



ADVISOR:

Chandrima Roy
SDGM

Editor-in-Chief

N.Murali Krishna,
Sr.Law Officer

Editors:

M.V.Ramana,
Law Officer/

Asst. Editors:

K.Gopinath, CLA.
Shaji.M.K, CLA.
V.Appa Rao, CLA.

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:

Sr.Law Officer,
Law Branch, SCR,
3rd Floor,
Rail Nilayam,
Secunderabad,
PIN- 500025.
e-mail: loscrhq@gmail.com

Lex Info

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Legal Maxim

Qui sentit commodum, sentire debet et onus – It means he who receives advantage must also bear the burden.

ABC OF ACTS**The Negotiable Instruments Act, 1881**

Contd... from last issue..

Sections 138 to 142 provide for dishonour of cheques and provides for criminal penalties in the event of dishonour of cheques for insufficiency of funds.

Penalty for dishonour of cheque – The drawer, u/s 138, may be punished with imprisonment up to 2 years or with a fine up to twice the amount of the cheque or with both.

However, in order to attract the aforesaid penalties, the conditions to be satisfied are i) The cheque should have been dishonoured due to insufficiency of funds in the account maintained by him with a banker for payment of any amount of money to another person from out of that account. ii) The payment for which the cheque was issued should have been in discharge of a legally enforceable debt or liability in whole or part of it, and iii) The cheque should have been presented within 3 months from the date on which it is drawn.

Section 139 provides for the Presumption in favour of holder: It shall be presumed that the holder of a cheque received the cheque for the discharge of any debt or other liability.

Defence which may not be allowed in any prosecution under section 138 to Section 140- It shall not be a defence in a prosecution of an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment because of insufficiency of funds. Offences by Companies - Section 141 If the person committing an offence is a company, every person, who at the time the offence was committed and the company shall be jointly liable for the offence.

Cognizance of offences (Section 142 A) :

- 1) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
- 2) Time limit for filing the complaint is 1 month.
- 3) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

Place of Jurisdiction of court for the trial of offence: The offence u/s 138, which deals with the dishonor of cheque, shall be inquired into and tried only by a court within whose local jurisdiction - a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Power of Court to try cases summarily (Section 143): Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees.

Power to direct interim compensation (Section 143A):

(1). Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant— a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and b) in any other case, upon framing of charge. (2) The interim compensation under sub-section (1) shall not exceed 20% of the amount of the cheque. (3) The interim compensation shall be paid within 60 days from the date of the order or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque. (4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the complainant.

Offences to be compoundable (Section 147): Notwithstanding anything contained in the Code of Criminal Procedure, 1973 every offence punishable under this Act shall be compoundable.

Power of Appellate Court to order payment pending appeal against conviction (Section 148):

1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court: Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant u/s 143A.

2) The amount mentioned above shall be deposited within 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the appellant.

3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal: Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the Court on sufficient cause being shown by the complainant..

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

RTI Series

Contd... from last issue

16. (1) The State Chief Information Commissioner shall hold office for a term of five years from the date on which he enters upon his office and shall not be eligible for reappointment: Provided that no State Chief Information Commissioner shall hold office as such after he has attained the age of sixty-five years.

(2) Every State Information Commissioner shall hold office for a term of five years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such State Information Commissioner: Provided that every State Information Commissioner shall, on vacating his office under this sub-section, be eligible for appointment as the State Chief Information Commissioner in the manner specified in sub-section (3) of section 15: Provided further that where the State Information Commissioner is appointed as the State Chief Information Commissioner, his term of office shall not be more than five years in aggregate as the State Information Commissioner and the State Chief Information Commissioner.

(3) The State Chief Information Commissioner or a State Information Commissioner, shall before he enters upon his office make and subscribe before the Governor or some other person appointed by him in that behalf, an oath or affirmation according to the form set out for the purpose in the First Schedule.

(4) The State Chief Information Commissioner or a State Information Commissioner may, at any time, by writing under his hand addressed to the Governor, resign from his office: Provided that the State Chief Information Commissioner or a State Information Commissioner may be removed in the manner specified under section 17.

