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 has incorporated important judgments of the Supreme Court on non-availability of consequential seniority in promotion, non-availability of RTI Act for access to information available under other statutes/ rules etc. The orders of the Supreme Court in view of COVID-19 pandemic and invalidity of recruitment due to illegality in the selection process etc. also find place. Regular features on arbitration, RTI Act, ABC of Acts, Know our Constitution, Legal Maxims, FAQ, Difference between etc. are also included. While placing this issue before readers, Team-SCR hope that all are adhering to the social distancing and other precautions ordered by the Governments in the wake of COVID-19 outbreak.

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 Payment of Gratuity Act 1972

The Payment of Gratuity Act 1972 is a social security enactment to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, Railway companies, shops or other establishments employing 10 or more persons.

The main purpose of gratuity is to help the workman after the retirement as a result of the rules of superannuation or physical disability or impairment of the vital part of the body. Gratuity is the amount which is not connected with any consideration and has to be considered as something given freely for the service the employee has rendered to the organization for more than 5 years.

Section 2(*e*) of the Payment of Gratuity Act, 1972 defines "employee" to mean "any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity". As Railway employees fall under this exclusion, the Payment of Gratuity Act, 1972 does not apply to the Railway employees. The Supreme Court, confirmed the legal position in Union of India v. Manik Lal Banerjee, (2006) 9 SCC 643. The Railway Services (Pension) rules, 1993 issued by the President of India in exercise of the powers conferred under Article 309 of the Constitution of India in supersession of all existing rules and orders on the subject, applicable to all Railway servants, provides for the retirement benefits including the payment of various kinds of gratuity to the Railway employees.

Wages for Calculation - It is 15 days' wages for every completed year as if the month comprises of 26 days at the last drawn wages (Sec.2(s)) i.e.

$$\text{Gratuity} = \frac{\text{Last drawn monthly salary}}{26} \times 15 \times \text{No. of Yrs.}$$

Display of Notice- On conspicuous place at the main entrance in English language or the language understood by majority of employees of the factory, etc. (Rule-4)

Under Sec.4(3), Maximum Ceiling has been enhanced from Rs.10,00,000 to Rs.20,00,000.

Forfeiture of Gratuity- If service is terminated by any act, willful omission, negligence causing damage or destruction of property, forfeiture is to the extent of damage. Wholly or partially forfeited If termination is due to riotous or disorderly conduct or violence on employees part. For offence involving moral turpitude in course of employment(Sec.4(6))

Nomination to be obtained by employer after expiry of one year's service, in Form 'F' (Sec.6 & Rule-6)

Application for payment of gratuity [Section 7(1)]: Person eligible to gratuity, to act on his behalf shall send a written application on this behalf. Rule-7 of the payment of gratuity rules, 1972 provides that the application shall be ordinarily made within 30 days from the date of gratuity becomes payable. In case of superannuation or retirement of employee is known, the employee may apply before 30 days of superannuation or retirement. Rule 7(2) provides that a nominee of employee is eligible for gratuity in case death of employee shall apply within 30 days from the date it becomes payable to him.

S-7(2) lays down that as soon as gratuity becomes payable, the employer shall determine the amount of gratuity and give notice in writing to the person to whom it is payable. S- 7(3) provides that employer shall pay the gratuity within 30 days from the date it become payable. Under Section 7(3A), if gratuity is not paid within the specified period then gratuity becomes payable along with simple interest at the rate of 10% p.a. Section 7(4(e) provides that if the disputes relates to the amount of gratuity payable , the employer shall deposit the amount with controlling authority such amount as he admits to be payable by him.

Recovery of Gratuity - To apply within 30 days in Form I when not paid within 30 days (Sec.8)

The appeal is made by the person who is aggrieved by the order of controlling authority; Limitation- 60 days from the date of receipt of order which is further extended to 60 days more on sufficient causes.

No court shall take cognizance of offence punishable under this act save on a complaint made by or under the authority of the appropriate govt. Gratuity if not paid or received, within 6 months from the expiry of the prescribed time, the appropriate govt. shall authorize the controlling authority to make a complaint against the employer, whereupon controlling authority shall initiate action against the employer, within 15 days from the date of authorization. No court inferior to that of the metropolitan magistrate or judicial magistrate of the first class shall try any offence punishable under this act.

