Indirect Tax Practitioners Assn vs R.K.Jain on 13 August, 2010

Equivalent citations: AIR 2011 SUPREME COURT 2234, 2010 (8) SCC 281, 2011 AIR SCW 3252, 2011 CRI LJ (SUPP) 598 (SC), (2010) 2 ORISSA LR 809, (2016) 3 CURCRIR 15, (2010) 8 SCALE 212, (2010) 5 KANT LJ 249, (2011) 1 MAD LJ(CRI) 262, (2010) 4 RECCRIR 1, (2010) 4 CHANDCRIC 74, 2010 (3) SCC (CRI) 841

Author: G.S. Singhvi

Bench: G.S. Singhvi, Asok Kumar Ganguly

IN THE SUPREME COURT OF INDIA

ORIGINAL JURISDICTION

CONTEMPT PETITION (CRL.) NO.9 OF 2009
IN
CONTEMPT PETITION (CRL.) NO.15 OF 1997

Indirect Tax Practitioners Association .....Petitioner

Versus

R.K. Jain .....Respondent

JUDGMENT

G.S. Singhvi, J.

1. Whether by writing editorial, which was published in Excise Law Times dated 1.6.2009 with the title "CESTAT PRESIDENT SETS HOUSE IN ORDER - ANNUAL TRANSFERS FOR MEMBERS INTRODUCED - REGISTRY IN LINE", the respondent violated the undertaking filed in this Court in Contempt Petition (Criminal) No.15 of 1997 and whether contents of the editorial constitute criminal contempt within the meaning of Section 2(c) of the Contempt of Courts Act, 1971 (for short, `the Act') are the questions which need consideration in this petition filed by Indirect Tax Practitioners' Association, Bangalore under Articles 129 and 142 of the Constitution of India.

2. This Court had, after taking cognizance of letter dated 18.9.1997 written by Justice U.L. Bhat, the then President of the Customs, Excise and Gold (Control) Appellate Tribunal to the Chief Justice of India pointing out that the respondent had published objectionable editorials in 1996 (86) Excise Law Times pages A169 to A179, 1996 (87) Excise Law Times pages A59 to A70 and 1997 (94) Excise

Law Times pages A65 to A82 containing half truths, falsehoods and exaggerated versions of the alleged deficiencies and irregularities in the functioning of the Tribunal, initiated contempt proceedings against the respondent which came to be registered as Contempt Petition (Criminal) No.15 of 1997. On 25.8.1998, the respondent filed an undertaking, the relevant portions of which are reproduced below:

> "I realize that my approach and wordings in the Impugned Editorials of ELT have given the impression of scandalising or lowering the authority of CEGAT. I state that I had no such intention as I had undertaken the exercise in good faith and in public interest. I sincerely regret the writing of the said Editorials which have caused such an impression.
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> That I have been advised by my senior counsel - Mr. Shanti Bhushan that in future whenever there are any serious complaints regarding the functioning of CEGAT, the proper course would be to first bring those matters to the notice of the Chief Justice of India, and/or the Ministry of Finance and await a response or corrective action for a reasonable time before taking any other action. I undertake to the court to abide by this advise of my counsel in future."

After taking cognizance of the same, the Court passed the following order:-

> "Mr. Shanti Bhushan, learned counsel for the respondent (alleged contemnor) tenders a statement in writing signed by the respondent. We accept the regret tendered by the respondent in the said statement. We also accept the undertaking to Court given by the respondent in the said statement. Having regard to the aforesaid, the contempt notice is discharged. There will be no order as to costs.
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> We express our gratitude to Mr. T.R. Andhyarujina who as assisted the Court at our request."

3. During the pendency of the aforementioned contempt case, the respondent had written detailed letters dated 2.6.2008, 7.7.2008, 23.7.2008, 26.7.2008, 9.8.2008 and 12.8.2008 to the Finance Minister, Government of India highlighting specific cases of irregularities, malfunctioning and corruption in the Central Excise, Customs and Service Tax Appellate Tribunal (CESTAT). After the notice of contempt was discharged, the respondent wrote two more letters dated 21.10.2008 and 28.2.2009 to the Finance Minister on the same subject and also pointed out how the appointment and posting of Shri T.K. Jayaraman, Member CESTAT were irregular. He drew the attention of the addressee to the fact that some of the orders pronounced by CESTAT had been changed. He wrote similar letters to the Revenue Secretary, President, CESTAT, Registrar, CESTAT and the Central Board of Excise and Customs. The particulars of these letters as contained in the reply affidavit filed by the respondent are as under:

> LETTERS TO THE FINANCE MINISTER Letter Date Subject 02-06-2008 CESTAT - Member-Advocate Nexus 07-07-2008 Gold Smuggling - Carrying of gold in soles of

the shoes is a trade practice as per CESTAT order - Need for CBI enquiry 23-07-2008 Gold Smuggling - Carrying of gold in soles of the shoes is a trade practice as per CESTAT order - Need for CBI enquiry 26-07-2008 Change of "Pronounced Orders" by CESTAT Members - Open Court handwritten order directing deposit of Rs.15 lakhs changed to Rs.5 lakhs -

Department's ROM application pointing out this discrepancy, repeatedly dismissed by CESTAT 09-08-2008 CESTAT : Changing of orders - Direction for deposit of Rs.50 lakhs changed to Rs.50,000 in a Customs case booked by DRI for "mis-declaration" of imports from China involving Rs.2.07 crores - Need for CBI Enquiry 12-08-2008 CESTAT, Settlement Commission, Revisionary Authority and Govt.

Litigation in revenue evasion cases involving high revenue - Request for personal meeting 21.10.2008 Appointment of Judicial Members to CESTAT - Serious irregularities and tampering with the records - Mis-

declaration as to eligibility by Mr. M.V. Ravindran, Member (Judicial), CESTAT.

28-02-2009 CESTAT : Changing of orders - Direction for deposit of Rs.50 lakhs changed to Rs.50,000 in a Customs case booked by DRI involving Rs.2.07 crores - Further revelations and Evidences - Need for CBI Enquiry strengthens LETTERS TO THE REVENUE SECRETARY Letter Date Subject 05-09-2008 CESTAT : Proposal for confirmation of Shri M.V. Ravindran, Member (J) and Shri K.K. Agarwal, Member (T) may be kept in abeyance, pending verification of allegations and irregularities committed by them - Initiation of disciplinary proceedings for their removal.

