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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 6900/2018**

BHARATIYA VITTA SALAHKAR SAMITI & ANR..... Petitioner

Through: Mr. Puneet Agrawal with Ms. Parvi
Sinha and Mr. Bharat Agrawal, Advs.

versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing
counsel for revenue with Ms. Suhani
Mathur and Mr. Ankit Singh, Advs.
Mr. Vikas Mahajan with Mr. Aakash
Varma, Mr. Prajesh V.S. and Mr. Anil
Kumar, Advs. for UOI.
Mr. Gautam Narayan, ASC, Gncd.

+ **W.P.(C) 3247/2019**

BHARTIYA VITYA SALHAKAR SAMITI & ANR..... Petitioner

Through: Mr. Puneet Agrawal with Ms. Parvi
Sinha and Mr. Bharat Agrawal, Advs.

versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing
counsel for revenue with Ms. Suhani
Mathur and Mr. Ankit Singh, Advs.
Mr. Vikram Jetly, CGSC.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

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ORDER
19.11.2019

1. The petitioner has preferred the present writ petition raising a challenge to Section 109 of the Central Goods and Services Tax Act (CGST) and Section 109 of the Delhi Goods and Services Tax Act (DGST) as being ultra vires. The petitioner also assails the Constitutional vires of Section 110 of the CGST and Section 110 of the DGST Act. The petitioner seeks a direction to the respondents to not take steps for appointment and/ or the constitution of the Goods and Service Tax Appellate Tribunal (GSTAT) in terms of the aforesaid provisions till the same are brought in line with the settled principles regarding appointment of members and constitution of Benches, in order to ensure Rule of Law and in line with separation of powers.

2. On 02.05.2019, this Court directed that the respondents shall not, without prior intimation to this Court, proceed to appoint persons to the GST Appellate Tribunal till the next date. The interim order was made absolute till the disposal of the writ petition on 26.07.2019.

3. In the meantime, High Court of Judicature at Madras has rendered its decision in a batch of writ petitions, including W.P. NO. 21147/ 2018, preferred by the Revenue Bar Association (Chennai), whereby the Section 110(1)(b)(iii) of the GST Act – which states a member of Indian Legal Services, who has held a post not less than Additional Secretary for a period of three years, can be appointed as a Judicial Member in GSTAT, has been struck down. The High Court has also struck down Section 109(3) and 109(9) of CGST Act, 2017, which prescribes that the Tribunals shall consist of one Judicial Member, one Technical Member (Centre) and one Technical

Member (State). The High Court has also recommended to the Parliament that it must consider amendment of the relevant Section, to include Lawyers to be eligible to be appointed as Judicial Members to the Appellate Tribunal, in view of the issues which are likely to arise for adjudication under the CGST Act and in order to maintain uniformity in various statutes.

4. Mr. Harpreet Singh submits that the Government has decided to challenge the said decision before the Supreme Court.

5. Very recently i.e. on 13.11.2019, the Supreme Court has rendered its Constitution Bench Judgment in ***Rojer Mathew v. South Indian Bank Ltd. & Ors.***, Civil Appeal No. 8588/2019. In this decision, the Supreme Court considered the Constitutionality of Part XIV of the Finance Act, 2017 and of the rules framed in consonance therewith.

6. The Supreme Court, inter alia, considered the issue regarding the need to rationalize the administration of Tribunals, especially conditions of service, mode of appointment, security of tenure and requisite qualifications of Member and Presiding Officers of various Tribunals. The issue with regard to the growing menace of pendency before the Supreme Court arising from direct statutory appeals from orders of such Tribunals was also considered. The Supreme Court, in paragraph 92 of the majority decision crystallized the issues which arose before it, as follows:

“92. In light of these arguments put forth by learned Counsels and the suggestions of by the Amicus Curiae, the following issues arise for our consideration:

I. Whether the ‘Finance Act, 2017’ insofar as it amends certain other enactments and alters conditions of service of persons manning different Tribunals can be termed as a ‘money bill’ under Article 110 and consequently is validly enacted?

II. If the answer to the above is in the affirmative then Whether

Section 184 of the Finance Act, 2017 is unconstitutional on account of Excessive Delegation?

III. If Section 184 is valid, Whether Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 are in consonance with the Principal Act and various decisions of this Court on functioning of Tribunals?

IV. Whether there should be a Single Nodal Agency for administration of all Tribunals? V. Whether there is a need for conducting a Judicial Impact Assessment of all Tribunals in India?

