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Articles/write-ups on
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EDITORIAL

In this issue some important articles on 'One Person Company' and 'Stare Decisis –reluctant order-per in curium' have been discussed. Also, in addition to the above some judgements on selection i.e. 'challenge to selection after participation is possible if glaring illegalities crept in' and on service matters i.e. litigants have to first exhaust court of first instance i.e. CAT and cannot approach High Court directly. Added to these, are the regular features such as ABC of Act on the Consumer Protection Act, 2019, RTI Act Series, Treatise on Arbitration & Conciliation Act 1996, Difference Between, FAQ, Know Our Constitution etc.

N.Murali Krishna
Sr. Law Officer/HQ

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

The Consumer Protection Act, 2019 came into force from 20th July 2020 replacing the earlier Consumer Protection Act, 1986. This Act empowers consumers and help them in protecting their rights through its various notified Rules and provisions like Consumer Protection Councils, Consumer Disputes Redressal Commissions, Mediation, Product Liability and punishment for manufacture or sale of products containing adulterant / spurious goods. This Act contains 107 sections in 8 Chapters.

Definition of consumer [Sec.2(7)]: A consumer is defined as a person who buys any good or avails a service for a consideration. It does not include a person who obtains a good for resale or a good or service for commercial purpose. It covers transactions through all modes including offline, and online through electronic means, teleshopping, multi-level marketing or direct selling.

Rights of consumers [Sec.2(9)]: Six consumer rights have been defined in the Bill, including the right to: (i) be protected against marketing of goods and services which are hazardous to life and property; (ii) be informed of the quality, quantity, potency, purity, standard and price of goods or services; (iii) be assured of access to a variety of goods or services at competitive prices; and (iv) seek redressal against unfair or restrictive trade practices.

Chapter-III of the Act provides for establishment of the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers. The CCPA will be empowered to conduct investigations into violations of consumer rights and institute complaints / prosecution, order recall of unsafe goods and services, order discontinuance of unfair trade practices and misleading advertisements, impose penalties on manufacturers/endorsers/publishers of misleading advertisements. The CCPA will have an investigation wing, headed by a Director-General, which may conduct inquiry or investigation into such violations. The CCPA may impose a penalty on a manufacturer or an endorser of up to Rs 10 lakh and imprisonment for up to two years for a false or misleading advertisement. In case of a subsequent offence, the fine may extend to Rs 50 lakh and imprisonment of up to five years.

Now as per the Act, the District forum is renamed as District Commission. The Opposite Party needs to deposit 50% of the amount ordered by District Commission before filing appeal before State Commission, earlier the ceiling was of maximum of Rs.25,000/-, which has been removed. The limitation period for filing of appeal to State Commission is increased from 30 days to 45 days, while retaining power to condone the delay.

Under this Act every e-commerce entity is required to provide information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, grievance redressal mechanism, payment methods, security of payment methods, charge-back options, etc. including country of origin which are necessary for enabling the consumer to make

an informed decision at the pre-purchase stage on its platform. E-commerce platforms have to acknowledge the receipt of any consumer complaint within forty-eight hours and redress the complaint within one month from the date of receipt under this Act.

Section 49(2) and 59(2) of the act gives power to the State Commission and NCDRC respectively to declare any terms of contract, which is unfair to any consumer, to be null and void.

This Act provides for simplifying the consumer dispute adjudication process in the consumer commissions, which include, among others, empowerment of the State and District Commissions to review their own orders, enabling a consumer to file complaints electronically and file complaints in consumer Commissions that have jurisdiction over the place of his residence, videoconferencing for hearing and deemed admissibility of complaints if the question of admissibility is not decided within the specified period of 21 days. An Alternate Dispute Resolution mechanism of Mediation is given statutory status by way of introduction of Section 74 in the Act for simplifying the adjudication process. A complaint will be referred by a Consumer Commission for mediation, wherever scope for early settlement exists and parties agree for it. Mediation will be held in the Mediation Cells to be established under the aegis of the Consumer Commissions. There will be no appeal against settlement through mediation.

This Act also introduces the concept of product liability and brings within its scope, the product manufacturer, product service provider and product seller, for any claim for compensation. The Act provides for punishment by a competent court for manufacture or sale of adulterant/spurious goods. The court may, in case of first conviction, suspend any licence issued to the person for a period of up to two years, and in case of second or subsequent conviction, cancel the licence.