(5) The salaries and allowances payable to and other terms and conditions of service of—

(a) the State Chief Information Commissioner shall be the same as that of an Election Commissioner;

(b) the State Information Commissioner shall be the same as that of the Chief Secretary to the State Government: Provided that if the State Chief Information Commissioner or a State Information Commissioner, at the time of his appointment is, in receipt of a pension, other than a disability or wound pension, in respect of any previous service under the Govt. of India or under the Government of a State, his salary in respect of the service as the State Chief Information Commissioner or a State Information Commissioner shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent of other forms of retirement benefits excluding pension equivalent of retirement gratuity: Provided further that where the State Chief Information Commissioner or a State Information Commissioner if, at the time of his appointment is, in receipt of retirement benefits in respect of any previous service

rendered in a Corporation established by or under any Central Act or State Act or a Government company owned or controlled by the Central Govt. or the State Govt., his salary in respect of the service as the State Chief Information Commissioner or the State Information Commissioner shall be reduced by the amount of pension equivalent to the retirement benefits: Provided also that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment.

(6) The State Government shall provide the State Chief Information Commissioner and the State Information Commissioners with such officers and employees as may be necessary for the efficient performance of their functions under this Act, and the salaries and allowances payable to and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.

17. (1) Subject to the provisions of sub-section (3), the State Chief Information Commissioner or a State Information Commissioner shall be removed from his office only by order of the Governor on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the Governor, has on inquiry, reported that the State Chief Information Commissioner or a State Information Commissioner, as the case may be, ought on such ground be removed. (2) The Governor may suspend from office, and if deem necessary prohibit also from attending the office during inquiry, the State Chief Information Commissioner or a State Information Commissioner in respect of whom a reference has been made to the Supreme Court under sub-section (1) until the Governor has passed orders on receipt of the report of the Supreme Court on such reference. (3) Notwithstanding anything contained in sub-section (1), the Governor may by order remove from office the State Chief Information Commissioner or a State Information Commissioner if a State Chief Information Commissioner or a State Information Commissioner, as the case may be,— (a) is adjudged an insolvent; or (b) has been convicted of an offence which, in the opinion of the Governor, involves moral turpitude; or (c) engages during his term of office in any paid employment outside the duties of his office; or (d) is, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body; or (e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the State Chief Information Commissioner or a State Information Commissioner.

(4) If the State Chief Information Commissioner or a State Information Commissioner in any way, concerned or interested in any contract or agreement made by or on behalf of the Government of the State or participates in any way in the profit thereof or in any benefit or emoluments arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of sub-section (1), be deemed to be guilty of misbehaviour.

M.K. Shaji, CLA/RWF

Three recent orders of Supreme Court:

(1) Transfer to a particular place: Not employee's choice

In a very short order, while dismissing an SLP, the Supreme Court had observed: "It is not for the employee to insist to transfer him/her and/or not to transfer him/her at a particular place. It is for the employer to transfer an employee considering the requirement." [Namrata Verma v. The State of Uttar Pradesh & Ors. SLP No. 36717/2017. DOJ – 07.09.2021].

(2) CG Appointment to be based on policy at the time of death / application for CGA:

While considering the claim for compassionate ground appointment, the Apex Court observed: "It cannot be disputed that the appointment on compassionate ground is required to be made only as per the policy of the Government and only in a case where the eligibility criteria under the Scheme has been satisfied. It also cannot be disputed that the policy which was prevailing at the time when the deceased employee died/the application was made only is required to be considered." The Supreme Court had thus, dismissed the SLP. [Seema Kausar v. The State of Maharashtra & Ors. SLP No. 19252/2018. DOJ – 06.09.2021]

(3) Emergency Arbitration in India

The Arbitration and Conciliation Act, 1996 (ACA 1996) has no provision for emergency arbitration. However, this provision finds place in the rules framed by certain institutions which administer institutional arbitration. Emergency Arbitration ("EA") is an arbitration pursuant to an agreement between the parties, which shall be conducted by an arbitrator appointed by an arbitral institution on an urgent basis due to paucity of time or an urgency pertaining to subject matter of the dispute, to specifically deal with an application for interim relief which cannot wait for the constitution of an arbitral tribunal to deal with the substantive dispute between the parties. The main role of Emergency Arbitration comes into play in a situation, when there is no arbitral tribunal in place or in a situation where sufficient time would be wasted in setting up one, depending upon the requirements of an arbitration agreement or the institutional rules.

