South Central Railway
Lex Info – e Magazine
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Do you have any case law/case study to be shared with other railwaymen?

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

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EDITORIAL

In this issue in addition to the regular articles on RTI Act, Arbitration & Conciliation Act, cases mostly related to service matters are covered. Notable among them are "whether a pensioner is consumer" to file a case before Consumer forum for retirement benefits, on seniority, claims pursuant to missing persons, salary attachment etc. Hope the judgements in this issue are useful.

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 The Apprentices Act, 1961

Object of the Act: Promotion of new manpower at skills. Improvement/refinement of old skills through theoretical and practical training in number of trades and occupation. The Act was enacted by the Government to regulate and control the training of apprentices.

Applicability of the Act to areas and industries as notified by the Central Government **(Sec. 1).** Indian Railways train apprentices under Apprentices Act, 1961 in certain designated trades. Railways engage apprentices in the workshops of the Civil, Mechanical and S&T Engineering Departments, Production Units, Diesel and Electric Loco Sheds, Carriage and Wagon Depot and Electrification Projects.

Apprenticeship Adviser[2(b)] means the Central Apprenticeship Adviser appointed under sub-section (1) of section 26 or the State Apprenticeship Adviser appointed under sub-section (2) of that section;

Industry(Sec.2(k): Industry means any industry, or business or in which any trade, occupation or subject/field in engineering or technology or any vocational course may be specified as a designated trade.

Qualification for being trained as an Apprentice (S. 3)
A person to become an apprentice in any designated must satisfy the condition that -

⇒ He is not less than 14 years of age and for an designated trades related to hazardous industries not less that 18 years of age.

⇒ He satisfies such standard of education And physical fitness as May be prescribed

Contract of Apprenticeship(Sec.4): To contain such terms and conditions as may be agreed to by the apprentice, or his guardian (in case he is a minor) & employers.

Conditions for Novation of Contract of Apprenticeship(Sec.5)

⇒ There exists an apprenticeship contract.

⇒ The employer is unable to fulfil his obligation.

⇒ The approval of the Apprenticeship Advisor is obtained.

⇒ Agreement must be registered with the Apprenticeship Advisor.

Period of Apprenticeship Training (Sec.6) -
In the case of trade apprentices possessing the institutional training in a school or other institution recognized by the National Council or any other authorized agency and passed the trade tests, the period of apprenticeship training shall be such as may be prescribed by that Council or Agency.

Termination of Apprenticeship (Sec. 7).

⇒ On the expiry of the period of Apprenticeship training.

⇒ On the application by either of the parties to the contract to the Apprenticeship Advisor.

⇒ Number of Apprentices in Designated Trade to be determined by The Central Government after consulting the Central Apprenticeship Council **(Sec.8)**

Obligations of employers (Sec.11)

Without prejudice to the other provisions of the Act, every employer shall have the following obligations in relation to an apprentice, namely:-

1)To provide the apprentice with the training in his trade in accordance with the provisions of the Act, and the rules made there under
2)If the employer is not himself qualified in the trade, to ensure that a person who possesses the prescribe qualifications is place in charge of the training of the apprentice; and
3)To carry out his obligations under the contract of apprenticeship.

Obligations of Apprentice (Sec.12)

Every trade apprentice undergoing apprenticeship training shall have the following obligations, namely:-
1)To learn his trade conscientiously and diligently and Endeavour to qualify himself as a skilled craftsmen before the expiry of the period of training;
2) To attend practical and instructional classes regularly;
3) To carry out all lawful orders of his employer and superiors in the establishment and
4) To carry out his obligations under the contract of apprenticeship.

Hours of work (Sec.14)- The daily hours of work of an apprentice shall not be more than 8 hours per day and weekly hours not less than 40 hours but not more than 45 hours. A short term apprentice may however be engaged to work up to a maximum limit of 48 hours per week. The hours of training of the apprentice should not be between 10pm and 6am except with the prior approval of the apprenticeship adviser.

Employer's liability to pay compensation for injury As per provisions of Workmen's Compensation Act **(Sec. 16).**

Stipend to the Apprentice(S-28)- rates of stipend for different categories be asked from the Apprenticeship Adviser in particular state, wherein the factory or the establishment is located.

