Lex Info

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Legal Maxim

***Ultra vires**: Means "beyond powers" i.e "Without authority". Used to describe an action done without proper authority, or acting without the rules. The term will most often be used in connection with appeals and petitions.*

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

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

Please mail them to:

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Note: This is only a news capsule. For information and understanding to cite the case, please go through the original judgement.

ABC OF ACTS

The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013

Under Section 21, the Collector shall publish the public notice on his website and cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensations and rehabilitation and resettlement for all interests in such land may be made to him. The public notice shall state the particulars of the land so needed, and require all persons interested in the land to appear personally or by agent or advocate before the Collector at a time and place mentioned in the public notice to state their claims to compensation rehabilitation and resettlement along with their objections which may be in writing. The time period should not be less than 30 days and not more than 6 months after the date of publication of the notice.

In case any person interested resides elsewhere, and has no agent, the Collector shall ensure that the notice shall be sent to him by post in letter addressed to him at his last known residence, address of business and also publish the same in at least two national daily newspapers and also on his website.

Under Section 22, the Collector may also require any interested person to make or deliver to him a statement within 30 days containing the name of every other person possessing any interest in the land or any part thereof as co-proprietor, sub-proprietor, mortgagee, tenant or otherwise, and of the nature of such interest, and of the rents and profits, if any, received or receivable on account thereof for three years next preceding the date of the statement.

Every person required to make or deliver a statement to the Collector shall be deemed to be legally bound to do so within the meaning of Section 175 (Omission to produce document to public servant by person legally bound to produce it) and Section 176 (Omission to give notice or information to public servant by person legally bound to give it) of the Indian Penal Code 1860.

The new Act stipulates that the minimum compensation is to be a multiple of the total of the ascertained market value, plus value of the assets attached to the property, plus a solatium equal to 100% of the market value of the property including value of assets.

Under Section 23, the Collector shall proceed to enquire into the objections which any person interested has stated pursuant to a notice given under Section 21 and into the respective interests of the persons claiming the compensation and rehabilitation and resettlement, shall make an award under his hand of–

(a) the true area of the land;

(b) the compensation as determined under Section 27 along with Rehabilitation and Resettlement Award as determined under Section 31 and which in his opinion should be allowed for the land; and

(c) the apportionment of the compensation among all the persons known or believed to be interested in the land, or of whose claims, he has information, whether or not they have respectively appeared before him.

Period for Award:

Under Section 25, the Collector shall make an award within a period of 12 months from the date of publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse.

Provided that the appropriate Government may take the decision to extend the period of 12 months if in its opinion, circumstances exist justifying the same but such decision shall be recorded in writing and the same shall be notified and be uploaded on the website of the authority concerned.

Determining Market Value:

The claimant will be entitled to the compensation which is determined on the basis of the market value of the land determined as on the date of preliminary notification. The market value of the proposed land under Section 26 to be acquired shall be set as the higher of:

- the minimum land value, if any, specified in the Indian Stamp Act, 1899 for the registration of sale deeds in the area, where the land is situated; or

- the average of the sale price for similar type of land being acquired, ascertained from the highest fifty per cent of the sale deeds registered during the preceding three years in the nearest village or nearest vicinity of the land being acquired.; or

- the consented amount in case the land is acquired for private companies or public-private partnership projects.

to be contd…..

V. Appa Rao, CLA, GM Office

RTI Series

Contd… from last issue

Section 20 deals with penalties. CIC/SIC is empowered to penalise the PIO of Rs. 250/- per day subject to a maximum of Rs.25,000/- on any complaint or appeal, if the CIC/SIC is of the opinion that the PIO had without any reasonable cause refused to receive an RTI application or has not furnished information within the time line or had given incorrect / incomplete / misleading information or destroyed information. The Act warrants extension of reasonable opportunity of being heard to the PIO before imposing any penalty on him. The onus lies on the PIO to prove that he had acted reasonably and diligently [S.20(1)].

The CIC/SIC is also empowered to recommend for disciplinary action against the PIO if the PIO had without any reasonable cause and persistently refused to receive an RTI application or has not furnished information within the time line or had given incorrect/incomplete/misleading information or destroyed information. The only difference between Section 20 (1) and (2) i.e., for imposition of penalty and for recommending disciplinary proceedings, is that there should be a persistent action from the PIO is warranted in the case of S. 20 (2).

