SOUTH CENTRAL RAILWAY : Lex Info e - Magazine

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Have you any case law/case study to be shared with other railwaymen?

Articles/write-ups on legal issues relevant to railways' working are invited from officers/staff including from other zonal railways/ production units;
Please mail them to:

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EDITORIAL

In this issue, apart from some important judgments, a significant judgment affecting the policy of the Railway on appointment on compassionate grounds is reported. Railway Board vide RBE No.1/1992 had taken a decision that appointments on compassionate grounds to the second widow and her children are not to be considered unless such second marriage is permitted, in special circumstances, taking into account the personal law. Considering that the legislature has protected legitimacy of a child treating him/her born from a marriage that may be null and void [under S.16(1) of Hindu Marriage Act, 1955], the Apex Court held that it is not open to the employer to lay down a condition which is inconsistent with Art.14 of the Constitution to deny benefit of compassionate appointment which is available to other legitimate children. Another important judgment is that the Supreme Court reiterated that courts cannot rewrite policy matters.

N.Murali Krishna, Sr. LO/HQ.

Note: This is only a news capsule. For full information and understanding to cite the case, please go through the original judgment.

Children from Second Marriage entitled for CG Appointment: Supreme Court

A Central Railway technician's son born out his father's second marriage made a claim for Compassionate Appointment upon the death of his father. Railways rejected the claim and the son approached the CAT which ordered to grant him CG appointment. The Railways approached in appeal before High Court after the dismissal of review also by the CAT. The HC upheld the order of the CAT. Aggrieved by this the Railways filed SLP before the Supreme Court.

While dismissing the Civil Appeal the Supreme Court reiterated its earlier stand that once Section 16 of the Hindu Marriage Act, 1955 regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would not be open to the State, consistent with Article 14 to exclude such a child from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires. Once the law has treated such children as legitimate, it would be impermissible to exclude them from being considered for compassionate appointment. Children do not choose their parents. To deny compassionate appointment though the law treats a child of a void marriage as legitimate is deeply offensive to their dignity and is offensive to the constitutional guarantee against discrimination.

The Supreme Court took note of the fact that the High Court, Calcutta in Namita Goldar Vs. Union of India (2010) 1 Cal. LJ 464 had struck down the circular of the Railways dated 02.01.1992 which bars appointment of children born out of second marriage. The said order of the High Court, Calcutta attained finality, having been implemented by the Railways. The Apex Court held it improper on the part of the Railway Board to issue a fresh circular on 3 April 2013, reiterating the terms of the earlier circular dated 2 January, 1992 even after the decision in Namita Goldar (supra).

The Single Bench order of the High Court, Madras, which adopted the above position, in M. Muthuraj Vs. Deputy General of Police, Tamil Nadu (2016) 5 CTC 50 was brought to the notice of the Apex Court. The Supreme Court further observed that the SLP filed in Union of India Vs. M. Karumbayee 2017 Lab. IC (NOC 237) 69 against the Division Bench order of the High Court, Madras, which followed the ratio laid down in Namita Goldar case, was dismissed by the Supreme Court.

In the same order the Supreme Court negated the objection of the Govt. against granting CG appointment in the case of children of 2nd wife of Muslim employee, "since the second marriage was in any event permissible under Muslim Personal Law". [CA No.12015-16/2018 Union of India & Anr. Vs. V.R.Tripathi. Date of order: 11.12.2018]

Courts cannot re-write eligibility conditions for CG appointment: Supreme Court.

On 17th January 2019, Hon'ble Supreme Court held in Civil Appeal No.977 [State of Himachal Pradesh and Anr. Vs. Parkash Chand] that Courts are not empowered to re-write the terms and conditions of the policy governing compassionate appointment and issue order to appoint a dependant who is not otherwise eligible.

