South Central Railway
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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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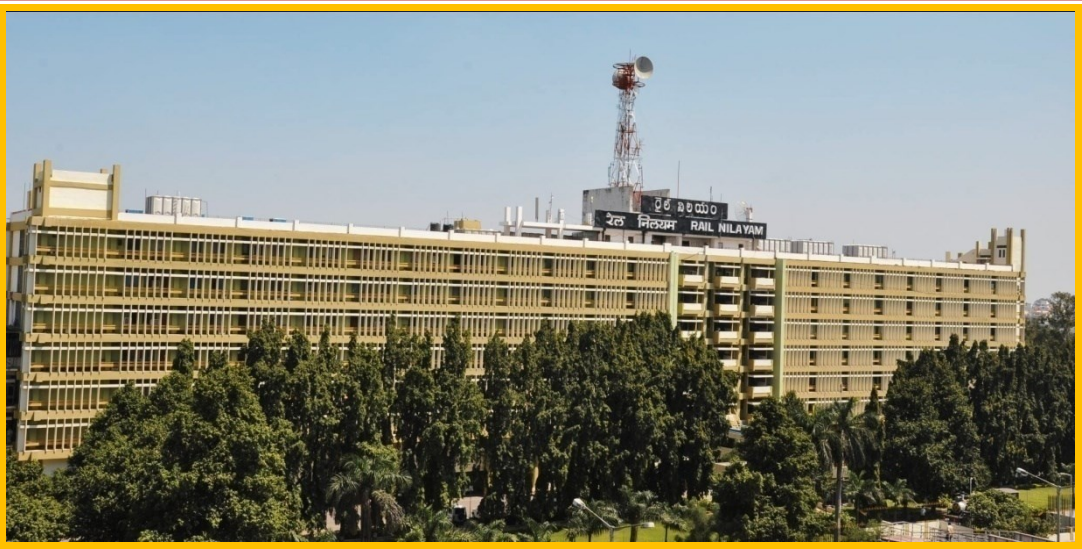

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Note: This is only a news capsule. For full information and understanding to cite the case, please go through the original judgment.

From Editor's Desk:

In the present issue a small note on Code of Wages, 2019 which was promulgated on 8th August 2019 subsuming 4 important labour enactments has been incorporated. In addition to this, a judgement on consumer matter where the NCDRC has held that unless valuables are separately booked as per IRCM, the Railways cannot be liable, has been included, which may be used to defend claims cases. Other regular features are also finding place.

Long Live Independence! - Editor

ABC of Acts:

Contract Labour (Regulation & Abolition) Act, 1970 (5th September, 1970) Along with CLRA Central Rules, 1971

Objective of the Act:

To regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

Applicability:

⇒ Every establishment in which 20 or more workmen are employed or were employed on any day of the preceding twelve months as contract labour.

⇒ Every contractor who employs or who employed 20 or more workmen on any day of the preceding twelve months.

Sec. 7: Registration certificate to be obtained by principal employer. Registration Certificate to be renewed /amended in case of any change in number of workmen engaged after registration/ change in the contractors.

Rule 79: Abstract of the Contract Labour (Regulation and Abolition) Act 1970 and central rules to be displayed at locations. Wages to the contract labour to be paid in line with the Minimum wages applicable.

Rule 65: Wages of contract labour to be disbursed on or before 7th day of the following month.

Sec 21.4: In-case the contractor fails to make payment of the wages to his workmen, the Principal Employer to make the payment.

Rule 74: A register of contractors in Form XII to be maintained by principal employer.

Rule 80(3): Registers to be maintained for 3 calendar years.

Rule 81(3): Return (to be submitted by the Principal Employer) in Form VI-B regarding commencement/completion of work to the concerned authority within 15 days of commencement/completion of work.

Rule 82(2): Return in Form XXV to reach the registering officer concerned not later than 15th February following the end of the year to which it relates.

Section 12 : Contractor to obtain license from the licensing officer (for more than 20 contract labors).

