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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 will enthuse the readers with some interesting articles such as the judgment of the Apex Court enabling dismissal of a superannuated employee and equity acts in personam but not in rem. Patna High Court's order that consent of first wife for second marriage is not valid is also noteworthy. The article on Bank Guarantees, with gist of important court rulings, will find practical application to employees dealing with them. Added to these, are the regular features such as ABC of Act on Lokpal & Lokayukta, RTI Act Series, Treatise on Arbitration & Conciliation Act 1996, Difference Between, FAQ, Know Our Constitution etc.

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 Lokpal and Lokayukta Act, 2013

The Lokpal and Lokayukta Act, 2013 seeks to provide for the establishment of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries and for related matters. The act extends to the whole of India, including Jammu & Kashmir and is applicable to "public servants" within and outside India. The act mandates for the creation of Lokpal for Union and Lokayukta for states. it came into force from 16 January.

Chapter-II (Sec.3 to 10) provides for the institution of Lokpal. It is a statutory body without any constitutional backing. Lokpal is a multimember body, made up of one chairperson and a maximum of 8 members. The person who is to be appointed as the chairperson of the Lokpal should be either the former Chief Justice of India or the former Judge of Supreme Court or an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

Out of the maximum eight members, half will be judicial members. Minimum 50% of the Members will be from SC / ST / OBC / Minorities and women. The judicial member of the Lokpal should be either a former Judge of the Supreme Court or a former Chief Justice of a High Court.

Chapter-VI (Sec.14 to 19) provides for the jurisdiction of the Lokpal. This will include the Prime Minister except on allegations of corruption relating to international relations, security, the public order, atomic energy and space and unless a Full Bench of the Lokpal and at least two-thirds of members approve an inquiry. It will be held in-camera and if the Lokpal so desires, the records of the inquiry will not be published or made available to anyone. The Lokpal will also have jurisdiction over Ministers and MPs but not in the matter of anything said in Parliament or a vote given there. Lokpal's jurisdiction will cover all categories of public servants.

Chapter-VII (Sec.20 to 24) provides for procedure in respect of preliminary inquiry and investigation.

Chapter-X (Sec.37 to 38) provides for Complaints against Chairperson, Members and Officials of Lokpal.

Chapter-IX (Sec.35 to 36) provides for constitution of Special Courts.

Group A, B, C or D personnel defined as such under the Prevention of Corruption Act, 1988 will be covered under the Lokpal but any corruption complaint against Group A and B officers, after inquiry, will come to the Lokpal. However, in the case of Group C and D personnel, the Chief Vigilance Commissioner will investigate and report to the Lokpal. However, it provides adequate protection for honest and upright Public Servants.

Chapter-VIII (Sec.25 to 34) provides for the powers of Lokpal.

It has powers to superintendence over, and to give direction to CBI. If it has referred a case to CBI, the investigating officer in such case cannot be transferred without the approval of Lokpal. Powers to authorize CBI for search and seizure operations connected to such case. The Inquiry Wing of the Lokpal has been vested with the powers of a civil court. Lokpal has powers of confiscation of assets, proceeds, receipts and benefits arisen or procured by means of corruption in special circumstances. Lokpal has the power to recommend transfer or suspension of public servant connected with allegation of corruption. Lokpal has power to give directions to prevent destruction of records during preliminary inquiry.

Sec.46 provides for Prosecution for false complaint and payment of compensation, etc., to public servant. Punishment will be imprisonment for a term which may extend to one year and with fine which may extend to one lakh rupees. Sec. 47 provides for False complaint made by society or association of persons or trust.

Sec.49 of the Act provides for Lokpal to function as appellate authority for appeals arising out of any other law for the time being in force.

Sec.54 provides for 'Bar of jurisdiction'. No civil court shall have jurisdiction in respect of any matter which the Lokpal is empowered by or under this Act to determine.

Sec.53. Limitation to apply in certain cases.— The Lokpal shall not inquire or investigate into any complaint, if the complaint is made after the expiry of a period of seven years from the date on which the offence mentioned in such complaint is alleged to have been committed.

Sec.56 of the Act- Act to have overriding effect. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Sec.63 of The Lokpal and Lokayukta Act,2013 provides for establishment of Lokayukta. Every State shall establish a body to be known as the Lokayukta for the State, if not so established, constituted or appointed, by a law made by the State Legislature, to deal with complaints relating to corruption against certain public functionaries, within a period of one year from the date of commencement of this Act.

