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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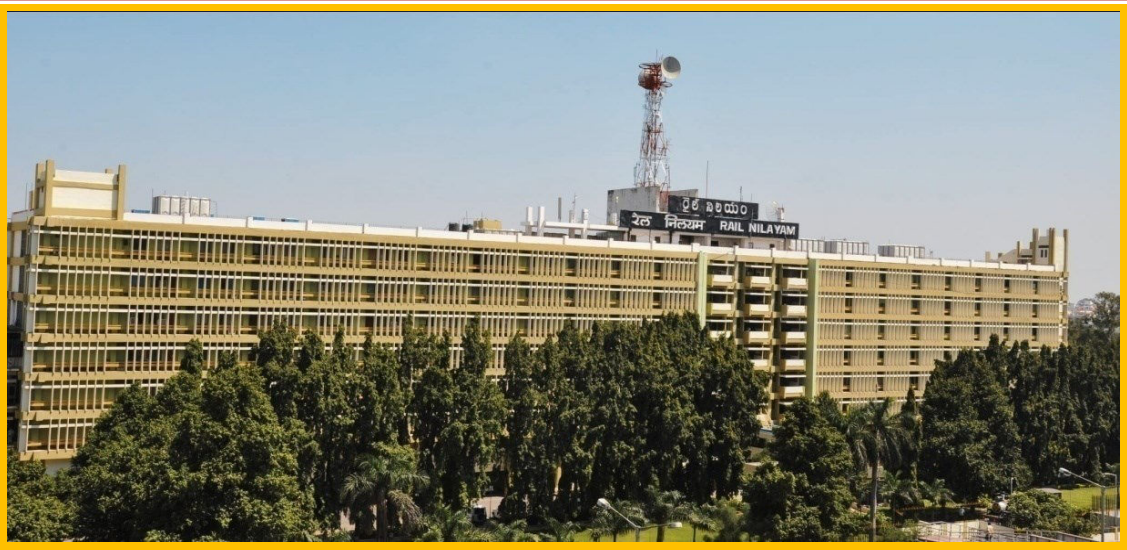

EDITORIAL

A nagging issue as to since when interest is to be paid and how to pay compensation when it is enhanced, has finally been decided by Hon'ble Supreme Court in Radha Yadav Case and an interesting case on arbitration as to power of arbitrator to recall his order are reported in this issue. Gist of judgement of High Court of HP on the maintainability of a review petition is an interesting addition to this issue. Hope these articles help you in enhancing your legal acumen.

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.

Courts cannot compel arbitration unless party demands

Madras High Court in the case of Convinio Shopping Nine 2 Nine v. Olympia Opaline Owners Assn., held that Section 8 of the Arbitration Conciliation Act, 1996 clearly indicates that the role of judicial authority to refer parties to arbitration arises only upon an application being made by a party to the arbitration agreement. The issue before the court was that "Whether the Civil Court can suo motu return/reject a Plaint without numbering the suit on the ground that there exists an Agreement to refer the disputes to arbitration?"

In the present case, there existed a Lease Agreement between the parties. As per Clause 19 of the Agreement, all disputes arising between the parties were to be resolved under the A&C Act. Subsequently, a dispute arose between the parties. The petitioner filed a suit before the District Munsif who returned the suit at the very threshold, observing on the basis of Clause 19 that "this Court does not have jurisdiction to entertain this suit. Hence, this plaint is returned." Aggrieved thereby, the petitioner approached the High Court.

The High Court referred to Section 9 CPC (courts to try all suits unless barred) and observed Civil Court have to try all suits of civil nature except those suits which have been specifically barred under provisions of some Acts or impliedly barred. Therefore, the Court perused Section 8 of the A&C Act (power to refer parties to arbitration where there is an arbitration agreement).

