

(2014) 04 BOM CK 0078

In the Bombay High Court

Case No : Central Excise Appeal No. 31 of 2013

Zenith Computers Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 98, 98(2), 98(3), 99
Criminal Procedure Code, 1973 (CrPC) — Section 195
Customs Act, 1962 — Section 125, 128, 128A, 129A, 129C
Finance Act, 1994 — Section 65(105), 73, 75, 75A, 76
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2014) 303 ELT 336 : (2014) 73 VST 132

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : M.H. Patil and Ms. Padmavati Patil i/b. Ms. Aparna Hirandagi,
Advocate for the Appellant; V. Sridharan, Sr. Advocate, Pradeep S. Jetly and J.B.
Mishra, Advocate for the Respondent

Judgement

1. By this appeal the appellant challenges the order passed on 1-11-2012 (2014 (34) S.T.R. 581 (Tribunal)) by the Customs, Excise and Service Tax Appellate Tribunal West Zonal Bench at Mumbai (for short "CESTAT"). Mr. Patil, learned Counsel appearing on behalf of the appellant submits that this appeal raises substantial questions of law and particularly as framed at Paragraph 25 of this Memo of Appeal.

2. It is submitted by Mr. Patil that the situation in this case is peculiar and common to the proceedings before the Tribunal particularly when the Tribunal consisting of Member (Judicial) and Member (Technical) do not agree on the final order to be delivered. There is difference of opinion, that difference of opinion is also on facts. Even if the difference of opinion is with regard to a factual matter, a reference is necessitated to a third member. In the present case, there is a peculiar situation inasmuch as the appellant was forced to file an application invoking the powers of the Tribunal to rectify the mistake appearing in the

original order. That mistake was pointed out in great details by the appellant before the Tribunal. The appellant pointed out that when the original order was delivered, the Member (Judicial) took a particular view on the merits of the case. The Member (Technical) in his separate opinion not only differed on the merits of the case but also held that the demand is not hit or barred by limitation. There was an opinion expressed even on this point. The Member (Technical) thus expressed a view that the extended period of limitation has rightly been invoked. Mr. Patil submits that it is pertinent to note that the Member (Judicial) has not expressed any opinion on this aspect of the matter. Yet, while formulating the question or opinion for answer by a Third Member, the Tribunal has framed that in the following manner:-

Whether the Member (Judicial) is correct in holding that the appellants are engaged in the activity of promoting the brand of Intel/Microsoft consequently, the activity of "promotion or marketing of logo or brand" does not cover under the category of Business Auxiliary Service by relying on the judgment of Jetlite (India) Ltd. (supra)?

Or

Whether the Member (Technical) is correct in holding that the appellants are engaged in the activity of promoting the branded goods of Intel/Microsoft, therefore, the judgment of Jetlite (India) Ltd. (supra) is not applicable to the facts of this case and the demands are rightly confirmed under the category of Business Auxiliary Service and the extended period of limitation has rightly been invoked?

3. The other mistake, according to Mr. Patil, is that the entire appeal has been decided by referring to the facts of another Assessee-M/s. Datamani Technologies India Ltd. The appellant before this Court is not M/s. Datamani Technologies India Ltd. nor is the business identical with that of M/s. Datamani Technologies India Ltd. The appellant, therefore, pointed out that the mistake should be corrected and the facts pertaining to it also be noted and considered. This was an apparent mistake and which could have been corrected. It was not necessary to examine any other issues or reopen the proceedings in any manner. In such circumstances and when the case was fully covered by the judgment of the Division Bench in the case of Suzlon Infrastructure Ltd. Vs. Union of India (UOI) and Others, , then, all the more the approach of the Tribunal cannot be upheld in law. The order under challenge, therefore, be set aside after this appeal is admitted on the substantial questions of law formulated in the Memo of Appeal.

4. On the other hand, Mr. Jetly learned Counsel appearing on behalf of the Revenue submits that the appeal is entirely premature. Today the matter has not attained finality. Though it is true that there is difference of opinion on factual matters between the Member (Judicial) and Member (Technical), but a reference has been made to a Third Member and which is pending. In the event the Third

Member agrees with the Member (Judicial), then, the appellant is bound to succeed because the issue will be answered in the terms of the opinion of majority. In the event, the Third Member agrees with the Member (Technical), then, the original order would stand and opinion of majority would be of dismissal of the appellant's appeal. In that event, the appellant has remedy to challenge the order of the Tribunal in accordance with law. At this stage this Court should not express any opinion, particularly, by entertaining this appeal. Mr. Jetly submits that expressing any opinion even on the maintainability of the application of rectification of mistake would mean answering the issue in the pending reference, either way. That would not be fair to both sides. Even otherwise, he submits that the law is well settled. Whenever there is a provision incorporated, enabling the Tribunal which is exercising an appellate power to express a difference of opinion on any point, then, that term/word must receive such meaning as would advance the purpose of the Statute. Restricting or narrowing the meaning of the provision would defeat the ends of justice. He further submits that this was not a case for rectification of any mistake. It will be open for the appellant to point out to the Third Member any factual matter and the distinction with the case of M/s. Datamani Technologies (India) Ltd. In such circumstances, the Tribunal rightly dismissed the application seeking to rectify the mistake and, therefore, the appeal does not raise any substantial questions of law. It should be dismissed.

