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

We, the TEAM LAW, are rejoiced to bring out the Annual Issue of Lex Info e-News Magazine, which we commenced in December 2018. The necessity for railway staff to keep legal and establishment matters updated was the motto behind this humble effort. With great and untiring support of many, who contributed their articles to this magazine and guided us, we moved on promptly for last one year. The inaugural issue, which was inaugurated by the AGM/SCR, contained the messages from GM/SCR, AGM/SCR & PCPO/SCR. Now we are delighted to have a kind and encouraging message from our patron Smt Chandrima Roy, SDGM & CVO.

We wish all the Railwaymen a Happy & Prosperous New Decade and beyond!

N.Murali Krishna
Sr. Law Officer/HQ

Note: This is only a news capsule. For full information and understanding to cite the case, please go through the original judgment.

चंद्रिमा रॉय
वरिष्ठ उप महाप्रबंधक एवं
मुख्य सतर्कता अधिकारी
CHANDRIMA ROY
Senior Deputy General Manager &
Chief Vigilance Officer

दक्षिण मध्य रेलवे
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MESSAGE

Lex Info e-News Magazine, a monthly journal on legal matters relevant to the Railways, was an excellent initiative taken by the Law Department of South Central Railway one year ago, to bring about awareness about important laws, rules and regulations. I am very happy to note that since the release of the first issue in December 2018, monthly issues have been regularly uploaded on the South Central Railway website. The present edition marks the completion of one full year of e-publication of Lex Info e-News Magazine. The depth and breadth of the topics covered in this e-magazine is praiseworthy and I am sure that it would go a long way in rendering knowledge to the railwaymen and keeping them updated with latest developments. I heartily congratulate all officers / staff behind Lex Info e-News Magazine and wish them all the best in their future endeavours and hope that they will continue to show the same zeal in bringing out the future issues!

Chandrima Roy
SDGM

ABC OF ACTS

The Rights of Persons with Disabilities Act, 2016

The Rights of Persons with Disabilities Act, 2016 ("RPD Act") has replaced the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and came into effect from 19.04.2017. It was enacted with due cognizance of the obligations under the United National Convention on the Rights of Persons with Disabilities (UNCRPD), to which India is a signatory. This new legislation adopts a social and human rights based approach to disability and recognizes that persons with disabilities are capable of human rights and fundamental freedoms on an equal basis with others.

The 21 disabilities are (a) blindness (b) Low-vision (c) Leprosy cured person (d) hearing impairment (e) Locomotor disability (f) Dwarfism (g) Intellectual Disability (h) Mental Illness (i) Autism Spectrum Disorder (j) Cerebral Palsy (k) Muscular Dystrophy (l) specific learning disabilities (m) multiple sclerosis (n) Thalassemia (o) Hemophilia (p) Sickle cell disease (q) Multiple Disabilities (r) Acid attack victims (s) Parkinson's disease (t) speech and Learning disability (u) Chronic Neurological conditions (Specified Disability). The RPD Act explicitly recognizes all persons with disabilities as any other person before the Law and enjoins it upon the appropriate Government to ensure that they are able to enjoy their legal capacity equally with others.

Section 2 (i) 'establishment' includes a Government establishment and private establishment. The RPD Rules have specified that: (a) every establishment shall publish such policy for persons with disabilities, preferably on their website or at a conspicuous places in their premises; (b) such policy in an establishment (private or government) where 20 (twenty) or more persons are employed shall contain facility and amenity to be provided to the persons with disabilities to enable them to effectively discharge their duties in the establishment, list of posts identified suitable for persons with disabilities, the manner of selection of persons with disabilities for various posts etc.

Section 2R 'benchmark disability' means a person with not less than 40% of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability has been defined in measurable terms, as certified by certifying authority.

The Act mandates every establishment to formulate an equal opportunity policy in the manner prescribed and register such policy with the Chief Commissioner or State Commissioner, as applicable. If a complaint is received from an aggrieved person regarding discrimination on the ground of disability, the head of such establishment is required to: (a) initiate action in accordance with the provisions of the RPD Act; or (b) inform the aggrieved person in writing as to how the impugned act or omission is a proportionate means of achieving a legitimate aim. Maintenance of records of persons with disabilities in relation to the matters of employment, facilities provided and other associated information as prescribed is required. The appropriate Government and local authorities shall provide incentives that are within the limits of their economic capacity, to establishments to ensure that at least 5% of the work force comprises of persons with benchmark disability.

