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Have you 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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I hope that vacations of the Courts during the month of May brought some respite to the legal fraternity. From this edition onwards, a new series on Right To Information Act is being brought out. You are aware of "Volkswagen emission scandal" by the car manufacturing company which sought to plead that emission standards of Europian countries cannot be applied to India. However, NGT refuting said plea and imposed costs of Rs.500 crores on the Company, reported under 'Polluter Pays principle'. Other important articles on this issue are whether consent given by Advocate is binding on the department, Test to determine an employee as a contract employee or not etc. in addition to regular features on A&C Act 1996, ABC of Acts etc. - Editor-in-Chief.

Page	Article Title
1	(i) Polluter Pays Principle & (ii) Difference Between: Legal Heir Certificate & Succession certificate.
2	ABC of Acts - Payment of Wages Act, 1936.
3	RTI Act Series.
4	(i) Contract employee has no vested right for continuation in employment (ii) FAQ & (iii) Know Our Constitution.
5	(i) Concession made by advocate is not binding on parties (ii) Joke & (iii) Legal Maxims
6	(i) Test to find whether contract labourers are direct employees of Principal employer (ii) Legal Update & (iii) Joke.
7	Yours Legally - Eviction of unauthorised occupants from railway premises.
8	Treatise on—Arbitration and Conciliation Act, 1996.

Note: This is only a news capsule. For full information and understanding to cite the case, please go through the original judgment.

Polluter Pays Principle

An application was filed before the National Green Tribunal (NGT) alleging that engines manufactured by Volkswagen have been found to be in violation of norms in USA and Europe on account of the use of 'cheat devices', defeating the test of the actual state of affairs. This case is known famously as 'Volkswagen Emission Scandal'. Referring to Notification dated 16-09-2016 issued by the Ministry of Road Transport and Highways under S.212 of the Motor Vehicles Act, 1988 which lays down that PEMS (Portable Emission Measurement System) can be used since it was introduced only on 16.09.2016. Observing that not only the manufacturers used the cheat device which could suppress the laboratory test, the NOx emissions were found to be higher by PEMS measurement, which is a globally accepted norm, NGT held that mere fact that the said procedure has been introduced by Notification dated 16.09.2016 does not mean that such procedure was prohibited earlier.

The NGT further held as "We may also observe that 'Precautionary Principle' and 'Sustainable Development' principle are part of Article 21 of the Constitution and Section 20 of the National Green Tribunal Act, 2010. 'Polluter Pays' principle does not mean polluter can pollute and pay for it. It would include environmental cost as well as direct cost to people. Environmental cost is not restricted to those which is immediately tangible but full cost for restoration of environmental degradation If cheat devices leading to pollution are ignored only on account of absence of a procedural protocol, it will be against the said accepted principles of environmental jurisprudence. Accepted global procedural norm can be accepted unless prohibited in India expressly or impliedly.

It will be paradox to say that what will be unethical in rest of the world will be ethical in India. It may also be noted that tolerance to air pollution in India cannot be higher than other countries. Adverse impact of air pollution is felt in India in more serious way. 22 of the 30 most polluted cities are in India. 4,15,000 people in Delhi died prematurely on account of air pollution. In such situation, usage of 'deceit device' with the intention of personal profit, regardless of consequences to the community, has to be dealt with strictly. As per information available in public domain, the manufacturers have been held liable for the same cheat device in as many as 17 countries."

"In Vellore Citizens Welfare Forum vs. Union of India (UOI) and Ors, the Hon'ble Supreme Court interpreted **"Polluter Pays" principle by stating that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.** Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land.

On the basis of principle laid down in M.C.Mehta and Anr. vs. Union of India and Ors., that a person undertaking an activity involving hazardous or risky exposure to human life is strictly liable for injury suffered by another person, irrespective of any negligence or carelessness on part of the managers of such undertaking and that where the activity of an enterprise is hazardous, highest degree of care is expected and breach of duty is inactionable.

The NGT further held that Pollution cannot be allowed to be a profitable activity. The environment is priceless. Intentional violations have to be visited with more stringent damages than accidental or unintended. Having regard to all the circumstances including violations, financial capacity of manufacturers, extent of penalties levied world over, the NGT imposed costs of Rs. 500 crores. [OA No. 509/2015 & 527/2015, Saloni Ailawadi Applicant(s) Vs Union of India & Ors. & Satvinderjeet Singh Sodhi & Ors. Volkswagen India Private Limited & Ors., DoJ: 07.03.2019]

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

Difference between:

Succession certificate & legal heir certificate:

Legal heir certificate and succession certificate are entirely different from one another.

