



Lex Info

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(from Law Branch, South Central Railway)

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Articles/write-ups on legal
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Legal Maxim

Nunc pro tunc – Now for then. A ruling *nunc pro tunc* applies retroactively to correct an earlier ruling.

ABC OF ACTS**Public Premises (Eviction of Unauthorized Occupants) Act 1971.**

Contd. from last issue.....

Powers of Estate Officer (Section-8) - All the powers of Sec.5 of CPC 1908 are exercised by the Estate Officer when trying a suit in the matters viz. (a) Summoning and enforcing the attendance of any person and examining him on oath, (b) Requiring discovery and production of documents and (c) Any other matter which may be prescribed.

Appeal - As per Sec.9 of the Act (a) In case of an appeal in order under Sec.5 - within 12 days from the date of publication of the order under section (I) of that section. (b) In case of an appeal in order under section 5B on Sec 7 - within 12 days from the date of communication of the order (c) In case of an appeal in order under Section 5C - 12 days from the date of such order.

Under Sec.10 - Every order made by an estate officer or appellate officer under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Offences and penalty (Sec.11) - If any person unlawfully occupies any public premises, he shall be punishable with simple imprisonment for a term which may extend to six months, or with fine which may extend to Rs.5000, or with both. If any person who has been evicted from any public premises under this Act again occupies the premises without authority for such occupation, he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to Rs.5000, or with both. Any magistrate convicting a person under 9[sub-section (2)] may make an order for evicting that person summarily and he shall be liable to such eviction without prejudice to any other action that may be taken against him under this Act. Offences under section 11 to be cognizable and the Code of Criminal Procedure, 1973 (2 of 1974) is applicable to an offence under section-11 as if it were a cognizable offence.

Power to obtain information (Sec.12) - If the estate officer has reason to believe that any persons are in unauthorized occupation of any public premises, the estate officer or any other officer authorized by him in this behalf may require those persons or any other

person to furnish information relating to the names and other particulars of the persons in occupation of the public premises and every person so required shall be bound to furnish the information in his possession.

Under Sec.13, there is Liability of heirs and legal representatives in case of death of any person against whom any proceeding for the determination of arrears of rent or for the assessment of damages, etc.

Bar of jurisdiction (Sec.15)—No court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorized occupation of any public premises, or the removal of any building, structure or fixture or goods, cattle or other animal from any public premises under section 5A, or (c) the demolition of any building or other structure made, or ordered to be made, etc. actions as prescribed under the Act.

Protection of action taken in good faith (Sec.16)—No suit, prosecution or other legal proceeding shall lie against the Central Government or the [statutory authority] or the appellate officer or the estate officer in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

Power to make rules (Sec.18) -The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

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

KNOW OUR CONSTITUTION

Article 39 : The State shall, in particular, direct its policy towards securing—

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

RTI Series**RTI Act Series****Scope of Section 10:**

Section 10 of the RTI Act deals with “severability” and states that “access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.” Section 10 finds application when the RTI information sought contains information which are partly protected and partly revealable. In such cases the part information which is not immunised from disclosure has to be furnished to the RTI applicant. In such cases it is incumbent upon the PIO to inform the applicant that only part information has been provided after applying Section 10 duly supported by reasons. The applicant shall be informed of his right to appeal, along with calculation of fees.

The following decided cases will throw more light on Section 10:

In *Shri R.B. Sharma Vs. DGCEI, New Delhi*, (No. CIC/AT/A/2007/00949 dated 09.10.2007) the appellant therein sought all documents including file noting pertaining to sanction of reward to the applicant. The CPIO denied the information u/s 8(1) (g) of the RTI Act, contending that the disclosure would expose the source of information thus endangering the life and physical safety of the officers who handled and processed the matter. The appellate authority upheld the decision of the CPIO. The CIC held that the appellant may be allowed inspection of the relevant file by the respondent with the proviso that the respondents shall be free to apply the severability clause under Section (10) (1) of the RTI Act withhold form disclosure that part of the information in the file which is unconnected with the appellant.

In the case of *D.P. Maheshwari vs. CBI* (Appeal No. CIC / WB / A /2008 /0269 and 270, dated 25.8.2009), the appellant sought the copy of the SP, CBI's report. In response to the application, SP, CBI responded that SP's report is a confidential document and hence exempted under 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. First appellate authority 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 required 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 had details of personal information of many persons and its disclosure would amount to invasion of privacy and thus qualify for exemption under Section 8(1)(j).

