South Central Railway
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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

The issue of July, 2019 has some important judgements that are being dealt by the CLAs/HYB & GTL by providing inputs like relevant decisions of the Supreme Court. A judgement of the Supreme Court in T.Muralibabu on absenteeism is to be kept in mind while contesting such cases, since in this case, the Supreme Court distinguished its earlier judgement in Krushnakant B. Parmar and held that it is not obligatory on the part of the DA to prove wilfulness on the part of the absentee. In addition to this, a new regular series on RTI is introduced.

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

FACTORY ACT, 1948

Factory Act (23rd September 1948) has given effect from 01.04.1949. It regulates the labor of factories and also regularize the various obligations that an "Occupier" has to fulfill in connection with Health, Welfare, safety, Hours of employment, leave, over time, rest etc.

FACTORY[Sec.2(m)] :

Factory means any premises

1. Where ten or more workers are working, or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power., or
2. When twenty or more workers are working or were working on any day of preceding twelve months and in any part of which a manufacturing process is being carried on without the aid of power.

Applicability of the Act

It is applicable to any premises where manufacturing activities are carried out with the aid of power and where 10 or more workers are/were working OR where manufacturing activities are carried out without the aid of power and where 20 or more workers are/were working. This Act applies to all Railway Workshops & Production Units but does not extended to Loco Sheds & C&W Depots.

OCCUPIER [Sec.2(n)] :

Occupier of a factory means the person who has ultimate control over the affairs of factory. Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory. In the case of a factory owned or controlled by the central Govt. or any state Govt. or any local authority, the person or persons appointed to manage the affairs of the factory by the central Govt., the state Govt. or the local authority, as the case may be, shall be deemed to be the occupier.

DUTIES OF THE OCCUPIER: every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

Health (S.11 to 20)

⇒ Cleanliness Disposal of wastes and effluents
⇒ Ventilation and temperature dust and fume
⇒ Overcrowding Artificial humidification Lighting
⇒ Drinking water Spittoons.

Safety Measures (S. 21 to 41)

⇒ Facing of machinery
⇒ Work on near machinery in motion.
⇒ Employment prohibition of young persons on dangerous machines
⇒ Striking gear and devices for cutting off power.
⇒ Self-acting machines.
⇒ Casing of new machinery.
⇒ Prohibition of employment of women and children near cotton-openers.
⇒ Hoists and lifts. Working Hours, Spread Over & Overtime of Adults
⇒ Weekly hours not more than 48 hours.
⇒ Daily hours, not more than 9 hours.
⇒ Intervals for rest at least ½ hour on working for 5 hours.
⇒ Spreadover not more than 10½ hours.
⇒ Overlapping shifts prohibited.
⇒ Extra wages for overtime double than normal rate of wages.
⇒ Restrictions on employment of women before 6AM and beyond 7 PM.

Welfare Measures (S.42 to 50)

⇒ Washing facilities
⇒ Facilities for storing and drying clothing
⇒ Facilities for sitting
⇒ First-aid appliances – one first aid box not less than one for every 150 workers.
⇒ Canteens when there are 250 or more workers.
⇒ Shelters, rest rooms and lunch rooms when there are 150 or more workers.
⇒ Creches when there are 30 or more women workers.
⇒ Welfare office when there are 500 or more workers.

Employment of Young Persons

⇒ Prohibition of employment of young children i.e. below 14 years.
⇒ Adolescent workers (15 to 18 years of age) are permitted with less working hours and special conditions.

Annual Leave with Wages

A worker having worked for 240 days @ one day for every 20 days of working.

Penal Provision

⇒ For contraventions of Provisions of the Act, imprisonment upto 7 years or fine upto Rs.2,00,000/-.
⇒ For continuous contraventions of the Act, imprisonment upto 10 year and/or fine upto Rs.5,000/- per day .

