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:

Sr.Law Officer,
Law Branch, SCR,
3rd Floor,
Rail Nilayam,
Secunderabad
PIN- 500025.
email:
loscrhq@gmail.com

EDITORIAL

The relevance of online magazine is all the more important in these days, owing to COVID-19 pandemic. The staff may utilise this opportunity to enrich themselves from the webinars going on presently. This issue contains judgments on bar on withdrawal of resignation, effect of non-participation in arbitral proceedings, bar on polygamy by Muslim employee, grant of benefit under MACPS etc. in addition to an outline on Govt. contracts. Added to these, the regular features on arbitration, ABC of Acts (on The Commercial Courts Act, 2015), RTI Act, Know our Constitution, FAQ, Legal Maxims, Difference between etc. will be useful to the readers. Hope this issue will interest you. Stay safe!

.Murali Krishna, Sr. Law Office/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 Commercial Courts Act 2015 (as amended in 2018)

The Commercial Courts Act 2015 has been introduced to resolve the issues or problems of business smoothly and quickly. It extends to the whole of India. The Act essentially introduces setting up of a Commercial Court at District level and a Commercial Division in the High Court, having ordinary original civil jurisdiction to deal with Commercial Dispute of a Specified Value, not being less than Rs.3,00,000 or such higher value as may be notified by the Central Government. All appeals from the orders of the Commercial Court/ Commercial Division would lie before the Commercial Appellate Divisions to be set-up in all High Courts.

Sec.2(c) defines 'Commercial dispute'. A Commercial dispute is a business dispute. It means a dispute between two businesses or dispute between business and customer/clients. A dispute is some disagreement such as infringement of contract, not delivering expected things which are mentioned in clauses of the contract, delivery of bad quality of products, invalid price, parties not fulfilling obligation in some way etc., which arises out of the 22 kinds of disputes viz. dispute in enforcement and interpretation of documents in ordinary transactions of merchants, bankers, financiers and traders, Export or import of merchandise or services, issues in admiralty and maritime law, the transaction relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same, Carriage of goods, etc.

Commercial Courts are defined in Section-2(b) of the Commercial Courts Act, 2015. Any court for the purpose of exercising the powers under the Commercial Courts Act, 2015 which is constituted by State Government at the district level, may after consultation with the concerned High Court by notification.

Section-3(3) of the Act, the State Governments with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in commercial disputes to be the judges of Commercial court.

Section-6 deals with the Jurisdiction of Commercial courts. The Commercial courts are made to resolve all suits and applications relating to the commercial dispute arising out of the entire territory of the State over which it has been vested territorial jurisdiction. A commercial dispute shall be related to provisions of Section 16, 17, 18, 19 and 20 of the CPC 1908.

Section-7 deals with the Jurisdiction of commercial divisions of High Courts. All suits and applications relating to commercial disputes of particular values filed in the High Court having original civil jurisdiction to hear and resolved by commercial division of High courts. Commercial Division of the High Court has jurisdiction to hear all suits and applications relating to commercial disputes, specified by an act to lie in a court (not inferior to a District court) and pending on original side of High court. All suits and applications transferred to the High Court under Section 22(4) of the Design Act, 2000 or Section 104 of the Patents Act, 1970 shall be heard and resolved by the Commercial Division of the High Court.

Section-11 provides for bar jurisdiction of Commercial Court and Commercial divisions and provides that they shall not be empowered to decide any suit, application or proceeding related to any commercial disputes in respect of which the jurisdiction of the Civil Court is either expressly barred under any other law for the time being in force.

Chapter IIIA, containing Section 12A was inserted after Chapter III, Section 12. S.12A provides for pre-institution mediation and settlement using the authorities under the LSA Act, 1987. According to Section-12A(1), a suit which does not require any urgent remedies shall not be instituted unless the plaintiff involves in remedies of pre-institution mediation in such a manner prescribed by the Central Government. Section-12A (2) states that the central government authorized authorities constituted under the Legal Services Authorities Act 1987. According to Section-12A(3), the time taken for resolving the dispute by mediation should be 3 months from the date of application made by the plaintiff. Provided that time period can be extended to 2 months with the consent of the parties. The period under proceeding of mediation will not be considered as limitation under the Limitation Act, 1963. According to Section 12A(4), when commercial dispute came to a solution or settlement, then it should be signed by both the parties along with mediator. The settlement has the effect of an arbitral award u/s 30 of the A& C Act, 1996.

