South Central Railway
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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

This issue contains useful topics viz. ABC of The Indian Contract Act, 1872 and also some judgments on issues viz. competency of the State Consumer Commission before the National Commission to challenge ex-parte order; need to explain delay in approaching Court; admissibility of Photostat copies in Court proceedings; acquittal in criminal case whether bar imposition of penalty in departmental disciplinary proceedings, etc. have been discussed. Other regular features also find place.

Long Live Republic!

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.

ABC OF ACTS

THE INDIAN CONTRACT ACT, 1872

The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts'. The Act basically identifies the ingredients of a legally enforceable valid contract in addition to dealing with certain contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc

Contract: A Contract is an agreement enforceable by law [S.2(h)]. An agreement is enforceable by law, if it is made by the free consent of the parties who are competent to contract and the agreement is made with a lawful object and is for a lawful consideration, and is not hereby expressly declared to be void [S.10]. All contracts are agreements but all agreements are not contracts. A contract that ceases to be enforceable by law is called 'void contract', [S.2(i)], but an agreement which is enforceable by law at the option of one party thereto, but not at the option of the other is called 'voidable contract' [(S.2(i)].

Offer and Acceptance: Offeror undertakes to do or to abstain from doing a certain act if the offer is properly accepted by the offeree. Offer may be expressly made or may even be implied in conduct of the offeror, but it must be capable of creating legal relations and must intend to create legal relations. The terms of offer must be certain or at least be capable of being made certain.

Acceptance of offer must be absolute and unqualified and must be according to the prescribed or usual mode. If the offer has been made to a specific person, it must be accepted by that person only, but a general offer may be accepted by any person.

Communication of offer and acceptance, and revocation thereof-

(a) Communication of an offer is complete when it comes to the knowledge of the offeree.

(b) Communication of an acceptance is complete: As against the offeror when it is put in the course of transmission to him as against the acceptor, when it comes to the knowledge of the offeror.

(c) Communication of revocation of an offer or acceptance is complete: It is complete as against the person making it, when it is put into a course of transmission so as to be out of power of the person making it and as against the person to whom it is made, when it comes to his knowledge.

CONSIDERATION

Consideration is a price for the promise of the other party and it may in the form of benefit to the parties. Consideration must move at the desire of the promisor. It may be executed or executory. Past consideration is valid provided it moved at the previous request of the promisor. It must not be something which the promisor is already legally bound to do. It may move from the promisee or any third party. Inadequacy of consideration is not relevant. Consideration must be legal. The general rule of law is "No Consideration, No Contract" but there are a few exceptional cases where a contract, even though without consideration is valid.

"Stranger to a contract can't sue but in some exceptional cases the contract may be enforced by a person who is not a party to the contract.

ESSENTIAL ELEMENTS OF A CONTRACT

The following persons are incompetent to contract:

(a) minor, (b) persons of unsound mind, (c) other disqualified persons.

(a) **Minor:** Agreement with a minor is altogether void but his property is liable for necessaries supplied to him. He cannot be a partner but can be admitted to benefits of partnership with the consent of all partners. He can always plead minority and cannot be asked to compensate for any benefit received under a void agreement. Under certain circumstances, a guardian can enter into valid contract on behalf of minor. Minor cannot ratify a contract on attaining majority.

(b) **Persons of unsound mind:** Persons of unsound mind such as idiots, lunatics and drunkards cannot enter into a contract, but a lunatic can enter into a valid contract when he is in a sound state of mind. The liability for necessities of life supplied to persons of unsound mind is the same as in case of minors. (S. 68).

Free Consent

Two or more persons are said to consent when they agree upon the same thing in the same sense (S.13). Consent is free when it is not caused by mistake, misrepresentation, undue influence, fraud or coercion. When consent is caused by any of above said elements, the contract is voidable at the option of the party whose consent was so caused (S. 19& 19A)

(a) **Coercion:** Coercion is the committing or threatening to commit any act, forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain, any property, to the prejudice of any person with the intention of causing any person to enter into an agreement (S.15). A contract induced by coercion is voidable at the option of the aggrieved party.

(b) **Undue influence:** When one party to a contract is able to dominate the will of the other and uses the position to obtain an unfair advantage, the contract is said to be induced by undue influence. (S.16). Such contract is voidable, not void.