5. With the assistance of Mr. Patil and Mr. Jetly, we have perused the original record which we called from the Tribunal. Perusal of the original record indicates that the original order was pronounced in the appeal being Appeal No. ST/10/2010-Mum. The Member (Judicial) has rendered his findings and conclusions on 20-6-2012 resulting in the appeal of the present appellant and others being allowed. The learned Member (Judicial) held that the activity of the appellant during the impugned period is not covered under "business auxiliary services". Since the appellant's activity does not fall under this class that the learned Member (Judicial) set aside the order of adjudicating authority and allowed the appeal with consequential reliefs. The Member (Technical) expressed his disagreement and in his separate opinion which is dated 15-6-2012 he has concluded as under:-

(a) The services rendered by the appellants merit classification as "Business Auxiliary Service" under clause (zzb) of Section 65(105) of the Finance Act, 1994.

(b) The appellants are liable to Service Tax on the said activity for the impugned periods and, therefore, demand for Service Tax on the appellant u/s 73 of the Finance Act, 1994 is sustainable in law.

(c) The invocation of extended period for demand of Service Tax is justified as the appellants had suppressed facts. Therefore, the demand for Service Tax is not barred by time.

(d) The appellants are liable to pay interest on the delayed payment of Service

Tax at appropriate rates as provided for u/s 75 of the Finance Act, 1994.

(e) The appellants are liable to pay penalties under Sections 75A, 76 and 77 of the Finance Act, 1994.

(f) In the circumstances of the case, penalty u/s 78 is not warranted.

It is in such circumstances that the point for opinion of Third Member and noting the difference was framed and which we have reproduced above.

6. The appellant before us, made an application Tribunal styled as "Miscellaneous Application No. ROM/1580 of 2012". The appellant submitted that there is difference of opinion in the aforesaid terms. The appellant, however, submitted that while delivering the original order, the Member (Judicial) has not considered all the propositions. Further, the facts of the appellant's case and those of M/s. Datamani Technologies India Ltd., the appellant in Appeal No. ST/07/2010-Mumbai appear to be different. They are not at par with the present appellant. Therefore, referring the question to a Third Member, firstly on the issue not dealt with by the learned Member (Judicial) would not be proper. This is an apparent mistake and can be corrected. Secondly, the order deserves to be rectified so as to refer to the facts of the present appellant. Such an application was made on 20-9-2012. The Tribunal in dealing with the application for rectification of mistake filed by the present appellant has held that the issue before this Court in Suzlon Infrastructure Ltd. Vs. Union of India (UOI) and Others, was with regard to the maintainability of the application for rectification of mistake during the pendency of a reference to Third Member. That issue does not arise for consideration before the Tribunal. In Paragraph 4.1 of the order under challenge, the Tribunal observed that the Member (Judicial) gave his findings on merits and has not gone into other issues raised by the appellant. The Member (Technical) has considered other aspects also. Now, the Third Member is required to express an opinion on factual and other issue or question. However, this cannot be said to be a mistake apparent in the Tribunal's original order. In these circumstances, the Tribunal proceeded to dismiss the application. It is essentially this order which is challenged before us.

7. We clarify that we express no opinion on the rival contentions particularly on the difference of opinion and question formulated for answer by the Third Member. Each of the contentions as raised are open for being raised and at an appropriate stage. We see much substance in the contention of Mr. Jetly that the present appeal does not deserve to be admitted. It is not raising any substantial question of law. As we have noted above, the power of rectification of mistake is not akin to review of the original order. This is not a Review Jurisdiction. This is a power to correct an obvious or apparent mistake on face of the record. No detailed scrutiny or examination of the record again can be permitted. This power, as has been held by the Hon'ble Supreme Court, is extremely limited and restricted in nature. It enables the Tribunal to clear any ambiguity and apparent error in the original order so as not to cause inconvenience or cause prejudice to

the parties in any manner. It cannot be equated or termed as substantive proceedings. In the garb of invoking this power the aggrieved party like the appellant cannot seek review of the original order and by calling upon the Tribunal to go behind it in some manner. In the present case, if the appellant is aggrieved by the fact that the original order refers to the case of M/s. Datamani Technologies (India) Ltd. alone and not that of the appellant, then, nothing prevents the appellant from raising this grievance at an appropriate stage and before the appropriate authority and in appropriate proceeding. The matter is still at large before the Third Member on the point/question formulated and noted above. It would be open for the appellant to raise a grievance that the facts pertaining to it should be noted while rendering any opinion and the Third Member should not merely go by the facts noted in the original order. Meaning thereby, the matter need not be decided or opinion need not be rendered only with reference to the facts of M/s. Datamani Technologies (India) Ltd., but also by taking into consideration the appellant's case. In the event, the Third Member does not agree with the appellant, then, the appellant is not remedy-less. The opinion which would be given by the majority would then be the final order of the Tribunal and if it is adverse to the appellant, then, while challenging it the appellant can raise all contentions including the manner in which the appeal is decided originally and by the Third Member. The appellant can point out the errors committed in the course adopted by the Third Member while rendering his opinion or answering the question formulated above. At this stage, we are not inclined to go into the larger issue. We are of the opinion that the present appeal only challenges the order passed on the Miscellaneous Application. The dismissal of the application does not raise any substantial question of law. If the Third Member has any difficulty in answering the reference, he can set out the same in his opinion.

