it was held that the status of a "probationer" is that of appointment on trial. It was further held in the said decision that in case of an appointment to permanent post on probation, the servant so appointed does not acquire any substantive right to such a post and consequently cannot

complain if his service is terminated at any time. Thereafter, the Tribunal relied on the decision reported as *Triveni Shankar Saxena Vs. State of U.P. and others*, wherein it was held that "lien" means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively. Further reliance was placed on the decision reported as *Khazia Mohammed Muzammil Vs. The State of Karnataka and Another*, wherein it was held that the question of a probation is dependent upon his fitness for such confirmation.

16. Thus, on the basis of the discussions in the aforementioned judgments the Tribunal concluded that a person under probation may not be said to be holding an office for the purpose of section 129(6) of the Act. It was further concluded by the Tribunal that in case of discharge of probationer from service on account of not being not found suitable for being confirmed may not be compared with cessation of office by person who has acquired a lien on it. Further, while appreciating the intention of legislation incorporating Section 129(6) of the Act, the Tribunal referred to an order of ITAT Delhi ("B" Bench) Special Bench reported as (2009)120 ITD wherein it was held that Members of ITAT are debarred from appearing before ITAT only after retirement from service of the Tribunal and such conditions are not made applicable to a member discharged from service during the period of probation. Thus, on the basis of the aforesaid decisions the Tribunal, with regard to issues (i) and (ii), held that a member of the Tribunal discharged from service during probation period may not be debarred from practicing before it and provisions of Section 129(6) of the Act would be applicable only to such members who cease to hold office only after their confirmation. It was further held that the phrase "on ceasing to hold office as Member" used in section 129(6) of the Act would not include discharge of probationer and only a Member who is confirmed to hold office in such capacity can be said to have ceased to hold the same. Since a probationer does not acquire any lien on the post of Member before its confirmation, there is no question of his ceasing to hold the same.

17. With regard to issue (iii) the Tribunal noted that the respondent, while communicating his willingness to accept the offer of appointment as Member (J) did not question any of the conditions attached with the said post but had only made a request for change of place of his posting and further sought clarification whether the phrase "on ceasing to hold office as Member" would include only confirmed member or also a member discharged as probationer. On the basis of the above, the Tribunal held that merely because the applicant had sought for certain clarifications, it cannot be said that he had declined to accept the condition of his appointment. It was also held that since the applicant had shown confidence to seek clarification regarding applicability of Section 129(6) of the Act to those discharged on probation, the same cannot be held against him.

18. Finally, the Tribunal concluded that a person offered appointment as Member

(J) may not be prohibited from returning to his position enjoyed by him before such appointment in the event of being not considered as Member (J).

19. Mr. Rajeeve Mehra, learned Additional Solicitor General assisted by Mr. Ankur Chibber, Advocate appearing for the petitioners would challenge the impugned order of the Tribunal by stating that the Tribunal has erred in concluding that the letters dated September 27, 2012 and October 25, 2012 written by the respondent in response to the offer of appointment would not be construed as a conditional acceptance. According to him a perusal of the said letter would reveal that the respondent had sought change of his posting from Chennai to Mumbai which it was contrary to the terms offered by the petitioners.

20. Further, the interpretation sought by him to Section 129(6) of the Act would be contrary to the intention underlying the said Section inasmuch as a Member CESTAT on demitting office or for that matter resigning during probation was barred from practising in CESTAT. In fact this aspect has been conceded by the respondent in para 4.10 of the Original Application, which is reproduced as under:-

4.10 The fact of issuance of notice in the OA by this Hon"ble Tribunal vide order dated 3.12.12 was also brought, by the applicant himself, to the notice of the respondent, by means of letter dated 4.12.12, sent by fax as well as by speed post, wherein it was requested that, in view of the issuance of notice by this Hon"ble Tribunal in OA 4004/2012, the time limit for conveying his unconditional acceptance to the offer of appointment as Member (Judicial) be extended till disposal of the OA by this Hon"ble Tribunal or by any higher forum. A copy of the said communication dated 4.12.12, by the applicant to the respondent, is annexed hereto as Annexure A-8.

21. Mr. Rajeeve Mehra, learned Additional Solicitor General also relied upon the judgment of this Court reported as P.C. Jain Vs. Union of India (UOI) and Another, (connected writ petitions). His submission also centered around Article 220 of the Constitution of India to urge that in the absence of any express provision in Section 129(6) of the Act excluding Members demitting office while on probation, such Member would also be barred from practising in the CESTAT.

