



ADVISOR

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Editors:

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Asst. Editors:

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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

Volenti non fit injuria – Damage suffered by consent gives no cause of action. In other words, If someone willingly places himself in a position where he knows that harm might result, then he is not able (allowed) to bring a claim against the other party in tort or delict (a violation of the law).

ABC OF ACTS**The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013 (30 of 2013)**

S 12 provides for the preliminary survey of land and power of officers to carry out such survey. For the purposes of enabling the appropriate Government to determine the extent of land to be acquired, it shall be lawful for any officer, either generally or specially authorised by such Government in this behalf, and for his servants and workmen, (a) to enter upon and survey and take levels of any land in such locality; (b) to dig or bore into the sub-soil; (c) to do all other acts necessary to ascertain whether the land is adapted for such purpose; (d) to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon; and (e) to mark such levels, boundaries and line by placing marks and cutting trenches and where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle. No act under clauses (a) to (e) in respect of land shall be conducted in the absence of the owner of the land or in the absence of any person authorised in writing by the owner. Such survey may be undertaken in the absence of the owner, if the owner has been afforded a reasonable opportunity to be present during the survey, by giving a notice of at least sixty days prior to the survey.

S 13 provides that the officer shall at the time of entry under section 12 pay for any damage caused. It is payment for the intended damage. Damage means any harm done to land during the course of surveying it and other acts necessary to ascertain whether it is capable of being adapted for public purpose. In case of dispute as to the sufficiency of the amount so paid the officer shall at once refer the dispute to the decision of the Collector or other chief revenue officer of the district, and such decision shall be final.

S 15 is consistent with the basic principle that no man's property shall be acquired unless he has been given an opportunity of being heard. The main objective of issuing preliminary notification is to call for objections, if any, against such acquisitions from the owners or others who are having certain interest over the property; giving them an opportunity to raise their claims against the move of the government for acquiring their lands.

S 15(1) provides that any person interested in any land which has been notified as being required or likely to be required for a public purpose, may within 60 days from the date of the publication of the preliminary notification, object to— (a) the area and

suitability of land proposed to be acquired; (b) justification offered for public purpose; (c) the findings of the Social Impact Assessment report.

Every objection shall be made to the Collector in writing. The Collector shall give the objector an opportunity of being heard in person or by any person authorised by him or by an Advocate and shall, make a report to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him along with a separate report giving therein the approximate cost of land acquisition, particulars as to the number of affected families likely to be resettled, for the decision of that Government. If objections are made, the Collector will consider those objections and make his recommendation thereon in his report to government. If no objections are made, the Collector has got to make a report. It is thereafter that the Government is empowered to proceed further.

S 15(3) provides that the decision of the appropriate Government on the objections shall be final.

S 16 provides for the preparation of Rehabilitation and Resettlement Scheme by the Administrator. Upon the publication of the preliminary notification by the Collector, the Administrator for Rehabilitation and Resettlement shall conduct a survey and undertake a census of the affected families, in such manner, which shall include— (a) particulars of lands and immovable properties being acquired of each affected family; (b) livelihoods lost in respect of landless who are primarily dependent on the lands being acquired; (c) a list of public utilities Government buildings, amenities and infrastructural facilities which are affected or likely to be affected, where resettlement of affected families is involved; (d) details of any common property resources being acquired. The Administrator shall, based on the survey and census before, prepare a draft Rehabilitation and Resettlement Scheme, which shall include— (i) particulars of the rehabilitation and resettlement entitlements of each land owner and landless whose livelihoods are primarily dependent on the lands being acquired and where resettlement of affected families is involved; (ii) details of Government buildings, public amenities and infrastructural facilities which are to be provided in the Resettlement Area; The draft shall include time limit for implementing Rehabilitation and Resettlement Scheme. It shall be made known locally by public hearing in the affected area and discussed in the concerned Gram Sabhas or Municipalities. The Administrator shall, on completion of public hearing submit the draft Scheme for Rehabilitation and Resettlement along with a specific report on the claims and objections raised in the public hearing to the Collector.