Existing public buildings are required to comply with the specifications on accessibility (in relation to standards relating to physical environment, transport, information and communication technology) prescribed under the RPD Rules to make the existing infrastructure accessible to persons with disabilities. The time limit specified in this regard is 5 years from the date of notification of the RPD Rules which is June 15, 2022. Further, no establishment will be granted permission to build any structure, issued a certificate of completion or be permitted to take occupation, if the establishment does not comply with the specifications prescribed in the RPD Rules.

Section 2(w) 'public building' means Government or private building used or accessed by the public at large, including a building used for educational or vocational purposes, workplace, commercial activities, public utilities, religious, cultural, leisure or recreational activities, medical or health services, law enforcement agencies, reformatories or judicial for as, railway stations or platforms, roadways, bus stands or terminus, airports or waterways.

Special provisions –

Education : Every Child with benchmark disability between the age group of 6 to 18 years is entitled for Right to free education.

Reservation of not less than 5% seats for students with disabilities in Government higher education institutions and any other institution receiving aid from Government.

Employment: Reservation of not less than 4 % in Government establishment against total number of vacancies in the cadre strength in each group of posts.

Allotment of land: 5% of reservation in allotment of agricultural land and housing in all relevant schemes and development programmes.

Penalties for offences (Sec.89): Any person who violates provisions of the RPD Act, or any rule or regulation, shall be punishable with imprisonment up to 6 months and/or a fine of Rs. 10,000 or both. Any subsequent violation attracts imprisonment of up to 2 years and/or a fine of Rs. 50,000 to Rs. 5,00,000. Whoever intentionally insults or intimidates a person with disability or sexually exploits a woman or child with disability, shall be punishable with imprisonment between 6 months to 5 years and fine. Special Courts will be designated in each district to handle cases concerning violation of rights.

Sec. 91 & 92 provides for Punishment for fraudulently availing any benefit meant for persons with benchmark disabilities. Punishment for offences of atrocities- shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

V. Apparao, CLA, GM/O/SC

RTI Act Series

In case of R.K. Arya Vs Deputy Commissioners Police (DCP), Economic Offences Wing (EOW) [Appeal Nos. CIC/WB/A/2007/001547 dated 3-12-2007], the question before the CIC was that in providing the directory of employees and information regarding their remuneration as mandated under sub-section (ix) of Section 4 (1) (b), is the public authority required to include information regarding personal residence, particularly if that personal residence is not in government accommodation. The facts of grant of HRA to all employees and necessity to submit a residential address with the concerned department were taken into account by the CIC. The CIC held that the disclosure of the residential address of an official holding public office is not private information thus cannot qualify for exemption from disclosure under Section 8 (1) (j) of the RTI Act 2005. But if such an employee is engaged in a very sensitive work so that any such disclosure could lead to apprehension of danger to the life of physical safety of that employee, in which case it will merit exemption from disclosure of information. However, a conscious decision of this nature will have to be taken with regard to each such official failing which this exemption cannot be claimed in a general manner.

Now it would be advantageous to take a detailed look on orders of various Courts / CIC on Section 5. It is important to note that if the PIO seeks assistance from any other officer u/s 5 (4), he will be deemed as a PIO for the purpose of compliance with the provisions of the RTI Act. The CIC has clarified that even a First Appellate Authority has to extend assistance or furnish information when a PIO is seeking information from it. In Decision No. CIC/SG/A/2009/000713/3494penalty Appeal No. CIC/SG/A/2009/000713 CIC has clarified as follows: *"The PIO had also produced before the Commission a file noting of Mrs Suinita Kaushik on 21/05/2009 in which she appeared to be objecting to the information being sought from her, since she is a First Appellate Authority. The Commission was of the opinion that all authorities and officers who hold information are duty bound to provide the information when a PIO seeks assistance under Section 5(4). Any public servant no matter how high, will have to provide the assistance so that the PIO can discharge his duty under the RTI act."* The CIC had imposed maximum penalty of Rs.25,000/- upon the said FAA, deeming her as PIO under S.5 (4) of the RTI Act.