A Legal heir certificate is issued for the transfer of assets - movable and immovable properties to the living legal heirs of the deceased persons such as son, daughter, husband, wife, parents. It is issued by the Tahsildar. If the deceased is a government employee, the legal heir certificate is needed for availing the benefits like family pension, C.G. appointment, Gratuity, Provident Fund, Insurance and other benefits.

A Succession certificate is a document issued by a civil court to the legal heirs of a deceased person certifying a rightful person to be the successor of such deceased person. If a person dies without leaving any Will and dies intestate with debts and securities, a succession certificate is required to inherit the assets - movable and immovable properties, shares, provident fund and other securities. Section 372 of Indian Succession Act, 1925 deals with 'Application for certificate', which stipulates that any person of sound mind and not a minor can apply for certificate, provided he has an interest in the estate of the deceased. The only right which entitles a person to a succession certificate is the beneficial interest in the debt or security. It is open to anyone who has a beneficial interest to apply for it [Estate of C.V.Nayagar A.I.R. (1936) R.466].

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

ABC OF ACTS

PAYMENT OF WAGES ACT, 1936

To secure prompt & regular payment of wages without any arbitrary deductions. Applies to factory workers, industrial workers or others including Railways, either directly or through sub-contract. Applies to employees with average wages upto Rs. 24,000/- per month.

Wages include salary, allowances, award, settlement, OTA, NHA, Leave salary, terminal benefits, scheme benefits etc. *but does not include* bonus, value of accommodation, supply of light, water, medical facility, Govt. contribution to PF/Pension, TA, gratuity etc.

Time of payment of wages: Before the expiry of 7th day where less than 1000 employees are engaged & Before the expiry of 10th day for other railway / factory / industry / other establishment, counted from last day of wage-period. When employment is terminated before the expiry of the 2nd working day [S.5].

Deductions which may be made from wages: Fines, Absenteeism related, Damage or loss of goods / money entrusted, consequent to negligence or default, House accommodation, Amenities, Advances recovery with interest, Loans recovery, HB Loans recovery, IT Payable, Court order, PF Subscription & repayment of advance, Co-operative societies payments / Insurance of Post Office Premium of life insurance with written consent, Funds constituted by employer or a TU for the welfare of the employee / his family member with written consent, TU fees payable by him with written consent, Payment of insurance premia on Fidelity Guarantee Bonds, Recovery towards losses sustained by railways owing to counterfeit or base coins or mutilated or forged currency notes, Recovery towards losses sustained by railways owing to failure to raise invoice, bill or to collect appropriate charges due, including fares, freight, demurrage, wharfage and carnage or sale of food in catering establishments or sale of commodities in grain shops or otherwise, Recovery towards losses sustained on account of any rebates / refunds incorrectly granted due to neglect or default, Contribution to PM's National Relief Fund or other Funds, Contributions to any insurance scheme framed by CG for benefit of employees. Payments towards Railway Clubs, Institutes, Supply of water, Electric Current, Hospital Diet charges etc.

Provided further that the total amount of deductions shall not exceed 75% where payments to co-operative societies are involved and in all other cases 50% of such wages [S.7].

Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims: Aggrieved employee, legal practitioner, TU official authorised in writing, Inspector of this Act or any other person with permission may apply to the authority. Application to be made within 12 months of wages becoming due / deduction made. Delay condonation is permissible.

Authority to hear the applicant and employer and make inquiry, if need be, and direct refund / payment of delayed wages with compensation not exceeding 10 times the amount deducted / not exceeding Rs.25 for delayed wages, even if the delayed payment / refund was made before disposal of application.

Bonafide error or dispute /occurrence of emergency or exceptional circumstances, exempts ordering of compensation. Failure to apply for / accept payment also exempts compensation. Rs.50/- penalty on the applicant for malicious or vexatious application [S.15].