22-10-2008 Appointment of Judicial Members to CESTAT - Serious irregularities and tampering with the records - Mis-

declaration as to eligibility by Mr. M.V. Ravindran, Member (Judicial), CESTAT 10-11-2008 CESTAT - Non-functioning of the Chennai Bench of the CESTAT since 3-11-2008 19-11-2008 CESTAT - Unauthorised and manipulated Tour Notes/Tours by Ms. Jyoti Balasundaram, Vice President - Need for Vigilance Enquiry 14-02-2009 Appeal by Revenue Department in S.C. -

95% of appeal lost - Departments representation at High Court still worse -

Need for remedial measures 02-03-2009 CESTAT : Changing of orders - Direction for deposit of Rs.50 lakhs changed to Rs.

50,000 in a Customs case booked by DRI involving Rs. 2.07 crores - Further revelations and Evidences - Need for CBI Enquiry strengthens LETTERS TO THE HON'BLE PRESIDENT, CESTAT Letter Date Subject 30-08-2008 Change of "Pronounced Orders" by CESTAT Members - Open Court handwritten order directing deposit of Rs.15 lakhs changed to Rs.5 lakhs -

Department's ROM Application pointing out this discrepancy, repeatedly dismissed by CESTAT 01-09-2008 CESTAT - Changing of orders - Direction for deposit of Rs.50 lakh changed to Rs.50,000 in a Customs case booked by DRI for "mis-declaration" of imports from China involving Rs.2.07 crores - Need for CBI Enquiry 07-10-2008 Manner of listing of matters in the Cause List 11-10-2008 Need for uniform practice for dealing with Mention matters by different Zonal Benches of the CESTAT 05-05-2009 Annual Physical Checking of pending Appeals and Applications - Misplacement of Appeal files after grant of Stay in heavy matters 22-05-2009 Pronouncement of reverse orders within reasonable period - Need for re-hearing when order not pronounced within 4 months - Bombay High Court decision 08-06-2009 Pronouncement of "Reserved Order" -

Listing in cause list.

13-07-2009 Complaint against Shri S. Chandran, Registrar, CESTAT for non-compliance of Miscellaneous Order No.412/2007- SM(BR), dated 4-10-2007 passed by Justice R.K. Abhichandani, and misusing of authority as First Appellate Authority under RTI Act, by suppressing/fabricating information 31-08-2009 Disciplinary action against Shri S.K. Verma, Assistant Registrar, CESTAT as per the directions of the Presiding Officer of Debt Recovery Tribunal-II, Delhi and for other complaint and lapses 02-09-2009 Non-maintenance of records for Supplementary Cause Lists issued by Chennai Bench of the CESTAT 10-09-2009 Improper and illegal transfer of the Customs Appeal Nos.C/112 & 139/2009 from Division Bench to Single Member Bench in violation of provisions of Customs Act and CESTAT (Procedure) Rules, 1982 - Need for Inquiry by an Independent Agency.

16-09-2009 Service Tax appeals relating to valuation and rate of tax by Single Member Bench in violation of Section 86(7) of Finance Act, 19-09-2009 Need for incorporating the amount of duty, penalty and fine in the orders passed by the CESTAT 22-09-2009 Act of insubordination by Asst. Registrar by commenting on exercise of power by President as violating rules and exceeding powers - Need for disciplinary action 23-09-2009 Information about antedating of orders and delayed release of orders, particularly of CESTAT Bangalore and of Single Member Bench of the CESTAT, New Delhi 05-10-2009 Report of despatch of CESTAT Orders -

Non-Compliance By CESTAT, Mumbai 16-10-2009 Information about antedating of orders and delayed release of orders, particularly by Bangalore Bench of CESTAT 16-10-2009 Lodging of Police Complaint for missing records from CESTAT, New Delhi 23-10-2009 Delay in dispatch of the orders - Non submission of weekly report for dispatch of orders by the Regional Benches -

Inaction by the Registrar and Deputy Registrar at CESTAT Headquarters, New Delhi.

26-10-2009 Complaint against Shri P.K. Das, Hon'ble Member (Judicial), CESTAT, New Delhi 08-01-2010 Strengthening the CESTAT by providing facilities to the Members in the Tribunal LETTERS TO REGISTRAR, CESTAT Letter Date Subject 23-08-2008 Listing of matter in two different courts 09-12-2008 Files for Tour orders and Roaster orders for 2001 - missing 09-12-2008 Issuing of letters without File Number or letter number or the dispatch diary number 27-01-2009 Withholding of Supreme Court remand orders by the CESTAT Registry, Mumbai

- Request for disciplinary action.

04-11-2009 Fault of CESTAT Registry, Mumbai in not placing before the Bench the proof of deposit of pre-deposit amount 14-11-2009 Tracing out of case records of Kozy Silks (P) Ltd.

LETTER TO THE CDR, CESTAT, NEW DELHI Letter Date Subject 01-08-2009 Cross-Appeals to be heard together 06-08-2009 CESTAT Orders - Discrepancies between pronounced orders and issued orders -

Strengthening of Departmental Representation to safeguard revenue -

Reg.

LETTERS TO CENTRAL BOARD OF EXCISE & CUSTOMS Letter Date Subject 02-03-2009 CESTAT : Changing of orders - Direction for deposit of Rs.50 lakhs changed to Rs.50,000 in a Customs case booked by DRI involving Rs. 2.07 crores - Further revelations and Evidences - Need for CBI Enquiry strengthens 06-06-2009 Change in Pronounced Orders 13-06-2009 Appeals under Section 35G of the Central Excise Act to be filed within 180 days -

High Courts have no power to condone the delay - Latest Supreme Court decision in the case of Chaudharana Steels (P) Ltd. v.

Commissioner of Central Excise, Allahabad - Need for suitably modifying the CBE & C Circular No.888/8/2009-CX, dated 21-5-09 08-08-2009 Change of pronounced orders by CESTAT Members - Whereabouts of complaint dated 4-8-2008 made to the Finance Minister.