Chapter-V of the Act provides for Consumer Disputes Redressal Commission (CDRCs). These will be set up at the district, state, and national levels. A consumer can file a complaint with CDRCs in relation to Unfair or restrictive trade practices; Defective goods or services; Overcharging or deceptive charging; and the offering of goods or services for sale which may be hazardous to life and safety. As per the CDRC Rules, there will be no fee for filing cases upto Rs. 5 lakh. There are provisions for filing complaints electronically, credit of amount due to unidentifiable consumers to Consumer Welfare Fund (CWF). The State Commissions will furnish information to Central Government on a quarterly basis on vacancies, disposal, pendency of cases and other matters.

Complaints against an unfair contract can be filed only at the State and National levels. Appeals from a District CDRC will be heard by the State CDRC. A second appeal from State CDRC to NCDRC has been provided U/s 51(3) if there is a substantial question of law involved in the matter. Final appeal will lie before the Supreme Court.

Some more orders on Section 8 (1) (h):

Ongoing CBI investigation – Information protected from disclosure: In the case of S.R. Goyal Vs. PIO, Services Department, Delhi (Appeal No. CIC / WB / A/ 20060523, dated 26.3.2007), the appellant had sought a copy of the letter received by the public authority regarding his suspension, from the CBI, which was investigating the case. The public authority replied that the information requested by the applicant was exempted from disclosure by virtue of S-8(1)(g) and 8(1)(h) of the RTI Act. The CIC, rejecting the appeal of the applicant, held that the exemptions from disclosing information, u/s. 8(1)(h) of the RTI Act as well as under the relevant provisions of the Official Secrets Act, would apply. The CIC further said that if the public authority, decides that public interest in the disclosure outweigh the harm to the protected interests, it can disclose the information, which was not the position in this case.

Person exonerated has a right to get copy of SP, CBI's report: In the case of D.P. Maheshwari Vs. CBI (Appeal No. CIC / WB / A /2008 /0269 and 270, dated 25.8.2009), when the appellant sought the copy of the SP, CBI's report, SP/CBI responded that SP's report is a confidential document and hence exempted u/s- 8(1)(h) of the RTI Act. The first appellate authority rejected the appeal on the ground that the matter is pending trial and supply of SP's report at this stage would impede the prosecution of offenders and also mentioned that the document is confidential held under fiduciary relationship and its contents shall not be accessed by any one not authorized to access them. CBI also took the plea that the SP's report being sought is connected to the high profile scam in the State of Bihar amounting to Rs.200 crores. Disclosing the enquiry report itself will expose the pros and cons of the case and will give undue advantage to those who intend to exploit. Moreover the appellant is not an accused in the case. Disclosure of the information sought will accordingly be not in the public interest. The appellant however mentioned that the investigation report has discussed his role in the scam and he was exonerated of the charges thereafter. He requires to know about his exoneration in the enquiry report so as to obviate further harassment and enquiry in the matter.

CBI argued that the investigation report have details of personal information of many persons and its disclosure would amount to invasion of privacy and thus qualify for exemption under S-8(1)(j). The CIC held that the plea of exemption under S-8(1)(j) cannot be applied as the appellant is asking for information about his own case. Even if the report contains personal information about others, the principle of severability u/s- 10(1) can be applied. The CIC agreed that disclosure of complete report may impede the process of investigation and amount to invasion of privacy of the persons mentioned in the report. As such S-8(1)(g) is applicable. However, since the appellant is not the accused the information regarding him cannot be held to be such as to impede the process of investigation or prosecution. Accordingly part of information exonerating the appellate may be provided as per S -10(1) of the RTI Act.

Information on an on-going investigation can be given in special circumstances: In the case of Mangto Ram Vs. Additional Commissioner & PIO, Delhi Police (Appeal No. CIC/A/A/ 2006 /00355, dated 26.12.2006), the appellant filed an application with the police authorities, asking for information regarding the ongoing investigation into the death of his daughter under mysterious circumstances. The CIC examining the case held that this case was an exception to the general rule laid down in S- 8 (1)(h) of the Act, which prohibits the disclosure of information, as the supply of information to the victim's family would not put any obstacles or impede the process of investigation. The CIC further noted that, "Far from impeding the investigation, taking the appellant into confidence will give a positive direction to the investigation and enable the authorities to swiftly reach the truth." The CIC ordered the police to provide the status of the investigation to the appellant within three weeks.

