Lex Info

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(from Law Branch, South Central Railway)

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Legal Maxim

Nolle prosequi – A formal notice of abandonment by a plaintiff or prosecutor of all or part of a suit.

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Do you have any case law/case study to be shared with other railwaymen?

Articles/write-ups on legal issues relevant to railways' working are invited from officers/ staff including from other zonal railways/ production units;

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

ABC OF ACTS

Public Premises (Eviction of Unauthorized

It is an Act to provide for the eviction of unauthorised occupants from public premises and for certain incidental matters. It extends to the whole of India. The Act came into force on 6th September 1958 and Sec. 11, 19 & 20 came into the force on 23rd August 1971 when the Act was published in the gazette & Act known as Public Premises (Eviction of Unauthorized Occupants) Act 1971.

Public Premises [S.2(e)]. The property which belongs to the Central Government including building garden, open land etc.

Estate Officer [Sec.29(b)] – An officer appointed as such by the Central Govt. under Sec. 3 of the Act. Central Govt. by the notification in the official gazette appoints the gazetted officer as an Estate Officer to exercise all the powers conferred and perform the duties imposed on Estate Officer. He is also quasi-judicial body. Applicants before the Estate Officer are only Govt. authorities and they file the application for eviction, recovery of rent etc. of the public property. Respondent is the person who is in possession of the Government property unauthorizedly by trespassing / encroachment behind the permissible period. Complaint is the complaint / application filed by the applicant in the prescribed proforma before the Estate Officer for the eviction or recovery of rent of the public property. This is filed by the applicant after the departmental remedies are over and the premises not vacated by the occupied person. Railway Board vide its Notification issued under Letter No.82/W.2/14/4 dated 08.11.1985, Nominated the Additional Divisional Railway Managers over South Central Railway to be the Estate Officer in South Central Railway and shall exercise the powers conferred and perform the duties imposed on the Estate Officer.

Notice(Sec.4)- After scrutinizing the application if the Estate Officer is of an opinion that any persons who are in unauthorized occupation of any public premises and that they should be evicted, the estate officer should issue notice in the manner hereinafter provide a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made. Notice should cover the points viz. (1) It shall call upon all the persons concerned to show cause, (2) It must specify the grounds, (3) It must give 7 days' time to show cause, (4) It must call upon the person to produce evidence, (5) It must be properly served and (6) It must be in the proforma given in Form "B.

Hearing- (1) Opportunity of personal hearing shall be given, (2) Minimum three hearings should be given, (3) Roznama (i.e. Register of Daily Proceedings) should be maintained, (4) Last opportunity with summons shall be given before deciding the matter in presence of respondents or ex-party and (5) Rule of natural justice to be followed. Summons to be served on the respondents and applicants time to time or attending the matter and producing the evidence.

Passing of orders (Sec 5)– Estate Officer after hearing both the parties and after scrutinizing the records and evidence produced by the parties pass the appropriate order recording all the grounds and reason for satisfaction and directions for vacation.

Order covers the things viz. Identity of Public Premises, Name of the unauthorized occupant, Date of unauthorized occupation, Reasons for satisfaction, Direction for vacation, Date of vacation and Primary Intimation of use for force in case of forceable vacation.

Disposal of property left on public premises by unauthorized occupants (Section-6) - Where any persons have been evicted from any public premises has been taken and after publishing the notice in at least one newspaper having circulation in the locality, remove or cause to be removed or dispose of by public auction any property remaining on such premises.

Power to require payment of rent or damages of public premises (Section-7) - Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

Where any person is, or has at any time been, in unauthorized occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises if any may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order.

(to be contd… in next issue)

V. Appa Rao, CLA, GM/Office/SCR

RTI Series

Overriding effect of Section 8(2) of the RTI Act:

Section 8 (2) states: "Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests." Sub-section 8(2) overrides the ten exemptions provided under Section 8 (1). In fine, if the PIO is of the opinion that public interest warrants revealing / furnishing of information, then the protection provided under Section 8 (1) (a) to (j) can be ignored.

