Lex Info

An E - Magazine
(from Law Branch, South Central Railway)

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;

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Legal Maxim

Quod ab initio non valet, in tractu temporis non convalescit - What is not valid in the beginning does not become valid by time.

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 Micro, Small and Medium Enterprises (MSME) Development Act, 2006

The Micro, Small and Medium Enterprises Development Act, 2006 aims at facilitating the promotion, development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. The Act is operational from 2nd October 2006.

In accordance with the provision of MSMED Act, 2006 the Micro, Small and Medium enterprises (MSME) are classified in two categories:

1. Manufacturing Enterprises: The enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the first schedule to the industries (Development and regulation) Act, 1951).

2. Service Enterprises: The enterprises engaged in providing or rendering of services and **defined in terms of investment in equipment.**

Registration of MSM Enterprises: All classes of enterprises, whether Proprietorship, Hindu undivided family, Association of persons, Co-operative society, Partnership firm, Company or Undertaking, by whatever name called can apply for the registration and get qualified for the benefits provided under the Act. Provisional registration is granted to a unit at its pre-investment period to enable it to take necessary steps to apply for financial credit, land or an industrial set, water, power or telephone connections, etc. A provisionally registered industrial unit when it is about to go into production is to apply for grant of Permanent / Final Registration. An existing and functioning industrial unit is eligible to apply for Permanent / Final Registration without going into provisional registration processes.

Benefits of Registration of MSM Enterprises:

If a micro or small enterprise files a memorandum with District Industries Centre (DIC) of its area, then it stands to gain many benefits viz. Easy finance availability from Banks, without collateral requirement; Protection against delay in payment from Buyers and right of interest on delayed payment; Preference in procuring Government tenders; Stamp Duty and Octroi benefits; Concession in electricity bills; Reservation policies for manufacturing/ production through conciliation and arbitration; Reimbursement of ISO Certification Expenses; Moreover with the enactment of the Act, the interest on delayed payments to small scale and ancillary Industrial Undertaking Act, 1993 is repealed with effect from October 2, 2006.

Similarly, Medium enterprises enjoys the below mentioned benefits viz. Easy finance availability from Banks, without collateral requirement; Preference in procuring Government tenders; Reservation policies for manufacturing / production sector enterprises; Time-bound resolution of disputes with Buyers through conciliation and arbitration.

Disputes under MSMED Act

In case of disputes with regard to any amount due because of delayed payment, the enterprises under the provisions of the Act may refer to the MSME Facilitation Council which would further itself conduct conciliation in the matter and where the conciliation initiated is not successful and stands terminated without any settlement between the parties the council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services.

The MSME Facilitation Council providing alternate dispute resolution services shall have the same jurisdiction to act as an Arbitrator or conciliator under this section in a dispute between the supplier located within the jurisdiction and a buyer located anywhere in India.

The Act provides that every reference made under this section shall be decided within a period of 90 days from the date of making the reference.

U/s. 19 of the Act, it has also been mentioned that no Application for setting aside any decree/award, made by the Council / referred Institution shall be entertained by any Court unless the appellant (not being the supplier) has deposited with it seventy-five percent of the amount in terms of the decree/ award.

Further, pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.

Section 27 of the Act provides for penalty for contravention of Ss.8,22 or 26. (a) in the case of the first conviction, with fine which may extend to rupees one thousand; and (b) for second or subsequent conviction, with fine which shall not be less than rupees one thousand but may extend to rupees ten thousand.

(2) Where a buyer contravenes the provisions of section 22, he shall be punishable with fine which shall not be less than rupees ten thousand.

Section-28 provides for Jurisdiction of courts.—No court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

V. Apparao, CLA, GM Office/SCR

RTI Series

More orders on Section 8(1)(h) of the RTI Act:-
Pending disciplinary proceedings: Employee facing fraud charge cannot get information:-

The CPIO of Dept. of Posts refused to provide the documents related to disciplinary proceedings initiated against the RTI applicant/employee, invoking S. 8 (1) (g) & (h). The employee was the main offender in the fraud case. The CPIO has informed the appellant that all the copies of the documents on the basis of which charge sheet memo was prepared would be furnished as per the provision laid down under the CCS (CCA) Rules.