Penalties - Imprisonment for 6 months or fine upto Rs.10,000 for avoiding to make payment by making false statement or representation. Imprisonment not less than 3 months and upto one year with fine on default in complying with the provisions of Act or Rules (Rule-9).

Protection of gratuity - No gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court (Sec.13).

V. Apparao, CLA, GM Office/SC

RTI Act Series

Commonly applied exemptions in Railways:

Though there are 10 exemptions under Section 8 (1) of the RTI Act, 2005, only a few are applied by the CPIOs while seeking exemption from disclosure of information. These are mainly S. 8 (1) (e), (g), (h) & (j). At times S. 8 (1) (b) also has been invoked.

Important case-laws on "fiduciary relationship" [S. 8(1) (e)]:

Black's Law Dictionary (7th Edition, Page 640) defines `fiduciary relationship' thus:

"A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships - such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client - require the highest duty of care. Fiduciary relationships usually arise in one of four situations : (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer."

The order of the Apex Court in CA No.6454 of 2011 [Central Board of Secondary Education & Anr. Vs. Aditya Bandopadhyay & Ors.] throws light into the concept of "fiduciary relationship" wherein it was held as follows: "14. ...Every examinee will have the right to access his evaluated answer-books, by either inspecting them or take certified copies thereof, unless the evaluated answer-books are found to be exempted under section 8(1)(e) of the RTI Act…..

22…..But the words `information available to a person in his fiduciary relationship' are used in section 8(1) (e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary - a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically/infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a share-holder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body." Thus, the claim for exemption from furnishing evaluated answer books u/s 8 (1) (e) was not found favour with the Apex Court.

24.....This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself. One of the duties of the fiduciary is to make thorough disclosure of all relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship…. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer-book, s-8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer-book, seeking inspection or disclosure of it.

26.…The examining body entrusts the answer-books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer-book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer-books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words the examining body is the `principal' and the examiner is the agent entrusted with the work, that is, evaluation of answer- books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner. On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copy-right or proprietary right, or confidentiality right in regard to the evaluation. Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.

27. We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption u/s- 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption u/s-8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees."

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

When glaring illegalities committed in the examination, principle of estoppel by conduct or acquiescence has no application

The Haryana Staff Selection Commission invited applications for various posts, including the post of Physical Training Instructor (PTI) by prescribing criteria for written examination, minimum marks to be obtained in the written examination and Viva voce. Written examination was conducted, but same was cancelled on the ground that several complaints/reports with regard to malpractices and cheating committed in the written examination. Written examination was re-notified, but was cancelled. Finally, another notice was published to shortlist the candidates for interview stating in view the large number of applications, Commission has decided to shortlist eight times candidates of the advertised post for interview on the basis of essential academic advertised qualification. Interview was completed in the year 2008 itself. But the Commission declared the result of the selection only in 2010.

Challenging the select list, large number of writ petitions were filed in the High Court pleading that some of the candidates have been awarded more than prescribed 25 marks in viva-voice and some of selected candidates did not possess the requisite qualification. Petitioners pleaded that criteria have been changed by the Commission to get the desired result and in order to bring the candidates within the zone of selection and to grant them undue benefits. It was further pleaded that while making selection, neither any rationale criteria nor selected the candidates on the basis of merit was adopted. The criteria were changed from time to time in order to select some favourites. Entire selection appears to be a fraud played upon the general public.

Single Judge after hearing the parties and after perusing the record allowed all the writ petitions and quashed the selection directing the Haryana Staff Selection Commission to hold a fresh selection. Appeals filed before the Division Bench challenging the judgment were dismissed on 30.09.2013. The selected candidates whose selection had been set aside by the High Court filed appeals before the Supreme Court.