The DoP&T's OM No.1/14/2008-IR dated 28.07.2008 removes the misconception about the scope of seeking assistance and the role of a designated PIO vis-à-vis an officer whose assistance is sought u/s 5(4). The extract is as follows:

"Sub-sections (4) and (5) of section 5 of the Right to Information Act, 2005 provide that a Public Information Officer (PIO) may seek the assistance of any other officer for proper discharge of his/her duties. The officer, whose assistance is so sought, shall render all assistance to the PIO and shall be treated as a PIO for the purpose of contravention of the provisions of the Act. It has been brought to the notice of this Department that some PIOs, using the above provision of the Act, transfer the RTI applications received by them to other officers and direct them to send information to the applicants as deemed PIO. Thus, they use the above referred provision to designate other officers as PIO.

2. According to the Act, it is the responsibility of the officer who is designated as the PIO by the public authority to provide information to the applicant or reject the application for any reasons specified in sections 8 and 9 of the Act. The Act enables the PIO to seek assistance of any other officer to enable him to provide information to the information seeker, but it does not give him authority to designate any other officer as PIO and direct him to send reply to the applicant. The import of sub-section (5) of section 5 is that, if the officer whose assistance is sought by the PIO, does not render necessary help to him, the Information Commission may impose penalty on such officer or recommend disciplinary action against him the same way as the Commission may impose penalty on or recommend disciplinary action against the PIO."

It is thus, clear that the role of a designated PIO in furnishing the information cannot be substituted with another officer whose assistance is sought under S.5 (4) by the designated PIO. Nor can such an officer whose assistance is sought can be expected to directly send the information under his signature. Such an officer whose assistance is sought will be treated as deemed PIO only for the purpose of breach of the provisions of the RTI Act, but not for any other purpose. It is also to be kept in mind that transfer of RTI request in accordance with S. 6(3) is entirely different from seeking the assistance from another officer under S. 5(4). In the former case, the transfer occurs from one Public Authority (PA) to another Public Authority. Under the same Public Authority, there cannot and should not be any transfer of RTI request.

"Public Authority" means an authority or body or institution of self government established or constituted by/under the Constitution or by law made by Parliament/ State Legislature or by notification by Govt. and includes any body owned/controlled/substantially financed or NGO substantially financed, directly or indirectly by Govt. funds [S.2(h) of RTI Act].

A public authority may designate as many CPIOs for it, as it may deem necessary. It is possible that in a public authority with more than one CPIO, an application is received by the CPIO other than the concerned CPIO. In such a case, the CPIO receiving the application should send it to the concerned CPIO immediately, preferably the same day. Time period of five days for transfer of the application applies only when the application is transferred from one public authority to another public authority and not for sending from one CPIO to another in the same public authority [Ref:- DoP&T OM No.1/3/2008-IR dated 25.04.2008. However, the said OM used the word "transfer" in the above paragraph instead of "send", which is not appropriate].

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

Professionals are not liable criminally for improper advice

In a case for charging criminal liability against the advocate who rendered an opinion which resulted in loss to the employer, the High Court of Bilaspur has extensively relied on the orders of the Supreme Court. The facts of the case are that the petitioner-advocate was a panel advocate for Dena Bank and the said Bank sought non-encumbrance certificate from the petitioner-advocate for sanction of loan under Kisan Credit Card Scheme. The petitioner-advocate certified that the lands held by ten loan applicants had clear and marketable title to the property, free from all encumbrances. Subsequently, the loan was released for all the ten loanees. However, the borrowers failed to repay the loan amount and upon inquiry it was revealed that the loanees had submitted false and fabricated documents. FIR was lodged against all of them and the petitioner-advocate's name was not there in the FIR. Later, the petitioner-advocate's name was included in the final report. Questioning legality, validity and correctness of the charge-sheet filed against the petitioner-advocate, a quash petition under Section 482 of the CrPC was preferred before the High Court, Bilaspur.

The High Court had relied on the order of Apex Court in CBI Vs. K. Narayana Rao [2012 (9) SCC 512] wherein it was held "a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess". In *Jacob Mathew v. State of Punjab* [2005 (6) SCC 1] the Supreme Court laid down the standard to be applied for judging. To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

The High Court has also taken support of Supreme Court's order in *Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra* Court [1984 (2) SCC 556] wherein it was held that: (SCC p. 562, para 8) "8. There is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct."