Whether First Appellate Authority can be penalised?

It is important to note that the imposition of penalty or issuance of recommendation for disciplinary action lies only against the PIO but not against the First Appellate Authority. High Court, Delhi, has in its decision dated 29.08.2018 (R.K.Jain v. Union of India, LPA 369/2018) had held:

"9. ……. The Appellate Authority in sub-section (1) of Section 19 is classified as an officer senior in rank to the CPIO meaning thereby that under the scheme of RTI Act, the CPIO is a different authority or officer different from an Appellate Authority to whom an appeal lies under sub-Section (1) of Section 19. If the legislative intent, as can be made out on a combined reading of various provisions are taken note of, it would be seen that the legislature only proposes for taking action against CPIO, and not against any other authority like the Appellate Authority or officer to whom the appeal lies. That being so, the legislative intent was that the penal provisions are to be implemented or enforced only against the CPIO and not against any other authority like the senior ranking officer or the Appellate Authority who decides the appeal under Section 19(1). If this was not the legislative intention, the words appearing in Sections 19(1) and (2) would have been differently worded and the construction of the statutory provision would have been entirely different. If the argument canvassed by the petitioner was to be accepted then by that interpretation, we would be expanding the meaning of a CPIO and we would be adding something more into the definition of CPIO than the one as was conceived by the legislature. This is not permissible under law and when the CPIO is only indicated to be officer against whom penal action can be taken under Section 20, we cannot read into the said statutory provision anything more by supplying words or meaning which would enlarge the scope of the penal provisions under Section 20. That apart, the CPIO being custodian of the information or the documents sought for, is primarily responsible under the scheme of the RTI Act to supply the information and in case of default or dereliction on his part, the penal action is to be invoked against him only. The Appellate Authority is not the custodian of the information or the document. It is only a statutory authority to take a decision on an appeal with regard the tenability or otherwise of the action of the CPIO and, therefore, there is a conscious omission in making the Appellate Authority liable for a penal action under Section 20 of the RTI Act and if that be the scheme of the Act and the legislative intention, we see no error in the order passed by the learned writ Court warranting reconsideration."

Whether imposition of penalty is mandatory?

Imposition of penalty on PIO is not compulsory. CIC has in its decision dated 31.05.2017 [Pawan Kumar Sharma v. CPIO & Dy. Commissioner of IT (Admn), Complaint No. CIC/BS/C/2016/00366-BJ] referred to the ruling of Hon'ble Delhi High Court in W.P.(C) 11271/2009 [Registrar of Companies & Ors v. Dharmendra Kumar Garg & Anr. DOJ- 01.06.2012] wherein it was held that the PIOs may genuinely and bonafidely entertain the belief and hold the view that the information sought by the querist cannot be provided for one or the other reasons. Merely because the CIC eventually finds that the view taken by the PIO was not correct, it cannot automatically lead to issuance of a show cause notice under Section 20 of the RTI Act and the imposition of penalty. The legislature has cautiously provided that only in cases of malafides or unreasonable conduct penalty on the PIO can be imposed. This was certainly not one such case. If the CIC starts imposing penalty on the PIOs in every other case, without any justification, it would instill a sense of constant apprehension in those functioning as PIOs in the public authorities, and would put undue pressure on them. The above decision of the CIC also referred to the Delhi High Court's decision in Col. Rajendra Singh v. CIC & Anr. [WP (C) 5469/2008 dated 20.03.2009].

M.K. Shaji, CLA/RWF

DCRG can be withheld while appeal is pending against the conviction of the retired employee:

On the conviction in a criminal case for violation of integrity norms in performance of official duties and an appeal pending before the High Court, is the employee still entitled to his Death-cum- Retirement Gratuity (DCRG) is the moot point arising for consideration in the present appeals. In the context of the issue, the Hon'ble Supreme court examined a Full Bench judgment of the Kerala High Court which resolved the conflict of view of the Division Benches and ruled in favour of the employees. The Hon'ble Supreme Court held that pendency of the appeal by a convicted employee cannot disentitle the State from withholding his DCRG.