Rule 21(2) : Principal employer shall give a certificate in Form V to the contractor

Rule 76: Contractor to issue employment card in Form XIV to each contract labor within three days of employment.

Rule 75, 78(1): Registers to be maintained by the contractor.

Rule 78(1) (b): Contractor to issue Wage Slip (in form XIX) - one day prior to disbursement of wages.

Rule 78(1)(c): Signature of workman to be obtained in the register for the entries related to them

Rule 25(2): Return to be submitted by the contactor in Form VI-A within 15 days of commencement/ completion of each contract work.

Rule 82(1): Half yearly returns.

Rule 40: Welfare and Health

Rule 41: Rest Rooms- When they are required to halt at night in connection with their working; where contract labour is to continue for three months or more; Within 15 days of commencing the employment; Separate rooms to be provided for women employees.

Rule 42: Canteen - Where contract labour is to continue for six months.- 100 or more contract labour- Within 60 days of commencement of employment of contract labour

Section 18: Other facilities viz. sufficient number of latrines and urinals, Washing facilities etc.

Sec 19: First Aid (One box for 150 contract labours)

Section 20: Liability of Principal Employer In Certain Cases- 1) If any amenity required to be provided for the benefit of the contract labour employed in an establishment is not provided by the contractor within the time prescribed thereof, such amenity shall be provided by the principal employer within such time as may be prescribed. 2) All expenses incurred by the principal employer in providing the amenity may be recovered by the principal employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

Scenario on Railways- Many activities are carried out by way of awarding contract to perform the activities for example, Station Cleaning Activity, Rag picking activity on the track, Coach cleaning activity etc.

Responsibility of the establishment employing contractor labour are laid down in Sections 16 to 21 which covers provision of canteens, rest room, other facilities, First Aid facilities, Liability in certain cases and responsibility of payment of wages.

Penalties

Sec.23. Contravention of provisions regarding employment of contract labour. Whoever contravenes any provision of the notification, issued under section 10, prohibiting the employment of contract labour shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both, and in the case of a continuing contravention with an additional fine which may extend to one hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

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

FAQ:

Whether government is liable to pay stamp duty on documents executed in its behalf?

Documents executed by the Government is exempted from payment of stamp duty in view of the following provisions:

Section 3 of The Indian Stamp Act, 1899

3. Instruments chargeable with duty.—Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore, respectively, that is to say—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and

(c) every instrument (other than a bill exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day relates to any property situate, or to any matter or thing done or to be done, in India and is received in India:

Provided that no duty shall be chargeable in respect of—
(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

Section 35 of The Indian Stamp Act, 1899

35. Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: **Provided that—**
(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

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

KNOW OUR CONSTITUTION

Article 21: Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

The right is available to both citizens and non-citizens. Article 21 has within its ambit right to environment, right of prisoners, right to speedy and fair trial, right against sexual harassment, right against handcuffing, right to medical care, right to food and right against malnutrition, right against custodial violence, right not to be subjected to bonded labour, right to Legal Aid, right against solitary confinement, right against bar fetters, right to pure drinking water, right to reputation, right to privacy, right to education etc. In Common Cause (A Regd. Society) Vs. Union of India (2018 SC) SC held that the right to die with dignity is a fundamental right.

In Maneka Gandhi case, Personal liberty has been given an expansive meaning. It was held that articles 21, 14 & 19 are not mutually exclusive. In the words of justice VR Krishna Iyer, "no article in the constitution relating to fundamental rights is an island in itself. They are group of Islands connected with each other, i.e. not separate Islands". On personal liberty, Justice Iyer said, "the spirit of the man is at root of article 21. Personal liberty makes the worth of human person and travel makes Liberty worthwhile."

In Francis Coralie Mullin Vs. The Administrator [1981 AIR 746, 1981 SCR (2) 516] Supreme Court held: ".....the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, freely moving about and mixing and commingling with fellow human beings".