After the 2016 amendment to S.44, it is mandatory for the public servants to declare his assets and liabilities in the prescribed proforma.

V. Apparao, CLA, GM/O/SC

RTI Act Series

Contd.. From last issue

Another sub-section used by PIOs of Railways is 8 (1) (h) which protects information from revealing, which may impede the process of investigation or apprehension or prosecution of offenders.

CVC First Stage advice shareable: In the case Sunil Kumar Bansal Vs. Southern Railways, Chennai (F.No. CIC/OK/A/08/00893-AD, dated 15.05.2009), the applicant had sought for copy of the report send by the Southern Railways (Vigilance) to the Railway Board for obtaining the first stage advice of the CVC and also the copy of the full first stage advice of the CVC in the same case. The CIC directed the respondent to disclose the information asked for by the appellant. CIC mentioned that the fact of the case clearly indicates that investigation in the case is already over and the appellate has been charge-sheeted. Hence, there can be no justification to seek exemption of disclosure under the provisions of Section 8(1)(h) of the RTI Act, which is available on the grounds that it would impede the process of investigation or apprehensions or prosecution of offenders. Moreover, even natural justice demands that the information relevant to the case should be disclosed in order that the accused be granted an opportunity to prove his innocence. The CIC while considering the second argument in respect of Section 8(1)(e) of the RTI Act, 2005, examined in detail the concept and the meaning of fiduciary capacity and fiduciary relationship and arrived at the conclusion that CVC is not holding any documents in confidence under fiduciary capacity, but inquired into the whole incident and prepared an inquiry report and handed it over to the Southern Railways. Hence the plea of the respondent public authority seeking exemption under the garb of fiduciary relations is incongruous and the CIC decided that the documents are not held in fiduciary capacity as no fiduciary relationship exists. The denial to furnish the information sought by the appellant under Section 8(1)(e) is completely ruled out.

Pendency of Departmental Inquiry bars information parting: In the case of Sarvesh Kaushal Vs. F.C.I and others (Appeal Nos. 243 /ICPB /2006 and 244 / ICPB /2006, dated 27.12.2006), the appellant had applied for documents relating to the departmental inquiry launched against him in a corruption case. The CIC, rejecting the appeal, held that the departmental inquiry, which was in progress against him, was a pending investigation under law, and the same attracted the provisions of Section 8(1)(h). Therefore, there is no question of disclosing any information relating to his prosecution, the CIC noted.

Concluding part of vigilance report to be provided: In the case of P.K. Rana Vs. CPIO, Delhi Police, Delhi Police (Appeal No. CIC/AT /A/2006/00322, dated 11.12.2006), the applicant had asked for a report of the vigilance inquiry, which was instituted against her, as an employee of the public authority. The PIO informed her that the information asked for could not be provided as per the provision of Section 8(1)(h) of the RTI Act, according to which information which would impede the process of investigation cannot be provided. However, the CIC held that Section 8(1)(h) of the Act does not prohibit the sharing of information in the form of the concluding part of the Vigilance report. The CIC ordered that the concluding part of the vigilance report be disclosed to the appellant.

Mere existence of the investigation process cannot be a ground for refusal: In the case of Sh. Kishan Lal Bansal Vs. GNCT of Delhi (Appeal No. CIC / SG / A /2009 /000813 and CIC / SG / A/ 2009 / 000813 / 3558, dated 04.06.2009) the appellant sought copy of the inquiry report conducted by SDM regarding fixing of responsibility on the officials for misplacing the file relating to sealing. The CPIO provided a copy of the enquiry report which was illegible. The first appellate authority after considering the Section 8(1)(h) and 8(1) (j) concluded that confidential inquiry report are not to be furnished till such time that a decision is reached by the competent authority and accordingly rejected the request of disclosing the legible attested copy of the preliminary enquiry report. The CIC quoted the decision of Delhi High Court in Bhagat Singh Vs. CIC, (WP (C) No. 3114/2007dated 3.12.2007) interpreting that under Section -8 of the RTI Act, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. Mere existence of the investigation process cannot be a ground for refusal. The authority which holds the information must give germane reasons. Held that no satisfactory reason has been given by the PIO for not disclosing the enquiry report and accordingly allow the appeal for disclosure of enquiry report to the applicant.