The case in brief:

A case was registered in a crime of accepting bribe under the Prevention of Corruption Act, 1998 against Shri K. Chandran, Village Extension Officer, Noolaphuza, the Respondent in the Appeal. He was suspended from service and reinstated. Subsequently he was convicted in the Criminal Case and sentenced to undergo Rigorous Imprisonment for 2 years and a fine of Rs.5,000/- Aggrieved by this, he filed appeal before the Hon'ble High Court of Kerala. The appeal was admitted and the impugned order was suspended in the meantime. Then, Shri K. Chandran submitted a request for release of his DCRG. Since no response was forthcoming, he filed an application before the Kerala Administrative Tribunal, but it was dismissed on the ground that judicial proceedings had been concluded and Shri K. Chandran had been convicted holding that the issue, which arose pertained to the intent and purport of Rule-3A of the Part-III of the Kerala Service Rules, which was stated to require the outcome of Departmental or Judicial proceedings to be concluded for the release of DCRG. Again in the Appeal, Hon'ble High Court of Kerala held recovery under Rule-3 cold only be against pension and not DCRG and Rule-3A insofar as it permitted DCRG to be withheld was struck down. Rule 3A reads as follows : Where any departmental or judicial proceedings are instituted under Rule 3 or where a departmental proceeding is continued under clause (a) of the proviso thereto, against an employee who has retired on attaining the age of compulsory retirement or otherwise he shall be paid during the period commencing from the date of his retirement to the date on which, upon conclusion of such proceeding final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service up to the date of retirement, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension, but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders thereon.

Before the Apex Court, the State contended that the High Court proceeded on a wrong premise that Rule 3A was only for effective implementation of Rule 3 and it contended that that Rule 3A is necessary for temporary forfeiture of DCRG during pendency of departmental proceedings. The issue thus considered by the Court was that ' on the conviction in a criminal case for violation of integrity norms in performance of official duties and an appeal pending before the High Court, is the employee still entitled to the release of his Death-cum Retirement Gratuity?' The court first noted the objectives of holding back pension or the DCRG. "One can be to recover the amounts found due from the delinquent employee of any nature whatsoever after appropriate notice and proceedings. The second eventuality is if an employee is dismissed from service. It can hardly be doubted that in the second eventuality of the dismissal from service the employee would lose all retirement benefits.", the court noted. Disagreeing with the High Court view, the bench said that Rule 3A cannot be read in isolation. The court said: "Rule 3, Note 2, Ruling 3, and Rule 3A have to be read in conjunction as they provide for the treatment of the DCRG in case of disciplinary or judicial proceedings pending at the stage of retirement. Even in the absence of these proceedings in certain eventualities the amounts can be recovered from the DCRG." While allowing the appeal, the bench said: "We also believe that it is a very restrictive view to disburse DCRG on account of the proceedings against a pensioner coming to an end, even where a conviction has arisen. This is especially so where the convicted person has availed of the remedy of appeal. An appeal is a continuation of the proceedings in trial and would be, thus, a continuation of judicial proceedings. For example, if no appeal had been filed, can it be said that despite conviction in the criminal case, the State is without authority of forfeiting the DCRG or pension for that matter? If it is not so, as we believe, then the pendency of the appeal cannot disentitle the State from withholding the DCRG, considering that it is a hiatus period within which certain arrangements have to be made which would be dependent on the outcome of the appeal."

Hon'ble Apex Court set aside the impugned judgment of the Full Bench of the Kerala High Court and held that it cannot be opined that the DCRG would to be released to the respondents pending consideration of the Criminal Appeal [Local Self Government Department vs K Chandran |CA 7437- 7438 of 2021 DOJ: 15 March 2022]

Syed Amjad Ali, OS, GM Law Section

Difference between

Difference between Law and Act

A system of rules which regulate the order of the life of a country can said as law. An act is a part of the legislation and it is made by the legislators and it deals with particular circumstances and people. .

Law

The Law is a body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority. It is a structure of regulation how the society or people in a country behave or how they live. It is commonly used for the protection of the common people, in order to maintain the order in society. It is not complex or complicated it is for the safety and maintains the order in the society. It is something, such as an order or a dictum, having absolute or unquestioned authority. The commander's word was law.