Offer and acceptance of employment (Sec.22)

Every employer shall formulate its own policy for recruiting any apprentice who has completed the period of apprenticeship in his Establishment.

Offences & Punishment(Secs. 30 & 31)

Fine of Rs.1000/- for every occurrence is imposed when employer engages as an apprentice a person who is not qualified for being so engaged or fails to carry out the terms and conditions of a contract of apprenticeship, or contravenes the provisions of the Act relating to the number of apprentices which he is required to engage under those provisions.

V. APPARAO, CLA/GM/O/SC

RTI Act Series:

It is not open to an applicant to interrogate a public authority regarding the nature and the quality of their decision through recourse to the RTI Act. The applicant in a case had questioned the departmental authorities about why they had not accepted the defence which the appellant had apparently presented corresponding to the charges framed against him in the disciplinary proceedings. [CIC's Order in Sunil Kumar Katiyar Vs. Central Excise & Customs (F.No.CIC/AT/A/2009/000332). Date of Order: 9.06.2009].

CIC held on 18.09.2007 that *"Section 4(1) (d) does not apply to a judicial proceedings conducted by a Court or a Tribunal as it refers only to administrative and quasi-judicial decisions of public authorities."* [Rakesh Kumar Gupta Vs. ITAT. Appeal No. CIC/AT/A/2006/00586].

In another case the Supreme Court also adopted the above stand of the CIC and held: *"An applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. Of course, under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain later on for what reasons he had come to such a conclusion."* [Khanapuram Gandaiah Vs. Administrative Officer & Ors. DOJ: 04.01.2010].

S. 4 (1) (d) of RTI Act warrants to "provide reasons for its administrative or quasi-judicial decisions to affected persons". However, CIC in Dr. Jitender Nath Gupta Vs. Government of NCT, Delhi [Decision No. CIC/SG/A/2010/002398/9878] on 22.10.2010 held that *"....Section 4(1)(d) of the RTI Act does not bring within its ambit disclosure of reasons for each and every administrative or quasi judicial decisions taken by a public authority if they have not been recorded". It further observed: "....only those reasons (for certain administrative actions or decisions), which are available on record, come within the purview of the RTI Act".*

Information placed in website also needs to be furnished: CIC in re Complaint No.CIC/BS/C/2016/000366-BJ [Pawan Kumar Sharma Vs. Dy. Commissioner of Income Tax HQ) (Admn.)] held on 31.05.2017 that even the information already placed in website of the Public Authority needs to be furnished under the RTI Act. It observed: *"In this context, the Commission referred to the decision of the Hon'ble High Court of Delhi in Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal (LPA No.501/2009) (Judgment pronounced on: 12th January, 2010) wherein it was held as under:*

"60.....The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. In construing such a statute, the Court ought to give to it the widest operation which its language will permit. The Court will also not readily read words which are not there and introduction of which will restrict the rights of citizens for whose benefit the statute is intended.

61. The words "held by" or "under the control of" under Section 2(j) will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its functions and its official capacity. There are any numbers of examples where there is no legal obligation to provide information to public authorities, but where such information is provided, the same would be accessible under the Act. For example, registration of births, deaths, marriages, applications for election photo identity cards, ration cards, pan cards etc. The interpretation of the word 'held' suggested by the learned Attorney General, if accepted, would render right to information totally ineffective."

In an earlier order, while directing to furnish information which was already available in the website of the Public Authority, CIC ordered on 13.02.2015 as follows: *"6. Having heard the submissions and having perused the record available in the file, the Commission directs the respondent authority to provide hard copy of the information to the appellant after collecting copying charges from the appellant and also intimate him the web-link where the information is available, within 15 days from the date of receipt of this order. The appeal is disposed of."* [Vikrant Togat Vs. PIO, MoEF [CIC/SA/A/ 2014/00732]

In the case of Shri. Ishwar Lal Vs. Indian Oil Corporation Ltd. Decision No.4620/IC(A)/2009 F.No.CIC/MA/C/2009/000578 dated 07.10.2009 the CPIO had furnished partial information while the remaining information was refused on the ground that relevant files were not traceable and the record in question was too old. Under section 4 (1) (a) of the Act, every public authority is required to "maintain all its records duly categorized and indexed in a manner and the form which facilitates the right to information". In view of this, denial of information on the basis of non-availability of records was held to be not acceptable. A penalty of Rs.25,000/- was imposed on the PIO and Rs.50,000/- was ordered to be compensated under S. 19 (8)(b).