Section-13(1) of the Commercial Courts Act 2015 deals with Appeals. Appeal from an order of Commercial Court below District level Judge will lie before the Commercial Appellate Division and must be filed within 60 days. Appeal from an order of Commercial court at District Judge level exercising original civil jurisdiction or as the case may be, Commercial Division of the High Court will lie before Commercial Appellate Division of that High Court be filed within 60 days of such order. No appeal shall lie from any order/ decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of the Act.

According to Section-14, 'The Commercial Appellate Court and the Commercial Appellate Division shall try to dispose of appeals filed within a period of six months from the date of filing of such appeal'.

Section-15 deals with the transfer of pending cases and the proviso to section 15(2) of the Act clearly provides that no suit or application wherein the final judgments has been reserved by the Court prior to the Commercial Division or Commercial Court shall be transferred.

Section-21 provides for overriding effect for the provisions of the Act, notwithstanding any inconsistency with any other law.

V. Apparao, CLA, GM/O/SC

RTI Act Series

Contd.. From last issue

Now we will take a look at couple of other orders on S. 8 (1) (e) i.e., fiduciary relationship:

In Public Information Officer, Joint Secretary to the Governor, Goa and Anr. Vs. Manohar Parrikar and Anr., and Special Secretary to the Government of Goa Vs. State Chief Information Commissioner and Anr., the High Court of Bombay, Bench at Goa held that relationship between the President of India and the Governor of State is not fiduciary. Hence, a copy of the report sent by the Governor to the President through the Home Minister under Art. 356(1) of Constitution cannot be said to be exempted from the disclosure under Section 8 (1)(e) of the RTI Act. The Court further held that the exemption under Section 8(1)(e) of the RTI Act can be claimed only by the recipient and cannot be claimed by a person who is the author of the information or who gives the information [AIR 2012 Bom 71].

In the Institute of Chartered Accountants of India Vs. Shaunak H. Satya and Ors. the Supreme Court of India has held that anything given and taken in confidence expecting confidentiality to be maintained would be information available to person in fiduciary relationship. Therefore, instructions and solutions to questions communicated by examining body to examiners, head-examiners and moderators were information available to such persons in their fiduciary relationship and therefore, exempted from disclosure under Section 8(1)(e) of RTI Act [Appeal No. CIC/WB/A/ 2007/00760, Decision dated 11-5-2007].

All relationships usually have an element of trust, but all of them cannot be classified as fiduciary. In UPSC Vs. R.K. Jain, the High Court of Delhi has held that opinions/advices tendered/given by public officials could be sought for under the RTI Act, provided same had not been tendered in confidence/secrecy and in trust to authority concerned, i.e. to say in fiduciary relationship [2012(282)ELT 161(Del.)].

Some important orders on S. 8(1)(g) are extracted below:

In Decision No.CIC/SG/A/2009/002567/5719 Appeal No. CIC/SG/A/2009/ 002567 [Dr. Tariq Islam Vs. CPIO, Aligarh Muslim University] the CIC held: "The Respondent has refused to give the information sought by the Appellant on query-1 claiming exemption under Section 8(1)(g) of the RTI Act. Section 8(1)(g) exempts, "information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;". The obvious implication of this is that revealing the facts and reasons leading to the issue of suspending the appellant who is a faculty member of University would endanger the life or physical safety of the persons who are involved in this process. The implication of using this exemption would be that Aligarh Muslim University believes that faculty member is capable of physically harming those who may have been involved in the process of his suspension. This is a very serious charge and the PIO admits that this was not in their mind at all. Before invoking Section 8(1)(g) PIO should carefully evaluate whether It applies since it the instant case this is invoking this section is like making an allegation against a faculty member of the university itself. This would be reducing the respect and the structure of the University and the PI admits that he had not realized this implication. In view of this the exemption claimed under Section 8(1)(g) is struck down."

In Appeal No. CIC/OK/A/2006/00163 dated 07.07.2006 [Shri Dhananjay Tripathi Vs. Banaras Hindu University] it was held by the CIC: "The Commission, therefore, was compelled to observe that the Registrar had taken recourse to the provisions of Section 8(1)(g) and 8(1)(h) merely as a pretext to deny the information. It is difficult to comprehend why the Registrar sat over the fact-finding Committee's small report for fifteen months without taking any action even after there was an RTI application. Through this Order the Commission now wants to send the message loud and clear that quoting provisions of Section 8 of the RTI Act ad libitum to deny the information requested for, by CPIOs/ Appellate Authorities without giving any justification or grounds as to how these provisions are applicable is simply unacceptable and clearly amounts to malafide denial of legitimate information attracting penalties under section 20(1) of the Act." This order of the CIC made it abundantly clear that merely quoting provisions of S. 8 of the RTI Act will not suffice the requirement under the RTI Act.