The CIC held that a disciplinary action against the appellant was contemplated on the basis of the charge memo issued to him under the CCS (CCA) Rules. Under the relevant provision, he is entitled for all the documents that are favourable to him for effective defence. There is therefore no justification at this stage to interfere with the process of disciplinary proceedings. The denial of information sought is justified. [Shri B.S. Manian Vs. Department of Posts, (Decision No. 92/IC(A)/2007 F. No.CIC/PB/A/2007/00405 dated, 20.06.2007]

Pending departmental inquiry: Disclosure not required:-

In 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 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, it was held that there is no question of disclosing any information related to his prosecution.

Departmental inquiry report: To be disclosed:-

In Nahar Singh Vs. Deputy Commissioner of Police & PIO, Delhi Police (Appeal No. CIC/AT/ C/ 2006/0452, dt. 28.12.2006), the applicant had asked for a report of the departmental inquiry, which was concluded against him. The CPIO refused to provide the information saying it was barred from disclosure as per the provisions of Section 2 and 8(1) of the Act. The CIC held that the report of departmental inquiry can be shared with the concerned employee, and is not barred for disclosure under any of the exemptions provided in S.8(1). The CIC further ruled that the information held in the nature of a report is clearly "information" in terms of S.2(f). The CIC further held that the public authority can protect the interests of witnesses or other persons whose names appear in the report by not providing them to the appellant, and ordered the concerned public authority to provide the applicant with the relevant information.

Important orders on Section 8 (1) (j)
No disclosure of third-party confidential information:

In A.P. Singh Vs. Punjab National Bank (Appeal No. 12/IC(A)/2006, dated 14.3.2006) the appellant had sought information regarding the bank account of another person with whom the applicant had no professional or business relationship. This information was refused to the applicant by the public authority. The CIC held that a bank is under duty to maintain the secrecy of accounts of its customers, who are also third party. The CIC further held in this case that since the applicant had not established any bona fide public interest in having access to the information sought nor did he has any association or business relationship with the company (bank), his appeal cannot be accepted in terms of the law as provided in Section 8 (1)(j) of the RTI Act.

Employees cannot question the decisions of superior officers in the garb of seeking information:-

In the case of Dr. K.C. Vijayakumaran Nair Vs. Department of Post, the appellant had sought the following information namely– the name of the officer who raised the query as to whether the appellant had taken permission of the respondent for joining a Ph.D. course and the name of the officer who took the decision to relieve the appellant while he was posted at Shimla and whether the officer was competent to take such decision. He had also sought `file notings" with respect to the above. The CPIO informed him that his relieving order was issued in compliance with the orders of DG (Posts). As regards disclosure of `file notings", the information was denied u/s 8(1)(j) of the Act, on the ground that `file notings" was confidential. The appellant made his first appeal and the appellate authority upheld the decision of the CPIO.

CIC held that the information sought has been furnished, except the `file notings" with regard to the official who raised the query as to whether the appellant had obtained the official permission for doing the Ph.D course. The part of `file notings" containing the orders of the DG (Posts) for relieving him from the post, then held by the appellant has been similarly denied. The `file notings" in the instant case, contain information relating to transfer/ posting.

To be continued in next issue….

M.K. Shaji, CLA/RWF

Placement in higher pay scale is promotion: Supreme Court

The Supreme Court has re-asserted that promotion may include an advancement to a higher pay scale without moving to a different post, while dealing with an appeal filed by Telephone Operators of Delhi Fire Service, who were deployed as Radio Telephone Operators.

The interpretation of an Office Memorandum introducing ACP (Assured Career Progression) Scheme was in dispute, wherein two financial upgradations on completion of 12 and 24 years of regular service respectively were to be given. The appellants in this case claimed first financial upgradation as on 9.8.1999 or on completion of 12 years of service in the DFS as Telephone Operators/RTOs, but that the same were denied to them treating their conversion of the aforesaid posts as a promotion.

The appellants/employees approached the CAT and succeeded in terms of the judgment dated 6.10.1999 granting them the pay scale of RTOs, i.e., Rs.380- 560 on the principle of "equal pay for equal work". One of the RTOs made a representation on 31.05.2001 against the non-grant of the benefit under the ACP Scheme. Another O.A was filed before the CAT and vide its order dated 29.10.2003 it allowed the O.A opining that promotion and merger of cadres operated in different spheres and the requirement to be categorised as 'promotion' is that it must specify certain basic qualifications. On the other hand, conversion of the posts was in exercise of the powers of the Government in the given exigencies.