4. Since no one seems to have taken cognizance of the letters written by the respondent, he wrote the editorial in which he commended the administrative and judicial reforms initiated by the new President of CESTAT and, at the same time, highlighted how some members of CESTAT managed their stay at particular place. He also made a mention of what he perceived as irregularities in the appointment and posting of Shri T.K. Jayaraman, erstwhile Commissioner of Central Excise, Bangalore as member CESTAT. The respondent then referred to some of the orders passed by the Bench comprising Shri T.K. Jayaraman, which were adversely commented upon by the High Courts of Karnataka and Kerala. He also made a mention of the irregularities in the functioning of the Registry of CESTAT.

5. The petitioner, whose members are said to be appearing before Bangalore, Chennai, Bombay, Delhi, Ahmedabad and Calcutta Benches of CESTAT, took up the cause of Shri T.K. Jayaraman and submitted complaint dated 11.6.2009 to the President of CESTAT accusing the respondent of trying to scandalize the functioning of CESTAT and lower its esteem in the eyes of the public. By an order dated 16.7.2009, the President, CESTAT appointed a two-member committee to look into the grievance made by the petitioner as also the allegations contained in the editorial. The terms of reference made to the Inquiry Committee are as follows:

> "At this stage, the terms of reference for inquiry by the Committee shall relate to verification of grievances in the letter of the Association as well as the allegations made in the said editorial regarding the irregularities in relation to the appointment of Members of the Tribunal and regarding the decisions by some of the Bench of the Tribunal."

By letter dated 24.7.2009, the President, CESTAT informed Shri B.V. Kumar, President of the petitioner-Association about appointment of the Inquiry Committee.

6. Soon thereafter, the Inquiry Committee informed the parties that it would meet at Bangalore on 11.8.2009 but President of the petitioner- Association expressed his inability to attend the meeting and sought re-schedulment for 28/29.8.2009. It appears that members of the petitioner-Association were apprehensive that an inquiry into the truthfulness or otherwise of the contents of the editorial may cause embarrassment to some of them as also some members of CESTAT and, therefore, they decided to adopt a shortcut to silence him. In furtherance of this object, the petitioner sent letters dated 8.8.2009 and 25.8.2009 to the Solicitor General of India and the Attorney General of India respectively seeking their consent for filing contempt petition against the respondent. In neither of those letters, the petitioner made a mention of the Inquiry Committee constituted by the President, CESTAT to look into the complaint made by it. The Attorney General gave his consent vide letter dated 9.9.2009. Thereafter, this petition was filed.

7. The petitioner has sought initiation of contempt proceedings against the respondent by asserting that the editorial written by him is in clear violation of the undertaking given to this Court that serious complaint regarding the functioning of the Tribunal will be brought to the notice of the Chief Justice of India, and/or the Ministry of Finance and response or corrective action will be awaited for a reasonable time before taking further action. According to the petitioner, the editorial in question will not only create a sense of fear and inhibition in the minds of the members who are entrusted with the onerous task of dispensing justice, but also prevent the advocates and practitioners who appear before CESTAT from advancing the cause of their clients without any apprehension of bias/favouritism. The petitioner also pleaded that by targeting the particular member of CESTAT, the respondent has scandalized the entire institution.

8. In the written statement filed by him, the respondent has taken stand that he cannot be accused of violating the undertaking filed in this Court on 25.8.1998 because before writing the editorial he had brought all the facts to the notice of the Finance Minister and the Revenue Secretary, Government of India as also the President, CESTAT and other functionaries, but no one had taken corrective measures. The respondent has claimed that the sole object of writing the editorial was to enable the concerned authorities to streamline the functioning of CESTAT on administrative and judicial side and take other corrective measures. He has referred to the observations made by this Court in R.K. Jain v. Union of India AIR (1993) SC 1769, 162nd Report of the Law Commission on the Review of Functioning of CAT, CEGAT and ITAT and pleaded that he had written the editorial with a spirit of reform and not to scandalize the functioning of CESTAT.

9. Shri P.S. Narasimhan, learned senior counsel appearing for the petitioner emphasized that the editorial written by the respondent is clearly intended to scandalize the functioning of CESTAT and, therefore, this Court should take cognizance and initiate proceedings against him under Sections 2(c), 12 and 15 of the Act read with Article 129 of the Constitution. Learned senior counsel submitted that contents of the editorial amount to criminal contempt because adverse and uncharitable comments made by the respondent qua some of the orders passed by the particular Bench of CESTAT amounts to direct interference in the administration of justice and the same are bound to affect the credibility of the Tribunal in the eyes of the public in general and the litigants in particular who will have no confidence in the particular member of CESTAT and those appearing before the particular Bench will not be able to represent the cause of their clients with the freedom which is sine qua non for dispensation of justice.

10. Shri Prashant Bhushan, learned counsel for the respondent questioned the bona fides of the petitioner and argued that this petition is liable to be dismissed because the same has been filed with an oblique motive of preventing the respondent from highlighting the irregularities in the functioning of CESTAT. Learned counsel emphasized that the petitioner is guilty of misleading the Attorney General in granting consent for filing of the contempt petition because the factum of appointment of two-Member Committee by the President, CESTAT was deliberately not mentioned in letter dated 25.8.2009. Learned counsel then submitted that the sole object of writing the editorial was to awaken the concerned functionaries of the Government and CESTAT about the serious irregularities in the appointment, posting and transfer of the Members of CESTAT and orders passed by the particular Bench, which were highly detrimental to public interest.

11. We have given serious thought to the entire matter. One of the two minor issues which needs our consideration is whether by writing the editorial in question, the respondent has committed breach of the undertaking filed in Contempt Petition (Crl.) No.15/1997. The other issue is whether the editorial is intended to scandalize the functioning of CESTAT or the same amounts to interference in the administration of justice and whether the voice of a citizen who genuinely believes that a public body or institution entrusted with task of deciding lis between the parties or their rights is not functioning well or is passing orders contrary to public interest can be muffled by using the weapon of contempt.

