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

Many important amendments are on the anvil. Noteworthy is replacement of Consumer Protection Act, 1986 by Consumer Protection Act, 2019. Arbitration and Conciliation Act, 1996 also amended vide amendment of 2019. Also GCC for works 2018 has been amended by GCC for works 2019 with some important changes. Details of the amendments will be brought in next issues. The present issue discussed some important judgements like application of NPS to pre 2004 recruitment notifications, requirement of sanction for prosecution of Govt. servant involved in an act not connected to duty, whether government to deposit security amount when preferring an appeal and whether Back wages or no back wages on reinstatement of an employee in service.

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

TRADE UNIONS ACT, 1926

Object of the Act: To provide for the registration of Trade Union and in certain respects to define the law relating to registered Trade Unions

Registration of trade Union

⇒ Any **7** or more members of a trade union may, by subscribing their names to the rules of the trade union and its compliance.

⇒ There should be at least **10%,** or **100** of the work-men, whichever is less, engaged or employed in the establishment or industry with which it is connected.

⇒ It has on the date of making application not less than **7** persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.

Prescribed form with following details (Sec. 5)-

⇒Names, occupations and address of the members' place of work.

⇒ Address of its head office; and

⇒ Names, ages, addresses and occupations of its office bearers.

Minimum requirements for membership of trade union (Sec. 9A)

Not less than **10%**, or **100** of the workmen, whichever is less, subject to a minimum of **7**, engaged or employed in Establishments etc.

Cancellation of Registration (Sec. 10)

⇒ If the certificate has been obtained by fraud or mistake or it has ceased to exist or has willfully contravened any provision of this Act.

⇒ If it ceases to have the requisite number of members.

Criminal conspiracy in trade disputes (Sec. 17)

No office bearer or member of a registered trade union shall be liable to punishment under sub section (2) of conspiracy u/s 120B of IPC in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union.

Disqualification of office bearers of Trade Union

If one has not attained the age of **18** years.
Conviction for an offence involving moral turpitude. Not applicable when **5** years have elapsed.

Returns (Sec. 28)

Annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the **1st December.**

Penalties	Offence	Punishment
U/s 31	For making false entry in or any omission in general statement required for sending returns. For making false entry in the form.	Fine upto Rs.500. On continuing default, additional fault, Rs.5 for each week (not exceeding Rs.50). Fine upto Rs.500.
U/s 32	Supplying false information regarding Trade Union	Fine upto Rs.200.

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

KNOW THE LESSER KNOWN

An employee has to be allowed to absent himself from duty for 3-4 days to enable him to submit written statement of defence (reply) to the charge memorandum. The said period to be treated as "on duty" [RBE No.143/2004 dated 02.07.2004 based on DOP&T OM No.142/5/2003-A VD.I dated 06.4.2004].

LEGAL UPDATE

Starting 15th October 2019, banks have to shell out penalty at the rate of Rs.100/day for failed transactions, if not reversed within the Turn Around Time (TAT) suo motu. The penalty will apply if the amount is not reversed within the TAT to all failures not directly attributable to the customer which could be on account of various factors such as disruption of communication links, non-availability of cash in ATMs, time-out of sessions, non-credit to beneficiary's account due to various causes, etc.

Turn-around time to complete a transaction for card-to-card transfer has been set one day (T+1), for point of sale (PoS) and card-not-present transactions, it is T+5 days, for IMPS (T+1 day), for UPI transactions to beneficiary account (T+1 day), for UPI payments to merchants (T+5 days), for Aadhaar enabled payment systems (including Aadhaar Pay) (T+5 days), for Aadhaar Payment Bridge System (ABPS) T+1 day, for NACH transfers it is T+1 day, and also for the prepaid payment instruments (PPIs) .it is kept T+1 day.

