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Legal Maxim

Quod vanum et inutile est lex non requirit means - The law does not require what is in vain and useless.

ABC OF ACTS**The Contempt of Courts Act, 1971
(Act 70 of 1971)**

This Act is to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto. It extends to the whole of India. Contempt of Court is defined in Section 2(a) of the Contempt of Courts Act, 1971 which has broadly describe it as civil contempt or criminal contempt.

Contempt of Court is of two types viz. Civil Contempt and Criminal Contempt.

Section 2(a) of the Contempt of Court Act, 1971 states Civil Contempt as willful disobedience to the order, decree, direction, any judgment or writ of the Court by any person or willfully breach of undertakings by a person given to a Court. Since Civil Contempt deprives a party of the benefit for which the order was made so these are the offences essential of private nature. In other words, a person who is entitled to get the benefit of the court order, this wrong is generally done to this person.

Section 2 (a) to this act defines two categories of Contempt of court, namely, civil contempt and criminal contempt.

The following instances constitute 'contempt'-

Section 2(b) defines Civil Contempt- Willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a Court by a person in civil proceedings, on the faith of which the Court sanctions a course of action.

Section 2(c) defines Criminal Contempt- The publication of any matter, done whether by spoken or written words, or by signs, or by visible representation or of doing any other act; which; do or have the tendency to;

1. scandalize or lower the authority of, any court;
2. prejudice, or interfere with the due course of any judicial proceeding; or
3. Interfere or obstruct the administration of justice in any other manner.
4. An act of a judicial officer and a lawyer deliberately acts contrary to any order of a court and publishes libellous allegations against sitting Judges of High Court, respectively.
5. Publication of information relating to proceeding in chambers or in camera is contemptuous if;
6. It is contrary to the provisions of any enactment;
7. The court expressly prohibits the such publication;

8. The court sits in chambers or in camera for reason connected with public order or the security of the State; and

The information relates to a secret process, discovery or invention which is an issue in the proceedings.

The following instances don't constitute Contempt of Court;

Section-3 provides that publication of any matter in any form which has the tendency to interfere or obstruct the course of justice in any civil or criminal proceeding if; it is published while the case is pending but the person doing so does not have any reasonable ground to believe so, if the publication is made after completion of the case and if the person distributing such publication didn't have any reason to believe that it contains any matter as aforesaid.

Section-4 provides that publishing a fair and accurate report of a judicial proceeding or any stage thereof.

Section-5 provides that publication of any fair comment on the merits of any case which has been finally decided.

Section-6 provides that Any statement made by a person in good faith concerning the presiding officer of any subordinate court to any other subordinate court, or the High Court, to which it is subordinate.

Section-7 provides that Publication of information relating to proceeding in chambers or in camera except in certain cases. Publication of a fair and accurate report of a judicial proceeding before any court sitting in chambers or in camera

Section-12(1) provides that a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. Provided that this punishment is not imposed unless the court is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.

Section-12(3) provides that in case a person is found guilty of Civil Contempt, he can be detained in a civil prison by a court for such period not exceeding six months as it may think fit, if imposition of fine doesn't satisfy the court to meet the ends of justice. .

Section-9 provides that any disobedience, breach, publication or other act which is punishable under this act for contempt of court may also be punishable under the provision of any other act.

(.....to be contd.)

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

RTI Series

Contd... from last issue

We have already gone through Chapter III & IV of the RTI Act, 2005 (Sections 12 to 17) which deals with the constitution, terms and conditions of service and removal of commissioners of CIC and SIC. Now we shall acquaint ourselves with Chapter V which contains Sections 18 to 20. These three Sections are of utmost importance and shall familiarise in detail:

18. Powers and functions of Information Commission.—

(1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission as the case may be to receive and inquire into a complaint from any person,—

(a) who has been unable to submit a request to a Central Public Information Officer, or State Public Information Officer as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or Senior Officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(b) who has been refused access to any information requested under this Act;

(c) who has not been given a response to a request for information or access to information within the time limits specified under this Act;

(d) who has been required to pay an amount of fee which he or she considers unreasonable;

(e) who believes that he or she has been given incomplete, misleading or false information under this Act; and

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

(3) The Central Information Commission or State Information Commission, as the case may be shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

(b) requiring the discovery and inspection of documents;

(c) receiving evidence on affidavit;

(d) requisitioning any public record or copies thereof from any court or office;

(e) issuing summons for examination of witnesses or documents; and

(f) any other matter which may be prescribed.