Observing that the selection and appointment on post borne on the State establishment provides an opportunity to citizens of public employment, the Apex court held that the personnel who man the civil posts in State apart from carrying out objectives and policies of State also serve as source of sustenance for their families. The selection and appointment on post in the State have to conform to the fundamental rights guaranteed to the citizens under Articles 14 and 16. The objective of a State in selecting persons into public service has always been to select the best and most suitable person [Lila Dhar vs. State of Rajasthan and others, (1981) 4 SCC 159]. It is the Commission, that has the power to devise the mode of selection and fix the criteria for selection. The said power has to be exercised in a reasonable and fair manner to advance the purpose and object of selection. Even if it is assumed for the sake of the argument that the Commission can change the criteria of selection from time to time, the said power has to be exercised not in an arbitrary manner.

The Supreme Court observed that the Commission being recruiting body abdicated its obligation of screening out the best candidates. In the present case, when shortlisting candidates for interview, Commission did not publish any criteria or marks on the basis of which interview was to be held. Candidates are not aware of the criteria of selection under which they were subjected in the process and the said criteria for the first time was published along with final result. Said alteration of criteria, was sole handi-work of the Chairman, which decision was not the decision of the Commission. The Commission being multimember body, Chairman alone was not competent to alter the mode of selection and the criteria, which was fixed and published for conducting the selection for the post of PTI. When no reasons are forthcoming to support the so called 'administrative reasons' in the decision for the scrapping the written test, the said decision arbitrary and without reason. Thus, said decision for not holding the written examination and steps taken consequent thereto were all arbitrary decisions, unsustainable in law.

The Apex Court further held that the preposition that a candidate, who participates in a selection without a demur taking a calculated chance to get selected cannot turn around and challenge the criteria of selection and the constitution of the selection committee is well settled. However, the petitioners could not have been thrown on the ground of estoppel since in the present case, the selection process and criteria which was notified was never followed and the selection criteria never notified till the declaration of final result, hence, the writ petitioners cannot be estopped from challenging the selection. Further held that, when glaring illegalities have been committed in the procedure to get the candidates for examination, the principle of estoppel by conduct or acquiescence has no application.

[Ramjit Singh Kardam & ORS. Vs. SANJEEV KUMAR & ORS. SLP(C) No. 5373 of 2013) DOJ: April 08, 2020]

N. Muralikrishna, Sr.LO/HQ

FAQ: Pleadings Generally

Pleadings mean a formal statement of the cause of action or defense. Order 6 of CPC, 1908 explains 'Pleadings Generally'. Order 6 contains 18 Rules. Rule-1 defines "Pleadings", which means 'Plaint or Written Statement'. Mogha defines Pleadings that "Pleadings are a statement in writing drawn up and filed by each party to case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer'. The object of pleadings is to give fair notice to each party of what the opponent's case is and to ascertain the points on which the parties agree and those on which they differ and thus to bring the parties to a definite issue. Rule-2 states 'Pleadings to state material facts and not evidence' which means that every pleading shall contain and contain only statement in concise form of the material facts on which the party pleadings relies for his claim or defense but not the evidence by which they are to be proved. Relief could be given only on the basis of Pleadings. A plea not raised in Pleadings cannot be argued. Rule-17 provides 'Amendment of Pleadings'. This Rule deals with amendments to pleadings, which a party desires to be made in his opponent's Pleadings, or where the Pleadings contains irrelevant or prejudiced, embarrassing or delayed the fair trial of the suit, the party can seek leave of the court to amend his Pleadings.

K. Gopinath,CLA, GM Office/SC

KNOW OUR CONSTITUTION

30. Right of minorities to establish and administer educational institutions

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Difference between: Set-off & Counter Claim:

Set-off:

Set-off means a reciprocal acquittal of debts. Rule-6 of Order-8 of CPC, 1908 explains Legal Set-off. It is of two kinds. 1. Legal Set-off & 2. Equitable Set-off.

1. **Legal Set-off**: Rule-6 explains 'Particulars of Legal Set-off to be given in written statement'. It provides where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court and both parties fill the same character as they fill in the plaintiff's suit. There are 8 illustrations annexed to Rule-6 which give a clear and easy understanding about the legal set-off.

2. **Equitable Set-off**: It means a set-off for an unascertained sum of money arising out of cross-demands arising out of the same transaction. It may be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim.