Relying on the decision in P. Anand Gajapathi Raju v. P.V.G. Raju, 2000 (4) SCC 539 and Ameet Lalchand Shah v. Rishabh Enterprises, 2018 SCC OnLine SC 487, the Court observed, "a reading of Section 8 would clearly indicate that the role of the Judicial authority to refer parties to arbitration will arise only upon an application being made by a party to the arbitration agreement or a person claiming under or through him. This window is given only to enable the defendant who is not desirous of having the dispute settled by arbitration to waive his right for having the dispute referred to arbitration. Therefore, from a reading of the above, it is very clear that a Judicial authority cannot suo moto return/reject a suit on the ground that the parties to the suit have agreed to refer all their disputes to arbitration at the threshold when the case is filed."

It was also observed that under the A&C Act, there is no total ouster of jurisdiction of Civil Courts unlike in cases arising under the SARFAESI Act, Motor Vehicles Act, etc. Resultantly, the petition was disposed of by directing the District Munsif to number the suit forthwith on the petitioner resubmitting the returned papers along with the copy of order dated 04-03-2019.

[Convinio Shopping Nine 2 Nine Vs. Olympia Opaline Owners Assn. 2019 SCC On Line Mad 646, Order dated 04-03-2019]

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

Clarification on interest in Untoward Incidents

The Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 provide for a Schedule prescribing the amount of compensation payable in respect of death and injuries. The compensation is enhanced from time to time by way of amendment.

In the case of Union of India v. Rina Devi [2018 AIR 2362] the Supreme Court, inter alia, considered whether the quantum of compensation should be as per the prescribed rate of compensation as on the date of application/incident or on the date of order awarding compensation. The Court ruled that the liability will accrue on the date of the accident and the amount applicable as on that date will be the amount recoverable but the claimant will get interest from the date of accident till the payment at such rate as may be considered just and fair and if the revised amount of compensation as on the date of award of the Tribunal is less than the prescribed amount of compensation as on the date of accident with interest, higher of the two amounts ought to be awarded on the principle of beneficial legislation.

In this case, accident occurred on 02.10.2003 and RCT dismissed the OA on 27.09.2007 holding that the death was due to own act of the deceased. The High Court, on 03.03.2017, allowed appeal filed by the dependants holding that in terms of S.124-A of the Railways Act, 1989 the *'Principle of Strict Liability'* would arise as such the Tribunal erred in denying compensation and that the respondent is entitled to compensation of Rs.8 lakhs with interest @ 9% pa, since during the pendency of the matter, amount of compensation was raised to Rs.8 lakhs from Rs.4 lakhs (in case of death). Railways contended that grant of interest on the sum of Rs.8,00,000/- was not consistent with the law laid down by the Supreme Court in the case of Rina Devi**.**

Clarifying the issue, the Supreme Court held that the amount of compensation payable on the date of accident with reasonable rate of interest shall first be calculated. If it is less than the amount prescribed as on the date of the award, the claimant would be entitled to higher of these two amounts. Therefore, if the liability had arisen before the amendment was brought in, the basic figure would be as per the Schedule as was in existence before the amendment and on such basic figure reasonable rate of interest would be calculated. For instance, in case of a death in an accident which occurred before amendment, the basic figure would be Rs.4 lakhs. If, after applying reasonable rate of interest, the final figure were to be less than Rs.8 lakhs, which was brought in by way of amendment, the claimant would be entitled to Rs.8 lakhs. If original compensation plus interest exceeds Rs.8 lakhs, such sum shall be paid. This ensures the benefit of amendment.

[UOI Vs. Radha Yadav CA Nos.1265-66 of 2019]

M.V. Ramana, LO/HQ

ABC OF ACTS

INDIAN PARTNERSHIP ACT, 1932

Partnership is one form of a business entity and as the business expands, from a sole proprietary concern, one needs more capital and larger number of people to manage the business and share its risks. In such a situation, people usually adopt the partnership form of organisation.

Nature of Partnership: Section 4 of the Act defines partnership as the 'relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all'**.** Persons who have entered into partnership with one another are individually called 'partners' and collectively called 'firm'. The name under which the business is carried is called the 'firm's name'. A partnership firm has no separate legal entity, apart from the partners constituting it.