(4) Notwithstanding anything inconsistent contained in any other Act of Parliament, or the State Legislature, as the case may be, the Central Information Commission or the State Information Commission, as the case may be, may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority, and no such record may be withheld from it on any grounds.

Section 18 deals with complaint provision under the RTI Act, 2005 whereas Section 19 deals with appeal provision. Section 18 (1) deals with various occasions under which a complaint can be preferred to CIC or SIC by a person. Section 18 (2) empowers the CIC or SIC to initiate an inquiry into the matter raised in a complaint. Civil Court powers have been bestowed on the CIC / SIC while conducting an inquiry, as detailed in Section 18 (3) above. The CIC / SIC may examine any record of the public authority during the inquiry of any complaint, as provided in Section 18 (4).

Scope of exercising Section 18 power against person / entity who / which is not a public authority:-

In *I. Ismail v. Tamil Nadu State Information Commission*, the Madras High Court has clarified the scope of powers vested with the SIC against a person / entity who is not a public authority in the following terms:

“18. Therefore, this aspect should also be examined. In effect, the contention of the Information Commission and State is that Section 18 may be used to summon documents and information even from a person or entity which does not qualify as a public authority under Section 2(h) of the RTI Act. The Information Commission relies on the fact that Section 18(3) of the RTI Act does not confine the power of the Information Commission to persons who qualify as public authority under the Act. A more nuanced argument is also made that Section 18 may be resorted to against a private body under the supervisory control of a public authority. If that position were to be accepted, this avenue could be used against all societies, cooperative societies, limited companies, limited liability partnerships, partnerships and the like because all these entities are subject to supervisory and regulatory control under the relevant statute. Thus, if the contention of the State on this issue were to be accepted, the RTI Act would become indirectly unenforceable against all persons, irrespective of whether they answer to the description of public authority under Section 2(h) or not. This was clearly not the intention of the RTI Act. Indeed, sub-section 4 thereof throws light on this issue. Sub-section 4 enables the CIC/SIC, as the case may be, to examine any record to which the Act applies, which is under the control of any public authority. Therefore, it is clear that the power under Section 18(3) of the RTI Act is intended for summoning witnesses and calling for production of documents which are available with the public authority.” [W.P(MD)No.14288 of 2021 and W.M.P(MD).No.11213 of 2021. *I. Ismail v. Tamil Nadu SIC & 2 Ors.* DOJ – 01.10.2021]

M.K. Shaji, CLA/RWF

Judicial forums do not sit as an appellate authority to substitute their mind with the mind of the disciplinary authority insofar as the finding is concerned

The respondent joined the Department of Posts and a charge memo dated 13.04.2010 was issued to him by the Disciplinary Authority, Department of Posts. Certain charges related to procedural lapses in discharge of duties while another set of charges dealt with alleged illegal gratification received by way of bribes. Accordingly, violation of duties under the Central Civil Services (Conduct) Rules, 1964 was alleged. The departmental proceeding against the respondent culminated in an adverse report against him wherein none of the charges of bribery were made out against him but all charges relating to procedural lapses on the part of the respondent were held to have been proved. However, the respondent was inflicted with a punishment of compulsory retirement from service with immediate effect.