After filing of chargesheet, S.8(1)(h) cannot be applied: In the case of A.L. Motwani Vs. the CPIO, ITI Limited, Bangalore (F.No. CIC/AD/A/2009/000109, dated 10.02.2009), the applicant had sought documents pertaining to an ongoing CBI case. CIC allowed the appeal and directed ITI Limited to provide the information sought by the appellant. It ruled that since the charge sheet has already been submitted and the case is in progress in the CBI Court, disclosing the documents asked for cannot in any way impede the investigation process. The documents asked for by the requestor also do not form the part of Court record and there is also no order of CBI Court restraining the public authority from disclosure of information. Accordingly, the provisions of Section 8(1)(e) and 8(1)(h) are not attracted.

Pending police investigation protects information from sharing: In the case of Ravinder Kumar Vs. B.S. Bassi, Joint Commissioner, Police (F.No. CIC/AT/A/2006/00004, dated 30.06.2006), the applicant had sought details regarding the progress of an investigation of a case by the police. The CIC dismissed the appeal relating to the disclosure of information. It ruled that the disclosure of information, in cases under investigation by the police was exempted, according to the provisions of Sections 8(1)(g) and 8(1)(h) of the RTI Act. It is justified not to disclose information in cases of ongoing police investigations (which have not yet been completed), because such a disclosure could hamper the investigation process, the CIC held.

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

Equity acts in personam, but not in rem

Whether fence-sitters are entitled for any relief based on an earlier order of a Court is an issue decided many times by the Supreme Court. The fact of a recent case are as follows: UPPCL (Uttar Pradesh Power Corp. Ltd.) conducted selections for certain Class IV positions of Junior Meter Tester & Repairer, Mate and Meter Coolie/Chaukidar and declared results on 31.08.1978 through an Office Memorandum. The Respondent emerged as one of the successful candidates for being appointed as Meter Cooli/Chaukidar. Owing to subsequent discovery of certain irregularities in the selection process, UPPCL cancelled these selections on 03.11.1978 and consequently terminated services of all appointees on 07.11.1978.

Shyam Behari Lal, another successful candidate whose services too had been terminated, promptly approached the jurisdictional High Court which allowed his writ petition on 26.10.1989 observing that no reasons had been assigned for the termination. UPPCL unsuccessfully filed an intra-court appeal, and thereafter approached the Supreme Court by way of CA No. 7123 of 1993 (U.P. State Electricity Board and Others Vs. Shyam Behari Lal). The said appeal was allowed vide order dated 22.11.1993. Thereafter, a Division Bench of the High Court considered Shyam Behari Lal's case and held that though the writ petition was liable to be dismissed on merits, however, considering the peculiar circumstances wherein Shyam Behari Lal had already served the UPPCL for 17 years, rendering him jobless might be too harsh a consequence.

After the initial round of litigation in which Shyam Behari Lal had obtained relief from the High Court in 1989, the present Respondent also filed WP No. 7897 of 1990 in July, 1990, impugning the order dated 07.11.1978 terminating his services. A learned Single Judge of the High Court of Judicature at Allahabad summarily allowed the Respondent's writ petition on 05.04.2007 on the premise that the matter was "squarely covered" by the decision of the High Court dated 26.10.1989 in Shyam Behari Lal's case.

The aggrieved UPPCL preferred Special Appeal No. 643 of 2007 which was dismissed by a Division Bench vide the impugned order dated 29.04.2016. Although the Court noted that the order of 1989 relied upon by the learned Single Judge had been set-aside by the Apex Court and during fresh consideration of the matter a co-ordinate Bench had held Shyam Behari Lal's case being devoid of any merit; yet it laid emphasis on the equitable considerations which were pressed into aid in Shyam Behari Lal's case for his resultant continuation in service. The Division Bench, thus, dismissed UPPCL's appeal.

Vehemently refuting the Respondent's claim of illegal termination, UPPCL has preferred this Civil Appeal both against the Division Bench's order dated 29.04.2016, as well as the contempt proceedings initiated before the High Court by the Respondent. UPPCL has painstakingly urged that there is no correlation in law or any similarity in facts between the case of Shyam Behari Lal and the present case of Ram Gopal.

The Supreme Court held that the impugned order of the High Court is legally untenable and cannot be sustained for at least three glaring reasons.

(i) Erroneous conclusion of termination order being non-speaking: The Supreme Court had earlier vide order dated 22.11.1993 passed in Civil Appeal No. 7123 of 1993 overruled the High Court's finding of non-reasoned termination in Shyam Behari Lal's case and had held that the termination order was in fact a speaking order, with the reason for termination being writ large and clearly given. The High Court's findings, thus, undoubtedly fall foul of the observations made by this Court and the impugned order hence ought to be set-aside on this count alone.