8. Mr. Patil, would invite our attention to the judgment in the case of "Suzlon Infrastructure Ltd." (supra) and rendered by this Court. True it is that the Division Bench in "Suzlon Infrastructure Ltd." (supra) has held that the application of the nature made by the appellant is maintainable, but it is not necessary to express any further opinion by us at this stage as we are proceeding on the footing that rectification of mistake application made by the appellant was maintainable even during the pendency of the reference to the Third Member. Once we have proceeded on that basis and foundation and gone into the contents of the application for rectification of mistake, then, we need not express any further opinion or render any finding and conclusion. Suffice it to note that, it would be open for the appellant as well as the Revenue to raise appropriate contentions in the event any controversy with regard to the judgment of this Court in the case of "Suzlon Infrastructure Ltd." (supra) arises for determination and consideration.

9. We are of the opinion that the application which has been dismissed by the order under challenge has been so dismissed by taking into account the peculiar facts and situation emerging from difference of opinion. Equally it has been

decided in the backdrop of pendency of reference to Third Member. In such circumstances, the grievance raised by Mr. Patil that the Third Member would be obliged to answer the question on which there is no difference of opinion, need not be gone into and decided by us. We have noted as to how a remedy is available in terms aforesaid. Further the plea that the Bench and the Members constituting the same came together in rejecting the application for rectification of mistake and which course itself raises substantial question of law, does not appeal to us. The Bench has to assemble to take note of the grievance made in the application for rectification of mistake appearing allegedly in the original order. When the appellant pursues such application by going before the same Bench and which it was obliged to consider, then, it cannot make a grievance of the nature noted by us. Further both the members have rightly held that since they have differed and point of difference has been noted and matter at large is before the Third Member, then, it will not be proper to express any opinion and it will not be proper to say anything further. The Members have in their wisdom left the matter for being dealt with by Third Member. To us it is obvious and it will be open for the Third Member to answer the question on which there is a difference of opinion admittedly. As regards other issue or question, if it still arises or is at large, the Third Member is free to express such views as are permissible in law. We are, therefore, of the opinion that the rejection of the rectification of mistake application does not raise any substantial question of law. The appeal is, therefore, dismissed.

10. However, during the course of this appeal, we have called upon not only Mr. Patil and Mr. Jetly, but learned Senior Advocate Mr. Sridharan to assist us so that a disturbing trend which we have noted can be arrested and the Members of Tribunal do not routinely render differing opinions on factual matters necessitating reference to a Third member. It is with some pain and anguish that we have noted the grievance of the Counsel that occasions of the aforesaid nature are frequently occurring and that hampers the administration of justice, equally that affects the working and functioning of the Tribunal. The Tribunal comprising of Member (Judicial) and Member (Technical) is conferred with a special jurisdiction. It is expected to deal with the matters arising under the Special Act fairly and expeditiously and to enable the Tribunal to do so that its composition is as noted by us and of the above nature. The experience drawn from the Technical side is combined with the judicial wisdom. By combining it the Tribunal is expected to decide the issues arising in special cases. The Tribunal, thus, is manned by persons drawn from both, the technical and judicial sides.

11. In the case of State of Gujarat and Another Vs. Gujarat Revenue Tribunal Bar Association and Another, , the Hon"ble Supreme Court has extensively dealt with the aspect as to whether all the "Tribunals" are "Courts". The Hon"ble Supreme Court has also outlined the difference between the appellate, revisional and supervisory jurisdiction. The Supreme Court has held as under:-

9. Although, term "Court" has not been defined under the Act, it is indisputable

that courts belong to the judicial hierarchy and constitute the country's judiciary as distinct from the executive or legislative branches of the State. Judicial functions involve the decision of rights and liabilities of the parties. An enquiry and investigation into facts is a material part of judicial function. The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees etc. Thus, the system of tribunals was created as a machinery for the speedy disposal of claims arising under a particular Statute/Act. Most of the Tribunals have been given the power to lay down their own procedure. In some cases, the procedure may be adopted by the Tribunal and the same may require the approval of the competent authority/government. However, in each case, the principles of natural justice are required to be observed. Such tribunals therefore, basically perform quasi-judicial functions. The system of tribunals is hence, unlike that of the regularly constituted courts under the hierarchy of judicial system, which are not authorised to devise their own procedure for dealing with cases. Under certain statutes Tribunals have been authorised to exercise certain powers conferred under some provisions of the CPC (hereinafter referred to as the "CPC") or the Code of Criminal Procedure (hereinafter referred to as the "Cr.P.C."), but not under the whole Code, be it Civil or Criminal. However, in a regular court, the said Codes, in their entirety, civil as well as criminal, must be strictly adhered to. Therefore, from the above, it is evident that the terms "court" and "Tribunal" are not inter-changeable.

A Tribunal may not necessarily be a court, in spite of the fact that it may be presided over by a judicial officer, as other qualified persons may also possibly be appointed to perform such duty. One of the tests to determine whether a tribunal is a court or not, is to check whether the High Court has revisional jurisdiction so far as the judgments and orders passed by the Tribunal are concerned. Supervisory or revisional jurisdiction is considered to be a power vesting in any superior court or Tribunal, enabling it to satisfy itself as regards the correctness of the orders of the inferior Tribunal. This is the basic difference between appellate and supervisory jurisdiction. Appellate jurisdiction confers a right upon the aggrieved person to complain in the prescribed manner, to a higher forum whereas, supervisory/revisional power has a different object and purpose altogether as it confers the right and responsibility upon the higher forum to keep the subordinate Tribunals within the limits of the law. It is for this reason that revisional power can be exercised by the competent authority/Court suo motu, in order to see that subordinate Tribunals do not transgress the rules of law and are kept within the framework of powers conferred upon them. Such revisional powers have to be exercised sparingly, only as a discretion in order to prevent gross injustice and the same cannot be claimed, as a matter of right by any party. Even if the person heading the Tribunal is otherwise a "judicial officer", he may merely be persona designate, but not a Court, despite the fact that he is

expected to act in a quasi-judicial manner. In the generic sense, a court is also a Tribunal, however, courts are only such Tribunals as have been created by the concerned statute and belong to the judicial department of the State as opposed to the executive branch of the said State. The expression "Court" is understood in the context of its normally accepted connotation, as an adjudicating body, which performs judicial functions of rendering definitive judgments having a sense of finality and authoritativeness to bind the parties litigating before it. Secondly, it should be in the course of exercise of the sovereign judicial power transferred to it by the State. Any Tribunal or authority therefore, that possesses these attributes, may be categorized as a Court.

10. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act, (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi-judicial decision.

An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a "Court", but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a Court.

12. In the context of the complaint and grievance made about frequent differing opinions on factual matters, that we called upon the Counsel to address us as to what is the ambit and scope of Section 129C of the Customs Act, 1962, which reads as under:-

Section 129C. Procedure of Appellate Tribunal.-(1) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the members thereof.

(2) Subject to the provisions contained in sub-section (4), a Bench shall consist of one judicial member and one technical member.

(3) Omitted.

(4) The President or any other member of the Appellate Tribunal authorised in this behalf by the President may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member where-

(a) the value of the goods confiscated without option having been given to the

owner of the goods to pay a fine in lieu of confiscation u/s 125; or

(b) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(c) the amount of fine or penalty involved, does not exceed ten lakhs rupees.

(5) If the members of a Bench differ in opinion on any point, the point 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 make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.

(6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(7) The Appellate Tribunal shall, for the purposes of discharging its functions, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of any person and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(8) Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Bare perusal thereof would indicate that power and functions of the Appellate Tribunal may be exercised and discharged by the Benches constituted by the President from amongst the members thereof. Subject to the provisions contained in sub-section (4) of Section 129C, a Bench shall consist of one judicial member and one technical member. Sub-section (4) enables the President or any other member of the Appellate Tribunal authorised in that behalf by the President, to dispose of any case sitting singly. Sub-section (5) has been pressed into service. With the assistance of the learned Counsel appearing for the parties,

we have noted the language of this provision. We have also drawn the attention of the Counsel to certain provisions in the Code of Civil Procedure, 1908, as amended from time to time. Sections 98, 99 and 99A of the CPC reads as under:-

98. Decision where appeal heard by two or more Judges.-(1) Where an appeal is heard by a Bench of two or more judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed: Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.

99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction. - No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

Provided that nothing in this section shall apply to non-joinder of a necessary party.

99A. No order u/s 47 to be refused or modified unless decision of the case is prejudicially affected. - Without prejudice to the generality of the provisions of Section 99, no order u/s 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.

13. Mr. Sridharan, learned Senior Advocate who was invited by us to address us on the language of Section 129C(5) and Section 98 of the CPC submitted that sub-section (3) of Section 98 of the CPC is complete answer to our query. The query was "whether difference in opinion on any point can be said to be difference in opinion on facts as well." Mr. Sridharan would submit that there is no scope for interpreting sub-section (5) of Section 129C of the Customs Act, narrowly or in a restricted manner. It cannot be compared with sub-section (2) of Section 98 of C.P.C. When the Parliament has intentionally stated that a

difference in opinion can be on any point, then, that would envisage, in a given case, factual matters as well. Mr. Sridharan would submit that the language of sub-section (5) of Section 129C should be interpreted so as to advance this legislative intent and not to defeat or frustrate it. He submits that sub-section (3) of Section 98 of CPC can be taken aid or assistance of inasmuch as by that sub-section the Parliament clarifies that nothing contained in Section 98 shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court. He submits that Clause 36 of the Letters Patent of Bombay High Court uses the same terminology and language as is to be found in sub-section (5) of Section 129C of the Customs Act, 1962.

14. We agree with Mr. Sridharan on this point and his reliance placed on the judgment of Hon''ble Supreme Court and the other High Courts is apposite. In this regard, Mr. Sridharan has invited our attention to the judgment of Hon''ble Supreme Court rendered as far as back in the year 1997-1998 in the case of S.G.P. Committee Vs. M.P. Dass Chela (Dead) by LRS., . The Hon''ble Supreme Court has held as under:-

7. As regards the applicability of Section 98(2) C.P.C., it is rightly pointed out by learned counsel for the respondent that the contention was not raised at any stage before the arguments in this appeal. It has not been raised even in the Special Leave Petition. There is also no merit whatever in the said contention. The provisions of Section 98(3) have obviously been overlooked by learned counsel for the appellant. As per that sub-section, nothing in Section 98 shall be deemed to alter or otherwise affect any provision of the Letter Patent of any High Court. Admittedly the High Court of Punjab has Letters Patent. Clause 26 of the Letters Paten provides that in the event of difference of opinion between two Judge as to the decision to be given on any point it shall be heard upon that point by one or more of the other Judges and the case must be decided on the basis of the majority opinion. Our attention has been drawn to the judgment of the High Court of Punjab & Haryana in Mahant Swaran Dass Vs. Shiromani Gurudwara Parbandhak Committee, Amritsar, and the following rulings of various High Courts taking the view that the provisions of Section 98, C.P.C. are not applicable to High Courts which are governed by Letters Patent and a matter can be referred to a third Judge on a difference of opinion between two Judges even on a point of fact:

(i) Immidisetti Dhanaraju and Others Vs. Motilal Daga and Others, ;

(ii) AIR 1933 648 (Lahore) ;

(iii) Pritam Das Vs. Mst. Akbari and Others, ;

(iv) Shushila Kesarbhai and Others Vs. Bai Lilavati and Others, ;

(v) Mt. Rulia Devi and Others Vs. Raghunath Prasad, ; and

(vi) Smt. Jayanti Devi Vs. Srichand Mal Agrawal and Others, . We agree with those rulings and hold that the reference to Justice Gupta in this case on a

difference of opinion between Justice Tiwana and Justice Yadav is not in any way vitiated and does not suffer from any infirmity. There is no merit whatsoever in the first contention of the learned counsel for the appellant which is hereby rejected.