However, the CIC held that the plea of exemp-

tion under Section 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 under Section 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 Section 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 Sub-Section 1 of Section 10 of the RTI Act.

In *R.P. Aspal Vs. CPIO, NTC Ltd, New Delhi* (CIC/NTCLD/A/2018/172527/02854.DOO- 11.02.2020) the appellant had sought a copy of the inquiry/ investigation report wherein it was concluded that no excess payment was made to Sri D.P. Singh, Advocate, Allahabad. From a perusal of the relevant case records, it was noted by the CIC that the reply of the CPIO dated 30.08.2018 in which the information was denied u/s 8(1) (j) of the RTI Act was not proper. It was brought to the notice of the CPIO that the appellant was entitled to know the final outcome of his complaint and this should be provided to him since it was his complaint which was considered and the question whether any action was taken or not is a separate issue. Based on the above observations, the CPIO was directed to provide a revised reply to the appellant in the form of the final status of the said complaint or a summary giving a brief conclusion. The information was directed to be provided after applying the due procedure as envisaged u/s 10 of the RTI Act, thereby masking the names, designations and addresses etc. of all the concerned third parties mentioned in the said documents. This direction was to be complied with within a period of 10 days from the date of receipt of this order under intimation to the CIC.

In *Ashwin Shukla vs West Central Railway, Jabalpur* (CIC/VS/C/2015/900128. DOO – 09.12.2016), the CIC directed the respondents to provide information with regard to vigilance investigation conducted against the complainant and was completed, using severance clause under section 10 of the RTI Act and if so required, severe those parts which might compromise the sources of information and third party information.

In *Ram Chander Vs. Directorate Education, Government of NCT of Delhi, New Delhi* (CIC/AD/A/2012/000739. DOO – 21.03.2017), the Commission held that the service details of government employees were not completely exempt from disclosure under the provision of the RTI Act. Only those information (like details of nominees: deduction from monthly pay bills, insurance details etc.), disclosure of which might cause invasion of privacy of a third party has been decided to be withheld from disclosure, while other category of information i.e. service details (like, date of appointment, place of posting, details of increment in salary etc.) which are already in circulation or are available in the public domain, and are very much a part of a ‘service book’ of a government servant, have been allowed to be made available to the information seeker. The PIO shall furnish the present information (i.e. Copy of service book of Ms. Anita Satia, DDE, South) to the appellant after removing from it, under section 10(1) of the RTI Act, all the details which are personal to the third party.

M.K. Shaji, CLA/RWF

No adoption shall be valid unless it has been made in compliance with conditions mentioned in Chapter I of Hindu Adoptions And Maintenance Act, 1956

Undisputed facts of this case are that the Appellant is the daughter of the original Defendant's sister. The parents of the Appellant died when she was very young. As the Appellant was very young, she was brought by her grand-mother and given to the Respondent and her husband to be taken care of. The Appellant was brought up by the Respondent and her husband, Narasimhulu Naidu. School and College records and other documents that were filed in Court by the Appellant would show that the Respondent and her husband were shown as the parents of the Appellant. Eventually, the Appellant married and started living separately. After the death of Narasimhulu Naidu, the Respondent was residing in the suit schedule property and was in enjoyment of the properties of Narasimhulu Naidu. The request made by the Appellant for partition of the properties was turned down by the Respondent leading to the filing of the Civil Suit.

The only point that arises for consideration of the Supreme Court was whether the Appellant has proved that she has been adopted by the Respondent and Respondent's husband, and whether she is entitled to a declaration that she is the daughter of the Respondent and Narasimhulu Naidu, and whether the Appellant is entitled to partition of the properties belonging to Narasimhulu Naidu.

The Apex Court considered Section 6 of Hindu Adoptions and Maintenance Act, 1956 which prescribes the pre-requisites for a valid adoption. Which states that No adoption shall be valid unless – (i) the person adopting has the capacity, and also the right, to take in adoption, (ii) the person giving in adoption has the capacity to do so; (iii) the person adopted is capable of being taken in adoption; and (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

Further, Section 7 provides that the male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. The consent of his wife has been made mandatory by the proviso to Section 7. Section 9 deals with persons who are capable of giving a child in adoption. The other conditions for a valid adoption are stipulated in Section 11 of the Act of

1956. Section 11 (6) (vi) stipulates that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of his birth (or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption.

