No sir, CESTAT is not abolished

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By Vijay Kumar

SOME newspapers, even the very pink ones, declared that the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) was among the Tribunals abolished in the recently enacted ***Tribunals Reforms Act, 2021*** . Even some lawyers practicing in the CESTAT were apprehensive. This controversial Act which received the assent of the President on 13th August 2021, is deemed to have come into force on the 4th April, 2021. But why the confusion about CESTAT?

Section 12 (a) of the Act, that is the ***Tribunals Reforms Act, 2021*** , stipulates that in section 28E of the Customs Act, clauses (ba), (f) and (g) shall be omitted. This was interpreted as abolition of the CESTAT. But what Section 28E(ba) says is - (ba) ***"Appellate Authority" means the Authority for Advance Rulings constituted under section 245-O of the Income-tax Act, 1961 (43 of 1961)*** ." But what is this authority constituted under the Income Tax Act doing in the Customs Act? Well, that is another long confusing story. So, we may conclude that what has been abolished is the advance ruling authority and not the CESTAT as erroneously reported by some eminent newspapers.

Coming back to our ***Tribunals Reforms Act, 2021*** - why this Act and why now? This is how the Government explained it:

> 1. The Government of India began the process of rationalisation of tribunals in 2015. By the Finance Act, 2017, seven tribunals were abolished or merged based on functional similarity and their total number was reduced from 26 to 19. The rationale followed in the first phase was to close down tribunals which were not necessary and merge tribunals with similar functions.
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> 2. In the second phase, analysis of data of the last three years has shown that tribunals in several sectors have not necessarily led to faster justice delivery and they are also at a considerable expense to the exchequer. The Hon'ble Supreme Court has deprecated the practice of tribunalisation of justice and filing of appeals directly from tribunals to the Supreme Court in many of its judgements, including S ***.P Sampath Kumar versus Union of India*** - 2002-TIOL-406-SC-SERVICE-CB, ***L. Chandra Kumar versus Union of India - 2002-TIOL-159-SC-CB, Roger Mathew versus South Indian Bank Limited*** and ***Madras Bar Association versus Union of India*** - ***2021-TIOLCORP-26-SC-MISC*** . Therefore, further streamlining of tribunals was considered necessary as it would save considerable expense to the exchequer and at the same time, lead to speedy delivery of justice.
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> 3. Accordingly, the ***Tribunals Reforms (Rationalisation and Conditions of Service) Bill, 2021*** was introduced in Lok Sabha on the 13th February, 2021 proposing to abolish certain more tribunals and authorities and to provide for a mechanism to file appeal directly to the Commercial Court or the High Court, as the case may be. However, as the Bill could not be passed in the Budget Session of Parliament and there was an immediate need for legislation, the President promulgated the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 on 4th April, 2021.
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> 4. The Tribunals Reforms (Rationalisation and Conditions of Service) Bill, 2021 which seeks to replace the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021, inter alia provides for-

uniform terms and conditions of service for Chairperson and Members of various tribunals, including the following, namely:-

(i) Search-cum-Selection Committee for tribunals other than State Administrative Tribunals to be headed by the Chief Justice of India or a Judge nominated by him;

(ii) Search-cum-Selection Committee for the State Administrative Tribunal to be headed by the Chief Justice of the High Court of the concerned State;

(iii) recommendation of a panel of two names by the Search-cum-Selection Committee and such recommendation to be considered by the Government preferably within three months;

(iv) removal of Chairperson and Members on the recommendation of Search-cum-Selection Committee;

(v) the Chairperson and Member of a Tribunal to hold office for a term of four years;

(vi) age of retirement to be seventy years for Chairperson and sixty-seven years for a Member;

Section 3 of this lofty Act starts with

(1) Notwithstanding anything contained in any judgment, order or decree of any court, or in any law for the time being in force, the Central Government may, by notification in the Official Gazette, make rules to provide for the qualifications, appointment, salaries and allowances, resignation, removal and other conditions of service of the Chairperson and Member of a Tribunal after taking into consideration the experience, specialisation in the relevant field and the provisions of this Act:

Provided that a person who has not completed the age of fifty years shall not be eligible for appointment as a Chairperson or Member.

Do you see any confrontation with the Supreme Court?