Some sub-sections cannot be invoked beyond 20 years of occurrence of event or matter:
Section 8(3) of the Act lays down: "Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section". This sub-section means that the exemptions under sub-section 8 (1) (a) (c) & (i) only can survive beyond 20 years period from the date of occurrence, event or matter which is the subject matter of the RTI request. In other words, the exemptions under all other 7 sub-sections cannot be invoked by a PIO, if the subject matter of RTI request pertains to an occurrence, event or matter happened 20 years before the date of RTI request.

Section 9: "**Grounds for rejection to access in certain cases** — Without prejudice to the provisions of section 8, a Central Public Information Officer or State Public Information Officer, as the case may be may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State." This Section has been incorporated to avoid breach of copyright of a private person and thus to comply with various provisions of the Copyright Act, 1957.

Institute of Secretariat Training & Management under the DoP&T had compiled "Important decisions of Central Information Commission" in July 2010. A useful extract from the said compilation is placed below for better understanding of the nature of exemptions under Section 8 & 9:

"Exemptions under Section 8 and 9 of the RTI Act can be divided into two types: **Absolute exemptions:** Exemptions which are not subject to public interest test. Section 9 is the only absolute exemption.

Qualified exemptions: Exemptions which are subject to public interest test. All the exemptions under the section 8(1) are qualified exemptions. Here, the P.A. must consider whether there is greater public interest in disclosing the information or withholding the information (popularly called – balancing the public interest).

Qualified exemptions can be further divided into –

Class exemptions: Section 8 (1) (b), (e), (f), (i) contain these exemptions as these provisions exempt all information falling within a particular category. Exemptions in these classes assume that disclosure of information of a certain kind, laid out in the section, is harmful. For whole classes of information some sort of harm is presupposed and there is no requirement on the to show what that harm might be. Here the P.A. need not demonstrate any harm but simply show that the information is exempted under these sub-sections.

Prejudice-based exemptions: Section 8(1) (a), (c), (d), (g), (h),(j) contain these exemptions. These exemptions contain the phrases – "would harm", "would prejudicially". The word 'prejudice' is not defined in the Act. In legal terminology, prejudice is commonly understood to mean 'harm'. While the likelihood of prejudice may not be very high, it should not be negligible. In other words, prejudice need not be substantial, but it be more than trivial. The degree of prejudice is not specified, so any level of prejudice might be argued. However, the less significant the prejudice is shown to be, the higher the chance of the public interest falling in favour of disclosure. Whether prejudice exists is matter of fact to be decided on a case by case basis, considered only to the extent to which a disclosure harms the purpose of the exemption.

Time limited exemptions: Section 8(3) imposes time limit on exemptions. Section 8(1) b, d, e, f, g, h, j are time limited exemptions, which are not valid exemptions after 20 years from the date of creation of the records. It is implied that Section 8(1) (a), (c), (j) are not time limited exemptions. This means that only these three out of the ten exemption clauses are available, if the information is over 20 years."

The CIC has categorically held in S.R. Pershad Vs. Directorate General of Supplies & Disposals [Appeal No.37/ICPB/2006. DOO – 26.06.2006] that the information which relates to a period prior to 20 years needs to be furnished. The CIC observed as follows:

"5. Further, the public authority has erred in interpreting Section 8(3) of the Act to state that since some of the information related to the period prior to 20 years, the same need not be furnished. Section 8(3) is part of Section 8, which deals with 'exemption from disclosure of information". Section 8(1) specifies classes of information which are exempt from disclosure. What Section 8(3) stipulates is that, 3 the exemption u/s 8(1) cannot be applied if the information sought related to a period prior to 20 years except those covered in Section clauses (a), (c) and (i) of sub-section 8(1). In other words, even if the information sought is exempt in terms of other subclauses of sub-section (1) of Section 8, and if the same relates to a period 20 years prior to the date of application, then the same shall be provided. In the present case, since part of the information sought, even though related to a period prior to 20 years, relate to notifications, DGS&D is bound to furnish the same, if the same is available with it. It is also stated by the CPIO that the information sought relates to policy matters not dealt with in the administration of the Directorate. What the appellant seeks is only copies of the notification and, therefore, the question of the same being related to policy matter does not arise."