12. In our view, the respondent cannot be charged with the allegation of having violated the undertaking filed in this Court on 25.8.1998. The respondent is not a novice in the field. For decades, he has been fearlessly using his pen to highlight malfunctioning of CEGAT and its successor CESTAT. Letter dated 26th December, 1991 written by him to the then Chief Justice of India, M.H. Kania, J. complaining that CEGAT is without a President for last over six months and the functioning of the Tribunal was adversely affected because the Benches would sit hardly for two hours or so and further that there was tendency to adjourn the cases, was ordered to be registered as a petition in public interest. After an in depth analysis of the relevant constitutional and statutory provisions, this Court gave certain suggestions for improving the functioning of CEGAT and other Tribunals constituted under Articles 323-A and 323-B - R.K. Jain v. Union of India (1993) 4 SCC 119. K. Ramaswamy, J., who authored the main judgment, declined to interfere with the appointment of Shri Harish Chander as President, CEGAT, but observed as under:

> "There are persistent allegations against malfunctioning of the CEGAT and against Harish Chander himself. Though we exercised self-restraint to assume the role of an investigator to charter out the ills surfaced, suffice to say that the Union Government cannot turn a blind eye to the persistent public demands and we direct to swing into action, an in-depth enquiry made expeditiously by an officer or team of officers to control the malfunctioning of the institution. It is expedient that the Government should immediately take action in the matter and have a fresh look. It is also expedient to have a sitting or retired senior Judge or retired Chief Justice of a High Court to be the President."

Ahmadi, J. (as he then was) speaking for himself and Punchhi, J. (as he then was) observed:

> "7. The allegations made by Shri R.K. Jain in regard to the working of the CEGAT are grave and the authorities can ill afford to turn a Nelson's eye to those allegations made by a person who is fairly well conversant with the internal working of the Tribunal. Refusal to inquire into such grave allegations, some of which are capable of verification, can only betray indifference and lack of a sense of urgency to tone up the working of the Tribunal. Fresh articles have appeared in the Excise Law Times which point to the sharp decline in the functioning of the CEGAT pointing to a serious management crisis. It is high time that the administrative machinery which is charged with the duty to supervise the working of the CEGAT wakes up from its slumber and initiates prompt action to examine the allegations by appointing a high-level team which would immediately inspect the CEGAT, identify the causes for the crisis and suggest remedial measures. This cannot brook delay."

13. The respondent was very much conscious of the undertaking filed in the earlier contempt proceedings and this is the reason why before writing the editorial, he sent several communications to the concerned functionaries to bring to their notice serious irregularities in the transfer and posting of members, appointment of members, changes made in the pronounced orders and many unusual orders passed by the particular Bench of CESTAT, which were set aside by the Karnataka and the Kerala High Courts after being subjected to severe criticism. The sole purpose of writing those letters was to enable the concerned authorities to take corrective measures but nothing appears to have been done by them to stem the rot. It is neither the pleaded case of the petitioner nor any material has been placed before this Court to show that the Finance Minister or the Revenue Secretary, Government of India had taken any remedial action in the context of the issues raised by the respondent. Therefore, it is not possible to hold the respondent guilty of violating the undertaking given to this Court.

14. Before adverting to the second and more important issue, we deem it necessary to remind ourselves that freedom of speech and expression has always been considered as the most cherished right of every human being. Justice Brennan of U.S. Supreme Court, while dealing with a case of libel - New York Times Company v. L.B. Sullivan observed that "it is a prized privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity should be afforded for vigorous advocacy no less than abstract discussion." In all civilized societies,

the Courts have exhibited high degree of tolerance and accepted adverse comments and criticism of their orders/judgments even though, at times, such criticism is totally off the mark and the language used is inappropriate. The right of a member of the public to criticize the functioning of a judicial institution has been beautifully described by the Privy Council in Andre Paul Terence Ambard v. Attorney General of Trinidad and Tobago AIR 1936 PC 141 in the following words:

> "No wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

In Debi Prasad Sharma v. The King Emperor AIR 1943 PC 202, Lord Atkin speaking on behalf of the Judicial Committee observed:

> "In 1899 this Board pronounced proceedings for this species of contempt (scandalization) to be obsolete in this country, though surviving in other parts of the Empire, but they added that it is a weapon to be used sparingly and always with reference to the administration of Justice: McLeod v. St. Auhyn. In In re a Special Reference from the Bahama Islands the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. In Queen v. Gray it was shown that the offence of scandalizing the court itself was not obsolete in this country. A very scandalous attack had been made on a Judge for his judicial utterances while sitting in a criminal case on circuit, and it was with the foregoing opinions on record that Lord Russell of Killowen, C.J., adopting the expression of Wilmot, C.J., in his opinion in Rex v. Almon which is the source of much of the present law on the subject, spoke of the article complained of as calculated to lower the authority of the Judge."

In Regina v. Commissioner of Police of the Metropolis (1968) 2 All ER 319, Lord Denning observed:

> ``Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
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> It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of

> justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.
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> Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

15. In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, the freedom of speech and expression and freedom to speak one's mind have always been respected. After independence, the Courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the Court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill motivated or is construed as a deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons. Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power. The judgments of this Court in Re S. Mulgaokar (1978) 3 SCC 339 and P.N. Duda v. P. Shiv Shanker (1988) 3 SCC 167 are outstanding examples of this attitude and approach. In the first case, a three-Judge Bench considered the question of contempt by newspaper article published in Indian Express dated 13.12.1977 criticising the Judges of this Court. The article noted that the High Courts had strongly reacted to the proposal of introducing a code of judicial ethics and propriety. In its issue dated December 21, 1977 an article entitled "behaving like a Judge" was published which inter alia stated that the Supreme Court of India was "packed" by Mrs Indira Gandhi "with pliant and submissive judges except for a few". It was further stated that the suggestion that a code of ethics should be formulated by judges themselves was "so utterly inimical to the independence of the judiciary, violative of the constitutional safeguards in that respect and offensive to the self-respect of the judges as to make one wonder how it was conceived in the first place". A notice had been issued to the Editor-in-Chief of the newspaper to show cause why proceedings for contempt under Article 129 of the Constitution should not be initiated against him in respect of the above two news items. After examining the submissions made at the Bar, the Court dropped the contempt proceedings. Beg, C.J., expressed his views in the following words:

> "Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against the

> highest Court of Justice in this country and its pronouncements. If this is done in a reasonable manner, which pre-supposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous. In Bennett Coleman & Co. v. Union of India, I had said (at p. 828) (SCC pp. 827-28):
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> "John Stuart Mill, in his essay on `Liberty', pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the `dialectical' process of a struggle with wrong ones which exposes errors. Milton, in his `Areopagitica' (1644) said:
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> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensings to make her victorious; those are the shifts and defences that error makes against her power ...."

Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told, an adversary in arguments : "I do not agree with a word you say, but I will defend to the death your right to say it". Champions of human freedom of thought and expression throughout the ages, have realised that intellectual paralysis creeps over a society which denies, in however subtle a form, due freedom of thought and expression to its members.

> "Although, our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article 19(l)(a) of the Constitution, yet, it is well-recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said:
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> "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited."

Krishna Iyer, J. agreed with C.J. Beg and observed:

> "Poise and peace and inner harmony are so quintessential to the judicial temper that huff, "haywire" or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is

> so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the Court. I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge."

In the second case, this Court was called upon to initiate contempt proceedings against Shri P. Shiv Shanker who, in his capacity as Minister for Law, Justice and Company Affairs, delivered a speech in the meeting of Bar Council of Hyderabad on November 28, 1987 criticising the Supreme Court. Sabyasachi Mukharji, J. (as he then was) referred to large number of precedents and made the following observation:

> "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men" -- said Lord Atkin in Ambard v. Attorney-
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> General for Trinidad and Tobago. Administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favour. This the judges must do in the light given to them to determine what is right. And again as has been said in the famous speech of Abraham Lincoln in 1965: "With malice towards none, with charity for all, we must strive to do the right, in the light given to us to determine that right." Any criticism about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of judges and brings administration of justice into ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticised; the motives of the judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas criticisms about the judicial system or judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. This is how courts should approach the powers vested in them as judges to punish a person for an alleged contempt, be it by taking notice of the matter suo motu or at the behest of the litigant or a lawyer.
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> It has been well said that if judges decay, the contempt power will not save them and so the other side of the coin is that judges, like Caesar's wife, must be above suspicion, per Krishna Iyer, J. in Baradakanta Mishra v. Registrar of Orissa High Court. It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability

> of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done. This question was examined in Rama Dayal Markarha v. State of Madhya Pradesh where it was held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. In fact such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. But when it is said that the judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused, or has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule. Criticism of the judges would attract greater attention than others and such criticism sometimes interferes with the administration of justice and that must be judged by the yardstick whether it brings the administration of justice into ridicule or hampers administration of justice. After all it cannot be denied that predisposition or subtle prejudice or unconscious prejudice or what in Indian language is called "sanskar" are inarticulate major premises in decision making process. That element in the decision making process cannot be denied, it should be taken note of."

In Baradakanta Mishra v. Registrar of Orissa High Court (1974) 1 SCC 374, Krishna Iyer, J. speaking for himself and P.N. Bhagwati, J., as he then was,emphasized the necessity of maintaining constitutional balance between two great but occasionally conflicting principles i.e. freedom of expression which is guaranteed under Article 19(1)(a) and fair and fearless justice, referred to "republican justification" suggested in the American system and observed:

> "Maybe, we are nearer the republican justification suggested in the American system:
>
> "In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempt against these courts, the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their Government."

This shift in legal philosophy will broaden the base of the citizen's right to criticise and render the judicial power more socially valid. We are not subjects of a king but citizens of a republic and a blanket ban through the contempt power, stifling criticism of a strategic institution, namely, administration of Justice, thus forbidding the right to argue for reform of the judicial process and to comment on the performance of the judicial personnel through outspoken or marginally excessive criticism of the instrumentalities of law and justice, may be a tall order. For, change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic Government. The judicial instrument is no exception. To cite vintage rulings of English Courts and to bow to decisions of British Indian days as absolutes is to ignore the law of all laws that the rule of law must keep pace with the Rule of life. To make our point, we cannot resist quoting McWhinney, who wrote:

> "The dominant theme in American philosophy of law today must be the concept of change -- or revolution
>
> -- in law. In Mr Justice Oliver Wendell Holmes' own aphorism, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. prestige argument, from age alone, that because a claimed legal rule has lasted a certain length of time it must automatically be valid and binding at the present day, regardless of changes in basic societal conditions and expectations, is no longer very persuasive. According to the basic teachings of the Legal Realist and policy schools of law, society itself is in continuing state of flux at the present day; and the positive law, therefore, if it is to continue to be useful in the resolution of contemporary major social conflicts and social problems, must change in measure with the society. What we have, therefore, concomitantly with our conception of society in revolution is a conception of law itself, as being in a condition of flux, of movement. On this view, law is not a frozen, static body of rules but rules in a continuous process of change and adaptation; and the judge, at the final appellate level anyway, is a part -- a determinant part -- of this dynamic process of legal evolution."

This approach must inform Indian law, including contempt law.

It is very necessary to remember the legal transformation in our value system on the inauguration of the Constitution, and the dogmas of the quiet past must change with the challenges of the stormy present. The great words of Justice Holmes uttered in a different context bear repetition in this context:

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager

> our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

(emphasis supplied)

16. We shall now examine whether the editorial written by the respondent is an attempt to scandalise CESTAT as an institution or amounts to an interference with the administration of justice. The definition of the term `criminal contempt' as contained in Section 2 (c) of the Act reads as under:-

> "2. Definitions -
>
> (c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
>
> (i) scandalizes or tends to scandalise, or lowers or tends to lower the authority of, any court; or
>
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
>
> (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;"

Section 13, which was substituted by Act No.6 of 2006 and which empowers the Court to permit justification by truth as a valid defence in a contempt proceeding also reads as under:-

> "13. Contempts not punishable in certain cases.- Notwithstanding anything contained in any law for the time being in force,--
>
> (a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;
>
> (b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide."

17. The word `scandalize' has not been defined in the Act. In Black's Law Dictionary, 8th Edition, page 1372, reference has been made to Eugene A Jones, Manual of Equity Pleading and Practice 50-51, wherein the word scandal has been described as under:

> "scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added that any unnecessary allegation, bearing cruelty upon the moral character of an individual, is also scandalous. The matter alleged, however, must not only be offensive but also irrelevant to the cause, for however offensive it be, if it is pertinent and material to the cause, the party has right to plead it. It may often be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge."