The aforesaid order was assailed by the respondents before the Delhi High Court by filing writ petition being WP (C) No. 8406-07 of 2004. The High Court called for the records and, on the pleadings being completed, passed the impugned judgment dated 8.5.2009 allowing the writ petition filed by the respondents. The gravamen of the reasoning of the High Court is that the conversion of posts of Telephone Operators to RTOs was with a condition of completion of 5 years of regular service, with the benefit of the higher pay scale from Rs. 260-400 to Rs. 380-560 and consequently, was liable to be treated as promotion, thus disentitling the appellants to the benefits of the ACP Scheme.

Thus, the case carried to the Apex Court by the aggrieved appellants / employees. The question arose before the Supreme Court was whether their deployment as RTOs would amount to a promotion or whether it was a mere reorganisation and they were entitled to the ACP separately in terms of the ACP Scheme? Both the parties relied on an earlier order of the Apex Court in BSNL Vs. R. Santhakumari Velusamy. The appellants contended that the instant case is not promotion. The State argued that the three aspects present in the instant case i.e. (i) prequalification of minimum of 5 years of service; (ii) higher financial emoluments; (iii) rigorous of a specialized training makes it clear that is one which should be considered as the promotion for the purpose of ACP Scheme.

While dismissing the appeal, the Supreme Court held: "The reasons for coming to this conclusion is based on the principles set out in the BSNL case (supra). No doubt, sometimes there is a fine distinction which arises in such cases, but, a holistic view has to be taken considering the factual matrix of each case. The consequence of reorganization of the cadre resulted in not only a mere re-description of the post but also a much higher pay scale being granted to the appellants based on an element of selection criteria. We say so as, at the threshold itself, there is a requirement of a minimum 5 years of service. Thus, all Telephone Operators would not automatically be eligible for the new post. Undoubtedly, the financial emoluments, as stated above, are much higher. The third important aspect is that the appellants had to go through the rigorous of a specialized training. All these cannot be stated to be only an exercise of merely description or reorganization of the cadre. On applying the test in BSNL case (supra), as per sub-para (i) of para 29, promotion may include an advancement to a higher pay scale without moving to a different post. In the present case, there is a re-description of the post based on higher pay scale and a specialized training. It is not a case covered by sub-para (iii), as canvassed by learned counsel for the appellants, where the higher pay scale is available to everyone who satisfies the eligibility condition without undergoing any process of selection. The training and the benchmark of 5 years of service itself involve an element of selection process. Similarly, it is not as if the requirement is only a minimum of 5 years of service by itself, so as to cover it under sub-para (iv)." [CA No.5829-5830/2012. Rama Nand Vs. Chief Secretary, Govt. of NCT Delhi & Anr. DOJ – 06.08.2020]

K. Gopinath, CLA, GM Office/SCR

Difference between

Warning & Censure in D&AR 1968

Censure is a minor penalty under Rule 6 of Railway Servants (Discipline & Appeal) Rules, 1968. However, warning is not considered as a formal penalty. Issue of warnings, Govt's displeasure or counselling will not constitute a penalty under the rules. These are administrative steps in the nature of corrective actions [RB's Lr. No. E(D&A)77 RG 6-20 dated 10.05.1977]. The correct way would be to issue a charge memorandum and then impose the penalty of censure, after fulfilling the formalities. If at the end of the proceedings, it is found that some blame attaches to a Railway Servant, warning/ Govt. Displeasure/ Counselling which are not recognised penalties, should not be imposed. In such cases, at least the penalty of Censure should be imposed [Board's letter No. E(D&A)92 RG 6-149(A)/(B) dated 21.01.1993 (RBE 13/1993, 14/1993)]. Instructions applicable to record adverse remarks in the ACRs (now APAR) will apply mutatis mutandis to recorded warning also [RB's Lr. No. 97/V-1/VP/1/3 dated 18.11.97].