M.K. Shaji, CLA/RWF

Judgement:

Deposit of compensation by government in treasury, if deemed as payment to landowner in terms of Section 24(2) Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013-

After considering the issues at length, the larger bench has unanimously passed the following culling out the judgement:

1. Under the provisions of Section 24(1)(a) in case the award is not made as on 1.1.2014 the date of commencement of Act of 2013, there is no lapse of proceedings. Compensation has to be determined under the provisions of Act of 2013.

2. In case the award has been passed within the window period of five years excluding the period covered by an interim order of the court, then proceedings shall continue as provided under Section 24(1)(b) of the Act of 2013 under the Act of 1894 as if it has not been repealed.

3. The word 'or' used in Section 24(2) between possession and compensation has to be read as 'nor' or as 'and'. The deemed lapse of land acquisition proceedings under Section 24(2) of the Act of 2013 takes place where due to inaction of authorities for five years or more prior to commencement of the said Act, the possession of land has not been taken nor compensation has been paid. In other words, in case possession has been taken, compensation has not been paid then there is no lapse. Similarly, if compensation has been paid, possession has not been taken then there is no lapse.

4. The expression 'paid' in the main part of Section 24(2) of the Act of 2013 does not include a deposit of compensation in court. The consequence of non-deposit is provided in proviso to Section 24(2) in case it has not been deposited with respect to majority of land holdings then all beneficiaries (landowners) as on the date of notification for land acquisition under Section 4 of the Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. In case the obligation under Section 31 of the Land Acquisition Act of 1894 has not been fulfilled, interest under Section 34 of the said Act can be granted. Non-deposit of compensation (in court) does not result in the lapse of land acquisition proceedings. In case of non-deposit with respect to the majority of holdings for five years or more, compensation under the Act of 2013 has to be paid to the "landowners" as on the date of notification for land acquisition under Section 4 of the Act of 1894.

5. In case a person has been tendered the compensation as provided under Section 31(1) of the Act of 1894, it is not open to him to claim that acquisition has lapsed under Section 24(2) due to non-payment or non-deposit of compensation in court. The obligation to pay is complete by tendering the amount under Section 31(1). Land owners who had refused to accept compensation or who sought reference for higher compensation, cannot claim that the acquisition proceedings had lapsed under Section 24 (2) of the Act of 2013.

6. The proviso to Section 24(2) of the Act of 2013 is to be treated as part of Section 24(2) not part of Section 24(1)(b).

7. The mode of taking possession under the Act of 1894 and as contemplated under Section 24(2) is by drawing of inquest report/memorandum. Once award has been passed on taking possession under Section 16 of the Act of 1894, the land vests in State there is no divesting provided under Section 24(2) of the Act of 2013, as once possession has been taken there is no lapse under Section 24(2).

8. The provisions of Section 24(2) providing for a deemed lapse of proceedings are applicable in case authorities have failed due to their inaction to take possession and pay compensation for five years or more before the Act of 2013 came into force, in a proceeding for land acquisition pending with concerned authority as on 1.1.2014. The period of subsistence of interim orders passed by court has to be excluded in the computation of five years.

9. Section 24(2) of the Act of 2013 does not give rise to new cause of action to question the legality of concluded proceedings of land acquisition. Section 24 applies to a proceeding pending on the date of enforcement of the Act of 2013, i.e., 1.1.2014. It does not revive stale and time-barred claims and does not reopen concluded proceedings nor allow landowners to question the legality of mode of taking possession to reopen proceedings or mode of deposit of compensation in the treasury instead of court to invalidate acquisition.