The Apex Court, therefore held that a plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the Act of 1956 is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in Sections 7 and 11 are the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption. The Appellant admitted in her evidence that she does not have the proof of the ceremony of giving and taking of her in adoption. Admittedly, there is no pleading in the plaint regarding the adoption being in accordance with the provisions of the Act. That apart, the Respondent who is the adoptive mother has categorically stated in her evidence that the Appellant was never adopted though she was merely brought up by her and her husband. Even the grand-mother of the Appellant who appeared before the Court deposed that the Appellant who lost her parents in her childhood was given to the Respondent and her husband to be brought up. She also stated in her evidence that the Appellant was not adopted by the Respondent and her husband. Therefore, the Appellant had failed to prove that she has been adopted by the Respondent and her husband Narasimhulu Naidu.

Though the Appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. Further, the Apex Court in *Ghisalal v. Dhapubai (Dead) by Lrs. & Ors.* [(2011) 2 SCC 298] held that the consent of the wife is mandatory for proving adoption. [**M.Vanaja vs M.Sarla Devi (Dead)**, CIVIL APPEAL NO.8814 OF 2010, on 6 March, 2020]

K. Gopinath, CLA, GM/O/SCR

Difference between

Liquidated & Unliquidated damages

FAQ

What are Void Contracts?

In contracts, parties might agree to pay a certain amount on breach of the contract. The provisions so created in the contract are known as liquidated damage. On the other hand, unliquidated damages are granted by the courts on the basis of an assessment of the loss or injury caused to the party suffering such breach of contract.

Section 74 of the Indian Contract Act, 1872 deals with liquidated damages, relating to stipulated damages. Thus, there has to be a breach of the contract in order for the plaintiff to claim damages. In cases where there may be a reasonable revocation of the contract without any breach of the terms of the contract, the claim for damages should not arise as there is no breach per se.

Liquidated damages are a pre-agreed amount of money that is set out in advance in the contract, that fixes the sum payable as damages if the contractor breaches the contract - typically by failing to complete the construction works by the completion date set out in the contract. Prior to entering into an agreement, the parties must mention any specific or unusual loss, if contemplated, in the contract. The types of losses and the extent to them must have been foreseeable before signing the contract. Although not necessary, it is advised that the losses be foreseeable.

Section 73 of the Indian Contract Act 1872 deals with actual damages resulting from infringement of the contract and the injury arising from such infringement which is in the nature of unliquidated damages since such damages are granted by the courts on the basis of an evaluation of the loss or injury caused to the party against which the infringement occurred. Damages that are claimed for losses unforeseeable are called Unliquidated Damages. These damages are commonly awarded for cases involving a breach of contract. These damages apply to any breach of contract that does not contain a liquidated damages clause. It can, however, be difficult to estimate the compensation amount to be claimed by the complainant since the amount is "unliquidated." Unliquidated damages are damages that are payable for a breach, the exact amount of which has not been pre-agreed. The advantage of unliquidated damages is that it allows for recovery of losses which may have been impossible to foresee or to estimate with any certainty before the breach. If the contract contains an applicable liquidated damages clause, the client is generally not permitted to disregard and claim unliquidated damages instead.

Section 2(g) of Indian Contract Act, 1872 defines 'Void agreement': An agreement not enforceable by law is said to be void.

Essential ingredients of a void contract are:

A contract is void when it is immoral, impossible, opposed to public policy, without consideration or when made with minor.

A void contract cannot be converted into a valid contract at the option of the parties. It is rigid in nature and *ab initio* void.

Anything obtained under a void contract cannot be validly transferred to a third party. When a contract is shown to be void it can create no legal rights.

Agreements void for uncertainty- Agreements, the meaning of which is not certain or capable of being made certain are void.

Illustrations:

- 1) A agrees to sell B "a hundred tons of oil". There is nothing whatever to show what kind of oil is intended. The agreement is void for uncertainty.
- 2) A agrees to sell to B "one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the Agreement void.