(ii) Lack of similarity between Shyam Behari Lal and Ram Gopal:

At the outset, it is apparent that Shyam Behari Lal and Ram Gopal share little similarity. Whereas the former had remained in service for over seventeen years (except a brief period between August to November in 1978) and had fought his case tooth and nail, the Respondent has not been in the employment of UPPCL since 1978. The fact-situation in Shyam Behari Lal's case was unique and altogether different from that of Ram Gopal, and there arises no reason to seek or grant parity. Even otherwise, it is a settled canon of common law that equity acts in personam and not in rem. Hence, there could be no extension of parity between the case of Shyam Behari Lal and Ram Gopal (Respondent).

(iii) Inordinate delay in filing writ petition:

Finally, the prolonged delay of many years ought not to have been overlooked or condoned. Services of the Respondent were terminated within months of his appointment, in 1978. Statedly, the Respondent made a representation and served UPPCL with a legal notice in 1982, however such feeble effort does little to fill the gap between when the cause of action arose and he chose to seek its redressal (in 1990).

Consideration of unexplained delays and inordinate laches would always be relevant in writ actions, and writ courts naturally ought to be reluctant in exercising their discretionary jurisdiction to protect those who have slept over wrongs and allowed illegalities to fester. Fence-sitters cannot be allowed to barge into courts and cry for their rights at their convenience, and vigilant citizens ought not to be treated alike with mere opportunists.

The order passed by the High Court for retention of Shyam Behari Lal in service, does not possess any ingredient of a Judgment in-rem. In the opinion of the Supreme Court, the above cited exception, therefore, does not come to the Respondent's rescue.

For the reasons aforementioned, the appeals were allowed. The impugned order delivered by the learned Single Judge on 05.04.2007 as well as the order dated 29.04.2016 of the Division Bench upholding it, were set aside by the Apex Court. [CA No 852 of 2020 Chairman/Managing Director, U.P. Power Corporation Ltd. & others Vs. Ram Gopal with Criminal Appeal No. 204 of 2020]

– Vijitha.M.N, CLA/Gaz/PCPO/O/SCR

Difference between Force Majeure and Vis Major:

Force majeure is used to describe an event that occurs which is beyond the control of the contracting parties, and which prevents them from fulfilling their contractual obligations. The courts have previously held that force majeure is an event which goes beyond what the courts understand by the terms 'act of God' or 'Vis Major'. The term Force Majeure is a French term derived from the Latin expression, 'Vis Major' (superior force), though, the French term is known to have a wider meaning than the Latin expression. Presently, Force Majeure is a genus and Vis Major is a species.

Literally both the term means the same but in legal uses both are different. Where act of God includes all causes of an inevitable accident to be occasioned by elementary forces of nature not connected with any agency of man or any other cause directly or indirectly on the other hand, the definition of Force Majeure is much wider term which not only includes the natural forces but also include other causes which may not be related to nature and can be connected to human agency directly and indirectly, but on whom the humans involved in the accident don't have any control or the incident whose happening was inevitable and which can can't be controlled.

Examples of Vis Major include hurricanes, tornadoes, floods, and earthquakes. The terms act of God, natural disaster etc. are synonymous with Vis Major. These terms are commonly used in contracts to exclude one or both parties from liability and fulfilling their contractual obligations when events beyond their control occur.

A force majeure clause in a contract would typically include events such as war, terrorism, strike, acts of government, epidemics etc. in addition to vis major events like earthquakes, hurricanes, tornado, floods etc. or a non-exhaustive list wherein the parties simply narrate what generally constitute force majeure events and any such other acts or events that are beyond the control of parties.

K. Gopinath, CLA, GM/O/SCR

LEGAL MAXIMS

Qui facit per alium facit per se **(who acts through another, acts himself) :**

Means one who delegates a task to another, takes full responsibility for the performance of that act as if he himself had done it. Basis for the law of agency.