Appeal: Within 30 days of date of order. To Presidency -town Court or Court of Small Causes or District Court. By employer, if compensation exceeds Rs.300/- or a liability of more than Rs.1000/- on employer by the aggrieved order of the authority. By employee / legal practitioner / TU official authorised / Inspector of this Act or any person permitted by the authority, if the withheld wages exceeds Rs.20/- or for the unpaid group the withheld wages exceeds Rs. 50/-. By any person imposed with a penalty U/S 15 (4) [i.e., Malicious / vexatious application]. Order of the authority is final, if the above 3 conditions [S.17 (1) (a), (b) & (c)] are not attracted. Memorandum of Appeal to accompany certificate of the authority towards deposit of amount payable. Appellate court may withhold deposit made with the authority, pending disposal of the appeal. Appellate court may seek decision of the High Court, if it thinks that any question of law is involved [S.17].

Penalty for offences under the Act: Delay in payment, non-payment or unauthorized deductions – Upto Rs.3750/-. In all other cases viz., non-display of notices, non-maintenance of register of fines, obstructing Inspector – NLT Rs.1500 and upto Rs.7500/-. Failure to nominate person responsible to make payment U/S 3 – Upto Rs.3000/-. Subsequent conviction for contravention of same provision within 2 years of last offence – Imprisonment from 1 month to 6 months or Fine of Rs.3750/- to Rs.22500/- or both. Additional fine of Rs. 750/- for each day of failure to pay, notwithstanding any other action [S.20].

Bar of Suits: Jurisdiction to entertain suits is ousted for all courts if the subject matter is pending / adjudged by the authority or appellate court or could have been recovered U/S 15 through an application before the authority [S.22].

Contracting Out: Employee relinquishing any right through any contract or agreement is null and void [S.23].

- Ashok Prasad, CLA/NED.

RTI Act Series:

Right to Information Act, 2005

RTI Act is one of the progressive legislations which was witnessed in the last decade. The **objects** of the Act are:
i) To secure access to information under the control of Public Authorities (PA);
ii) To promote transparency & accountability in the working of every PA;
iii) To contain corruption &
iv) To hold Govt. accountable to the governed.

Supreme Court of India in State of U.P Vs. Raj Narain [1975 (3) SCR 333] held: "The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil secrecy the common routine business, is not in the interest of the public."

Though the RTI Act was enacted much later, that the right to information has its roots in freedom of 'speech and expression'. In Peoples Union for Civil Liberties Vs. Union of India [(**2**004) **2** SCC 476], the Supreme Court concluded that Right to information is a facet of the freedom of "speech and expression" as contained in Article 19 (1) (a) of the Constitution of India. It is now well settled that the right to information also is an off-shoot of Article 21 (right to life and personal liberty).

In the words of Mrs. Deepak Sandhu, ex. Chief Information Commissioner, "RTI is a game changer. It has democratized information to the citizen's advantage. The citizen is central in the Act. Other countries offer freedom of information while our legislation recognizes it as a right."

"Information" includes: any material in any form, records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information related to any private body which can be accessed by a PA under any other law for the time being in force. [S.2(f)]

What is information related to any private body which can be accessed by a public authority?

The second limb in section 2(f) states that information includes "information relating to any private body which can be accessed by a public authority under any other law for the time being in force". This provision enables to apply for information which the public authority should have collected from a private body. eg:- If under environmental legislation, a government department is supposed to collect an annual report on waste disposal of a private factory, a member of the public can request the department for the annual report (unless it is covered by an exemption in S.8).

"Record" includes - (a) any document, manuscript and file; (b) any microfilm, microfiche and facsimile copy of a document; (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not) & (d) any other material produced by a computer or any other device. [S.2(i)]

"File Notings" come under the ambit of "information":

File notings are not a generic category and fall clearly into the non-exhaustive definition of "information" in S.2 and have not been protected from disclosure under the exemptions laid down in S.8. Under S.2(f) of the RTI Act, the definition of 'information' is very wide and includes 'records'. Section 2(i)(a) of the RTI Act defines a 'record' to include any document, manuscript and file.

The Manual of Office Procedure, which all civil servants adhere to by law when carrying out their duties, defines 'file' to cover 'notes' and 'appendices to notes'. Furthermore, under the 1997 Public Records Rules, 'file' means a collection of papers relating to the public records on a specific subject matter consisting of correspondence, notes and appendices thereto and assigned with a file number. Thus, from a legal and technical perspective, the term 'file' as understood in section 2(i)(a) of the RTI Act includes file notings and so file notings have to be disclosed according to the RTI Act.