JOKE

Two schoolgirls were having an argument. "My dad's better than your dad. He's a carpenter and makes buildings." The other girl replied, "My dad does better than that. He's a lawyer, and makes loopholes."

RTI Act Series:

Right to Information Act, 2005

Section 4 of the RTI Act, 2005 is popularly described as 'voluntary disclosure' provision. Maintenance and upkeep of records, computerisation of records, networking of records are the obligations of Public Authority under S.4. It is also under obligation to publish various information connected with the concerned organisation voluntarily. This shall *inter alia* include particulars /functions/ duties of the organisation, powers/duties of officers/employees, process of decision making, rules/regulations/ instructions/manuals/records held / controlled by it, directory of officers/employees, monthly remuneration of officers/employees, budget allocation, subsidy programmes, concessions/permits/authorisations granted by it, particulars of PIOs etc. A very important aspect of S.4 is that it mandates providing reasons for the administrative /quasi-judicial decisions to affected persons. This has a far reaching effect in that this provision viz., S.2(d) can be used to demand passing of 'speaking order' by a public authority.

But the RTI Act has not laid down any mechanism to ensure compliance with S.4. Hon'ble High Court, Delhi in DDA Vs. CIC & Ors. observed that *"Section 4 merely sets out the obligations of the public authorities. It doesn't provide the machinery to enforce the implementation of these obligations."*

DoP&T had issued an Office Memorandum No.1/6/2011-IR on 15.04.2013 wherein guidelines for suo motu (proactive) disclosure were laid down. This inter alia include implementation of the said guide lines within 6 months of the date of issue of the said OM, 3rd party auditing of proactive disclosure package every year, revealing of 3rd party auditors in the website etc.

Section 5 of the RTI Act warrants designating officers as Central Public Information Officer/ State Public Information Officer in all administrative units / offices under it. It is also provided to nominate CAPIO /SAPIO, whose duties are merely restricted to receive RTI applications /appeals and forward the same to concerned PIO or AA. When Assistant Public Information Officer receives an RTI application / appeal, five days shall be added to the time limit for disposal of the RTI request. PIO shall render reasonable assistance to the information seekers.

PIO may seek the assistance of any other officer he considers it necessary for the proper discharge of his duties. Any such officer whose assistance is sought by the PIO shall be treated as PIO for the purpose of any contravention to the provisions of the Act. [S.5(4&5)]

In fine, the difference between CPIO and APIO has to be understood very clearly. In this regard it is noteworthy that Assistant Public Information Officer (APIO) is not empowered to dispose of RTI applications. CIC has in its decision reported in Second Appeal No. CIC/ITAT/A/2017/131638 & Complaint No. CIC/ITAT/C/2017/121948 [R K Jain Vs. Income Tax Appellate Tribunal. DOO-17.10.2018] held that APIO cannot sign reply to a RTI request, even after obtaining approval from the concerned CPIO.

The officer whose assistance has been sought by the CPIO cannot be considered as APIO, but will be treated as deemed CPIO for the limited purpose of compliance with the provisions of RTI Act. Even in cases, where the CPIO seeks assistance from any other officer u/s 5 (4), it is the responsibility and duty of the CPIO to dispose of the RTI application in consonance with the provisions of the RTI Act.

High Court, Delhi in J.P. Agrawal Vs. Union Of India & Ors. [W.P.(C) 7232/2009] held:

"8. Even otherwise, the very requirement of designation of a PIO entails vesting the responsibility for providing information on the said PIO. As has been noticed above, penalty has been imposed on the petitioner not for the reason of delay which the petitioner is attributing to respondent no.4 but for the reason of the petitioner having acted merely as a Post Office, pushing the application for information received, to the respondent no.4 and forwarding the reply received from the respondent no.4 to the information seeker, without himself "dealing" with the application and/or "rendering any assistance" to the information seeker. The CIC has found that the information furnished by the respondent no.4 and/or his department and/or his administrative unit was not what was sought and that the petitioner as PIO, without applying his mind merely forwarded the same to the information seeker. Again, as aforesaid the petitioner has not been able to urge any ground on this aspect. The PIO is expected to apply his / her mind, duly analyse the material before him / her and then either disclose the information sought or give grounds for non-disclosure. A responsible officer cannot escape his responsibility by saying that he depends on the work of his subordinates. The PIO has to apply his own mind independently and take the appropriate decision and cannot blindly approve / forward what his subordinates have done.