[Indore Development Authority v. Manoharlal and Ors, S.L.P. (C) NOS.9036-9038 OF 2016) 5 -Judge Bench 06-03-2020, (2020) 8 SCC 129]

K. Gopinath, CLA, GM/O/SCR

Difference between Fact-in-issue and Relevant Fact

"Fact-in-issue" has been defined under Section 3 of Indian Evidence Act as :-
"The expression "fact-in-issue" means and includes - any fact from which, either by itself or in connection with other facts, the existence, non- existence, nature or extent of any right, liability or dis ability, asserted or denied in any suit or proceedings necessarily follows."
Explanation : Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any court records an issue of fact, facts asserted or denied in the answer to such issue is a fact in issue. Two things are relevant for determining whether a fact is in issue or not viz. (i) The fact should be in dispute between the parties and (ii) The fact should touch the question of right or liability. A is accused of the murder of B. At this trial the following fact may be in issue, viz. (i) that A caused B's death; (ii) that A intended to cause B's death; (iii) that A had received grave and sudden provocation from B; (iv) that A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

The Act defines the terms `Fact' and `Relevant' separately, Section 3 defines "*Fact means and includes* - (i) anything, state of things, or relation of things, capable of being perceived by the senses (Physical fact); (ii) any mental condition of which any person is conscious Psychological facts);
Relevant facts - Section 3 of the Indian Evidence Act, 1872 defines the word relevant as follows:
One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. The word `relevant' means that any to facts to which it is applied are so related to each other that according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or existence or non- existence of the other. In short, relevant facts are facts so connected with each other as to prove or disprove the facts in issue. Relevant facts are not themselves issue, but are foundations of inference regarding them.

Definition of the word `relevant' is nowhere provided in the Evidence Act. It only lays down that a fact becomes relevant only when it is connected relevancy of facts. A fact in order to he a relevant fact must be connected with the facts in issue or with any other relevant fact in any of the ways referred to in Sections 5 to 55 of the Evidence Act, 1872. A fact not so connected is not relevant fact.

K. Gopinath, CLA, GM/O/SCR

FAQ What is a leading question?

Leading Question : Section 141 of Evidence Act provides that "any question suggesting the answer which the person putting it or wishes or expects to receive is called `leading question'.

So a question is said to be leading one when it indicates to the witness the real and supposed fact which the examiner expects or desires to be confirmed by the answer. For example, is it right that you have seen the occurrence? You must have seen Ram being murdered by Shyam? are examples of leading question. Rule of evidence as to leading question is provided in Section 142 which says that leading question must not be asked in examination- in-chief or in re-examination except with the permission of the court, however as provided in Section 143 of Evidence Act, leading question can be asked in cross examination.

In Verkey Josph v. State 1993 Criminal Law Journal 2010 (SC) Supreme Court observed that the question which suggests to a witness, the answer which the prosecution expects, must not be allowed unless the witness is declared hostile, with the permission of court. A prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely `yes' or `no' will give the evidence which the prosecutor wishes to elicit. The witness must account for, himself what he had seen."

K. Gopinath, CLA, GM/O/SCR

KNOW OUR CONSTITUTION

Article-38 : State to secure a social order for the promotion of welfare of the people

1. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
2. The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.]

Know the Labour Law Reforms:

The Industrial Relations Code 2020

(Part- I)

The Industrial Relations Code, 2020 received the President's assent on 28.09.2020 along with the Occupational Safety, Health and Working Conditions Code, 2020 and the Code on Social Security, 2020. The Government of India is yet to notify the effective date of the Codes. The Rules related to the Codes are yet to be published. The IR Code subsumes and amends the acts viz. The Industrial Disputes Act, 1947; The Trade Unions Act, 1926 & The Industrial Employment (Standing Orders) Act, 1946.

Amendments to the definitions:

Worker: Working journalists, sales promotion employees and supervisors drawing less than Rs.18000/- wages have been brought under the ambit of the definition.

Industry: The new definition excludes - Institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service; or any activity of the appropriate Government relatable to the sovereign functions of the appropriate Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or any domestic service; or any other activity as may be notified by the Central Government. From the list of exceptions under the ID Act, several other establishments such as hospitals, educational, scientific institutions etc. have been withdrawn.

Industrial Dispute: This definition has been widened to include any dispute or difference between an individual worker and employer connected with, or arising out of any discharge, dismissal, retrenchment or termination of such worker.

Strike: The concerted casual leave on a given day by fifty per cent or more workers employed in an industry now comes under "strike".

Employer: Expanded to include - In relation to an establishment which is a factory, the occupier of the factory as defined in section 2(n) of the Factories Act, 1948 and, where a person has been named as a manager of the factory under section 7(1)(f) of such act, the person so named; In relation to any other establishment, the person who, or the authority which has ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager or managing director, such manager or managing director; Contractor; and Legal representative of a deceased employer.

