South Central Railway
Lex Info – e Magazine

Vol.II Issue-4 April, 2019

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

This issue contains informative topics such as entitlement of back wages after reinstatement, appointment of arbitrator by courts within the precincts of GCC 64, choice of employer for not filling up all posts even after empanelment, what do not constitute penalties under D&AR 1968 etc. In addition, regular features such as ABC of Acts, FAQs, Difference between, Legal Maxims, Know Our Constitution, Yours legally, Treatise on Arbitration etc. are incorporated. Charter of Commitments on Establishment matters has also been incorporated.

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.

ABC OF ACTS

Minimum Wages Act, 1948

(w.e.f. 15.03.1948)

This Act extends to whole of India and contains 31 Sections and 1 Schedule (of employments covered). The Act is intended to secure minimum wages, especially in unorganized sector. It applies to employments included in the Schedule to the Act only.

In Railways, this Act applies to:

a) Road & Building constructions / repairs;
b) Stone breaking & crushing;
c) Loading/ Unloading at Godowns, store houses etc.
d) CL employed on P.Way.

Minimum Wages are fixed by the Central Government. For this purpose there are five Zones viz., A, B-1, B-2, C & D. Review of classification of zones is to be done at least once in 5 years. At present the minimum wages in Telangana w.e.f 01.04.2019 varies from Rs.337.86 per day to Rs.421.98. In addition Variable Dearness Allowance (VDA) also to be paid. 26 Days should be taken as a month for the purpose of calculating wages at the daily rate.

Display of Notices: Minimum rate fixed, Abstract of Act, Rules made thereunder, Name & address of Inspector etc. shall be displayed in English, Hindi and regional language at the work place.

Claims & Complaints (S.20): Complaints to be made within 6 months to the Authority designated for this purpose. Normally Regional Labour Commissioner (Central) acts as the authority under the Minimum Wages Act. Delay, if any, in preferring complaint is condonable. Authority may order payment of difference of wages + compensation not exceeding 10 times the deficit amount. Other than claims related to minimum wages, compensation not exceeding Rs.10/- to be ordered to be paid, even if payment is made during the pendency of Claim.

Single application in respect of a number of employees (S.21): A single application on behalf of a number of employees is permitted.

Penalties: Offences in respect of minimum wages, normal working hours, weekly holidays & payment for work done on rest days @ OTA rates – Imprisonment upto 6 months or fine upto Rs.500 or both [S.22]. Offences related to breach of rules / provisions for which no penalty is laid down – Fine upto Rs.500 [S.22A].

Cognizance of offences (S.22B) – No court to take cognizance of a complaint U/S 22A, unless an application u/s.20 was partly or wholly allowed by the Authority and the appropriate Govt./Authority sanctioned filing of complaint. For complaint U/S 22 or 22A, the Inspector to apply or at least with his sanction, the compliant to be lodged. Complaint u/s.22 to be made within 1 month of grant of sanction and for complaint u/s.22A within 6 months of alleged commitment of offence.

Bar of Suits (S.24)– No Court shall entertain any suit for the recovery of wages insofar as the sum so claimed - (a) forms the subject of an application under section 20 which has been presented by or on behalf of the plaintiff, or (b) has formed the subject of a direction under that section in favour of the plaintiff, or (c) has been adjudged in any proceeding under that section not to be due to the plaintiff, or (d) could have been recovered by an application under that section.

Contracting Out (S.25)- Any contract or agreement, whether made before or after the commencement of this Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him under this Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act.

Central Advisory Board (S.8): To be appointed by the Central Govt., representing employees and employers in equal numbers. One third of total members to be independent and among the independent members, one shall be appointed Chairman.

Registers to be maintained: Register of wages, Muster Roll, Register of OTA, Register of damage or loss & Register of fines.