These are created and enforced by a stipulated authority. Laws are more generic in nature. Law is established in a land. Laws are clear indication of what needs to be done and what does not. Laws are made to protect people from unfair practices and for maintenance of public order.

Act

Act is more specific than the law. It is the full text of some legislative writing, which lays out the entirety of what the legislature. It will include all of the necessary statutory language that is to be adopted, changed, or repealed, but will also often include language indicating the origin of the bill that was passed as well as any key findings upon which the legislature based their proposal, discussion, and/or decision on.

Act is the status created by the legislature, concentrating on a particular subject. It contains provisions related to it. Acts are specific in nature. When a bill is passed by both the houses of Parliament, it becomes an Act. Acts inform what, why and how laws need to be followed.

Act aims to inform people about the rules and regulations about specific situations

Act and Law, both, are necessary for the proper functioning and organization of the administration of the society, and the country as a whole.

K.Gopinath, CLA, GM/O/SCR

FAQ

Notice under Sec.80 of CPC

Is it mandatory to serve notice to the government or the public officers if any act done by the officer in the capacity of his office has caused a loss of any kind to the plaintiff?

For institution of any legal proceedings against any individual or private parties to claim relief from any mishap caused to the former, the law doesn't mandate to give notice to the other party. Whereas, in case of a suit against the government or any public officer who commits any act in the capacity of his public office, a notice u/s.80 is mandatory.

Section 80 of CPC provides 2 months to respond to the notice served to the government or public officer who has acted prejudicially to the interest of the plaintiff in the capacity of his public office. Thus, through this section, an attempt has been made by the legislature to amicably settle the matter in issue instead of knocking the door of the Court. Moreover, it saves them time, resources, and money which would be wasted by the plaintiff as well as the authorities in the institution of the suit.
Section 80(1) of CPC enlists the offices wherein the notice has to be given in writing and delivered to or left at as per the category they belong to:

a) If the suit is against the Central Government: office of the Secretary to that Government except if the case is against railways,

b) If the suit is against the Central Government relates to a railway: office of the General Manager of that railway;

c) If the suit is against the Government of the State of Jammu and Kashmir: office of the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

d) If the suit is against any other State Government: office of a Secretary to that Government or the Collector of the district;

e) In the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description, and place of residence of the plaintiff and the relief which he claims.

A notice under this section is specifically sent to bring to the information of the government or public official against whom the suit has to be filed about the alleged act committed by it which has caused wrongful loss to the plaintiff.

Hon'ble Supreme Court vide Judgement dt. 02.08.2005 in the case of Salem Advocate Bar Association Vs. UOI, (2005) 6 SCC 344, held that replies shall be given to statutory notices promptly.

K. Gopinath, CLA, GM/O/SCR

Some important clarifications related to the provisions of the Arbitration and Conciliation Act, 1996:

Whether the panel of Arbitrators maintained by the Respondent will be hit by Section12 of the Act?

BCC Developers & Promoters Ltd. v. DMRC (Judgment dated 28.10.2021 in ARB.P. 813/2021)

Relying on the judgment in Central Organization for Railway Electrification, the Hon'ble High Court of Delhi held that merely because the arbitrators on the panel are the ex-employees of one of the parties, it would not make them ineligible to be appointed as arbitrators to decide on the dispute. When the parties agreed on a procedure to appoint the arbitrators, the appointment shall be made in accordance with the agreed procedure only.

Whether the arbitrator could be made a party in a Section 34 application?

Kothari Industrial Corporation Ltd. v. M/S Southern Petrochemicals Industries (Judgment dated 29.09.2021 in OSA (CAD) No.83 of 2021)

The Hon'ble High Court of Madras imposed a cost of Rs. 1 Lakh on the appellants for unnecessarily impleading the arbitrator as a party under Section 34 petition. The court observed that it is absolutely pointless to make the arbitrator a party to a challenge petition, unless specific personal allegations are made which would merit an answer from the arbitrator.

Whether a party could raise a new ground of challenge in appeal under Section 37?