The facts of the case are that the request of the claimant for CG appointment was turned down by the Revenue Department of the State of Himachal Pradesh, where his father was a peon. The eligibility conditions as at paragraph 5(c) of its policy dated 18.01.1990 pertaining to CG appointment read:

"In all cases where one or more members of the family are already in government service or in employment of autonomous bodies/bodies/ boards/corporations etc. of the State/Central Government, employment assistance should not under any circumstances be provided to the second or third member of the family. In cases, however, where the widow of the deceased government servant represents or claims that her employed sons/ daughters are not supporting her, the request of employment assistance should be considered only in respect of the widow…"

The High Court has observed that the State should consider cases for appointment on compassionate basis by dealing with the applications submitted by sons, or as the case may be, daughters of deceased government employees, even though, one member of the family is engaged in the service of the government or an autonomous board or corporation. This direction of the judgment of the High Court virtually amounts to a mandamus to the State Government to disregard the terms. Aggrieved by the order of the Hon'ble High Court, the State approached Hon'ble Supreme Court.

Hon'ble Apex Court held: "In the exercise of judicial review under Article 226 of the Constitution, it was not open to the High Court to re-write the terms of the policy. It is well-settled that compassionate appointment is not a matter of right, but must be governed by the terms on which the State lays down the policy of offering employment assistance to a member of the family of a deceased government employee.

For the above reasons, we are of the view that the judgment of the High Court is unsustainable. The High Court has virtually re-written the terms of the policy and has issued a direction to the State to consider applications which do not fulfill the terms of the policy. This is impermissible." Thus, the appeal of the State of Himachal Pradesh was allowed.

- Kumar Kotappa, CLA/GTL.

ABC OF ACTS

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (w.e.f 29.12.2007)

A senior citizen who is unable to maintain himself may seek monthly maintenance from his children or from his relative, if the said relative is to inherit his property (S.4). Application for maintenance may be made by a Sr. Citizen or any person or organisation authorised by him or by the Tribunal suo motu and to be finalised in 90 days, after hearing the children / relative. Tribunal may extend the time limit for disposal by maximum of 30 days in exceptional cases.

The definition of children includes son, daughter, grandson and grand-daughter. Parent means father or mother, whether biological, adoptive or step father or step mother. Relative means any legal heir of the childless senior citizen and is in possession of or would inherit his property after his death.

As per S.3, the Act to have overriding effect, notwithstanding any inconsistency with any other Act.

Proceedings for maintenance U/S 5 against children / relative may be taken in the district they reside or last resided. One or more Tribunals at each Sub-Divisional level presided over by an officer not below the rank of SDO and one Appellate Tribunal for each district presided over by an officer not below the rank of District Magistrate to be constituted. In A.P / Telangana, RDOs have been nominated as Presiding Officer of Tribunals and District Collectors have been nominated as Presiding Officer of Appellate Tribunals.

Tribunal has the powers of First Class Judicial Magistrate. Tribunal may refer the case to Conciliation Officer (CO) before hearing the application and within 1 month CO to submit his findings. If any amicable settlement is arrived at, the Tribunal shall pass order accordingly (S.6).

Tribunal may adopt summary procedure and has the powers of Civil Court for enforcing attendance of witnesses, discovery of documents, taking evidence on oath etc. Tribunal has the powers to seek expert assistance (S.8). Evidence to be taken in the presence of children/ relative or ex-parte. On being satisfied of neglect or refusal, the Tribunal may order children / relative payment of monthly maintenance subject to maximum of Rs.10,000/- (S.9).

Copy of the maintenance order to be given free to senior citizen / parent. (S.11). Sr. Citizen / Parent may opt either to receive maintenance U/S 5 of this Act or Chapter IX of Cr.PC, but not both (S.12). Amount ordered to be paid by children / relative to be deposited in whole within 30 days of making of the order (S.13). Simple interest @5-18% may be ordered to be paid from the date of application (S.14).

Appeal by a Sr. Citizen / Parent to the Appellate Tribunal to be filed within 60 days from the date of order. Delay, if any, is condonable. The Appellate Tribunal may allow or reject the appeal, after extending an opportunity to be heard for both the parties. The Appellate Tribunal shall endeavour to pronounce its order within one month of receipt of appeal. Both the parties are entitled for order copy free of cost.

Legal practitioners are not permitted to represent any parties before a Tribunal or Appellate Tribunal (S.17), except Maintenance Officer for applicant (S.18).