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

Difference between:
Starred Question & Unstarred Question:

Members have a right to ask questions to elicit information on matters of public importance within the special cognizance of the Ministers concerned. The questions are to be placed with at least 15 clear days' notice and are of four types:—

(i) Starred Questions- Starred question is part of Question Hour in Parliament. Generally, the first hour of sitting of Lok Sabha is devoted to Questions and that hour is called the Question Hour. A Starred Question is one to which a member desires an oral answer from the Minister in the House and is required to be distinguished by him/her with an asterisk. Answer to such a question may be followed by supplementary questions by members.

(ii) Unstarred Questions- An Unstarred Question is one to which written answer is desired by the member and is deemed to be laid on the Table of the House by Minister. Thus it is not called for oral answer in the House and no supplementary question can be asked thereon.

(iii) Short Notice Questions- A member may give a notice of question on a matter of public importance and of urgent character for oral answer at a notice less than 10 days prescribed as the minimum period of notice for asking a question in ordinary course. Such a question is known as 'Short Notice Question'.

(iv) Questions to Private Members- A Question may also be addressed to a Private Member (Under Rule 40 of the Rules of Procedure and Conduct of Business in Lok Sabha), provided that the subject matter of the question relates to some Bill, Resolution or other matter connected with the business of the House for which that Member is responsible. The procedure in regard to such questions is same as that followed in the case of questions addressed to a Minister with such variations as the Speaker may consider necessary.

In the Lok Sabha, the list of Starred Questions is printed on green paper, Unstarred Questions on white paper , the list of Short Notice Questions on pink paper and the list of Questions to Private Members on yellow paper, so that Members can distinguish these lists easily.

Each MP can submit a maximum of 10 questions for each day of the Parliament's sitting when question hour is to take place. The submissions are made 15 days before the date assigned for answer and a paper signed by the MP listing the question must be submitted in the parliamentary notice office.

Out of that, a maximum of five questions will get picked for answering. In Lok Sabha there can only be 20 starred questions, which are due for oral answer and 230 unstarred questions, where written answers are provided, on each day. In Rajya Sabha the starred questions are limited to 15 and unstarred to 175. Normally only the first five of the list are answered on the floor of the House and where MPs can ask supplementary questions. The rest only get written replies.

K.Gopinath, CLA/GM/O/SC

FAQ: Salary Attachment

The extent to which attachments are permitted from the salary of railway employees is governed by Chapter XVIII of IREM Vol.II. Provisions of Section 60 CPC have been incorporated in Chapter XVIII.

The following allowances, are exempted from the purview of such court attachments:
(i) Travelling allowances; (ii) Conveyance allowances; (iii) Allowances towards uniforms and rations; (iv) Allowances towards higher cost of living; (v) HRA (vi) Allowances granted to provide relief against the increase in the cost of living; (vii) Foreign allowance; (viii) CEA & (ix) Re-imbursement of medical expenses.

The attachable portion (moiety) as per Para 1803, except for a decree for maintenance, is as follows =

$$\frac{\text{(Gross Salary - Exempted Allowances - Rs.1000)}}{3}$$

In the case of a decree for maintenance, 2/3rd of the salary is attachable [CPC Section 60 (1) (ia)].

In cases where the whole or any part of the portion of the attachable moiety has been under attachment, whether continuously or intermittently, for a total period of 24 months, such portion shall be exempt from attachment until the expiry of a further period of 12 months, and, where such attachment has been made in execution of one and the same decree, shall after the attachment has continued for a total period of 24 months, be finally exempt from attachment in execution of that decree [Para 1804]. This means that: (i) the moiety of salary which was under attachment for 24 months in execution of a decree gets exempted for the following 12 months against another decree. & (ii) the portion of salary which was under attachment for 24 months in execution of a decree gets exempted permanently against the same decree.