State Of Chhattisgarh v. M/s Sal Udyog Private Limited (Judgment dated 08.11.2021 in CIVIL APPEAL NO. 4353 OF 2010)

The Hon'ble Supreme Court held that a party is not barred from raising a new ground of challenge in appeal. The Court held that ground of 'patent illegality' is equally available under Section 37 of the Act and the same ground can be raised for the first time in appeal as well. There is nothing in the act which restrict the application of Section 34(2A) application to Section 34 petition only.

K. Phani Raj, ACM/M&D

KNOW OUR CONSTITUTION

Article 66– Election of Vice President

(1) The Vice President shall be elected by the members of an electoral college consisting of the members of both Houses of Parliament in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot

(2) The Vice 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 Vice President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Vice President

(3) No person shall be eligible for election as Vice President unless he (a) is a citizen of India; (b) has completed the age of thirty five years; (c) is qualified for election as a member of the Council of States

(4) A person shall not be eligible for election as Vice President if he holds any office of profit under the Government of India 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.

Article 67- Term of office of Vice President

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

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

(b) a Vice President may be removed from his office by a resolution of the council of States passed by a majority of all the then members of the council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days notice has been given of the intention to move the resolution.

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

YOURS LEGALLY

Term "*sum in dispute*" in the 4th Schedule includes aggregate value of the claims as well as counter claims while fixing fees of Arbitrator

Arbitral Tribunal entered reference to resolve dispute as to a claim amount of Rs.33,53,27,205/-, and amount of counter claim of Rs.11,43,40,050/-. The Arbitral Tribunal fixed the arbitral fees as Rs.40,44,795/- in terms of ratio of the judgment of this Court in Rail Vikas Nigam Vs. Simplex Infrastructure Ltd. [MANU/DE/1367/2020], and both the parties consented to the fixation of the arbitral fees. However, the counsels requested the Arbitral Tribunal on the issue whether counter claim(s) is/are to be included in the expression "*sum in dispute*" appearing in the 4th Schedule of the Arbitration and Conciliation Act, 1996, or the amount thereof is to be separately considered in terms of proviso to Section 38(1) of the Act.

The Arbitral Tribunal passed the order holding that the applicable arbitral fee has to be assessed separately for the claim, and counter claim. Hence, the present application has been filed seeking clarification with regard to the fixation of arbitral fee.

After hearing both parties, the High Court held that the term "*sum in dispute*", would take in its ambit claims as well as counter claims. The said expression "*sum in dispute*" used in the 4th Schedule to the Act has to be given its ordinary meaning, to include the total amount of claim made by the claimant, and the total amount of counter claim made by the respondent. The proviso to Section 38 (1) of the Act can only apply when the Arbitral Tribunal fixes its own fees, as in the case of most *ad hoc* arbitrations. The said proviso cannot apply when the fees of the Arbitral Tribunal has been fixed in terms of 4th Schedule to the Act. Therefore, Section 38(1) of the Act and its proviso cannot be resorted to while interpreting the term "*sum in dispute*", as occurring in the 4th Schedule to the Act.

The observations of the Arbitral Tribunal with regard to counter claim being an independent action requiring separate adjudication, it may also be relevant to note that unlike a civil suit, where a counter claim could be in respect of a totally different transaction, in the context of arbitral proceedings, the counter claim has to necessarily be in relation to the arbitration agreement. Therefore, in the context of arbitration proceedings it may not be correct to say that counter claim would be an "independent" cause of action. It seems from the same subject matter/transaction.

The High Court distinguishing the judgments in M/s Chandok Machineries Vs. M/s. S.N. Sunderson & Co., [2018 SCC OnLine Del 11000] and NTPC Limited Vs. Afcons RN Shetty & Co Private Limited, [MANU/DE/1574/2021] relied on by the AT held that they were in the context of interpreting Sections 38(1) and 31A of the Act where the Arbitral Tribunal was free to fix its own fees and the fee was not fixed by the Court in terms of 4th Schedule to the Act. The said judgments cannot be resorted to for interpretation of the words "*sum in dispute*" as occurring in 4th Schedule to the Act. Therefore, the said judgments are not applicable to the facts and circumstances of the present case.