Agreements contingent on impossible events, void- Contingent Agreements to do or not to do anything, if an impossible event happens, are void whether the impossibility of the event is known or not to the parties to the Agreement at the time when it is made.

Illustrations:

- 1) A agrees to pay B Rs.1000/- if two straight lines should enclose a space. The Agreement is void.
- 2) A agrees to pay B Rs.1000/- if B will marry A's daughter C. C was dead at the time of the Agreement. The Agreement is void.

Void Contracts are:

Agreement without consideration (Sec 25), Agreement in restraint of Marriage (Sec 26), Agreement in restraint of Trade (Sec 27), Agreement in restraint of legal proceedings (Sec 28), Agreements void for uncertainty (Sec 29), Wagering agreements (Sec 30), Agreements to do impossible acts (Sec 56).

Know the Labour Law Reforms:**The Industrial Relations Code 2020****(Part– 2)****Constitution of Industrial Tribunals [Section 44]**

The IR Code provides for the constitution of one or more industrial tribunals and a National Industrial Tribunal to decide industrial disputes. The industrial tribunals shall be set up in place of the existing multiple adjudicating bodies under the ID Act such as the court of inquiry, board of conciliation, labour courts. Every industrial tribunal shall consist of two members to be appointed by the appropriate Government out of whom one shall be a judicial member and the other, an administrative member in place of only one judicial member presently. A Bench consisting of a Judicial Member and an Administrative Member shall entertain and decide the cases only relating to — (a) the application and interpretation of standing order; (b) discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen dismissed; (c) illegality or otherwise of a strike or lockout; (d) retrenchment of workmen and closure of establishment; and (e) Trade Union disputes, and the remaining cases shall be entertained and decided by the bench of the Tribunal consisting either a Judicial Member or an Administrative Member of the Tribunal.

Further, the Central Govt may by notification, constitute one or more National Industrial Tribunals [S 46] for the adjudication of industrial disputes which, in the opinion of the Central Govt, involve questions of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such disputes [S 54(1)]. The National Industrial Tribunal shall also consist of two members to be appointed by the Central Govt.

Power of Govt. to reject or modify tribunal awards

- ♦ IR Code provides the Govt to defer the enforcement of awards passed by the Tribunals in certain circumstances on public grounds of affecting national economy or social justice.
- ♦ The ID Act, 1947 had similar provisions. In 2011, the Madras High Court (agreeing with a 1997 Andhra Pradesh High Court judgement) struck down these provisions on constitutional grounds and held that the power to the executive to decline enforcing an award or to modify it, allows the executive to sit in appeal over the decision of the Tribunal, and therefore, violates the separation of powers between the executive and the judiciary, which forms a part of the basic structure of the Constitution.

Prohibition on Strikes and Lock-Outs

No worker can go on a strike without giving notice to the employer within a period of 60 days before striking; or within 14 days of giving such notice; or before the expiry of the date of strike specified in such notice; or during the pendency of conciliation proceedings; or 7 days after the conclusion of conciliation proceedings; or during the pendency of arbitration proceedings; or 60 days after the conclusion of arbitration proceedings; or during any period in which a settlement or award is in operation in respect of any matters covered by the settlement or award [S 62]. Similarly, no employer of an industrial establishment shall lock-out any of his/her work-

ers unless the conditions mentioned are met [S 63]. While the ID Act contained similar provisions for prior notice of strike and lock-out, and the same were applicable to public utility services.

Lay-off, Retrenchment and Closure

Under the ID Act, industrial establishments with more than 100 workers employed were required to obtain prior permission from the appropriate Govt to lay-off/retrench workers as well as in cases of closure of an industrial undertaking. The IR Code has waived off this requirement for industrial establishments such as mines, factories and plantations employing not less than 300 workers or such higher number as may be notified by the Govt [S 77]. However, it is not necessary to obtain prior permission in cases wherein such lay-off is due to shortage of power, natural calamity, and in the case of a mine, such lay-off is due to fire, flood, excess of inflammable gas or explosion [S 78(1)]. In the event the Govt does not communicate the order granting or refusing to grant permission to the employer within a period of 60 days from the date on which such application is made, the permission applied for shall be deemed to have been granted as applied for on the expiration of 60 days and the application shall be deemed to have been disposed of [S 78(5)].