A partnership is not created by status but by a contract between the partners. Hence, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying business as such, are not partners in such business. [Section 5]. Partnership comes into existence as a result of agreement among the partners. The agreement can be either oral or written. The Partnership Act does not require that the agreement must be in writing. But wherever it is in writing, the document, which contains terms of the agreement is called 'Partnership Deed'. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is called as "partnership at will". [Section 7].

Section 8 deals with particular partnership, which states that a person may become a partner with another person in particular adventures or undertakings.

Mutual Rights and duties of the partners of a firm is determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing. (S.11)

The property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. [S.14] If a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm and if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business. [S.16]

Any act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. [S.19] In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. [S.22]. Further, every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. [S.25] Also for the wrongful acts or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner. [S.26]

Introduction of a new partner: No person shall be introduced as a partner into a firm without the consent of all the existing partners. [S.31] Further, a partner may retire either (a) with the consent of all the other partners, or (b) in accordance with an express agreement by the partners, or (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire. [**S.32].**

Dissolution of a firm: A partnership firm may be dissolved i) by agreement between the parties, ii) Compulsory dissolution because of the adjudication that all the partners or of all the partners but one as insolvent, or by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. (Ss 39-41). Further, a firm may also be dissolved by a court at the filing of a suit by a Court. (S.44)

Registration of a firm: Registration of a partnership firm is not mandatory. However, if so advised, partners of a firm may register it with Registrar of the firms under Section 59 of the Act.

A. Bhagwat Prasad, CLA/G/SC Divn.

FUNNY LAWYER QUOTES:

Whoever tells the best story wins. - *John Quincy Adams*
A Lawyer will do anything to win a case, sometimes he will even tell the truth. - *Patrick Murray*
Ignorance of the law excuses no man - from practicing it. - *Adison Mizner*
In almost every case, you have to read between the lies. - *Angie Papadakis*
A man is innocent until proven broke. - *Anonymous*
A lawyer is a gentleman who rescues your estate from your enemies and keeps it for himself. - *Lord Brougham*

Approving authority does not become Appointing Authority

In many a cases GM approves the CG appointment due to guidelines on the issue. In some CGA cases and sports quota appointments the Railway Board approves the appointment. Whether the authority who approved appointment to service has to be treated as Appointing Authority for the purpose of imposition of penalty of dismissal from service, removal from service or reduction in rank?

The Hon'ble Apex Court held that it is not so in Smt. Kanta Devi Vs. Union of India & Anr. [CA No. 2313 of 2003]. The deceased employee was appointed Naik and subsequently promoted as Subedar with the approval of IG as required under Rules. He was dismissed from service by DIG as a consequence of a disciplinary proceeding. Appellate Authority also confirmed the penalty.

Matter was taken through a writ petition to the Delhi High Court, and a learned Single Judge quashed the order of removal and directed re-instatement with consequential benefits. The sole ground on which interference was made by learned Single Judge was that the scheme of the Rules is such that either in the case of appointment or promotion, prior approval of the Inspector General of Police (in short 'the IG') is imperative. As a natural corollary any termination without approval of the IG, as in the present case, would be bad in law. It was, therefore, held that the order of dismissal passed by the DIG was non est. On Letters Patent Appeal the High Court reversed the order and held the order of dismissal as valid.

A bare reading of the provisions show that while for the purpose of appointment, the approval of the DIG or the IG, as the case may be, is required to be obtained, that does not make the IG, the appointing authority. The punishments shown as items 1 to 11 in column 2 of the table can be imposed on non-gazetted officers and men of various ranks by the authorities named under headings at columns 3 to 6 in terms of the conditions mentioned in column 7. So far as item No.1 in Rule 27 is concerned, Subedar (Inspector) can be dismissed or removed from the Force by the Deputy Inspector General of Police, who is higher in rank than the Commandant. While considering an almost identical provision, the Supreme Court held that even when prior recommendation is necessary, it does not make the recommending/approving authority the appointing authority. (See State of Assam v. Kripanath Sarma and Ors. AIR 1967 SC 459).