(Contd... in next issue)

V. Appa Rao, CLA, GM Office

RTI Series

Contd... from last issue

It is now time to take a look at S 19, which is one of the most important Sections of the RTI Act, 2005:

“19. (1) Any person who, does not receive a decision within the time specified in subsection (1) or clause (a) of sub-section (3) of section 7, or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within 30 days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or State Public Information Officer as the case may be, in each public authority: Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) Where an appeal is preferred against an order made by a Central Public Information Officer or a State Public Information Officer, as the case may be, under section 11 to disclose third party information, the appeal by the concerned third party shall be made within thirty days from the date of the order.

(3) A second appeal against the decision under subsection (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission: Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(4) If the decision of the Central Public Information Officer or State Public Information Officer, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be, shall give a reasonable opportunity of being heard to that third party.

(5) In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the Central Public Information Officer or State Public Information Officer, as the case may be, who denied the request.

(6) An appeal under sub-section (1) or sub-section (2) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing.

(7) The decision of the Central Information Commission or State Information Commission, as the case may be, shall be binding.

(8) In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to— (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—

(i) by providing access to information, if so requested, in a particular form; (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be; (iii) by publishing certain information or categories of information; (iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records; (v) by enhancing the provision of training on the right to information for its officials; (vi) by providing it with an annual report in compliance with clause (b) of subsection (1) of section 4; (b) require the public authority to compensate the complainant for any loss or other detriment suffered; (c) impose any of the penalties provided under this Act; (d) reject the application.

(9) The Central Information Commission or State Information Commission, as the case may be, shall give notice of its decision, including any right of appeal, to the complainant and the public authority.

(10) The Central Information Commission or State Information Commission, as the case may be, shall decide the appeal in accordance with such procedure as may be prescribed.”

Summarising, the key features of Section 19 are:

The period for preferring First Appeal is 30 days from the end of time line prescribed i.e., on expiry of 48 hours (When life or liberty is concerned) or 30 days (in normal RTIA applications), as the case may be, excluding the time taken by the RTI applicant to pay further fees when directed to be paid by the PIO.

Delay in preferring the First Appeal is condonable, for justifiable causes.

Third party to prefer appeal within 30 days against the order of the PIO for disclosure of third-party related information.

Second Appeal lies to the CIC/SIC within 90 days of date of receipt of the First Appellate Order or within 90 days from the date of expiry of 30 days' time line permitted. Delay in preferring the Second Appeal is condonable, for justifiable causes.

CIC/SIC to afford a reasonable opportunity to the third party before deciding the Second Appeal, in cases where third party information is involved.

Onus to prove that a denial of RTI request was justified lies on the PIO.

First Appeal to be disposed of within 30 days of receipt of the same. Extendable up to 45 days, provided the reasons are recorded. The decision of the CIC / SIC is binding.

The CIC / SIC has the following powers while deciding the Second Appeal viz. Require the Public Authority to take steps to secure compliance with the provisions, including – Providing access to information in a particular form; Appointment of CPIO /SPIO; Publishing certain information; Making necessary changes to its practices w.r.t maintenance, management and destruction of records; Enhancing training to officials; Providing an Annual Report w.r.t Section 4; Order compensation to the complainant for any loss / detriment suffered; Impose penalty & Reject the application.

M.K. Shaji, CLA/RWF

Communication of adverse remarks in ACR

Dr. Arvind Kumar, the respondent joined IRMS on 01.04.1998. The benchmark for promotion to JA Grade was "Good". The previous year's ACR of the respondent for the year 2003-04 was 'average' and 'not fit'. Similarly, the ACR for the year 2004-05 was average' and 'not fit for promotion'. The ACR for the year 2005-06 was 'good'. Both the aforesaid adverse remarks of the year 2003-04 & 2004-05 (Part-I and Part-II) were duly communicated and conveyed to the respondent. The respondent responded by submitting his representation against the aforesaid ACR which was considered by the accepting authority and found to be unsatisfactory, which decision was conveyed to the respondent. The respondent preferred an appeal before the General Manager/ECR. The appeal was decided by the GM holding 'that adverse entries shall remain'.