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

RTI Act Series:

Right to Information Act, 2005

Section 2 (j): **Right to information** means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to
(i) inspection of work, documents, records;
(ii) taking notes, extracts or certified copies of documents or records;
(iii) taking certified samples of material;
(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

Scope of RTI: Though the first thing comes to one's mind is getting some document containing the information sought for, the definition of "right to information" is having wider scope which inter alia includes inspection of work, getting certified samples of material etc. It is permitted to videograph or photograph the documents during inspection as held by CIC in Sanjay Singh Vs. P.W.D [CIC in CIC/WB/A/2006/00144 dated 20.3.06] and Sidharth Mishra Vs. BSNL, Cuttack [CIC/AD/A/09/00125 dated 23.2.2009] respectively. An applicant, who is not sufficiently literate, may take the assistance of another person as ruled by CIC in Chandrabhan Singh Vs. Senior General Manager, (FAA), Ordinance Factory, Kanpur [Appeal No. CIC/WB/A/2007/00692-SM].

Right to information is not absolute: Section 3 guarantees all citizens the right to information, subject to the provisions of the Act. It is to be taken note that the second limb lays down that the right to information is subject to the provisions of the Act. In other words, such a right is subject to the restrictions / exemptions incorporated in the RTI Act viz., S.8 & 9.

RTI extends to "persons", not merely to "citizens": Though, as per S.3 the right to information is guaranteed to all "citizens", Hon'ble Supreme Court of India in Chief Information Commissioner Vs. State of Manipur [AIR 2012 SC 864] had extended the benefit to non-citizens as well, depending on the word "person" used in S. 6 (1).

RTI not applicable to legal / juristic persons: However, the word "citizens" in S. 3 brings within its ambit only natural persons, but not legal persons [Tata Engineering and Locomotive Co. Vs. State of Bihar, AIR 1965 SC 40]. In other words, companies, firms etc. cannot obtain information under the RTI Act.

RTI cannot be denied to a person who holds a position in a Company / Firm etc.: In the judgment of the High Court of Delhi [Writ Petition 3652 of 2012], it was stated that merely because the RTI applicant was holding the position of Company Secretary of a company, it did not mean that the applicant was also a company. Any citizen was entitled to raise queries under the RTI Act and merely because he happened to be working as an employee with a company or an organization, which is not a citizen of India, it did not disentitle him from raising the queries under the Act.

RTI eligibility: The Central Information Commission in Devas Multimedia Pvt. Ltd. Vs. CPIO, Department of Space [File Nos. CIC/SH/A/2014/002787 and CIC/SH/A/2014/002788] on 13.06.2016 summarised the position as follows, duly taking into account the order of the High Court, Delhi referred above:

"(a) The RTI Act gives the Right to Information only to citizens of India and not to Corporations and Companies etc. which are legal entities/persons, but not citizens.

(b) An office bearer of a company can seek information under the RTI Act on behalf of the company, provided he is a citizen of India. His identifying himself as the office bearer of the company or filing the application on the letterhead of the company does not take away his right to raise queries under the RTI Act.

(c) The RTI applications and the subsequent appeals should be signed by the same person, with his name mentioned on the same.

(d) Since an office bearer, seeking information on behalf of his company, would be construed to be a citizen seeking the information, he would need an authorization from the Board of the company to receive the information concerning its affairs from the Respondent public authority."

Advocate cannot file RTI request on behalf of client unless vakalatnama / authorization is given by client: On 04.02.2016, CIC observed in re Sri Lambadi Banavath Govind Vs. CPIO, Deccan Grameena Bank [File No.CIC/SH/A/2014/002943] :

"3. In our view if an Appellant files an RTI application through an advocate, it should be accompanied by a vakalatnama or proper authority letter to the satisfaction of the public authority. Further, as per provisions of the RTI Act, applications filed under the Act are to be disposed of by the CPIO and FAA designated by the public authority and note by the advocate of the public authority. In view of what is stated in the preceding paragraph, no action is necessary on the application dated 24.2.2014. However, we would advise the Respondents to take a careful note of what is stated in this paragraph for guidance while taking action in future on the applications filed under the RTI Act."

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

Courts cannot alter tender conditions

For the construction of Veterinary College building at Navsari Agricultural University, Gujarat a tender was floated on 21.11.2008. As per the tender conditions, Pre-qualification documents had to be sent by 27.11.2008, failing which the tender would be liable for rejection and would not be opened. The construction was required to be done immediately, since the grant released by the University was going to lapse on 31.03.2009.