Based on the above orders it was held that the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. Reliance was extensively placed on its earlier pronouncement in K.Naryana Rao's case supra, wherein it was held: *"30. Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A6 was abetting or aiding the original conspirators.*

31. However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.

32. In the light of the above discussion and after analysing all the materials, we are satisfied that there is no prima facie case for proceeding in respect of the charges alleged insofar as respondent herein is concerned. We agree with the conclusion of the High Court in quashing the criminal proceedings and reject the stand taken by CBI."

High Court has also taken note of Supreme Court's earlier order in Surendra Nath Pandey & Others Vs. State of Bihar and Others [MANU/SC/1216/2015].

The High Court observed that the petitioner-advocate's name was not included in the written complaint of the Bank official dated 19.10.2016 nor in the FIR dated 18.03.2017. Only in the statements of three Bank Mangers, the name of the petitioner-advocate was for the first time included. There is no basis on record for making such statement except the non-encumbrance certificate was not found proper. There is no evidence on record to hold that the petitioner met the accused persons at any point of time and there is no allegation that she gained any pecuniary benefit as a result of preparing such a report. There is no material to show that the petitioner at any point of time was involved in any criminal conspiracy with any of the accused persons to commit the offence alleged against her. The petitioner has taken care in observing some safeguards to be followed by the Bank in paragraph 12 of her report, but there is no material on record to show whether the Bank has observed any such safeguards as recommended by the petitioner. The High Court further observed that it was true that the petitioner could have exhibited more and greater professional care and competence, yet in failure to exercise the same, she could not have been held criminally liable. Even there is no allegation of criminal conspiracy against the petitioner and it is nowhere apparent that only acting upon the non-encumbrance certificate issued by her, loans were granted to the said borrowers. The High Court, while quashing the criminal proceedings, observed that even if the allegations are taken at their face value and accepted in their entirety, the same do not disclose any commission of offence and make out a case against the petitioner. These orders come to the rescue of professionals such as advocates, doctors and engineers.

Debashish Patnaik, CLA/CCO/SC

Scope of S.151 CPC
as summarised by Supreme Court

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is `right' and undo what is `wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

[K.K. Velusamy Vs. N. Palanisamy. Civil Appeal Nos. 2795-2796 of 2011. DOJ - 30.3.2011]

M.N.Vijitha, CLA/Gaz/PCPO

Legal Maxims:

Derivativa potestas non potest esse major primitiva - The power which is derived cannot be greater than that from which it is derived.
Et cetera - Other things of that type.
Ei incumbit probatio qui dicit, non qui negat - The burden of the proof lies upon him who affirms, not he who denies.
Factum - An act or deed.

K.Gopinath, CLA/GM/O/SC

KNOW OUR CONSTITUTION

Article 26:

26. Freedom to manage religious affairs:

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law.

Know the lesser known:

♦ A railway servant compulsorily retired from service as a penalty may be granted, by the authority competent to impose such penalty, pension or gratuity, or both at a rate not less than two-thirds and not more than full compensation pension or gratuity, or both admissible to him on the date of his compulsory retirement [Rule 64 of Railway Servants (Pension) Rules, 1993].

♦ If an employee is dismissed or removed his pension and gratuity shall be forfeited. However, if the case is deserving of special consideration, the authority passing the dismissal / removal order may sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension [Rule 64 of Railway Servants (Pension) Rules, 1993].

Joke

One day in Contract Law class, Professor Jepson asked one of his better students, “Now if you were to give someone an orange, how would you go about it?” The student replied, “Here’s an orange.” The professor was livid. “No! No! Think like a lawyer!” The student then recited, “Okay, I’d tell him, ‘I hereby give and convey to you all and singular, my estate and interests, rights, claim, title, claim and advantages of and in, said orange, together with all its rind, juice, pulp, and seeds, and all rights and advantages with full power to bite, cut, freeze and otherwise eat, the same, or give the same away with and without the pulp, juice, rind and seeds, anything herein before or hereinafter or in any deed, or deeds, instruments of whatever nature or kind whatsoever to the contrary in anywise notwithstanding…”

Officers shall not be called to Courts without adequate reasons

On 10.12.2019, the Supreme Court has reiterated its earlier ruling that an officer shall not be called to Court without adequate reasons. The facts of the case are as follows: The respondent-doctor joined the service of State of Uttar Pradesh as Lecturer (Anesthesia) at Motilal Nehru Medical College, and while she was holding the said post sought no objection certificate to apply for the post of Associate Professor at Chattisgarh Institute of Medical Sciences (CIMS), Bilaspur. Subsequent to her application she received an appointment letter from CIMS and thereafter she applied for leave for two years without pay for joining CIMS. During the pendency of the leave application she joined as CIMS. The respondent submitted another leave application for one month and the said leave was sanctioned. On expiry of the leave the respondent did not resume duty with the appellant-State of Uttar Pradesh. Her application for leave preparatory to retirement and voluntary retirement application were not replied to and after retiring from CIMS the respondent claimed pensionary benefits from the appellant.

