South Central Railway
Lex Info – e Magazine

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Have you any case law/case study to be shared with other railwaymen?

Articles/write-ups on legal issues relevant to railways' working are invited from officers/staff including from other zonal railways/production units;
Please mail them to:

Sr.Law Officer,
Law Branch, SCR,
3rd Floor,
Rail Nilayam,
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email:
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Note: This is only a news capsule. For full information and understanding to cite the case, please go through the original judgment.

Shri John Thomas, AGM/S.C.Rly. (second person from right side, Shri A.K. Singh, Secy.(PG)(third person from right side,) Shri N. Murali Krishna, Sr.LO(first from right side) Shri M.V.Ramana, LO/BZA and legal staff during the launching of Lex Info – e Magazine on 20th December 2018

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From Editor's Desk

Dear readers, on behalf of the editorial board wish you a very happy and prosperous new year, to you all and your families. The second issue of the Lex-Info e-Magazine is now before you. You are all aware that the IRGCC has been revamped and a new GCC has been published by Railway Board on 5.11.2018 by modifying certain clauses, including Arbitration Clause in terms of A&C Act, 1996. IRS Conditions have also been amended on 12.12.2018 and brought them in tune with GCC for works contracts. A noteworthy modification in both the GCCs is, hitherto unknown clause to dispute resolution mechanism on the Railways, a clause on Conciliation of disputes. Hope this new clause in both the GCCs will give room for quick and more amicable resolution of the disputes.

In this issue, we have covered some important judgments, one of which, though is an old judgment, but quite relevant to defend cases filed by the employees before Consumer fora, claiming that employees are also consumers for the purposes of retirement benefits. Two more judgments on Arbitration and Conciliation Act, 1996 are also included. In the regular column, "Treatise on A&C Act, 1996", appointment of arbitrators on the Railways is dealt.

N. Murali Krishna, Sr.LO/HQ

Scope of intervention u/s. 34 of A&C Act by Courts is minimal when the award is based on facts:

A Division Bench of Delhi High Court ruled that, Single Judge of the High Court could not have justly interfered with the arbitral award passed by the Tribunal which was primarily based on findings of fact. Consequently, the appeal was allowed and the impugned judgement was set aside.

The Appellant was aggrieved by the Judgment of Single Judge who upheld the objects of the respondent under Sec.34 of the Arbitration and Conciliation Act, 1996 against the Arbitral Tribunal's Award.

The parties entered into a contract for construction work. The work was to be executed by the appellant as per the terms of the work order. Dispute arose between the parties regarding the payments related to the contract. On an application moved by the appellant u/s.11, the Court appointed an Arbitrator.

The arbitration agreement itself was earlier disputed by the respondent but the arbitrator as well as the Single Judge consistently ruled in favour of its existence.

The arbitrator in his award, partly allowed the claim of the Appellant. The award was challenged by the respondent by filing objections u/s 34. The Single Judge allowed the objections and set aside the award. Aggrieved thereby, the Appellant preferred the present appeal u/s.37.

Appellant relied on a series of e-mails and letters exchanged between the parties to support his claim. It is pertinent to note that the Tribunal gave its award after perusing such correspondence; while the Single Judge assumed that only the written contract entered into between the parties was to be considered.

The High Court referred to Associate Builders Vs. DDA, (2015)3 SCC 49, wherein the Hon'ble Supreme Court cautioned that u/s 34, the courts should not set aside arbitral award merely because they do not agree with the interpretation of the agreement given by the arbitrator, rather it has to be shown that Tribunal's findings were based on no evidence or irrelevant evidence or was perverse.

In the present case, the findings of Tribunal were pursuant to a process of reasoning and discussion and analysis of evidence and documents presented before it. It was observed that in such a case, the scope of interference u/s 34 was minimal. [Wishwa Mitter Bajaj Vs. Shipra Estate Ltd., FAO (OS) No.162 of 2017, Del HC, DOJ: 14.12.2018]

- IVVRP Prasad, LO/HQ

Know our Constitution

Part – III:
FUNDAMENTAL RIGHTS

Art. 12: "The State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Art. 13: Laws inconsistent with or in derogation of the fundamental rights shall be void to the extent of such inconsistency. "Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. Constitutional Amendments under Art. 368 are not affected by Art. 13.

Art. 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

"Mr Smith, I have reviewed this case very carefully," the divorce court judge said, "and I've decided to give your wife $275 a week".