In Aiyer's Law Lexicon, Second Edition, page 1727, reference has been made to Millington v. Loring 50 LJQB 214 wherein it was held:

> "A pleading is said to be `scandalous' if it alleges anything unbecoming the dignity of the court to hear or is contrary to good manners or which charges a crime immaterial to the issue. But the statement of a scandalous fact that is material to the issue is not a scandalous pleading."

18. In Baradakanta Mishra v. Registrar of Orissa High Court (supra), Palekar, J. referred to the definition of the term `criminal contempt' and observed:

> "It will be seen that the terminology used in the definition is borrowed from the English Law of Contempt and embodies concepts which are familiar to that Law which, by and large, was applied in India. The expressions "scandalize", "lowering the authority of the Court", "interference", "obstruction" and "administration of justice" have all gone into the legal currency of our sub-continent and have to be understood in the sense in which they have been so far understood by our Courts with the aid of the English Law, where necessary."

19. In Naramada Bachao Andolan v. Union of India (1999) 8 SCC 308, Dr. A.S. Anand, C.J., speaking for himself and B.N. Kirpal, J. (as he then was) observed as under:

> "7. We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. .....Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the court and deliberately give a slant to its proceedings, which have the tendency to scandalise the

> court or bring it to ridicule, in the larger interest of protecting administration of justice."

(emphasis supplied)

20. In the light of the above, it is to be seen whether the editorial written by the respondent can be described as an attempt to scandalize the functioning of CESTAT. A reading of the editorial in its entirety unmistakably shows that while expressing his appreciation for the steps taken by the new President of CESTAT to cleanse the administration, the respondent had highlighted what he perceived as irregularities in the transfer and postings of some members and appointment of one member. He pointed out that Shri T.K. Jayaraman was accommodated at Bangalore by transferring Shri K.C. Mamgain from Bangalore to Delhi in less than one year of his posting and further that the posting of Shri T.K. Jayaraman for a period of 7 years was against all the norms, more so because he had earlier worked as Commissioner of Central Excise (Appeals), Bangalore. The respondent then made a detailed reference to the orders passed by the particular Bench of CESTAT which were set aside by the High Courts of Karnataka and Kerala with scathing criticism. This is evident from the following extracts of the editorial:

> "Several orders of the Division Bench of Shri T.K. Jayaraman came under the watchful eyes of Hon'ble High Courts particularly of Karnataka High Court. Comments bordering on strictures were passed in many cases. Severest of the strictures on any bench of the CESTAT by any High Court were passed, on the Division Bench order authored by Shri T.K. Jayaraman, in the case of Commissioner v. McDowell & Co. Ltd. [2005 (186) E.L.T. 145 (Kar.)]. In this case an amount of Rs.99 crores was involved and CESTAT Bangalore had earlier ordered deposit of Rs.25 crores as condition for waiver of pre-

deposit of balance amount. However, subsequently CESTAT Bangalore modified its own order and waived even this condition for deposit of Rs.25 crores [2005 (182) E.L.T. 114 (Tri. - Bang.)].

The Karnataka High Court was shocked and appalled at the manner in which the CESTAT Bench modified its own order and was compelled to even state in relation to Division Bench Order authored by Shri T.K. Jayaraman that the assessee had managed to obtain the order and it is a clear case of abuse and misuse of powers by the Tribunal. The Hon'ble Karnataka High Court in specific words held as under:-

> "... The order is totally lacking in conforming to the requirement of Section 35F of the Act.... The argument of non-interference with an order passed by the Tribunal with jurisdiction is called in aid only to safeguard and protect the order which the assessee has managed to obtain before the Tribunal. ..... An order which cannot speak for itself, an order which has not taken into consideration all relevant aspects, particularly, the statutory requirements of the proviso to Section 35F of the Act, in my view is an order that is not at all sustainable. It is a clear case of abuse and misuse of the powers under the proviso to Section 35F of the Act." (Emphasis supplied] The

> High Court was compelled to comment that the CESTAT, Bangalore granted relief to the assessee on a ground which was not even pleaded by him. In strong words the High Court observed that the Tribunal was acting more loyal than the King in the following words:-
>
> ".....The effect of this order is that the Tribunal has dispensed with the requirement of pre-deposit of total duty amount of Rs.64 crores as also the penalty amount of Rs.35 crores without showing any awareness as to the existence of any undue hardship to the assessee if the assessee is required to comply with the provisions of Section 35F and the proviso and in total disregard of the interest of the revenue by not providing sufficient safeguard. In fact, while in the earlier order, it is held that the appellant has not even pleaded any financial hardship, in the present order, nothing is mentioned at all. Here is a typical case of the Tribunal acting more loyal than the King!"

[Emphasis supplied] Under the garb of modification, the CESTAT bench waived the entire pre-deposit of around Rs.99 crores even when the interim order passed before had held that the appellant did not have prima facie case and had suppressed information from the Department and the same Bench of Tribunal ordered part pre-deposit of Rs.25 crores as a condition of stay of Rs.99 crores and it was done when the Tribunal has not powers to review its own order. The High Court took note of such infirmities and held that -

> "...the order is woefully lacking in the Tribunal having not exhibited its awareness to the requirements of proviso of Section 35F of the Act. It is also clear that the Tribunal after having exercised jurisdiction for the purposes of passing an order for waiver of pre-deposit under the proviso to Section 35F of the Act cannot modify that order subsequently like an appellate authority, nor can keep tinkering with the order as and when applications for modification of the order are filed."

(Emphasis supplied] The CESTAT, Bangalore Bench in the case of Rishi Polymach Ltd. v. Commissioner [2005 (192) E.L.T. 884 (Tri.- Bang.)] allowed appeals by assessee and extended Cenvat credit to the tune of Rs.31 lakhs based on supplementary balance sheet produced. The Hon'ble Karnataka High Court [2008 (232) E.L.T. 201 (Kar.)] did not approve the Division Bench order authored by Shri T.K. Jayaraman and held that acceptance of supplementary balance sheet by the Tribunal was a grave error. It held -

> "10. Without assigning any reason, the Tribunal has accepted the supplementary balance sheet, which according to us, the tribunal has committed a grave error in allowing the appeal by accepting the supplementary balance sheet."