S.19 deals with establishment of oldage homes and S.20 deals with medical support to the Sr. Citizens. When a Sr. citizen had, after the commencement of this Act, transferred by way of gift or otherwise his property, subject to the condition that the transferee shall provide basic amenities and basic physical needs to the transferor, and if such transferee refuses or fails to provide such amenities and physical needs, the transfer of property may be declared as void at the option of the transferor, deeming the transfer as made by fraud / coercion / undue influence (S.23).

Failure to pay maintenance will result in issuance of warrant and in sentencing up to 1 month or until payment (S.5). Abandoning a Sr. Citizen is punishable with imprisonment up to 3 months / Rs.5000/- fine or both (S.24). Every offence under this Act shall be cognizable and bailable and shall be tried summarily by a Magistrate (S.25) Jurisdiction of civil courts is ousted U/S 27.

- Ram Nihora Lal, CLA/Gaz/Pers.

Legal Maxims:

Ex facie - On the fact of it.
Ex gratia - Out of kindness, voluntary.
Ex parte - Proceeding brought by one person in the absence of another.
Ex post facto - By reason of a subsequent act.
Ex turpi causa non oritur actio - No action arises on an immoral contract.
Generalia specialibus non derogant - Things general do not derogate from things special.
Habeas corpus - That you have the body.
Ignorantia facti excusat, ignorantia juris non excusat - Ignorance of fact excuses, ignorance of law does not excuse.

Belated representations cannot revive stale claims:

In a recent order Supreme Court held emphatically that a stale or dead claim cannot be revived through belated representations and its responses, if any, from the administrative authorities. The case on hand related to a dispute about selection to the post Assistant Personnel Officer (UR-4 & SC-1) in Southern Railway by 30% LDCE quota. Promotion order was issued on 09.01.2001.

The UR employee (Ms. C.Girija) who was fifth and could not get promoted in the said selection submitted a representation to the General Manager, Southern Railway, Chennai on 25.09.2007 requesting for her inclusion and promotion against the post of APO against 30% quota in the panel drawn on 09.01.2001, questioning earmarking of one post for SC category. This was replied by the General Manager vide letter dated 27.12.2007.

Aggrieved by the communication dated 27.12.2007 Ms. C.Girija filed O.A. No.466 of 2009 before the CAT, Ernakulam duly impleading the employee selected under SC category as 9th respondent (Ms. Meena Bhaskar). The CAT ordered on 09.11.2011 to promote the applicant to the post of APO, duly condoning the delay of 560 days.

Ms. Meena Bhaskar and the Railways appealed before the High Court, but the High Court remanded the matter back to CAT. Against the judgment of the High Court, the applicant Ms. C.Girija filed C.A.Nos.7181-82 of 2014 before Supreme Court and it set aside the judgment of the High Court and remanded the matter to the High Court for determination of the controversy on merits in accordance with law.

In pursuance of the judgment of the Supreme Court dated 04.08.2014, the High Court heard the parties and by judgment dated 06.02.2015 upheld the order of the Tribunal and dismissed the Original Petitions filed by the Union of India as well as Ms. Meena Bhaskar. Aggrieved by the judgment of the High Court dated 06.02.2015 Union of India as well as Ms. Meena Bhaskar had filed two appeals before the SC. Ms. C. Girija also approached the Apex Court for implementation of the orders of the High Court and CAT, which were in her favour.

While discussing the issue of delay condonation by CAT in the OA filed before it, Apex Court held that the Tribunal and High Court had not adverted to the delay, which accrued from the declaration of panel on 09.01.2001 and submitting her representation on 25.09.2007, i.e. after more than 06 years and 09 months.

The Supreme Court referred to its earlier decision in C.Jacob Vs. Director of Geology and Mining and Another (2008) 10 SCC 115 about how a time barred claim gets attended to and the bar of limitation or laches get obliterated or ignored.

The Apex Court again in the case of Union of India and Others Vs. M.K. Sarkar, (2010) 2 SCC 59 on belated representation laid down: "When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

In P.S. Sadasivaswamy Vs. State of Tamil Nadu, (1975) 1 SCC 152 noticed that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion.