RTI Act Series:

RTI Act, 2005

Before proceeding any further, it would be informative to have a glance through various important orders on Section 2 & 4 of the RTI Act 2005:

Frivolous applications: The applicant sought varied information about GATE and JEE for 20 years. The CIC held that it amounted to making a mockery of the Act. Though the PIO is duty bound to supply information sought for, the applicants also should keep in mind the objectives stipulated in the pre-amble of the RTI Act. The CIC observed that how such diverse and lengthy information, which seemed to only put the public authorities under undue and uncalled for pressure, would meet the objectives of the RTI Act. The CIC appreciated the PA who supplied much information and dismissed the appeal as frivolous and inconsequential [A.P. Tripathi Vs. IIT Delhi. (No CIC /OK / A/2006 /00655 dt. 28.3.07)].

Applicant should ask for specific information which should not cause enormous time and efforts to collect and furnish: The entire gamut of functioning of the insurance company was sought for by the applicant by seeking copies of documents and other details in 62 serials. Though an annual report was furnished to the applicant, the PIO expressed inability to collect other information, the same being voluminous and is beyond the available fiscal and human resources of the organisation, that it would definitely cause a lot of pressure on the resources of the company. While dismissing the appeal, the CIC observed that the applicant should have asked for specific information which would not cause enormous time and efforts to collect and furnish [Hitesh Kumar Vs. Oriental Insurance Company Limited [Decision No. 570/ICPB/2007 F.No. PBA/06/562 dt. 15th June 2007)].

Scope of the words "held by or under the control of Public Authorities" [Section 2(j)]: A complaint was returned to the complainant for rectification of defects. Thereafter, another person sought information under the RTI Act about the said complaint which was returned to the complainant. During the hearing of the 2nd appeal it was held by the CIC that the respondents cannot be said to be 'holding' this information, which they have admittedly returned to its originator. Till such time as the respondents received the information back and registered it, they could not be said to be 'holding' it or 'be in control of' it. According to them, arguably, the complainant to whom the documents have been returned may choose not to resubmit them. In such an event, the respondents providing the documents to the present appellant will be wholly untenable because then they would have supplied to the appellant an information which they did not even 'hold'. The expression 'held' or 'under the control of' used in the subsection 2(j) of the Act are significant. These expressions mean that information can be said to be under the control of a public authority only when such public authority holds that information authoritatively and legitimately. Information which a public authority might receive casually or, which it had returned to its point of origin for supplying omissions, will not qualify to be 'held' or 'under the control of' the public authority. The present information solicited by the appellant falls in this category. Having been returned by the public authority the respondents herein, to its originator, the information cannot be said to be under the control of the respondents. [Priyavadan H Nanavati Vs. Institute of Chartered Accounts of India. Appeal No. CIC/AT/A/2007/00327]

Questions, other than interrogative questions, which are based on available information need to be answered: RTI is not meant for seeking answers to questions or seeking interpretation of law or as regards the correctness or otherwise of a decision taken by an authority [Saidur Rehman Vs. CIC. Appeal Nos. CIC/AA/A/2006/00032 & 00034]. "Interrogative queries viz. "How/Why/When" do not come under the ambit of RTI Act" [G.Senthil Kumar Vs. Director of Health & Family Welfare Service, Puducherry. F.No. CIC/SS/A/2013/000838-YA]. However, CIC has also held that "the RTI act does not state that queries must not be answered, nor does it stipulate that prefixes such as 'why, what, when and whether' cannot be used. The PIO is right in accepting that what is asked must be a matter of record, but errs in imposing a new set of non-existent exemptions." [T.B.Dhorajiwala Vs. Indian Institute of Technology, Bombay]. In fine, we can safely conclude that except interrogative queries, PIOs need to answer other queries if it is related to an available information as defined in S.2(f).