Counter Claim: Rules 6-A to 6-G of Order-8 deals with Counter Claim. It means when the defendant in an action has the claim against the plaintiff which he might have asserted by bringing a separate suit, he may raise it in the existing suit as a counter-claim in his written statement, giving the facts on which it is based. It reduces the pendency of cases and the causes of action and cross-claims of similar nature could be clubbed together and disposed of by common judgment. Rule 6-A provides the Counter-claim by Defendant, wherein, the defendant in suit may, in addition to his right of pleading a set-off under this Rule, set-up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the deliver his defense or before the time limit for delivering his defense has expired, whether such counter-claim is in the nature of a claim for damages or not. Such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

K. Gopinath,CLA, GM Office/SC

Excerpts of important orders of Supreme Court in the wake of COVID-19 pandemic:

With regard to extension of limitation:

Suo Motu Writ Petition (Civil) No. 3/2020

"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities….."

With regard to hearing of cases by Courts:

Suo Motu Writ (Civil) No. 5/2020

"6. Therefore, in exercise of the powers conferred on the Supreme Court of India by Article 142 of the Constitution of India to make such orders as are necessary for doing complete justice, we direct that:

i. All measures that have been and shall be taken by this Court and by the High Courts, to reduce the need for the physical presence of all stakeholders within court premises and to secure the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;

ii. The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and

iii. Consistent with the peculiarities of the judicial system in every state and the dynamically developing public health situation, every High Court is authorized to determine the modalities which are suitable to the temporary transition to the use of video conferencing technologies;

iv. The concerned courts shall maintain a helpline to ensure that any complaint in regard to the quality or audibility of feed shall be communicated during the proceeding or immediately after its conclusion failing which no grievance in regard to it shall be entertained thereafter.

v. The District Courts in each State shall adopt the mode of Video Conferencing prescribed by the concerned High Court.

vi. The Court shall duly notify and make available the facilities for video conferencing for such litigants who do not have the means or access to video conferencing facilities. If necessary, in appropriate cases courts may appoint an amicus-curiae and make video conferencing facilities available to such an advocate.

vii. Until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both the parties by video conferencing. If it is necessary to record evidence in a Court room the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the Court.

viii. The presiding officer shall have the power to restrict entry of persons into the court room or the points from which the arguments are addressed by the advocates. No presiding officer shall prevent the entry of a party to the case unless such party is suffering from any infectious illness. However, where the number of litigants are many the presiding officer shall have the power to restrict the numbers. The presiding officer shall in his discretion adjourn the proceedings where it is not possible to restrict the number."

With regard to lab testing for COVID-19 cases:

Writ Petition No. of 2020 (D. NO.10816/2020)

Shashank Deo Sudhi Vs. Union of India and Ors.

"…..the order dated 08.04.2020 is clarified and modified in the following manner:

(i) Free testing for COVID-19 shall be available to persons eligible under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana as already implemented by the Government of India, and any other category of economically weaker sections of the society as notified by the Government for free testing for COVID-19, hereinafter. (ii) The Government of India, Ministry of Health and Family Welfare may consider as to whether any other categories of the weaker sections of the society e.g. workers belonging to low income groups in the informal sectors, beneficiaries of Direct Benefit Transfer, etc. apart from those covered under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana are also eligible for the benefit of free testing and issue appropriate guidelines in the above regard also within a period of one week. (iii) The private Labs can continue to charge the payment for testing of COVID-19 from persons who are able to make payment of testing fee as fixed by ICMR. (iv) The Government of India, Ministry of Health and Family Welfare may issue necessary guidelines for reimbursement of cost of free testing of COVID-19 undertaken by private Labs and necessary mechanism to defray expenses and reimbursement to the private Labs.(v) Central Government to give appropriate publicity to the above, and its guidelines to ensure coverage to all those eligible.

Vijitha, CLA/Gaz. PCPO Office

Consequential Seniority of SC/ST employees in promotion: Quantifiable data is required

In an order dated 17.04.2020, the Supreme Court has held that to grant the benefit of consequential seniority to SC/ST employees subsequent to their promotion, the Govt. need to have quantifiable data to justify the same. The facts of the case are as follows: The Govt. of Orissa vide Resolution No.39374 dated 02.11.2000 had issued instructions for implementing "Catch Up Principle" in the matter of reservation in promotions. Subsequently, the Govt. of Orissa had withdrawn the "Catch Up Principle" vide Resolution dated 20.03.2002 consequent to the OM dated 21.01.2002 issued by the Ministry of Personnel, Public Grievances and Pensions. It was further ordered that the government servants belonging to SCs/ STs shall retain their seniority in the case of promotion by virtue of rule of reservation. In the said G.O. it was further clarified that the government servants belonging to general/OBC category promoted later will be placed junior to the SC/ST government servants promoted earlier, by virtue of rule of reservation.

