



Dispute Resolution & ADR

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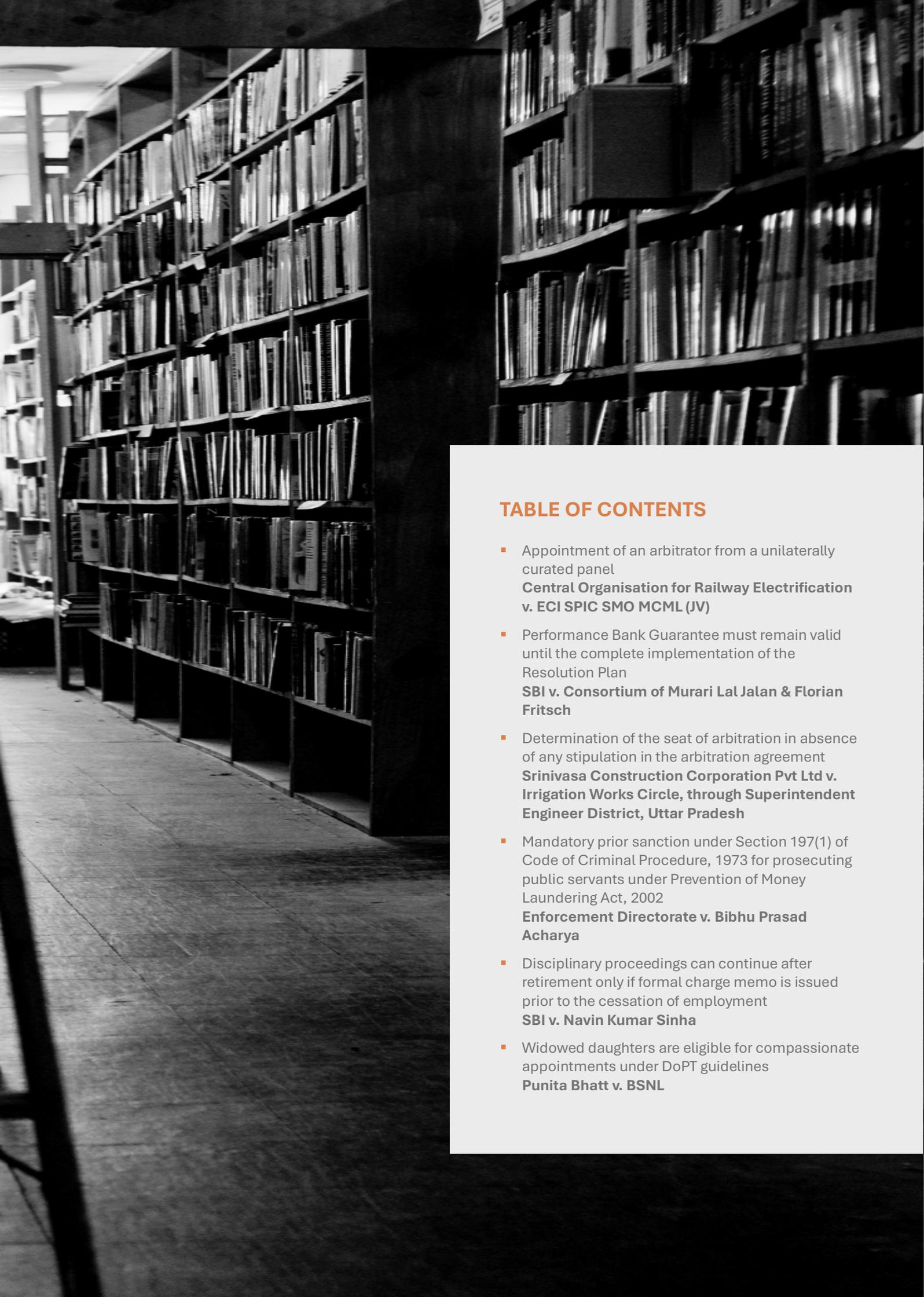


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Appointment of an arbitrator from a unilaterally curated panel

Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)

Supreme Court of India | November 8, 2024
2024 SCC OnLine SC 3219

The Supreme Court of India held that a party to an arbitration cannot be compelled to nominate its arbitrators from a panel unilaterally curated by the other party. The Court affirmed that the principles of equal treatment of parties apply at all stages of arbitrations (including the stage of appointment of arbitrators) and includes the necessity to maintain equity and fairness in the arbitral process by ensuring neutrality (independence and impartiality) of the arbitral tribunal to eliminate the element of bias. This judgment strikes a fine balance between party autonomy and principles of natural justice to prevent miscarriage of justice, particularly in one-sided contractual relationships between the government and private contractors. Further, by clarifying that the provision of waiver by a written agreement (after disputes have arisen) under the proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 (**Act**) applies to unilaterally appointed tribunals, the Court has affirmed the principles of party autonomy in its true sense.