The same view has been taken in some of the decisions of the High Courts and particularly in the case of Babulal Vadilal Vs. Ambica Iron and Steel Works Re. Rolling, ."

15. We are of the view that the peculiar language of this provision and the position of the Tribunal in law as a last fact finding authority would enable us to arrive at a conclusion that by sub-section (5) of Section 129C of the Customs Act it is possible for the Members of the Tribunal to record differing opinions on any point including facts. However, here we may sound a note of caution. That the Tribunal as a last Appellate Court should equally be aware of the powers conferred on the Appellate Court. An appeal is a creature of a Statute and is not an inherent right of the litigant. In appeal, the original order is brought before the Court of appeal for being challenged on law and facts. In the scheme of the Customs Act, the Tribunal has been empowered to decide appeals. Section 129A of the Customs Act, 1962 reads as under:-

Section 129A. Appeals to the Appellate Tribunal.-(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

(a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 128A;

(c) an order passed by the Board or the Appellate Commissioner of Customs u/s 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Customs, either before or after the appointed day, u/s 130, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,-

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made thereunder:

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where-

(i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation u/s 125; or

(ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed fifty thousand rupees.

(1A) Every appeal against any order of the nature referred to in the first proviso to sub-section (1), which is pending immediately before the commencement of Section 40 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of or connected with such appeal and which is so pending shall stand transferred on such commencement to the Central Government and the Central Government shall deal with such appeal or matter u/s 129DD as if such appeal or matter were an application or a matter arising out of an application made to it under that Section.

(1B)(i) The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Act.

(ii) Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Customs or two Commissioners of Customs, as the case may be.

(2) The Committee of Commissioners of Customs may, if it is of opinion that an order passed by the Appellate Commissioner of Customs u/s 128, as it stood immediately before the appointed day, or by the Commissioner (Appeals) u/s 128A, is not legal or proper, direct the proper officer to appeal on its behalf to the Appellate Tribunal against such order:

Provided that where the Committee of Commissioners of Customs differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Customs who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct the proper officer to appeal to the Appellate Tribunal against such order.

Explanation.-For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner of Customs having jurisdiction over the adjudicating authority in the matter.

(3) Every appeal under this section shall be filed within three months from the

date on which the order sought to be appealed against is communicated to the Commissioner of Customs, or as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,-

(a) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of duty and interest demanded and penalty levied by any officer of customs in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).

(7) Every application made before the Appellate Tribunal,-

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:

Provided that no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Customs under this sub-section.

A bare perusal of sub-section (1) and particularly clauses (a), (b) and (c) would

denote that an appeal lies to the Appellate Tribunal against the order passed by the Commissioner u/s 128A or an order passed by the Board or the Appellate Commissioner of Customs u/s 128, as it stood immediately before the appointed day. We wish to emphasise that the Tribunal is not always deciding appeals against original orders. It can be approached against some appellate orders as well. The sub-sections of Section 129A would show that the appeals lie against various orders and in varied situations. The Tribunal, therefore, should be mindful of the salutary principle which the Hon''ble Supreme Court has enunciated while dealing with the Appellate powers in its decision in the case of Mohd. Mehtab Khan and Others Vs. Khushnuma Ibrahim and Others, . The Hon''ble Supreme Court reiterated this principle in the following words:-

15. In a situation where the learned Trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the Trial Court was a possible view the Appellate Court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in Wander Ltd. v. Antox India (P.) Ltd. Para. 14 of the aforesaid judgment which is extracted below would amply sum up the situation:

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the

trial Court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, .

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton* "...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

The appellate judgment does not seem to defer to this principle.

16. Thus, even when seized of an appeal against the order passed by the appellate authority or an original order, this principle has to be borne in mind. The appellate power has to be exercised so as to correct such errors as are referred by the Hon^{ble} Supreme Court. Equally, due regard and respect must be given to the opinion of the original Authority/Appellate Authority. If the view taken is possible, plausible and probable, then, merely because another opinion can also be rendered on the same facts, every order under appeal need not be interfered with. If this salutary principle and extended by this Court to judicial discipline is borne in mind, there would be few occasions for the Tribunal Members to differ on factual matters and an overall perspective is the requirement in such matters. A broad attitude accompanied by robust common sense is what is expected from the members of the Tribunal. If they bear in mind the parameters and limitation of appellate power, there would not be a friction and conflict in the Tribunal. It does not augur well when there is tension in judicial proceedings. The words "adjudication" ordinarily means to act and decide judicially. The word "acting judicially" is not performing some rituals or completing somehow the assigned work, but is a serious business. It requires continued application of mind and alertness. It should not be undertaken casually. No one can approach judicial proceedings in a light-hearted manner. If differing opinions are rendered frequently, then, that creates an imbalance. Certainty and consistency are necessary as that alone instills confidence in the Institution of Judiciary and enables it to earn respect and regard for it. The trust and faith in it is then reaffirmed. Its efficacy is maintained. Then, Rule of Law prevails. The administration of justice and conferment of judicial power is intended to reach this goal. No litigant should thrive on uncertainty and unpredictability. If this basic rules of judicial discipline are not abided by and followed meticulously, there will be several complications and which would, then, require not just judicial intervention by the Higher Court but equally by the Parliament. The members of Tribunal should bear in mind that the Legislature expects them to give finality to certain matters. They are not expected to be left open endlessly. It is often said that lesser the Number of Appeals or interference by the Higher Courts the better it will be for the system. Justice delivery should be expedient and efficient. Ultimately, the adjudication cannot be go on and on. It must end at some stage and at least on factual issues. The issues and matters with regard to levy of tax including customs duty in this case ought to attain