22. Mr. Atul Nanda, learned Senior Counsel appearing for the respondent would submit that there is a fallacy in the submission made on behalf of the petitioners inasmuch as a distinction has to be carved out between the terms and conditions in an offer of appointment with a request for a change of posting. Mr. Atul Nanda would submit that the respondent vide letter dated September 27, 2012 and October 25, 2012 had given unconditional acceptance to the terms and conditions laid down in the offer of appointment. The respondent had at no point of time asked the petitioners to change any of those terms. Mr. Atul Nanda would also submit that the petitioners being on probation for a period of one year extendable by another year cannot be considered to be holding an office during the said period. It is only when he is made permanent on successful completion

of probation, that the respondent said to be holding an office. In other words he would canvass that if the respondent demits the office during the period of probation the bar u/s 129(6) would not be applicable to him and the respondent would be within his right to practice before the CESTAT. He would submit that the judgment relied upon by the petitioners in N.K. Bajpai's case (supra) would not be applicable to the case in hand inasmuch, on facts, the Supreme Court was considering a case where the appellants before it had demitted the office while holding the post on permanent basis. According to him the case of the respondent is not of such a nature. Rather he would rely upon the opinion of the Supreme Court in the case reported as N. Kannadasan Vs. Ajoy Khose and Others, to contend that even the Supreme Court held while considering the case of an Additional Judge, appointed to High Court but not confirmed, is allowed to practise before the same High Court. On a specific query from us, Mr. Nanda would submit that the respondent is ready to join the place at Chennai. In other words the respondent would not be insisting for being appointed at a place other than Chennai.

23. Before we deal with the submissions of the counsel for the parties we would like to reproduce Section 129 of the Act.

129. Appellate Tribunal-

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

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

Explanations: For the purposes of this sub-section,

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

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

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

at least three years.

(3) The Central Government shall appoint-

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

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

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

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

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

24. The President, in exercise of power conferred by the proviso to Article 309 of the Constitution of India had made Rules regulating the method of recruitment and conditions of service of persons appointed as members of the Customs, Excise and Service Tax Appellate Tribunal known as customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987 (hereinafter referred to as Rules). The Rules inter alia stipulates qualification for recruitment (Rule 3), disqualification (Rule 4), method of recruitment (Rule 6), probation (Rule 8), reversion or termination of the service of members (Rule 9), classification (Rule 13), age of superannuation (Rule 16), retirement benefits (Rule 17) and other conditions of service (Rule 18). For the purpose of our consideration we reproduce Rule 8, Rule 9, Rule 16, Rule 17 and Rule 18, the same are as under:-

(1) Every person appointed as a member shall be on probation for a period of one year.

Rule 8. Probation.-

(2) The Central Government may extend the period of probation for a further period of one year at a time so that the period of probation in aggregate may not exceed three years.

(3) A member may be discharged from service at any time during the period of probation without assigning him any reason.

Rule 9.-Reversion or termination of the service of members.-

(1) in the case of a person appointed as a technical or a judicial member from any post under the Union or a State, unless such a person is confirmed, the Central Government may at any time revert him to his parent post without assigning any reason, after giving him one month's notice of such reversion and in case a technical or a judicial member wishes to revert to his parent post, he shall be required to give one month's notice to the Central Government.

Provided that in case such a technical or judicial member has already superannuated according to the relevant rules of his parent post, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such technical or judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

(2) In case of a person appointed as a judicial member directly from the Bar, unless he is confirmed, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

Rule 16-. Age of Superannuation.-

Subject to the provisions of rule 10, a member shall hold office until he attains the age of sixty-two years.

Rule 17-Retirement benefits.-

(1) A member, who at the time of his appointment as a member was holding a pensionable post under a Government in a permanent capacity shall be eligible for pension in accordance with the rules for pension applicable to him at the time of his retirement.

(2) A member to whom sub-rule (1) does not apply shall be entitled to Contributory Provident Fund benefits in accordance with the Contributory Provident Fund Rules (India), 1962.

(3) A member covered by sub-rule (2) on appointment in a substantive capacity may within 3 months of his appointment in a substantive capacity, elect for pensionary benefits, and if no communication is received in the office of the Registrar of the Tribunal, within this period, the member shall be deemed to have exercised his option to continue to subscribe to the Contributory Provident Fund, in which case he shall not be entitled to any pension.

(4) The declaration once made shall be final.

(5) A member recruited directly from the Bar shall be eligible to add to his service qualifying for superannuation pension (but not for any other class of pension) the actual period not exceeding one-fourth of the length of service or the actual period by which the age at the time of recruitment exceeded twenty five years, or a period of five years, whichever is less, provided that this concession shall not be admissible to a member unless the actual qualifying service at the time he quits Government service is not less than ten years.

Rule 18-Other conditions of service.-

The conditions of service of a member in respect of matters for which no

provision is made in these rules shall be the same as may for the time being be applicable to other employees of the Government of India of a corresponding status.

25. We may state here that the vires of Section 129(6) came up for consideration of this Court in the case reported as P.C. Jain's case (supra). Suffice it to say that this court has upheld the vires of the said Section. In appeal, the Supreme Court has also upheld the view of this Court in N.K. Bajpai's case (supra).