Extent of "Public Authority" [S.2(h)]: CIC, while holding that Jaipur Stock Exchange and NSE come under the ambit of "Public Authority", concluded that every authority or institution which is a 'state' has to be a public authority under Section 2(h) of the Right to Information Act, 2005. Even a non-governmental organization if substantially financed directly or indirectly by funds provided by the Government may be a public authority. Even a private institution substantially financed by an appropriate Government can also be a 'public authority' but such non-governmental bodies or such private institutions or bodies may not be categorized as 'state' but they would be public authorities within the meaning of Section 2(h) of the RTI Act. CIC concluded that there is enough merit in these submissions and it agreed that an authority or an institution or a body if it is a "state" within the meaning of Article 12 of the Constitution of India, it cannot claim that it is outside the purview of the RTI Act, 2005 [Smt. Raj Kumari Agrawal and others Vs. Jaipur Stock Exchange Ltd. (Decision No. CIC /A 2006 /00684&CIC /AT/ A/2007/ 00106 dt. 25.4.2007)].

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

Difference between:
Review & Revision in the context of D&AR:

Revision:

1. Revision is done under Rule 25 of Railway Servants (Discipline & Appeal) Rules, 1968.
2. Revision may be done by the President, RB or GM /Equal status officer, Appellate Authority not below the rank of DRM where no appeal has been preferred and Dy.HOD or above rank officers.
3. May do suo motu or on revision petition of the aggrieved employee.
4. RA may (a) confirm, modify or set aside the order; or (b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or (c) remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or (d) pass such orders as it may deem fit.
5. Show-cause notice calling for representation against enhancement of penalty is to be served on the charged employee.
6. Inquiry is to be conducted, subject to Rule 14, if major penalty is to be imposed.
7. Proceeding for revision shall not be initiated until after the expiry of the appeal period is over. Where the appeal is already pending, RA shall await the outcome for the appeal. However, this sub-rule does not apply for accident cases.
8. Appellate Authorities other than the President or a Dy.HOD cannot initiate revision proceedings after the expiry of 6 months from the date of penalty order, where it is proposed to impose or enhance/ modify a penalty to the detriment of an employee and after 1 year where it is proposed to reduce, cancel or modify the penalty in favour of the employee. This time limit is not applicable for the President, RB and GM / Equal status officer.

Review:

1. Review is done under Rule 25-A of RS (D&AR) 1968.
2. President alone is empowered to do review.
3. May do suo motu or on review petition of the ag grieved employee.
4. President may review when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case has come or has been brought to his notice.
5. The Railway servant concerned has to be given a reasonable opportunity of making a representation against the penalty proposed and if major penalty is to be imposed conducting of an inquiry is mandatory, subject to Rule 14.

Objects and reasons for amendment of Rule 25 and insertion of Rule 25-A:

In R.K.Gupta Vs. Union of India 1981 (1) SLR 752 a question arose before the Delhi High Court that whether Rule 29 of CCS (CC&A) Rules 1965 (as it stood before its amendment) only gives power to the President to review his own order which he had passed earlier. The Court held that Rule 29 does not empower the President and other authorities to review their earlier order. It was further held that the power of review under Rule 29 is really in the nature of a revision power to revise by an authority higher than the authority whose order is sought to be reviewed. It does not cover the case of authority reviewing its own earlier order. Hence, Rule 29 was amended and it was made clear that Rule 29 confers the power of revision on the President and other authorities mentioned in the Rule and Rule 29A has been inserted empowering the President only to review any order passed earlier under these Rules, including an order passed in revision under the amended Rule 29, when any material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought, to his notice.

Revision / Review of disciplinary cases already finalised before retirement of the concerned Railway employee cannot be initiated after his retirement with a view to impose a cut in the pensionary benefits. However, in cases where a show cause notice for suo-moto revision had been issued before retirement or where a revision petition submitted by the employee was pending at the time of retirement, revisionary proceedings can continue after retirement also [RB's Lr. No. e (d&a) 93 RG6-61 dated 11.01.2000 (RBE No.5/2000)].

Correction of mistake is not review of the order. [Birendra Nath Mondal Vs. Vidyasagar University, 1999 (4) SLR 525 Cal]

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

JOKES

♦ A lawyer had a jury trial in a very difficult business case. The client who had attended the trial was out of town when the jury came back with its decision, which was in favour of the lawyer and his client. The lawyer immediately e-mailed his client a message reading: "Justice has triumphed!" The client e-mailed back, "Appeal at once!"