The appellant rejected the request of the respondent vide reply dated 01.04.2015 observing that she had joined CIMS without obtaining approval / NOC from the appellants and without getting her leave sanctioned. It was stated by the appellants that there was no provision for sanctioning leave / approval ex-post facto and hence the request was unacceptable.

Being aggrieved, the respondent filed Writ Petition for quashing the order dated 01.04.2015. While the said WP was pending, the appellants, by an order dated 16.02.2016, rejected the application for VR and resultant benefits. It was stated therein that after the respondent's joining another service she remained no longer in the service of State of UP and hence she was not entitled to retiral benefits on attaining superannuation.

The High Court allowed the said WP on 24.08.2018. Pointing out that the respondent had been submitting her leave applications from 2004 onwards, the High Court concluded that the services of the respondent in Motilal Nehru Medical College could not have been ignored for the purpose of pension/notional pension and on those findings, the High Court quashed the order dated 01.04.2015. The High Court remitted the matter to the Principal Secretary, Medical Education and Training Department, Govt. of UP through its order dated 24.08.2018.

Aggrieved by the High Court's order the appellants filed SLP before the Supreme Court contending that the High Court's order suffered from patent illegality and as per Fundamental Rules 67-68 leave cannot be claimed as a matter of right and the case of the respondent was "abandonment of her service", thus disentitling her for pensionary benefits. Reliance was placed on SC's order in State of Uttar Pradesh & Ors. Vs. Achal Singh [2018 (17) SCC 578] wherein the Supreme Court held that under Rule 56 as applicable in the State of UP, notice of voluntary retirement does not come into effect automatically on the expiry of the three months period. It was held that under the rule, the appointing authority has to accept the notice for voluntary retirement or it can be refused on permissible grounds.

Before the SLP was filed by the appellants, the respondent had initiated contempt proceedings against the appellants and an order dated 04.01.2019 was passed by the appellants, rejecting the claim of the respondent. In view of the order dated 04.01.2019, the CP was closed. Challenging the order dated 04.01.2019, the respondent filed Writ Petition before the High Court and the High Court passed an order on 15.03.2019 wherein it observed that the order dated 04.01.2019 could not have been passed since the order rejecting the request for voluntary retirement already stood quashed in terms of the judgment in Writ A. No.65084 of 2015 rendered inter-parties. Being aggrieved, the appellants have preferred appeal arising out of SLP(C) No.10542 of 2019 before the Supreme Court on 20.04.2019. In the said SLP, which was converted into CA No.9301/2019, the appellants argued that the High Court was not right in directing the Principal Secretary to be present and explain as to how the appellants proceeded to reject the claim of the respondent which already stood quashed in terms of the judgment rendered inter-parties in Writ A. No.65084 of 2015. Attention of the SC was drawn to the well-settled principles as held in Shri N.K. Janu, Deputy Director, Social Welfare Forestary Division, Agra and others Vs. Lakshmi Chandra 2019 (6) SCALE 236 wherein the Supreme Court inter alia held that the practice of summoning officers to court is not proper and does not serve the purpose of administration of justice.

The Supreme Court held that the High Court did not keep in view the conduct of the respondent and it proceeded merely on the ground that no orders came to be passed on the leave applications filed by the respondent. The Supreme Court held that the High Court was not right in putting restrictions upon the appellants by saying that the fresh orders will have to be passed in the light of the observations made by the High Court.

The Apex Court further held that the High Court was not right in directing the Principal Secretary to appear in the court and explain the reason for passing the order dated 04.01.2019. Observing that merely because an order has been passed by the officer, it does not warrant the personal presence of the officer in the Court and summoning of officers to the Court and eventually affect the public at large, as held in Shri N.K. Janu, Deputy Director Social Forestary Division, Agra and Others v. Lakshmi Chandra 2019 (6) SCALE 236. The Supreme Court quashed the impugned order dated 15.03.2019 passed by the High Court directing the presence of Principal Secretary to appear before the High Court. [State of Uttar Pradesh & Others Vs. Sudarshana Chatterjee (Civil Appeal No. 9300 & 9301 of 2019)]

Stanly Paul, CLA/P/SC Division

Sanction for prosecution under Prevention of Corruption Act, 1988 not required against retired employees

The Supreme Court has recently held that sanction for prosecution under S.197 CrPC, which inter alia warrants procuring sanction against public servants, is not required if the employee is not in Govt. Service.