The Apex Court further held: "She having participated in the selection for promotion under 30% LDCE quota and the bifurcation of the vacancies being part of the process of selection, it was not open for her to challenge the bifurcation of vacancies into general and reserved after taking a chance to get selected."

In Chandra Prakash Tiwari Vs. Shakuntala Shukla, (2002) 6 SCC 127, the Apex Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. Many earlier orders were relied upon by the Apex Court to reiterate that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection [Chandigarh Admn. Vs. Jasmine Kaur, (2014) 10 SCC 521].

The Supreme Court thus concluded that the delay shall be reckoned from the date of issue of panel i.e., 09.01.2001, but not from the date of her belated representation dated 25.09.2007. Thus, mere fact that representation was replied by Railways on 27.12.2007, a stale claim shall not become a live claim. Both Tribunal and High Court did not advert to this important aspect of the matter.

[CA No. 1577/2019 with CA No.1578/2019 and WP (C) No.653/2015; Date of order: 13.02.2019]

- M.V.Ramana, LO/HQ.

FAQs

Garnishee:

Many a times Railways receive orders from Courts ordering to deduct and remit from the wages of an employee on account of an order passed by it in favour of an outsider. Such orders are called Garnishee Order.

It is an order passed by an executing court directing or ordering a garnishee not to pay money to judgment debtor, since, the latter is indebted to the Garnisher (decree holder). Garnishee means a judgment-debtor's debtor. Garnishee is a person who is liable to pay a debt to judgement-debtor or to deliver any movable property to him. It is an Order of the court to attach money or Goods belonging to the judgment debtor in the hands of a third person. The purpose of the order is to protect the interest of the creditor (decree holder) without pushing him to file another suit for realisation. A garnishee is bound to implement the order of the Court. If the garnishee finds it difficult to implement the order it must immediately approach the Court, to avoid adverse proceedings against it. Order 21, Rules 46-A, 46-1 of CPC, 1908 deals with Garnishee.

eg:- A has given Rs.10,000/- to B. B has given Rs.10,000/- to C in another occasion. B did not pay any amount to A. A obtained a decree against B, which is pending before the Court for the recovery of money of Rs.10,000/-. Meanwhile, A comes to know that C has to pay Rs.10,000/- to B. A applies to the Court for the recovery of his debt from C and the Court decrees the same. Here A is a judgment-creditor. B is the judgment-debtor. C is the judgment debtor's debtor, and C is known here as 'Garnishee'.

- K.Gopinath, CLA/GM/O/SCR.

Office bearers of Organised labour should be role models by following Railway Board's orders

The applicant, as a depute to an organised union on the Railway, was issued with a Cheque Pass. It was found that the applicant had made reservations on consecutive days or for more than one train on the same day using the pass, though performance of journey would be possible on only one such reservation. Consequently, the competent authority decided to withhold amount equivalent to the fares towards multiple reservations. The applicant filed OA contending that reservation of seats/berths are done free of charge and that no action can be taken against any deputationist and without the concurrence of the trade union.

Dismissing the OA, the Tribunal held the applicant is a Government servant, even if he is on deputation. Therefore D&A rules apply to him. Further, making multiple reservations on different trains on the same day and not cancelling them smacks of using the pass without due responsibility. Applicant being an office bearer of a responsible union it was the responsibility of the applicant to cancel the reservations in trains in which he did not intend to travel. By not doing so he did put the respondents organisation to loss. Applicant being an office bearer should have set an example for others by following guidelines indicated in Railway Board in regard to reservations in trains. Hence the Tribunal finds no merit in the case. [K. Kaladhar Vs. UOI, OA No.20/815/2016, DOJ 20.12.2018, CAT/HYB]

New reservation policy for Economically Weaker Sections (EWS)

The following are the gist of the instructions issued regarding reservation for EWSs not covered under the reservation scheme for SCs/STs/OBCs in respect of direct recruitment in civil posts and services in the Government of India w.e.f 01.02.2019:

Quantum of Reservation: The persons belonging to EWSs who, are not covered under the scheme of reservation for SCs, STs and OBCs shall get 10% reservation in direct recruitment in civil posts and services in the Government of India. "Scientific and Technical" posts which satisfy the conditions mentioned shall be exempted.