Recently the Supreme Court had to adjudicate whether a decision of the Emergency Arbitrator constituted an order of an arbitral tribunal under the ACA 1996 and whether an order passed under Section 17 (2) of the Act for enforcement of the award passed by an emergency arbitrator was appealable or not under the ACA 1996. The dispute was between Amazon and Future Retail Limited (FRL) of Biyani Group about control of Future Retail Limited. Amazon invested a sum of Rs 1,431 crores in Future Coupons Pvt. Ltd., based on the rights granted to

FCPL under the FRL Share Holders Agreement and the rights granted to Amazon. It was agreed between the parties that FRL could not transfer its retail assets without FCPL's consent (and thus Amazon's consent). FRL was also prohibited from transferring its retail assets to certain specifically restricted persons, which included the Reliance Group. However, later FRL, FCPL and other members of the Biyani Group entered into a transaction with the Reliance Group, enabling transfer of FRL's retail assets to the Reliance Group.

Amazon initiated emergency arbitration proceedings under the Singapore International Arbitration Centre Rules seeking emergency interim relief. On 25.10.2020, the FRL and other associates were restrained through interim order from taking any steps to complete the transaction with the Reliance Group. However, the Biyani Group proceeded with the implementation of the transaction with the Reliance Group. Biyani Group also sought interim order from Delhi High Court to restrain Amazon from writing to statutory authorities on the basis of the Emergency Arbitral Award. However, the Delhi High Court declined to grant any interim injunction.

On the other hand, Amazon sought enforcement of the EA Award. The Delhi High Court restrained the Biyani Group from implementing the transaction with Reliance Group and upheld that the EA Award was enforceable under the ACA 1996. However, the Division Bench of the Delhi High Court granted stay of the order of the single Bench. Thus, Amazon carried the matter to the Supreme Court challenging the Division Bench order.

The Apex Court noted that the Parliament had not implemented the recommendation of the 246th Law Commission Report about EA decisions by amending Section 2 (d) of ACA 1996. 2015 Amendment failed to incorporate the above change. However, it did not necessarily conclude that EA decisions are not enforceable in India. It relied on the Srikrishna Committee Report which concluded that EA decisions are enforceable in India upon proper interpretation of the ACA 1996. The Supreme Court further held that a party would be estopped, after having agreed to institutional rules and after participating in an EA proceeding, from subsequently contending that it could not be bound by an EA's ruling. The Apex Court further held that an order of a court enforcing an EA order, or an interim order of an arbitral tribunal would not be appealable under the Act. In the absence of a provision similar to S 17 of the Act for foreign seated arbitrations under Part II of the Act, an emergency award cannot be enforced under the Act and the only method available for enforcing the same would be to file a suit, the disposal of which could take a considerable time thereby rendering the emergency award futile.

M.K. Shaji, CLA/RWF

Difference between**Arbitration and Conciliation****FAQ****What are "issues " under the CPC 1908 and how they are framed ?**

Like arbitration, conciliation is also another means of settling disputes, yet the two differ in many aspects. Similarities between the two are:

- i) in both methods, a third person is chosen or nominated by the parties to resolve their disputes and
- ii) that both the arbitrator and conciliator are guided by the principle of objectivity, fairness, and justice. They conduct the proceedings in such a manner which consider appropriate and help to settle the dispute between the parties.