The WP(C) No. 6781/2008 filed by the general category employees, who were seniors to appointees belonging to SC/ST category, was allowed by the High Court by setting aside the order dated 17.04.2008 passed in O.A.No.904(C) of 2008 etc. by the Orissa Administrative Tribunal. The Government Resolution dated 20.03.2002 and the consequential Gradation List dated 03.03.2008 of Orissa Administrative Services, Class-I (Junior Branch) were also quashed. The benefit of "Catch Up Rule" was evolved by the Supreme Court in the case of Virpal Singh Chauhan [AIR 1996 SC 448 = (1995) 6 SCC 684] and was subsequently accepted in the case of Ajit Singh (II) [(1999) 7 SCC 209].

The HC followed the law laid down in M. Nagaraj & Ors. Vs. Union of India & Ors. [(2006) 8 SCC 212] wherein it was held that the State is not bound to make reservation for SCs/STs in matter of promotions. It was held that if the Govt. wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 of the Constitution of India. It was further made clear that even if the State has compelling reasons, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling of 50% or obliterate the creamy layer or extend the reservation indefinitely.

In the case of Suraj Bhan Meena & Anr. V.State of Rajasthan & Ors. [(2011) 1 SCC 467] a two-Judge Bench of the Apex Court has considered the validity of notifications, providing for promotion of members of SC/ ST with consequential seniority, issued by the State Government. In the aforesaid judgment, it was held by the Supreme Court that the need for collecting quantifiable data and ascertaining inadequacy of representation of members belonging to SC/STs is a condition precedent for issuing notifications providing benefit of reservation with consequential seniority. Further, in the case of B.K. Pavitra & Ors. v. Union of India & Ors. [(2017) 4 SCC 620] the Supreme Court has held that the determination of 'inadequacy of representation', 'backwardness' and 'overall efficiency' is mandatory for exercising power under Article 16(4A). It is further held in the said case that the mere fact that there is no proportionate representation in promotional posts for reserved category candidates, by itself is not sufficient to extend the benefit of consequential seniority to promotees who are otherwise juniors. It is held that in absence of such mandatory exercise by the State the "Catch Up Rule" fully applies. In the case of Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors. [(2018) 10 SCC 396] while answering the reference a Constitution Bench of this Court has held that the judgment in the case of M. Nagaraj1 need not be revisited.

While dismissing the Civil Appeal it was held by the Apex Court : "12….While it is open for the State to confer benefit even through an executive order by applying mandatory requirements as contemplated under Article 16(4A) but the Resolution dated 20.03.2002 is merely issued by referring to the instructions of the Union of India without examining the adequacy of representation in promotional posts, as held by this Court.……

13. …..In view of the stand of the respondent-State in the counter affidavit filed in the writ petition and further in view of the submission made by the learned counsel for the State of Orissa that no benefit of seniority was extended by any State Act or by any executive order by examining adequate representation in terms of Article 16(4A) of the Constitution, we do not find any merit in this appeal so as to interfere with the well reasoned judgment of the High Court." **Pravakar Mallick & Anr. Vs. The State of Orissa & Ors. [Civil Appeal No.3240 & 4421 of 2011. DOJ – 17.04.2020]**

K. Gopinath, CLA, GM Office/SC

What is Streisand effect

The Streisand effect is a social phenomenon that occurs when an attempt to hide, remove, or censor information has the unintended consequence of further publicizing that information, often via the Internet. It is named after American entertainer Barbra Streisand, whose attempt to suppress photographs of her residence in Malibu, California inadvertently drew further attention to it in 2003.

Attempts to suppress information are often made through cease-and-desist letters, but instead of being suppressed, the information receives extensive publicity, as well as media extensions such as videos and spoof songs, which can be mirrored on the Internet or distributed on file-sharing networks.