(c) **Fraud:** Fraud exists when a false representation has been made knowingly with an intention to deceive the other party, or to induce him to enter a contract (S.17). Contract in the case is voidable.

(d) **Misrepresentation:** Means a misstatement of a material fact made believing it to be true, without an intent to deceive the other party (S.18). Contract will be voidable in this case.

(e) **Mistake:** When both the parties are at a mistake to a matter of fact to the agreement, the agreement is altogether void.

Lawful Object and Consideration

An agreement where the object or the consideration is unlawful, is void. Object or consideration is unlawful if it is forbidden by law, it defeats the provisions of law; or is fraudulent, or involves injury to the person or property of another; or is immoral; or is opposed to public policy. Besides the above said agreements, certain agreements have been expressly declared to be void by the Contract Act such as – wagering agreements, agreement with uncertain meaning, agreements where consideration is unlawful in part etc.

(Contd……..in next issue)

V. Apparao, CLA, GM/O/SC

RTI Act Series

Section 6 of the RTI Act, 2005 deals with request for obtaining information. S. 6 (1) requires that the request shall be in writing or through electronic means in English or Hindi or the official language of the area in which the application is being made. Thus, an applicant has three language choices for preferring his request. S. 6(1) also requires the applicant to pay the prescribed fees. It further warrants the request to be addressed to the CPIO/SPIO or CAPIO/SAPIO of the concerned public authority. The application shall specify the particulars of the information sought by the applicant. If the request cannot be made in writing, the CPIO/SPIO shall render all reasonable assistance to the person making the request orally to reduce the same in writing.

Section 6 (2) lays down that an applicant does not require to give any reason for requesting the information or any other personal details except those that are necessary for contacting him.

An important aspect of transfer of RTI request is governed by S. 6 (3), as per which if the information is held by another public authority of the subject-matter of which is more closely connected with the functions of another public authority, then the public authority which received the application shall transfer the application or part of it to the appropriate public authority and inform the applicant immediately about such transfer. The upper limit for transfer of application is five days from the date of receipt of the application. The difference between seeking the assistance from another official U/S 5 (4) and transfer U/S 6 (3) has already been covered in detail in the previous issue (December 2019).

CIC has dealt with the issue of multiple transfers made by the CPIOs in many cases. In Ketan Kantilal Modi Vs. Central Board of Excise & Customs [Date of Decision: 22.9.2009. Appeal No.CIC/AT/A/2008/01280 dated 29.09.2008] CIC held as follows:

"54. We, therefore, hold that a petitioner is obliged under Section 6(1) to file his RTI-application before the CPIO of the public authority which is the "concerned public authority", which holds the information within the meaning of Section 2(j) of the Act.

55. The decision to transfer an RTI-application to another public authority under Section 6(3) is to be CPIO's given the circumstances surrounding a particular request for information. These circumstances may vary from case to case and petition to petition and cannot be predetermined.

56. A public authority which does not hold or is not related to an information sought by a petitioner, will not be obliged to provide an answer to the petitioner only for the reason that that public authority was the Apex body or the nodal office of others sub-ordinate public authorities. Such a public authority such as the CBEC or the Ministry of Finance/ Department of Revenue when it receives an RTI-application for disclosure of an information which both the petitioner and the CBEC or the Ministry know is held by subordinate offices such as the Commissionerates, then the public authority (CBEC or the Ministry) may inform the petitioner that it was not the holder of the information and hence not the 'concerned public authority'. In the alternative, such a public authority may choose to help the petitioner by transferring his request to the subordinate public authorities where the information was known or expected to be held. This latter decision is to be of the public authority given the circumstances and the conditions surrounding the petition and the case. It cannot be claimed by the petitioner as a matter of right a substitute for his own due diligence, i.e. to file the petition under Section 6(1) appropriately before the public authority which is known to hold the information requested and, more importantly, which the petitioner himself knows holds the information.

.....

58. In our view, in case CPIO of the public authority can easily and inexpensively transfer an information-request under Section 6(1) to its subordinate offices under Section 6(3), which in themselves may be public authorities, then such CPIO should proceed to do so. As in this case, since all it needed to transfer the request to other public authorities under the CBEC was to use the e-mail or the Internet, with which all these public authorities were connected, it should be possible to effect the transfer under Section 6(3).