"That's very fair, your honour, "the husband said. "And every now and then I'll try to send her a few bucks myself."

ABC of Acts

The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013

w.e.f. **09.12.2013**

"Sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature. [S.2(n)]

Prevention of sexual harassment - No woman shall be subjected to sexual harassment at any workplace. Promise of preferential treatment, threat of detrimental treatment, threat about present / future employment, creating intimidating / offensive / hostile work environment, humiliating treatment in relation to sexual harassment will also amount to sexual harassment. [S.3] Rule 3C of the Railway Services (Conduct) Rules, 1966 prohibits sexual harassment of women at workplace.

Internal Complaints Committee (ICC) to be formed by all employers and Local Complaints Committee (LCC) to be formed by nominated District Officer (DO).

Complaint of sexual harassment – Written complaint to ICC/LCC within 3 months. Delay condonable. Legal heir/ other persons may also complain [S.9]

Conciliation – ICC/LCC to initiate conciliation if requested by aggrieved woman provided that no monetary settlement shall be made. No further inquiry shall conducted by ICC/LCC [S.10].

Inquiry into complaint – ICC/LCC to make inquiry as per the service rules and complete within 90 days. LCC to forward complaint to police within 7 days for registering case. If settlement terms not complied with by the respondent, the ICC / LCC shall make inquiry / forward complaint to the police. Court may order payment of sums to the aggrieved by respondent [S.11].

Action during pendency of inquiry – ICC/LCC may recommend to transfer the aggrieved woman / respondent or grant leave to the aggrieved woman up to a period of three months (not debited to the employee's leave account). The employer shall implement the recommendations and send report to the ICC/LCC. [S.12]

Inquiry report – ICC/LCC to provide report of its findings to employer / DO/ both parties within 10 days of inquiry completion. When allegation is not proved it shall recommend no action against the respondent. If allegation is proved, it shall recommend to take up the respondent under service rules and deduct from salary of the respondent sum considered appropriate and pay to the aggrieved woman. Employer / DO to act upon the recommendation within 60 days [S.13]. Action against the complainant / witness under service rules to be taken, if malicious intention is established after an inquiry. Mere inability to substantiate a complaint need not attract action against the complainant. [S.14]

Notwithstanding anything contained in the RTI Act, 2005, the contents of the complaint and all subsequent proceedings shall not be published, communicated or made known to the public/press/media in any manner [S.16]. Contravention of S.16, renders liable for penalty as per the service rules applicable [S.17].

Appeal - Any person aggrieved from the ICC/LCC recommendations or action recommended under service rules or non-implementation of such recommendations may prefer an appeal within 90 days to the court or tribunal [S.18]. Penalty up to Rs.50,000/- for breaches of non-compliance of the provisions of Act. Twice the punishment for subsequent offences [S.26].

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

Where there is a will,
there is a law suit.

No regularisation of service when appointment was illegal – Disciplinary proceedings not required to terminate such employees:-

The Supreme Court has reiterated that when the appointments were illegal and void ab initio, the question of regularization of their services by invoking the judgment in Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors. [2006 (4) SCC 1] case does not arise.

Bihar State Government, having found that a large number of appointments were made on the basis of false or forged documents, without following due process of recruitment and mostly without the appointment orders, cancelled such appointments and the concerned incumbents were discharged from service. The High court had set aside such termination invoking Umadevi judgment.

The bench explained the Umadevi judgment and observed that the Constitution Bench has held that unless the appointment is made in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. "If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it was an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. A temporary employee could not claim to be made permanent on the expiry of his term of appointment. It was also clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules".

The court also took note of the State Committee report that many of them had secured appointments by producing fake or forged appointment letter or had been inducted into government service surreptitiously by the concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order.

Allowing the appeals, the court observed that the State Committee, on appreciation of the materials on record, has opined that their appointment was illegal and void ab initio. Therefore, the Apex Court did not find any ground to disagree with the finding of the State Committee and held that the question of regularisation of their services by invoking Para 53 of the judgment in Umadevi does not arise. Since the appointment of the petitioners is ab initio void, the Supreme Court held that they cannot be said to be civil servants. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise. [CA No.8649 of 2018 (State of Bihar & Ors. Vs. Kirti Narayan Prasad & Ors. DOJ: 30.11.2018]

- D.R.V.S.S.S.N.RAJU, CLA/G/BZA

Legal Terms & Maxims

Bona fide - Sincere, in good faith
Caveat emptor - Let the purchaser beware.
Caveat venditor - Let the seller beware.
Consensus ad idem - Agreement as to the same things.
De facto - In fact.
De jure - Rightful, by right.
De novo - Starting afresh.
Delegata potestas non potest delegari - A delegated authority cannot be again delegated.