The Streisand effect is an example of psychological reactance, wherein once people are aware that some information is being kept from them, they are significantly more motivated to access and spread that information. From Wikipedia.

YOURS LEGALLY

Access to information under RTI Act when alternative avenues are available

Position at the starting: The law has been changing on the issue of access to information under RTI Act when other resources are available for a citizen. Earlier the Central Information Commission has held in its decision in the matter of Mr. Rakesh Kumar Aggrawal [CIC/WB/A/2008/01010/SG/2228] that:

"If a Public authority has a process of disclosing certain information which can also be accessed by a Citizen using Right to Information, it is the Citizen's right to decide which route he wishes to use. The existence of another method of accessing information cannot be used to deny the Citizen his freedom to use his fundamental right codified under the RTI Act. If Parliament wanted to restrict his right, it would have been stated in the Law. Nobody else has the right to constrain or constrict the rights of the Citizen. There is no proviso in the RTI Act which restrains the Citizen's right to use it, if another route to avail information has been offered. It is a Citizen's right to use the most convenient and efficacious means available to him."

First change of position: However, the CIC changed its stand subsequently. The changed stand was subsequently reiterated in Vijay Prakash Gupta Vs. CPIO. Supreme Court [Appeal No.CIC/RM/A/2014/001189] held on 07.04.2016:

"10.This Commission, in its decision CIC/RM/A/2014/004655 dated 09.03.2016 held that the provisions of the RTI Act cannot override the rules and orders made by the Supreme Court for disclosure of certified copies of judicial records mainly because there is nothing inconsistent in those rules and orders. The common objective of both the RTI Act and the rules and orders of the Supreme Court is disclosure of information. Therefore, any citizen seeking certified copies of judicial records must get such records by adopting the procedure prescribed by the Supreme Court and not under the RTI Act.

11.The High Court of Delhi in W.P. (C) 11271/2009 decided on 01.06.2012 in the matter of Registrar of Companies & Ors. Vs. Respondent: Dharmendra Kumar Garg & Anr. held inter alia that "Therefore, if another statutory provision, created under any other law, vests the right to seek information and provides the mechanism for invoking the said right (which is also statutory, as in this case) that mechanism should be preserved and operated, and not destroyed merely because another general law created to empower the citizens to access information has subsequently been framed."

Restoration to initial position: However, on 11.04.2019, a two-judges Bench of the Apex Court has changed the above position in Institute of Company Secretaries of India Vs. Paras Jain [Civil Appeal No. 5665/2014]. The factual matrix of the case is that the respondent appeared in the final examination for Company Secretary conducted by the Appellant in December, 2012. On being unsuccessful in qualifying the examination, the respondent made an application under the Right to Information Act for inspection of his answer sheets and subsequently, sought certified copies of the same from the appellant. The appellant thereafter has demanded Rs.500/- per answer sheet payable for supply of certified copy of answer book and Rs.450/-per answer book for providing inspection thereof respectively as per Guideline No.3 notified by the statutory council of the appellant.

After the RTI applicant's WP getting dismissed by the Delhi High Court, a Letters Patent Appeal was preferred by him and the Division Bench held that the appellant can charge only the prescribed fee under Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005. Thereafter, the Apex Court held as under:

"12. Be that as it may, Guideline no.3 of the appellant does not take away from Rule 4, The Right to Information (Regulation of Fees and Cost) Rules, 2005 which also entitles the candidates to seek inspection and certified copies of their answer scripts. In our opinion, the existence of these two avenues is not mutually exclusive and it is up to the candidate to choose either of the routes. Thus, if a candidate seeks information under the provisions of the Right to Information, then payment has to be sought under the Rules therein, however, if the information is sought under the Guidelines of the appellant, then the appellant is at liberty to charge the candidates as per its guidelines."

Present position: However, a three-judges Bench of the Apex Court has thereafter taken a different stand on 04.03.2020 in CIC Vs. High Court of Gujarat & Another [CA No.1966-1967/2020] and held:

"2. The point falling for determination in this appeal is as regards the right of a third party to apply for certified copies to be obtained from the High Court by invoking the provisions of Right to Information Act without resorting to Gujarat High Court Rules prescribed by the High Court. ...