As per S.21 (1) of Contract Labour (Regulation & Abolition) Act, 1970, the contractor is liable to pay the workers wages within the wage period. In default, the Principal Employer is liable to pay the wages / deficit, if any, thereof which the Principal Employer may recover from the contractor [S.21 (4)]. As per S.12 (2) of Minimum Wages Act, 1948, the provisions of Payment of Wages Act, 1936 shall not be affected. Every direction by the Authority under the Minimum Wages Act, 1948 shall be final [S.20(6)]. Hence, there is no procedure for regular appeal before any court. However, the concerned High Court may, under its writ jurisdiction, entertain appeal against the direction of the Authority.

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

LEGAL UPDATE

The Supreme Court on 26.04.2019 has held that a contempt petition is maintainable not solely at the behest of a party to the judgment when the directions issued by the Supreme Court are general in nature and any violation of such directions would enable an aggrieved party to file a contempt petition. [Girish Mittal Vs. Parvati V Sundaram & Anr. CP (C) No.928/2016 in Transfer Case (C) No. 95/2015 & related CPs. DOJ - 26.04.2019]violation of such directions would enable an aggrieved party to file a contempt petition violation of such directions would enable an aggrieved party to file a contempt petition violation of such directions would enable aggrieved party to file a contempt petition.

Empanelling does not create any right for appointment:

While relying on its earlier order in Kulwinder Pal Singh Vs. State of Punjab, (2016) 6 SCC 532 which in turn based on Manoj Manu v. Union of India, (2013) 12 SCC 171, Hon'ble Supreme Court has set aside the order of the High Court and allowed the appeals, wherein it examined the question whether a person who got empanelled for a post has an indefeasible right for appointment.

The appellant Kerala State RTC aggrieved by the direction to make appointments against 97 vacancies on the post of Blacksmith Grade II approached the Hon'ble Supreme Court. The appellant made a requisition for 405 vacancies to the Kerala Public Service Commission , which forwarded a recommendation with regard to 351 vacancies initially, and later for another six posts followed by 23 more against non-joining vacancies.

Respondent Nos. 1 and 2, were empanelled at S Nos. 284&294 respectively in the rank list. Appointments were made till rank No. 278 only. The rank list had expired on 21.10.2017. The respondents filed WPfor not making appointment for the remaining candidates. The High Court opined that the appellant was obliged to make appointments against the vacancies including those that might have arisen subsequently, but during the life of the rank list. The question before the Apex Court in these appeals was whether mere empanelment can justify a mandamus to make appointments because vacancies existed. Additionally, whether mandamus can be issued to make appointments from the panel on vacancies which may have arisen due to superannuation etc. during the life of the rank list. The question assumed significance in view of the stand of the appellant that it did not wish to make any further appointments due to a financial crunch and a skewed bus to passenger ratio, and for which purpose it had also appointed a committee to recommend remedial measures.

The Apex Court held that vacancies which might have arisen subsequently could not be clubbed with the earlier requisition and necessarily had to be part of another selection process. It further observed that the law stands settled that mere existence of vacancies for empanelment does not create any right to appointment. The employer also has the discretion not to fill up all requisitioned vacancies, but which has to be for valid & germane reasons not afflicted by arbitrariness. Here, the appellant contended a financial crunch along with a skewed staff/bus ratio which were definitely valid and genuine grounds for not making further appointments. The Apex Court further held that the court cannot substitute its views over that of the appellant, much less issue a mandamus imposing obligations on the appellant corporation which it is unable to meet and allowed the appeal. [**Civil Appeal Nos. 3346-3348 of 2019. DOJ - 01.04.2019. KSRTC Vs. Akhilesh V.S & Ors**.]

- T.Satyavathy, LO/SC.

FAQs

What NOT amounts to Penalty under D&AR, 1968?

⇒ Withholding of increments of pay of a Railway Servant for failure to pass any departmental examination in accordance with the rules or orders governing the service to which he belongs or post which he holds or the terms of his appointment.

⇒ Stoppage of a Railway servant at the efficiency bar in the time scale of pay on the ground of his unfitness to cross the bar. (Now obsolete).