The DPC for promotion of JA Grade for IRMS Senior Scale Officers met on 1.05.2007, 27.02.2008 & 04.02.2009 and found the respondent not suitable on the basis of the performance reflected in his ACRs.

The Government of India came up with a scheme for grant of promotion in the year 2009 known as "Dynamic Assured Career Progression Scheme" which in terms of the scale extended upto Senior Administrative Grade in the Railway. Earlier only adverse remarks given in the ACRs were to be communicated to the officer reported upon for submission of representation, if any, but other remarks which were not adverse were not communicated. In view of the advent of a benchmark for considering suitability in promotion, an issue arose that a candidate can be held unsuitable even without communicating such remark to him and giving an opportunity to represent for its review. The matter went to the Apex Court and was considered by the Hon'ble Supreme Court in the case of Dev Dutt and it was held vide its judgment dated 12.05.2008 that not only adverse but all other good remarks should also be communicated so as to give opportunity to the candidate to represent and improve upon their performance.

The respondent represented on 25.10.2010 with respect to the same ACRs of the year 2003-04-05 without disclosing the facts that he had earlier represented which had been rejected and his appeal was also rejected by the GM/ECR. His application was considered and the adverse remark for the year 2003-04 & 2004-05 Part-I and Part-II were upgraded from average to good, very good and fit for promotion vide order of the GM/ECR dated 17.01.2011. After said upgradation, the respondent's candidature was also considered by the DPC in its next meeting held in the year 2012 and he was given promotion w.e.f. 21.11.2012 vide order dated

10.01.2013. The respondent after taking the said promotion w.e.f. 21.11.2012, submitted a representation on 25.10.2016 before the Railway Authority for antedating his date of promotion in the JAG Grade w.e.f. the year 2007 instead of 2011 and further for promotion in the selection grade w.e.f. 2012 instead of 2016. The same has been rejected. The respondent filed OA No.215 of 2017 before the Tribunal contending that he was similarly placed as one Dr. T.N. Wary whose case had been allowed by Guwahati Bench. The Patna Bench of the Tribunal considered the case of the respondent and rejected the same. The respondent preferred a writ petition before the Patna High Court. The High Court remitted the matter back to the Tribunal to decide afresh in the light of Dr. T.N. Wary case.

The matter was revisited by the Tribunal and allowed similar relief as was allowed in the case of Dr. T.N. Wary without examining the facts and issues as to whether the case of the applicant was comparable at par with that of the case of Dr. T.N. Wary or not.

UOI preferred an appeal before the High Court, and High Court held that the respondent was properly communicated with regard to adverse remarks in the ACR for the year 2003-04 and 2004-05. The principle as laid down by the Hon'ble Supreme Court in Dev Dutt makes it incumbent upon the concerned authorities to communicate all ACRs to a public servant in order to enable him to make a representation against them, if so advised. It also gives directions to consider such a representation in a fair manner within a reasonable period by placing the same before an authority higher than the one who made the original entry, thereby emphasising upon the principles of transparency and fairness in public administration. The learned Tribunal has not considered the admitted fact that the adverse entry of the respondent has been communicated to him. Thereafter he filed representation which was also rejected. Thereafter he filed appeal which was also dismissed.

The matter of Dev Dutt based on which the case of Dr. T.N. Wary was allowed, was concerned with the specific matter where APARs/ACR below Benchmark was never communicated to Dr. Wary, as it was treated adverse where as in the matter of the respondent, he was properly communicated with regard to adverse remarks in the ACR for the year 2003-04 and 2004-05. Learned Tribunal did not examine the fact in case of the respondent vis. a vis. that of Dr. T.N. Wary. Thereby the order dated 14.02.2020, passed by CAT/Patna is set aside. This WP is allowed. (Civil Writ Jurisdiction Case No.2706 of 2021 (UOI V Dr. Arvind Kumar) DOJ 02.12.2021).