FAQ:

Zero FIR

An FIR that can be filed at any police station irrespective of the place of crime and area of jurisdiction is referred to as a Zero FIR. The FIR that is registered at the police station regardless of place of incidence or jurisdiction will later be transferred to the police station that has competent jurisdiction upon conducting preliminary investigation. The notion of Zero FIR is to institute a jurisdiction free FIR. It was introduced by the recommendation of the Justice Verma Committee in the Criminal Law Amendment Act, 2013 after the ghastly Delhi rape case. The Amendment was passed by the Lok Sabha on 19 March, 2013 and by the Rajya Sabha on 21 March, 2013 and received the President's assent on 2 April, 2013 and is deemed to have come into force from the 3rd day of February, 2013.

The police cannot claim 'lack of jurisdiction' to register an FIR and they are also urged to conduct a prelude investigation despite lack of jurisdiction. This is done in order to ensure that the evidence in certain cases involving offences of Sexual abuse or Road accidents is collected at the right time and isn't lost. Protection of evidence from manipulation and corruption is extremely vital in such situations, therefore the concept of Zero FIR becomes beneficial. Crimes like murder, rape and accidents require immediate action from the concerned police authorities so that they take appropriate samples, eye witnesses and other circumstantial details. Zero FIR allows the authorities to pen down the initial action taken rather than trying to figure out what had happened at the crime scene initially.

K. Gopinath, CLA, GM/O/SCR

KNOW OUR CONSTITUTION

Article 31B:

Validation of certain Acts and Regulations Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

BANK GUARANTEE

A Bank Guarantee is a deed poll issued by a bank on behalf of its customer. By issuing this guarantee, a bank takes responsibility for payment of a sum of money, in case if it is not paid by the customer in performance of its contractual obligations.

According to Section 126 of the Indian Contract Act, a contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default. A bank guarantee is a contractual assurance that is given by the bank to a third party creditor. By virtue of this commercial instrument, the concerned bank undertakes liability on behalf of the principal debtor to fulfil his contractual obligation in the event of default. This secures the transaction by ensuring that no detriment is caused to the creditor. The nature of obligations of the principal debtor is primary while the obligations of the bank are secondary. By issuing a guarantee, a bank ordinarily undertakes to pay the amounts specified in the guarantee agreement to the beneficiary on demand made by him in accordance to predetermined terms and conditions.

The object of a bank guarantee is to ensure the due performance of certain works contracts. The guarantee can also be towards security deposit for a contract or of any kind. In the case of State Trading Corp. of India Ltd. Vs. Jainsons Clothing Corp., the Supreme Court held that the bank guarantee is a trilateral contract in which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in domestic or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of events mentioned in the guarantee contract, the bank guarantee becomes enforceable.

There are two types of bank guarantees:

Unconditional bank guarantee- In an unconditional bank guarantee, the bank/guarantor has to pay the guarantee amount to the beneficiary in whose favour the bank guarantee has been issued on demand, irrespective of any pending disputes / litigations;

Conditional bank guarantee- In a conditional bank guarantee, the bank/guarantor has to pay the guarantee amount to the beneficiary in whose favour bank guarantee has been issued on demand, only after the specific conditions for invocation in the contract are fulfilled.

Correspondence with Government Departments:

(i) The Constitution of India states that all executive action relating to Union of India shall be, and shall be stated to be, in the name of President of India. However, the business of the Government of India is transacted through several Ministries/Departments and even though documents such as guarantees reflect the President of India as one of the parties, correspondence is not to be exchanged with the President of India but with concerned Government Ministry/Departments.

(ii) The banks should, therefore, ensure that any correspondence relating to guarantees furnished by the banks in the name of the President of India favouring the Government Departments should not be addressed to the President of India causing avoidable inconvenience to the President's Secretariat.

Cancellation of Bank Guarantee:

The beneficiary of the guarantee shall invoke the bank guarantee on or before the expiry date of the guarantee. The bank is discharged from its liability if no claim is received by it on or before validity period mentioned in the guarantee. When an original guarantee issued by the bank, is not returned to the bank for cancellation after the expiry of guarantee, the procedure for cancellation of expired guarantee adopted by the banks is that a registered notice is sent to the beneficiary of the guarantee to return the original guarantee immediately. If no reply is received or original guarantee is not surrendered for cancellation, the guarantee can be cancelled by the bank after waiting for a reasonable time.

Judicial Rulings:

The Supreme Court in the case of Tarapore and Co. Vs. V/O Tractors Export,(AIR 1970 SC 891) held that "*the contract created between the creditor and the bank is separate from the original contract between the buyer and the seller because of that bank's undertaking to the creditor is absolute and unconditional, so there is no need of any interventions form courts as interventions from court may destroy the very essence of Bank guarantee*".