⇒ Non-promotion of a Railway servant, whether in a substantive or officiating capacity, after consideration of his case, to a Service, grade or post or promotion to which he is eligible.

⇒ Reversion of a Railway servant officiating in higher Service, grade or post to a lower Service, grade or post, on the ground that he is considered to be unsuitable for such higher Service, grade or post, or on any administrative ground unconnected with his conduct.

⇒ Reversion of a Railway servant, appointed on probation to any other Service, grade or post, to his permanent Service, grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing such probation.

⇒ Replacement of the services of a Railway servant, whose services had been borrowed from any other Ministry/ Department of the Central/State Government/Local authority at their disposal from which the services of such Railway servant had been borrowed.

⇒ Compulsory retirement of a Railway servant in accordance with the provisions relating to his superannuation or retirement.

⇒ Termination of the services of a Railway servant appointed on probation, during or at the end of the period of his probation in accordance with the terms/ rules/orders governing such probation, or of a temporary Railway servant in accordance with Rule 301 of IREC, Vol-I (Fifth Edition, 1985), or of a Railway servant employed under an agreement, in accordance with the terms of such agreement.

⇒ Discharge of Railway servants – for inefficiency due to failure to conform to the requisite standard of physical fitness on reduction of establishment.

KNOW OUR CONSTITUTION

Art. 17: Abolition of Untouchability: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Art.18: Abolition of titles: (1) No title, not being a military or academic distinction, shall be conferred by the State.
(2) No citizen of India shall accept any title from any foreign State.
(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Prosecution launched by the police for involvement of an employee in a criminal case vis-a-vis the criminal proceedings initiated at the behest of the employer – Entitlement of back wages :

Confusion prevails as to the entitlement of backwages and other consequential benefits, when an employee was dismissed for his conviction in a criminal case but later acquitted in the criminal case, in all situations whether prosecution launched by the police for involvement of an employee in a criminal case or the criminal proceedings were initiated at the behest of the employer. This is because of the language employed in Rule 1344 (FR-54A) of IREC, which states that where the dismissal, removal or compulsory retirement of a railway servant is set aside by a Court of law and such Government servant is reinstated without holding any further inquiry… and did not distinguish any difference between prosecution launched by the police for involvement of an employee in a criminal case and criminal proceedings initiated at the behest of the employer.

The Supreme Court considered a similar situation, along with another circumstance for back wages in the following case. Raj Narain (Appellant) was placed under suspension in 1979 while he was working as Sorting Assistant on the allegations of involvement in forged payments of high value money orders. An FIR was lodged against him and the case was registered under S.409/420 IPC.

Suspension was revoked in 1987 and the appellant joined duty and worked till 1997, when he was dismissed from service in view of his conviction under Section 409, 467 and 420 IPC as he was sentenced to imprisonment for three years. An appeal against his conviction was allowed and he was acquitted of the charges for offences under Section 409, 420 and 467 IPC. As his request for reinstatement after acquittal was refused in 2002, Appellant challenged said order before CAT. The Tribunal allowed the OA and directed reinstatement of the Appellant holding that he shall be entitled for seniority and notional fixation of pay with increments from the date of his acquittal till reinstatement without any back wages for the period during which he was not in service.

WP filed by the appellant for pay & allowances for the period of the suspension was partly allowed by the High Court holding that that the Appellant is entitled to full back wages from the date of the order of his acquittal till the date of his reinstatement. In appeal before the Supreme Court appellant contended that restricting payment of back wages only to the period between the date of his acquittal and the date of his reinstatement and sought payment from the date of dismissal.

Considering the ratio laid down in UOI & Ors. v. Jaipal Singh, [2004 (1) SCC 121] wherein the Apex Court held that subsequent acquittal would not entitle an employee to seek back wages, the Supreme Court held that the observation made in the said judgment has to be understood in a manner in which the department would become liable for back wages in the event of a finding that the initiation of the criminal proceedings was mala fide or with vexatious intent.

