

An Ordinance that extended CESTAT President's tenure

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ON 5.6.2021, the Government extended the tenure of the CESTAT President, Justice Dilip Gupta.

But it is a long story.

Justice Dilip Gupta born on 07.06.1956 was a judge of the Allahabad High Court from where he retired on 06.06.2018 on attaining the age of 62. That is the age at which High Court judges retire.

On 27.09.2018, the Government appointed him as President of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) for a period of:

- a) Three years from the date of assumption of charge of the post; or
- b) till he attains the age of 65 years; or
- c) until further orders

whichever happens first.

He joined the Tribunal on 03.10.2018. So, his tenure as President of CESTAT would have been till

- (a) 02.10.2021 (three years) or
- (b) 06.06.2021 (age of 65 years) or
- (c) further orders (there were no further orders; so, this is not applicable).

The normal course would have been for him to retire on 06.06.2021. 6th June was a Sunday and 5th June was a Saturday, both holidays for the Tribunal. So, technically, he would have demitted office on 4th June. But on 5th June, Saturday, the Government issued an order to the effect:

The Appointments Committee of the Cabinet has approved the proposal of the Department of Revenue for the following modification in tenure of Justice (Retd.) Dilip Gupta on the post of President, Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

Tenure earlier approved by the ACC:

"For a period of 03 years from the date of assumption of charge of the post, or till he attains the age of 65 years, or until further orders, whichever is the earliest."

Modified tenure in terms of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021:

"For a period of 04 years from the date of assumption of charge of the post, or till he attains the age of 70 years, or until further orders, whichever is the earliest".

This means Justice Dilip Gupta can continue as President of the CESTAT till

(a) 02.10.2022 (four years); or

(b) 06.06.2026 (70 years of age); or

(c) further orders;

whichever happens first.

How did this happen?

The CESTAT created by the Finance Act of 1980 and Section 129 of the Customs Act started functioning only from 11th October, 1982. As is usually the case with the Finance Ministry, the Notification constituting the tribunal with effect from 11.10.1982 was issued on 12.10.1982. Even after the notification, the Tribunal came into existence without a President. A President was appointed only in December, 1982.

As per Rule 10(3) of the

Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987,

Where a serving or retired Judge of a High Court is appointed as President, he shall hold the office as President for a period of 3 years from the date he enters upon the office or till he attains the age of 65 years, whichever is earlier.

This went on for thirty years, until the 2017 Budget. Section 184 of the Finance Act 2017 postulated that

The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and the other terms and conditions of service of the President or Member of the Tribunal.

Accordingly,

The Tribunals, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017

were notified by the Government on 1.6.2017, according to which the tenure of the President was made three years and age limit 67 years.

Writ petitions have been filed before the Supreme Court challenging

The Tribunals, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 .

In November 2019, the Supreme Court held that

"The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 suffer from various infirmities. These Rules formulated by the Central Government under Section 184 of the Finance Act, 2017 being contrary to the parent enactment and the principles envisaged in the Constitution as interpreted by this Court, are hereby struck down in entirety". [ROJER MATHEW - [2019-TIOL-495-SC-MISC-CB](#)

In a couple of months, the Government brought in the new

Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020, effective 12th February, 2020.

Under the new Rules, the tenure of the President of the CESTAT was made **four** years.

These Rules were also challenged in the Supreme Court. Though the Rules were not struck down, the Supreme Court gave several directions to the Government, some of which are: [MADRAS BAR ASSOCIATION - [2020-TIOL-174-SC-MISC-LB](#)

- The Chairpersons, Vice-Chairpersons and the members of the Tribunal shall hold office for a term of **five years** and shall be eligible for reappointment. Rule 9(2) of the 2020 Rules shall be amended to provide that the Vice-Chairman, Vice-Chairperson and Vice President and other members shall hold office till they attain the age of sixty-seven years.
- The 2020 Rules shall be amended to make advocates with an experience of at least 10 years eligible for appointment as judicial members in the Tribunals.
- The Chairpersons, Vice Chairpersons and members of the Tribunals appointed prior to 12.02.2020 shall be governed by the parent statutes and Rules as per which they were appointed.

The Government reacted by bringing in an ordinance called the ***Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021***.

As per the Supreme Court directions, Justice Dilip Gupta should have a five-year term, but as per the Ordinance which is **law** as of now,

Notwithstanding anything contained in any judgment, order, or decree of any court or any law for the time being in force, --

- (i) the Chairperson of a Tribunal shall hold office for a term of **four** years or till he attains the age of seventy years, whichever is earlier

That is why Justice Dilip Gupta did not retire on 6th June 2021 and as per the Ordinance, he can continue till October 2022.

In the ITAT:

There was a case of Ms Madhumita Roy who was offered appointment as Member(Judicial), ITAT for a period of three years or till she attains the age of 62 years, whichever is earlier. She filed an application in the Supreme Court for a direction that she should be permitted to continue as Member (Judicial), ITAT till she attains the age of 62 years.

The Supreme Court directed that she would continue as Member(Judicial), ITAT till 18.03.2023. (Miscellaneous Application No. 111/2021 in W.P.(C) No. 804/2020 - order dated 09-03-2021) - [2021-TIOL-125-SC-SERVICE-LB](#)

Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021

was also promptly challenged in the Supreme Court. Arguments were completed on 3rd June and the order is reserved.

Interesting arguments in the Supreme Court.

The Court observed:

If the Union of India losing a case can become the subject matter of legislation, that will become the order of the day!

How the government could have **"knocked down"** the basis of its order by bringing in an ordinance.

Can the Court give directions to legislate in a particular manner and whether, in the process, the Parliament is denuded of its power to make law?

The AG observed,

Your Lordships may pass any number of judgements. But the Parliament can always say that we won't accept this because it is not in the interest of people. The Parliament is entitled to override the judgement of the Supreme Court, within the contours of what is permissible.

What is the effect on GST Appellate Tribunal? That is stillborn - we will have to invent the wheel again.

Until Next Week.