Appointment of a Negotiating Union/Council [S 14]

The IR Code provides for a single negotiating union/council in an industrial establishment having a registered trade union for negotiating on such matters as may be prescribed. Where only one trade union of workers registered is functioning, then, the employer of such establishment shall, subject to such criteria as may be prescribed, recognize such trade union as the sole negotiating union of the workers. If more than one trade union is functioning, then, the union having 51% or more workers shall be recognized as the sole negotiating union of the workers. Further, if more than one trade union of workers are functioning in an industrial establishment, and no such trade union has 51% or more of workers, then, a negotiating council having not less than 20% of the total workers of that industrial establishment shall be constituted by the employer.

Worker Re-skilling Fund [S 83]

The IR Code introduces provisions for re-skilling of workers for the first time for those workers who have been laid-off so that they are able to secure employment again. Under IR Code, the fund shall consist of :

- ⇒ The contribution of the employer of an industrial establishment of an amount equal to fifteen days wages last drawn by the worker immediately before the retrenchment, or such other no. of days as may be notified by the Central Govt, for every retrenched worker in the case of retrenchment only; and
- ⇒ The contribution from such other sources as may be prescribed by the appropriate Govt.

The fund shall be utilized by crediting fifteen days wages last drawn by the retrenched worker to his account, within 45 days of retrenchment in the manner as prescribed.

Penalty for violation of rights of workers laid off for compensation, conditions for retrenchment, etc. will be fine of Rs.50,000 upto Rs.2 lakhs and in case of violation after conviction, the penalty will be fine of Rs.1 lakh upto Rs.5 lakh and/or imprisonment upto 6 months.

M.K. Shaji, CLA/RWF

YOURS LEGALLY

Direction of court “to consider” does not always be interpreted or understood as directing grant of relief sought in the representation/petition.

Many times, executives treat the direction of a court “to consider” means as an absolute direction to grant the relief asked for. However, what is the actual import of a direction “to consider” by a court of law is explained by the Hon’ble Supreme Court as follows:

13. We may, in this context, examine the significance and meaning of a direction given by the court to “consider” a case. When a court directs an authority to ‘consider’, it requires the authority to apply its mind to the facts and circumstances of the case and then take a decision thereon in accordance with law. There is a reason for a large number of writ petitions filed in High Courts being disposed of with a direction to “consider” the claim/case/representation of the petitioner/s in the writ petitions.

13.1) Where an order or action of the State or an authority is found to be illegal, or in contravention of prescribed procedure, or in breach of the rules of natural justice, or arbitrary/unreasonable/ irrational, or prompted by mala fides or extraneous consideration, or the result of abuse of power, such action is open to judicial review. When the High Court finds that the order or action requires interference and exercises the power of judicial review, thereby resulting in the action/order of the State or authority being quashed, the High Court will not proceed to substitute its own decision in the matter, as that will amount to exercising appellate power, but require the authority to ‘consider’ and decide the matter again. The power of judicial review under Article 226 concentrates and lays emphasis on the decision making process, rather than the decision itself.

13.2) The High Courts also direct authorities to ‘consider’, in a different category of cases. Where an authority vested with the power to decide a matter, fails to do so in spite of a request, the person aggrieved approaches the High Court, which in exercise of power of judicial review, directs the authority to ‘consider’ and decide the matter. In such cases, while exercising the power of judicial review, the High Court directs ‘consideration’ without examining the facts or the legal question(s) involved and without recording any findings on the issues. The High Court may also direct the authority to ‘consider’ afresh, where the authority had decided a matter without considering the relevant facts and circumstances, or by taking extraneous or irrelevant matters into consideration. In such cases also, High Court may not examine the validity or tenability of the claim on merits, but require the authority to do so.

13.3) Where the High Court finds the decision-making process erroneous and records its findings as

to the manner in which the decision should be made, and then directs the authority to ‘consider’ the matter, the authority will have to consider and decide the matter in the light of its findings or observations of the court. But where the High Court without recording any findings, or without expressing any view, merely directs the authority to ‘consider’ the matter, the authority will have to consider the matter in accordance with law, with reference to the facts and circumstances of the case, its power not being circumscribed by any observations or findings of the court.