The facts of the case in brief are that the respondent/accused was charged with various sections of IPC and PC Act for alleged acts of omissions / commissions resulting in huge loss to his employer Bank. After the cognizance was taken by the concerned court, an application was moved by the Respondent No.1 seeking discharge in terms of Sections 227 and 239 of the Code of Criminal Procedure, 1973. This application was rejected by the Additional City Civil and Sessions Judge and Principal Special Judge for CBI cases, Bangalore holding that sanction as required u/s 19 of PC Act, 1988 to prosecute accused No.1 is not required.

The Criminal Revision Petition filed by the accused employee was allowed by the High Court and the accused was discharged. Hence, the case reached the Supreme Court. It was submitted before the Apex Court on behalf of the appellant State that the protection under Section 19 of the Act is available to a public servant only till he is in the employment and no sanction is necessary after the public servant has demitted office or has retired from service. As regards sanction under Section 197 of the Code, it was submitted that for an action to come within the purview of Section 197 of the Code, it must be integrally connected with the official duties or functions of a public servant and that if the office was merely used as a cloak to indulge in activities which result in unlawful gain to the beneficiaries, the protection under said Section 197 would not be available. [SHO, CBI Vs. B.A.Srinivasan & Anr. Cr. Appeal No.1837/2019, DOJ - 05.12.2019.]

Ashok Prasad, CLA/NED

FAQ: What is a Probate?

Section 2(f) of the Indian Succession Act, 1925 defines that a "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator (the person who wrote the will).

Probates are issued to the executors of the will, to authorize them with a seal of approval from the court. In case there are no executors of the will, only a simple letter of administration is issued by the court, and not a probate.

When a probate is applied for, and the will is proved, the original copy is retained by the court, which provides the executor with a certificate proving that it is genuine (the probate) and a copy of the will.

Importance of a Probate:
A probate legalises a will or the executor of the will to transfer the properties in the names of individuals to whom the property is bequeathed. However, a probate may not always required in each and every case. A probate is issued for a will or any codicil attached, by persons of Indian Hindu, Parsis, Buddhists, Sikhs or Jains, primarily in the cities of Chennai, Kolkata and Mumbai.

Application for Probate:
A probate is issued with reference to Section 57 and Section 213 of the Indian Succession Act. The probates are granted to the executor or executors. A probate is completely different from the Letter of Administration, which is allotted when the will does not name an executor or a will is not made by the deceased person.

K.Gopinath, CLA/GM/O/SC

Difference between: Indemnity & Guarantee

1. In the contract of indemnity, one party makes a promise to the other that he will compensate for any loss occurred to the other party because of the act of the promisor or any other person. In the contract of guarantee, one party makes a promise to the other party that he will perform the obligation or pay for the liability, in the case of default by a third party.
2. Indemnity is defined in Section 124 of Indian Contract Act, 1872, while Guarantee is defined in Section 126.
3. In indemnity, there are two parties, indemnifier and indemnified but in the contract of guarantee, there are three parties i.e. debtor, creditor, and surety.
4. The liability of the indemnifier in the contract of indemnity is primary whereas if we talk about guarantee the liability of the surety is secondary because the primary liability is of the debtor.
5. The purpose of the contract of indemnity is to save the other party from suffering loss. However, in the case of a contract of guarantee, the aim is to assure the creditor that either the contract will be performed, or liability will be discharged.
6. In the contract of indemnity, the liability arises when the contingency occurs while in the contract of guarantee, the liability already exists.

K.Gopinath, CLA/GM/O/SC

Know the lesser known:

- A railway servant compulsorily retired from service as a penalty may be granted, by the authority competent to impose such penalty, pension or gratuity, or both at a rate not less than two-thirds and not more than full compensation pension or gratuity, or both admissible to him on the date of his compulsory retirement [Rule 64 of Railway Servants (Pension) Rules, 1993].
- If an employee is dismissed or removed his pension and gratuity shall be forfeited. However, if the case is deserving of special consideration, the authority passing the dismissal / removal order may sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension [Rule 64 of Railway Servants (Pension) Rules, 1993].