The term "investigation" has wide connotation: S- 8(1) (h) of the RTI Act exempts an information which would impede the process of investigation or apprehension or prosecution of offenders. The Act does not define either the term "investigation" or "process of investigation". The Code of Criminal Procedure makes a distinction between "investigation", "inquiry" and "trial" and all the three terms denote three different stages of a criminal case. The first stage is reached when a police officer investigates into a case. After completing the investigation, when the case is sent to a Magistrate, the next stage begins, which is either an inquiry or a trial. As has been held by the Apex Court in the Directorate of Enforcement Vs. Deepak Mahajan (AIR 1994 SC 1775), the word "investigation" cannot be limited only to police investigation but includes the "investigation" carried on by any agency whether he be a police officer or empowered or authorized officer invested with the power of investigation. The expression "inquiry" as defined under the Code of Criminal Procedure is of wide import and takes in every proceedings other than a trial conducted by a Magistrate. Thus, the term "investigation" used in S-8(1)(h), in the context of this Act should be interpreted broadly and liberally. We cannot import into RTI Act the technical definition of „investigation“ one finds in Criminal Law. Here, investigation would mean all actions of law enforcement, disciplinary proceedings, enquiries, adjudications and so on. Logically, no investigation could be said to be complete unless it has reached a point where the final decision on the basis of that investigation is taken. In that sense, an investigation can be an extended investigation. In the case of the Income Tax Department investigation into tax evasion can be said to be over or complete, only after the final adjudication about the tax liability had been made after the matter has gone through all the stages of appeals and revisions as well as a final decision about prosecuting or not prosecuting that person has been taken by an appropriate competent authority. The respondents are, therefore, right in holding that it would be a misnomer to hold that investigation in matters such as this, the moment the Investigating Officer submits his report to the competent authority spells the end of investigation. [Shri Shanker Sharma and M/s. First Global Stock broking Pvt. Ltd. and others Vs. Director of Income Tax (Inv.)-II & CPIO, Deptt. of Income Tax, Mumbai (F. No. CIC/AT/A/2007/00007 dated 10.07.2007)].

One Person Company (OPC)

The most prevalent types of corporate legal entity for small business at an initial stage which is started, managed and executed by a single individual is One Person (Private Limited) Company - OPC.

Government of India promotes the entrepreneurs of the country and thus it has brought in new and more beneficial schemes for their growth and advantage. OPC is a product of that idea. It is said that "*A One Person Company is a paradigm shift in the Indian corporate regime, bringing it at par with global standards.*" As per section 3(1)(c) of the Companies Act, 2013, an OPC may be formed for any lawful purpose by one person being a citizen of India.

Commonly known as OPC, One Person Company is also an old school concept, similar to that of a proprietorship business, where just one person is whole and sole of the business. But the new thing here is that instead of small scale proprietorship business, now we can incorporate a company, which in other words is a large scale proprietorship registered with Central Government. Here there is just one human being who is whole and sole of the Incorporated Company. This person is both Manager as well as Owner i.e. Director and Shareholder and no one else has any major role in this entity, as far as decision making and ownership is concerned.

Legally speaking, One Person Company can be introduced as follows -

As per provision of section 2(62) of the Companies Act, 2013 defined (62) "one person company" means a company which has only one person as a member.

For the formation of OPC - Only a natural person who is an Indian citizen and resident in India---

- ◆ shall be eligible to incorporate a One Person Company;
- ◆ shall be a nominee for the sole member of a One Person Company.

The term "resident in India" means a person who has stayed in India for a period of not less than 182 days immediately preceding one calendar year.

Benefits that a Registered One Person Company reaps are:

It is considered as a Separate Legal entity which means that it becomes its own legal business structure, separate from the individuals who had found the business;

It gives one Protected Liability. Let's put it this way - when one starts a business as a proprietorship, he puts extreme efforts and most importantly he invests a lot of money, from every source possible. As the founder and owner, one is responsible not only for the benefits, assets and profits but also for all the debts, liabilities and losses; here, responsible means, personally liable for

debts and liabilities. However, when one's business entity is an Incorporated Company i.e registered as a One Person Company, he is responsible only for that amount of money which he personally invested. His personal assets cannot be used to satisfy the debts and liabilities of the incorporated business entity.

It separates Management from Ownership so eventually; Directors are the managers of the business and its day to day activities. Whereas, Shareholders who are the actual owners, reaps the benefits of the investment they made into the business.