The person appointed for the process of arbitration is called arbitrator. Appointment of Arbitrator is done under provision of section 11 of Arbitration and Conciliation act 1996. While, the person appointed for the process of Conciliation is called conciliator. Appointment of conciliator is done under the provisions of section 64 of Arbitration and Conciliation act 1996. Some important points of difference between arbitration and conciliation are stated as follows:

- 1) Commencement of arbitration proceedings requires prior written agreement between the parties for redressal of disputes through arbitration. Hence, reference to arbitration is mandatory before approaching any court and is binding on the parties. On the other hand, conciliation proceedings start by sending a written invitation and a written acceptance thereof between the parties. No prior agreement is required. The invitation may be accepted or rejected by the other party as it has no binding effect, being an invitation only.
- 2) Arbitration is the process of adjudication by an arbitrator appointed by mutual consent of the parties *whereas* Conciliation is the process by which discussion between parties is kept going through the participation of the conciliator.
- 3) The method of conciliation is applicable mostly to existing disputes, while arbitration is available for existing as well as for future disputes.
- 4) The role of conciliator is to help and assist the parties to reach an amicable settlement of the dispute between both the parties. Whereas, arbitrator not only assists the parties but also adjudicates and resolves the dispute by making an arbitral award.
- 5) An arbitrator has the power to enforce his decision (Arbitration award). While a conciliator does not have power to enforce the decision taken by him.

Order 14 of the CPC 1908 deals with settlement of issues and determination of suit on issues of law on issues agreed upon. Rule 1 of Order of the CPC provides that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

According to sub-rule (4) of Rule 1 of Order 14 of the Code of Civil Procedure, issues are of two kinds :-

- (a) issues of fact
- (b) issues of law

Sub-rule (5) of Rule 1 of Order 14 of the CPC 1908 further provides that at the first hearing of the suit, the court shall, after reading the plaint and the written statements, if any, and (after examination under Rule 2 of Order X and after hearing the parties or their pleaders) ascertain upon what material propositions of fact or of law, the parties are at variance, and shall thereupon proceed to frame and record those issues on which the right decision of the case appears to depend.

According to Order 14 Rule 3 of the Code, the court may frame the issues from all or any of the following materials :-

- (a) allegations made on oath by the parties, or by any person present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party :

In addition to the said material the other material which may be considered in framing issues are the answer to interrogatories statements made by parties or their representatives, when examined under Order X of the CPC 1908 and examination of a witness or any document ordered to be produce under Order XIV of the CPC 1908. Rule 4 of order XIV of the CPC provides that where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issue to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is, by summons of other process.

Suo-Moto extension to limitations ends w.e.f. October 02, 2021 – SC orders dated 23.09.2021

Consequent upon the outbreak of COVID-19 pandemic Supreme Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws. Thus, on 23.03.2020, Supreme Court directed extension of the period of limitation in all proceedings before the Courts/Tribunals including Supreme Court w.e.f. 15.03.2020 till further orders. Later, considering the normalcy being restored, Hon'ble court issued an order on 08.03.2021 for ending the extension period w.e.f. 15.03.2021. However, in view of the second wave of COVID-19, Supreme Court had extended the period of limitation till further orders. Now, on a request for ending the relaxation of the period of limitation Hon'ble SC has disposed of the M.A. No.665 of 2021 on 23.09.2021 with the following directions:

In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

N. Murali Krishna, Sr.Law Officer/SCR

Know Our Constitution

Article 56. Term of office of President:

(1) The President shall hold office for a term of five years from the date on which he enters upon his office: Provided that

(a) the President may, by writing under his hand addressed to the Vice President, resign his office;

(b) the President may, for violation of the constitution, be removed from office by impeachment in the manner provided in Article 61:

(c) the President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(2) Any resignation addressed to the Vice President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the Speaker of the House of the People.

Article 57. Eligibility for re election:

A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re election to that office.

Article 58. Qualifications for election as President

(1) No person shall be eligible for election as President unless he

(a) is a citizen of India,

(b) has completed the age of thirty five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the or the Government of any State or under any local or other authority subject to the control of any of the said Governments Explanation For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice President of the Union or the Governor of any State or is a Minister either for the Union or for any State.