finality so as to sub-serve larger interest of justice. It does not augur well for the economic and the business world and equally for judicial fraternity that matter lingers on and issues are left open giving unending scope for differing opinions and views. That enables the litigants to take chances and resort to even forum shopping. This needs to be avoided at all costs. No member, judicial or technical, is above the law. The Supreme Court's decisions and particularly cautioning the Appellate Tribunal/Court/Authority should, therefore, guide the Tribunals in exercise of their appellate power. We expect that the Tribunal at least now takes cognizance of our anxiety and the note of caution. The Tribunal should bear in mind that in the present case when the original order was delivered on 20-6-2012, the order on rectification application was passed on 11-10-2012, till the end of April, 2014 nothing has been achieved. The issues and the matters are kept pending. The delay in deciding tax cases upsets not only the assessee but the Revenue. In a given case it may have adverse impact on the collection of duty. Equally the assessment or valuation proceedings should not drag on and remain pending for years. Thus, avoiding the delay in disposal of cases is an object which needs to be achieved, particularly, when the period for disposal of the appeal is prescribed by law. That may not be binding and there is no mandate flowing therefrom but the provision in that behalf cannot be brushed aside and discarded. If the Tribunal keeps the matter pending in this manner and leaves the issues and questions undecided, then, it may be urged that the very purpose of setting up a specialised Tribunal is defeated and frustrated. The litigant should not come with such grievance or urge that they were better off before a ordinary Civil Court rather than these specialised Tribunals. We would expect the Tribunals, at least now, not to keep the references pending and give them priority and earmark them for early disposal. True it is that haste may result in waste but that is not always the experience. The need for urgency in some cases does not mean the Presiding Officer has to act hastily or in a irresponsible manner. He must minimise the adjournments and postponement of adjudication on trivial grounds. When day in and day out the Tribunal is deciding the matters only under the Customs, Excise and Service Tax Acts, then it is expected to be well versed with the law and is expected to be also aware and informed of the latest developments in the business and economic world. The Scientific and Technological advancement can never be lost sight of. This is a normal expectation from those manning the Tribunal. It is expected that Member (Technical) and Member (Judicial) work in coordination and in tandem. They ought to match their experience in their respective fields, their expertise in rendering a quality judgment. This harmony and order has to be maintained on the Bench and in all causes. The Tribunal Members should bear in mind that litigants would suffer and eventually justice would be a casualty if there are frequent differences of opinion resulting in matter being referred to a Third Member. The experience shows that virtually the same members assemble for work day in and day out. If there is lack of cordiality and co-operation between them, then, the composition of the Tribunal itself may have to be altered. It is not possible and frequently to replace members or alter the composition of

Benches. The President is not expected to address such issues repeatedly. In these circumstances, we expect a better understanding and coordination between the members manning this Tribunal. At one time this Tribunal was known for its professionalism and expertise. The decisions were rendered efficiently and quickly. It was one of the best Tribunals and its example was cited even during the course of imparting training to the Judicial Officers at Academies. Its working resulted in saving time and costs. Further, both the Revenue and assessee knew where they stand in terms of the applicability of tax laws. That serves larger public interest and guarantees economic justice to all.

17. We would now at least expect the Tribunal to work in a manner so as to uphold the object and purpose of the Act. It may not be out of context if we remind the members of the Appellate Tribunal of the practice, tradition Customs followed over decades by the Judges and which have been referred by the Hon"ble Supreme Court in several judgments. In one of the judgments delivered in the case of Tirupati Balaji Developers Pvt. Ltd. and Others Vs. State of Bihar and Others, the Supreme Court has held thus:-

9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to re-hear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of latter to carry out such directions or show disrespect to or to question the propriety of such directions would - it is obvious - be destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both.

10. In *Shankar Ramachandra Abhankarb v. Krishnaji Dattatraya Bapat* -, this Court pointed out that appeal is the right of entering the superior court and invoking its aid and interposition to redress the error of the court below. There are two important postulates of constituting the appellate jurisdiction; (i) the existence of the relation of superior and inferior court; and (ii) the power in the former to review decisions of the latter. Such jurisdiction is capable of being exercised in a variety of forms. An appeal is a process of civil law origin and removes a cause, entirely subjecting the facts as well as the law, to a review and a retrial.