In the case of Smt. V. Renuka Devi Vs. Southern Railways (Decision No. CIC / SG / A /2009 /000500 / 3131, dated 08.05.2009) the applicant asked for details of settlement regarding pensionery benefits and details of nominations in respect of a third person due for superannuation. The PIO rejected the request under Section 8(1) (g) and 8(1)(j) of the RTI Act. CIC exempted the disclosure of information pertaining to the details of pension and nominations of a third person as its disclosure could lead to some danger to the safety of a person and could also be considered an intrusion of his privacy. The appeal was accordingly dismissed.

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

LEGAL MAXIMS

Jus cogens or **ius cogens** – Compelling law.

Jus Necessitatis – It means a person's right to do what is required for which no threat of legal punishment is a dissuasion.

Jus scriptum – Written law.

Novation – Transaction in which a new contact is agreed by all parties to replace an existing contract.

Quantum meruit – What one has earned or the amount he deserves for the work done.

Can resignation be withdrawn after acceptance?

The Supreme Court has made things clear about the question of withdrawing resignation by the employee after its acceptance. While dealing with an appeal against the Madurai Division Bench's order, the Apex Court held that it is not permissible to withdraw the resignation after its acceptance.

The respondent employee was a police constable since 01.04.2010 and had submitted her resignation on 01.06.2017 and sought to be relieved from her job. The resignation was accepted on 12 June 2017. On 13 July 2017, the respondent purported to address a communication withdrawing the resignation. The respondent instituted a writ petition 1 before the High Court which was disposed of on 1 March 2018 with a direction to the Director General of Police to consider the representation and to pass appropriate orders in accordance with law. On 2 June 2018, the Director General of Police passed an order rejecting the representation. In doing so, the DGP relied on the provisions of Rule 35A of the Special Rules of Tamil Nadu Police Subordinate Services. The order of the DGP was challenged before a learned Single Judge in a writ petition which was dismissed by an order dated 21 August 2018.

The writ appeal filed by the respondent was, however, allowed. The Division Bench came to the conclusion that in terms of Section 50 of the Tamil Nadu Government Servants (Conditions of Service) Act 2016 6, a period of ninety days' notice is necessary. In the view of the High Court, this period of ninety days is intended for the benefit not only of the authority, but for the person who tendered the resignation to rethink whether the resignation should be withdrawn. The High Court found fault with the appellants for having accepted the resignation without waiting for the period of notice to expire and accordingly set aside the decision. Consequently, reinstatement was granted with continuity of service.

The Apex Court had considered the Special Rules of Tamil Nadu Police Subordinate Services to arrive at its conclusion. Rule 35A of the said Rules provided for withdrawal of resignation before its acceptance. It further provided that the employee loses the entitlement to withdraw the resignation upon its acceptance. Moreover, it is evident from clause (c) of Rule 35A that the appointing authority, while accepting the resignation, is empowered to indicate a date from which it will take effect which will not be later than the date of expiry of the notice. In other words, the authority can legitimately accept the resignation from a date anterior to the expiry of the notice. Upon the acceptance of the resignation, the cessation of service takes place and it is not open to the employee to withdraw the resignation. 9 In the present case, as the facts which have been narrated indicate, the resignation dated 1 June 2017 was accepted on 12 June 2017. It was only a month thereafter on 13 July 2017 that the respondent purported to withdraw the resignation. The resignation having taken effect upon its acceptance, the withdrawal was of no consequence.