Calcutta High Court in Biman Kumar Biswas Vs. Commercial Engineering Corporation Pvt. Ltd & Ors.[C.O No.2240/1982. DOJ– 14.9.1982] held that even where part of attachable portion of salary is attached, continuously or intermittently, for a total period of 24 months, the judgment-debtor is entitled to total exemption u/s 60(1)(i) of CPC from any more attachment in execution of the same decree.

In a case where attachment was done for 35 months, the decree executing Court had ordered for further recovery after a gap of 12 months in relation to the same decree. In this regard the AP High Court held that re-commencement of recovery / attachment after a gap of 12 months is not possible in connection with the same decree. [SK.Noorjahan Vs. M.Rajeswari, Civil Revision Petition 3414/2009, DOJ - 30.4.2010]

Money payable against pension/gratuity (S.11 of Pensions Act 1871), insurance, PF, PPF etc. are exempted from Court attachment.

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

Claims pursuant to missing of persons

Family members of Railway employees sometimes approach authorities reporting that the employee is missing for some time seeking consequential benefits of the said employee viz settlement dues/family pension, appointment on CG etc on the ground that if a person is not heard for seven years, it is to be presumed that said person is dead. However, two important legal questions arise from this situation. 1) who can declare that said person is dead; and 2) since when said person is to be presumed to be dead. Section 108 of Indian Evidence Act, 1872 deals with presumption as to death of a person who has not been heard of for seven years by those who would naturally have heard of him if he had been alive.

The Supreme Court answered the two questions in the case of LIC Vs.Anuradha [AIR 2004 SC 2070] as follows:

An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise. Therefore, unless a competent court declares that said person is dead, no such presumption can be taken.

The view that on the expiry of seven years by the time the issue came to be raised in Consumer Forum or Civil Court and evidence was adduced that the person was not heard of for a period of seven years by the wife and/or family members of the person then not only the death could be presumed but it could also be assumed that the presumed death had synchronized with the date when he was reported to be missing or that the date and time of death could be correlated to the point of time coinciding with the commencement of calculation of seven years backwards from the date of initiation of legal proceedings, is not accepted by the Supreme Court. Presumption under Section 108 of Evidence Act, 1872 is confined only to presuming that the person is dead but there is no presumption as to the date or time of death.

The apex court further held that if an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

This being the legal position, the Railways, as benevolent as it is, has issued consolidated instructions for family pension and gratuity to the eligible family member of the railway employee reported missing under RBE 68/2013 dated 15.07.2013 in order to assuage the family of missing person. Railway Board had clarified that an FIR is not required since FIR can be lodged only in case of cognizable offences and a missing person does not per se point to commission of cognizable offence. Hence, in case of a missing employee/ pensioner/family pensioner, the family can apply for the grant of family pension, amount of salary due, leave encashment due, and the amount of GPF and gratuity (whatever has not already been received), six months after lodging of police report. Such benefits may be granted after observing that (i) the family lodged a report with the concerned police station and obtain a report from the police, that the employee/family pensioner has not been traced despite all efforts have been made by them. The report may be a FIR or any other report such a s Daily Diary or General Diary entry. (ii) An indemnity bond shall be obtained from the nominees/dependants of the employee/pensioner/family pensioner that all the payments will be adjusted against the payments due to the employee/pensioner/family pensioner if he/she appears and makes a claim for said amounts.

M. Anil Kumar, CLA, CCO/O/SC

Legal Maxims:

Actus reus - A guilty deed or act.

Ante - Before.

Casus Omissus - A legal issue or situation not governed by statutory or administrative law or by the terms of a contract.

Contra - To the contrary.

Damnum sine injuria - damage without legal injury.

K.Gopinath, CLA/GM/O/SC

KNOW OUR CONSTITUTION

Art 25. Freedom of conscience and free profession, practice and propagation of religion:

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Can seniority be claimed from date of vacancy, instead of date of appointment?