Challenging this, the respondent filed an OA before the Tribunal on many grounds, inter alia, not referring to CVO prior to issuance of departmental proceedings. The Tribunal held that since the bribery charges were not proved, the case of the respondent could not be said to be prejudiced by not referring it to the CVO. Additionally, on the argument of the respondent that sufficient opportunity to produce documents and witnesses was not provided, the Tribunal found that the procedural lapses had been found against the respondent on the basis of certain admissions and explanations offered by him. As such, it was felt that on the appreciation of evidence, the conclusion was just and proper. Thereafter, the Tribunal proceeded to examine the issue of proportionality of punishment. It found that the punishment of compulsory retirement was unduly harsh and shockingly disproportionate considering that none of the bribery charges had been found sustainable. To that extent, the order of the disciplinary authority was set aside with a direction to impose an appropriate minor penalty instead within 8 weeks.

This order was assailed by both the parties before the High Court of Andhra Pradesh. While the writ petition filed by the respondent was allowed with an order that the direction of imposition of minor penalty be set aside. The petition filed by the department of posts was dismissed and the authorities were directed to reinstate the respondent into service with all consequential benefits. Against which the department has filed the present appeal.

The Supreme Court held that “It is correct to say that judicial forums do not sit as an appellate authority to substitute their mind with the mind of the disciplinary authority insofar as the finding is

concerned. However, disproportionality of punishment is a concept certainly not unknown to service jurisprudence and has received consideration inter alia of this Court”. This is what the Tribunal proposed to do.

When examined the finding of the Tribunal on the issue of disproportionality of punishment, the Supreme Court held that it was in complete agreement with the view that the punishment of compulsory retirement was completely disproportionate and harsh, keeping in mind the finding arrived at by the disciplinary authority. It, thus, seems to appear that the charges originally levelled may have persuaded the concerned authority to impose punishment; losing sight of the fact that the allegations qua bribery had not been found against the respondent.

The apex court further held that the question is whether the Tribunal proceeded correctly in passing the final direction to impose appropriate minor penalty. The Tribunal itself did not impose the punishment but left it to the authority concerned (for appropriate course of action). It was of the view that considering the findings of procedural lapses against the respondent, the appropriate punishment could only be a minor penalty and not a major penalty. The nature of charges found against the respondent can hardly be one to call for a major penalty, keeping in mind that there was no bribery charge. Anyone can make mistakes. The consequences of mistakes should not be unduly harsh.

With this view, the Supreme Court held that the direction of the Tribunal is liable to be sustained and the impugned judgment of the High Court is set aside. [*Union of India Vs P. Balasubrahmanayam*, DOJ: 04 Mar 2021]

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

KNOW OUR CONSTITUTION

Article 59—Conditions of Presidents office

(1) The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President (2) The President shall not hold any other office of profit (3) The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule (4) The emoluments and allowances of the President shall not be diminished during his term of office

Difference between**Limitation and laches****FAQ****What is a continuing guarantee?**

The differences between limitation and laches are as under:

The word limitation in its literal term means a restriction or the rule or circumstances which are limited. The law of limitation has been prescribed as the time limit which is given for different suits to the aggrieved person within which they can approach the court for redress or justice. According to Section 2 (j) of the Limitation Act, 1963, 'period of limitation' means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act.

The doctrine of laches refers to a lack of diligence and action in making legal claims or going forward, especially with respect to equity, with legal compliance of a right. An unreasonable wait is not admissible in the court and thus the laches doctrine is applied, which is called the Restriction Act 1963.

Limitation prescribes a period of time within which a suit must be filed in the court, whereas period time is not fixed for laches. In case of laches, it is the duty of a court to see (a) Whether the evidences of the case have been lost or destroyed due to the delay caused by plaintiff (b) Whether the plaintiff caused unreasonable delay and (c) Whether the defendant has been induced by the plaintiff by causing delay or commission to alter his position or to incur an expense.

The doctrine of laches is applied in India in the following cases:

- (i) Cases relating to the Specific Relief Act;
- (ii) Cases of temporary injunction;
- (iii) Cases of interlocutory orders;
- (iv) Cases relating to marriage and divorce;
- (v) Cases relating to limitation.