Smt .M.N. Vijita, CLA/Gaz /PCPO Office

Difference between**Liquidator and Resolution Professional**

When a company faces insolvency, the creditors of company have two options i.e. recovery or resolution. Resolution is the sale of the existing business as a going. The sale of the assets of the company is called Liquidation. The IBC is a consolidated law which provides provisions for both; insolvency resolution and liquidation.

The liquidator is appointed to close the company in a professional manner, making sure a fair distribution of the company's assets takes place amongst creditors. Neither the Court or the official receiver are involved in a CVL procedure. Liquidators are also appointed in Members Voluntary Liquidation (MVL). Liquidators are generally assigned by the court, by unsecured creditors, or by the company's shareholders to take over control of the organization, etc.

According to the Insolvency Act, the liquidator's powers include exercising the court's power of settling a list of contributories; exercising the court's power of making calls; and summoning general meetings of the company to obtain its sanctions where deemed necessary by the liquidator i.e. shifting the regime from the 'debtor in control' regime to a 'creditor in control' regime which provides a mechanism wherein a neutral person is appointed by the Hon'ble National Company Law Tribunal (NCLT) known as the Interim Resolution Professional (IRP), who may be later confirmed as RP.

A Resolution Personnel (RP) is a professional who has qualified an insolvency course and is registered with the Insolvency and Bankruptcy Board of India (hereafter, referred to as "IBBI") and is governed by the IBBI (Insolvency Professional) Regulation, 2016. The adjudicating authority appoints Interim Resolution Professional (IRP) on the commencement date of insolvency who will conduct the entire proceeding. The IRP's appointment is temporary until a Resolution Professional is appointed by the Committee of Creditors (COC). After passing of an order for liquidation of the corporate debtor under section 33 of Insolvency Code, 2016 by Adjudicating Authority, the resolution professional appointed for the corporate insolvency resolution process under chapter II shall, subject to submission of a written consent by the resolution professional. In this case, the Resolution Professional takes the responsibilities of a liquidator and conducts the liquidation process. The insolvency professional or a Resolution Professional is the backbone of the process. Resolution Professional is the first person appointed and the last person to be relieved.

K. Gopinath, CLA, GM Office

FAQ**Who is a Receiver under the CPC?**

The Receiver is an independent and impartial person appointed by the court under order 40 of the Civil Procedure Code, 1908 to administer, to safeguard and maintain the disputed property involved in a lawsuit. According to the Civil Procedure Code, 1908 the court before which the proceedings are pending can appoint a receiver if it appears just and convenient to the court to appoint such receiver [section 51(d)].

When a party in possession of the disputed property exhausts the property or causes irreparable damage to it, because the subject matter ceases to exist or its value is impacted, the entire object of the suit is defeated. Therefore, if the court considers that the disputed property must not be delegated to either party, pendente lite, the court shall designate a recipient to whom the security and maintenance of that property is entrusted. It is a form of temporary security given by the court to the parties making the request before the court adjudicates the matter. The court should appoint a receiver only when there is a possibility of wrong or injury. Also, if it is shown that the subject matter is not in the possession of any of the parties and it is in the common interest of both the parties to appoint a receiver for the protection and preservation of the property. The Receiver is regarded as a court officer and is the court's extension.

A person who is independent, impartial and totally disinterested should be appointed as a receiver. Such a person should not have any stake in the disputed property. Generally, parties to the suit are not appointed as receiver by the court. But in extraordinary circumstances, a party to suit can be appointed as receiver. The process of appointment of a receiver is provided by the courts in their respective court rules. The high court has the power to make rules for the superintendence and control of the subordinate courts.

K. Gopinath, CLA, GM Office

KNOW OUR CONSTITUTION

Article 63. The Vice President of India There shall be a Vice President of India.

Article 64. The Vice President to be ex officio Chairman of the council of States The Vice President shall be ex officio chairman of the council of States and shall not hold any other office of profit: Provided that during any period when the Vice President acts as President or discharges the functions of the President under Article 65, he shall not perform the duties of the office of chairman of the council of States and shall not be entitled to any salary or allowance payable to the chairman of the council of States under Article 97.