The Apex Court did not find merit in the submission that the acceptance of the resignation was invalid. The Supreme Court observed that the order which was passed clearly indicated the acceptance of the resignation. The order, however, provided that if the Vigilance and Anti Corruption Department indicated that any adverse remarks or if any adverse noting was made by the Special Branch CID, the resignation would be cancelled. The fact of the matter, however, was that the acceptance of the resignation was complete on 12 June 2017. Once this was the position, the withdrawal was of no consequence in law. The Supreme Court held that the High Court was not justified in coming to the conclusion that within a period of ninety days, which is the period of notice required under the Rules, it was open to the employee to withdraw the resignation even after acceptance. This construction, according to the Apex Court, was clearly contrary to the provisions of Rule 35A. In the result, the appeal was allowed. [CA No. 9423/2019. DGP & Anr. Vs. Jeyanthi. DOJ – 13.12.2019]

Vijitha, CLA(Gaz Section), PCPO/O/SCR

Difference between: Cognizable and Non Cognizable offences

Cognizable and Non-Cognizable offences have been defined in the Criminal Procedure Code as follows;

Cognizable Offence

1. Cognizable offence means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without a warrant.

2.Cognizable offences are those offences which are serious in nature. Example- Murder, Rape, Dowry Death, Kidnapping, Theft, Criminal Breach of Trust, Unnatural Offences.

3. Sec-154 of Cr.Pc provides that under a Cognizable offence or case, the Police Officer has to receive the First Information Report (FIR) relating to the cognizable offence, which can be obtained without the Magistrate's permission and enter it in the General Diary to immediately start the investigation. An FIR sets the criminal law in motion.

If a Cognizable offence has been committed, a Police Officer can investigate without the Magistrate's permission.

Non-Cognizable Offence

1. A non-cognizable offence or a non-cognizable case has been defined in the Criminal Procedure Code as an offence for which the police have no authority to arrest without a warrant.

2. Non-Cognizable offences are those which are less serious in nature. Example- Assault, Cheating, Forgery, Defamation, etc.

3. Sec-155 of Cr.Pc provides that if a police officer receives information regarding the commission of a non-cognizable offence, he is supposed to enter the substance of the case in the station diary and refer the informant to approach the concerned Magistrate.

Under a Non-Cognizable offence/case, in order to start the investigation, it is important for the police officer to obtain the permission from the Magistrate.

K.Gopinath, CLA/GM/O/SCR

Effect of non-participation in Arbitral proceedings

An agreement dated 01.08.2010 was entered into between two companies for supply of certain construction equipments at the work site of respondent-company (Janardan Nirman Pvt. Ltd). This was followed by signing of other agreements on 02.10.2010, 19.03.2011 and 14.04.2011 for supply of further equipments. In the agreement dated 01.08.2010, the venue of arbitral proceedings was incorporated as New Delhi. The exclusive jurisdiction clause was shown as Kolkata in the agreement dated 14.04.2011. Due to non-payment of agreed amount, the appellant company (Quippo Construction Equipment Limited) sent notices for payment and since the payment was not forthcoming, the appellant invoked arbitration on 02.03.2012. In reply dated 15.03.2012, the respondent denied existence of any agreement between the parties and did not take any steps to participate in the arbitration. A Sole arbitrator was thereafter appointed. On the other hand, the respondent filed title suit praying to declare the agreements null and void and permanent injunction restraining the appellant from relying on the arbitration clauses contained in the agreements. The appellant's application u/s 5 & 8 was allowed on 26.05.2014 by the Trial Court and ordered the disputes to be adjudicated by the arbitrator, duly returning the plaint. The respondent filed Miscellaneous Appeal before the Additional District Judge, Sealdah, challenging the order of the Trial Court. Pending appeal, interim relief was prayed for by the respondent and repeated adjournments on that count were sought by the respondent before the Arbitrator. The Arbitrator granted accommodation to the respondent on some occasions but as no interim order was passed by the appellate court, the proceedings before the Arbitrator continued. By ex-parte award dated 24.03.2015, which was common to all the four Agreements, the Arbitrator accepted the claim preferred by the appellant.

Soon after the award, OMP was filed by the appellant in the High Court of Delhi seeking relief under Section 9 of the Act, post the passing of the award. The respondent being aggrieved, filed a petition under Section 34 of the Act before the High Court at Calcutta which was dismissed on maintainability front. Thereafter, a petition under Section 34 of the Act was filed by the respondent in the Court of District Judge, Alipore. The respondent reiterated its case about non-existence of any agreement. It also stated, inter alia, that the venue of arbitration in terms of the agreement dated 14.04.2011 was at Kolkata. The appellate court dismissed the Miscellaneous Appeal of the respondent as not being maintainable. The respondent filed Revision Petitions in the High Court at Calcutta, which dismissed the same as not maintainable. SLP arising out of the said dismissal was dismissed by the Supreme Court.