The issue in the matter is that the tender submitted by M/s Shrijikrupa Buildcon Ltd. has been rejected on the ground that their documents were received only on 01.12.2008. Aggrieved by this, they approached High Court, Gujarat which held that the University acted arbitrarily in requiring the pre-qualification documents to be sent physically so as to reach the University by R.P.A.D./Speed Post by 27.11.2008, inasmuch as it meant that the contractor had to send pre-qualification documents by the aforesaid mode by dispatching the same latest by 25.11.2008. Consequently, the writ petition was allowed and the decision of the respondent no. 2 - University dated 10.12.2008 accepting the bid of the appellant was quashed and set aside with a further direction that the University shall issue a fresh tender notice with the same terms and conditions but it would also provide seven days time for submitting the pre-qualification documents after the end date for downloading the bid documents.

M/s. Sorath Builders, who was the lowest bidder, contested the Judgement of the High Court before the Supreme Court. Supreme Court found that "the respondent no. 1 never specifically raised the issue regarding paucity and shortage of time as one of the grounds for challenging the decision of the University. The only stand that was taken by respondent no. 1 for late submission of his pre qualification documents is that he came to know about the tenders only on 27.11.2008 as he was undertaking various construction works, and therefore, could not submit all the required pre qualification documents in time stipulated in the notice inviting tenders. The aforesaid stand makes it crystal clear that respondent no. 1 was prevented in submitting the required documents in time due to his personal difficulty and not for the time schedule attached to the notice inviting tenders. That was also not one of his grounds taken specifically in the writ petition at any stage. But only during the course of hearing such a contention seems to have been raised which found favour with the High Court. No other intending bidder came to the court on any such plea that they were deprived of an opportunity of submitting their tender due to paucity of time and that any prejudice is caused to anyone due to time schedule provided by the University. It appears that only during the hearing stage a plea was raised which found favour with the High Court but as stated above the aforesaid plea is without any merit for the advertisement was issued on 21.11.2008 requiring the parties to submit their pre qualification documents only by 27.11.2008. Therefore, sufficient time was provided to submit tender papers. The University also permitted pre qualification documents to be submitted "On Line". Therefore, the contention that the time was too short for submission of pre qualification documents by 27.11.2008 is without any merit."

While allowing the appeal filed, the Supreme Court referred to one of its own previous judgement in Puravankara Projects Ltd. vs. Hotel Venus International and Others, reported in (2007) 10 SCC 33 wherein it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts do not have jurisdiction to judge as to how the tender terms should be framed. It was further held that the statutory parameters have to be kept in view and the High Court can never alter or amend a contract entered into between the parties.

The Supreme Court also relied on its earlier order in W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Others, reported in (2001) 2 SCC 451, with regard to the process of tender wherein it was held: "where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values". It was also held: "the very purpose of issuing rules/ instructions is to ensure their enforcement lest the rule of law should be a casualty". It was further held: "the contract is awarded, normally, to the lowest tenderer which is in public interest and that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited".

Apex Court further observed that the High Court proceeded to interfere with the entire process as if acting as an appellate authority over the decision of the University which was beyond the jurisdiction of the Court. Thus, Supreme Court allowed the appeal setting aside the judgement of the Divisional Bench upholding the decision of the University in awarding the contract in favour of M/s. Sorath Builders.

[M/S Sorath Builders vs Shreejikrupa Buildcon Limited & Another. (2009) 11 SCC 9, DOJ - 20.02.2009]

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

Transfer on administrative exigency- Court's cannot interfere

The applicant in the OA before CAT, Hyderabad Bench challenged the transfer order issued by the respondent on administrative grounds alleging that the same was issued on mala fide intention. The respondent submitted that the transfer was issued on administrative grounds as the applicant is creating problems in a sensitive Station.

Railways - Respondents stated that Indalwai is a sensitive Station and the applicant is creating problems, apart from challenging the very authority of superiors. It is also stated that the matter was enquired into by the administration and on the basis of the reports submitted therein, it was felt that the transfer of the applicant is inevitable. The respondents further contend that the transfer is made purely on administrative grounds and in the interest of proper functioning of the Railways.