59. We, therefore, direct the CPIO, CBEC to transfer appellant's RTI-application to the subordinate offices/ public authorities where the information requested by the appellant is known to be held. This may be done within two weeks of the receipt of this order.

60. In case, given the nature of the information, CPIO, CBEC is not sure about the location of the information, a suitable reply to the appellant may be given within two weeks of the receipt of this order…..

61. It is further directed that in case CPIO, CBEC transfers appellant's RTI-application electronically to the subordinate Commissionerates, the latter shall process these information-requests as independent requests under Section 6(1) and collect from the petitioner all requisite fees including the application fee as if the application were made independently by him to that public authority subordinate to the CBEC."

While deciding a case on 23.9.2019 [G.L. Maurya Vs. M/o Railways. 2nd Appeal No. CIC/RAILB/A/2018/105503] CIC held: "….the CPIO/Railway Board should have been more vigilant in responding to the RTI application in line with the provisions of the RTI Act, 2005 rather than for the sake of shifting his burden, transferring it to each and every zonal office for sending compiled information of their respective divisions to the RTI applicant. It is also to be noted that the RTI application has not been addressed to the 'CPIO' and instead, it has been addressed to the Chairman, Railway Board, New Delhi. This aspect has also been ignored by the CPIO, as the RTI Act, 2005 mandates that the RTI application should be addressed to the 'CPIO' of the Public Authority as per Section 6(1) of the RTI Act, 2005."

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

Ex-Parte order of State Consumer Commission can be challenged before NCDRC

In the Supreme Court of India Civil Appellate Jurisdiction Civil Appeal No. 9317 of 2019 (Arising out of SLP (C) No. 18658 of 2018) M/s. Shiur Sakhar Karkhana Pvt. Ltd. [Appellant(s) Vs. State Bank of India [Respondent(s)]. Order leave granted.

The judgment dated 03.05.2018 passed by the Aurangabad Bench of the High Court of Bombay in W.P. No. 2104 of 2017, entertaining the said writ petition against the ex-parte order passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumbai Circuit Bench at Aurangabad (hereinafter, "the State Commission"), and setting aside the said order of the State Commission, has been called into question in this appeal. The records reveal that the respondent-Bank was ex-parte before the State Commission for failing to appear before it despite service of notice. Subsequently, an application was filed by the respondent-Bank to set aside the ex-parte order, which came to be dismissed by the State Commission on the ground that it does not have jurisdiction to recall its own prior order. As against this order, the respondent herein approached the High Court by filing a writ petition. Entertaining the same, the High Court passed the impugned order and set aside the ex-parte order of the State Commission. A contention was raised before the High Court by the appellant herein that an alternative and efficacious remedy was available to the respondent in the form of an appeal before the National Consumer Disputes Redressal Commission as provided under Section 21 of the Consumer Protection Act, 1986.

However, the High Court concluded that an appeal may not lie before the National Commission u/s 21 of the Act and consequently there was no alternative remedy available to the respondent. Based on this, the High Court entertained the said writ petition and allowed the same by the impugned order. In view of the above, the only question to be decided in this appeal by this Court is whether the National Commission has jurisdiction to set aside an ex-parte order of the State Commission.

In this context, it is relevant to note Section 21 of the CP Act, which reads "21. Jurisdiction of the National Commission.— Subject to the other provisions of this Act, the National Commission shall have jurisdiction— (a) to entertain— (i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore; and (ii) appeals against the orders of any State Commission; and (b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity." It was held that a plain reading of Section 21(a) (ii) read with S. 19 of the Act makes it clear that the National Commission has jurisdiction to entertain appeals against the orders passed by the State Commission. S. 21(a)(ii) does not state that appeals cannot be entertained against orders that have been passed ex parte.

The plain and simple meaning of the said provision is that appeals will be entertained by the National Commission against any order passed by the State Commission. The word "orders" as used in Section 21(a)(ii) means and includes "any orders". Thus, the ex-parte order of the State Commission can also be questioned before the National Commission.