However, there do exist instructions of the Railway Board which permits issuance of warning etc. [RB's Confidential letter No. 2004/V-I/DAR/1/3 dated 16.8.04 (RBVNo.19/04) & 2005V/1/DAR/1 dated 06.10.2005]. The Administration has the right to caution, warn, counsel, admonish, reprimand any officer for any act of negligence, omission, commission of minor nature for which no action as prescribed in the D&AR rules is considered necessary. Such actions are termed as administrative actions. In para No.1312 and 1313 of the Vigilance Manual, the procedure for administrative actions has been explained. It may be seen that in case of recorded warning, a show cause notice has to be served on the person and his representation has to be properly considered by the competent authority. The person also has a right to appeal against an order of recorded warning. For other administrative actions like admonishing, counselling, cautioning, warning, reprimanding etc., there is no necessity of issuing show cause notice as explained in para 1313[c]. However, if any of the above actions has to be mentioned in the character roll (presently APAR) of the officer, it should be done after issuance of show cause notice. A model memorandum for admonishing/counselling/ cautioning/warning also has been laid down in RBV No.19/2004. It was subsequently clarified by the Board that the word "appeal" appearing in RBV No.19/2004 is liable to be equated with the appeal admissible under the D&AR 1968, which is not the intention, and therefore, it was decided that the word "appeal" may be read as "representation".

K. Gopinath, CLA, GM Office

FAQ

Is it possible to correct the entry of Date of Birth in SR?

Rule 225 of IREC Vol. I deals with the topic of date of birth. Every person shall declare his date of birth on entering railway service, which shall not differ from any previous declaration. Literate staff to write down the DOB in their own handwriting and in the case of illiterate staff the DOB to be recorded by a senior railway servant and witnessed by another railway servant.

A person who is not able to declare his age should not be appointed to railway service. If the person is unable to give his DOB but gives his age, he should be assumed to have completed the stated age on the date of attestation. Eg:- Date of attestation / entry in SR – 10.03.2020. Age stated: 25 years. DOB to be considered as: 10.03.1995.

If year of birth alone is known: 1st July of that known year. If year & month are known: 16th of that month of the known year. No alteration of recorded DOB is ordinarily permitted. However, for Group A & B staff the President and for Group C & D staff the GM may alter the DOB subject to the following conditions:

1. The DOB was falsely declared to derive an inadmissible advantage. But the correction shall not entail the employee for a longer retention in service beyond the DOB declared by him;
2. Clerical error occurred in the case of illiterate staff;
3. Before completion of probation or within 3 years' service, whichever is earlier, a satisfactory explanation about wrong entry is furnished by the railway servant, together with the statement of any previous attempts made to have the record amended.

Documents permissible as proof of DOB: School leaving certificate, Baptismal certificate in original or some other reliable document. Horoscope is not acceptable. In the absence of above, an affidavit may be obtained. DOB of Group D staff shall not be different from what they had given at the time of employment as CL / substitute. The source / basis of DOB entry has to be recorded below the DOB entry.

Related case laws:

1.Order of CAT, Jaipur Bench in O.A No.85/2010. Bal Ram Vs. GM, West Central Railway, Jabalpur & Anr. DOJ – 31.05.2011. Claim made after 11 years of service rejected.

2.Order of Supreme Court in Executive Engineer, Bhadrak & Others Vs. Rangodhar Malik [1993 SCC (L&S) 276]. Held that a representation made one year before superannuation for correction of date of birth was rightly rejected by the department.

3.Order of Apex Court in Union of India Vs. Ram Suia Sharma [1996 SCC (L&S) 605]. Rejected the claim for correction of DOB made after 25 years of joining service.

4.Order of Apex Court in Chandigarh Vs. Megh Raj Garg & Another [2010 (2) Apex Court Judgments 411 (SC)] wherein its earlier order in Union of Indi Vs. Harnam Singh [1993 (2) SCC 162] was relied, turning down a claim made after 35 years of service.

K. Gopinath, CLA, GM Office

Arbitration - Once the seat of arbitration is designated, it operates as an exclusive jurisdiction to entertain S. 34 application against an arbitral award

By an order dated 14.11.2019 passed by Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram in Arbitration Case No. 252 of 2018, the Judge on construing the arbitration clause in the agreement between the parties arrived at the finding that the seat of arbitration was at New Delhi. Yet, by virtue of Bharat Aluminium Company and Ors. vs. Kaiser Aluminium Technical Services, Inc. and Ors. (2012) 9 SCC 552 since both Delhi as well as the Faridabad Courts would have jurisdiction as the contract was executed between the parties at Faridabad, and part of the cause of action arose there, and since the Faridabad Court was invoked first on the facts of this case, Section 42 of the Arbitration Act would kick in as a result of which the Faridabad Court would have jurisdiction to decide all other applications.