According to Rule 7(b), the appointing authority is the Commandant and since the DIG is of higher rank, there is no illegality in the order passed by him in passing the order of dismissal. Just because the IG's approval is required for the purpose of appointment or promotion, the position of the Commandant as the appointing authority is not changed and the IG does not become the appointing authority. Hence, the Supreme Court upheld the order of the Division Bench of the High Court.

- G. Ratna Kumar, CLA/P/BZA

Arbitrator is empowered to recall termination order

Section 25 (a) of the A&C Act, 1996 lays down that if the claimant fails to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings. S.32 (2) deals with different eventualities, under which arbitrator can terminate the arbitral proceedings. A question has arisen whether the arbitral tribunal is empowered to recall its order of termination of arbitral proceedings.

In view of disputes between parties, the parties agreed on an arbitrator to resolve the disputes. The first sitting was attended by both the parties and the claimant was directed to file statement of claim by next date. On next date the claimant was absent and despite further date was given to file the statement of claim, since neither claim statement was filed nor claimant presented, arbitral proceedings were terminated on 12.12.2011 U/S 25 (a).

Subsequently, the claimant filed an application requesting the arbitrator to recall the termination order duly seeking delay condonation stating in detail the reasons for non-filing of the statement of the claim and for non-appearance of the claimant. The application filed by the claimant was objected by the appellant, on the ground that arbitral tribunal has become functus officio. The arbitrator by an order dated 26.04.2012 held that he cannot re-commence the arbitration proceedings, and rejected the application of the claimant.

Aggrieved, the claimant approached the Calcutta High Court which held that arbitral tribunal enjoys the power to recall its own order. The Calcutta High Court remitted the matter back to the arbitrator to decide on the claimant's application dated 20.01.2012.

The appellant, approached the Supreme Court. Since none appeared for the claimant-respondent, the Apex Court appointed amicus curiae. It was held that the Scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be filed even after the prescribed time u/s Section 23(1). Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the arbitrator and there is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown.

The Apex Court further concluded: "When the legislature used the phrase "the mandate of the arbitral tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object when the claimant shows sufficient cause, the proceedings can be re-commenced."

While endorsing the views expressed by the Patna, Delhi and Madras High Courts in various cases, the Supreme Court directed the arbitrator to consider the application of claimant expeditiously. Accordingly, the appeal was dismissed. [Srei Infrastructure Finance Ltd. Vs. Tuff Drilling Pvt. Ltd. [CA No. 15036 of 2017]

- K.Phani Raj, ACM/M&D/HQ

FAQs — Suspension & Deemed Suspension under D&A Rules, 1968

Suspension (in Standard Form - 1):

Suspension is not a penalty. An employee may be placed under suspension - (i) when Disciplinary proceedings are pending against him or (ii) when he has engaged in activities prejudicial to the interest of the security of the state or (iii) when a criminal case is pending which is under investigation , inquiry or trial.

Deemed suspension (in Standard Form - 2):

An employee has been deemed to have been placed under suspension - (i) if he remains in police custody exceeding 48 hours; (ii) if he is convicted for an offence and sentenced to imprisonment for a period exceeding 48 hours and is not forthwith dismissed, removed or compulsorily retired; (iii) when a penalty of dismissal, removal or compulsory retirement is imposed on an employee under suspension is set aside on appeal or revision and the case is remitted for further inquiry or action the order of his suspension shall be deemed to have continued in force from the date of original order of dismissal, removal or compulsory retirement; (iv) when a penalty of dismissal, removal or compulsory retirement is imposed on an employee under suspension is set aside by a Court of law and the Disciplinary authority decides to hold further inquiry in the same case, the employee shall be deemed to have been placed under suspension from the date of original order of dismissal, removal or compulsory retirement.

In cases of deemed suspension, the competent authority issues a formal order of suspension in SF-2 as soon as the facts come to his notice. This order is effective from the earlier date of deemed suspension.