In light of this, the Apex Court is of the opinion that the High Court could have avoided to entertain the writ petition against the order of the State Commission, in view of the availability of an alternative and efficacious remedy to the respondent and the presence of an alternative and efficacious remedy is not an absolute bar on the jurisdiction of the High Court under Article 226 of the Constitution, and is a rule of discretion and self-imposed limitation rather than that of law. However, entertaining a writ petition in such a case may be proper in certain circumstances, for instance when an order has been passed in total violation of the principles of natural justice, or has been passed invoking repealed provisions (CIT v. Chhabil Dass Aggarwal, (2014) 1 SCC 603). In the instant case, no such circumstance has been invoked.

Thus, propriety required the Respondent-Bank to have approached the National Commission in view of the availability of an alternative remedy under a specific legislation. Therefore, the Apex Court proposed to set aside the judgment of the High Court. And held that it is open for the respondent herein to file an appeal before the National Commission within four weeks from this day. In case such appeal is filed within four weeks, the question of limitation shall not be raised by the appellant or by the National Commission, and such appeal shall be decided on its own merits. The appeal stands disposed of accordingly. There shall be no order as to costs.

V. Apparao, CLA, GM Office

Legal Maxims:

Ferae nature : Dangerous by nature.

Force majeure : Circumstance beyond one's control, irresistible force or compulsion

Generalia specialibus non derogant : General things do not derogate from special.

Admissibility of Photostat copies in Court proceedings

In Surinder Kaur Vs. Mehal Singh & Others MANU/PH/3614/2013 the Punjab & Haryana High Court considered the question of admissibility of Photostat copy of a document as evidence. After detailed discussion the following points were culled out by the High Court:

a) Photostat copy of a document can be allowed to be produced only in absence of original document.

b) When a party seeks to produce Photostat copy it has to lay the foundational facts by proving that original document existed and is lost or is in possession of opposite party who failed to produce it. Mere assertion of the party is not sufficient to prove these foundational facts.

c) The objections as to non existence of such circumstances or non existence of foundational facts must be taken at earliest by the opposite party after the photostat copy is tendered in evidence.

d) When the opposite party raises objection as to authenticity of the Photostat copy its authenticity has to be determined as every copy made from a mechanical process may not be accurate. Both the requirements of clause (2) of section 63 are to be satisfied.

e) Allowing production of Photostat copy in evidence does not amount to its proof. Its probative value has to be proved and assessed independently. It has to be shown that it was made from original at particular place and time.

f) In cases where the Photostat copy is itself suspicious it should not be relied upon. Unless the court is satisfied that the Photostat copy is genuine and accurate it should not be read in evidence.

g) The accuracy of photostat copy shall be established on oath to the satisfaction of court by the person who prepared such copy or who can speak of its accuracy. The above said principles must be followed by the courts while admitting a photostat copy as secondary evidence and assessing its probative value.

Sunil Kumar, CLA, CCO Office

KNOW OUR CONSTITUTION

Article 27:

27. Freedom as to payment of taxes for promotion of any particular religion:

No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religions denomination.

FAQ: Curative Petition

Curative petition is the last constitutional remedy available to a person whose review petition has been dismissed by the Supreme Court. Though the Constitution explicitly speaks about the review power of the Supreme Court under Article 137, it is silent about 'Curative power'.

The curative petition was given shape and form in the case of Rupa Ashok Hurra v. Ashok Hurra & Anr.(2002), where the apex court reconsidered its judgment in exercise of its inherent power to prevent abuse of its process and to cure a gross miscarriage of justice.

It was explained in the above said decision that the curative power of the Court flows from Article 142 of the Constitution, which gives Court power to do complete justice. In the said case, the five judge bench held that "The Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power".

When can a person apply for curative petition?

A petitioner is entitled to relief under curative petition, if he establishes:

(i) violation of principles of natural justice where he was not a party to the lis but the judgement adversely affected his interests.

(ii) he was a party to the lis, but he was not served with notice of the proceedings and the matter proceeded as if he has the choice.

(iii) wherein the proceedings a Learned Judge failed to disclose his connection with the subject-matter.

(iv) the parties giving scope for an apprehension of bias and the judgement adversely affects petitioner.

In the curative petition thus filed, the petitioner shall assert the grounds mentioned therein had been taken in the review petition and that it was dismissed by circulation. The curative petition should also contain a certification by a Senior Advocate with regard to the fulfilment of the above requirements.