The Supreme Court clarifying the position and held that the Supreme Court in Civil Appeal No. 9307 of 2019 entitled BGS SGS Soma JV vs. NHPC Ltd. on 10.12.2019 held that "It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have jurisdiction.

Explaining para 96 of the Balco [(2012) 9 SCC 552] judgement, it is held that said judgment declares that once the seat of arbitration is designated, such clause then becomes an exclusive jurisdiction clause as a result of which only the courts where the seat is located would then have jurisdiction to the exclusion of all other courts.

Hence, on facts, in this case that New Delhi was the chosen seat of the parties, even if an application was first made to the Faridabad Court, that application would be made to a court without jurisdiction. This being the case, the impugned judgment is set aside following BGS SGS Soma JV (supra), as a result of which it is the courts at New Delhi alone which would have jurisdiction for the purposes of challenge to the Award. As a result, the Section 34 application that has been filed at Faridabad Court will stand transferred to the High Court of Delhi at New Delhi. [**Hindustan Construction Company ... vs Nhpc Ltd on 4 March, 2020]**

N. Murali Krishna, Sr.LO/SCR

Reopening of a D&AR case is permissible under Rules or Law.

The Railway Servants D&A Rules 1968 have the force of law since these Rules are promulgated under Article 309 of the Constitution of India. These rules are complete and comprehensive and are *pari materia* to Central Civil Services (Classification, Control and Appeal) Rules, 1965. However, many doubts arise in day to day functioning and the role of DA, IO, PO (if any nominated). In order to throw more light and remove doubts, Master circular 67 issued by the Railway Board. And further there were several judgments on any issue upholding and dissenting an administrative action.

In State of Punjab v. Harbhajan Singh Greasy 1996 SCC (L&S) 1248, the Supreme Court held that when the enquiry was found to be faulty, it could not be proper to direct reinstatement with consequential benefits. Matter requires to be remitted to the disciplinary authority to follow the procedure from the stage at which the fault was pointed out and to take action according to law.

In Union of India vs Y.S. Sadhu-Ex.-Inspector 2009 (1) SCC (L&S) 126, the Supreme Court held that the proper course which the High Court should have adopted was to allow the proceedings to continue from the stage where it stood before the alleged vulnerability surfaced.

In A. Gopala Rao v. Post Master General, Andhra Circle, Hyderabad. (1979) 2 SLR 370 it was held that once an enquiry was conducted in accordance with the rules and ended in favour of the employee and charges were dropped, a further enquiry cannot be conducted.

In Arun Kumar Prasad vs Steel Authority of India Ltd. Jharkhand High Court held that issuance of the charge-sheet and reopening or restarting of an enquiry against the petitioner for the same charge is illegal and wholly without jurisdiction.

In State of Assam vs J N Roy Biswas [1975 AIR 2277] it was held that once a disciplinary case was closed and the official re-instated, presumably on full exoneration, Government cannot re-start the exercise in the absence of specific power to review or revise, vested by rules in some authority.

As the discussion continues, the purpose of this article is to appreciate the actions taken by the officers donning the roles of qusi-judicial and executive authorities. One among many issues to ponder and is being an intriguing question of fact and question of law which are intertwined obviously in a Disciplinary case need to be bisected and view the issue from critical angle. Many a legal persona do agree with the multiple functionality of a judicial officer while exercising its power vested under Judicial, quasi-judicial, executive and administrative functions vested on by different set of Rules, orders etc. Care is always exercised by these authorities while donning the different roles as per the call of duty and follow strict adherence of rules attached to that particular role.

IVVRP Prasad, Sr.LO/HQ/SCR

YOURS LEGALLY

Right to pension cannot be taken away by mere executive or administrative instructions

The short issue which arises for consideration is whether the State Government was justified in withholding 10% pension and full gratuity of the Appellant under Circulars, and Government Resolution on the ground of pending criminal proceedings?

The Appellant was appointed as Touring Veterinary Officer (TVO)/Bihar. While he was in service, he was made an accused in the Fodder Scam lodged by the CBI wherein a Charge-Sheet was filed against him. The Appellant was placed under suspension under the relevant Civil Services (Classification, Control & Appeal) Rules. He continued to remain under suspension till he attained the age of superannuation on 31.03.2008. On attaining the age of superannuation, the State Government sanctioned payment of 90% of the provisional pension, and withheld 10% of the pension, entire gratuity, leave encashment and GPF on account of pending criminal proceedings.