YOURS LEGALLY**Compensation for Train Delay**

In Special Leave Petition (C) No. 13288 Of 2021, Northern Western Railway & Anr. Petitioner (s) Vs. Sanjay Shukla Respondent(s), the Hon'ble Apex Court dismissed the petition upholding the decision of the National Commission to pay compensation to the passenger for the deficiency in service i.e. train delay.

The respondent booked four tickets for his family including himself from the Northern Western Railway in Ajmer Jammu Express Train No. 12413 for the journey from Kishangarh to Jammu Tawi on 10.06.2016. He also further booked return reserved tickets from the same train for 17.06.2016. The said train after starting from Ajmer had to reach Jammu Tawi at 8:10 a.m. in the morning on 11.06.2016. As per the case of the respondent, he had to take flight at 12:00 noon from Jammu to Srinagar in SpiceJet, which was to be landed at Srinagar at 12:15 p.m. But the said train did not reach in time and it was delayed by four hours and reached Jammu at 12:00 noon. Since the Jammu Airport was at a far distance from Jammu Railway Station and they had to reach the airport at least two hours prior to the departure of the flight, they could not reach in time and missed the flight. That thereafter the respondent booked private taxi and reached Srinagar.

Therefore, the respondent herein – original complainant filed a complaint before the District Forum against the petitioners herein being Complaint Case No. 993 of 2016 and claimed loss of Rs. 9,000/- as air fare, Rs. 15,000/- towards taxi hire charges for going from Jammu to Srinagar, Rs. 10,000/- on account of booking of boat in Dal Lake. The aforesaid claim petition was opposed by the petitioners herein.

The learned District Forum by order dated 14.09.2017 allowed the complaint by observing that there was a deficiency in service and because of that the complainant – respondent herein suffered. The District Forum directed the petitioners to pay to the complainant Rs. 25,000/- as compensation, Rs. 5,000/- each 3 towards mental agony and litigation charges within one month from the date of the order, failing which the complainant would be entitled to 9% simple interest. The order passed by the District Forum came to be confirmed by the State Commission in an appeal and thereafter by the National Commission by the impugned judgment and order passed in the revision petition.

The petitioner submitted that late running of train cannot be said to be deficiency in service on the part of the railways. It is submitted that in view of Rule 114 and Rule 115 of the Indian Railway Conference Association Coaching Tariff No. 26 Part-I (Volume-I), there shall not be any liability of the railways to pay compensation for late running of train. It is submitted that there may be number of reasons for delay and late running of train.

It is not in dispute that there was a delay in the arrival of the Ajmer Jammu Express Train by four hours. As per the scheduled time, the train was to reach at Jammu Tawi at 8:10 a.m. in the morning on 11.06.2016. However, it reached Jammu Tawi at 12:00 noon. No evidence at all was led by the railways explaining the delay and/or late arrival of train at Jammu. The railways were required to lead the evidence and explain the late arrival of train to establish and prove that delay occurred because of the reasons beyond their control. At least the railways were required to explain the delay which the railways failed. It cannot be disputed that every passenger's time is precious and they might have booked the tickets for further journey, like in the present case from Jammu to Srinagar and thereafter further journey. Therefore, unless and until the evidence is laid explaining the delay and it is established and proved that delay occurred which was beyond their control and/or even there was some justification for delay, the railway is liable to pay the compensation for delay and late arrival of trains.