Employee who refuses promotion offer is not entitled to Financial Upgradation

Suman Lata Bhatia and Manju Arora who were appointed as Senior Translator (Hindi), were offered promotion to the higher post of Translation Officer (Hindi) on regular basis. But due to personal grounds, they refused the offered promotions. However, the benefits under the ACP Scheme were given to the respondents on 15.11.1999 but when it was found that those were wrongly granted, the same were withdrawn by orders dated 4.9.2002 and 10.10.2002. The withdrawal order adverted to the clarificatory O.M. dated 18.7.2001 which disentitled financial upgradation under the ACP Scheme to those who had refused vacancies based promotion.

The employee (respondent herein) having refused promotion on multiple occasions, cannot be said to be stagnating as she, of her own volition has opted to remain in the grade of Senior Translator (Hindi). Accordingly, taking note of the response to the show cause notice and rejecting the same, the ACP benefit was withdrawn and the respondent was reverted back to her earlier pay scale.

The withdrawal of ACP benefit for the two respondents were challenged before the CAT. The decision of the Tribunal declaring disentitlement of the Original Applicants to the ACP benefits were challenged respectively in the WP (C) No. 7227/2003 (Manju Arora), W.P. (C) No.7283/2003 (Suman Lata).

The Division Bench adverted to the condition No. 5.1 as also Condition No.10 in the O.M. dated 9.8.1999 to conclude that in case a particular employee had turned down the offered promotion, the non-acceptance of promotion would impact their second upgradation only. It was concluded that the employees were rightly given the benefit of first upgradation, which could not have been withdrawn. Accordingly, the judgment of the Tribunal was interfered and consequently, direction was issued for restoration of the upgradation under the ACP Scheme, to the concerned employees.

The basic facts in the Civil Appeal Nos.7150 - 7151/2009 are similar where the concerned respondents Kanta Suri and Veena Arora were also appointed as Senior Translator (Hindi) in the Air Headquarters. The key point of distinction for these two employees was that instead of regular promotion, both Kanta Suri and Veena Arora were offered promotion on officiating basis to the post of Translation Officer (Hindi) with the stipulation that the promotees are liable to reversion if their seniors who are on deputation to other office/posts, return to their present cadre in the Air Force or due to any administrative reasons.

If a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation. This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for her own personal reasons. However, this vital aspect was not appropriately appreciated by the High Court while granting relief to the employees.

The employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. In this situation, the Scottish doctrine of “Approbate and Reprobate” springs to mind. The English equivalent of the doctrine was explained in *Lissenden v. CAV Bosch Ltd.*¹ where-in Lord Atkin observed at page 429,

“.....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other.....”

The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, “eat their cake and have it too”. It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009. However, the above would not apply to the two respondent employees Kanta Suri and Veena Arora in C.A Nos.7150-7151/2009 as they were not offered regular promotion but conditional promotion on officiating basis subject to reversion, by the order dated 29.12.1988. These two employees cannot be said to have exercised a choice between alternatives and as such the above Principle would not apply and their refusal to accept the officiating promotion cannot be held against them. The refusal of the promotion offered by the communication dated 29.12.1988 will not disentitle the two employees, Kanta Suri and Veena Arora to the benefits under the ACP Scheme. It is declared accordingly. Since the respondents have reached the age of superannuation in the meantime, the consequential relief under this order should be made available to the two eligible employees (if not granted), within three months from today.

Civil Appeal Nos.7027-7028 of 2009 are allowed. However, Civil Appeal Nos.7150-7151 of 2009 stand dismissed. [Civil Appeal Nos.7027-7028 OF 2009 and 7150-7151 OF 2009 (UOI & ORS. Vs. Manju Arora & ANR.) DOJ: 03.01.2022]

Smt. M.N. Vijita, CLA/Gaz/PCPO Office

YOURS LEGALLY**Reservations in Promotions – Broad guidelines by Supreme Court**

Six points are formulated for determination by the Hon'ble Supreme Court in the above matter and the Apex Court has delivered its judgement on 28.1.2022. The points for determination are as follows:

- 1) What is the yardstick by which, according to M. Nagaraj (supra), one would arrive at quantifiable data showing inadequacy of representation of SCs and STs in public employment?
- 2) What is the unit with respect to which quantifiable data showing inadequacy of representation is required to be collected?
- 3) Whether proportion of the population of SCs and STs to the population of India should be taken to be the test for determining adequacy of representation in promotional posts for the purposes of Article 16(4-A)?
- 4) Should there be a time period for reviewing inadequacy of representation?
- 5) Whether the judgment in M. Nagaraj (supra) can be said to operate prospectively?
- 6) Whether quantifiable data showing inadequacy of representation can be collected on the basis of sampling methods, as held by this Court in B.K. Pavitra & Ors. v. Union of India & Ors. [(2019) 16 SCC 129], ("B.K. Pavitra II")?

1) YARDSTICK FOR ARRIVING AT QUANTIFIABLE DATA:

Therefore, we are of the opinion that no yardstick can be laid down by this Court for determining the adequacy of representation of SCs and STs in promotional posts for the purpose of providing reservation.

2) UNIT FOR COLLECTING QUANTIFIABLE DATA:

Before providing for reservation in promotions to a cadre, the State is obligated to collect quantifiable data regarding inadequacy of representation of SCs and STs. Collection of information regarding inadequacy of representation of SCs and STs cannot be with reference to the entire service or 'class'/'group' but it should be relatable to the grade/category of posts to which promotion is sought. Cadre, which should be the unit for the purpose of collection of quantifiable data in relation to the promotional post(s), would be meaningless if data pertaining to representation of SCs and STs is with reference to the entire service.

3) PROPORTIONATE REPRESENTATION AS TEST OF ADEQUACY:

It is for the State to assess the inadequacy of representation of SCs and STs in promotional posts, by taking into account relevant factors.

4) TIME PERIOD FOR REVIEW:

As regards review, we are of the opinion that data collected to determine inadequacy of representation for the purpose of providing reservation in promotions needs to be reviewed periodically. The period for review should be reasonable and is left to the Government to set out.

5) PROSPECTIVE OPERATION OF THE JUDGMENT IN M. NAGARAJ:

The judgment of M. Nagaraj (supra) was delivered in 2006, interpreting Article 16(4-A) of the Constitution which came into force in 1995. As making the principles laid down in M. Nagaraj (supra) effective from the year 1995 would be detrimental to the interests of a number of civil servants and would have an effect of unsettling the seniority of individuals over a long period of time, it is necessary that the judgment of M. Nagaraj (supra) should be declared to have prospective effect.

6) QUANTIFIABLE DATA AND SAMPLING METHOD:

The State should justify reservation in promotions with respect to the cadre to which promotion is made. Taking into account the data pertaining to a 'group', which would be an amalgamation of certain cadres in a service, would not give the correct picture of the inadequacy of representation of SCs and STs in the cadre in relation to which reservation in promotions is sought to be made. Rosters are prepared cadre-wise and not group-wise. Sampling method which was adopted by the Ratna Prabha Committee might be a statistical formula appropriate for collection of data. However, for the purpose of collection of quantifiable data to assess representation of SCs and STs for the purpose of providing reservation in promotions, cadre, which is a part of a 'group', is the unit and the data has to be collected with respect to each cadre. Therefore, we hold that the conclusion of this Court in B.K. Pavitra II (supra) approving the collection of data on the basis of 'groups' and not cadres is contrary to the law laid down by this Court in M. Nagaraj (supra) and Jarnail Singh (supra).

List the matters on 24/2/2022 for further hearing.
[Civil Appeal No. 629 of 2022 (Arising out of SLP (C) No. 30621 of 2011) Jarnail Singh & Ors. Versus Lachhmi Narain Gupta & Ors. And batch, DOJ: 28.1.2022]

N. Murali Krishna, Sr.Law Officer

TREATISE ON

A&C Act, 1996

Sub section (2) of Section 28 stipulates that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. Sub section (3) further stipulates that “While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction”. Before analysing the sub sections, let us see what is meant by the term “*ex aequo et bono* or as *amiable compositeur*”.