Also, when one's entity is registered with Central Government, namely MCA (Ministry of Corporate Affairs), an Incorporated Company i.e registered as a One Person Company, it has more credibility with potential customers, vendors and employees which is helpful for efficient operations.

Most importantly, it helps one in expansion. This credibility helps one to expand his business both organically and inorganically.

There's a unique provision in OPC which will ensure continuity of the life of the Company. The memorandum of association, popularly known as MOA of an OPC shall indicate the name of another person who is mentioned as NOMINEE (with his/her prior written consent), who shall, in the event of the Director's death or his incapacity to contract become the member of the company.

Benefits/Exemptions for OPC:

- ◆ OPC doesn't have a wide range of business so it's not required for OPC to hold 4 board meetings in year, OPC may hold 2 board meetings in a calendar year.
- ◆ Annual Return of an OPC can be signed by a single Director of the Company.
- ◆ An OPC needs not to include Cash Flow Statement as part of its financial statement.
- ◆ OPC is not required to give report on Internal Financial Controls with reference to financial statements and the operating effectiveness of such controls in Audit Report.
- ◆ As per Section 96(1) OPC is not required to hold annual general meeting.
- ◆ Exemptions for rotation of Company Auditors.
- ◆ Exemptions from signing of financial statements.
- ◆ Exemptions for Board's Report.
- ◆ Lesser penalties for OPC under Section 446B of the Companies Act, 2013.

Difference between :

Notarization and Apostillisation

Notarization is the act of a notary public authenticating by his signature and official seal, certifying the due execution in his presence of a deed, contract or other writing, or verifying some fact or thing about which the notary public has definite knowledge. In India notarisation is performed under the Notaries Act, 1952.

Apostille Certificates are issued by Ministry of External Affairs (MEA), Government of India on birth certificates, death, power attorney, marriage certificates, educational certificates and affidavits. Before getting apostilled all the concerned documents must be authenticated by regional offices located in every state. An Apostille is granted by apostillisation office of a country which is a member of the Hague Convention, 1961. Apostille is certificate which verifies and confirms the seal and signature of person who authenticated the document. This is also called 'superlegalization'.

Need for Notarisation

Documents are notarised to certify their genuineness and prevent fraud and to make sure they are properly executed. The Notary is considered as an impartial witness who verifies signers and ensures they have entered into agreements knowingly and willingly. In short, its objective is to determine everything is true and genuine on the document.

Need for Apostillization

Sometimes just a simple notarization is not enough, one might be asked to get one's documents apostilled, it is known as 'superlegalisation' or legalization of documents for overseas use. Once this is done, document is recognized worldwide, such as a travel document. Those countries which are signatory to Hague Convention can only issue apostille.

K. Gopinath, CLA, GM/O/SCR

LEGAL MAXIMS

Quid pro quo (i.e. this for that) means An equal exchange of goods or services, or of money (or other consideration of equal value) for some goods or services.

FAQ:

Execution Petition

Execution of the decree is the important and final stage of judicial proceedings. Section 36-74 of CPC, 1908 deal with the procedure of execution. Order XXI of CPC deals with "Execution of Decrees and Orders". Order 21 contains 106 Rules. It is the largest of all the Orders of the Code.

Where the decree-holder desires to execute the decree, he shall apply to the court which passed the decree, in writing, signed and verified by him or by some other person proved to be the proper person to the satisfaction of the court. He has to attach a certified copy of the decree to the petition. Where the decree-holder is one person, he or his legal representatives apply for the execution, the decree may be executed against judgement-debtor, if he is dead, against his legal heirs/representatives. If the judgement-debtor is personally liable, on his death his legal heirs or representatives are personally liable.

In the following circumstances, the court may stop the execution of the decree.

- ♦ Where the judgement-debtor became insolvent
- ♦ Where judgment-debtor dies but left no properties, then the legal representatives or heirs are personally not liable.
- ♦ The court may at its discretion, refuse the execution.

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KNOW OUR CONSTITUTION

Article 31C: Saving of laws giving effect to certain directive principles.-

Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

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

Doctrine of Stare Decisis – reluctant order – per in curium.

The power of overall superintendence of all lower courts under its jurisdiction vested under Article 227 of constitution of India to the High Courts.