Authorities competent to place a railway servant under suspension: An employee may be placed under suspension by (a) Appointing authority, or (b) Any higher authority to which appointing authority is subordinate, or (c) Disciplinary authority & (d) Any authority who has been empowered to place the employee under suspension. Group A & B officers may be suspended by Railway Board, GM/AGM, DG/RDSO, DG/RSC, CAO and Gr. C and D employees by Junior Scale and Group B officers. Sr. Supervisors may suspend Group D staff. PHOD may suspend Group B officers and Group A Jr Scale.

Review of suspension: If not revoked within 90 days, the suspension stands automatically revoked on expiry of 90 days. Competent authority may extend suspension based on the recommendations of Review Committee, prior to the expiry of 90 days. For those in custody, the 90 days limit counts from the date of release from detention or the date on which the employee intimates about such release, whichever is later. Suspension is revoked through SF-4.

Subsistence Allowance:

Granted to employees under suspension (on submission of SF-3) equal to leave salary on half average pay and allowances admissible on such pay. Deductions of PF, Court attachment and fines cannot be recovered.

House Rent, water charges, diet charges, electric charges, re-payment of advances, station debits, Income tax and doctor's fee under contract system will be recovered. Recoveries other than the above, such as co-operative society dues, institute fee, LIC Premia, school fee and refund of Staff Benefit Fund and PF loans may be made on written request of employee.

Regularisation of suspension period:

Regularised only after disciplinary proceedings are finalised. In case the employee is fully exonerated in a court case or awarded a minor penalty in a disciplinary case, the said period may be regularised by a competent authority as period spent on duty on the basis that the suspension was wholly unjustified.

Effects of suspension:

Service conditions remain unaffected.

Headquarters-

The place of duty continues to be his headquarters. The request for change of headquarters may be granted if there are no extra expenditure or other complications.

Promotion-

An employee under suspension cannot be promoted. However he will be called for selection (written test and viva). His result will be kept in a sealed cover and a provisional panel will be published. He will be considered for promotion after finalisation of Disciplinary proceedings [RBE 13/1993 & 16/1993]. Forwarding of Application, Deputation, Assignment, Foreign service, leave etc. not allowed. Resignation will not be accepted normally. But if it is considered cheaper to accept or if acceptance is in public interest it may be accepted. VR is not freely acceptable, subject to approval of Appointing authority. TA may be allowed if inquiry is held at an outstation.

- Syed Amjad Ali, OS/Law Branch/HQ.

LEGAL MAXIMS

In extenso - At full length.
In personam - Against the person.
In situ - In its place.
In terrorem - As a warning or deterrent.
Interest reipublicase ut sit finis litium - It is in the interest of the State that there be an end to litigation.

Courts cannot pre-empt an authority's judicial / quasi-judicial powers

In a WP filed against order of Commissioner of Excise, Bombay High Court passed the following order. "Since an apprehension is expressed and a serious one by the petitioners, we direct that in the event the fourth respondent passes any orders adverse to the petitioners, then such orders shall not take effect for a period of four weeks from the date they are communicated to the petitioners……."

On appeal filed by the Commissioner of Excise, the Supreme Court held that "In our considered view, the High Court ought not to have issued directions of this nature. It was legally not permissible to do so. Indeed, the High Court by issuing such directions which are essentially passed in anticipation of the order being passed by an appellate authority, interfered with the judicial independence of an appellate authority in deciding the appeals in accordance with law.

It is the sole discretion of the appellate authority under the Act to decide the appeal based on the facts and legal provisions which eventually result in passing a judicial order. No higher court can pass such directions merely on anticipation of an order being passed by an appellate authority. It is only after the order is passed, that the aggrieved person has a legal right to take recourse to a legal remedy available in law against such order by approaching to a higher forum and pray for grant of appropriate relief against such order.

This stage in this case is yet to arrive. The High Court should not have, therefore, pre-empted the passing of any order of the appellate authority, while deciding the WP. It is a settled law that the Court can stay or quash only those orders, which are impugned in the lis before it. A fortiori, the Court cannot stay or/and quash the orders in anticipation, before they are passed. We cannot, therefore, uphold such writ/directions issued by the High Court."