11. The very conferral of appellate jurisdiction carries with it certain consequences, Conferral of a principal substantive jurisdiction carries with it, as a

necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant. As held by their Lordships of the Privy Council in AIR 1932 165 (Privy Council) (Sir Dinshah Mulla speaking for the bench of five) an appeal is an application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of Full Bench (of five judges) in Chakkara Chappan Vs. Moidin Kutti, stated inter alia that appeal is "the removal of a cause or a suit from an inferior to a superior Judge or Court for reexamination or review". According to Wharton's Law Lexicon such removal of a cause or suit is for the purpose of testing the soundness of the decision of the inferior Court. "In consonance with this particular meaning of appeal, "appellate jurisdiction" means the power of a superior Court to review the decision of an inferior Court". Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. This has been well put by Story:-"The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised," (Section 1761, Commentaries on the Constitution of the United States).

13. What is the significance of creating an appellate forum? And, what is sought to be achieved by creation of such hierarchy in the justice administration system?

"The Appellate Court plays an important role in securing high standards of judicial behavior in Court.....Bearing this in mind, the role of the Court of Appeal in checking judges should not be underestimated.....The Court of Appeal regards itself as fulfilling a disciplinary function.....The Court of Appeal carefully phrases its criticism. The Court usually makes clear that they do not doubt that "the judge was actuated by the best motives" or that "in a strong desire to do justice a judge may make mistakes", but they use a language clear enough to ensure that the judge to whom the criticism is addressed, as well as other judges, get their message." (See Judges on Trial, Shimon Shetreet, pp. 201-202). The role of the Court of Appeal in checking judicial conduct and in securing high standards of judicial behavior in Court is manifold. The Court of Appeal censures and criticized judicial misconduct in particular cases and corrects injustices resulting from such misconduct. Whether it reverses the judgment, quashes the conviction, reduces the sentence, or changes the judgment in any manner, the disapproval and condemnation of the mis-conduct restores the public confidence in the Courts which might otherwise have been impaired. The party offended or prejudiced, and the public at large, might be tempted to attribute misconduct of a particular judge to the judiciary as a whole. The disapproval and criticism of the appellate Court, even without amending the

judgment, eliminates such danger and restores the scales of justice to their proper balance.

16. The Founding Fathers of the Constitution devised a justice delivery system in the country as one homogeneous in content, taking care of independence and hierarchy both, and holding the scales of balance even while doing so. The Union judiciary and the State judiciary are undoubtedly independent of each other except for a few areas relating to jurisdiction as we have very briefly indicated hereinbefore. However, at the same time, we cannot resist laying emphasis on the appellate hierarchy which, examined in the correct perspective, is a factor strongly contributing towards the independence of the judiciary and securing finality in adjudication within the system and its insulation from any outside interference or correction. The delicate balance has been carefully crafted and sought to be achieved by independence and interconnection - both existing simultaneously - of the Supreme Court and the High Courts. There are "relationships of tension as well as those of cooperation", to borrow the expression employed by Frank M. Coffin in his work "On Appeal - Courts, Lawyering, and judging". He says, "on the sensitive and sophisticated application of the various doctrines governing these relationships depends in large part the effective functioning of our unique form of federalism."

18. How the Supreme Court and the High Court have to deal with each other specially when the Supreme Court is exercising its appellate jurisdiction over a decision by, or proceedings - concluded or pending in the High Court? The Constitution has clearly divided the jurisdiction between the two institutions and while doing so these institutions have to have mutual respect for each other. The framers of the Constitution did not think it necessary to specifically confer power on the Supreme Court to give a command to the High Court for they were the men of vision and foresight. They knew that all the constitutional functionaries and institutions would act in the best interest of norms and traditions consistent with democracy and constitutionalism, set down in and discernible from the Constitution and as handed down by history and generations of judges. Everyone would, it was expected, keep within its bounds and would not overstep its limits so that the idea is and the values remain a living reality and do not become either an intrusion or an illusion. The constitutional and democratic institutions, complementing and supplementing each other, would lend strength to these handed down traditions and would also contribute to developing such rich traditions as would be respected and hailed by posterity. This would result in strengthening the working of the Constitution. In the realms of constitutionalism the values of mutual trust and respect between the functionaries, nurtured by tradition, alleviate the need to codify the rules of the relationship. Experience shows that any rigid codification of such delicate relationship is advantageous to those bent upon vilification. A rigid written law makes it difficult to maintain that dignity which is better and rightly left to be perceived by right-minded people who zealously uphold the dignity of others as they do their own.

19. An institution dealing with another institution under the Constitution shall have to observe grace and courtesy. No judge shall criticise another judge and certainly not strongly. Any departure therefrom needs to be corrected at the earliest and in the larger interest. It is obligatory on an appellate forum to correct such deviation from rule brought to its notice as having been committed by a jurisdiction subject to appeal and if it does not do so it fails in its duty. Undoubtedly, the corrective step too is taken carefully with courtesy and respect and not by way of harsh criticism. An instance quoted by David Pannick is worthy of reference and reverence, in a 1971 case Mr. Justice Lawson gave his reasons for doubting the correctness of an earlier decision of the Court of Appeal. Nevertheless, he concluded, "I am bound by the decision in [the earlier case], although I am compelled to say, again with the greatest respect, that I believe it to have been wrongly decided". The Court of Appeal was very unhappy. Lord Justice Davies replied, "with the greatest respect to Lawson, J., that he thought that "those observations were out of place. It is unusual, and, I am bound to say, undesirable, in my opinion, for a judge sitting at first instance.....to express the opinion, although accepting that he is bound by it, that a decision, and a fairly recent decision, of this court was wrong." (Judges, pp. 127-128).