Fixed Term Employment: A new term which means and refers to the engagement of a worker on the basis of a written contract of employment for a fixed period provided that: His/her hours of work, wages, allowances and other benefits shall not be less than that of a permanent worker doing the same work or work of similar nature;
He/she shall be eligible for all statutory benefits available to a permanent worker proportionately according to the period of service rendered by him/her even if his/her period of employment does not extend to the qualifying period of employment required in the statute; and
He/she shall be eligible for gratuity if he/she renders service under the contract for a period of one year.

Standing Orders

The provisions with respect to the standing orders shall apply to all industrial establishments with three hundred workers. The employers of such establishments are required to prepare standing orders on the matters listed out in the first schedule to the IR Code. The matter listed in the Schedule are given below:

- Classification of workers, whether permanent, temporary, apprentices, probationers, badlis or fixed term employment.
- Manner of intimating to workers periods and hours of work, holidays, pay-days and wage rates.
- Shift working.
- Attendance and late coming.
- Conditions of, procedure in applying for, and the authority which may grant leave and holidays.
- Requirement to enter premises by certain gates, and liability to search.
- Closing and reporting of sections of the industrial establishment, temporary stoppages of work and the rights and liabilities of the employer and workers arising therefrom.
- Termination of employment, and the notice thereof to be given by employer and workers.
- Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
- Means of redress for workers against unfair treatment or wrongful exactions by the employer or his agents or servants.
- Any other matter which may be specified by the appropriate Government by notification.

The Central Government is required to make model standing orders relating to conditions of service and other matters incidental thereto or connected therewith. Where an employer adopts a model standing order of the Central Government with respect to matters relevant to the employer's industrial establishment or undertaking, then such model standing order shall be deemed to have been certified and the employer shall forward the information in this regard to the concerned certifying officer in the manner as may be prescribed.

Grievance Redressal Committee- For resolution of disputes, every establishment employing 20 or more workers should have one or more grievance redressal committees and such committee should consist of equal number of members representing the employer and the workers chosen in a manner as may be prescribed. Further, the total number of members in such committee shall not exceed 10 and there shall be equal representation of women workers in the committee and such representation shall not be less than the proportion of women workers to the total workers in an establishment. The ID Act provided for grievance settlement authorities to bet set up in establishments employing a minimum of 50 workers. Further, it did not provide for equal representation of women as envisaged in the IR Code.

(……Part – II in next issue.)

M.K. Shaji, CLA/RWF

YOURS LEGALLY

Gratuity can be withheld for recovery of dues - Supreme Court

Rule 15 of RS (Pension) Rules 1993 deals with recovery and adjustment of Government or railway dues from pensionary benefits. Rule 15(4) empowers the Railway to recover (a) losses (including short collection in freight charges, shortage in stores) caused to the Government or the railway as a result of negligence or fraud on the part of the railway servant while he was in service; (b) other Government dues such as over-payment on account of pay and allowances or other dues such as house rent, Post Office or Life Insurance Premia, or outstanding advance and (c) non-Government dues.

The rule permits recovery on account of item (a) which cannot be made in terms of rule 8, and any recovery on account of sub-clauses items (b) and (c) that cannot be made from these even with the consent of the railway servant, the same shall be recovered from retirement, death, terminal or service gratuity which are not subject to the Pensions Act, 1871. It is permissible to make recovery of Government dues from the retirement, death, terminal or service gratuity even without obtaining his consent, or without obtaining the consent of the member of his family in the case of a deceased railway servant.

In Secretary, O.N.G.C. Ltd. And Anr vs V.U. Warrier on 20 April, 2005, (2005) 5 SCC 245 similar question arose before the Hon'ble Supreme Court as to whether ONGC can recover from his gratuity towards unauthorized occupation charges of official accommodation. The Apex Court considered Regulation 5 of ONGC and observed that in exercise of statutory powers under Section 32(1) of the Oil and Natural Gas Commission Act, 1959, regulations known as the Oil and Natural Gas Commission (Death, Retirement and Terminal Gratuity) Regulations, 1969 were promulgated. Regulation 5 reads as follows: "The appointing authority, or any other authority empowered by the Commission in this behalf shall have the right to make recovery of Commission's dues before the payment of the death-cum retirement gratuity due in respect of an officer even without obtaining his consent or without obtaining the consent of the members of his family in the case of the deceased officer, as the case may be."