11. When the supplementary balance sheet is relied upon by the respondents, it is for them to show that the goods received were actually received and utilized in manufacturing the finished products. The Tribunal has wrongly placed the burden of proof on the appellant instead of pleading it on the respondents." [Emphasis supplied] Pre-deposit of Rs.320 crores waived for deposit of Rs.1 crore -

Case heard without being listed:

In the case of Harsinghar Gutka Pvt. Ltd. v.

Commissioner [2008 (221) E.L.T. 77 (Tri.-Del.)], the CESTAT Division Bench comprising of S/Shri S.S. Kang and T.K. Jayaraman granted a waiver of pre-deposit of Rs.320 crores against deposit of just Rs.1 crore only. This order of waiver of pre-deposit was also authored by Shri T.K. Jayaraman, Member (Technical) and related to the clandestine removal of gutka. The various dimensions of the case and ramifications of the order were highlighted in our editorial "Battle for Rs.320 Crores - Mysterious recusal by CESTAT Member - New Bench orders pre-deposit of Rs.1 Crore" [2008 (229) E.L.T. A153].

The order of waiver of pre-deposit of Rs.320 crores passed in this case has been challenged by the Commissioner of Central Excise, Lucknow before the Allahabad High Court. The most important aspect of this case is that it was heard and the Stay Order of Rs.320 crores was passed on a day when the case was not even listed in the cause list. The CEGAT Enquiry Committee had recommended that in such cases, the Members concerned should be made personally responsible and this recommendation has already been accepted by the Government. In view of this, the President, CESTAT is expected to initiate action against the erring Members.

Tribunal persistently ignoring statutory provisions and High Court rulings:

Coming back to the Hon'ble Karnataka High Court, within whose jurisdiction the Bangalroe Bench of the CESTAT, is functioning, the High Court in the case of Commissioner v.

United Telecom Ltd. [2006 (198) E.L.T. 12 (Kar.)], while considering the validity of the full waiver of pre-deposit granted by the Bangalore bench of the CESTAT [2005 (191) E.L.T. 1056], which included Shri T.K. Jayaraman, Member (Technical) commented upon the routine manner in which waiver of pre-deposit are being granted.

The High Court also commented upon the statutory responsibility of the CESTAT to safeguard the interest of the revenue, while granting waiver of pre-deposit and observed as under:

"It is not the lip sympathy of the Tribunal which can fulfil the statutory requirement of ensuring the safeguard of the interest of the revenue, but a concrete order indicating the manner in which the interest of the revenue is in fact safeguarded by imposing commensurate conditions."

> The High Court finally held that the Tribunal's order in this case was clearly in violation of statute and fit to be characterized as arbitrary even while drawing reference to its own observations in McDowell case supra as under:-
>
> "In the present case it is not even the case of the appellant before the Tribunal that it faces any financial hardship or has any difficulty in this regard. Even in the absence of any plea from the appellant before the Tribunal to this effect, the tribunal ventures upon to grant total waiver of pre-deposit. It is undoubtedly yet another instance of as observed by this court in the case of McDowell & Company (supra) the Tribunal being more loyal than the king. It is rather surprising that the Tribunal persists in ignoring the statutory provisions as contained in the proviso to Section 129E in passing such order for the purpose of pre-deposit when the order is passed only under this proviso and not under any other provision.

The impugned order is clearly a violation of the statute, fit to be characterized as arbitrary inasmuch as the Tribunal has not shown its awareness to the aspect of undue hardship if in fact existed or will be caused to the assessee if the assessee has to fulfil the statutory requirement of pre-deposit..."

[Emphasis supplied] Pre-deposit of Rs.440 crores waived without any financial hardship - High Court rulings again violated:

> The Bangalore Bench of the CESTAT comprising of Dr. S.L. Peeran, Member (J) and Shri T.K. Jayaraman, Member (T) in the case of Bharti Airtel Ltd. v. Commissioenr of Customs [2009 (237) E.L.T. 469] has waived the pre-deposit of the entire amount of Rs.440 crores on the ground that the appellant has strong prima facie case. In this case, the order of waiver has been authored by Shri T.K. Jayaraman, but it does not contain any reference to any financial hardship either pleaded or considered by the Bench. Surprisingly this order is very sketchy and observations, discussion and decision of the Bench are in just 11 printed lines while the case involved more than Rs.440 crores.
>
> The Karnataka High Court has repeatedly held in the cases of McDowell & Co. Ltd. and United Telecom Ltd. that it is the statutory obligation of the CESTAT to safeguard the interest of the revenue and therefore, unless the assessee pleads financial hardship with regard to the compliance with pre- deposit and the assessee is unable to make pre-deposit, it cannot be said that assessee is facing financial hardship warranting dispensation of pre-deposit. The order passed in the case of Bharati Airtel Ltd. by the Bangalore Bench is not only in violation of the dictum of the Karnataka High Court, but also contemptuous as the Bangalore Bench of the CESTAT is refusing to follow the law laid down by the Karnataka High Court, which is the jurisdictional High Court for CESTAT, Bangalore.
>
> Asked for "three" got "thirteen":

Recently, the Central Excise Department, Mangalore has filed an appeal against the order passed by the Bangalore Bench of the CESTAT, again comprising of Dr. S.L. Peeran, Member (J) and Shri T.K. Jayaraman, Member (T) in the case of Alvares & Thomas [2009 (13) S.T.R. 516] on the plea that the assessee has preferred the appeal to the Tribunal only on the question of limitation, whereas the Tribunal has decided the appeal in favour of the assessee on merits. The Hon'ble Bench of the Supreme Court comprising of Hon'ble Mr. Justice S.H. Kapadia and Hon'ble Mr. Justice Aftab Alam in Civil Appeal D. No.5566 of 2009, passed the following order on 27.04-2009:

"Delay condoned.

Issue notice to the extent mentioned below.

Since the assessee had preferred an appeal before the Tribunal only on the question of limitation, we do not see any reason why the Tribunal has decided the assessee's appeal on the merits of the case."

[Emphasis supplied] Kerala High Court also dissatisfied with Bangalore Bench Orders:

In the case of Electronic Control Corporation v. Commissioner [2009 (235) E.L.T. 417 (Ker.)], the Kerala High Court too has recorded its annoyance with the order of the CESTAT Bangalore as reported in [2006 (197) E.L.T. 291 (Tri.