K.Gopinath, CLA./GM/O/SC

LEGAL UPDATES

103rd CONSTITUTIONAL AMENDMENT

Art. 15 has been amended to add a new clause (6) to facilitate admission of Economically Weaker Sections (EWS) of citizens for admission into educational institutions, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions subject to maximum of 10% of the total seats in each category.

Art.16 has been amended to add a new clause (6) to enable reservation of appointments or posts for EWS in addition to existing reservation, subject to 10% of the posts in each category.

FAQ - Caveat

Caveat is a Latin term which means, 'let a person beware'. A Caveat Petition is a formal notice filed before the proper legal authorities by an interested party (Caveator) requesting them to refrain from an action until the party is heard. S.148A of CPC 1908 deals with caveat petition. A caveat petition is a precautionary measure which is undertaken by people usually when they are having a very strong apprehension that some case is going to be filed in the Court affecting their interest in any manner.

Though the word "caveat" is not defined in CPC, in re Nirmal Chand Vs. Girindra Narayan the Court defined it as a caution or warning given by a person to the Court not to take any action or grant relief to the other side without giving notice to the caveator and without affording opportunity of hearing him.

Any person claiming a right to appear before the Court where an application is expected to be made or has already been made in a suit / proceeding instituted or about to be instituted may lodge a caveat thereof. The Caveator shall serve a notice of the caveat by registered post A/D on the person (applicant) by whom the application is expected to be made / has been made. The Court shall serve a notice of the application on the Caveator. The applicant upon whom a notice of Caveat has been served shall furnish a copy of his application to the Caveator along with all the papers/documents which have been filed by him / may be filed by him in support of his application. Caveat remains in force for 90 days and needs to be renewed before the expiry of 90 days, if the Caveator wishes to be heard.

A total stranger to a proceeding cannot lodge a caveat [in re Kattil Vayalil Parkkum Koiloth Vs. Mannil Paadikayil Kadeesa Umma]. It was held in Reserve Bank of India Employees Association & Anr. Vs. Reserve Bank of India and Ors. (AIR 1981 AP 246) that as there is no specific provision declaring any action taken by the Court contrary to its mandatory duty under S.148A (3) to give a notice would be void, the order passed by the Court below is not a nullity.

G. Kumara Kotappa,CLA/GTL

Difference Between

Stay Order, Status Quo Order & Injunction:

Courts grant a stay in a case when it is necessary to secure the rights of a party. A stay order means the act of temporarily stopping a judicial proceeding through the order of a court. A stay is a suspension of a case or a suspension of a particular proceeding within a case. A judge may grant a stay on the motion of a party to the case or issue a stay sua sponte, i.e. voluntarily without the request of a party. Stay order is from a higher court or tribunal on the order of a lower court or tribunal. It is in between two courts or tribunal. Stay order binds lower courts/ tribunals/ parties.

On the other hand, status quo order in law means that court has ordered that the present condition be maintained and no change etc. be done. If any alteration or change in the property or the subject matter of the proceedings after the order of status quo is made, then it amounts to contempt of court. A judge has the authority to issue a status quo order to prevent anyone from taking any action until the matter is heard and resolved by the court. eg: If in a property Suit an order to maintain the Status Quo has been passed, then the property cannot be sold, sublet, leased etc. The property has to be kept as it was on the date of passing of the order. Status quo order is regarding the position or status or condition of moveable or immovable property under lis between rival parties who sought adjudication of their dispute before a court or tribunal. Status quo order binds parties.

An injunction is a prohibitive writ issued by a court of equity, at the suit of a party, directing the defendant forbidding to do or permit complainant's servants or agents to do some act, such act being unjust, inequitable and injurious to the plaintiff, and cannot be adequately compensated by an action under law, keeping in view balance of convenience and irreparable injury. Injunction may be either temporary or perpetual/ permanent. The law of injunction has been provided for by the Specific Relief Act, 1963 and Order XXXIX, Rule 1 to 5 of CPC, 1908.