A curative petition, which is circulated to a Bench of three senior-most judges and the judges who passed the judgment complained of (if available), is usually decided by judges in chamber, unless a specific request for an open-court hearing is allowed. Another speciality is that there is no limitation period for curative petition. But the Court has said that it must be filed within a "reasonable time".

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

Joke:

Some American academics, discussing the Six Day War with an Israeli general, were eager to know how it had ended so quickly. The general told them, “We had a crack regiment at the most sensitive front. It was made up entirely of lawyers and accountants. When the time came to charge – boy, did they ever know how to charge!”

Delay in approaching Court to be satisfactorily explained

The Supreme Court on 20.01.2020 emphasised that failure to give cogent reasons for delay and non-adherence of prescribed timelines will strike off the right to file the Written Statement in terms of Order VIII Rule 1 of the Civil Procedure Code (CPC).

While passing a judgment to this effect, the Bench of CJI SA Bobde and Justices BR Gavai and Surya Kant observed: "20. Routine condonations and cavalier attitudes towards the process of law affects the administration of justice. It affects docket management of Courts and causes avoidable delays, cost escalations and chaos. The effect of this is borne not only by the litigants, but also commerce in the country and the public-in-general who spend decades mired in technical processes."

Issue(s) involved in the case: The central issue was whether the timeline of 90 days for filing written statement under Order VIII Rule 1 of the CPC was merely procedural and directory for non-commercial suits?

Facts of the case: The appellant and respondent were brothers and owned one floor each of the ancestral property in Devli Village, Delhi. The respondent approached the appellant offering to purchase his share of the property and a sale agreement was entered into between the parties on March 17, 2017 for a total consideration of Rs. 7.5 lakhs. Earnest money had also been paid to the appellant but the agreement was subsequently not honored.

In light of the above, the respondent approached the Civil Court praying for a decree of specific performance of the sale agreement dated March 17, 2017, along with an application for permanent injunction praying that for a stay on alienating the property to a third party.

The appellant was served on May 1, 2017, after which he appeared through counsel on May 15, 2017, wherein he was granted to file his written statement within 30 days.

The court gave multiple opportunities to the Appellant to file his written statement, but he failed to do so. Despite several opportunities (including one beyond the maximum period of 90 days), the appellant failed to file any written statement. In fact, on November 3, 2017, the Trial Court closed the appellant's right to file written statement and struck off his defence after the appellant failed to appear on the said date.

Aggrieved by the order of the trial court, the appellant filed a Revision petition in the High court wherein the petition was dismissed. The High court held that in light of *Oku Tech Pvt. Ltd. v. Sangeet Agwarwal & Others*, there was no discretion with courts to extend the time for filing the written statement beyond 120 days after service of summons.

Aggrieved, the appellant approached the Supreme Court in Civil Appeal, averring that the deadline of 90 days in terms of the unamnded Order VIII Rule 1, CPC could be relaxed, depending on the facts and circumstances of the case. He contended that it would be prejudicial to the appellant if the delay in filing written statement is not condoned.

Decision: The Court held that unamended Order VIII Rule I CPC was indeed directory and did not do away with the inherent discretion of the courts to condone certain delays. However, the provision could not be interpreted to bestow a free hand to any litigant or lawyer to file a written statement at their own whim.

Timelines were provided in the legislations in order to resolve disputes in a time bound manner. Extreme hardships and delays occurring due to factors beyond control of the parties would be the only just and equitable instances for the condonation of delay, the Bench observed.

The Court went on to hold that the facts pertaining to the present case only pointed towards a blatant lapse on the part of Appellant. No reasoned justification or explanation was given by the appellant.

In light of the above, the court observed that it was the duty of the judicial system to cultivate a culture of respecting deadlines as *"routine condonations & cavalier attitudes towards the process of law affects administration of justice."*

While the Court observed that the appeal was liable to be dismissed in light of the above, it adopted a lenient view of the unique circumstances of the case. Therefore, without setting a precedent, the Court directed the appellant to place his 2017 written statement on record, subject to payment of Rs. 25,000/-. [Civil Appeal No.433/2020 Desh Raj Vs. Balkishan (D) Through Proposed LR Ms. Rohini. DOJ - 20.01.2020]. - Syed Amjad Ali, OS/Law Branch/SCR.