Aggrieved, the Appellant filed a Writ Petition before the High Court contending that the Bihar Pension Rules,1950 do not prohibit payment of full pension and gratuity to a retired Government servant against whom criminal proceedings were pending. The State of Bihar stated that if a government servant retires while under suspension, he will not be entitled to payment of full pension and gratuity, and at best, would be entitled to payment of 90% of the provisional pension till the conclusion of the departmental or judicial proceedings as per Rule 43(b) of the Bihar Pension Rules and as per Circulars dated 22.08.1974 and 31.10.1974, and Government Resolution No. 3104 dated 31.07.1980 of the State Government. High Court dismissed the Writ Petition. Aggrieved, the Appellant has filed the present SLP before the Supreme Court.

The Supreme Court considered the issue and held that a reading of Rule 43(b) indicate that the State Government was empowered to withhold or withdraw the whole or part of the amount of pension, permanently or for a specified period, if the pensioner was “found to be guilty of grave misconduct” in any departmental or judicial proceeding, or to have “caused pecuniary loss to Government by misconduct or negligence”, during the tenure of his service. Rule 43(b) did not cover a situation where judicial or departmental proceedings were pending.

The Circulars provided that no gratuity or death-cum retiral gratuity would be paid during the pendency of the proceedings. The Supreme Court held that the cited Circulars and Government Resolution were merely administrative instructions/ executive orders. They were not issued in exercise of the power under Article 309 of the Constitution and cannot be said to have the force of law. Further, in State of Jharkhand and Ors. vs. Jitendra Kumar Srivastava and Ors. [(2013) 12 SCC 210], it was held that Rule 43(b) makes it clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension etc., ONLY when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office.

It was further held that a person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300A of the Constitution. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the Appellant cannot withhold-even a part of pension or gratuity.

It is well settled that the right to pension cannot be taken away by a mere executive fiat or administrative instruction. Pension and gratuity are not mere bounties, or given out of generosity by the employer. An employee earns these benefits by virtue of his long, continuous, faithful and un-blemished service. The right to receive pension of a public servant has been held to be covered under the “right to property” under the Constitution.

In view of the above, the Supreme Court held that the Respondent-State was unjustified in withholding 10% pension under administrative Circulars, and Government Resolution. However, since Rule 43(c) was inserted in the Bihar Pension Rules w.e.f 19.07.2012, the State is empowered to legally withhold 10% of the pension amount, till the criminal proceedings are concluded. Consequently, the State will deduct 10% from the pension amount w.e.f. 19.07.2012 subject to the outcome of the criminal proceedings. With respect to withholding of the full amount of gratuity, “pension” includes “gratuity”. With the insertion of Rule 43 (c) in the statute book w.e.f. 19.07.2012, gratuity also could not have been withheld under administrative circulars and Government Resolution. Hence, the State is directed to release 90% of the gratuity and 10% will be released subject to outcome of criminal proceedings pending against him. [**Hira Lal vs The State Of Bihar on 18 February, 2020, CA No.1677-1678 of 2020]**

V. Apparao, CLA, GM Office

TREATISE ON **A & C Act, 1996**

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

Continued from previous issue..

Sub Sections (2) to (6) of Section 16 deal with the limitations for raising of objections as to the jurisdiction of the Arbitrator and its effect. They are reproduced herein below:

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.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

As can be seen from S.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.

The Supreme Court held that "It is no longer open to contend that, under Section 16, a party cannot challenge the composition of the arbitral tribunal before the arbitral tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge. If a party chooses not to so object there will be a deemed waiver under Section 4". [Narayan Prasad Lohia vs Nikunj Kumar Lohia & Ors, DOJ: 20 February, 2002].

Where a party has received notice and he does not raise a plea of lack of jurisdiction before the arbitral tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(v) of the Act on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown. [M/S. Gas Authority Of India Ltd. ... vs M/S. Keti Construction (I) Ltd. DOJ: 11 May, 2007.

To a question "whether a party to an arbitration proceeding may be permitted to raise objections under Section 34 of the Arbitration and Conciliation Act, 1996, with regard to the jurisdiction of the Arbitral Tribunal after the stage of submission of the written statement. 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.

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 on 5 December, 2014].

N. Murali Krishna, Sr.LO/SCR

KNOW OUR CONSTITUTION

Article-32-
Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.