The clarity given by the Apex Court in CBSE Vs. Aditya Bandhopadyay & Ors. (CA 6454/2011) [(2011) 8 SCC 497] about the scope of S.2(f) is noteworthy: *"35. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Actprovides access to all information that is available and existing. This is clear from a combined reading of section 3 and the definitions of `information' and `right to information' under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide `advice' or `opinion' to an applicant, nor required to obtain and furnish any `opinion' or `advice' to an applicant. The reference to `opinion' or `advice' in the definition of `information' in section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act."*

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

Contract employee has no vested right for continuation in employment

The respondent was appointed a conductor on contractual basis on 21 January 2006 by the appellant. The contractual appointment was for a period of one year or until the shortage of drivers was met, whichever was earlier. The services of the respondent were dispensed with on 21 March 2007.

Challenging the order of termination, the respondent filed a writ petition, which was allowed by a Single Judge of the Rajasthan High Court on 6 April 2016. Writ appeal filed by the RSRTC was dismissed on 19 September 2016 by a Division Bench of the High Court. Hence, the present SLP by RSRTC.

The Supreme Court observed that Clause 16 of the agreement (described as the contract letter) which was entered into between the appellant and the respondent stipulated as: "16. The first party will have the right to terminate the temporary appointment of the first party at any time without any notice."

Considering the submission of RSRTC that the nature of the appointment was purely contractual for a period of one year or until the shortage of drivers was met, whichever was earlier and the contract stipulates that the services of the respondent could be dispensed with without any notice, the Supreme court observed that the terms of the appointment indicate that the respondent was on a purely contractual appointment and that the services could be dispensed with without notice at any stage and the High Court allowed the WP by the petitioner on the sole ground that there was a breach of the principle of natural justice.

Having regard to the terms of the contractual engagement, the Supreme Court was of the view that the action of the RSRTC cannot be faulted and accordingly allowed the appeal and set aside the impugned judgment and order of the High Court. [Rajasthan State Roadways Transport Corporation Vs. Paramjeet Singh, CA No 4593 of 2019, DOJ:May 03, 2019]

- S.Nagendra, CLA/HYB.

Ex-Gratia Payments

Family members are eligible for the following ex-gratia if the railway employees concerned die in the bonafide performance of their duties:

(a) Death occurring due to accidents in the course of performance of duties: Rs.25 lakhs.
(b) Death in the course of performance of duties attributed to acts of violence by terrorists, anti-social elements, etc: R.25 lakhs.
(c) Death occurring in border skirmishes and action against militants, terrorists, extremists, sea pirates etc :Rs.35 lakhs.
(d) Death occurring while on duty in the specified high altitude, inaccessible border posts, etc. on account of natural disasters, extreme weather conditions: Rs. 35 lakhs.
(e) Death occurring during enemy action in war or such war like engagements, which are specifically notified by Ministry of Defence and death occurring during evacuation of Indian National from a war-torn zone in foreign country: Rs. 45 lakhs.

These ex-gratia rates have taken effect from 01.01.2016.

[RBE 139/2016 dated 25.11.2016]

FAQ:

Cause of action

The term 'cause of action' means the bundle of essential facts which is necessary for the plaintiff to prove before he/she can succeed in the suit. Cause of Action refers to a set of facts or allegations that make up the grounds for filing a lawsuit. A **cause of action** is therefore by its very nature essential to a civil suit, since without a Cause of Action a Civil Suit cannot arise. The term 'Cause of Action' is mentioned in the Civil Procedure Code, 1908 in various places.

Cause of action is important to reckon the period of limitation for filing suits / cases. There may be instances when the cause of action is treated as continuous and recurring.

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

KNOW OUR CONSTITUTION

Article 19. **Protection of certain rights regarding freedom of speech, etc.-**

(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
(f) *omitted.*
(g) to practise any profession, or to carry on any occupation, trade or business.

Nothing in sub-clause 1 (a) (b) (c) (d) (e) & (g) of the said clause shall affect the operation of any existing law or prevent the State from making any law in relaxation of the above rights.

Concession made by advocate is not binding on parties

By an Award dated 01.11.2009, the Labour Court, Haridwar held, referring to a notification dated 24.04.1990 under the Contract Labour (Regulation and Abolition) Act, 1970 that the workmen were not deployed to do the work mentioned in the notification dated 24.4.90. It was further held that based on documentary evidence in the form of gate passes, the workmen, who were otherwise employed by a contractor, to be treated as directly employed by the appellant- BHEL.