In all other cases, there is no difference between initiation of the criminal proceedings by the Dept. vis-a-vis a criminal case lodged by the police. For example, if an employee is involved in embezzlement of funds or is found indulging in demand and acceptance of illegal gratification, the employer cannot be mulcted with full back wages on the acquittal of the person by a criminal Court, unless it is found that the prosecution is malicious. Holding so, the Supreme Court held that the appellant is entitled for back wages only from the date of acquittal till the date of his reinstatement and also held that the Appellant shall be entitled to full salary from the date of suspension till its revocation. [**CA No. 3339 of 2019 Raj Narain Vs. UOI & Others, DOJ - 01.04. 2019.**

- E.Satya Narayana, CLA/Pers/NG/PCPO/O.

Inspection of answer scripts and copies thereof can either be obtained under RTI Act or under the concerned rules /guidelines of the establishment / organisation:

The Supreme Court on 11.04.2019 has held that when two avenues are available for accessing answer scripts, it is for the candidate to opt one among them. The Apex Court held:

"10. Thus it is clear that the avenue for seeking certified copies as well as inspection is provided both in the Right to Information Act as well as the statutory guidelines of the appellant.

11. We are cognizant of the fact that guidelines of the appellant, framed by its statutory council, are to govern the modalities of its day-to-day concerns and to effectuate smooth functioning of its responsibilities under the Company Secretaries Act, 1980. The guidelines of the appellant may provide for much more than what is provided under the Right to Information Act, such as re-evaluation, re-totalling of answer scripts.

12. Be that as it may, Guideline no.3 of the appellant does not take away from Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005 which also entitles the candidates to seek inspection and certified copies of their answer scripts. In our opinion, the existence of these two avenues is not mutually exclusive and it is up to the candidate to choose either of the routes. Thus, if a candidate seeks information under the provisions of the Right to Information, then payment has to be sought under the Rules therein, however, if the information is sought under the Guidelines of the appellant, then the appellant is at liberty to charge the candidates as per its guidelines. [**Institute of Company Secretaries of India Vs. Paras Jain. CA No.5665/2014. DOJ—11.04.2019**]

- S Nagendra , CLA/HYB

RBE No.157/2017 dated 25.10.2017: **CHARTER OF COMMITMENTS ON ESTABLISHMENT MATTERS**

S No	ITEM	TIME LINE	
1	Redressal/Disposal of staff grievances/representation received in different portals like single window Cell, CPGRAM, Nivaran	30 Working days from receipt of application	
2	Personal Interview with DRM	Same day (If DRM is not available, then interview will be with ADRM concerned)	
3	Compassionate Appointment	Cases Approved at Divisional level	90 days
		Cases requiring approval from HQ	60 days in Division + 30 Days in HQ
4	Payment of settlement dues	Superannuation : on date of retirement	
		VRS/Death/Resignation: 60 days (for non-disputed cases only)	
5	Promotion through Selections and Suitability	Within one year of issue of previous panel	
6	NOC for own request transfer including mutual transfer	Disposal of application within 15 working days of receipt (forwarding/Rejection)	
7	Sending call letters to candidates selected through RRB and RRC Including verification of panel from RRB/RRC	Within 30 working days of operation of panel.	
8	a)Approval of various types of advances / Loans b) Disbursal of advances/loans & arrears after approval	Administrative sanction within 7 working days. With salary in the next billing cycle (as applicable)	
9	P.F. Withdrawal	Administrative approval of competent authority within 7 working days of receipt of application Disbursal to be done within 7 days from the date of approval.	
10	Issue of PF Statement	Same day.	
11	Viewing Service Record	Once a year	
12	N.O.C. for Higher Education, Property transaction, Passport, Deputation	14 Working days from receipt of application where vigilance clearance is not required and 30 days in other cases.	
13	Disposal of D&AR cases	Major – 150 Days Minor - 31 Days	
14	Issue of Pass/PTO	1 Working day	
15	Sanction & Payment of CTG/OT/TA	Sanction within 45 working days from date of receipt of claim Disbursal to be done with salary in the next billing cycle	
16	Provision of Essential Amenities for staff	Provision of Ladies Toilet and Changing Room in offices where there are more than 5 female employees working	By March 2018
		Whitewashing of office buildings	Every year
		Filtered water for identified offices	Within 60 days of issue of charter
		Fans and Desert Coolers in identified offices	Within 60 days of issue of charter
		Provision of PC & Internet	Within 6 months of issue of charter
17	Disposal of Leave applications	a)Casual Leave 1 Working Day b)LAP/Maternity/Paternity Leave : 7 Working days c)Ex-India : 30 working days	
18	Issue of Seniority List	Once every year	