YOURS LEGALLY

Can departmental disciplinary action sustain after acquittal in criminal case?

When departmental proceedings and criminal case are based on identical and similar set of facts:

Supreme Court while deciding the case Karnataka Power Transmission Corporation Limited Vs. C. Nagaraju and Ors. [Civil Appeal No. 7279 of 2019] had referred to its earlier order in G.M. Tank v. State of Gujarat [(2006) 5 SCC 446] wherein it was held: "In the Appeal filed by the delinquent officer, this Court was of the opinion that the departmental proceedings and criminal case were based on identical and similar set of facts. The evidence before the Criminal Court and the departmental proceedings being exactly the same, this Court held that the acquittal of the employee by a Criminal Court has to be given due weight by the Disciplinary Authority. On the basis that the evidence in both the criminal trial and Departmental Inquiry are the same, the order of dismissal of the Appellant therein was set aside."

When departmental proceedings and criminal case are based on different facts / charges:

The Supreme Court in Krishnakali Tea Estate v. Akhil Bhartiya Chah Mazdoor Sangh [(2004) 8 SCC 200] was concerned with the validity of the termination of the services of workmen after acquittal by the Criminal Court. Dealing with a situation similar to the one in Karnataka Power Transmission Corporation Limited Vs. C. Nagaraju and Ors. case, where the acquittal was due to lack of evidence before criminal court and sufficient evidence was available before the Labour Court, the Apex Court was of the opinion that the judgment in Captain M. Paul Anthony's case cannot come to the rescue of the workmen.

It is settled law that the acquittal by a Criminal Court does not preclude a Departmental Inquiry against the delinquent officer. The Disciplinary Authority is not bound by the judgment of the Criminal Court if the evidence that is produced in the Departmental Inquiry is different from that produced during the criminal trial. The object of a Departmental Inquiry is to find out whether the delinquent is guilty of misconduct under the conduct Rules for the purpose of determining whether he should be continued in service. The standard of proof in a Departmental Inquiry is not strictly based on the Rules of evidence. The order of dismissal which is based on the evidence before the Inquiry Officer in the disciplinary proceedings, which is different from the evidence available to the Criminal Court, is justified.

Supreme Court of India in Shashi Bhushan Prasad Vs. Inspector General Central Industrial Security Force & Ors.(2019) 7 SCC 797 & AIR 2019 SC 3586 [Civil Appeal No(s). 7130 of 2009] on 01-08-2019 held: "No : 884481265 Constable Sashi Bhushan Prasad is charged with gross misconduct and serious breach of discipline unbecoming of a member of the armed force in that he handed over an unlicensed fire arm with ammunitions (a country made revolver) concealed in a brief case at the residence of No. 88441220 Constable S.P. Patel on 19.11.92 in the evening by suppressing the fact that the same was used in a case of murder in the same day."

12. Disciplinary inquiry was held against him under Rule 34 of CISF Rules, 1969 for the gross misconduct and serious breach committed by him in discharge of his official duties in handing over unlicensed fire arm with ammunitions (a country made revolver) concealed in a brief case at the residence of Constable S.P. Patel on 19th November, 1992 and in support of the charge, the statement of PW-5 Smt. Laxmi Patel w/o Constable S.P. Patel was recorded. In the course of disciplinary inquiry, she had categorically stated that the appellant Constable came to her house in the evening and handed over small brief case to her for keeping it in the house…….

13. There was further allegation against him that he had suppressed the fact that the country made revolver was used in the murder case the same day. After an independent inquiry was conducted by the Inquiry Officer the charge stood proved against him and it was confirmed by the Disciplinary Authority, after affording him an opportunity of hearing, and being a serious misconduct on the part of the appellant, which he had committed in discharge of duties, penalty of dismissal was inflicted upon him, after due compliance of the principles of natural justice in terms of the scheme of CISF Rules 1969 and that came to be confirmed on rejection of his appeal/revision by the Appellate/Revisional Authority and also by the High Court on dismissal of the writ petition…..

14. At the same time, in the criminal case which was instituted against him, the charge against the appellant was "Accused Sashi bhusan Prasad stands charged U/s 25(1) (a) of the Arms Act."