It was also held to have been fairly conceded by the employer's representative that supervision, superintendence and administrative control of all these workmen were with BHEL. Hence, it was held that all such workers were entitled to be reinstated with immediate effect but without backwages. Review petition was filed by BHEL, stated that no such concession, as recorded by the Labour Court, was made before it. Further, notification dated 24.04.1990 had no application as BHEL was exempted therefrom and, therefore, application of this notification to the facts of this case was also wrong. Labour Court dismissed the review.

A writ petition filed against the aforesaid orders was dismissed holding that "undisputedly" all petitioners, i.e., workmen, were performing the duties which were identical with those of regular employees. Therefore, it can be said that they were under the command, control, management of the BHEL and, concomitantly, the contractor has absolutely no control over the workmen in performing such duties. It was, therefore, held that the alleged contract with the contractor was "sham" and, consequently, the Labour Court Award was correct in law and was upheld. Review petition filed against this order on direction of Supreme Court in an SLP was also dismissed. Against which SLP the present SLP was filed by BHEL.

BHEL contended before the Supreme Court that the Labour Court Award was perverse as it could not have applied the notification dated 24.04.1990 as BHEL was excluded from such notification, and being excluded from such notification, there was, consequently, no prohibition on employment of contract labour. Further, the representative of BHEL made it clear that workers of such contractors, who were paid by them involved in the present dispute and no concession was made before the Labour Court. Merely because gate passes were given, does not lead to inference that there was any direct relationship between the appellant and the respondent-workmen. There was no manner of direct employment between his client and the workmen.

The Supreme Court held that "a reading of the aforesaid notification makes it clear that the appellant-BHEL is exempted from the aforesaid notification. Despite this, however, the Labour Court went on to apply the said notification, which would clearly be perverse.

The Apex Court further observed that gate passes were issued only at the request of the contractor for the sake of safety and also from the administrative point of view. The idea was security, as otherwise any person could enter the precincts of the factory. This evidence was missed by the Labour Court.

Relying on *Swami Krishnanand Govindananad* v. *Managing Director, Oswal Hosiery (Regd.)* [(2002) 3 SCC 39, the Supreme Court held that even a concession on facts disputed by a respondent in its written statement cannot bind the respondent. In the cited case, the Supreme Court held that there can be no doubt that admission of a party is a relevant material. But can the statement made by the counsel of a party across the Bar be treated as admission of the party? Having regard to the requirements of Section 18 of the Evidence Act, on the facts of this case, the statement of the counsel for the respondent cannot be accepted as an admission so as to bind the respondent.

Therefore, the Supreme Court held that it would be perverse to decide based only on a concession, without more, that a direct relationship exists between the employer and the workmen. Equally perverse is finding that the extended definition of 'employer' contained in the Act would automatically apply since in order that said section to apply, evidence must be led to show that the work performed by contract labour is a work which is ordinarily part of the industry of BHEL and evidently on the facts of the present case, that no such evidence has, in fact, been led. Hence, the Supreme Court allowed the appeal of BHEL. *[BHARAT HEAVY ELECTRICALS LTD. Vs MAHENDRA PRASAD JAKHMOLA & ORS. CA Nos. 1799-1800 OF 2019, DOJ: 20.2.2019]*

- E. Satyanarayana, CLA/NG/Pers.

JOKE

A housewife, a lawyer and an accountant were asked, "How much is 2 + 2?" The housewife replies, "Four!"

The accountant says, "I think it's either 3 or 4. Let me run those figures through my spreadsheet one more time."

The lawyer pulls the drapes, dims the lights and asks in a hushed voice, "How much do you want it to be?"

Legal Maxims:

Inter alia - Amongst other things.
Ipso facto - By that very fact.
In personam - Against the person.
In situ - In its place.
Interest republicae ut sit finis litium - It is in the interest of the State that there be an end to litigation.

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

Test to find whether contract labourers are direct employees of Principal employer:

Two of the well-recognized tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. *[General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon* v. *Bharat Lala and Another'* [2011 (1) SCC 635]

The expression "control and supervision" in the context of contract labour was explained by Supreme Court as follows:

"38…. if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor." *[International Airport Authority of India* v. *International Air Cargo Workers' Union, (*2009) 13 SCC 374]*]*

The principal employer cannot be said to control and supervise the work of the employee merely because he directs the workmen of the contractor 'what to do' after the contractor assigns/ allots the employee to the principal employer. This is precisely what paragraph 12 explains as being supervision and control of the principal employer that is secondary in nature, as such control is exercised only after such workman has been assigned to the principal employer to do a particular work.