"It is a well settled principle of law, that in the guise of exercising jurisdiction under Article 227 of the Constitution of India, the High Court cannot convert itself into a court of appeal. It is equally well settled, that the supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and seeing that they obey the law. It has been held, that though the powers under Article 227 are wide, they must be exercised sparingly and only to keep subordinate courts and Tribunals within the bounds of their authority and not to correct mere errors. " [CA 2697 of 2020]

Similarly, Article 141 of the constitution of India says that law declared by Supreme Court is to be binding on all courts within the territory of India.

Further, all the High court judgments/orders and that of Supreme Court are normally bound by certain rules for maintaining uniformity of law and of precedents commonly known as **doctrine of stare decisis**.

The usual practice adopted by the court of law can be cited as under:

- ♦ the law laid down by a bench of larger length is bearing on the subsequent bench of lesser or equal strength.
- ♦ a bench of lesser strength cannot disagree with the earlier decision; in case of any doubt arises, [viz, any inconsistency] the issue shall be referred to a larger bench duly inviting the attention of CJ. This will enable to place the issue before a larger bench, for proper adjudication.

It is the cardinal judicial principle that subsequent direction needs to stand by the decisions pronounced inter alia by a competent court and not to disturb what is already settled.

It is also relevant to know that the Hon'ble Supreme Court in the case of Kamleshwar Ishwar Das Patel vs Union of India [1995 Supp (3) SCC 732], held that, when a High Court confronts with situation contrary to the law laid down by the Apex Court on different occasions, which is to be followed, follow the later decision of the Supreme

Court.

If the court does not follow the above there could be a chance of improper order.

What is per incuriam

When a court of record passed judgement or pronounced order in ignorance of the previous decision of its own or ignorance of the law laid down by the Superior court, or the decision given earlier by the court of records and if the relevant law is not duly considered by the said court, then it is said to be an order per in curium

In other words, in curium means carelessness, in general, in some cases wherein the statute has been ignored and decision is rendered in ignorance of a statute law or other binding authority.

Under the following circumstances such decision of the court can be contested, where a point in issue is not gone into and are not considered by the court or the decision rendered without any argument are pleading not having any reference to the statute or any other authority under the rules.

Decision which was passed sub silentio, in the technical sense need to be examined and appropriate logical analogy need to be evolved before going for an appeal, in order to differentiate the decision.

It is also a point of consideration which need to be pondered, whether, it is a settled law or the direction of the Supreme Court, without laying down any principle of law, is a president or not. It is often opined that decision without a discussion on facts and law, is not binding on the lower courts and it is not to isolate down under article 142 of the constitution of India.

Any direction for or the decision given in particular circumstances by the court of record in exercise of its original jurisdiction is not a binding precedent. However, this condition was not appreciated judicially and a similar contention was negated by the constitution bench in Umadevi case [1981 (2) SCC 732]

To summarise it would be appropriate to tell that the decision of the court can be said to be per incuriam, if any provision of a statute are rule or Precedent, was not brought up relevant factor for the consideration of the court and an order was passed, it would be called as per incuriam.

In service matters, litigants will have to exhaust Court of first instance, i.e Central Administrative Tribunal- Cannot approach High Court ignoring jurisdiction of CAT:

Petitioner assails the empanelment dated 18.02.2019 made by UPSC and subsequent appointment of Respondent No. 4 as DGP, State of Haryana vide Appointment Order dated 18.02.2019 initially before the Supreme Court under Article 32 of Constitution of India. Supreme Court vide order dated 25.03.2019 disposed of the writ petition holding that “the petitioner may approach the jurisdictional High Court, if so advised”. Thereafter, the petitioner filed present WP before the High Court.

At the outset, respondent UPSC raised an objection to the maintainability of the present petition. It is submitted that IPS is an All India Service, and thus Petitioner is amenable to the jurisdiction of Central Administrative Tribunal. The Court of ‘first instance’ for ‘service matters’ in light of the provisions of Administrative Tribunals Act, 1985 is the Central Administrative Tribunal, as held by the Constitution Bench of the Supreme Court in *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261. Reliance is placed specifically on Section 14 (1) of the Act in this regard.

Reliance is also placed on the judgement of the Supreme Court in *Kendriya Vidyalaya Sangathan v. Subhas Sharma*, (2002) 4 SCC 145, where the Supreme Court, relying on *L. Chandra Kumar (supra)*, held that the High Court erred in law in directly entertaining the writ petition concerning service matters of employees of Kendriya Vidyalaya, as these matters directly come under the jurisdiction of the Central Administrative Tribunal.