9....This Court in Vivek Mittal Vs. B.P. Srivastava MANU/DE/4315/2009 held that a PIO cannot escape his obligations and duties by stating that persons appointed under him had failed to collect documents and information; that the Act as framed casts obligation upon the PIO to ensure that the provisions of the Act are fully complied."

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

LEGAL UPDATE:

The Code on Wages, 2019

Code of Wages, 2019 has been approved by both the Houses of the Parliament and has got Presidential assent on 08th August, 2019. This extends to the whole of India. It shall subsume and repeal the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 & the Equal Remuneration Act, 1976. The Code on Wages, 2019 has 69 sections. Code on wages shall regulate wage and bonus payments in all employments and shall extend to all employees irrespective of their wage ceiling and type of employment.

Key Features: Wages defined to include salary, allowances and other components expressed in monetary terms. A distinction has been drawn between "employee" and "worker" with employee discharging his duties in an establishment and worker at an industry. The ceiling to classify as "supervisor" is Rs.15,000/-.

The wages paid shall not be gender discriminative. A new concept of "Floor Wage" has been introduced, which needs to be fixed by the Central Govt. taking into account the minimum living standards of workers and depending on the geographical areas. The minimum rate of wages fixed by the State Governments cannot be lesser than the floor wage. If the existing minimum wages are higher than the floor wage, the Central and State Governments cannot reduce the minimum wages. The minimum rate of wages shall be reviewed and revised in intervals not exceeding 5 years.

The Central and State Governments may fix the number of hours that constitute a normal working day. Fine, absence from duty, accommodation given by the employer, recovery of advances given, etc. are certain grounds to deduct employee's wages. These deductions should not exceed 50% of the total wages and if the authorised deductions exceed 50% of the wages, the excess may be recovered by the employer in the manner provided.

Payment of bonus shall apply only to establishments having at least 20 employees of if at least 20 employees have been employed on any day in that accounting year. The bonus shall be at least 8.33% of wages or Rs.100/-, whichever is higher. An employee may receive a maximum bonus of 20% of his annual wages. Dismissal from service on the ground of conviction for sexual harassment is now an additional ground which would disqualify an employee from receiving his statutory bonus.

There is a provision for issuance of a wage slip. In place of Inspectors, it is now required to appoint Inspectors cum Facilitators, to carry out inspections etc. In the event the employer violates provisions of the Code on wages, the Inspector-cum-Facilitator shall not initiate any action against the employer unless the employer has been given an opportunity to rectify the non-compliance within a specified time period. However, in case of repetition of the same contravention within five years from the date on which such first violation was committed such an opportunity shall not be provided to the employer.

The Code on Wages specifies penalties for offences committed by an employer, such as (i) paying less than the due wages, or (ii) for contravening any provision of the Code on Wages. Penalties vary depending on the nature of the offence, with the maximum penalty being imprisonment for three months and/or with a fine of up to Rs. 1,00,000.

The period of limitation for filing of claims by a worker has been enhanced to three years, as against the existing time period varying from six months to two years.

Vijitha.M.N, CLA/Gaz/PCPO/O

Application of Constructive Resjudicata by CAT/HYB

Mr.L.Hanumanth, RR cook was imposed a penalty of compulsory retirement from service w.e.f 26.02.2008. He had filed OA 1320 of 2015 before the Hon'ble CAT Hyderabad with a prayer to direct the respondent railway administration to sanction and relase the retiral benefits and other attendant benefits. The Hon'ble Tribunal in its order dated 12.02.2016 directed the respondents to settle the pensionary benefits and arrears of pay. Accordingly, the applicant was paid the arrears and pension.