Dismissing the OA, the Tribunal observed that hardly an employer needs to prove the order of transfer with the support of any material. Transfer is always an incidence of service and in case of administrative transfer, guidelines are not relevant. The decision formed by an employer that it is not desirable to continue an employee at a particular station, cannot be interfered by Courts.

The Tribunal also quoted from the Apex Court's Judgment in Sergeant JK Vs. UOI & Anr. reported in 2003 (4) SLD 797 & 2004 (1) SLT 563, which reads as follows: "8. The expression "Administrative Exigency" is too difficult to be confined into a particular set of parameters. In a given case, the desirability or otherwise of continuing an employee at a particular station may become an important factor to ensure proper functioning of the unit. The reasons for the same may differ from case to case. Once the employer forms an opinion that it is not desirable to continue an employee at a particular station, such decision becomes part of administrative exercise and thereby it may tend to be characterized as administrative exigency. Even if what is stated by the petitioner is true, the decision to transfer the petitioner cannot be said to be without basis. A transfer effected to ensure that an employee does not have any opportunity to repeat an act, which was found to be improper, cannot be outside the administrative necessity." [Yogeshwar Meena Vs. GM/SCR & Others. OA/021/00221/2019. DOJ - 12-04-2019]

- S. Nagender, CLA/HYB.

Bonafide Mistakes can be corrected

A Senior Technician (Diesel) retired from railway service on 30.9.2016. Prior to it, he had represented on 14.5.2016 about reduction of LAP at his credit. The respondent-railway vide letter dated 20.7.2016 informed that LAP to the extent of 110 days which was credited excess to the applicant's account was corrected.

Applicant had represented again on 10.8.2016 and to the Pension Adalat. In response, applicant was informed vide order dated 6.12.2016 that LAP to the extent of 185 days was sanctioned at the time of retirement and after deducting 51 days excess credited to his account, the leave salary for 134 days was paid. Aggrieved over the same an OA was filed before CAT/HYB Bench. It is true that there were some inconsistencies in the number of days of leave under dispute, in that the railway given different numbers on different occasions, as the excess leave credited erroneously.

CAT observed: "Mathematical errors are natural where ever figure work is involved and therefore the prescription of checks and counter checks are prescribed so that errors committed are detected and rectified as was done in the present case. The applicant stated that on different occasions different versions were presented. The mathematical errors pointed out were bonafide mistakes which the respondents rectified them. The applicant expecting benefits from the errors committed by the respondents is unfair to say the least.

Hon'ble Supreme Court has observed that bonafide mistake can be corrected in VSNL v. Ajit Kumar Kar,(2008) 11 SCC 591, as under: "46. It is well settled that a bona fide mistake does not confer any right on any party and it can be corrected."

The CAT dismissed the OA accordingly.
[OA 20/419/2017. S.Guruswamy Vs. GM/SCR & 2 Others. DOJ - 11.03.2019]

- G. Kumar Kotappa, CLA/GTL.

LEGAL MAXIMS:

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.

Pari passu - "with an equal step" or "on equal footing". It is sometimes translated as "ranking equally", "hand-in-hand", "with equal force", or "moving together", and by extension, "fairly", "without partiality".-

K.Gopinath, CLA/GM/O/SC.

DIFFERENCE BETWEEN

Advocate, pleader and lawyer

Most of the times, the three terms are used synonymously, but the three terms are different from one another. In literal sense a pleader is actually a person who drafts pleadings and pleads in the court of law on behalf of his client.

An Advocate is a law graduate enrolled with the Bar Council of India/ State Bar and entitled to practice in any court of law in India. An advocate is entitled to appear before a court of law.

Pleader is actually a person who drafts pleadings and pleads in the court of law on behalf of his client. Section 2 (7) of Civil Procedure Code 1908, defines Government pleader who is appointed by the State Government to perform all or any of the functions expressly imposed, by Civil Procedure Code 1908, on the Government Pleader and also any pleader acting under the directions of the Government Pleader. Section 2(15) of CPC, 1908 defines "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court. Therefore, every advocate can act as pleader but every pleader cannot perform the task of advocate since advocates only will have right to argue under Bar Council of India.