The minimum age to become a Member of the Tribunals is 50 years - quite old. In the ***Madras Bar Association vs Union of India,*** in its order dated 14th July 2021 - ***2021-TIOLCORP-26-SC-MISC***, the Supreme Court observed,

The direction given by this Court in the nature of mandamus is to the effect that advocates are entitled for appointment as Members, provided they have experience of 10 years. The proviso which prescribes a minimum age of 50 years is an attempt to circumvent the direction issued in striking down the experience requirement of 25 years at the bar for advocates to be eligible. Introduction of the proviso is a direct affront to the judgment of this Court in MBA-III. This Court in MBA-I and Roger Mathew underlined the importance of recruitment of Members from the bar at a young age to ensure a longer tenure. Fixing a minimum age for recruitment of Members as 50 years would act as a deterrent for competent advocates to seek appointment. Practically, it would be difficult for an advocate appointed after attaining the age of 50 years to resume legal practice after completion of one term, in case he is not reappointed. Security of tenure and conditions of service are recognised as core components of independence of the judiciary. Independence of the judiciary can be sustained only when the incumbents are assured of fair and reasonable conditions of service, which include adequate ***renumeration*** and security of tenure. Therefore, the first proviso is in violation of the doctrine of separation of powers as the judgment of this Court in MBAIII has been frustrated by an impermissible legislative override. Resultantly, the first proviso is declared as unconstitutional as it is violative of Article 14 of the Constitution.

The proviso which has been struck down by the Supreme Court has been brought back!

This is not all. Section 3(7) of the new Act stipulates: -

> (7) Notwithstanding anything contained in any judgment, order or decree of any court, or in any law for the time being in force, the Search-cum-Selection Committee shall recommend a panel of two names for appointment to the post of Chairperson or Member, as the case may be, and the Central Government shall take a decision on the recommendations made by that Committee, preferably within three months from the date of such recommendation.

This was also held unconstitutional by the Supreme Court, which is brought back with
Notwithstanding anything contained in any judgmentâ€¦

Section 5 of the Act fixes the tenure of the Chairperson and Member as four years. The Supreme Court had declared this as void and unconstitutional. Parliament brings it back.

The Finance Minister, replying to the debate in Rajya Sabha, said,

> The primacy of the Legislature to make the law is as important as the independence of Judiciary and that should be recognized by people who are sitting here to make the laws. We are here to make the laws. Of course, we have to keep in line with the requirement of the Constitution. And, if it is violative of the Constitution, the Supreme Court would always say that it is violative of the Constitution. We fully respect the independence of Judiciary. We fully respect the independence of Judiciary, but we also remember the power of the law making body where we are seated to make laws for the sake of the people, for the sake of the common people. And in this case, cases being sent to the tribunals and then immediately appeals being made in the court, has only lengthened the process. It has only mounted the backlog in the tribunals and in the courts. I can say that even the Supreme Court has deprecated the practice of tribunalisation of justice. Even the Supreme Court has said, 'Don't tribunalise justice'.
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> On the points which the Supreme Court has struck down on the 14th of July, 2021, I would like to say that if there are areas of Legislature on which the Court has raised points, we are willing to answer them. The Judiciary has not struck it down on grounds of constitutionality. It has only raised questions on certain points. Now, if the Court says, 'appoint for five years' and we say, 'no, in order to have a better efficient management of the tribunal we want members to be there only for four years and not five years', is there a question of constitutionality in that? Is there a question of constitutionality in five years versus four years?
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> Let me give you one more example, Sir. The point that the Court had raised was that they would recommend a panel of only one member. We said, kindly recommend two members. The Court also said that we have to appoint them immediately, within three months. I am asking, what is sacrosanct about three months, especially in Covid times when we are not able to do all the requisites and due diligences? Now, suppose, there are instances where against that one member whose name is sent from the Court there is an IB information which is such that I cannot appoint him.
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> Therefore, I appeal to the entire House to look at the legislative competence of this House, and therefore, pass this Bill.

And the Bill was passed.

Not the end of the story - -

It is reported that the Act is already challenged in the Supreme Court. While speaking in a webinar, The Attorney General is reported to have said,

> Now this means that at a certain stage even Parliament wonders, are we not having any powers if the judiciary is interfering to this extent? It is a matter of policy, whether four years or five years. The policy cannot be interfered with. Similarly, 50 years.
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> Therefore, there would be a confrontation perhaps, but I hope not, as I started by saying that they both exercise powers conferred to them by the Constitution. Therefore, it would be worth waiting & watching.

Yes, wait and watch, but

CESTAT stays

Until Next Week.

Also read An Ordinance that extended CESTAT President's tenure