Petitioner draws the attention of the Court to the order dated 25.03.2019 passed by the Supreme Court contending that the Supreme Court granted liberty to the Petitioner to approach the ‘jurisdictional High Court’ and as office of UPSC is located within the Territorial jurisdiction of this Court, the jurisdictional High Court is Delhi High Court. Since the present petition has been filed in terms of the liberty granted by the Supreme Court and thus it is not open to the Respondents to raise any objection to its maintainability. Without prejudice to the said contention, it was also argued that existence of an alternate remedy is not a bar in entertaining a petition by a Writ Court and is merely a rule of self-imposed limitation.

Admittedly, Petitioner is a member of an All India Service, which is covered under S.14(1)(b) (i) of the Act. S.14(1)(b)(i) of the Act provides

that the Central Administrative Tribunal shall exercise on and from the appointed day, all the jurisdiction, power and authority exercisable immediately before that day, by all Courts in relation to all service matters concerning a member of any All India Service. Section 3(q) of the Act defines ‘Service Matters’ as all matters relating to conditions of a service and includes matters with respect to tenure, confirmation, seniority, promotion etc.

The Constitution Bench of the Supreme Court in *L. Chandra Kumar* laid down that the Tribunals created pursuant to Article 323-A or under Article 323-B of the Constitution of India will continue to act as only Courts of ‘first instance’ in respect of the areas of law for which they have been constituted. Supreme Court categorically observed that it will not be open for litigants to directly approach the High Court even in cases where there is a challenge to the vires of statutory Legislation, by overlooking the jurisdiction of the concerned Tribunal, with a cautious caveat that the Tribunal shall not entertain a challenge regarding the vires of the Parent Statute.

The principles laid down in *L. Chandra Kumar* are binding on this Court in view of Article 141 of the Constitution of India. Though jurisdiction conferred on High Courts under Article 226 of the Constitution of India is an inviolable basic framework of our Constitution, with respect to service matters of the employees covered under the Act, High Courts cannot exercise jurisdiction in the first instance. As enunciated by the Supreme Court, all decisions of the Tribunal are subject to scrutiny by a Division Bench of the concerned High Court and it is at this stage that High Court exercises its power of Judicial Review. After the authoritative pronouncement of the Constitution Bench of the Supreme Court, High Court cannot entertain the present petition and remedy of the Petitioner lies only before the Central Administrative Tribunal.

The High Court further held that the order of the Supreme Court passed on 25.03.2019, relied upon heavily by the petitioner, has to be read and understood in the light of the judgement in *L. Chandra Kumar*, to mean a High Court exercising power of judicial review over the order of the Tribunal, having territorial jurisdiction in the matter. Therefore, the contention of the Petitioner that the Supreme Court intended to confer jurisdiction upon this Court, which it does not have, cannot be sustained. [W.P.(C) 3334/2019 PRABHAT RANJAN DEO versus UPSC AND Ors DOJ. 13.07.2020, Delhi High Court]

YOURS LEGALLY

Challenge to selection after participation: Possible, if glaring illegalities crept in

Courts have many a times held that it is not permissible to challenge a selection procedure after participating in it and failing. However, the Supreme Court has carved out an exception to this general rule in this case.

The brief facts are that the Haryana Staff Selection Commission (HSSC) had invited applications for various posts enumerated in different categories, including Physical Training Instructor (PTI). Notification issued on 28.12.2006 stated that the written examination comprising 100 MACQ will be held on 21.01.2007 and the minimum qualifying mark was 50% for General Category and 45% for SC/BC. Notification further proposed Viva-voce for 25 marks to the extent of thrice the vacancies. The written examination was held on 21.01.2007.

On 01.02.2007 the HSSC issued notification cancelling the written examination held on 21.01.2007 on the grounds of malpractices and cheating. Another notice dated 11.06.2008 was issued by the HSSC re-notifying the written examination on 20.07.2008. However, before the written examination could take place, another notice was issued by the HSSC cancelling the written examination to be held on 20.07.2008. Another notice dated 11.07.2008 was published by the HSSC to shortlist the candidates for interview. The notice mentioned that HSSC had decided to shortlist eight times candidates of the advertised post in the respective category for interview on the basis of essential academic advertised qualification.