Lawyer is not defined anywhere in the Statute book. However, in India, the term "lawyer" is often commonly used, but the official term is "advocate" as prescribed under the Advocates Act, 1961.

-S. Sreenivasu, CLA/GNT

KNOW OUR CONSTITUTION

Article-20. Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

FAQ Jurisdiction

Any case has to be filed before a court having territorial jurisdiction over the subject matter. Territorial jurisdiction refers to power of court to enquire and try the matter presented before it. Parties, for their convenience, cannot mutually agree to subject their disputes to the jurisdiction of a Court which would not otherwise have jurisdiction to entertain the dispute between them.

Under Section 20 of CPC, 1908, a Suit can be instituted in a Court within the local limits of whose jurisdiction

(i) Where the defendant/s, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(ii) Where any one of the defendants actually and voluntarily resides, or carries on business, or personally works for gain, then either with the leave of the Court, or on acquiescence by them in such institution; or

(iii) the cause of action, wholly or in part, arises.

Therefore, a Court will have jurisdiction to entertain a Suit in relation to a dispute where the Defendants reside or carry on business within its local limits or the cause of action has wholly or partly arisen within its local limits of the Court. In a suit for damages for breach of a contract, the cause of action consists of making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. But making of an offer in a particular place does not form cause of action in a suit for damages for breach of contract.

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

JOKE

Usual Suspect

While prosecuting a robbery case, I conducted an interview with the arresting officer.
My first question: "Did you see the defendant at the scene?"
"Yes, from a block away," the officer answered.
"Was the area well lit?"
"No. It was pretty dark."
"Then how could you identify the defendant?" I asked, concerned.
Looking at me as if I were nuts, he answered, "I'd recognize my cousin anywhere."

YOURS LEGALLY

Unauthorized absence is a misconduct—Need not be proved as wilful

Of late, employees are contesting D&A proceedings of unauthorised absence by taking shelter under the judgement of SC in Krushnakant B. Parmar v. UOI and another [2012 (3) SCC 178] to highlight that in the absence of a finding returned by the Inquiry Officer or determination by the disciplinary authority that the unauthorized absence was wilful, the charge could not be treated to have been proved. In the said case, the question arose whether unauthorized absence from duty did tantamount to failure of devotion to duty or behaviour unbecoming of a Govt. servant inasmuch as the appellant therein was charge-sheeted for failure to maintain devotion to duty and his behaviour was unbecoming of a Govt. servant.

However, the Supreme Court in [Chennai Metropolitan Water ... vs T.T. Murali Babu [AIR 2014 SC 1141] **held that the view expressed in the said case has to be restricted to the facts of the said case** regard being had to the rule position, the nature of the charge levelled against the employee and the material that had come on record during the enquiry. **Whenever there is a long unauthorized absence, it is not obligatory on the part of the disciplinary authority to record a finding that the said absence is wilful even if the employee fails to show the compelling circumstances to remain absent.**

In this case, respondent, remained absent from duty without any intimation and did not respond to the repeated reminders requiring him to explain his unauthorized absence from duty. After about 17 months, he reported to duty with a medical certificate for his absence. In the disciplinary proceedings, his explanation that he could not attend to duties because of ill health was not agreed to by the Inquiry Officer and the enquiry report was accepted by the disciplinary authority and after following the due procedure, punishment of dismissal was imposed.

In WP filed there against, Single Judge of High Court allowed the petition holding that even if the employee had absented from duty, there was no past misconduct of desertion/absence and, therefore, the punishment of dismissal from service for the first time absenteeism is too harsh and disproportionate. Divn. Bench affirmed the judgment and directed his reinstatement with continuity of service but without back wages.

When the matter was brought before the Supreme Court by the Corporation, referred to ratio in State of Punjab v. Dr. P.L. Singla, (2008) 8 SCC 469, the Supreme Court held that "Unauthorised absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorized absence by an employee, two courses are open to the employer. The first is to condone the same by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action for the unauthorized absence and the disciplinary proceedings may lead to imposition of major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect basing on the nature of service, the position held by the employee, the period of absence and the cause/ explanation for the absence".