13.4) We may also note that sometimes the High Courts dispose of matter merely with a direction to the authority to ‘consider’ the matter without examining the issue raised even though the facts necessary to decide the correctness of the order are available. Neither pressure of work nor the complexity of the issue can be a reason for the court, to avoid deciding the issue which requires to be decided, and disposing of the matter with a direction to ‘consider’ the matter afresh. Be that as it may.

13.5) There are also several instances where unscrupulous petitioners with the connivance of ‘pliable’ authorities have misused the direction ‘to consider’ issued by court. We may illustrate by an example. A claim, which is stale, time-barred or untenable, is put forth in the form of a representation. On the ground that the authority has not disposed of the representation within a reasonable time, the person making the representation approaches the High Court with an innocuous prayer to direct the authority to ‘consider’ and dispose of the representation. When the court disposes of the petition with a direction to ‘consider’, the authority grants the relief, taking shelter under the order of the court directing him to ‘consider’ the grant of relief. Instances are also not wanting where authorities, unfamiliar with the process and practice relating to writ proceedings and the nuances of judicial review, have interpreted or understood the order ‘to consider’ as directing grant of relief sought in the representation and consequently granting reliefs which otherwise could not have been granted. Thus, action of the authorities granting undeserving relief, in pursuance of orders to ‘consider’, may be on account of ignorance, or on account of bona fide belief that they should grant relief in view of court’s direction to ‘consider’ the claim, or on account of collusion/connivance between the person making the representation and the authority deciding it. Representations of daily wagers seeking regularization/absorption into regular service is a species of cases, where there has been a large scale misuse of the orders ‘to consider’.

[A.P.S.R.T.C. & Ors vs G. Srinivas Reddy & Ors on 24 February, 2006, Appeal (civil) 3424 of 2000]

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

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

Seat of arbitration – Continued from previous issue:

The seat of arbitration is a vital aspect of any arbitration proceedings. Significance of the seat of arbitration is that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award. The situs is not just about where an institution is based or where the hearings will be held. But it is all 12 about which court would have the supervisory power over the arbitration proceedings. In *Enercon (India) Limited and others v. Enercon GMBH and another* (2014) 5 SCC 1, the Supreme Court held that “the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the Seat normally carries with it the choice of that country’s arbitration/curial law”. It is well-settled that “seat of arbitration” and “venue of arbitration” cannot be used inter-changeably. It has also been established that mere expression “place of arbitration” cannot be the basis to determine the intention of the parties that they have intended that place as the “seat” of arbitration. The intention of the parties as to the “seat” should be determined from other clauses in the agreement and the conduct of the parties.

In the context of domestic arbitration, holding that once the “Seat” is determined, only that jurisdictional court would have exclusive jurisdiction, in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and others* (2017) 7 SCC 678, it was held that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. In a case where the seat of arbitration is Mumbai and Clause of agreement further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.” [Arbitration Petition No. 32/2018, *MANKASTU IMPEX PRIVATE LIMITED Vs AIRVISUAL LIMITED*, March 05, 2020]

Union of India v. Hardy Exploration and Production (India) INC (2018) 7 SCC 374, the ratio of the judgment postulates that a “venue” can become a “seat” only if – (i) no other condition is postulated; (ii) if a condition precedent is attached to the term “place”, the said condition/indicia has to be satisfied first for “venue” to be equivalent to “seat”. However, in *BGS Soma*, (Another 3 member Bench) held that the judgment in *Hardy Exploration* is contrary to the decision of the Constitution Bench judgment of this Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552 (BALCO) and therefore, cannot be considered good law.

A plain reading of Section 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, Section 20 (2) authorizes the tribunal to determine the place/seat of such arbitration. Section 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. The fixation of the most convenient “venue” is taken care of by Section 20 (3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. [*Bharat Aluminium Co. Vs Kaiser Aluminium Technical Service, Inc.* [(2012) 9 SCC 552]

However, in an international commercial arbitration, 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 seat of the arbitration remains the place initially agreed by or on behalf of the parties.” This is the correct depiction of the practical considerations and the distinction between “seat” (Section 20(1) and 20(2)) and “venue” (Section 20(3)). The distinction between “seat” and “venue” would be quite crucial in the event, the arbitration agreement designates a foreign country as the “seat”/“place” of the arbitration and also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings.

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