- bang.)]. In this case also, the order for the Bench was authored by Shri T.K. Jayaraman, Member (T) and as per the Kerala High Court, the CESTAT did not consider the evidences relied on by the Department and burden of proof was held as not discharged by the Department. The High Court expressed its "thorough displeasure" in its order in the following words -

"Since we are thoroughly dissatisfied with the order of the Tribunal which was issued without reference to the materials gathered by the department and based on which adjudication was made, we set aside the order of the Tribunal with direction to the Tribunal to rehear the matter..."

[Emphasis supplied] The High Court expressed surprise over the Tribunal order by holding that -

"Strangely, the Tribunal has not considered any evidence relied on by the department like the statements recorded from the employees, admission made by the proprietrix at the time of search and the evidence collected from the Bank pertaining to business transactions. When prima facie evidence is established by the department, particularly with reference to banking transactions, it is for the respondent-assessee to explain why the transactions should not be treated as pertaining to business. The Tribunal failed to note that reasonable inferences can be drawn from evidence collected by the department, more so when the respondent fails to explain the

> transactions brought on record. Strangely, the employees statements which have evidentiary value have been ignored by the Tribunal."

[Emphasis supplied] Over-ruling the order of the CESTAT, Bangalore Bench in the case of Middas Pre-cured Tread Pvt. Ltd. v. Commissioner [2006 (200) E.L.T. 423 (Tri. - Bang.)], the Kerala High Court in 2009 (236) E.L.T. 26 (Ker.) held that the Tribunal, instead of considering scope of notifications with reference to statutory provisions, under which such notifications are issued, considered the scope of statutory provisions with reference to notifications issued. The Court held that -

> "We do not know on what basis the Tribunal has held that prospectively has no relevance in this case...the Tribunal or even the High Courts have no power to grant retrospectively for a notification in the interpretation process."

21. Although, the petitioner has tried to project the editorial as a piece of writing intended to demean CESTAT as an institution and scandalize its functioning but we do not find anything in it which can be described as an attempt to lower the authority of CESTAT or ridicule it in the eyes of the public. Rather the object of the editorial was to highlight the irregularities in the appointment, posting and transfer of the members of CESTAT and instances of the abuse of the quasi judicial powers. What was incorporated in the editorial was nothing except the facts relating to manipulative transfer and posting of some members of CESTAT and substance of the orders passed by the particular Bench of CESTAT, which were set aside by the High Courts of Karnataka and Kerala. Even, this Court was constrained to take cognizance of the unusual order passed by CESTAT of which Shri T.K. Jayaraman was a member whereby the appeal of the assessee was decided on merits even though the Tribunal was required to examine the question of limitation only. By writing the editorial which must have caused embarrassment to functionaries of the Central Government and CESTAT and even some members of the petitioner-Association but that cannot be dubbed as an attempt to scandalize CESTAT as a body or interfere with the administration of justice. What the respondent projected was nothing but true state of the functioning of CESTAT on administrative side and to some extent on judicial side. By doing so, he had merely discharged the constitutional duty of a citizen enshrined in Article 51A(h). It is not the petitioner's case that the facts narrated in the editorial regarding transfer and posting of the members of CESTAT are incorrect or that the respondent had highlighted the same with an oblique motive or that the orders passed by Karnataka and Kerala High Courts to which reference has been made in the editorial were reversed by this Court. Therefore, it is not possible to record a finding that by writing the editorial in question, the respondent has tried to scandalize the functioning of CESTAT or made an attempt to interfere with the administration of justice.

22. The matter deserves to be examined from another angle. The substituted Section 13 represents an important legislative recognition of one of the fundamentals of our value system i.e. truth. The amended section enables the Court to permit justification by truth as a valid defence in any contempt proceeding if it is satisfied that such defence is in public interest and the request for invoking the defence is bonafide. In our view, if a speech or article, editorial, etc. contains something which appears to be contemptuous and this Court or the High Court is called upon to initiate

proceedings under the Act and Articles 129 and 215 of the Constitution, the truth should ordinarily be allowed as a defence unless the Court finds that it is only a camouflage to escape the consequences of deliberate or malicious attempt to scandalize the court or is an interference with the administration of justice. Since, the petitioner has not even suggested that what has been mentioned in the editorial is incorrect or that the respondent has presented a distorted version of the facts, there is no warrant for discarding the respondent's assertion that whatever he has written is based on true facts and the sole object of writing the editorial was to enable the concerned authorities to take corrective/remedial measures.

23. At this juncture, it will be apposite to notice the growing acceptance of the phenomenon of whistleblower. A whistleblower is a person who raises a concern about wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues). Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company. One of the most interesting questions with respect to internal whistleblowers is why and under what circumstances people will either act on the spot to stop illegal and otherwise unacceptable behavior or report it. There is some reason to believe that people are more likely to take action with respect to unacceptable behavior, within an organization, if there are complaint systems that offer not just options dictated by the planning and controlling organization, but a choice of options for individuals, including an option that offers near absolute confidentiality. However, external whistleblowers report misconduct on outside persons or entities. In these cases, depending on the information's severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, state, or federal agencies. In our view, a person like the respondent can appropriately be described as a whistleblower for the system who has tried to highlight the malfunctioning of an important institution established for dealing with cases involving revenue of the State and there is no reason to silence such person by invoking Articles 129 or 215 of the Constitution or the provisions of the Act.

24. We agree with the learned counsel for the respondent that this petition lacks bonafide and is an abuse of the process of the Court. The petitioner is a body of professionals who represent the cause of their clients before CESTAT and may be other Tribunals and authorities. They are expected to be vigilant and interested in transparent functioning of CESTAT. However, instead of doing that, they have come forward to denounce the editorial and in the process misled the Attorney General of India in giving consent by suppressing the factum of appointment of Inquiry Committee by the President, CESTAT. We are sorry to observe that a professional body like the petitioner has chosen wrong side of the law.

25. In the result, the petition is dismissed. For filing a frivolous petition, the petitioner is saddled with cost of Rs.2,00,000/-, of which Rs.1,00,000/- shall be deposited with the Supreme Court Legal Services Committee and Rs.1,00,000/- shall be paid to the respondent.

.....J. [G.S. Singhvi] .....J. [Asok Kumar Ganguly] New Delhi August 13, 2010