Thereafter, the applicant has filed another OA, vide OA No.701 of 2016 with a prayer to sanction and release pension from dated of CR i.e.26.02.2008 along with interest. On 11.06.2018, the applicant sought specific permission to withdraw the OA with a liberty to file fresh OA. Subsequently, he has filed another OA 919/2018 on 25.09.2018 with a prayer for payment of interest at the rate of Rs.2/- per month from 26.02.2008 to 02.04.2016.

The Hon'ble Tribunal in its order dated 05.08.2018 held that the OA was hit by the principle of "constructive resjudicata" as he made the same prayer in his earlier OA 1320/2015 as well as in the second OA i.e.701/2016 which he withdrew.

Hon'ble Tribunal observed: "In simple terms constructive resjudicata is an extension of resjudicata principles serving the same purpose of preventing the multiplicity of proceedings. Whereas resjudicata basically prohibits suit which has already been decided by a competent court, constructive resjudicta prohibits raising the issues which ought to have raised in the previous suit." Hon'ble Tribunal dismissed the OA as not maintainable. **[L.Hanumanth Vs. South Central Railway. OA 919/2018]**

Stanly Paul, CLA/SC

FIR cannot be lodged after compromise before Lok Adalat

Appellant is the owner of a house and he let it to respondent -3. The officials of the Enforcement Department of BSES Rajdhani Power Ltd. inspected the electricity meter on 15.4.2014 installed in the aforesaid house and found that the meter was not recording correct reading. On verification, the BSES made assessment in relation to the consumption of the electricity and accordingly sent a bill for theft for Rs. 97,786/- to the appellant. A case was accordingly registered against the appellant.

On 27.02.2015, the BSES organized a Permanent Lok Adalat in Lower Courts at Delhi under the provisions of Legal Services Authorities Act, 1987 to settle their several recovery cases. The appellant's case was also fixed for settlement. By order dated 27.02.2015 (Annexure P2), the case was settled at Rs.83,120/- against full and final payment of the aforesaid bill of Rs.97,786/. The appellant accordingly paid Rs.83,120/- to the BSES in terms of the order in three equal instalments.

Despite settlement of the case and receiving the payment, the BSES filed FIR No.548/15 against the appellant on 21.03.2015 under Section 135 of the Electricity Act in Police Station. The appellant felt aggrieved by the registration of FIR against him and filed a petition under Section 482 of the Code of Criminal Procedure, 1973 in the High Court challenging its registration as being bad in law. The High Court, by impugned order, dismissed the petition. Hence, the present appeal before the Supreme Court.

The Supreme Court held that once the dispute in relation to recovery of outstanding amount was finally settled between the parties (appellant and BSES) amicably in Lok Adalat resulting in passing of the award dated 27.02.2015 in full and final satisfaction of the entire claim, there was neither any occasion and nor any basis to file FIR by the BSES against the appellant in respect of the cause which was subject matter of an award.

The remedy of the parties in such a case was only to challenge the ward in appropriate forum in case they felt aggrieved by the award. Such was, however, not the case here. the effect of passing of an award was that dispute in relation to the demand raised by the BSES was settled amicably between the parties leaving no dispute surviving. The original demand was for Rs.97,786/- whereas the dispute was settled at Rs.83,120/- in full and final satisfaction of the claim made by the BSES against the appellant.

The dispute between the parties, therefore, came to an end for all purposes consequent upon passing of an award except to the extent of recovery of the awarded amount of Rs.83,120/-. It is not in dispute that the appellant paid the awarded amount to the BSES in terms of the award dated 27.02.2015 and the same was also accepted by the BSES without any protest. The award thus stood fully satisfied.