Eligibility Income limit: Persons who are not covered under the scheme of reservation for SCs, STs and OBCs and whose family has a gross annual income below Rs 8 lakh (Rupees eight lakh only) are to be identified as EWSs for benefit of reservation. Income shall also include income from all sources i.e. salary, agriculture, business, profession, etc. for the financial year prior to the year of application.

Also, persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWS, irrespective of the family income:-

i) 5 acres of agricultural land and above;
ii) Residential apartment of 1000 sq ft. and above;
iii) Residential plot of 100 sq. yards and above in notified municipalities;
iv) Residential plot of 200 sq. yards and above in areas other than the notified municipalities.

Income and Asset Certificate Issuing Authority and Verification of Certificate: Benefit of reservation under EWS can be availed upon production of an Income and Asset Certificate issued by a Competent Authority. The Income and Asset Certificate issued by any one of the designated authorities in the prescribed format as given in Annexure-I shall only be accepted as proof of candidate's claim as belonging to EWS. Crucial date for issuance of Income & Asset Certificate shall be the closing date for receipt of application for the post, unless another crucial date is specified.

Effecting Reservation – Maintenance of Rosters: General principles of post based roster to apply. Annexures II, III, IV & V to be followed for reservation.

Adjustment of EWS against Unreserved Vacancies: Persons belonging to EWS who are selected on the basis of merit and not on account of reservation are not to be counted towards the quota meant for reservation. Unfilled EWS vacancies do not carry forward to the next year.

[Ref:- RBE 19/2019 dated 05.02.2019 & RBE No.21/2019 dated 07.02.2019]

- I.V.V.R.P.Prasad, LO/HQ.

Employees of Co-Operative societies are not Railway Employees: CAT

The applicant, claiming that 50% of the service rendered by him from 01.04.1987 to 12.10.2006 [19 years 6 months of CL service], should be counted for the purpose of computing qualifying service, filed the OA before Hon'ble CAT, Hyderabad. The applicant was engaged as casual labour from 01.04.1987 in the South Central Railway Employees Mutually Aided Consumers Cooperative Stores Ltd, Guntakal ("Cooperative Stores"). Railway Board vide letter No.E(NG)II/99/RR-1/15(Vol.iv) dated 10.02.2006 decided to absorb workers of quasi administrative offices on certain conditions being fulfilled. The applicant was accordingly absorbed as Khalasi and he joined the said post on 12.10.2006.

The Railway rejected the claim of the applicant on the ground that he was engaged by the Cooperative Stores Ltd and not by the Railways and counting of 50% of his casual service does not arise. The tribunal considered the issue and held that Rule 25 of Pension Rules for qualifying service wherein it is clearly stated that the employees of quasi railway bodies are entitled for the benefit of being absorbed or appointed in Indian Railways. However, mutually Aided Cooperative Society Stores Ltd has not been termed as a quasi-railway body.

The Tribunal further held that the issue of pass or medical facilities are generally extended to employees working in allied institutions of the Railways as a gesture of welfare. There is no rule which says that if somebody were to be extended a railway pass or granted medical benefit, then it would mean that he shall be considered as a Railway employee. Railway passes are granted to freedom fighters, persons excelling in sports, etc. It does not mean that they are to be considered as railway employees. Neither the employees of the Society were appointed by the respondents nor was the Society funded by the respondents. As the said Society was neither funded nor does it come under the direct administrative control of the respondents, the applicant cannot claim to be a railway employee.

In this regard, reliance was placed on the Hon'ble Supreme Court's order in Union of India (Railway Board) & Others Vs. J.V. Subbaiah & Others, [1996 (2) SCC 258, para 22]: "*..We, therefore, have no hesitation to hold that the officers, employees and servants appointed by the Railway Cooperative Stores/ Societies cannot be treated on a par with Railway Servants under paragraph 10-B of the Railway Establishment Code nor can they be given parity of status, promotions, scales of pay, increments etc. as ordered by the CAT, Hyderabad Bench.*" Following the above ratio, the CAT held in the present OA that the applicant cannot come under the ambit of Railway employee while working in the Cooperative Stores. [M H C Mahaboob Vs. Union of India, OA No. 20/526/2017, DoJ: 04.01.2019, CAT/HYB]

- N.Murali Krishna, Sr. LO/HQ.