SUMMARY OF FACTS

In *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) (CORE)*¹, the arbitration clause provided for the constitution of an arbitral tribunal comprising 3 Railway officers. From a panel of at least 4 officers selected by the Railways, the contractor was to suggest at least 2 names, out of which at least 1 would be selected by the Railways and appointed as the contractor's nominee arbitrator. The balance arbitrators would be appointed by the Railways duly indicating the presiding arbitrator.

Before the 3-judge bench of the Supreme Court, it had been argued that the clause was invalid basis 3 decisions:

- *TRF Ltd v. Energo Engg Projects Ltd*²: A person who becomes ineligible to be appointed as an arbitrator cannot nominate another person as an arbitrator.
- *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn Ltd*³: Current or former employees of a party are ineligible under Section 12(5) of the Act to be appointed as an arbitrator, although government employees of a different department having no connection with a party would not be ineligible.
- *Perkins Eastman Architects DPC v. HSCC (India) Ltd*⁴: An interested party should not have the power to unilaterally appoint the arbitrators unless such power is counterbalanced by an equal nominating power with the other party (relying on *TRF*).

The 3-judge bench had relied on *Voestalpine* to hold that Section 12(5) of the Act does not bar appointment of former government employees as arbitrators, thereby allowing the retired Railway officers to be appointed arbitrators. While holding *TRF* and *Perkins* to be inapplicable, the Court observed that the right of the Railways in appointing the tribunal gets counterbalanced by the contractor's power to choose any 2 persons from the panel of 4 curated by the

Railways. Accordingly, the Supreme Court in *CORE* upheld the validity of the arbitration clause. Subsequently, in *Union of India v. Tania Constructions*⁵, a coordinate bench of the Supreme Court expressed *prima facie* disagreement with *CORE* and the issue was referred to a 5-judge bench.

DECISION OF THE COURT

While considering the issue of appointments from a unilaterally curated panel, the final judgment by the 5-judge bench of the Supreme Court in the *CORE* matter held the process of appointing arbitrators to be unequal and prejudiced in favour of the Railways.

Just as a clause authorising a party to unilaterally appoint an arbitrator impedes the neutrality of the arbitrators (as held in *Perkins*), similarly compelling one party to nominate arbitrators from a panel unilaterally curated by the other party is against the principles of equal treatment of parties enshrined under Section 18 of the Act, which applies at all stages of arbitration proceedings.

While holding that such unilateral appointment clauses in a public-private contract are violative of Article 14 of the Constitution of India, the Court clarified that the Act does not prohibit Public Sector Undertakings (*PSUs*) from empanelling potential arbitrators, as long as there is no mandate restricting the contractor's choice.

The Court held that the principle of express waiver under the proviso to Section 12(5) of the Act (which applies after disputes have arisen) applies to a unilaterally appointed arbitral tribunal, thus striking a balance between the principles of party autonomy and neutrality of the tribunal.

Lastly, the Court held this decision to have prospective effect that applies only to arbitrator appointments made after November 8, 2024, and only to 3-member arbitral tribunals.

¹ (2020) 14 SCC 712

² (2017) 8 SCC 377

³ (2017) 4 SCC 665

⁴ (2020) 20 SCC 760

⁵ (2023) 12 SCC 330

Performance Bank Guarantee must remain valid until the complete implementation of the Resolution Plan

SBI v. Consortium of Murari Lal Jalan & Florian Fritsch

Supreme Court of India | November 7, 2024
2024 SCC OnLine SC 3187

The Supreme Court directed the liquidation of Jet Airways Ltd (**Jet Airways**) on account of the failure of the Successful Resolution Applicant (**SRA**) to comply with the terms of the approved Resolution Plan (**Plan**) despite lapse of a considerable period of time. Highlighting the requirement for strict adherence of the terms of a Plan for balancing stakeholder interests, the Court held that modifications to an approved Plan are impermissible and as such, a Performance Bank Guarantee (**PBG**), which serves as security in case of failure of the Plan, must remain valid until the complete implementation of the Plan and cannot be adjusted against the payment otherwise required to be made by the SRA. The Court's suggestions for the introduction of regular monitoring mechanisms, along with effective legal and procedural reforms, as well as a more proactive and structured approach from all stakeholders, are likely to increase oversight and accountability, ensuring that resolutions are not delayed indefinitely.

SUMMARY OF FACTS

The dispute before the Supreme Court pertained to non-compliance by the SRA of the terms of the Plan for Jet Airways.