20. A great judge and jurist Benjamin N. Cardozo has a little bitter truth to describe. Cautioning the judges against the official-in-judge being permitted to swallow up the man-in-him, Benjamin Cardozo says that there have been judges in the past who suffered that disaster. However, what Cardozo has in mind is something more than "the egotism that displays itself in harsh and overbearing manners, in explosive vigour of voice, etc. Exuberances such as these are at times the result of infirmities of temper not unknown altogether to the bench though happily uncommon; more often they are the defensive appliances of weakness or incapacity, conscious of its failings, and hopeful to divert attention by what seems to be a manifestation of its strength", "The slumbering beast is in us, and may be waked to life and fury if we feed him overmuch. The ravening official will seek to swallow up the man. I interpret the invitation to be with you today as an expression of your judgment that whatever mistakes I may have made - and I know that they have been more than I like to figure or remember - I have at least avoided this one, I have not allowed the official to swallow up the man. I don't mean that I am entitled to a great deal of credit for so modest an achievement in a court where the tradition of courtesy and equity is so ingrained and inveterate as it is in the Court of Appeals, one would have to be a pretty hardened sort of sinner to be guilty of the particular form of wrongdoing that has its origin in the pride of office. But then, when you come to think of it, virtues are important in the inverse order to the credit that is due to those who cultivate and practice them. No one of us struts about with satisfaction for the self-restraint involved in refraining from the crime of homicide, yet if the importance of the virtue were the measure of the credit we should all be crawling and cawing with the pride of moral excellence. So I don't assume to pride myself on the very modest virtue of being merely a human being." (Selected Writings of Benjamin

Nathan Cardozo, pp. 427-428).

25. Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit emphasises self-restraint as helping build up the Courts constitutional legitimacy overtime inasmuch as judicial self-restraint helps both to generate and to preserve judicial independence. In the context of dealing of judges by judges, he uses the term "collegiality" and then he mentions the relationship between collegiality and independence by saying - ".....an aspect of judicial practice that has seemed increasingly important to me over the last decade: the practice of collegiality. By collegiality I mean an attitude among judges that says, we may disagree on some substantive issues, but we all have a common interest and goal in getting the law right.We are, in a word, one another's colleagues. An attitude of collegiality means, in practice, that we respect one another's views, listen to one another, and, where possible, aim to identify areas of agreement.....Collegiality does mean, however, that, even when I disagree with another judge, I recognize that we are part of a common endeavour, and that each of us is, almost always, acting in good faith according to his or her own view of what the law requires.....Because I see myself as engaged in a common endeavour with my judicial colleagues, it follows that I have the interests of the judiciary as a whole at heart..... When there is little or no judicial collegiality, there is less incentive for judges to exercise self restraint.collegiality is important not only for working together effectively, but also at a deeper structural level. An attitude of judicial collegiality helps reinforce judges' incentives to behave in a principled and responsible fashion. I think that any discussion of judicial independence, either at the level of institutions or individuals, should take this practice of collegiality into account." (See - Judicial Norms: A Judge's Perspectives - Washington University School of Law).

26. We would end our this discussion by quoting what Oliver Wendell Holmes Jr. nearing his 60th birthday, and unaware that he was shortly to be elevated from the office of Chief Justice of Massachusetts to the Supreme Court of the United States said - "I ask myself, what is there to show for this half lifetime that has passed? I look into my book in which I keep a docket of the decisions of the full court which falls to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly a half a lifetime. A thousand cases when one would have liked to study to the bottom and say his say on every question which the law has presented ... I often imagine Shakespeare or Napoleon summing himself up and thinking: "Yes, I have written 5,000 lines of solid gold and a good deal of padding, who would have covered the Milky Way with words that outshone the stars". We are lucky enough if we can give a sample of our best and if in our hearts we can feel that it has been nobly done." (Extracted and cited by J.H. Wootten, "Creativity in the Law" (1972) 4 Aust J. Forensic Sciences, at 107).

27. Cooperation can be achieved and tension avoided between two judicial

Institutions if only judicial collegiality is learnt, nobility prevails and Holmes' humility rules.

The above lines are a reminder to all in the fraternity and family including us. As a result of the above, we are of the view that nothing needs to be said further. We would expect the Tribunal to take all this in the right spirit. We are not at all critical of the manner in which the Tribunal is functioning and working. We are aware of the fact that at times large number of cases take a toll on the Judicial Officers or the Members. Pressure of work and docket explosion requires one to work tirelessly. However, Cordiality, Co-operation, Courtesy and respect for each other's view would assist in avoiding divergence of opinion on factual issues. If the view held by the other is possible, then, nothing is lost in going by it and if that furthers the cause of justice. To avoid differences of opinion on Mixed and purely factual matters, to foster the spirit of brotherhood and uphold judicial fraternity that we have invited the attention of all concerned to the above Judgment of the Supreme Court. Beyond that we may not be understood to have said anything and in disapproval. We have also not made any comments much less adverse and which may be taken as a reflection on the working of any of the members in this case. It is only the increasing tendency to record a dissent that has prevailed us to take note of the grievance raised before us. We close here. Debate resolves but dissent is unending at times. The word "Comrade" as defined in the Concise Oxford Dictionary means a "workmate, friend or companion". The word and spirit need not be forgotten even by Judges and Adjudicating Bodies. We should continue the debate, dialogue, discussion and deliberation but differ rarely and in exceptional cases, with dignity. We record our appreciation for the assistance rendered by all the Counsel and particularly by Mr. M.H. Patil, Mr. Pradeep S. Jetly and Mr. V. Sridharan.

18. The record and proceedings be sent down to the Tribunal forthwith. A copy of this order be forwarded to the learned President of the CESTAT.