Susanta Kumar Dash, CLA, CCO Office

Difference Between: Judicial Separation & Divorce

Judicial Separation is being dealt by S.10 of Hindu Marriage Act, 1955, whereas S.13 deals with Divorce. S.14 bars divorce within one year of marriage whereas there is no such restriction for judicial separation. Divorce is a drastic step putting an end to the marriage whereas judicial separation keeps the marriage legally live, paving way for a possible reconciliation between the husband and wife. Judicial separation can be sought on all the grounds for which dissolution of marriage (i.e. divorce) applies. There are 9 grounds available for judicial separation / divorce viz., cruelty, desertion, adultery, conversion, mental disorder, communicable disease, incurable leprosy, renunciation of the world or presumption of death of/ by one of the parties to the marriage and additional 4 grounds available for wife which are earlier marriage of husband, rape/ sodomy/bestiality of husband, non-resumption of co-habitation beyond 1 year from alimony award, repudiation of marriage after 15 years by wife but before 18 years. Judicial separation is no defence to a claim for maintenance under Hindu Marriage Act. Section 13 of the Act provides that if there is no resumption of co-habitation between the parties one year after the decree for judicial separation is passed, the parties can get a decree for divorce on this ground itself. Court may rescind the order of judicial separation, if it is convinced with the reasons submitted by the party [S.10(2)].

K.Gopi Nath, CLA/O/GM/SC

Limitation Act Vs. Specific Limitation in other Statutes

Limitation Act, 1963 provides for various time limits and exemptions thereof for filing a case. Section 5 of the Limitation Act, 1963 permits extension of upper time limit if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Section 14 of the Limitation Act, 1963 provides for exclusion of time spent in pursuing bona fide in a court without jurisdiction.

On the other hand, some special enactments have laid down some cut off time lines for filing a case before concerned authority / court. S.34 (3) of the Arbitration & Conciliation Act, 1996 provides for filing an application for setting aside Arbitral Award within 03 months from the date of receipt of the Arbitral Award by the party making the application. The Courts are empowered to "entertain the application within a further period of thirty days, but not thereafter".

In the issue of challenge to Arbitral Awards, the Supreme Court has held that Section 5 of the Limitation Act has no applicability in view of the express restriction incorporated through the words "but not thereafter". However, the Apex Court has held that the Courts are empowered to condone the delay in preferring an application under S.34 of Arbitration & Conciliation Act, 1996 on account of perusal of a suit/ application / proceeding before a wrong authority / court without jurisdiction. In other words, though S.5 of the Limitation Act cannot come to the rescue of an applicant challenging the Arbitral Award, the exemption under S.14 of the Limitation Act is very much available for such an applicant. [Appeal (Civil) 1457 of 2004 in State of Goa Vs. Western Builders. DOJ - 05.07.2006]. Subsequently, it was held by Supreme Court that "Once the Respondents received the Award, the time under Section 34(3) commenced and any subsequent disability even as per Section 17 or Section 9 of Limitation Act is immaterial." [CA No. 7710-7713 of 2013. P.Radha Bai Vs. P.Ashok Kumar DOJ - 26.09.2018].

S.74(1) of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013 stipulates 60 days time limit for preferring appeal to High Court from the date of Award of the reference court, which is extendable by another 60 days. Karnataka High Court, in this regard, held: "96. We have already interpreted Section 74(1) of 2013 Act in light of Section 29(2) of the Limitation Act by holding that Section 5 thereof is not applicable whereas Section 4 and Sections 12, 13 and 14 are applicable while computing the period of limitation of 60 days + 60 days." [Misc. FA No. 3806/2019. Dy. Commissioner & Special LA Officer Vs. S.V.Global Mill Ltd. DOJ - 26.09.2019].

Rule 5 of Chapter VII of the Delhi High Court Rules, 2018 restricts filing of replication within 30 days, which is extendable by another 15 days. Delhi High Court has held: "15. So, from the above discussion, it necessarily follows that the period of 30 plus extended period of 15 days are mandatory for the plaintiff to file replication along with admission / denial of documents. If the same are not filed within the time prescribed, learned Joint Registrar or the court has no power to extend time beyond that period." [Odeon Builders (P) Ltd. NBCC (India) Ltd. CS (COMM) 1261/2018 & IA No. 10178/2019 and OA No. 81/2019. DOJ - 31.10.2019].