♦ A lawyer was filling out a job application when he came to the question, "Have you ever been arrested?" He answered, "No." The next question, intended for people who had answered in the affirmative to the last one, was "Why?" The lawyer answered it anyway: "Never got caught."

Strict compliance to exam instructions is required

The respondent who is an advocate of Tamil Nadu appeared for the Judicial Services examination but was not successful. She came to know that another candidate from the same community (Most Backward Class), whose performance was not satisfactory got selected. The respondent made a representation to the Tamil Nadu Public Service Commission (TNPSC) and it was informed that her Law Paper – 1 was invalidated in view of the breach of instructions to applicants issued by the TNPSC.

In the Writ Petition filed, the respondent contended before the High Court that she did not violate any of the conditions stipulated by the TNPSC. But when the answer sheets were summoned by the High Court it was found that she had underlined the answer sheet with pencil at several places, which was in violation of the instructions of the TNPSC. When the respondent was confronted by the High Court by showing the answer sheet, she submitted that it might have been done inadvertently and due to anxiety. The respondent pleaded for leniency and the High Court accepted it that it was done unwittingly and inadvertently and that she did not gain any advantage from such marking.

Accordingly, the WP was allowed and the High Court directed the TNPSC to declare the result and if found qualified, was directed to conduct interview of the respondent as a special case. Aggrieved by this judgment of the High Court, SLP was filed. In the SLP it was contended on behalf of the State that the initial stand taken by the respondent that she did not use the pencil disentitles he from the relief sought for and no lenient view can be taken in such cases since the instructions are mandatory and the order of the High Court would set a precedent. Further, it was submitted, that other disqualified candidates also would claim relief.

While opposing the SLP, the respondent vehemently argued that the Supreme Court should not exercise its discretion under Article 136 of the Constitution of India and there was not substantial question of law involved. A fervent appeal was made before the Supreme Court that the career of a meritorious backward class candidate should not be nipped at the bud.

The Supreme Court observed that the instructions issued by the TNPSC were mandatory, having the force of law and they have to be strictly complied with. The Apex Court further observed that the High Court in exercise of its powers under Article 226 cannot modify / relax the instructions issued by the TNPSC (M.Vennila Vs. TNPSC 2006 (3) Mad. LJ 376). While observing that "Hard cases make bad law", the Supreme Court observed that any order in favour of the respondent would be laying down bad law. The submission to pass an order under Article 142 of the Constitution also did not find favour with the Supreme Court. In the result, the appeal was allowed and the judgment of the High Court was set aside.

[State of Tamil Nadu & Ors. Vs. G.Hemalathaa & Anr., CA No.6669/2019. DOJ–28.08.19]

B.R.R.Naidu, CLA/Con.

Know Our Constitution

Article 22: Protection against arrest and detention in certain cases:(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice;
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest (excluding journey time) and no such person shall be detained in custody beyond the said period without the authority of a magistrate;
(3)Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention;
(4)No law providing for preventive detention shall authorise the detention of a person for a longer period than 3 months unless (a) an Advisory Board has authorised the detention before the expiration of the said period of 3 months;
(5)The authority making the preventive detention order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order;
(6)Nothing in clause (5) shall require the authority to disclose facts which is against the public interest;
(7)Parliament may by law describe (a) the circumstances under which, and the classes of cases where preventive detention may be for more than 3 months (b) the maximum period of preventive detention & (c) the procedure to be followed by an Advisory Board.

Legal Maxims:

Suppressio veri, suggestio falsi - The suppression of truth is the suggestion of falsehood.

Ubi jus ibi remedium est - Where there is a right there is a remedy.

Vigilantibus non dormientibus jura subveniunt - The laws serve the vigilant, not those who sleep.

Volenti non fit injuria - An injury is not done to one consenting to it.

K.Gopinath, CLA/GM/O/SC

Whether Govt. needs to deposit security amount while preferring an appeal?