43. We summarize our conclusion:

(i) Rule 151 of the Gujarat High Court Rules stipulating a third party to have access to the information/obtaining the certified copies of the documents or orders requires to file an application/affidavit stating the reasons for seeking the information, is not inconsistent with the provisions of the RTI Act; but merely lays down a different procedure as the practice or payment of fees, etc. for obtaining information. In the absence of inherent inconsistency between the provisions of the RTI Act and other law, overriding effect of RTI Act would not apply. (ii) The information to be accessed/certified copies on the judicial side to be obtained through the mechanism provided under the High Court Rules, the provisions of the RTI Act shall not be resorted to. "In fine, the above order dated 04.03.2020 is binding owing to the fact that it is from a three-judges Bench and is the latest.

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

TREATISE ON

Contd… from previous issue:

Section 16: **Competence of arbitral tribunal to rule on its jurisdiction:**

Section- 16(1) (a) that states that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. An arbitration agreement may be in the form of a clause in the arbitration agreement or as a separate agreement. All over the world, it has been a common practice in majority of cases that arbitration clauses are included as part of a detailed agreement and not as a separate agreement between the parties. In such cases, problem arises as to existence of arbitration clause when the main agreement is terminated. In order to avoid such questions, UNCITRAL model law on arbitration has adopted the severability doctrine. In India, the doctrine of severability takes its source from Article 13 of the Constitution of India. In R. M. D. Chamarbaugwalla Vs. The Union of India [1957 AIR 628, 1957 SCR 930], the Supreme Court held that if the valid and invalid provisions are so distinct and separate that after striking out what is invalid what remains is a complete code independent of the rest, then it will be upheld not withstanding that the rest had become unenforceable. In National Agricultural Co-Op. Vs. Gains Trading Ltd on 22 May, 2007, the Supreme Court held that an arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Hence, the contention of respondent that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end, has never been accepted in law.

In M/S. Magma Leasing & Fin. Ltd. & Anr Vs. Potluri Madhavilata & Anr on 18 September, 2009, the core question that falls for determination before the Supreme Court was: does the arbitration agreement survive for the purpose of resolution of disputes arising under or in connection with the contract even if its performance has come to an end on account of termination due to breach? In this case, MAGMA Leasing Limited Public United Company, a financial institution engaged in the business of providing funds for purchase of plant and machinery and other assets by way of hire purchase. It has entered into an agreement with respondent for purchase of a motor vehicle. However, as per the terms of hire purchase agreement, the hirer (respondent) did not pay the instalments and defaulted in payment and as a result thereof, MAGMA seized the said vehicle and also sent a notice to the hirer intimating her that hire purchase agreement has been terminated. When hirer filed a suit against Magma, it has filed an application under S.8 informing the Court that there existed an arbitration agreement between the parties. However, the Civil Court dismissed the petition. High Court also dismissed a revision petition holding that upon termination of the hire purchase agreement, the arbitration agreement does not survive. Hence, the Supreme Court held that in the present case, clause 22 of the hire purchase agreement that provides for arbitration has been couched in widest possible terms as can well be imagined. It embraces all disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, it was held, as it must be, that the arbitration clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.

In A. Ayyasamy Vs. A. Paramasivam & Ors on 4 October, 2016, the Supreme Court held that Section 16 empowers the arbitral tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement. Section 16(1)(b) stipulates that a decision by the arbitral tribunal that a contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Hence, the invalidity of the contract between the parties does not render the arbitration agreement invalid as a consequence of law. This recognizes as inhering in the arbitrator the jurisdiction to consider whether the main contract (other than the arbitration clause) is null and void. The arbitration agreement survives for determining whether the contract in which the arbitration clause is embodied is null and void, which would include voidability on the ground of fraud. The severability of the arbitration agreement is a doctrinal development of crucial significance. For, it leaves the adjudicatory power of the arbitral tribunal unaffected, over any objection that the main contract between the parties is affected by fraud or undue influence.

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

Legal Maxims

Nemo debet bis vexari pro una et eadem causa – It means no man shall be punished twice for the same offence.