The High Court, Delhi rejected the OMP of the appellants on the ground that no prima facie case was made out by the appellant. Section 34 application of the respondent was dismissed by the Alipore Court on 13.08.2018 for want of jurisdiction. The respondent's Revision Petition against the Alipore Court order was dismissed as not maintainable by the High Court, Calcutta, owing to availability of remedy u/s 37 of the ACA 1996. Thereafter, the respondent filed appeal u/s 37 and the High Court, Calcutta on 14.02.2019 restored the case to the Alipore Court. The said order was challenged before the Supreme Court.

Regarding the mentioning of the venue as Kolkata in one of the four Agreements, the Apex Court held that the place of arbitration may have special significance in an International Commercial Arbitration to decide the applicable curial law. However, in the present case, the applicable substantive as well as curial law would be the same. Considering the facts that the respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections.

The Supreme Court considered whether not raising objection about the venue of arbitration as contained in the 4th Agreement or competence of the arbitrator, would amount to waiver of right envisaged u/s 4 of the ACA, 1996. In this regard the Apex Court had taken into account its earlier order in Narayan Prasad Lohia Vs. Nikunj Kumar Lohia & Ors. 2002 (3) SCC 572 wherein the number of arbitrators were two, which was in breach of the statutory provision of Section 10 (1) of ACA 1996. The Supreme Court further placed reliance on Konkan Railway Corpn. Ltd. Vs. Rani Construction (P) Ltd 2002 (2) SCC 388 wherein it was held that the challenge, if any, to the composition of arbitral tribunal shall be made not later than the submission of the statement of defence u/s 16 (2). Thus, a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, the Apex Court was unable to accept the submission that Section 10 is a non-derogable provision and held that Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

In view of its earlier orders, while allowing the appeal, it was held by the Supreme Court that the respondent is now precluded from raising any submission or objection as to the venue of arbitration, the conclusion drawn by the Court at Alipore while dismissing Miscellaneous Case No.298 of 2015 was quite correct and did not call for any interference. The High Court was in error in setting aside said Order.

M.V.Ramana, LO/HQ/SCR.

GOVERNMENT CONTRACTS

A Contract in which the Central Government or a State Government is a party to the Contract is called a "**Government Contract**." Like other contracts, a Government Contract is also governed by the Indian Contract Act, 1872. However, in addition to the requirements of Indian Contract Act, 1872, a Government Contract has to comply with the provisions of Article, 299 of the Indian Constitution.

Constitutional Provision in respect of Government Contracts:

Under Article, 298 of the Indian Constitution, under the exercise of its executive power, the Union or a State Government can enter into contracts for the acquisition, holding and disposal of property, or to carry on any trade or business or for any other purpose.

Article 299 of the Indian Constitution states how the Government Contract is made and who will be liable in case of breach of Government Contract.

Article 299: Contracts:

(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

The position resulting from Article, 299 can be stated in this form: -

- Government contracts must be expressed as to be made by the President or the Governor.
- They shall be executed by the competent person and in the prescribed manner.

If the above requirements are not complied with then the Government is not bound by the contract because Article 299 of the Constitution is mandatory.

The officer executing the contract would be personally bound. The Government, however, if it enjoys the benefit of performance from the other party to the contract, would be bound to restore the benefit to the party from whom or on behalf the benefit had been received by the Government.

How the Government Contract is made expressly or impliedly:

While an ordinary contract can be made by express words or by implied conduct of the parties, but a Government Contract should be made expressly. This provision has been made to safeguard the Government against the fake contract which may be made on their behalf to defraud the people and this is the reason why implied contracts do not have any scope in case of Government Contract.

In case if a person enters into a Contract with Government impliedly, then neither he nor the Government will be able to enforce the contract in the court of law. [K.P. Chowdhary Vs State of M.P. AIR 1967 SC 203]. While the Supreme Court has held in many cases that there should be a formal express contract, but many have argued that it is not practical to always have a formal agreement and many times the Government Officers enter into petty contracts as well and therefore it is not ideal to create a formal agreement every time even for such contacts. So the requirements have been relaxed and if the contract is made in writing and the substantial requirements under Article 299 Clause 1 are fulfilled then a contract will be valid even if all the requirements under this provision has not been fulfilled.

Contractual Liability in Government Contracts:

Under Article, 299 Clause 2, the President, the Governor and the person who is authorized to act on their behalf are provided immunity from any personal liability which may be incurred due to non-performance of the contract. This immunity is provided to them only but it does not mean that the Government is also not liable for the contract.

Therefore, the liability of the Government will be the same as in the case of a normal contract under the Indian Contract Act, 1872. Thus, a person can sue to Government or Government can sue a person in case of breach of Contract in the Court of Law.