The Supreme Court considered the issue whether an unconditional stay of the award be granted under Section 36 (Enforcement) of the Arbitration and Conciliation Act 1996 (1996, Act) when the applicant is Government, in the case of Pam Developments Pvt. Ltd. Vs. State of West Bengal (Civil Appeal No.5433 of 2019.

Arbitration proceedings went on for around seven years; pursuant to which an award was passed, allowing some of appellant's claims. While the respondent State challenged the award under Sec.34 (Application for setting aside arbitral award), during the intervening period, the 1996, Act was amended, thereby making it necessary for respondent to file a stay application under Section 36.

Respondent's stay application was dismissed for default and the executing court passed an order attaching sum of Rs. 2.75 Crores lying to the credit of the respondent State with Reserve Bank of India. The respondent instead of filing an application seeking to recall the aforesaid order filed a fresh stay application. The impugned order granted an unconditional stay relying on provisions of the Code of Civil Procedure, 1908 (CPC) Order XXVII, Rule 8A (No security to be required from Government or a public officer in certain cases).

The Supreme Court held that it was not the legislature's intent that, when judgment debtor is the government, the award would become unenforceable immediately on filing of an application under Sec. 34 as the award would be stayed merely as a matter of course.

That the reference to CPC in Section 36 is to guide the Court on what conditions can be imposed and the 1996, Act as a special act must be applied first and CPC would be applicable only to the extent that it is consistent with the 1996, Act.

Further, the bar envisaged under Order XXVII, Rule 8A is only with regard to security being provided as mentioned in Rules 5 and 6 of Order XLI of CPC. However, the same cannot be stretched to be interpreted that a decretal amount cannot be asked to be deposited in appeal. It was observed that Order XXVII, Rule 8A was introduced in 1937 during the British Raj and that the same would not be applicable in today's times with a democratic government in place.

The Supreme Court held that while CPC may provide for differential treatment of government in certain cases, the 1996, Act is a special act which mandates that parties to arbitration are treated equally, no special treatment can be given to the government when considering an application for stay of award. Thus, even Govt. needs to deposit the decretal amount while preferring an appeal.

IVVRP Prasad, LO/HQ.

Whether sanction for prosecution of Govt. servant involved in an act not connected to duty is required?

The accused in a case, which was taken cognizance by the Judicial Magistrate, for commission of offences punishable under Sections 323, 341, 379& 504 IPC, had invoked the jurisdiction of High Court, Patna which allowed Crl. M. No. 35751/2014 filed by the accused and quashed the order passed by the Judicial Magistrate in a Complaint Case. Thus, the issue reached the Supreme Court.

The short issue considered by the Apex Court was whether the High Court was justified in quashing the complaint filed by the appellant-complainant against the respondent No.2, holding that there was no prima facie case made out against respondent No.2. The Supreme Court observed that the "High Court quashed the complaint essentially on two grounds: First, no sanction under Section 197 of the Cr.P.C was obtained by the prosecution for filing the complaint against respondent No. 2 and the second, there are contradictions in the statement of the complainant and the witnesses." It was held by the Apex Court that in the nature of the allegations made by the complainant against respondent No.2, no prior sanction to prosecute under S.197 of Cr.PC was required for filing such complaint.

It was concluded by the Supreme Court: "10. In other words, it cannot be contended that respondent No. 2 committed the alleged offences while acting in discharge of his official duties or while purporting to act in discharge of his official duties so as to attract the rigor of Section 197 of the Cr.P.C.

11. In our view, in order to attract the rigor of Section 197 of the Cr.P.C., it is necessary that the offence alleged against a Government Officer must have some nexus or/and relation with the discharge of his official duties as a Government Officer. In this case, we do not find it to be so.

12. So far as the second ground is concerned, we are of the view that the High Court while hearing the application under Section 482 of the Cr.P.C. had no jurisdiction to appreciate the statement of the witnesses and record a finding that there were inconsistencies in their statements and, therefore, there was no *prima facie* case made out against respondent No.2. In our view, this could be done only in the trial while deciding the issues on the merits or/and by the Appellate Court while deciding the appeal arising out of the final order passed by the Trial Court but not in Section 482 Cr.P.C. proceedings.