26. The challenge to the vires of Section 129(6) before this Court and the Supreme Court was made by officers of the Indian Customs and Central Excise Service who were also working as Member (Technical) in CAGET/CESTAT on different dates. Some of them were repatriated to parent department from CAGET and some them demitted office as Member (Technical) in CAGET/CESTAT. In that way the ratio of the opinion of the Supreme Court in N.K. Bajpai's case (supra) would not be of relevance while deciding the issue raised by the respondent before the Tribunal. In other words, the bar u/s 129(6) would be applicable to a Member holding the post on substantive basis. This we say so for the reason, it is not the case of the respondent that even after demitting office as a confirmed Member (Judicial) he can practice in CESTAT. His case was on demitting office as a probationer, the bar u/s 129(6) would not be applicable.

27. Now coming to the arguments advanced by the learned counsel for the parties, in so far as the submission of Mr. Rajeev Mehra, learned ASG on the conclusion of the Tribunal regarding the acceptance given by the respondent to the terms and conditions in the offer of appointment, is concerned, we note that the respondent was to be on probation for a period of one year extendable by one more year. The terms of appointment also reveal that the appointment would continue till the respondent was to attain the age of 62 years. It is also noted that till the respondent was on probation his appointment was liable to be terminated by the Central Government at any time without assigning any reasons.

28. We have noted respondent's letter dated September 27, 2012 in para 4 above. To appreciate the letter the distinction between accepting terms of appointment and accepting a place of posting has to be kept in mind. Terms of appointment would concern the conditions of service. Place of posting would be a field post appointment. So read, respondent's letter is ex facie an unconditional acceptance of the terms of appointment. The request to be posted at a place near Indore and preferably at Mumbai cannot be construed as a condition to the acceptance. It is merely a request that upon being appointed on the terms as per letter offering appointment the respondent should be posted near Indore. In fact, the letter of appointment dated September 13, 2012 itself has to be read as constituting two distinct subject matters. The terms on which appointment was offered are as per paras 1 to 11 of the letter. Paragraph 12 which reads: "If he accepts this offer, his first posting will be at CESTAT, Chennai Bench" clearly brings out that even as per the letter the petitioners clearly understood that

place of posting had no concern with the terms offering appointment and thus the petitioners themselves distinctly wrote that upon respondent accepting the offer he would be posted at Chennai.

29. The issue in so far as whether a Member on probation is said to be holding office is concerned the same can be also looked from a different perspective. The word "probation" has been defined in shorter Oxford Dictionary to mean the testing of the character, conduct or abilities of a person. In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, the Supreme Court had culled out the difference between an appointment of a Government servant on substantive, on probation, and on officiating basis. In so far as the appointment to a permanent post on probation the Supreme Court held as under:-

An appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. The period of probation may in some cases be for a fixed period, e.g., for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by a notice. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave in the former case or on a substantive appointment being made to that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law. It is, therefore, quite clear that appointment to a permanent post in a Government service, either on probation, or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time.

30. The Supreme Court in its opinion reported as *State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla*, placing reliance on judgment in *Parshotam Lal Dhingra's* case (*supra*) has held as under:-

A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of

temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well-settled that the form of the order is not conclusive and it is open to the Court to determine the true nature of the order. In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, a Constitution Bench of this Court held that the mere use of expressions like "terminate" or "discharge" is not conclusive and in spite of the use of such expressions, the Court may determine the true nature of the order to ascertain whether the action taken against the Govt. servant is punitive in nature. The Court further held that in determining the true nature of the order the Court should apply two tests namely: (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by way of punishment. It must be borne in mind that a temporary government servant has no right to hold the post and termination of such a Govt. servant does not visit him with any evil consequences. The evil consequences as held in *Parshotam Lal Dhingra's* case (*supra*) do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in *Dhingra's* case has been reiterated and affirmed by the Constitution Bench decisions of this Court in *The State of Orissa and Another Vs. Ram Narayan Das*, ; *R.C. Lacy v. The State of Bihar* C.A. No. 590/62 decided on 23.10.1963; *Champaklal Chimanlal Shah Vs. The Union of India (UOI)*, ; *Jagdish Mitter Vs. The Union of India (UOI)*, ; *A.G. Benjamin v. Union of India*, C.A. No. 1341/66 decided on 13.12.1966 and *Samsher Singh Vs. State of Punjab and Another*, . These decisions have been discussed and followed by a three Judge Bench in *State of Punjab and Another Vs. Shri Sukh Raj Bahadur*, .

31. Further we find that a reading of the Rules and the terms and conditions of appointment the following distinction can be culled out in an appointment of a Member who is on probation and a Member who is confirmed.

32. A Member demitting office while on probation does not retire whereas a Member who is confirmed, retires on attaining the age of superannuation, unless

he resigns. The rules do recognize Member on probation and a Member who is confirmed as two distinct separate classes.

33. The provision in question must be read to mean that the bar would not be applicable to a Member who demits the office while on probation. The conclusion arrived at by the Tribunal is a plausible view. Even if another view is possible, this Court in exercise of the jurisdiction under Article 226 of the Constitution of India would not like to interfere with the impugned order. The writ petitions are accordingly dismissed. There would be no order as to costs.