D. R.V.S.S.S.N. Raju, CLA/G/BZA

FAQ: NOTARY

Notary is a Public Officer appointed by the Central Government or State Government under Notaries Act 1952. Though Notary can be appointed either by the Central Government or the State Government, certain basic and specific powers have been assigned to such notary. If the documents are required to be produced in the court, then the Notary or the Oath Commissioner appointed for that specific purpose by the State Government has to notarize the same. He is also authorised to administer oath and take an affidavit from any person.

According to the Act, the Notary has to sign on the document and also has to affix the notary seal. Apart from this, it is the duty of the Notary to mention the Registration number of the document and the volume of the Book, which is required to be maintained by the notary. The Notarial act will be completed only after the executant, executing the document or the affidavit signs in the book maintained by the notary. Thus, the presence of the executant is mandatory. After the completion of the all the mandatory requisites, the document or the affidavit notarized will be considered as authenticated documents. Rule 10 of the Notarial Rules 1956 has prescribed the fees for each category of acts.

Functions of a Notary (Section 8)

(1) A notary may do all or any of the following acts by virtue of his office, namely:- (a) verify, authenticate, certify or attest the execution of any instrument; (b) present any promissory note, hundi or bill of exchange for acceptance or payment or demand better security; (c) note or protest the dishonour by non -acceptance or non-payment of any promissory note, hundi or bill of exchange or protest for better security or prepare acts of honour under the Negotiable Instruments Act, 1881 (XXVI of 1881), or serve notice of such note or protest; (d) note and draw up ship's protest, boat's protest or protest relating to demurrage and other commercial matters; (e) administer oath to, or take affidavit from, any person; (f) prepare bottomry and respondentia bonds, charter parties and other mercantile documents; (g) prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may conform to the law of the place where such deed is entitled to operate; (h) translate, and verify the translation of, any document, from one language into another; [(ha) act as a Commissioner to record evidence in any civil or criminal trial if so directed by any court or authority; (hb) act as an arbitrator, mediator or conciliator, if so required; any other act which may be prescribed.

The Section 139 of CPC 1908 permits any affidavit verified by notary is admissible as evidence. Likewise, Section 297 of Cr.PC provides for admission of affidavits verified by the notary.

K. Gopinath, CLA, GM/O/SCR

Polygamy by Muslim Employee not permitted

The correctness of bigamy by an employee in contravention to the service rules on the strength of religious faith had come under the scrutiny of the Supreme Court. The appellant, who was Irrigation Supervisor in Govt. of UP, was removed from service for proved misconduct of contracting another marriage during existence of the first marriage without permission of the Government in violation of Rule 29(1) of the U.P. Government Servant Conduct Rules, 1956 and further alleging that he had given misleading information to the authorities that he had given divorce to first wife. It is on record that before the charge sheet, on a complaint by the sister of the first wife of the appellant, the NHRC had issued notice to the appellant and conducted an inquiry through the SP, Moradabad who submitted a report to the effect that the appellant had in fact performed a second marriage without the first marriage having been dissolved. The S.S.P., Moradabad also wrote to the department for taking action as per rules. In the disciplinary proceedings, an inquiry officer was appointed who gave a report that the charge was fully proved. Thereafter, the disciplinary authority imposed the punishment of removal from service.

Aggrieved by the order of removal from service, the appellant filed the W.A. No.36738 of 2008. He impleaded his first wife and her sister as respondents in the writ petition. He also filed an affidavit of his first wife that the divorce had in fact been taken place in the year 1999 before his second marriage in the year 2005. However, the first wife-respondent filed a counter affidavit denying that a divorce had taken place as claimed by the appellant. She relied upon the statement of the appellant on 03.12.2006 before the S.S.P., Moradabad in pursuance of order of the NHRC to the effect that both the wives were living with him comfortably. She further stated that on legal advice, the appellant took her signatures on blank papers and manipulated the affidavit which was relied upon in support of the writ petition.

The High Court after considering the submissions, dismissed the writ petition, observing that the finding of bigamy recorded by authorities concerned are based on petitioner's own admission. Thus, the case had reached the Supreme Court. While challenging the fact recorded by the disciplinary authority and upheld by the High Court, the appellant has raised the question of validity of the impugned Conduct Rules as being violative of Article 25 of the Constitution.