The Supreme Court in National Highways Authority of India Vs. Gayatri Jhansi Roadways Limited [2019 SCC OnLine SC 906] held that the fees was to be fixed in terms of the agreement between the parties and not the 4th Schedule to the Act. It was in that context that the Supreme Court made the following observations:-

"14. However, the learned Single Judge's conclusion that the change in language of Section 31(8) read with Section 31-A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Sections 31(8) and 31-A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in Gayatri Jhansi Roadways Ltd. is not a correct view of the law."

Thus, Sections 31(8) and Section 31A would have no application where the fees of the arbitral tribunal has been fixed by agreement between the parties, as in the case before the Supreme Court. Similarly, where the fees has been fixed by the Court in terms of 4th Schedule to the Act, as in the case at hand, Sections 38(1), 31(8) and Section 31A would have no application. The term "*sum in dispute*" provided in the 4th Schedule to the Act has to be interpreted so as to include the aggregate value of the claims as well as counter claims. *[Jivanlal Joitaram Patel vs. NHAI, FAO (OS)(COMM) 70/2017 High Court of Delhi, DOJ: March 08, 2022]*

K. Phani Raj, ACM/M&D

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

Contd.. from previous issue.

Though Section 5 of the Act limits the judicial intervention in matters relating to arbitration, it is felt that the interference of the Judiciary in the arbitration process at almost every stage and also after the award has been a hindrance towards foreign investment in India. It is a pertinent issue that has been considered by the legislation that the arbitral award given by the arbitrator or the arbitral tribunal gets challenged at every stage until it reaches the highest court therefore calling for judicial interference which very defeats the very purpose of an expedited dispute resolution. This also acted as a detriment for the foreign companies to do business in India and therefore it was thought necessary that an amendment to straighten the curve in the process of business as well as dispute resolution in India. Section 96 of CPC, 1908 stipulates that an appeal lies from an order of a lower court and if the superior court feels that the lower court has erred in law or procedure then the superior court can overturn or reverse the decision. Same is not the position with A&C Act, 1996. Judiciary cannot overturn or reverse an award by the arbitrator or the arbitral tribunal. Section 34 of the Act provides that the court can merely set aside the award passed by the arbitrator or arbitral tribunal. Section 28(3) is one of the sections that fall for consideration for amendment since AT not deciding the dispute in accordance with the terms of the contract leads to interference of the Court under Section 34.

It should be understood that while Section 28 of the Act states as to the 'Rules applicable to substance of dispute', Section 28 (3) specifically deals with the treatment of the terms of the contract and usages of trade. Consequent to the legal exposition of the Arbitration proceedings throughout the world by the Supreme Court and the Law Commission's proposals, Section 28(3) has been amended in 2015.

Section 28(3), before the Amendment Act, 2015 read as follows:

"28. Rules applicable to substance of dispute.— xxx xxx xxx (3) In all cases, 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."

Section 28(3), after amendment, reads as follows:

"28. Rules applicable to substance of dispute.— xxx xxx xxx (3) 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."

Section 28(3) has been amended to bring it in line with the judgment of the Supreme Court in Associate Builders, (2015) 3 SCC 49, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one. The amendment to section 28(3) has been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC vs. Saw Pipes Ltd, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside and of limiting the grounds of challenge to awards. [HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471]. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would.

The change in the language of Section 28(3) gives some discretionary power to the arbitral tribunal to look into the nature and intent of the contract along with the trade usage of the agreement instead of strict construction. Prior to the amendment the arbitral tribunal was compelled to pass an award strictly in accordance with the terms and conditions as mentioned in the contract with a narrow interpretation of the terms of the contract similar to 'as is where is' clause. However, this amended Section 28(3) does not gives unfettered liberty to the Arbitrator to decide the disputes as if they desire and AT cannot determine the dispute by totally ignoring the terms of the Contract. In an appropriate case, if the Arbitral Tribunal finds that in the facts and circumstances of the case and in terms of the applicable law, a well-reasoned departure from a contractual prohibition clause is warranted, then the resulting Arbitral Award cannot be interfered on the sole ground that the same is contrary to the contract, if the reasoning of the Arbitral Tribunal in this regard is rational and plausible.

N. Murali Krishna, Sr.Law Officer