Further in IOC Ltd. and anr. v. Ashok Kumar Arora [(1997) 3 SCC 72] the Apex court held that "it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/ authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee".

The Supreme Court further held that employees in any organization should adhere to discipline for not only achieving personal excellence but for collective good of an organization. It cannot be understood that the employers should be harsh to impose grave punishment on any misconduct.

On facts, the Supreme Court observed that the respondent had remained absent for a long time and exhibited adamantine attitude in not responding to the communications from the employer. The respondent by remaining unauthorisedly absent for a long period with inadequate reason had not only shown indiscipline but also made an attempt to getaway with it. Such a conduct is not permissible and the High Court has erroneously placed reliance on the authorities where the Supreme Court had interfered with the punishment. There is no shadow of doubt that the doctrine of proportionality does not get remotely attracted to such a case. The Supreme Court held that the punishment is shocking proportionate and allowed the appeal by setting aside the order of the Hurt.[Chennai Metropolitan Water ... Vs T.T. MuraliBabu, AIR 2014 SC 1141]

-N Murali Krishna, Sr.LO/HQ

TREATISE ON

Arbitration and Conciliation Act, 1996

Interim measures by Court in arbitral proceedings:

In agreements where an arbitration agreement exists, there may arise need for provisional remedies or other interim measures of reliefs. A provision in CPC, 1908 is available for attachment before judgement, to protect the interest of the plaintiff during the pendency of the litigation before the Court, so that unscrupulous defendants are prevented from doing any sort of mischief by destroying the suit property leaving the plaintiff with nothing even after he/she wins the case. Arbitration and Conciliation Act, 1996, provided a similar provision U/S 9 enabling parties to approach Courts for seeking interim measures.

Section 9 is an exception to Section 5

S.9 is an exception to S.5 which prohibits any intervention by any judicial authority, but any such exclusion of jurisdiction is only in matters which are not otherwise specifically provided for since S.9 specifically empowers the Civil Court concerned to pass suitable orders on the subject and in relation to matters stipulated therein.

Nature of reliefs, that can be sought

A party under S.9, may (i) before or (ii) during arbitral proceedings or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with S.36, apply to a court for an interim measure of protection in respect of the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; securing the amount in dispute in the arbitration; the preservation or inspection of any property which is the subject-matter of the dispute in arbitration, or to enter upon any land or building in the possession of any party which may be necessary or expedient for the purpose of obtaining full information or evidence; or such other interim measure of protection as may appear to the Court to be just and convenient.

S.9 permits application being filed in the court before the commencement of the arbitral proceedings. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting S.9, read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection". The order passed by the court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all-time or permanent protection. [Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155]

Once interim relief granted, arbitration proceedings to commence within 90 days: Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the "proximately contemplated" or "manifestly intended" arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order U/S 9, the relationship between the order U/S. 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before" i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application U/S 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which S.9 is placed obligates the court to do so. The court may also while passing an order U/S.9 put the party on terms and may recall the order if the party commits breach of the terms. [Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155].

Once the arbitral tribunal is constituted, the Court shall not entertain application for interim measure, unless the Court finds that circumstances exist which may not render the remedy provided with the arbitral tribunal is efficacious. Interim orders cannot amount to granting full and final relief claimed. Respondent can seek monetary compensation for the loss sustained by him by virtue of the interim order, if he ultimately wins the case. [Orissa Manganese & Minerals Ltd Vs. Synergy Ispat (P) Ltd, (2014) 16 SCC 654]

Interim measures, so made by the court can be allowed in favour of a party who moves said application either before the commencement of the arbitration proceedings, or during the pendency of the arbitral proceedings and even after making the arbitral award, but before its enforcement. [Ultratech Cement Ltd. Vs. Rajasthan Rajya Vidyut Utpadan Nigam Ltd, (2018) 15 SCC 210].

-N Murali Krishna, Sr.LO/HQ