13. In view of the foregoing discussion, we allow the appeal, set aside the impugned order and restore the aforementioned complaint case to its original file for being proceeded with on merits in accordance with law." [Devendra Prasad Singh Vs. State of Bihar & Anr. Criminal Appeal No. 579/2019. DOJ–02.04.2019]

Sushanta Dash, CLA/CCO/O

Whether employment notice prior to 1.1.2004 entitles coverage under old pension Rules?

RRB/Calcutta issued notification on 25.2.2002 for the post of Trainee Assistant Driver. The applicant applied for the post and a written exam was held on 29.9.2002 followed by psychological test on 19.2.2003. Upon successful passing of the above, his certificates were verified on 17.11.2003 and a medical test on 18.11.2003. The applicant was given offer of temporary appointment on 8.4.2004, and subsequently on completion of training and was posted in Chakradharpur Division on 4.5.2005. In the meanwhile, National Pension Scheme was introduced by the Central Govt. w.e.f 1.1.2004.

The applicant filed the OA in 2014 before CAT/ Calcutta contending that due to unnecessary delay caused by the authorities in finalising the selection and deputing the applicant for training, the railway administration had caused disadvantage to him, thereby he was brought under the purview of NPS-2014 instead of Railway Services (Pension) Rules, 1993. He further contended that the selection process was started in May 2002, but due to delay by respondents he had to come under the ambit of NPS-2014. Had the selection process was completed without undue delay, he would have entitled for benefits under RSPR, 1993.

The applicant further stated that at the time of his submission of application for the said post, it was governed by RSPR, 1993 and there was no condition that any other rules would apply to them. He claimed that, therefore, no subsequent rules / scheme shall apply to him.

Answering to the O.A, the respondent railways submitted that the first panel was issued on 17.9.2003. In that first panel, the applicant's name was not there. Since many candidates failed in the medical examination, to make good the short fall, candidates below the initial cut-off rank were called and the applicant was one among them.

The respondents submitted the Gazetted Notification dated 22.12.2003 issued by the Ministry of Finance which stipulated that all CG employees who joins service on or after 1.1.2004 shall come under the purview of National Pension Scheme, 2004. The respondents also produced RBE 225/2003, by which the NPS 2004 was extended to Railways.

The Tribunal framed two issues viz., (i) Whether NPS-2004 was bad in law as alleged by the applicant? & (ii) Whether the applicant is entitled to retrospective status in appointment, since notification is of the year 2002 and whether he was entitled to be covered under RSPR, 1993?

The Tribunal relied on the judgment of the Supreme Court in SLP (C) 3106-3107/2012 in T.M.Sampath & Ors. Vs. Secretary, Ministry of Water Resources & Ors. wherein the applicants challenged the NPS that it was arbitrary and discriminatory. The SC held that "The cut-off date is a domain of the employer and so the introduction of new scheme of pension will be done considering all the relevant factors including financial viability of the same". The SLP was dismissed by the Apex Court.

With regard to the 2nd issue, the Tribunal considered the appointment letter wherein the applicant had accepted the conditions therein and signed the same unconditionally, without raising any objection about 18 months training and passing the same before being absorbed in a working post.

The Tribunal held that the NPS cannot be held to be bad in law or non-sustainable as there is not a single reason, justification, logic made by the applicant to prove as to salient features of NPS-2004 is bad in law or not sustainable. The relevant Ministry of Law & Justice has not been impleaded in O.A by the applicant and hence, there is no scope for the concerned Ministry of the Govt. of India to defend the legality of the policy decision. The CAT cited in support, the ratio laid down by SC in T.M.Sampath (supra) that no arbitrariness or discrimination has been proved with respect to NPS.