Section 13(1)(a) & (2)(a) of the Consumer Protection Act, 1986 provides for filing of Written Version by the Opposite Parties "within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum". Supreme Court and National Consumer Disputes Redressal Commission has held in plethora of cases that the Fora are not empowered to entertain Written Version.

However, owing to some conflicting judgments of the Supreme Court, the issue is under consideration of 5-Judge Bench of the Supreme Court and is listed for hearing on 29.01.2020 [Bhasin Infotech and Infrastructure Pvt. Ltd. Vs. Grand Venezia Buyers Association. CA No.1083 & 1084/2016]. Pending the decision in this case, the Apex Court, in Reliance General Insurance Co. Ltd. & Anr. vs. M/s Mampee Timbers & Hardwares Pvt. ltd. & Anr. [Civil Appeal D. No. 2365 of 2017 decided 10.02.2017], has ordered as follows: "We consider it appropriate to direct that pending decision of the larger bench, it will be open to the concerned Fora to accept the written statement filed beyond the stipulated time of 45 days in an appropriate case, on suitable terms, including the payment of costs, and to proceed with the matter."

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

LEGAL UPDATE

Salient Features of

Arbitration& Conciliation (Amendment)Act, 2019

1. To amend S.11 to facilitate appointment of arbitrators by the arbitral institutions designated by the Supreme Court or High Court, instead of directly by the SC or HC.
2. If no graded arbitral institutions are available, the CJ of HC may maintain a panel of arbitrators.
3. Insertion of Part 1A for establishment of the Arbitration Council of India for the purpose of grading arbitral institutions.
4. To amend S.23 to provide that the statement of claim and defence shall be completed within 6 months from the date the arbitrator receives the notice of appointment.
5. To provide that parties, arbitrator & arbitral institutions shall maintain confidentiality and to protect arbitrator(s) from any suit/ legal proceedings for act done in good faith.
6. To clarify that S.26 of A&C (Amendment) Act, 2015 is applicable only to the arbitral proceedings commenced on or after 23.10.2015.

YOURS LEGALLY

Acquittal in criminal case does not bar imposition of penalty in departmental disciplinary proceedings

Recently, the Supreme Court has considered the question of validity or sustainability of a punishment order passed pursuant to departmental disciplinary proceedings, though the charged employee was acquitted in criminal proceedings by a Court. The facts of the case are as follows: The respondent-employee of Karnataka Power Transmission Corporation Ltd [KPTCL] was charge sheeted for accepting illegal gratification. After the furnishing of reply to the charge memorandum an inquiry was held wherein the charge was held to be proved. The penalty of dismissal from service was imposed on the respondent-employee. The penalty order was confirmed by Appellate authority and aggrieved by the same the respondent-employee filed a writ petition before the High Court of Karnataka, which was allowed by the single judge. The writ appeal was dismissed by the Division Bench. Dissatisfied with the judgment of the High Court the appellant-KPTCL approached the Apex Court.

The respondent-employee was tried under various sections of Prevention of Corruption Act, 1988 and acquitted by the Court of Special Judge since the prosecution witnesses turned hostile and did not support the case of the prosecution. The single Judge of the High Court allowed the WP relying upon the order of SC in Captain M. Paul Anthony Vs. Bharat Gold Mines Ltd and G.M.Tank Vs. State of Gujarat. It was held that the charges in the departmental inquiry and the criminal case are the same and Respondent No.1 ought not to have been dismissed from service after he was found not guilty by the Criminal Court. The Division Bench upheld the judgment of the learned single Judge by observing that an order of dismissal from service could not have been passed once the Respondent was honourably acquitted by the Criminal Court.

However, the learned counsel appearing for the Appellant submitted that the charges framed against Respondent No.1 in the Criminal Court and the Departmental Inquiries were different. He submitted that the complainant resiled from his statement and turned hostile before the Criminal Court. He further submitted that the evidence which was the basis of the order of dismissal was different from the evidence before the Criminal Court. By relying upon the judgments of this Court, the learned counsel emphasized that an acquittal (1999) 3 SCC 679; (2006) 5 SCC 446 by a Criminal Court does not bar a departmental proceeding. According to him, the standard of proof in a criminal trial is different from what is required for a departmental proceeding. Strict rules of evidence are followed in criminal proceedings whereas preponderance of probabilities is what is taken into consideration in a departmental inquiry. Reliance was placed by the learned counsel for the Appellant on the judgments of SC in Depot Manager, A.P. State Road Transport Corporation v. Mohd. Yousuf Miya and Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia.