High Court cannot appoint independent arbitrator without resorting to procedure laid in GCC 64(3):

Supreme Court, while considering S.11(6)(c) has laid emphasis to act on the agreed terms and to first resort to the procedure as prescribed and open for the parties to the agreement to settle differences/disputes arising under the terms of the contract through appointment of a designated arbitrator although the name in the arbitration agreement is not mandatory or must but emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible. The corrective measures have to be taken first and the Court is the last resort.

Further, by appointing an arbitrator in terms of Section 11(8) of Act, 1996, due regard has to be given to the qualification required for the arbitrator by the agreement of the parties and also the other considerations such as to secure an independent and impartial arbitrator. To fulfil the object with terms and conditions which are cumulative in nature, it is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the contract is first exhausted.

The Supreme Court further held that the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.

In the present batch of appeals, where arbitration proceedings commenced prior to 23.10.2015, independence and impartiality of the arbitrator has never been doubted by the parties. Further, question of application of Section 12(5) (by which departmental arbitrators are prohibited, unless agreed to by the parties) is not applicable. Thus, in the given circumstances the High Court was not justified in resorting to an alternative arrangement by appointing independent arbitrator under Section 11(6) of the Act without resorting to the procedure for appointment of an arbitrator which has been prescribed under clause 64(3) of the GCC under the inbuilt mechanism as agreed by the parties.

The Apex Court further held that furnishing of "no claim certificate" in the instant case has not resulted in discharge of contract, since the contractors were under financial duress. The Supreme Court has relied on many earlier orders, the prominent being National Insurance Company Limited Vs. Boghara Polyfab Private Limited to drive this point.

[**UOI Vs. Parmar Construction Co., CA No. 3303/2019, DOJ - 29.03.2019**]

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

Differences between Partnership Firm & Company:

Partnership Firm:

When two or more persons agree to carry on a business and share the profits & losses mutually, it is known as a 'Partnership firm'. Partnership firm is created by mutual agreement between the partners. In Partnership Firm, registration of Firm with Registrar of Firms is not mandatory. To form a Partnership Firm, minimum number of persons required is two and maximum partners are 100. The Partnership Firm is managed by Partners themselves. In Partnership, the liability of partners is unlimited. For dissolution/winding up of Partnership Firms, legal formalities are not necessary, unless the firm is registered. It is governed by the Indian Partnership Act, 1932.

Company:

A company is an association of persons who invests money towards a common stock, for carrying on a business and shares the profits & losses of the business. The company is created by incorporation under the Companies Act. To form a Private Company, minimum number of persons required is two and maximum 200. In a Public company, the minimum number of persons is seven and can have unlimited number of members. In companies the liability is limited. A Company has a perpetual existence and is a juristic person. Hence, it can sue and be sued in its own name. In Companies the use of the word 'Limited' or 'Private Limited' is must. For dissolution/winding up of a Company, the legal formalities are necessary. It is governed by 'The Indian Companies Act, 2013'.

- K.Gopinath, CLA/GM/O.

LEGAL MAXIMS

Ipso facto - By that very fact.
Judex non potest esse testis in propira causa - A judge cannot be witness in his own cause.
Jus naturale - Natural justice.
Necessitas non habet legem - Necessity has no law.
Nemo debet esse judex in propria causa - No one can be judge in his own case.