Regarding the issue as to whether the candidate is entitled to the benefits from the date of announcement of vacancies, the Tribunal observed that the candidate himself accepted the terms and conditions of his appointment and hence he is estopped at a later stage to raise objections about the same. Further, the applicant furnished a format of undertaking preferring his option for NPS-2004. Further, RBE No.225/2003 being an extant instruction prior to the offer of such appointment letter, is binding on the applicant.

The issue that the candidate was appointed after 1.1.2004 on account of delay on the part of the respondents does not hold good as the candidate was low in the merit list and hence he was placed in the second list of candidates since many candidates failed in the medical examination. The O.A was, accordingly, dismissed [OA 350/299/2014. Sumit Chatterjee Vs. UOI. DOJ 21.2.2018]

JOKE

A physician, an engineer and an attorney were discussing who among them belonged to the oldest of the three professions represented. The physician said, "Remember, on the sixth day God took a rib from Adam and fashioned Eve, making him the first surgeon. Therefore, medicine is the oldest profession." The engineer replied, "But, before that, God created the heavens and earth from chaos and confusion, and thus he was the first engineer. Therefore, engineering is an older profession than medicine." Then the lawyer spoke up. "Yes," he said, "but who do you think created all of the chaos and confusion?"

YOURS LEGALLY

Reinstatement in service: Back wages or no back wages?

In a situation where an employee who is dismissed from service based on his conviction in a criminal case under Rule 14(1) of D&A rules and later reinstated in view of acquittal from the conviction by a Higher judicial forum, a question arises whether such an employee is entitled for back wages considering this case falls under Rule 1344(3)?

The Supreme Court had an occasion to deal with such a situation in the case of **Ranchhodji Chaturji Thakore Vs. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar, (Gujarat) and another,** AIR1997SC1802, (1996) 11 SCC 603.

In this case, the petitioner was charged for an offence under Section 302 read with 34 IPC for his involvement in a crime. The Sessions Judge had convicted the petitioner and sentenced him to undergo imprisonment for life. On that basis, he was dismissed from service. However, on appeal against the conviction, the High Court acquitted him of the offence. Consequently, he was reinstated but without back wages. Denying the back wages to him, the Apex court held that "It was his conduct of involving himself in the crime that was taken into account for his not being in service of the respondent. Consequent upon his acquittal, he is entitled to reinstatement for the reason that his service was terminated on the basis of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in its own backdrops. In this case, since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail. Under these circumstances, the petitioner is not entitled to payment of back wages".

In **Union of India (UOI) and Ors. Vs. Jaipal Singh,** AIR 2004 SC 1005, (2004)1SCC121, the Supreme Court held that "if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges, a person convicted of an offence to be so kept out and not to be retained in service. The appellants (department) cannot be made liable to pay for the period for which they could not avail of the services of the respondent. The respondent will be entitled to back wages from the date of acquittal and except for the purpose of denying the respondent actual payment of back wages, that period also will be counted as period of service, without any break."

In a recent judgement in **Raj Narain Vs UOI & Ors., CA No. 3339 of 2019, in SLP (Civil) No. 100 of 2016, 01.04.2019** the question before the Supreme Court was that "In case the criminal proceedings are initiated at the behest of the employer, and the employee is acquitted, whether he would be entitled to claim full wages for the period he was kept out of duty during the pendency of the criminal proceedings? [Cases like embezzlement of Railway money etc. fall under this category, where Railway file FIRs against the employee]. Clarifying the matter, the Supreme Court held that 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 department 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.

N.Murali Krishna, Sr. LO/HQ

FAQ:

What is a Gazette Notification?

The Gazette of India is a public journal and an authorised legal document of the Government of India, printed by the Government of India Press which is being published weekly by the Directorate of Printing, Department of Publication, Ministry of Housing and Urban Affairs. Official notices of the Government is printed in the Gazettes.

It is authentic in its contents, accurate and strictly in accordance with the Government policies and decisions. Extraordinary Gazettes are published every day depending upon the urgency of the matters to be notified. The publication of gazette is executed as per the Government of India (Allocation of Business Rules) issued from time to time by the Cabinet Secretariat. The Ministry of Urban Development began publishing an electronic version of the gazette in 2008 known as e-Gazette.