The Apex Court also observed that the award did not contain any condition granting liberty to the BSES to file an FIR against the appellant under the Electricity Act notwithstanding settlement of the dispute and passing of an award in relation to demand in question. On the other hand, the conditions set out in the award, in clear terms, record that the dispute has been settled in full and final satisfaction of the demand in question. It is not in dispute that Section 152 of the Electricity Act empowers the officer concerned to compound the offences punishable under the Electricity Act.

The Supreme Court further held that if the BSES was so keen to file FIR against the appellant under the Electricity Act then either they should not have settled the matter through Lok Adalat or while settling should have put a condition in the award reserving therein their right to file FIR notwithstanding settlement of the dispute in question. This was, however, not done.

Therefore, the Supreme Court held that the filing of FIR after passing of the award by the Lok Adalat was wholly unjust and illegal and the same was not permissible being against the terms of the award and also for want of any subsisting cause of action arising out of demand. It is, therefore, not legally sustainable. [Saleem Ahmed Vs .State & Anr. CRI APPEAL No. 1244 OF 2019 (Arising out of S.L.P.(Crl.) No.8801 of 2018), DOJ: 19.08.2019]

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

JOKES

⇒ A red-faced judge convened court after a long lunch. The first case involved a man charged with drunk driving who claimed it simply wasn't true. "I'm as sober as you are, your honor," the man claimed. The judge replied, "Clerk, please enter a guilty plea. The defendant is sentenced to 30 days."

⇒ "You seem to be in some distress," said the kindly judge to the witness. "Is anything the matter?" "Well, your Honour," said the witness, "I swore to tell the truth, the whole truth and nothing but the truth, but every time I try, some lawyer objects."

Railways not liable for theft unless valuables are separately booked as per IRCM 1101 and negligence is proved

National Consumer Disputes Redressal Commission held that the Railways is not liable to pay any compensation when the passengers failed to book the valuable luggage in accordance with Para 1101 of the Commercial Manual & S.100 and carried them at their risk in the coach. The Revision Petition was filed against the order of the APSCDRC which confirmed the order of the Visakhapatnam District Consumer Forum.

The complainants who were travelling by Visakha Express on 08.02.2001 to attend a wedding function lost their handbag, which according to them contained Rs. 3,500/- and gold/diamond items worth Rs.5 lakhs besides one credit card. It was alleged that unauthorised intruders boarded their AC coach in collusion with railway employees and lifted their belongings. An FIR was lodged and subsequently a consumer complaint was also raised seeking the OPs to pay Rs.5,03,500/- plus Rs.2 lakhs for mental agony and Rs.5,000/- as cost of litigation.

The railways resisted by stating that the articles are carried by the passengers at their own risk and the railways are not responsible for any loss/damage to the same, unless formal booking of the belongings is made with the Railways and receipts issued, and unless it is proved that the loss/damage etc. was due to the negligence or misconduct on the part of the Railways. The OPs also stated that the possibility of unauthorised persons having entered the reserved compartment was remote, as the halting period for the train was less than two minutes. It was the duty of the passengers to take prudent care to protect their belongings. It further stated that the TTE and the coach attendant had discharged their duties correctly and did not allow any unauthorised persons in the compartment.

However, the District Forum held the railways liable and allowed the complaint and award Rs.5,03,500/- along with compensation of Rs. 25,000/- and Rs.5000/- as cost of litigation. Railways appeal before the State Commission was dismissed and hence the Revision Petition. During the hearing the Railways pointed out that the FIR contained the value of jewellery as Rs.3 lakhs but the complaint stated it to be Rs.5 lakhs. The learned counsel stated that inconsistency in quoting the value of the articles, stated to have been lost, gives the impression that the complaint was not based on correct facts.

The NCDRC observed that as per the version given in the complaint itself, when the train halted at Khurda Road railway station around 6.20pm, two unauthorised women entered the reserved compartment and lifted the second complainant's handbag. It has nowhere been stated whether the complainants raised any hue and cry at that time and whether they alerted the other passengers or not. It has not even been mentioned whether there were more passengers in the same compartment or not. The time of the incident is 6.20 pm and at that time, the complainants as well as the other passengers are supposed to be in an alert condition.