In UP State Sugar Corporation Vs. Sumac International Ltd 1 it was held as, above, that when an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such bank guarantee irrespective of pending disputes and that a bank guarantee constituted a bargain between the two parties, by which the banker creditor was unconditionally required to pay the amount in question.

Suit cannot be decreed on photostat copy of Bank Guarantee: In the case of C.S. Company Vs. Punjab & Sind Bank, [I (2004)BC 312(DB)] it is held that "*Suit could not be decreed on the basis of xerox copies when the bank could not account for the non-production of originals of the guarantees*".

Arbitrator cannot direct renewal after expiry of Bank Guarantee [Santram Grain Suppliers Vs. State of Gujarat, Guj LR 1 (2008) 612.

Bank Guarantee cannot be encashed for a different contract between the same parties [Jivanlal Joitaram Patel Vs. National Highways Authority of India, AIR 2008 Guj 181.

Principle of Audi Alteram Partem not applicable for Bank Guarantees [Banwari Lal Radhe Mohan Vs. Punjab State Corporative Supply and Marketing Federation Limited, AIR 1982 Delhi 357 & Chamundi International Vs. Union of India, ELT 97 (1998) Mad 227.

Principal Debtor not necessary party: In the case of Mula Sahakari Sakhar Karkhana Ltd., Vs. State Bank Of India, AIR 2005 Bom 385 and also in case of State Bank of India Vs. Jaipur Vidyut Vitran Nigam, I (2009) BC 68, Para 31 it was held that "*In a suit for enforcement of a Bank Guarantee, the Principal Debtor is not a necessary party in such Suit*".

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

Consent of first wife for second marriage is not valid:

In the case of Binod Kumar Sing Vs. UOI & Ors. in the Hon'ble High Court of Patna in WP No. 8078 of 2007, the Hon'ble High Court dismissed the petition challenging the order of punishment of dismissal from service has been imposed by the Dy.Inspector General of Police. Briefly the facts are as under:-

On the allegation that during the subsistence of the petitioner's marriage with Ranju Singh, he contracted second marriage with a constable in Central Reserve Police Force, which is a misconduct under Section 11(1) of the Central Reserve Police Force Act, 1949, a disciplinary proceeding was initiated against the petitioner. The disciplinary proceeding was initiated on the basis of a complaint made by his wife Ranju Singh. It was also alleged against him that he prepared a forged document to make out a case that his marriage with Ranju Singh stood dissolved by a decree of divorce on mutual consent. There were altogether four charges framed against the petitioner. All revolved around his conduct of marrying another lady during the subsistence of his earlier marriage.

The Hon'ble High Court observed that from the pleadings of the writ application that neither cause of action, leading to the filing of the present application has arisen within the territorial jurisdiction of this Court nor Offices of any of the respondents are situate within the territorial jurisdiction of this Court. This writ application could have been dismissed on the ground of territorial jurisdiction but since no preliminary objection has been raised on behalf of the respondents to this effect in the counter affidavit or in course of oral submission, I proceed to adjudicate upon the matter particularly, as it has remained pending for nearly seven years before this Court.

The Inquiry Officer after conducting the departmental enquiry submitted his report, holding that the charges levelled against him stood proved on the basis of evidence on record. The disciplinary authority i.e. Deputy Inspector General of Police, Central Reserve Police Force, Imphal vide his order dated 16.3.2006 imposed upon the petitioner the punishment of his dismissal from service. The petitioner's appeal and revision petition were also dismissed by orders dated 12.6.2007, 12.7.2006 and 20.3.2007 which are under challenge in the present writ application.

From the pleadings of the writ application, it appears that it is not the case of the petitioner that there was any infirmity or procedural lapse in course of the departmental proceeding. Only plea which has been taken in the writ application is that the petitioner's wife, said Ranju Singh sent a petition before the Inquiry Officer through registered post on 25.1.2006 to the effect that she had no complaint against her husband and she had made the complaint against the husband out of her wrong advice. It has further been stated that said Ranju Singh has also stated on affidavit that she wanted to withdraw her complaint and the complaint was ill advised. The said affidavit is said to have been faxed to the Disciplinary authority on 8.3.2006. Further plea of the petitioner as taken in the writ application is that neither the disciplinary authority nor the appellate/revisional authority considered the petitioner's explanation/defence/points and they imposed and affirmed the order of punishment without any basis.