The question of granting seniority from the date of commencement of vacancy instead of date of appointment has been very recently settled by the Supreme Court. The facts of the case which require to be known for understanding are as follows:

The dispute between promotees and direct recruits of Manipur Police Service Grade II Officer Grade (MPS Grade II Cadre) had reached the Supreme Court after a decision by the High Court of Manipur. The promotees contended that they entered the MPS Grade II cadre on 1.3.2007 whereas the direct recruits entered only on 14.8.2007/ 24.11.2007 and hence they should be regarded as senior to the direct recruits.

The direct recruits on the other hand claimed seniority over the promotees by contending that seniority has to be decided in accordance with the year of the vacancy and not by the fortuitous date on which, the appointment could be finalized for the direct recruits.

Earlier, in the High Court, the State in their counter affidavit took the stand that seniority should be determined from the date on which the person was appointed but not from the date of vacancy. For the direct recruits appointed on 14.08.2007 against the vacancy of 2004-2005 it was averred that their seniority should be counted from the date of appointment.

The Single Bench which heard the matter directed that the batch of promotees appointed on 01.03.2007 must be given seniority above the direct recruits appointed on 14.08.2007 and he justified this by stating that a direct recruit can claim seniority only from the date of his regular appointment and cannot claim seniority from a date when he is not borne in the service.

The ratio in Jagdish Chandra Patnaik Vs. State of Orissa was relied upon by the Single Bench. The Court also held that the expression "year" must refer to financial year and not calendar year. Support for such conclusion is based on the Office Memorandum dated 29.4.1999, which specifies that the recruitment year would be treated as the financial year. Besides the Manipur Reservations of Vacancies in Posts and Services (for Schedule Castes and Schedule Tribes) Act of 1976 provided that the term meant financial year. It was also seen that on 18.12.2009, the State of Manipur amended the Manipur Police Service Rules of 1965 by introducing sub-rule 2(g) defining the word "year" to mean calendar year. In consequence, the learned Single Judge held that the promotees get entry into the cadre in the recruitment year 2006-2007 whereas the direct recruits would stand appointed in the recruitment year 2007-2008.

Aggrieved by the order of the Single Judge, Writ Appeal was filed before Manipur High Court which was transferred to Gauhati High Court and was re-numbered. The Division Bench upheld the conclusion of the Single Judge, but confined its justification to the principle that seniority for direct recruits could not be reckoned from a date prior to their appointment. It further observed that there was no need to go into the question as to whether "year" means "calendar year" or "financial year", since the position was even otherwise clear. The review petition filed thereafter was dismissed for non-prosecution. Restoration was not allowed.

Thus, the matter reached the Supreme Court. Appellants-direct recruits relied on Supreme Court's order in UOI Vs. N.R.Parmar [2012 (13) SCC 340] to argue that when action was initiated for filling up the 2005 vacancies, the administrative delay in finalization of the recruitment leading to delayed appointment should not deprive the individual of his due seniority. The appellants further referred to the 1989 Amendment of the MPS Rules to point out that recruitment year has been clarified as "calendar year" and therefore, there is no necessity to interpret the expression.

On behalf of the respondents-promotees it was pointed out, inter alia, that N.R.Parmar case did not lay down the correct law in determination of seniority. It was also argued that there was no relevance to financial year or calendar year and what mattered was only the date of joining. The Counsel on behalf of the State submitted that while determining the inter-se seniority of the Manipur Police Service Officer, the applicable Service Rules should be the basis instead of resorting to an interpretive exercise particularly when, there is no scope for ambiguity in the Rules.

Referring to the word "recruited" occurring in the Orissa Service of Engineers Rules, 1941 the Supreme Court earlier held in J.C. Patnaik Vs. State of Orissa 1998 (4) SCC 456 that person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment but he is borne in the post only when, formal appointment order is issued.