Thus, the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

(i) who appoints the workers;
(ii) who pays the salary/remuneration;
(iii) who has the authority to dismiss;
(iv) who can take disciplinary action;
(v) whether there is continuity of service; and
(vi) extent of control and supervision i.e. whether there exists complete control and supervision.

[*Balwant Rai Saluja and Another* v. *Air India Limited and Others'* (2014) 9 SCC 407]

- V.Appa Rao, CLA/GM/O/SC.

LEGAL UPDATE:

CONTEMPT PETITIONS TO BE FILED WITHIN ONE YEAR

The Madras High Court recently observed that the period of Limitation under section 20 of the Contempt of Courts Act 1970 should be harmoniously read. The Court was hearing a contempt application against the Director of the Local Fund Audit in Kuralagam Chennai alleging his failure to comply with an order of the Court dated 02.09.2014, passed in an earlier writ petition.

The Court in such petition had directed the respondent to consider her representation against such order. After her representation was rejected, the petitioner filed the said contempt application after a lapse of about 1.5 years from the date of the order of the Court.

Section 20 of the Contempt of Courts Act 1971, states "No court shall initiate any proceedings of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed." Article 215 states "High Courts to be courts of record Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself".

While discussing the general principles regarding contempt, the Constitution under Article 215 provides power to the High Court to punish for contempt itself. The general principle of law is that in the presence of a Special Act in respect of limitation, the Constitution has to be read harmoniously and cogently with the Special Act. Although this did not imply that powers under Article 215 cannot be exercised beyond 1 year, it can only be done in exceptional circumstances.

[P.Rajammal Vs. J.Kailainathan, Director, Local Fund Audit. CONT.P.(MD)No. 1009 of 2016. DOJ - 14.06.2019]

- T.Satyavathi, LO/SC

JOKE

A lawyer was out hiking with a friend when they encountered a mountain lion. The lawyer dropped his pack and got ready to run. "You'll never outrun a hungry mountain lion!" exclaimed his friend. "I don't have to outrun him," replied the lawyer. "I just have to outrun you!"

YOURS LEGALLY

Eviction of unauthorised occupants from railway premises

The issue of re-possessing the railway premises from unauthorised occupants is often troublesome. Challenges are being faced to evict a licensee, encroacher etc. It would be helpful to know the following enabling provisions in this context:

Section 147 of the Indian Railway Act 1989: This Section provides for imprisonment up to 6 months or fine up to Rs.1000/- (subject to minimum fine of Rs.500/- unless special /adequate reasons are there) or both, if any person: (i) enters railway property unauthorised; or (ii) who lawfully entered misuses it or refuses to leave. Any such person may be removed by any railway servant or any other person whom such railway servant may call to his aid.

Provisions of Public Premises (Eviction of Unauthorised Occupants) Act 1971 are effective in tackling unauthorised occupation. S.3 provides for appointment of Estate Officers (EO) by Govt. to exercise the powers under the Act. S.3A empowers Estate Officer to make reasoned order for eviction of any persons who were allowed temporary occupation of any public premises. Upon refusal or failure to comply with the said eviction order, the EO may evict them, if need be with necessary force, and take possession.

If the EO has information about any unauthorised occupation, he shall issue a written notice within 7 working days from the date of receipt of information calling upon the occupant to show cause as to why an eviction order should not be made. Delay in issuing notice does not vitiate the proceedings. The notice shall specify the grounds for proposed eviction duly requiring the occupant to show cause on or before the date mentioned therein, which shall be within 7 days from the date of issue of notice. The notice has to direct the occupant to appear for personal hearing on the date indicated, along with evidence in his support. Affixing notice on the outer door or at a conspicuous place will be deemed as due service [S.4].

After considering the cause and evidence produced by such unauthorised occupant, if the EO is satisfied that the premises were under unauthorised occupation, the EO shall pass an eviction order, duly recording the reasons, and direct to vacate by the date specified, which shall be within 15 days of the date of eviction order. EO may, for compelling reasons, extend the time by another 15 days for vacating the premises. This eviction notice also shall be served as stated above. After the lapse of date for eviction / time granted, the EO may evict the unauthorised occupant, if required by using necessary force, and take possession [S.5].