The Counsel for Respondent No.1 justified the judgments of the High Court by arguing that an order of dismissal cannot be passed by the Appellant after he was honourably acquitted by the Criminal Court. He stated that the essence of the charge in the criminal trial and the departmental inquiry is the same.

While deciding the case the Supreme Court held: "9. Acquittal by a criminal court would not debar an employer from exercising the power to conduct departmental proceedings in accordance with the rules and regulations. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. In the disciplinary proceedings, the question is whether the Respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings, the question is whether the offences registered against him under the PC Act are established, and if established, what sentence should be imposed upon him. The standard of proof, the mode of inquiry and the rules governing inquiry and trial in both the cases are significantly distinct and different."

The SC distinguished the judgment it rendered in Captain M. Paul Anthony by observing that the issue under consideration therein was about continuance of simultaneous departmental disciplinary proceedings and trial. It was held therein that it is desirable to stay departmental inquiry till conclusion of the criminal case if the departmental proceedings and criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact.

In G.M.Tank's case the evidence before the Criminal Court and the departmental proceedings being exactly the same, Supreme 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 by the Supreme Court.

SC further held: "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 and needed no interference by the High Court." [Karnataka Power Transport Corpn. Ltd. Vs. C Nagaraju. CA No.7279/2019. DOJ – 16.09.2019]

TREATISE ON ARBITRATION

Section 13: Challenge procedure – This section deals with the challenge of appointment of arbitrator before the arbitrator himself under Section 16 of the Act.

According to this section, the parties are free to agree on a procedure for challenging an arbitrator. In the absence of any such procedure, the party may challenge his appointment under the following two grounds. (a) give rise to justifiable doubts as to independence or impartiality of the arbitrator, or (b) he does not possess the qualifications agreed to by the parties. However, such a challenge has to be made within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances.

When such a challenge is made, the arbitrator has two options. (a) withdraw from his office or (b) decide on the challenge. If the challenge is not successful, the arbitrator shall continue the arbitral proceedings and make an arbitral award. In such case, the party challenging the arbitrator has to wait till the award is made and then only may make an application for setting aside the arbitral award in accordance with section 34.

Section 14 of the Act deals with failure or impossibility to act as an arbitrator. In such case, the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if

(a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

If a controversy remains concerning any of the grounds referred above, aggrieved party may apply to the Court to decide on the termination of the mandate. Though, recourse is to go to a court, but neither Section 34 nor Section 37 comes to the rescue of the aggrieved party since under section 34 only an award can be challenged and S.37 does not provide for an appeal against such an order. However, the Supreme Court in the case of HRD Corporation (Marcus Oil And ... vs Gail (India) Limited, (2018) 12 SCC 471 held that after the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible".

In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13.

Section 15 deals with termination of the mandate of the arbitrator and appointment of substitute arbitrator in his place. Accordingly, in addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate :
(a) where he withdraws from office for any reason; or
(b) by or pursuant to agreement of the parties.

Under any of the above reasons, where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Clause 64.(3)(c)(i) of GCC provides for appointment of substitute arbitrator if one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his office or unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed.

If a substitute arbitrator is appointed, the parties, may by agreement continue the arbitration proceedings from the time it was left prior to the appointment of the substitute arbitrator. However, Clause 64.(3)(c)(i) of GCC provides that such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s). Further, unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

N. Murali Krishna, Sr.LO/HQ/SCR

Know the lesser known:

⇒ If subsistence allowance is not paid, holding of ex-parte D&AR inquiry proceedings is not justified and is violative of Article 311(2) of the Constitution of India. [RB's Lr.No.E(D&A)81 RG 6-22 dated 18.8.1981]. Such inquiry proceedings stand vitiated [2004 (3) SLJ 113 CAT, Bangalore]. Subsistence Allowance is a right and not a bounty [Jagadambika Prasad Shukla vs. State of UP 2000 (7) SCC 90].

⇒ Notice of initiation of ex-parte proceedings to be sent to the Charged Employee [Ramesh Chander vs. GM, Western Railway & E(D&A) 69 RG/6-20 dated 18.6.1989].