The Supreme Court held: "39. At this stage, we must also emphasize that the Court in N. R. Parmar (Supra) need not have observed that the selected candidate cannot be blamed for administrative delay and the gap between initiation of process and appointment. Such observation is fallacious in as much as none can be identified as being a selected candidate on the date when the process of recruitment had commenced. On that day, a body of persons aspiring to be appointed to the vacancy intended for direct recruits was not in existence. The persons who might respond to an advertisement cannot have any service-related rights, not to talk of right to have their seniority counted from the date of the advertisement. In other words, only on completion of the process, the applicant morphs into a selected candidate and, therefore, unnecessary observation was made in N. R. Parmar (Supra) to the effect that the selected candidate cannot be blamed for the administrative delay." The Supreme Court overruled N.R.Parmar case and placed reliance on Suraj Prakash Gupta & Ors. Vs. State of JK & Ors. And Pawan Pratap Singh & Ors. Vs. Reevan Singh &Ors. The cases of the direct recruits were dismissed. [K.Meghachandra Singh& Ors. Vs. Ningam Siro & Ors. CA Nos.8833-8838/2019. DOJ: 19.11.2019]

S. Venkateswarlu, CLA/PCE/O/SC

Govt. Servant cannot file complaint about service conditions or retiral benefits before Consumer Fora

"The appropriate forum, for redressal of any of his grievance, may be the State Administrative Tribunal, if any, or the civil court but certainly not a forum under the Act." The Supreme Court in Civil Appeal No. 8472 of 2019 (arising out of SLP(C) No.26538) - Ministry of Water Resources & Ors. (Appellants) Vs. Shreepat Rao Kamde (Respondents) has reiterated that a government servant is not a 'consumer' for the purpose of Consumer Protection Act and cannot raise any dispute regarding his service conditions or for payment of gratuity or GPF or any of his retiral benefits before any of the forum under the Act.

The Ministry of Water Resources had approached the Apex Court against the order of National Consumer Commission (NCDRC) which dismissed its revision petition against the order of the District Forum and State Commission granting relief to its employee whose claim for compensation and interest for the delayed payment of General Provident Fund dues was allowed. The National Commission had refused to condone delay in filing the revision petition.

The bench comprising Justice Uday Umesh Lalit and Justice Indu Malhotra noted that this issue is settled in Jagmittar Sain Bhagat v. Director, Health Services, Haryana (2013) 10 SCC 136. In the said judgment, the Court had held that a government servant cannot approach any of the forum under Consumer Protection Act for any of the retiral benefits. It was observed thus:

It is evident that by no stretch of imagination can a government servant raise any dispute regarding his service conditions or for payment of gratuity or GPF or any of his retiral benefits before any of the forum under the Act. The government servant does not fall under the definition of a "consumer" as defined under Section 2(1)(d)(ii) of the Act. Such government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum, for redressal of any of his grievance, may be the State Administrative Tribunal, if any, or the civil court but certainly not a forum under the Act.

The Court also noticed that in another judgment, in Secretary, Board of Secondary Education, Orissa vs. Santosh Kumar Sahoo, it was held the Consumer Protection Act was not intended to cover discharge of statutory function of examining whether a candidate was fit to be declared as having successfully completed a course by passing the examination.

While allowing the appeal, the bench observed: "On the point of entitlement of a Government servant in respect of dues as stated and whether such Government servant can maintain any action under the provisions of the Act, the law is thus well settled. The decision of this Court rendered in Jagmittar Sain Bhagat was holding the field when the matter was decided by the State Commission and the National Commission. A plea was squarely raised by the appellants about the inapplicability of the provisions of the Act. However, that plea was not gone into. In keeping with the principles laid down by this Court in the case of Jagmittar Sain Bhagat, we hold that the complaint in the present case was not maintainable before the District Forum under the provisions of the Act."

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

Legal Update: Additional disputes which were not part of litigation can be included in a Settlement Agreement arrived at mediation: Supreme Court

"In the Mediation it is always open for the parties to explore the possibility of an overall amicable settlement including the disputes which are not the subject matter of the proceedings before the Court. That is the benefit of the Mediation. In the Mediation parties may try for amicable settlement, which is reduced into writing and/or a Settlement Agreement and thereafter it becomes the part of the Court's Order and the Court disposes of the matter in terms of the Settlement Agreement. Thereafter the order in terms of the Settlement Agreement is executable irrespective of the fact whether the Settlement Agreement is with respect to the properties which was/were not the subject matter of the proceedings before the Court. Thereafter the order passed by the Court in terms of the Settlement is binding to the parties and is required to be acted upon and/or complied with and as observed above the same is executable."