The EO is empowered to remove movable structures, goods or animals without notice if it occupies unauthorised. In the case of immovable structures, buildings etc. he has to give a notice of not less than 7 days and thereafter remove such structure, if not responding to the notice or the cause shown is insufficient [S.5A]. Further provisions regarding demolition of immovable property are laid down in S.5B. It is lawful for the EO to seal the property in accordance with S.5C, in the case of unauthorised construction. EO is empowered to auction any part of demolished structures or goods, animals etc. after giving 14 days notice to the concerned owner and after publishing in a local newspaper. Perishable goods may be disposed of as considered appropriate [S.6].

EO may order payment of arrears of rent and damages together with compound interest at the current rate as prescribed under Interest Act, 1978. Such action shall not be taken unless the EO gives a notice requiring the occupant to show cause within 7 days of notice and after hearing him [S.7].

EO has the powers of a civil court to summon/ enforce attendance of any person and examine him on oath and also for discovery / production of documents etc [S.8].

Appeals against EO's orders u/s 5, 5B, 5C & 7 lies to the Appellate Officer [District Judge], to be preferred within 12 days. Every endeavour to be made to dispose of the appeal within 1 month of filing [S.9]. Every order made by an estate officer or appellate officer under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act [S.10].

Unauthorised occupation attracts SI upto 6 months or fine upto Rs.5000 or both. If evicted person reoccupies the premises unauthorised, he shall be liable for imprisonment upto 1 year or fine upto Rs.5000 or both in addition to eviction [S.11]. EO or officer authorised by him may obtain name and other particulars from unauthorised occupants [S.12].

Legal heirs / representatives are liable to pay for any offences u/s 5A, 5B or 7 if the unauthorised occupant dies before realisation of dues. The legal heirs / representatives are liable to the extent of assets of the deceased in their hands [S.13]. Unrealised dues may be recovered as an arrear of land revenue by the Collector, upon the certificate issued by EO. Jurisdiction of Courts w.r.t issues dealt with under S.5, 7 & 9 is barred [S.15].

Action against railway employees for non-vacation of Railway quarter is covered by RB's Lr. Nos. E(5)81 QR1-51 dated 24.04.1982 & 04.06.1983, RBE Nos. 20/1985 & 243/1990.

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

Ignorance of the law excuses no man from practicing it. - *Adison Mizner*

TREATISE ON

Arbitration & Conciliation Act 1996:

Power to refer parties to arbitration by judicial authority: Section 8 of A&C Act, 1996 deals with power of judicial authority, before whom an action is brought, to refer parties to arbitration. However, what is meant by reference elaborated as: "Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where 'all disputes' are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes". [State Of Goa vs M/S Praveen Enterprises, (2012) 12 SCC 581]

An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied: (a) that there exists an arbitration agreement; (b) that action has been brought to the court by one party to the arbitration agreement against the other party; (c) that the subject matter of the suit is same as the subject matter of the arbitration agreement; (d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof. Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as aforestated are satisfied, the court must refer the parties to arbitration. On fulfilment of conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. [The Branch Manager, M/s. Magma Leasing &Finance Limited & Anr. Vs. Potluri Madhavilata & Anr. (DOJ: 18.09.2009)]

The language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. [Hema Khattar Vs. Shiv Khera, (2017) 7 SCC 716].

Judicial authority 'referring the parties to arbitration' under S.8 has no power to appoint an arbitrator: Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application under Section 11 of the Act for appointment of an arbitrator. The judicial authority `referring the parties to arbitration' under Section 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator. [State Of Goa vs M/S Praveen Enterprises, (2012) 12 SCC 581]

Pending S.8(1) application before judicial authority - Effect: Held, does not preclude commencement of an arbitration or its continuance and making an arbitral award in terms of Section 8(3). Section 8(3) makes it clear that notwithstanding the application under Section 8(1) of the Act and the issue pending before the judicial authority, arbitration may be commenced or continued and an arbitral award can also be made. In other words, despite the pendency of an application under Section 8 (1) of the Act before the judicial authority, Section 8 (3) of the Act permits the parties to commence and continue the arbitration and the arbitral tribunal is free to pass an award. That alone is what is contemplated under Section 8(3) of the Act. [Anil vs. Rajendra, (2015) 2 SCC 583].

Court, when need not refer parties to arbitration: The inquiry of the Court, while dealing with an application under Section 8 of the Act, should be viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. *[A. Ayyasamy vs A. Paramasivam & ors, (2016) 10 SCC 386)]*

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