15. So far as the charge in the departmental inquiry and the charge in the criminal case is concerned, indubitably it was different having been inquired on an independent set of facts and evidence in a departmental/judicial proceedings. That apart, the fact which reveal from the judgment of acquittal passed by the Court of competent jurisdiction dated 12th September, 1995 that Shankar Prasad Patel and his wife Laxmi Patel had appeared in a criminal case as PW-4 and PW-5 and both were declared hostile. Apart from that, the other material witnesses were also declared hostile and that was the reason for which the Court came to the conclusion that the prosecution failed to prove the charge against him while acquitting him vide judgment dated 12th September, 1995.

16. The facts noticed by us which have been inquired in a disciplinary inquiry and in the judicial proceedings indisputedly are based on different allegations and the set of evidence not based on the same facts and circumstances….

21. It may not be of assistance to the appellant in the instant case for the reason that the charge levelled against the appellant in the criminal case and departmental proceedings of which detailed reference has been made were on different sets of facts and evidence having no nexus/ co-relationship….." The Supreme Court had dismissed the Civil Appeal filed by the employee.

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

TREATISE ON ARBITRATION

Section 12 – Challenge to appointment of arbitrators – Contd.. from previous issue

There is some confusion as to at what stage a challenge under items under Schedule 5 and Schedule 7 has to be made. The Apex Court in **HRD Corporation (Marcus Oil And ... vs Gail (India) Limited** CIVIL APPEAL NO. 11126 OF 2017 **(31 August, 2017)** held that

- Challenge against items in Fifth Schedule can be made before the Arbitral Tribunal only. Once an award is passed, such grounds can be raised before the Court.
- Challenge against items in Seventh Schedule can be directly raised before the Court if arbitrator falls within the Schedule, as he becomes de jure unable to perform his functions. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under S.14(2) to the Court to decide on the termination of his/her mandate.

1. Whether an arbitrator who has had previous involvement in the dispute is hit by Item 16 of the Seventh Schedule, which states that the arbitrator should not have previous involvement "in the case".
2. Whether an arbitrator who has been an advisor to one of the parties in another unconnected matter can act as an arbitrator.

Rejecting the contentions in the case, the Hon'ble Supreme Court explained that reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, in the present case the said arbitrator had no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule.

Referring to Item 22 and 24 of Schedule 4, the Apex court held that the disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24.

Further, "the arbitrator" refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served "as arbitrator" before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. Further, appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15.

Therefore, the Apex court held that the fact that the said arbitrator has already rendered an award in a previous arbitration between the parties would not, by itself, on the ground of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration.

The other contention was that since one of the arbitrators had rendered an opinion on behalf of one of the parties to the arbitration, he would stand disqualified under Item 1 of the Seventh Schedule and also under Items 8 and 15.

The Supreme Court held that Item 8 has no application as it is nobody's case that said arbitrator "regularly" advises the respondent. And Item 15 cannot apply as no legal opinion qua the dispute at hand was ever given. On reading Item 1 of the Seventh Schedule, it is clear that the item deals with "business relationships". The words "any other" show that the first part of Item 1 also confines "advisor" to a "business relationship". The arbitrator must, therefore, be an "advisor" insofar as it concerns the business of a party. Howsoever widely construed, it is very difficult to state that a professional relationship is equal to a business relationship, as, in its widest sense, it would include commercial relationships of all kinds, but would not include legal advice given. Since the arbitrator has only given a professional opinion to one of the parties, which has no concern with the present dispute, he is clearly not disqualified under Item 1.

Item 22: The Arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

Item 24: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

Item 1: The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

Item 8: The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

Item 15: The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

N.Murali Krishna, Sr.LO/HQ

LEGAL UPDATE

Aspects to be considered while granting stay:

(i) Balance of convenience;
(ii) Irreparable harm or injury &
(iii) Prima facie case.

[State of Mizoram & Ors. Vs. Pooja Fortune Pvt. Ltd. CA No.8899&8900/2019. DOJ - 15.11.2019].

The court will first of all examine what is the extent of loss that would be caused to the applicant if the order is not passed and also whether it is reparable by monetary compensation i.e. by payment of cost. Then it will examine the loss suffered by respondent if the order is passed and thereupon it has to see which loss will be greater and irreparable. The party who would suffer greater loss would be said to be having balance of convenience in his favour and accordingly, the court will pass or refuse to pass the order.