[Kaushaliya Vs. Jodha Ram & Ors. CP No.1868/2018 in SLP (C) No.10022/2016. DOJ - 25.11.2019]

Know the lesser known:

- The time taken by a railway doctor to come to a decision on the fitness of an employee under PME is to be treated as 'on duty', though instructions exist to complete the same in 3 days. In other words, the period taken, even if it is in excess of 3 days, to be treated as 'on duty' [IRMM Vol.I, Note below Para 524 (RB's Lr.No.86/H/5/11 dated 07.02.1990).

- The Disciplinary Authority cannot order de novo inquiry with the same IO or by appointing another IO [V.Ramabharan vs. Union of India 1992 (1) SLR CAT 57 (Mad.)]

- If a penalty of dismissal, removal, CR, reduction or withholding of increment is imposed, the Charged Employee may seek the Appellate Authority for a personal hearing along with his Defence Counsel before the disposal of appeal [Rule 24(1) of D&AR 1968].

YOURS LEGALLY

Scope for redress of grievances through RTI Act

The Central Information Commission had couple of occasions to deal with the issue of using RTI Act for redressal of grievances. In Pratap Singh Vs. CPIO, Supreme Court of India, the appellant before the CIC was an advocate and he raised 7 items through RTI Act with the CPIO of Supreme Court regarding the AOR examination conducted by the Supreme Court. These inter alia included (i) re-checking/re-evaluation of his answer sheet of Paper-III, (ii) whether the registrar has power to award grace marks and (iii) how may candidates approached the Hon'ble High Court under Writs and succeeded in getting a favourable order. Not satisfied with the reply and first appellate order, the appellant approached the CIC.

The CPIO submitted before the CIC that vide point nos. 1 and 2 of the RTI application, the appellant had requested the CPIO to send his answer scripts for re-checking/re-evaluation, which was not permissible under the RTI Act, as under the provisions of the RTI Act, the appellant cannot expect the respondent to take certain action or initiate action as desired by him. Hence, the appellant was informed that the information sought for is not covered under Section 2(f) of the RTI Act. As regards the query nos. 1, 2 and 5 of the RTI application, regarding rechecking and re-evaluation of his AoR examination answer scripts, the appellant was advised to refer to the regulations framed in this regard under the Supreme Court Rules, 2013, and to take appropriate action accordingly.

The CPIO also clarified that the answer scripts for the AoR examination is retained only for a period of 1 year as per Regulation 18 of the Advocates-on-record Examination contained in Supreme Court Rules, 2013 and hence the answer scripts could not be provided, as the same would have been weeded out before the filing of the RTI application. The respondent further submitted that the appellant is seeking redressal of his grievances. However, the RTI Act is not the proper law for redressal of grievances and there are other appropriate fora for resolving such matters.

The Commission, while disposing of the 2nd appeal, also accepted the stand of the respondent that the RTI Act was not the proper law for redressal of grievances and that there were other appropriate fora for resolving such matters. [Second Appeal No. CIC/SCOFI/A/2018/128650. Pratap Singh Vs. CPIO, Supreme Court of India. Date of order—14.10.2019].

Earlier this year, on 06.02.2019 the CIC had dealt with a similar matter wherein the appellant who was aggrieved by the cancellation of his health insurance policy after paying premium for five years had initially approached the NHRC. However, the NHRC had recommended him to approach the appropriate forum of law relating to his grievance.

The appellant had, thus, sought the CPIO, Supreme Court's advice regarding the amount of compensation he was entitled to receive from Royal Sundaram Alliance Company, Chennai as per the Bima Ordinance Bill No. 31(c), 2015 passed by the Parliament for illegally cancelling his health insurance policy. However, no information was furnished to him by the respondent.

The respondent reiterated that the appellant has been informed vide CPIO's reply dated 23.08.2017 that under the RTI Act, the CPIO is not supposed to interpret the law, to take action against any authority or to give explanation, opinion, comment or advise on any matter. Hence, the appellant was informed that his query does not fall within the definition of 'information' as per Section 2(f) of the RTI Act. The respondent further submitted that the appellant is seeking redressal of his grievances. However, RTI Act is not the proper law for redressal of grievances and there are other appropriate fora for resolving such matters.