The law of limitation is based on public policy and general utility while laches is based on equity.

The law of limitation is based on expression while laches is based on the doctrine of impartial judicial behaviour.

The plea of limitation is raised by the defendant against the plaintiff while the plea of laches can be raised against both i.e. plaintiff or defendant.

K. Gopinath, CLA, GM/O/SCR

Section 129 of Indian Contract Act provides that a guarantee which extends to a series of transactions, is called, a continuing guarantee.

A guarantee may be an ordinary guarantee or a continuing guarantee. In case of ordinary guarantee, the surety is liable only in respect of a single transaction but in case of continuing guarantee the surety is liable in respect of any of the successive transactions which come within its scope.

Thus, in consideration that B will employ C in collecting the rent of B's zamindari, promises B to the responsible, to the amount of 5,000/- rupees for the due collection any payment by C of those rents. This is continuing guarantee.

But it is not always easy to decide whether a guarantee is confined to one particular transaction only or extends to a series of transactions. In difficult cases the proper course always is to ascertain the intention of the parties and the intention is best ascertained by looking at the relevant position of the parties at the time of the instrument.

Revocation of continuing guarantee. - (1) A continuing guarantee may, at any time, be revoked by the surety as to future transaction by notice to the creditor.

Example. - A, in consideration of B's discounting, at A's request, a bill of exchange for C, guarantees to B, for twelve months the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards at the end of three months. A revokes the guarantee. This revocation discharges A from all liability to B for subsequent discount. But A is liable to B for the 2,000 rupees on default of C.

(2) The death of surety operates, in the absence of any contract to the contrary, as revocation of continuing guarantee, so far as future transactions. (Section 13).

K. Gopinath, CLA, GM/O/SCR

Joke

After I prosecuted a man for killing a bird out of season with his slingshot, the court clerk suggested setting up a date for him to return with both the money for the fine and proof of community service. "That way," she said innocently, "you can kill two birds with one stone."

DOB Cannot be changed at Fag End

In CA No. 5721 of 2021 Karnataka Rural Infrastructure Development Ltd. Vs. T.P. Nataraja & Ors., Hon'ble Supreme Court held that application can be rejected on the ground of delay and laches also more particularly when it is made at the fag-end of service and/or when the employee is about to retire on attaining the age of superannuation.

In this case, Respondent No.1 was appointed with the appellant - corporation in the year 1984. In the service record his date of birth was reflected as 04.01.1960 as per SSLC Marks Card. After the lapse of nearly 24 years, respondent no.1 requested for change of date of birth from 04.01.1960 to 24.01.1961. That thereafter respondent No.1 filed a suit for declaration before Additional City Civil and Sessions Judge at Bangalore to declare that his date of birth is 24.01.1961. The suit was opposed by the appellant – corporation relying upon the Karnataka State Servants (Determination of Age) Act, 1974 (hereinafter referred to as the Act, 1974) and resolution dated 17.05.1991 passed by the appellant - corporation adopting the Karnataka Civil Service Rules and allied laws. The said rule provided that the request for change of date of birth in the service record shall be made within a period of three years from the date of joining or within one year from commencement of the Karnataka Act No.22 of 1974. The suit was also opposed on the ground of delay and laches on the part of respondent No.1 in requesting to change the date of birth. Relying upon Section 5(2) of the Act, 1974 the learned Trial Court dismissed the suit vide judgment and decree dated 28.07.2013. Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned Trial Court dismissing the suit, respondent No.1 – original plaintiff preferred Regular First Appeal No.1674 of 2013 before the High Court. The High Court by the impugned judgment and order dated 11.03.2019 has allowed the said appeal by observing that it is highly impossible that the plaintiff should have availed the remedy within three years from the date of joining of service and also observing that the resolution dated 17.05.1991 passed by the appellant – corporation adopting the Karnataka Civil Service Rules and allied laws was not brought to notice of the plaintiff.

Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court dated 11.03.2019 allowing the said appeal and quashing and setting aside the judgment and decree passed by the learned Trial Court dismissing the suit preferred by respondent No.1 herein and consequently decreeing the suit and

declaring the date of birth of respondent No.1 24.01.1961 instead of 04.01.1960 recorded in the service record, original defendant – employer – corporation has preferred the present appeal.

Learned advocate appearing on behalf of the appellant – corporation had fairly admitted that so far as respondent No.1 herein - employee is concerned, the impugned judgment and order passed by the High Court has been implemented. However, as others suits are pending, he has requested to decide the question of law so that the impugned judgment and order passed by the High Court may not come in the way of corporation. On change of date of birth can be summarized as under:

- (i) application for change of date of birth can only be as per the relevant provisions/regulations applicable;
- (ii) even if there is cogent evidence, the same cannot be claimed as a matter of right;
- (iii) application can be rejected on the ground of delay and laches also more particularly when it is made at the fag-end of service and/or when the employee is about to retire on attaining the age of superannuation.

Therefore, the application of the respondent for change of date of birth was liable to be rejected on the ground of delay and laches also and therefore as such respondent employee was not entitled to the decree of declaration and therefore the impugned judgment and order passed by the High Court is unsustainable and not tenable at law. However, considering the fact that when the impugned judgment and order passed by the High Court has been implemented and respondent No.1 has retired thereafter considering his date of birth as 24.01.1961, it is observed that the present judgment and order shall not affect respondent No.1 – employee and we decide the question of law in terms of the above in favour of the appellant – corporation. However, considering the fact that thereafter after the impugned judgment and order dated 05.11.2019 passed by the High Court in W.P. No.109447 of 2019 directing the appellant – corporation to consider the case of the original writ petitioner – respondent herein in light of the decision in the case of RFA No.1674 of 2013, the case of the respondent came to be reconsidered and his prayer for change of date of birth came to be rejected on the ground of delay and laches. However, question of law is decided in favour of the appellant – corporation. (CIVIL APPEAL NO. 5721 OF 2021 KARNATAKA RURAL INFRASTRUCTURE DEVELOPMENT LIMITED Vs. T.P. NATARAJA & ORS)

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

YOURS LEGALLY**Court cannot appoint an arbitrator where the claims are ex facie time-barred**

A work was allotted by BSNL to the respondent and after the completion of the work and about after 5 and half years, the respondent raised a dispute and requested for appointment of an independent arbitrator on 29.04.2020. BSNL replied on 09.06.2020 that the request for appointment of an arbitrator could not be entertained, since the case had already been closed on 04.08.2014, and hence the notice invoking arbitration was time barred. Nortel filed an application under Section 11 of A&C Act before the Kerala High Court for appointment of an arbitrator and the High Court referred the disputes to arbitration. Review by BSNL before the High Court against said order was dismissed. Answering the questions raised before it, the Supreme Court held as follows:

It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days' from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s) / dispute(s) to be referred to arbitration (as contemplated by Section 21 of the Act) is made, and there is failure to make the appointment.

Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963. The effect being that the period of limitation to file an application under Section 11 is 3 years' from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier.

Applying the aforesaid law to the facts of the present case, the application under Section 11 was filed within the limitation period prescribed 11 under Article 137 of the Limitation Act. Nortel issued the notice of arbitration vide letter dated 29.04.2020, which was rejected by BSNL on 09.06.2020. Hence, the application under Section 11 was filed on 24.07.2020 i.e. within the period of 3 years of rejection of the request for appointment of the arbitrator.

Whether the Court while exercising jurisdiction under Section 11 is obligated to appoint an arbitrator even in a case where the claims are ex facie time-barred: The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred,

or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself. In a recent judgment delivered by a three-judge bench in *Vidya Drolia v. Durga Trading Corporation* [(2021) 2 SCC 1], it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes." The prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject matter is not arbitrable, that reference may be refused. Hence, it is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time barred by over 5 ½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Accordingly, the Supreme Court held that :

(i) The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator.