The Apex Court held: "9. …….The defence of the appellant that his first marriage had come to an end has been disbelieved by the disciplinary authority and the High Court. Learned counsel for the State has pointed out that not only the appellant admitted that his first marriage was continuing when he performed second marriage, first wife of the appellant herself appeared as a witness during the inquiry proceedings and stated that the first marriage was never dissolved. On that basis, the High Court was justified in holding that the finding of proved misconduct did not call for any interference. Learned counsel for the State also submits that the validity of the impugned Conduct Rule is not open to question on the ground that it violated Article 25 of the Constitution in view of the law laid down by this court in Sarla Mudgal vs. Union of India"

The Supreme Court further held: "….there is adequate material on record in support of the charge against the appellant that he performed second marriage during the currency of the first marriage. Admittedly, there is no intimation in any form on record that the appellant had divorced his first wife. In service record she continued to be mentioned as the wife of the appellant. Moreover, she has given a statement in inquiry proceedings that she continued to be wife of the appellant. The appellant also admitted in inquiry conducted on directions of the Human Rights Commission that his first marriage had continued. In these circumstances, the finding of violation of Conduct Rules cannot be held to be perverse or unreasonable so as to call for interference by this Court. In these circumstances, the High Court was justified in holding that the penalty of removal cannot be held to be shockingly disproportionate to the charge on established judicial parameters."

While considering the question of any breach of Article 25 of the Constitution of India, the Supreme Court opined that the matter was no longer res integra and cited from the case law of Javed Vs. State of Haryana [(2003) 8 SCC 369] wherein it was held that what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality. The Javed's case had a reference to the Bombay High Court's order in State of Bombay Vs. Narasu Appa Mali [AIR (1952) Bom 84] wherein it was held that "sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

The Supreme Court further referred to the order of the Allahabad High Court which ruled that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

In Ram Prasad Seth v. State of U.P. [AIR (1957) All 411] a learned Single Judge held that "the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, Rule 27 of the U.P. Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution." By referring to the above precedences, the Supreme Court had dismissed the appeal [Khursheed Ahmad Khan Vs. State of UP & Ors. CA No.1662/2015. DOJ – 09.02.2015].

Stanly Paul, CLA(P)/SC/SCR

YOURS LEGALLY

Benefit under MACP Scheme:
Next hierarchical GP or next promotional GP?

The Supreme Court has had an occasion to deal with a batch of civil appeals filed by the Union of India and others challenging the orders passed by various High Courts, which upheld the decision of various CATs, about the grant of MACPS benefit to employees.

The main questions fell for consideration in these appeals were:-

(i) Whether MACP scheme entitles financial upgradation of pay to the next grade pay or to the grade pay of the next promotional post as envisaged under the ACP scheme? Whether MACP Scheme envisages grant of financial upgradation in Grade Pay Hierarchy and not in promotional hierarchy?

(ii) As contended by the respondents, whether MACP scheme is disadvantageous to the employees in comparison to ACP scheme as long as the financial upgradation is granted in hierarchy of grade pay under MACP scheme?

Under the MACP Scheme, three financial upgradations are made available in the next grade pay to an employee who has completed 10, 20 and 30 years of regular service in the same post without getting any promotion. The benefit would be available at the next higher grade pay. Some of the salient features of the MACP Scheme are as follows:

Para No.2 of the MACP Scheme provides that the "MACP Scheme envisages merely placement in the immediate next higher grade pay in the hierarchy of the recommended revised pay bands and grade pay".

As per para No.10 of the MACP Scheme – Office Memorandum dated 19.05.2009, no stepping up of pay in the pay band or grade pay would be admissible with regard to junior getting more pay than the senior on account of pay fixation under the MACP Scheme.

As per para No.11 of the said memorandum dated 19.05.2009, the differences in pay scales on account of financial upgradations under the ACP Scheme and MACP Scheme would not be construed as anomaly.

Para (19) of MACP Scheme contemplates merely placement on personal basis in the immediate higher grade pay/grant of financial benefits only and shall not amount to actual/functional promotion of the employees concerned. As per para (20) of the MACP Scheme, financial upgradations shall be purely personal to the employee and shall have no relevance to the seniority position. As such, there shall be no additional financial upgradation for the senior employees on the ground that the junior employees in the grade have received higher grade pay under MACP Scheme.