From the Inquiry report, it appears that there were ample evidence adduced in course of the disciplinary proceeding that the petitioner had contracted second marriage during the subsistence of the first marriage. From the report of the Inquiry Officer it would appear that there were oral as well as documentary evidence on record in support of the fact that the petitioner had contracted second marriage with a constable of the same Force. The said Constable Sunita Upadhyay was also dismissed from service on the same charge. It appears from Annexure-8 of the writ application that said Sunita Upadhyay was reinstated in service and a proceeding afresh has been initiated against her for the same charge.

The findings of the Inquiry Officer cannot be said to be without any basis. From the report of the Inquiry Officer it appears that he has considered the oral as well as documentary evidence on record and after analyzing and assessing such evidence recorded the finding that the charges against the petitioner stood proved. Order of the disciplinary authority imposing punishment, agreeing with the finding of the Inquiry Officer is also well reasoned and has been passed after taking into account and discussing the evidence on record. I do not find any infirmity in the orders of the appellate authority as well as revisional authority as their orders also show application of mind before rejecting the petitioner's appeal/revision.

From the report of the Inquiry Officer, it appears that there were ample evidence on record to prove the charge against the petitioner that he contracted second marriage during the subsistence of the earlier marriage, at least on the standard of the preponderance of probabilities.

The High Court held that the impugned action of the respondents need no interference in the facts and circumstances of the case. The application was, accordingly, dismissed.

N. Murali Krishna, Sr.Law Officer/HQ

YOURS LEGALLY

Dismissal after Retirement - Possible!

How a pensioner can be dismissed after his superannuation must be a puzzling thing! The Supreme Court in a split judgment (2-1) recently held that it is quite possible. In the case before the Apex Court the respondent-employee was in service of the petitioner-employer (Mahanadi Coalfields Ltd.) and was subject to the Conduct, Discipline & Appeal Rules, 1978 [CDA Rules], which inter alia provides for continuation of disciplinary proceedings even after superannuation and further provides for its finalization as if the employee had continued in service. The said Rules further provided for withholding of gratuity during the pendency of the disciplinary proceedings.

The employee was served with a charge memorandum with serious allegation and was suspended subsequently. The suspension was revoked after about a year's lapse and thereafter the employee retired on superannuation. The departmental inquiry was pending at the time of retirement and hence the gratuity was withheld. The employee challenged the withholding of gratuity before the Controlling Authority under Payment of Gratuity Act. After notice and reply by the employer, it was held by the Controlling Authority that the claim was premature.

The employee challenged the order through Writ Petition, which dismissed the said WP since the employee did not approach the Appellate forum against the Controlling Authority's order. Instead of filing an appeal before the Appellate forum, the employee challenged the order of the single judge through an intra-court appeal. The Division Bench of the High Court, by relying on the order of the Supreme Court in Jaswant Singh Gill Vs. Bharat Coking CoalLtd., (2007) 1 S CC 663, held the WP as maintainable and held that the question of removal from service would not arise. The DB further held that the power to withhold the payment of gratuity as contained in the disciplinary rules shall be subject to the provisions of the PG Act, 1972. Consequently, direction was given to the employer to release the amount of gratuity to the employee. Thus, the matter reached the Supreme Court.

In the appeal before the Supreme Court it was argued by the employer that in the Jaswant Singh Gill's case the Supreme Court did not properly appreciate/ consider Rule 34.2 of the CDA Rules and Rule 34.3 was not in conflict with S.4 (6) of the PG Act, 1972. Employer placed reliance on SC's order in SBI Vs. Ram Lal Bhaskar 2011 (10) SCC 249, wherein the order of post-retirement dismissal was upheld by the Apex Court based on a similar provision of service rule. Moreover, the SBI Vs. Ram Lal Bhaskar was by a three-judge Bench and the Jaswant Singh Gill's case was by a two-judge Bench.

On behalf of the employee it was argued that the four major penalties can be imposed so long as an employee remains in employment and no order of extension of service or re-employment was passed. It was submitted that while there is no service / re-employment, there arises no question of removal or dismissal from service. As far as gratuity is concerned it was argued that as per S. 4 (1) of the PG Act, 1972, gratuity becomes payable as soon as the employee retires. It was further urged that S. 4 (6) (a) & (b) of PG Act, 1972 applies if it satisfies the pre-condition that the service of the employee has already been terminated for any act, or omission or negligence causing any damage or loss or destruction of property belonging to the employer. In other words, "termination from service" is *sine qua non* for invoking S. 4 (6) (a) (b) of the PG Act, 1972.