The Supreme Court observing that regulations framed by the Commission under Section 32 of the Oil and Natural Gas Commission Act 1959 are statutory in nature and they are enforceable in a court of law, held that the above regulation leaves no room of doubt that ONGC has right to effect recovery of its dues from any officer without his consent from gratuity. It also cannot be said that the Commission had no right to withhold gratuity by deducting the amount which is found `due' to Commission and payable by the respondent towards penal charges for unauthorized occupation of the quarter. With reference to the Payment of Gratuity Act is concerned, the Court held that the said Act was not applicable to the respondent.

The ratio in the above judgement is affirmed by the Hon'ble Supreme Court in M/S STEEL AUTHORITY OF INDIA LTD. Vs RAGHBENDRA SINGH & ors, in Special Leave to Appeal (C) No(s). 11025/2020 dated 15.12.2020. The three member bench of the Supreme Court held that "we are of the view that if an employee occupies a quarter beyond the specified period, the penal rent would be the natural consequence and such penal rent can be adjusted against the dues payable including gratuity. This is so in view of the judgment in *Secretary, ONGC Ltd. v. V.U. Warrier* - (2005) 5 SCC 245 and the reliance placed in the impugned judgment on the case of *Ram Naresh Singh v. Bokaro Steel Plant* [Civil Appeal No.4740/2007] dated 31.03.2017 is misplaced as is not even a judgment but an order in the given facts of the case.

With reference to Railway is concerned, Railway Servants (Pension) Rules, 1993 is also statutory in nature having been promulgated under Article 309 of Constitution of India by the President of India. Further, rule 15 of the Rules is pari materia to Regulation 5 of ONGC regulations. Hence the ratio as affirmed by the Hon'ble Supreme Court that if an employee occupies a quarter beyond the specified period, the penal rent would be the natural consequence and such penal rent can be adjusted against the dues payable including gratuity is applicable to all the Railway cases. In addition to this, since RS (Pension) Rules, 1993 are statutory in nature, are enforceable in a court of Law as held by the Hon'ble Supreme Court, it is felt that this pleading can be put forth in making post retirement recoveries from the employees.

N. Murali Krishna, Sr.Law Officer/SCR

TREATISE ON Arbitration & Conciliation Act, 1996

Freedom of parties to agree on a place of arbitration: Section 20 of the A&C Act, 1996 deals with place of arbitration. However, there is a good amount of confusion as to the terminology used in the arbitration matters viz., (i) Place of arbitration; (ii) Seat of arbitration; and (iii) Venue of arbitration. Many times, the three terms are used as synonyms, but in fact the three terms have different meanings and connotations and create jurisdictional conundrums. Let us see what the Act provides for.

The Act empowers the parties to agree on the place of arbitration. However, if parties fail to enter into any agreement as to place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Further, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property, unless otherwise agreed by the parties.

The Hon'be Supreme Court had an occasion to deal with the matter in Bharat Aluminium Co. Vs Kaiser Aluminium Technical Service, Inc. [(2012) 9 SCC 552] and held that a plain reading of S. 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, S. 20(2) authorizes the tribunal to determine the place/seat of such arbitration. S. 20 (3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

However, problem arises in international commercial arbitrations, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) under the heading "The Place of Arbitration":-

"Place" of arbitration is the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.. In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties." The Apex Court held that this is the correct depiction of the practical considerations and the distinction between "seat" (S. 20 (1) and 20(2)) and "venue" (S. 20(3)).

It is further held that the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in S. 2 (1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. The provision in S. 2(1)(e) has to be construed keeping in view the provisions in S. 20 which give recognition to party autonomy. The legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under S. 17 of the Arbitration Act, 1996, the appeal against such an interim order under S. 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

(To be continued…)

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