The Apex Court observed: "27. ……..By perusal of the MACP Scheme extracted earlier, it is seen that the words used in the Scheme are "placement in the immediate next higher Grade Pay in the hierarchy of the recommended revised pay bands". The term "Grade Pay in the next promotional post" is conspicuously absent in the entire body of the MACP Scheme. The argument of the respondents that the benefit of MACP Scheme is referable to the promotional post, is de hors the MACP Scheme and cannot be accepted. Though ACP and MACP Schemes are intended to provide relief against stagnation, both the Schemes have different features. Pay scales under the Sixth Pay Commission and the MACP Scheme are stated to be more beneficial since it extends to the employees with time intervals with higher pay bands and various facilities which were not available under the ACP Scheme including the three financial upgradations in shorter time span. In any event, MACP Scheme has not been challenged by the respondents. As rightly contended by the learned ASG, the respondents cannot be permitted to cherry-pick beneficial features from the erstwhile ACP Scheme and also take advantage of the beneficial features in the MACP Scheme.

28. The object behind the MACP Scheme is to provide relief against the stagnation. If the arguments of the respondents are to be accepted, they would be entitled to be paid in accordance with the grade pay offered to a promotee; but yet not assume the responsibilities of a promotee. As submitted on behalf of Union of India, if the employees are entitled to enjoy Grade Pay in the next promotional hierarchy, without the commensurate responsibilities as a matter of routine, it would have an adverse impact on the efficiency of administration."

The Supreme Court also held the fact that though various contentions have been raised assailing the MACP Scheme viz. "financial upgradation in the next Grade Pay" and "no stepping up of pay on the ground that junior getting more pay", the clauses of the MACP Scheme including the clause providing the financial upgradation in the next Grade Pay have not been challenged by the respondents.

The Apex Court further examined in detail the case of Raj Pal which various High Courts have followed and distinguished it. The SLP filed in Raj Pal's case was dismissed for delay. It was, inter alia, held that the dismissal of a case by the Supreme Court on the ground of delay in filing / non-filing, is not a binding precedent. It held: "45. …….Raj Pal's case having been dismissed on the ground that no sufficient cause was shown for the delay in refiling, Raj Pal's case ought not to have been quoted as precedent of this Court by the High Courts."

While allowing the appeals, the Supreme Court held: "51. The ACP Scheme which is now superseded by MACP Scheme is a matter of government policy. Interference with the recommendations of the expert body like Pay Commission and its recommendations for the MACP, would have serious impact on the public exchequer. The recommendations of the Pay Commission for MACP Scheme has been accepted by the Government and implemented. There is nothing to show that the Scheme is arbitrary or unjust warranting interference. Without considering the advantages in the MACP Scheme, the High Courts erred in interfering with the government's policy in accepting the recommendations of the Sixth Central Pay Commission by simply placing reliance upon Raj Pal's case. The impugned orders cannot be sustained and are liable to be set aside."

[Union of India & Ors. Vs. M.V.Mohanan Nair. CA Nos.2016-2022 & 2044-2045/2020. DOJ – 05.03.2020. DoP&T OM No.22034/4/2020-Estt.(D) dated 23.03.2020 connects]

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

TREATISE ON — The Arbitration & Conciliation Act, 1996

Contd.. from last issue:

Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause.

S-16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions under S-16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission that with the termination of the MOU on 31st December, 2007, the arbitration clause would also cease to exist. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject matter of the relationship between the parties which came into existence through the MOU. Clearly, therefore, the disputes raised by the petitioner needs to be referred to arbitration. *[M/S Reva Electric Car Co.P.Ltd vs M/S Green Mobil on 25 November, 2011, 2012 (2) SCC 93]*

A three member bench of Supreme Court in *M/s. Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman [Civil Appeal No. 7023 of 2019 arising out of SLP (Civil) No. 8519* of 2019, September 05, 2019] observed that a reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in SBP & Co. and Boghara Polyfab required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator. The Supreme Court, therefore, held that this being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as S-11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. In *Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729*], the Supreme Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator u/s-11(6) of the Act.

Relying on this ratio, the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited* [DOJ: 27.11.2019] at para 9.8 held that "In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the Kompetenz-Kompetenz principle."

The Apex Court further held at para 9.11 of the same judgement that S-16 (1) provides that the arbitral tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage u/S-11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."

N. Murali Krishna, Sr.LO/SCR

KNOW OUR CONSTITUTION

31. Compulsory acquisition of property. – Repealed by 44th Amendment Act, 1978.

31A. Saving of laws providing for acquisition of estates, etc. – Notwithstanding anything contained in article 13, no law providing for-

(a)the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.