The Supreme Court held that if the order of dismissal cannot be passed after the employee has retired and/or has attained the age of superannuation in the disciplinary proceedings which were instituted while the employee was in service, in that case, there shall not be any fruitful purpose to continue and conclude the disciplinary proceedings in the same manner as if the employee had continued in service. While disagreeing with the order passed in Jaswant Singh Gill, the Apex Court held that if the view taken therein is accepted, then no major penalty can be imposed after retirement in a case where the disciplinary proceedings were instituted while the employee was in service, rendering Rule 34.2 otiose and meaningless.

The Apex Court held that once it is held that a major penalty which includes the dismissal from service can be imposed, even after the employee has attained the age of superannuation and/or was permitted to retire on attaining the age of superannuation, provided the disciplinary proceedings were initiated while the employee was in service, S. 4(6) of the PG Act, 1972 is attracted and gratuity can be withheld till the disciplinary proceedings are concluded. It was further held that even otherwise withholding of gratuity is permitted under Rule 34.3 of CDA Rules which is not in conflict with S. 4(6) of the PG Act, 1972.

The Apex Court relied on its decision in State Bank of Patiala & Anr. Vs. Ram Niwas Bansal 2014 (12) SCC 106 wherein it was held that the concept of deemed continuance in service of the officer have full play and therefore, the order of removal could have been passed after finalization of the departmental proceeding, but prospectively as held in R.Jeevaratnam Vs. The State of Madras AIR 1966 SC 951. The Supreme Court further relied on Ramesh Chandra Sharma Vs. PNB & Anr 2007 (9) SCC 15 and held that imposition of dismissal from service would not be impermissible in law in view of the legal fiction and if the employee is removed / dismissed, he would not get the pensionary benefits. The Apex Court further considered many other past orders and upheld the dismissal from service post-retirement. [CA No. 9693/2013. CMD, Mahanadi Coalfields Ltd. Vs. Sri Rabindranath Choubey. DOJ- 27.05.2020].

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

TREATISE ON The Arbitration & Conciliation Act, 1996

Contd.. from last issue:

16. Competence of arbitral tribunal to rule on its jurisdiction:

Section 16(2): A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

Explaining the effect of Section 16(2), the Supreme Court held that "On a plain reading, this provision mandates that a plea that the Tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the Section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the Tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning an Tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the Respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the Tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the Tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree". [M/S MSP INFRASTRUCTURE LTD Vs M.P. ROAD DEVL. CORP. LTD., (2018) 10 SCC 826]

The Apex court, in the same case rejected the contention that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the Court which decided the matter, since the order of such a Court is a nullity. The Court held that the position of law has been well settled in relation to civil disputes in Courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. The scheme of the Act is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court.

The High Court of Delhi, in S.N. Malhotra And Sons vs Airport Authority Of India [2008 (2) ARBLR 76 Delhi] held that a bare perusal of Section 16(1) of the Act makes it abundantly clear that the arbitral tribunal has now been rendered competent by the legislature to rule on its own jurisdiction, including ruling on any objections with regard to the existence or validity of the arbitration agreement. While Sub-section (2) relates to a plea that the arbitral tribunal does not have jurisdiction, Sub-section (3) relates to a plea that the arbitral tribunal has exceeded its jurisdiction. On an analysis of the provisions of Section 16(1) to (6), in our view, it is clear that the legislative intent was that a plea as to jurisdiction of the arbitral tribunal or as to exceeding of its authority must be raised at the threshold and cannot be entertained at a subsequent stage. In other words, a plea in terms of Sub-section (2) or Sub-section (3) of Section 16 of the Act not having been taken at the initial stage, must be deemed to be waived.

N. Muralikrishna, Sr.LO/HQ

JOKE

A young lawyer was defending a wealthy businessman in a complicated lawsuit. Unfortunately, the evidence was against his client, and he feared the worst. The lawyer asked the senior partner of the law firm if it would be appropriate to send the judge a box of Havana cigars. The partner was horrified. "The judge is an honorable man," the partner exclaimed. "If you do that, I can guarantee that you will lose the case." Weeks later the judge ruled in favour of the lawyer's client. The partner took him to lunch to congratulate him. "Aren't you glad that you didn't send those cigars to the judge?", the partner asked. "Oh, but I did send them," replied the lawyer. "I just enclosed the plaintiff's lawyer's business card!"