The term “*ex aequo et bono* or as *amiable compositeur*” is a Latin term for “according to the right and good.” The term (also known as *amiable compositeur*) refers to a tribunal's consideration of a dispute according to what is fair and just given the particular circumstances, rather than strictly according to the rule of law. This type of consideration, primarily utilized in international law, typically requires the consent of all parties.

In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand. However, a decision *ex aequo et bono* is distinguished from a decision on the basis of equity (*equity infra legem*), “Whereas an authorisation to decide a question *ex aequo et bono* is an authorisation to decide **without deference** to the rules of law, an authorisation to decide on a basis of equity does not dispense the judge from giving a decision **based upon** law, even though the law be modified.

An important issue that has to be kept in mind is that party autonomy. Arbitrators are empowered to decide a dispute only in accordance with the powers granted by the parties. In accordance with the rule of party autonomy, parties may confer authority on the arbitrators to decide the dispute *ex aequo et bono* and ignore the actual intentions of the parties.

As the conceptus of the Arbitration revolves around party autonomy, arbitrators cannot decide the dispute deviating from the rules and agreement simply on the basis what they consider to be fair and equitable in the case at hand. such a situation would rarely happen because the parties must expressly agree to adopt *ex aequo et bono* for the principle to be applied under the UNCITRAL Model Law. Article 28(3) the UNCITRAL Model Law states that “[t]he arbitral tribunal shall decide *ex aequo et bono* ... only if the parties have expressly authorized it to do so”; arbitrators are not able to rely on their idea of fairness without clear authorisation by parties. Article 28(4) of the UNCITRAL Model Law also provides that ‘the arbitral tribunal shall decide in accordance with the terms of the contract and shall

take into account the usages of the trade applicable to the transaction’.

The Tribunal has a duty to decide a dispute in accordance with the legal rights of the parties, rather than in what the tribunal considers a fair and reasonable way, unless there is specific agreement between the parties to the contrary. The tribunal may be specifically instructed by the arbitration agreement to decide the disputes on some basis other than the law; an agreement to this effect has generally become known as an ‘equity clause’. For example, the parties may agree that the tribunal is to decide the dispute in accordance with concepts variously known as ‘honourable engagement’, ‘amiable compositeur’ ‘equity’, ‘*ex aequo et bono*’, the ‘general principles of law recognized by civilized nations’ or the ‘*lex mercatoria*.’ (Russel on Arbitration)

Therefore, the term “*ex aequo et bono* or as *amiable compositeur*” precisely means “An arbitrator empowered, by agreement of the parties, to settle a dispute on the basis of what is equitable and good (*ex aequo et bono*), subject to procedural fairness and the terms of the arbitration agreement as opposed to the settled substantive rules of a given legal system”.

These two articles of the UNCITRAL Model Law has been incorporated in the above sub sections of Indian Arbitration & Conciliation Act, 1996.

In PRAKASH ATLANTA (JV) FAO(OS) 428/2007, March 17,2016, the Delhi High Court observed as follows:

“The 50 : 50 solution find by the learned Arbitrators is on the reasoning that the tender made known to Claimant-Contractor that there was a reinforcing element in the works and there was some hiatus between clause 703(A) and item No.5.41(a) of the Technical Specifications. Putting the blame on Claimant-Contractor for not having got the matter resolved i.e. the conflict resolved, the learned Arbitrators held that it could not be overlooked that NHA was equally responsible for this because it was the author of the tender documents. Therefore, both parties had to share the blame 50 : 50. 19. The learned Single Judge has held that this was a ‘Panchayati Solution’. The learned Single Judge is absolutely correct. As per the Arbitration and Conciliation Act, 1996, the mandate of an Arbitral Tribunal is to decide a dispute in terms of a written agreement between the parties, if the dispute relates to the written agreement. If the language of the written agreement is clear, the Arbitral Tribunal has to give effect to the language. If the language is unclear, giving reasons to justify what was held to be unclear, the Arbitral Tribunal would have the mandate to give a meaning to the clause in question.”

.... To be continued in next issue..

N. Murali Krishna, Sr.Law Officer