The version given by the complainants that two ladies just came and took away the handbag without any commotion of any kind, seems to be wholly unnatural. The complainants have also not stated as to whom they informed at that time from the Railways department, whether it was the coach attendant or the T.T.E. or their security personnel. The overwriting in the form for lodging FIR also was held against the complainants.

NCDRC further held that as per para 1101 of the Commercial Manual of the Railways, the article of special value, i.e. jewellery, precious stones, currency notes etc. have to be booked with the Railways and their value declared on the forwarding note. In the present case, no such booking was made with the Railways and hence, the provisions of Section 100 of the Railways Act, etc. are applicable in the matter. NCDRC further given credence to the affidavit of Sr.DCM which stated that 29 RPF personnel were at Khurda Road railway station and the complainants did not report anything to them. Based on the above facts, the NCDRC dismissed the consumer complaint. [**Revision Petition No. 1916 of 2014, ECoRly & Anr. Vs. Kadambari Rama Joga Rao & Anr.**]

Debashish Patnaik, CLA/CCO/O

Difference between:

Agreement & Contract

When a proposal is accepted by the person to whom it is made, it is an agreement. When an agreement is enforceable by law, it becomes a contract. Offer and acceptance are the basic elements of an agreement whereas agreement and enforceability in law are the basic elements of a contract. Section 2 (e) of Indian Contracts Act, 1872 defines agreement and S.2 (h) defines contract. Both agreement and contract need not necessarily be in writing. Agreement does not create any legal obligation whereas a contract creates legal obligation. Every agreement need not be a contract, but all contracts are agreements.

A contract must consist of elements like adequate and unconditional consideration, offer and acceptance, capacity, free consent, certainty, lawful objects, intentions of creating legal obligations, and no void agreement.

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

YOURS LEGALLY:

Courts not to entertain challenge to charge-sheets / show-cause notices

The Kunisetti Satyanarayana (the respondent) was appointed as a Clerk in the Postal Department on 30.11.1965. The SSLC certificate indicated that he belongs to the 'Konda Kapu' community which is a Scheduled Tribe community in the State of Andhra Pradesh. Based on the quota reserved for the category of Scheduled Tribe he obtained two more promotions, later on.

On 28.11.1994, a show-cause notice was issued to him to show cause as to whether he obtained employment on forged caste certificate. In reply to the said show-cause notice, the respondent admitted that he does not belong to 'Konda Kapu' community, but he belongs to 'Kapu' community which is not a Scheduled Tribe community. Considering the reply, the Assistant Post Master General directed that the respondent be treated as 'OC' community and accordingly an alteration was made in the respondent's Service Book stating that he belongs to 'OC' community.

However, the Collector of Hyderabad District cancelled said caste certificate and requested the Chief Post Master General, to take action against the respondent vide order dated 11.7.1997. Consequently a Charge Memo dated 23.12.2003 was issued to the respondent. Instead of replying to the Charge Memo, the respondent filed an OA before the Central Administrative Tribunal, which was disposed with a direction to the applicant to submit his reply to the Charge Memo dated 23.12.2003. Instead of filing any reply the respondent filed a Writ Petition in the High Court which was allowed, and hence this appeal.

The apex court held that ordinarily no writ lies against a charge sheet or show-cause notice. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

The submission of respondent that the impugned Charge Memo would amount to double jeopardy and was therefore illegal since the charge against him had already been enquired into earlier and he had been exonerated of the charge in an earlier proceeding is not correct. In the present case, the charges levelled against the respondent under the Charge Memo dated 23.12.2003, had not been enquired into by any authority and he had not been exonerated on those charges. Hence it is not a case of double jeopardy.