The words "G.S.R" in the Gazette stands for General Statutory Rules", "S.R.O" stands for "Statutory Rules and Orders" and "S.O" denotes "Statutory Orders". The number is allotted by the publisher. The gazette is made use for various purposes such as for notification of change in law / rules, introduction of Acts, change of name, notifying some appointments etc.

K.Gopinath, CLA/GM/O/SC

TREATISE ON

Appointment of arbitrators
(continued from last issue…)

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 has put 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.

Where the impartiality of the arbitrator in terms of the arbitration agreement is in doubt or where the Arbitral Tribunal appointed in terms of the arbitration agreement has not functioned, or has failed to conclude the proceedings or to pass an award without assigning any reason and it became necessary to make a fresh appointment, Chief Justice or his designate in the given circumstances after assigning cogent reasons in appropriate cases may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act. [Union of India Vs Parmar Construction Company, CA No. 3303 of 2019 dated 29.03.2019]

Section 11(6) of the Act would come into play only when there was failure on the part of the party concerned to appoint an arbitrator in terms of the arbitration agreement [Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Another (2006) 6 SCC 204]. Hence, the High Court was not right in appointing an independent arbitrator without keeping in view the terms of the agreement between the parties and therefore, order appointing an independent arbitrator/retired District Judge is not sustainable.

The Supreme Court dismissed apprehensions as to the appointment of a governmental employee as the arbitrator in the government contract, observing that, *"In a catena of judgments, the Supreme Court* has *held that arbitration clauses in government contracts providing that an employee of the department will be the sole arbitrator are neither void nor unenforceable…The fact that a named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or lack of independence on his part.*" [*SP Singla Constructions Pvt. Ltd.* **v**. *State of Himachal Pradesh and Another,* Civil Appeal Nos.11824-11825/ 2018, DOJ- 04.12.2018].

The Apex Court reiterated that Section 11(6) of the Act of 1996 empowers the Chief Justice or his designate to appoint an arbitrator, on request, where either no arbitrator has been appointed, or the

appointed arbitrators fail to reach an agreement. In *the present case, the Arbitrator has been appointed as per the agreement and as per the provisions of law. Hence, the apex court held that once, the appointment of an arbitrator is made at the instance of the government, the arbitration agreement could not have been invoked for the second time."*

Mere neglect of an arbitrator to act or delay in passing the award by itself cannot be the ground to appoint another arbitrator in deviation from the terms agreed to by the parties. Rajasthan Small Industries Corporation Limited V. M/S Ganesh Containers Movers Syndicate, CIVIL APPEAL NO. 1039 OF 2019 DOJ: 23.01.2019].

However, delays and frequent changes in the Arbitral Tribunal defeat the process of arbitration and therefore, the appointment of the arbitrator by the court of its own choice departing from the arbitration clause has become an acceptable proposition of law which can be termed as a legal principle. [Union of India v. Singh Builders Syndicate (2009) 4 SCC 523]. Hence, where delay in arbitral proceedings was intentional, Court can appoint arbitrator. [Union of India and others v. Uttar Pradesh State Bridge Corporation Limited (2015) 2 SCC 52]

However, where the necessity to appoint an arbitrator, after the amendment to A&C Act in 2015, in terms of Section 11(6)(A), the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) or 11(5) or 11(6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. As per sub-section (6A) of Section 11, the power of the Court has now been restricted only to see whether there exists an arbitration agreement.

Thus, as per amended provision Section 11 (6A), the power of the Supreme Court or the High Court is only to examine the existence of an arbitration agreement. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.

The amended provision in sub-section (7) of Section 11 provides that the order passed under Section 11(6) shall not be appealable and thus finality is attached to the order passed under this Section. [M/S Duro Felguera S.A vs M/S. Gangavaram Port Limited, (2017) 9 SCC 729]

N.Murali Krishna, Sr. LO/HQ