FUNNY LAWYER QUOTES:

A lawyer was out hiking with a friend when they encountered a mountain lion. The lawyer dropped his pack and got ready to run. "You'll never outrun a hungry mountain lion!" exclaimed his friend. "I don't have to outrun him," replied the lawyer. "I just have to outrun you!"

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A woman was being questioned in a court trial involving slander. "Please repeat the slanderous statements you heard, exactly as you heard them," instructed the lawyer. The witness hesitated. "But they are unfit for any respectable person to hear," she protested. "Then," said the attorney, "just whisper them to the judge."

YOURS LEGALLY

Effect of death of an employee on pending disciplinary proceedings:

The High Court, Hyderabad has considered the fate of pending disciplinary proceedings upon the death of the charged employee. The husband of the respondent faced departmental inquiry and based on the inquiry officer's report, a show cause notice dated 10.12.1993 was issued proposing stoppage of two annual increments with cumulative effect, besides recovery of Rs.25,023 Ps.45. But before any final order could be passed the charged employee expired. Though the department has taken note of the death and treated the disciplinary action against the deceased employee as abated, it had directed the recovery of amount from the DCRG towards the loss caused by the deceased employee. It was further decided to treat the period of suspension as not on duty.

Feeling aggrieved by the above proceedings, the wife of the deceased employee filed OA before the AP Administrative Tribunal, which allowed the OA and held that consequent upon the death of the employee, the disciplinary proceedings stood abated and consequently recovery of the amount also stood abated. It further directed to treat the suspension period as on duty.

High Court, AP, upheld the view of the APAT, that once disciplinary proceedings have abated, recovery also gets abated and observed further as follows: "The reason for this is not far to seek. Before the proceedings were brought to its logical end, the delinquent died. Had he been alive, there would have been a possibility of his convincing the disciplinary authority to drop further action by submitting his explanation. Such an opportunity was lost with the death of the delinquent. It is precisely for this reason that the death of a delinquent before the conclusion of disciplinary proceedings would bring in the abatement of the disciplinary proceedings. Once the proceedings get abated, every aspect connected therewith will cease to exist in law".

While dealing with the issue of treating the period of suspension, the High Court held that the Govt. had failed to notice FR.54.B (2) which reads :

"Notwithstanding anything contained in Rule 53, where a Government servant under suspension dies before the disciplinary or Court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay an allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid". Accordingly, the High Court dismissed the WP filed by the Govt. [**WP 4138/2004 Govt. of AP & Anr. Vs. Smt. M.Veeramma. DOJ - 10.08.2017**]

In a similar case High Court, Jharkhand considered the claim of the writ petitioner for compassionate ground appointment since his father died in harness. The initial appointment of petitioner's father was under scrutiny for fraudulently obtaining employment by impersonation. But the deceased employee performed duty up to 13.08.2013 and expired on 16.08.2013. The Inquiry Officer submitted his report on 10.10.2013.

The claim of the widow for compassionate appointment to his son (petitioner) and payment of death-cum-retiral dues was rejected by the respondents on the ground that late Shailendra Kumar (petitioner's father) had obtained employment fraudulently by impersonating himself as son of late Ramdas Bhuiyan, who belonged to scheduled caste community, whereas petitioner's father belonged to upper caste, thus treating the employment of the petitioner's father as non-est in the eye of law. The said order was challenged before the High Court by the son of the deceased employee.

The counsel for the respondents/ Central Coalfields Ltd. had relied on the order of the Hon'ble Supreme Court in R.Vishwanatha Pillai Vs. State of Kerala and Others 2004 (2) SCC 105 and claimed that the appointment of petitioner's father was non-est in the eye of law. Hence, the petitioner was not entitled for appointment on compassionate ground and other monetary benefits.