The SC has further expunged all adverse and disparaging remarks passed by the High Court against the State Excise Commissioner.

[Manish S. Pardasani v. State Excise, (2019)2 SCC 660]

- V. Appa Rao, CLA/GM/O.

KNOW OUR CONSTITUTION

Art.16. Equality of opportunity in matters of public employment: **(1)** In matters relating to employment or appointment to any office under the State; **(2)** No discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence in respect of any employment; **(3)** Law stipulating any requirement as to residence within that State or Union territory prior to such employment or appointment is permitted; **(4)** State empowered to make provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State & **(5)** Operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination shall not be affected.

Difference between: Libel & Slander

Both libel and slander are forms of defamation of character (S.499 IPC), differing only in the way the person making the damaging remarks goes about it. While libel refers to making false and malicious statements in print, or publishing or posting damaging pictures, slander refers to the making of damaging remarks verbally. Because libel and slander are different forms of the same wrong, which is defamation, the laws and remedies are pretty much the same.

One primary difference between the two as far as the law is concerned, is the ability to prove that the defamation actually occurred. Libel can easily be proven, as it involves written remarks, or published pictures. Slander requires proof beyond he-said/she-said in court. Proving slander would require bringing witnesses, usually the people to whom the damaging statements were made. In some states, recordings of the accused person making the defamatory statements to others may be allowed in court, depending on the circumstances of how the recording was obtained.

Example of libel & slander:

A tells her co-workers that B, another co-worker, got drunk at a corporate meeting out of town, and was asked to leave. The statements made their way back to the company president, who fired B for unprofessional behavior. B claims the statements were not true, and files a civil law suit against A for defamation of character, which caused him to lose his job.

In court, A denies making any untrue statements to anyone, and B is unable to find even a single person who is willing to testify to A telling them anything about B or his behavior. Lacking proof that A slandered him, B cannot win his case.

If, on the other hand, A had sent out an email with her claims, and had B been able to obtain even one copy of that email, A might be on the hook for libel. The same would be the case had she published the statements on Twitter or Facebook. This assumes, however, that B can prove the statements were actually false.

Proving Libel

Proving libel requires the victim to show the court that certain elements, such as the following, took place:

Defendant made a false, defamatory statement about the plaintiff. Defendant published or shared the statement with a third party. Defendant made the statement with the intent to cause harm, or negligently, giving no care to the harm that was likely to be caused. In some situations, the plaintiff must prove that the defendant's statement resulted in "special damages".

- K.Gopinath, CLA/GM/O

YOURS LEGALLY

Scope of filing of an application for review of a Decree/Order/judgement of a court

Filing of an application for review of a Decree/ Order/judgement of a court is provided under Section 114 and Order 47, Rule 1 of CPC, 1908. Section 114 of CPC, 1908 states that any person considering himself aggrieved:

1) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
2) by a decree or order from which no appeal is allowed by the Court, or
3) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

Order 47, Rule 1 of CPC,1908 reiterates the same. It further provides the grounds on which such an application can be filed. They are:

1) the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
2) on account of some mistake or error apparent on the face of the record: or
3) for any other sufficient reason.

Further, Article 124 of Limitation Act, 1963 provides that a for a review of judgment by a court other than the Supreme Court, time limit is 30 days from the date of the decree/order.

Though there are only three grounds on which a review can be filed, the characteristics of these grounds as dealt by the SC are given below ground by ground:

1. **Discovery of new matter or evidence:**

- New matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment.
- Such additional matter or evidence was not within the knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

2. **Error apparent on the face of record – What could be:**

- Signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position.
- Review on the ground that a different view could have been taken by the court/tribunal on a point of fact or law is not permissible.

3. **Any other sufficient reasons:**

- A reason sufficient on grounds, at least analogous to those specified in the rule.