VI. Whether judges of Tribunals set up by Acts of Parliament under Articles 323-A and 323-B of the Constitution can be equated in 'rank' and 'status' with Constitutional functionaries?

VII. Whether direct statutory appeals from Tribunals to the Supreme Court ought to be detoured?

VIII. Whether there is a need for amalgamation of existing Tribunals and setting up of benches."

7. So far as the first issue is concerned, the same stands referred to a Larger Bench of Seven Hon'ble Judges. The other issues have been considered and answered by the Supreme Court.

8. We may observe that the issue regarding the constitution of Appellate Tribunal under the CGST Act was not before the Supreme Court, since the Supreme Court was dealing with several issues arising before it in the context of the Finance Act, 2017, whereas the CGST Act was passed by the Parliament on 12.04.2017 w.e.f. 01.07.2017. However, a perusal of the decision of the Supreme Court clearly shows that the said decision would have a serious bearing on the challenge raised by the petitioner in the present case as well. The decision rendered by the Supreme Court is binding on all

concerned and the respondents are also bound to ensure compliance therewith, not only in respect of the Tribunals considered by it, but in respect of the Appellate Tribunals constituted under the CGST Act.

9. We, therefore, direct the respondents and particularly respondent Nos. 2,3 and 4 to examine the position as emerging from the decision in ***Rojer Mathew*** (supra) and to consider formulation of appropriate amendments in the CGST Act so that the provisions of the said Act do not continue to fall foul of the said decision.

10. The petitioner has highlighted, what according to it, are the infirmities in Section 109 and 110 of the CGST and DGST Act, which are para materia. These infirmities, as pointed out by the petitioner are the following:

*“a. The number of technical members on the bench are always two, which exceeds the number of judicial member being one (bench would comprise of three members), and is violative of para 120(xiii) in **Madras Bar Association v UOI 2010 11 SCC 1***

*b. Appointment of Members of Indian Legal Services as Judicial Members would affect the very purpose of Tribunal, and is directly contrary to para 120(i) of **Madras Bar Association v UOI 2010 11 SCC 1** case as also **Neelkamal Realtors [(2017) SCC Online Bom 9302]** case*

*c. Further, there is no provision for Advocates to become Judicial Members, which is violative of para 120(i) of **Madras Bar Association v UOI 2010 11 SCC 1** case. Other specialists such as Chartered Accountants having specialized knowledge of accounting as also tax, also does not figure in the eligible GSTAT members.*

d. Qualification for becoming a technical member is lesser than the qualification required in the case of first appellate authority, which is grossly violative of rule of law

e. The requirement laid down in Section 110(1)(d) for

Technical Member(State) is that he is has merely 3 years of experience in the administration of existing law/SGST or in the field of finance or taxation. The requirement of just 3 years of experience that too in the administration, makes the qualification highly inadequate to hold the present position of Technical Member (State), who will be involved in deciding highly technical and complex legal issues

*f. A Technical Member (Centre) of GSTAT which requires experience of 15 years as officers of "Indian Revenue Services", is short of the criteria laid down by the Apex Court in **Madras Bar Association v UOI 2010 11 SCC 1** which prescribes the minimum qualification as a secretary/ additional secretary [para 111 & para 120(ii)]*

*g. Provisions providing selection committee, appointment, re-appointment, transfer, term and removal of members for technical and judicial members, are in violation of the doctrine of separation of powers as there is complete control and discretion of the government in the said sphere. The similar provisions were declared unconstitutional by the Hon'ble Supreme Court in the case of **Madras Bar Association V Union of India [(2014) 10 SCC 1]***

h. Government has the power to transfer members at its own will, and hence the total go by to the doctrine of separation of powers .

i. The term of judicial members is just three years which is grossly inadequate, and is shorter than tenure of technical members giving preference to technical members, robbing the GSTAT from its judicial character”

11. Mr. Agrawal has also drawn our attention to the notification dated 21.08.2019, issued by the Central Government, Ministry of Finance, whereby the Goods and Services Tax Appellate Tribunal (Appointment and Conditions of Service of President and Members), Rules, 2019 have been framed. Mr. Agrawal has pointed out that these rules do not appear in

consonance with the decision of the Supreme Court in *Roger Mathew* (supra).

12. The respondent, while examining the position should also bear in mind the aforesaid aspects highlighted by the petitioner.

13. Let the respondents do the needful and place on record a status report before the next date of hearing after due application of mind and examination of all the aforesaid aspects.

14. List on 05.02.2020.

15. The matter shall be treated as part heard.

VIPIN SANGHI, J

SANJEEV NARULA, J

NOVEMBER 19, 2019

N.Khanna