(ii) In rare and exceptional cases, where the claims are ex facie time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference. [*Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.* (10.03.2021)]

N. Murali Krishna, Sr.Law Officer

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

(Contifrom previous issue)

Section 27: Court assistance in taking evidence –

There is nothing in the Act to contra indicate the existence of jurisdiction/power in the tribunal to require the parties to produce documents, exhibits or other evidence, as the arbitral tribunal may determine. The aforesaid provision has the effect of vesting the tribunal with much greater autonomy in the matter of regulating its procedure for conduct of the arbitration proceedings, than that exercised by a civil court- which is bound by the rigour of the Code of Civil Procedure and the Indian Evidence Act.

The scheme contained in Section 19 of the Act is not to denude the arbitral tribunal of its power to regulate its procedure for effective and expeditious conduct of the arbitration proceedings in a transparent and fair manner. On the contrary, the legislative intent appears to be vest the arbitral tribunal with autonomy and flexibility in the matter of conduct of its proceedings so as to expedite the proceedings and cut the procedural wrangles witnessed in courts - which are governed by the CPC and the Evidence Act. [*Silor Associates Sa vs Bharat Heavy Electrical Ltd on 1 July, 2014*]

Though Section 27 provides for taking assistance of the Court, as can be seen from the section, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence. That means, neither Arbitral Tribunal nor a party before the tribunal has any prescriptive right to demand the Court to assist the Tribunal in taking evidence. Court may decline the request of the arbitrator for assistance.

Arbitral tribunal has to apply its mind and not to mechanically direct an application to be filed before the court:

Section 27 envisages an application to be made to the court for seeking assistance to take evidence. Such an application can be made either by the arbitral tribunal or a party with the approval of the arbitral tribunal. Thus, in case of an application by a party, the legislature itself envisaged an approval of the arbitral tribunal. This in turn puts an obligation on the arbitral tribunal to apply its mind and not to mechanically direct an application to be filed before the court. Detailed reasons may

not be specified by the tribunal but at least application of mind must be available from the order passed by the tribunal. While considering an application under Section 27 of the said Act, the procedure to be followed by a court would be as prescribed under Order 16 of the said Code. However, possibly, in order to facilitate the exercise of power by the court and also so that the court is not inundated with unnecessary requests, a condition of prior approval of the arbitral tribunal is envisaged under Section 27 of the said Act. [*Hindustan Petroleum Corporation vs Ashok Kumar Garg on 11 September, 2006: 2007 (1) ARBLR 368 Delhi*]

In Ennore Port Ltd. vs. Hindustan Construction Co. Ltd. (AIR 2007 Mad 73) Madras High Court held that “Court is not expected to pass an order automatically once an application is made under Section 27 of the Act and it has been conferred with discretion whether to order the request or not. It is true that appreciation of evidence by the arbitrator is not a matter which the Court questions and considers and an arbitrator is a sole Judge of the quality as well as the quantity of the evidence as held in (cited supra). Similarly whether a particular document is material or not and whether it should be produced before the arbitrator is eventually a matter for the arbitrator to decide and whatever decision taken by the arbitrator is binding on the parties. But it does not mean that Court is left with no option except to order the request made under Section 27 of the Act 1996”. In this case, The Court declined the request on the ground that the production of the charge-sheet before the arbitral tribunal would ‘*jeopardise the interest of the respondent before the criminal court*’.

Section 27(3) mandates that the Court "may" within its competence "and according to its rules on taking evidence", execute the request made by the tribunal by ordering that the evidence be provided directly to the tribunal. The use of the expression "may" shows that the court is not bound to act on the request in every case where a request for taking evidence is made by the tribunal. The Court "may" decline the request of the tribunal, if either it is not within the competence of the court to make an order on the request, or the request is not in accordance with the rules of the court on taking evidence. [*Silor Associates Sa vs Bharat Heavy Electrical Ltd on 1 July, 2014*]

N. Murali Krishna, Sr. Law Officer