– K.Gopinath, CLA/GM/O/SC

Govt. Servants are not consumers for the purpose of retirement benefits:

The Supreme Court in CA No.5476 of 2013 [Dr. Jagmittar Sain Bhagat (Appellant) Vs. Dir. Health Services, Haryana & Ors.(Respondent)] has dealt with the question as to whether or not to treat a Government Servant as consumer for the purpose of claiming retiral benefits.

The appeal before it was preferred against the order of the National Consumer Disputes Redressal Commission, New Delhi dismissing the claim of the appellant as well as the review petition seeking certain reliefs.

Brief facts giving rise to the appeal are that:

The appellant-Medical Officer was transferred to another district, but he retained the government accommodation. The appellant claimed that he had not been paid all his retiral benefits, and penal rent for the said period had also been deducted from his dues of retiral benefits without giving any show cause notice to him. The appellant made various representations, however, he was not granted any relief by the State authorities.

Aggrieved, the appellant preferred a complaint before the District Consumer Disputes Redressal Forum, Faridabad and the said Forum dismissed the complaint on merits observing that his outstanding dues i.e. pension, gratuity and provident fund etc. had correctly been calculated and paid to the appellant by the State authorities.

The appellant preferred appeal before the State Commission. The State Commission dismissed the appeal by observing that though the complaint was not maintainable as the District Forum did not have jurisdiction to entertain the complaint of the appellant as he was not a "consumer" and the dispute between the parties could not be redressed by the said Forum, but in view of the fact that the opposite party (State) neither raised the issue of jurisdiction before the District Forum nor preferred any appeal, order of the District Forum on the jurisdictional issue attained finality. However, there was no merit in the appeal.

The Revision Petition and Review Petition filed by the appellant before the NCDRC were also dismissed. Aggrieved by this, the appellant approached the Hon'ble Supreme Court.

The Hon'ble Supreme Court held that the Govt. Servant does not fall under the definition of Consumer and he is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for the purpose. The appropriate forum for redressal of any grievance will be the State Administrative Tribunal or Central Administrative Tribunal as the case may be. [(2013) 5 SCC 527].

- V. Apparao, CLA/GM/O/SC

Provisions of RTI Act not to be resorted to, if information can be accessed through mechanism provided under another statute:

The order of the State Information Commissioner, Karnataka to provide information which was available as annexures to a Civil Suit to which the RTI applicant was a party, was challenged before the Hon'ble High Court, Karnataka, which in turn relied upon the order of the Hon'ble High Court, Delhi in re Registrar, Supreme Court Vs. R.S.Mishra [WP(C) No.3530/2011].

The Hon'ble High Court, Karnataka held: "….if any information can be accessible through the mechanism provided under another statute, then the provisions of the RTI Act cannot be resorted to. In the case on hand, the information which is sought by the second respondent related to the legal notice which is issued by the second respondent through his advocate. This is available with the second respondent. In respect of other documents related to O.S.No.4132/2010 which was pending in the Civil Court, Bangalore, he can obtain the same by applying for the certified copies as per the provisions of Rule 230 of the Rules of Practice. Since the second respondent is party to the proceedings he can apply for the certified copies and obtain the same".

In the result, the impugned order was held to be unsustainable. [WP 25763/2013 & 26762/2013 spio & Dy. Registrar, Karnataka HC Vs. Karnataka Information Commissioner & Anr.]

- N. Murali Krishna, Sr.LO/GM/O/SC

Yours Legally

Notional extension of work place & time

Section 3(1) Workmen's Compensation Act, 1923 provides that the employer is liable to pay compensation to an employee "if personal injury is caused to an employee by accident arising out of and in the course of employment". Employment does not necessarily end when the tool down signal is given or when the workman leaves the actual workshop. There is a notional extension at both the entry and exit time and space.

Hon'ble Supreme Court held in General Manager, B.E.S.T Undertaking, Bombay Vs. Mrs. Agnes: "It is now well-settled, however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and re-passes in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension."

It was further held therein: "…The man's work does not consist solely in the task which he is employed to perform. It includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employers' premises to another, and periods of rest may all be included." (1964) 3 SCR 930.

The claimant-employee has to prove (i) the occurrence of accident, (ii) casual connection of accident with the employment & (iii) that accident arisen out of the course of employment.