Therefore, in the facts and circumstances of the case and in the absence of any evidence led to explain the delay, the District Forum, the State Commission and the National Commission have rightly observed and held that there was deficiency in service and therefore the railway is liable to pay the compensation to the passenger – complainant for the loss suffered and for the agony 5 suffered. These are the days of competition and accountability. If the public transportation has to survive and compete with private players, they have to improve the system and their working culture. Citizen/passenger cannot be at the mercy of the authorities/administration. Somebody has to accept the responsibility. No interference of this Court is called for, in exercise of powers under Article 136 of the Constitution of India. The special leave petition is, accordingly, dismissed. [In Special Leave Petition (C) No. 13288 Of 2021, Northern Western Railway & Anr. Petitioner(s) Vs. Sanjay Shukla Respondent(s)]

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

TREATISE ON**A&C Act, 1996****Expert appointed by Arbitral Tribunal (S 26):-**

S 26 deals with seeking of expert opinion, his examination etc. during the course of arbitral proceedings. S 26 (1) (a) & (b) materially corresponds to S 37 (1) (a) (i) & (ii) of the English Arbitration Act, 1996.

The AT may appoint one or more experts to report to it on specific issues to be determined by the AT and require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods or other property for his inspection. Such an expert shall participate in an oral hearing where the parties have the opportunity to put questions to him. If a party requests, such an expert shall make available for examination all documents, goods or other property in his possession which he was provided with in order to prepare his report.

Cross-examination of expert witness:-

It is not open to the arbitrator to refuse to grant an opportunity to a party to produce evidence on the ground that there was no necessity to examine witnesses or hear the counsel. In case the parties state before the arbitrators that they do not wish to adduce any evidence, non-examination of witnesses by arbitrator is not judicial misconduct, particularly when the arbitrators had taken into consideration the statements and admissions made by the parties.

When the witness speaks of material facts and is examined by the arbitrators suo motu, there must be an opportunity given to the parties to cross-examine him. Consequently, the arbitrators are guilty of misconduct in examining a witness without the consent of the parties and refusing to permit the parties to cross-examine him.

Arbitrator seeking advice:-

If the arbitrator takes advice upon the general rules of law bearing upon the case and does not mean to leave to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, the award is not bad for misconduct. Merely because some clarifications were sought from the lawyers to make the award legal, it cannot be contended that the award in question is not of the arbitrators, but the work of a legal brain.

An arbitrator may for his own guidance consult persons of expert knowledge or skill on questions arising in the course of the reference. However, it is not advisable that he should do so except with the parties' knowledge and consent.

Court assistance in taking evidence (Section 27):-

S 27 elaborates the role of a Court in rendering assistance to an arbitral tribunal. For seeking the assistance from a court, either the arbitral tribunal or a party authorised by the arbitral tribunal, may apply to the court indicating the names and addresses of the parties and the arbitrators, nature of claim and the relief sought, the evidence to be obtained duly indicating the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required. The description of a document to be produced or property to be inspected also to be incorporated in the application [S 27 (1) & (2)].

The court may order that the evidence be provided directly to the AT [S 27 (3)]. The court may issue the same processes to witnesses as it issues in suits tried before it [S 27 (4)]. Persons failing to attend in accordance with such process or making any other fault, or refusing to give their evidence, or guilty of any contempt to the AT during the conduct of the arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the court on the representation of the AT as they would incur for the like offences in suits tried before the Court [S 27(5)]. "Processes" includes summonses and commissions issued to witnesses and summonses to produce documents [S 27 (6)].

The meaning of the word "process" used in this section includes summonses and commission for the examination of witnesses to produce documents. Such summons are to be issued only after the party concerned has given the addresses of any person to be heard as a witness on the subject matter of the testimony required and also when description of the document to be produced or property to be inspected has been given.

Evolution of Section 27:-

Under the Arbitration Act, 1899 the arbitrator had no power to summon witnesses and procure their attendance. If the parties went in for private arbitration under the Act, it was for them to produce witnesses before the arbitrators. However, if the case was one under the Second Schedule of the CPC, the courts could issue commissions for examination of witnesses. To change this grave defect in law provision was included in the Arbitration Act, 1940.

Every order or decision in an arbitration proceeding is not an award. An order or decision in the course of proceedings which are continuing and in respect of which no remedy is provided in the Act would normally be challenged while challenging the award u/s 34. But an order rejecting the application u/s 27 is neither a decision nor an order and in no case can it be taken to be an interim award.

N. Murali Krishna, Sr.Law Officer/SCR