Difference between: Document, Instrument & Deed

Document: Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by the more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Section 31(18) of General Clauses Act,1894 deals with Document.

Instrument: The word Instrument has been interpreted in different judgments by different courts with reference to the different enactments. As such, the meaning of instrument has to be understood with reference to the Provision of particular Act. For example, under Section 2 (b) of Notaries Act, 1952 and Section 2(14) of the Indian Stamp Act, 1899, the word 'Instrument' includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

Deed: A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title, or interest. Deeds are in writing, signed, sealed and delivered. It is a solemn document. The term deed is normally used to describe all the instruments by which two or more persons agree to affect any right or liability such as Gift Deed, Sale Deed, Deed of Partition, Partnership Deed, Lease Deed, Mortgage Deed etc.

- K. Gopinath, CLA/GM/O/SCR.

KNOW OUR CONSTITUTION

Art.15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.— Citizens shall not be discriminated on grounds of religion, race, caste, sex or place of birth or subject them to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

State is empowered to make special provisions for women, children, socially and educationally backward citizens or SCs/STs, including admission to private (excepting minority educational institutions) or other educational institutions , whether aided or not. Art.15 has been amended to add a new clause(6) to facilitate admission of Economically Weaker Sections (EWS) of citizens for admission into educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions subject to maximum of 10% of the total seats in each category.

YOURS LEGALLY

Dealing with file missing cases:

The issue of missing files resulting in non-supply of information under RTI Act has been dealt with by the Hon'ble CIC in various orders. Hon'ble CIC while dealing with a RTIA 2nd appeal hearing in Sh. Om Prakash Vs. Land & Building Dept, GNCTD [File No.CIC/DS/A/2013/001788-SA] held on 29.08.2014 that the excuse of "missing file" is not acceptable and observed:

"4. .....The defense of missing file cannot be accepted even under the RTI Act. If the file is really not traceable, it reflects the inefficient and pathetic management of files by the Public Authority. If the file could not be traced in spite of best efforts, it is the duty of the respondent Authority to reconstruct the file or develop a mechanism to address the issue raised by the appellant.

5. The Commission feels that lodging of FIR is not the remedy in such cases, as one cannot expect the Police to come to the office and trace the file. According to law, Police does not have any responsibility to trace missing files, as they will come into picture only when there is theft of the files. It cannot be said that police should come to office and search for the files or things misplaced by negligence or deliberate action or by mistake etc. It is the duty of the PIO to make necessary efforts to trace the file and inform the same to the appellant in the form of an affidavit.

13. Based on the above discussion, the Commission thus holds: Unless proved that record was destroyed as per the prescribed rules of destruction / retention policy, it is deemed that record continues to be held by public authority. Claim of file missing or not traceable has no legality as it was not recognized as exception by RTI Act. By practice 'missing file' cannot be read into as exception in addition to exceptions prescribed by RTI Act. It amounts to breach of Public Records Act, 1993 and punishable with imprisonment up to a term of five years or with fine or both. Public Authority has a duty to initiate action for this kind of loss of public record, in the form of 'not traceable' or 'missing'. The Public Authority also has a duty to designate an officer as Records Officer and protect the records. A thorough search for the file, inquiry to find out public servant responsible, disciplinary action and action under Public Records Act, reconstruction of alternative file, relief to the person affected by the loss of file are the basic actions the Public Authority is legitimately expected to perform.

14. The Commission, therefore, deems Public Authority as continuously holding the information, until and unless they prove that the information was destroyed in accordance with the existing rules provided for the same. Any claim of defense that the file is missing without any efforts to trace the same, would amount to denial of information which can be dealt with as per Section 20 of Right to Information Act, 2005".

In Shahzad Singh Vs. PIO, Department of Posts [CIC/POSTS/A/2016/299355] Hon'ble CIC had reiterated its serious concern and reiterated that claim of 'missing file' and 'not traceable' cannot be accepted.