On 18.07.2008, the interview schedule was published by the HSSC wherein Interview was notified from 02.09.2008 to 17.10.2008. 15,582 candidates appeared in the interview. Although the interview was completed in the year 2008 itself, the HSSC could declare the result of the selection for 1983 posts after one and half years only on 10.04.2010 which was published on 11.04.2010. HSSC granted 60 marks for academics and 30 marks for viva-voce. The select list dated 10.04.20 was challenged on various grounds through many WPs based on the information obtained under RTI Act. It was alleged therein that some of the candidates have been selected and appointed who did not possess the requisite qualification of certificate in Physical Education conducted by Haryana Education Department or an equivalent qualification recognized by Haryana Education Department. The petitioners further pleaded that it was not proper to change the criteria subsequently, to get the desired result and in order to bring certain candidates within the zone of selection to grant them undue benefits. The writ petitioners further alleged that neither any rationale criteria nor merit was considered. Entire selection appears to be a fraud played upon the general public. 25 marks were mentioned for viva-voce but some selected candidates were awarded more than 25 marks. The Single Judge of the HC allowed the WPs, where selected candidates were impleaded. The HSSC was ordered to hold fresh selection within 5 months. The DB upheld the order of the

Single Judge, following which the issue reached the Apex Court through SLPs filed by the selected candidates as well as by the HSSC and the State of Haryana.

On behalf of the selected candidates-appellants, it was argued that the respondents had participated in selection without any demur or protest, hence, they were not entitled to challenge the selection after having been declared unsuccessful. Further, criteria for selection was uniformly applied to all the candidates and respondents having not challenged the criteria of selection cannot be allowed to challenge the criteria after declaration of the select list. The HC committed error in accepting the grounds of challenge that those candidates who secured good marks in Academics were deliberately given less marks in viva-voce so that they may go out of select list. The appellants are now over age and having worked for about 10 years, at this stage, they cannot be displaced.

The respondents argued that writ petitioners were unaware of the criteria which was to be applied by the HSSC in the selection and they came to know about the criteria of 60 marks for Academics Qualifications and 30 marks for Interview only by final result dated 10.04.2010 when it was mentioned in the final result. The written examination which was re-notified on 11.06.2008 was not proceeded with without any valid reason. The High Court found out from the original records that those candidates who were meritorious as per the qualification and academic marks were deliberately given marks ranging from 7 to 13 so that they may go out of the Select list. Those candidates who had poor academic records were given marks in interview ranging from 18 to 28 so that they may get selected.

The Apex Court concluded that the HSSC is empowered to fix the criteria for selection, proceeded to decide other aspects. It was held, that the writ petitioners who had participated in the selection are not estopped from challenging the selection. The challenge was possible only after 10.04.2010, after the declaration of final results, when the selection criteria was also made public. It was further held that the decisions to change the selection criterion published on 28.12.2006 were arbitrary, since it had the effect of downgrading the merit in the selection. The HSSC being a multi-member body should have taken all decisions by itself, but not by the Chairman alone and hence his decisions unsustainable. The decision dated 03.08.2008 was never taken on that date and was prepared subsequent to the declaration of the results when the Single Judge asked for criteria of the selection. The High Court's observation about less marks allotment to meritorious candidates was upheld by the Supreme Court. In the result, the Apex Court ordered to conclude the entire selection process as per the criterion fixed on 28.12.2006 within 5 months after the completion of the present lockdown. The candidates who worked based on the interim order were exempted from refunding the salary paid etc. [Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors. CA No. 2103/2020 and other tagged CAs. DOJ – 08.04.2020.]

B.R.R.Naidu, CLA/Con./SCR

TREATISE ON

The Arbitration & Conciliation Act, 1996

Contd.. from last issue:

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

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

A three member bench of Supreme Court in *M/s. Mayavti Trading Pvt. Ltd. Vs. Pradyut Deb Burman* [Civil Appeal No. 7023 of 2019 arising out of SLP (Civil) No. 8519 of 2019, September 05, 2019] observed that a reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in *SBP & Co. and Boghara Polyfab* required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator. The Supreme Court, therefore, held that this being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the exam-

ination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment *Duro Felguera, S.A. In Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729]*, the Supreme Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act.

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

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

N. Murali Krishna, Sr.Law Officer/HQ

JOKE

The lawyer's son wanted to follow in his father's footsteps, so he went to law school. He graduated with honors, and then went home to join his father's firm. At the end of his first day at work he rushed into his father's office, and said, "Father, father, in one day I broke the accident case that you've been working on for ten years!"

His father responded: "You idiot, we could live on the funding of that case for another ten years!"