Negligence cannot be a ground to decline compensation: Section 3 of E.C Act 1923 disentitles an employee/legal heir of compensation if he was under the influence of drink/drugs or there was wilful disobedience of safety order/rule or wilful removal of safety guard/device.

Hon'ble SC held in Jaya Biswal & Others Vs. Branch Manager, Iffco Tokio General Insurance Company Ltd. & Anr. [Civil Appeal No.869 of 2016] as follows: "The E.C. Act does not envisage a situation where the compensation payable to an injured or deceased workman can be reduced on account of contributory negligence. It has been held by various High Courts that mere negligence does not disentitle a workman to compensation. Lord Atkin in the case of Harris v. Associated Portland Cement Manufacturers Ltd.[10] observed as under: "Once you have found the work which he is seeking to be within his employment the question of negligence, great or small, is irrelevant and no amount of negligence in doing an employment job can change the workman's action into a non-employment job ... In my opinion if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it he is entitled to compensation." 2016 ACJ 721.

Hon'ble Apex Court on 22.1.2019 in Civil Appeal No. 931 of 2019 [Leela Bai & Anr. Vs. Seema Chouhan & Anr.], while dealing with the claim of legal heirs of a bus driver who died one hour after his duty hours from an accidental fall from the roof of the bus after having his meals, held: "…..In the facts of the case, and the evidence available, it is evident that the deceased was present at the bus terminal and remained with the bus even after arrival from Indore not by choice, but by compulsion and necessity, because of the nature of his duties. The route timings of the bus required the deceased to be readily available with the bus so that the passenger service being provided by respondent no.1 remained efficient and was not affected. If the deceased would have gone home every day after parking the bus and returned the next morning, the efficiency of the timing of the bus service facility to the travelling public would definitely have been affected, dependant on the arrival of the deceased at the bus stand from his house. Naturally that would bring an element of uncertainty in the departure schedule of the bus and efficiency of the service to the travelling public could be compromised. Adherence to schedule by the deceased would naturally inure to the benefit of respondent no.1 by enhancement of income because of timely service." Accordingly, the appeal was allowed.

–Shaji.M.K, CLA/GM/O/SC

Treatise on Arbitration and Conciliation Act, 1996

Contd.. from last issue

Disputes not arbitrable: Further, adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora.

The well recognized examples of non-arbitrable disputes are:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights & child custody;
(iii) guardianship matters;
(iv) insolvency and winding up matters;
(v) testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The Arbitration and Conciliation Act, 1996 does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force." [Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Ors. AIR 2011 SC 2507]

While referring to judgment in Booz Allen and Hamilton Inc. (supra), those principles have again been reiterated by the Supreme Court in A. Ayyasamy Vs. A. Paramasivam and Others, (2016) 10 SCC 386, by holding that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable:

(i) patent, trademarks and copyright;
(ii) anti-trust/competition laws;
(iii) insolvency/winding up;
(iv) bribery/corruption;
(v) fraud;
(vi) criminal matters.

Fraud is one such category spelled out by the decisions of the Supreme Court where disputes would be considered as non-arbitrable.

In Vimal Kishore Shah vs Jayesh Dinesh Shah, (2016) 8 SCC 788 the Supreme Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.

Composition of Arbitral Tribunal:-

Arbitrators may be of any nationality, unless otherwise agreed by the parties [S.11(1)]. Further, the parties are free to agree on a procedure for appointment of arbitrator(s). Arbitral Tribunal means a sole arbitrator or a panel of arbitrators [S.2(1)(d)]. The parties are free to determine the number of arbitrators, which shall not be an even number [S.10 (1)]. If the parties fail to determine the number of arbitrators to decide the dispute, the dispute shall be decided by a sole arbitrator [S.10 (2)]. On Indian Railways in works contracts (GCC) in case of appointment of in house arbitrators, the Arbitral Tribunal shall consist of a Sole Arbitrator where the total value of all claims added together does not exceed Rs.1,00,00,000/- (Rupees One Crore), and if the amount is more than one Crore, the Arbitral Tribunal shall consist of three arbitrators. However, if outside arbitrators are appointed, the limit for appointment of sole arbitrator is Rs.50,00,000/-. Same scale applies to appointment of Arbitration Tribunal under IRS conditions.

..(Contd. in next issue)

–Shaji.M.K, CLA/GM/O/SC