Therefore, the Supreme Court set aside the impugned judgment of the High Court and the respondent is directed to submit his reply to the Charge Memo and the authority concerned should decide the same expeditiously in accordance with law after giving an opportunity of hearing to the respondent. [Union Of India And Another vs Kunisetty Satyanarayana on 22 November, 2006, Appeal (civil) 5145 of 2006]

Affirming the ratio in the above case, similar view has been expressed by the Supreme Court in Secretary, Ministry of Defence & Ors. v. Prabhash Chandra Mirdha [2012 11 SCC 565]. The apex court has held as under:-

"Ordinarily a writ application does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge-sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge-sheet or show-cause notice in disciplinary proceedings should not ordinarily be quashed by the court."

S.Venkateswarlu, CLA/PCE/O

Legal Maxims

Per curiam - In the opinion of the court.
Qui facit per alium, facit per se - He who acts through another acts himself.
Res integra - A matter untouched (by decision).
Stare decisis - To stand by decisions (precedents).
Sub silentio - In silence.

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

Treatise on Arbitration: Appointment of arbitrators

Section 11 of A&C Act, 1996 deals with appointment of arbitrators by the Court, where (i) no agreed procedure exists between the parties to appoint arbitrator(s); or (ii) despite a procedure to appoint arbitrators exists in the agreement, either of the parties fail to adhere to the procedure and appoint arbitrator(s); or (iii) in case of Arbitral Tribunal Consisting of three arbitrators, the two arbitrators so appointed, fail to appoint the third (presiding arbitrator) within 30 days from the date of request for appointment of arbitrator. Indian Railways has a standard procedure for appointment of arbitrators in GCC for works contracts, IRS conditions for stores matters and also in GCC for services. Hence, arbitrators will be appointed as per the agreed procedure.

Appointment of Departmental Officers as arbitrators: The practice of incorporating a named arbitrator who is an employee of the Government, is not ipso facto a ground to raise a presumption of bias, or partiality, or lack of independence on his part. [*Union of India v. M.P. Gupta, Ace Pipeline Contract v. Bharat Petroleum]*. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the disputes by arbitration, but not by the named arbitrator who is an employee of the other party. [*Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520].

However, after the amendment dated 23.10.2015 to A&C Act, 1996, by including Section 12 (5), any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule is made ineligible to be appointed as an arbitrator. Said Section further provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this subsection by an express agreement in writing. Accordingly, the GCC of the Railways modified the rules for appointment of arbitrators in to two types: (i) where parties waived the applicability of the Section and (ii) parties did not agree for waival of the applicability of the Section. In the first case, departmental officers are appointed and in the second case, retired officers retired not less than the rank of SAG are appointed as arbitrators.

The Supreme Court in the case of the Government of Haryana PWD Haryana (B and R) Branch Vs M/s. G.F. Toll Road Pvt. Ltd. & Ors., [SLP (C) No. 20201 of 2018, DOJ:03.01.2019] held that Arbitration and Conciliation Act, 1996, does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. Even after 2015 amendment, the position remains the same, as Entry 1 to 5th Schedule of the Act does not include "past/former employees."

Forfeiture of Right to Appoint Arbitrator:

Despite availability of procedure for appointment of arbitrators in case of any dispute between the parties; for any reason, if arbitrator(s) is not appointed by the Railway as per the agreed procedure, the intervention of Court necessitates and the aggrieved party may approache Court for appointment of arbitrator. The Supreme Court in Datar Switchgears Ltd. v. Tata Finance Ltd and Anr. [(2002) 8 SCC 151] held that "If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. Supreme Court reiterated the same in M/S Deep Trading Company Vs M/S Indian Oil Corporation & Ors, (2013) 4 SCC 35. However, the Court, while doing so, has to issue notice to the other party and to keep conditions prescribed, if any, for appointment of arbitrators. [Union of India and Anr. v. M.P. Gupta (2004) 10 SCC 504].

Since procedure prescribed by the parties for appointment of arbitrators is given prime importance, there is no prohibition for appointment of arbitrator chosen by the parties and Court can appoint them as arbitrator(s). Therefore, the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Section 11(8) of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration. [Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. (2008) 10 SCC 240].

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