The High Court observed that as on the date of death of the petitioner's father, no punishment was awarded to him and the company had paid him the salary till July / August 2013. It further distinguished the ratio laid down in R.Vishwanatha Pillai's case by observing that due opportunity was given to the appellant therein to put forth his point of view and defend himself before the Scrutiny Committee. In the instant case, on the basis of report of the officer who conducted preliminary inquiry, a fresh departmental proceeding initiated. Under the said circumstance, in that departmental proceeding all the evidences are required to be adduced again and the delinquent employee (petitioner's father) ought to have been given opportunity to cross-examine the witnesses.

The High Court further relied on its earlier order in Jayanti Dev Vs. State of Bihar & Ors 2001 (2) J.C.R-165. Reliance was also placed on Bombay High Court's order in Hirabai Vs. State of Maharashtra 1986 Lab.I.C. -248.

In view of the above facts, the High Court allowed the Writ Petition and directed to consider the case of the petitioner for appointment on compassionate ground. It was further directed to pay the terminal dues as well.

The Railway Board, vide RBE No.115/2000 dated 19.06.2000, have clarified that "the disciplinary proceedings should be closed immediately on the death of the charged employee".

[**Manoj Kumar Vs. CCFL, Ranchi & 4 Others. WP (S) No.2991/2014. DOJ—20.01.2016**]

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

TREATISE ON

Arbitration and Conciliation Act, 1996 Employee as arbitrator – Not always bias:

(Contd.. from last issue)

The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person."

Appointment of retired employee as arbitrator: The 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable. [The Government of Haryana PWD Haryana (B and R) Branch … Appellant Versus M/s. G.F. Toll Road Pvt. Ltd. & Ors., CA. 27/2019 (Arising out of S.L.P.(C) No. 20201 of 2018)DOJ 01.03.2019]

However, when there is a failure to follow the agreed terms, the Supreme Court stated that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view. [Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited, (2008) 10 SCC 240].

Forfeiture of right of appointment of arbitrator: In Datar Switchgears [(2000) 8 SCC 151], the Supreme Court considered the question whether in a case falling u/s 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. The Court held that in cases arising u/s 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application u/s11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application u/s 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited. In M/S Deep Trading Co. vs M/S Indian Oil Corporation & Ors [(2013) 4 SCC 35, the Supreme Court held that the Corporation has failed to act as required under the procedure agreed upon by the parties and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made u/s 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction u/s 11(6) for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings u/s 11 (6) was of no consequence.

The Supreme Court, in the case of National Insurance Co. Ltd v. Boghara Polyfab Pvt.Ltd., (2009) 1 SCC 267 held that there are of three categories for the Court to decide when an application for appointment of arbitrator is filed before it:

First category: The issues which the Court has to decide (a) Whether the party making the application has approached the appropriate High Court. (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

Second category: The issues which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitrator) are: (a) Whether claim is a dead (long-barred) claim or a live claim. (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

Third category: The issues which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration). (ii) Merits or any claim involved in the arbitration."

In Arasmeta Captive Power Co. Pvt. vs Lafarge India P. Ltd, (2013) 15 SCC 414, the Supreme Court held that the Court while dealing with an application u/s 11 (6) of the Act, on an issue raised with regard to the excepted matters, was not justified in addressing the same on merits whether it is a dispute relating to excepted matters under the agreement in question or not. In terms of S.11(6A), the Supreme Court or, as the case may be, the High Court, while considering any application for appointment of arbitrator shall confine to the examination of the existence of an arbitration agreement only notwithstanding any judgment, decree or order of any Court. Hence, the role of the court was restricted to the examination of whether there was a valid arbitration agreement.[*Duro Felguera SA v Gangavaram Port Limited*, (2017) 9 SCC 729]. Therefore, if the judicial authority opines that *prima facie* the arbitration agreement exists, it shall refer the dispute to arbitration and leave the question of validity and enforceability of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that an arbitration agreement does not exist, the conclusion will be final and no reference shall be made.

- N.Murali Krishna, Sr. LO/HQ