Culling out from various High Court and Supreme Court judgements, the parameters with regard to the maintainability/non-maintainability of review petition was considered by High Court of Himachal Pradesh in Yashpal Singh and others Vs. State of Himachal Pradesh and another, [RP No. 2/2016, decided on 24.8.2016] and laid down certain broad principles, as under:

When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;
(ii) Mistake or error apparent on the face of the record;
(iii) Any other sufficient reason.

When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
(ii) Minor mistakes of inconsequential import.
(iii)Review proceedings cannot be equated with the original hearing of the case.
(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.
(vi) The mere possibility of two views on the subject cannot be a ground for review.
(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.
(viii)The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.
(x) Review is not maintainable on the basis of a subsequent decision/judgment of a coordinate or larger Bench of the Court or of a superior Court.
(xi) While considering an application for review, court must confine its adjudication with regard to the material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
(xii) Mere discovery of a new or important matter or evidence is not sufficient ground for review. The parties seeking review has also to show that such matter or evidence was not within its knowledge and even after exercise of due diligence, the same could not be produced before the Court earlier.

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

TREATISE ON

Arbitration and Conciliation Act, 1996

(Contd…..from last issue)

Appointment of arbitrators:

An important feature of the Arbitration and Conciliation Act, 1996 is the primacy given to the agreement entered into between the parties. Party autonomy is given prime importance as can be seen in many of the sections of the Act. Appointment of arbitrators also can be made by the parties as per the terms and conditions made in the agreement. However, there may be situations where no terms and conditions stipulated for such appointment, one party may not agree for appointment of arbitrator by the other party etc. Section 11 of the A&C Act, 1996 deals with almost all such situations.

Therefore, appointment of arbitrators can be made i) by the parties on their own and ii) in case of failure to appoint arbitrators by the parties, then by the Court. In terms of the A&C Act, 1996, an arbitrator has to be appointed within 30 days from the date of receipt of the request for appointment of arbitrator.

On the Railways, a system is in place to appoint arbitrator(s) in case of works contracts (GCC for works), supply contracts (IRS Conditions of Contract) and service contracts (GCC for services). In addition to these contracts, in other contracts also, the Railway incorporates arbitration clauses for dispute resolution and appointment procedure. GCC for Works contract provides for a procedure for appointment of arbitrators under Cl.64. Accordingly, in the event of any dispute or difference between the parties as to i) the construction or operation of the contract, or ii) respective rights and liabilities of the parties on any matter in question, iii) dispute or difference on any account or iv) as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or v) if the Railway fails to make a decision within 120 days on the claims made to GM under Cl.63, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. Hence, the time limit for demand for appointment of arbitrator on the Railways is 60 days. Similar provision also available in Cl.2900 of IRS conditions.

However, after the amendment to the A&C Act, 1996 w.e.f 23.10.2015, in view of insertion of Section 12(5) which provides that any person whose relationship with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. However, parties may waive the applicability of this sub-section by an express agreement in writing. Accordingly, there are two types of appointment of arbitrators is provided on the Railways.

1. **Where parties have waived of application of S.12 (5) for appointment of arbitrators:** In such case, a sole arbitrator not below the rank of JA grade or an arbitral tribunal consisting of three Gazetted Railway Officers not below Junior Administrative Grade or 2 Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer**,** as the case may be, will be appointed, as the arbitrators.

2. **Where applicability of S.12 (5) not been waived off:**

(i) where total value of all claims added together does not exceed Rs. 50,00,000/- (Rupees Fifty Lakh) - Arbitral Tribunal shall consist of a Retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrator.

(ii) If total value of all claims added together exceed Rs.50,00,000/- (Rupees Fifty Lakh) - Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer**,** as the arbitrators.

Employee as arbitrator – Not always bias: As brought out supra, after the amendment to the A&C Act, 1996 w.e.f 23.10.2015, as per S.12(5), any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. However, subsequent to disputes having arisen between them parties may waive the applicability of this sub-section by an express agreement in writing. In Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 , the Supreme Court held that “The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.

Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

…..to be continued in next Issue

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