The CIC after hearing the matter relied on Supreme Court's order in CBSE & Anr. vs. Aditya Bandopadhyay & Ors. (C.A. No. 6454 of 2011) wherein it was held as under: "35..... But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant.....". While disposing of the appeal, the CIC upheld the stand of the CPIO. [Second Appeal No. CIC/SCOFI/A/2018/109988. Ravipati Narasimhulu Vs. CPIO, Supreme Court. Date of order — 06.02.2019]

In 2018, CIC had dealt with a 2nd appeal related to grievance of the appellant for not issuing insurance policy. The appellant sought information regarding Photostat of two of his cheques, copy of application form, reasons for denial of policy etc. It was submitted by the PIO that the cheque issued was bounced and hence no policy was issued. The application form did not reach them, it was further submitted. The agent whose name was indicated by the appellant was also terminated. Not satisfied with the reply of the PIO, a first appeal was preferred and the first appellate authority concurred with the view of the PIO, and thus the appellant reached CIC.

The Hon'ble Supreme Court of India in the matter of Union of India v. Namit Sharma in REVIEW PETITION [C] No.2309 OF 2012 IN Writ Petition [C] No.210 OF 2012 with State of Rajasthan and Anr. vs. Namit Sharma Review Petition [C] No.2675 OF 2012 In Writ Petition [C] No.210 OF 2012 had held as under: "While deciding whether a citizen should or should not get a particular information "which is held by or under the control of any public authority", the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions." Reliance was also placed on the order of High Court of Delhi in the matter of Hansi Rawat and Anr. vs. Punjab National Bank and Ors. LPA No.785/2012 dated 11.01.2013. The CIC ruled that the matter needs to be resolved at an appropriate forum.

Syed Amjad Ali, OS/GM/O/SC

TREATISE ON

Challenging the appointment of arbitrator –

Though the title of the Section reads as "Grounds for Challenging the appointment of arbitrator" it majorly deals with the issue of neutrality of arbitrators. Section 12 has been amended (w.e.f 23.10.2015) with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. Accordingly, an arbitrator may be challenged only if

a. circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

b. he does not possess the qualifications agreed to by the parties.

The Act further stipulated by way of Section 12 (5) that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. However, parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

In compliance with the said sub section GCC for works and IRS conditions have been modified providing for an opportunity to the claimant as to whether he/she desires to waive off applicability of the said sub section. Accordingly, if the claimant desires to waive off the said condition, departmental officers are appointed to resolve the dispute. Otherwise, retired officers on the panel of the Railway to act as arbitrators are appointed.

In addition to the above grounds, a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. [Voestalpine Schienen GmbH Vs. Respondent: Delhi Metro Rail Corporation Ltd. Arbitration Petition (Civil) No. 50 of 2016 Decided On: 10.02.2017, (2017) 4 SCC 665 = AIR 2017 SC 939]

Appointment of retired officer as arbitrator [per GCC and IRS conditions]: The Supreme Court, in the same judgement, further held that "It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators.

In CA NO. 27/2019 between The Government of Haryana Vs M/s. G.F. Toll Road Pvt. Ltd. & Ors. [DOJ: January 3, 2019] The apex court held that entry 1 of the Fifth Schedule and the Seventh Schedule are identical. The Entry indicates that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words "is an" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties. An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees.

N.Murali Krishna, Sr.LO/HQ.

Funny Lawyer Quotes:

A bar was so sure that its bartender was the strongest man in the world that it offered $1,000 to anyone who could beat him in one task. The bartender squeezed a lemon until all the juice ran out. Anyone who could get a drop of juice out of it after the bartender was done would win the $1,000. Many strong people tried and failed. One day a scrawny man came into the bar wearing thick glasses and a polyester suit. He squeaked, "I'd like to try the bet." After the laughter died down, the bartender grabbed a lemon and squeezed away. Then he handed the rind to the man, who to everyone's amazement, squeezed six drops into the glass. Stunned, the bartender paid up, and then asked the man, "What do you do for a living? Are you a lumberjack? A weight lifter?" "Nope", the man replied. "I'm an attorney for the IRS."