Action to be taken:-

1) Records should not be weeded out / destroyed prematurely in contravention to the Record Retention Schedule notified by DAR & PG and circulated vide SCR Lr. No.SCR/P/HQ/Ruling/O/945 & No.P(R)226 dated 28.10.2011.

2) Maintain proper record for destruction / weeding out of files. This may be produced in the event the information sought for has already been destroyed/ weeded out in consonance with Record Retention Schedule.

3) It is desirable to nominate a "Records Officer since it is a requirement under Public Records Act, 1993, to deal with all issues related to records.

4) In the event it is noticed that a record is lost / not traceable, immediate action to be initiated to reconstruct alternative file, based on related files.

5) Grant relief, wherever possible, to the person affected by the loss of file. This will alleviate the suffering of the person affected by the loss of file and thus help minimize / avoid action u/s 20 of RTI Act.

6) It will help to reduce the intensity of adverse action such as imposition of penalty, recommendation for action under disciplinary proceedings etc., if responsibility is fixed and take action taken against the concerned for loss of file.

- Shaji.M.K, CLA/GM/O/SCR.

JOKES

#[Court] Lawyer: Did you kill him?
Accused: No.
Lawyer: Do you know what is the punishment for perjury?
Accused: Much lesser than murder.

What do lawyers wear to Court?
Lawsuit.

A doctor complained to a lawyer that his friends asked for free medical advices and sought lawyer's advice. Lawyer advised the doctor to leave a bill in the friends' mailbox. Doctor thanked lawyer and went home. At home he found lawyer's bill in his mailbox.

TREATISE ON

Arbitration and Conciliation Act, 1996

Contd.. from last issue

Prohibition on judicial intervention:

Superiority of Arbitration and Conciliation Act, 1996 over regular adversary litigation lies in the Statute itself. S.5 of the Act prohibits judicial intervention. It stipulates that no judicial authority shall intervene except where so provided. However, this does not preclude the authority of Constitution Courts to exercise their Writ Jurisdiction over the matters. Further, once it is proved that *prima facie* there is a valid arbitration agreement between the parties for resolution of the disputes as to the matter in the agreement, Section 8 stipulates that the judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement shall, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration. However, such reference to arbitration shall be made if the other party has not submitted first statement on the substance of the dispute.

What could be first statement on the substance of the dispute?

The Supreme Court had occasions to examine what is first statement on the substance of the dispute. In Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., [(2006) 7 SCC 275], interpreting the expression the Supreme Court has held that "the expression 'first statement on the substance of the dispute' contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression "written statement". It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable."

In Greaves Cotton Ltd. v. United Machinery & Appliances (DOJ: 14-12-2016), the Supreme Court held that filing of an application for extension of time to file written statement before a judicial authority constitutes -"submitting first statement on the substance of the dispute" or not.

Thus, not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute', if by filing such statement /application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/ appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him." [Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., [(2011) 5 SCC 532].

What is an Arbitration Agreement?:

S.7 describes an arbitration agreement as an agreement between the parties to submit to arbitration all or certain disputes which have arisen or may arise w.r.t a contractual or other legal relationship. An arbitration agreement, including an arbitration clause in an agreement, is a contract, and hence the essentials of contract viz., legal competence, consent, lawful object, ability to carry out etc. should be fulfilled. A dispute not arising from the legal relationship is beyond the scope of arbitration.

An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. However, it shall be in writing. An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Thus, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. In Unissi (India) Pvt. Ltd Vs. Post Graduate Institute of Medical Education and Research, (01.10.2008) the Supreme Court held that although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause.

The Supreme Court in M/S Caravel Shipping Services Pvt. Ltd. v. M/S Premier Sea Foods Exim Pvt. Ltd., D.O.J: 29.10.2018, taking reference to its decision in the case of *Jugal Kishore Rameshwardas vs. Mrs. Goolbai Hormusji* [AIR 1955 SC 812], wherein it was held that an arbitration agreement needs to be in writing though it need not be signed, clarified that the expression "arbitration agreement shall be in writing" does not mean that in all cases an arbitration agreement needs to be signed. The only pre- requisite is that it shall be in writing, as has been pointed out in S.7(3).

.....(Contd. in next issue)

–N.Murali Krishna, Sr. LO/HQ.