The Plan was approved by the NCLT, Mumbai on June 22, 2021. The SRA had submitted a PBG of INR 150 crore under Regulation 36B(4A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**). The conditions precedent for the Plan were to be fulfilled within 90 days from the approval of the Plan, which period was extendable by 180 days. Additionally, the SRA was required to make a first tranche payment of INR 350 crore within 180 days.

During the proceedings before the NCLAT, the SRA deposited only INR 200 crore towards the first tranche payment and sought to adjust the PBG towards the balance. The NCLAT permitted this adjustment which was challenged by the lenders before the Supreme Court.

DECISION OF THE COURT

The Court observed that under Regulation 36B(4A) of CIRP Regulations, the PBG serves as security in case of failure of the Plan and must remain valid until its complete implementation. Thus, the NCLAT's order allowing adjustment of PBG violated both the regulatory framework as well as the Plan.

The Court relied on its decision in *Ebix Singapore Pvt Ltd v. Educomp Solutions Ltd (CoC)*,⁶ which held that modifications to an approved Plan are impermissible, allowing the lenders to encash the PBG and other funds infused by the SRA which were declared as forfeited.

Additionally, the Court also addressed the consequences of repeated delays and non-compliance with the Plan, including whether liquidation under Section 33(3) of the Insolvency & Bankruptcy Code, 2016 (**Code**) was warranted.

Underscoring the Code's objective for time-bound resolutions, the Court deprecated the practice of SRAs to constantly seek extension of timelines and relaxations under approved Plans and directed the NCLT and NCLAT to cautiously exercise their inherent powers and not accede to such requests mechanically. Consequently, the Court invoked its power under Article 142 of the Constitution of India to direct liquidation of Jet Airways, despite being a measure of last resort, on account of excessive delay and dim prospects of implementation of the Plan.

The Court identified several deficiencies in the insolvency ecosystem, including delays in adjudication, inadequate infrastructure, improper functioning of the NCLT and NCLAT as well as lack of domain knowledge amongst the members, and suggested legislative and policy reforms including:

- Regular identification of deficiencies in the insolvency framework and quick redressal.
- Strict adherence to the existing provisions of the Code by all stakeholders.
- Establishment of an oversight committee to enforce the standards for the CoC on impartiality, professional competence, supervision and timeliness, feasibility of the corporate debtor, and regular meetings, as reflected in IBBI's guidelines dated August 8, 2024.
- Active support by creditors to facilitate the implementation of the Plan.
- Sensitisation of the members of the NCLT and NCLAT to judiciously exercise their discretion to extend timelines.
- NCLT and NCLAT to record in their orders, the next steps to be undertaken by stakeholders for commencement of the Plan.
- Incorporation of a statutory provision for constitution of a monitoring committee to supervise the Plan and ensure compliance with all regulations while updating the NCLT and the creditors about the status of the Plan's implementation.

⁶ (2022) 2 SCC 401

Determination of the seat of arbitration in absence of any stipulation in the arbitration agreement

Srinivasa Construction Corporation Pvt Ltd v. Irrigation Works Circle, through Superintendent Engineer District, Uttar Pradesh

Delhi High Court | November 6, 2024
Arbitration Petition No. 454 of 2024

The Delhi High Court has affirmed that absent any indication of the parties' choice, the principles of Code of Civil Procedure, 1908 (**CPC**) would govern the determination of the arbitral seat, irrespective of a stipulation providing the place of arbitration to be a 'neutral location'. This decision rightly addresses and resolves ambiguities that arise in situations where the arbitration clause is unclear or vague regarding the seat of arbitration. The Court also held that parties cannot unilaterally confer supervisory jurisdiction on a Court (which otherwise has no connection to the dispute) by proposing a venue in a subsequent correspondence. However, in keeping with the fundamental tenet of party autonomy, it is apposite that Courts thoroughly examine the agreement and parties' correspondences before concluding the absence of any 'significant indicia' of a seat, in line with the decision in *BGS SGS Soma JV v. NHPC Ltd*,⁷ before resorting to the principles of CPC.

SUMMARY OF FACTS

Irrigation Works Circle, Uttar Pradesh (**IWC**) entered into an agreement with Srinivasa Construction Corporation Pvt Ltd (**SCCPL**) for rehabilitation of canal systems in Lalitpur, Uttar Pradesh.

The arbitration clause provided that the place of arbitration (seat) shall be a neutral location specified in the 'contract data', which, however, did not specify any place of arbitration.

Disputes arose between the parties and SCCPL invoked the arbitration clause proposing Delhi as the neutral location, as SCCPL was registered in Nagpur, Maharashtra while IWC primarily operated in Lalitpur, Uttar Pradesh.

Since both parties failed to agree on the seat of arbitration, SCCPL filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Act**) before the Delhi High Court seeking appointment of an arbitrator.

DECISION OF THE COURT

The Delhi High Court dismissed the petition for lack of territorial jurisdiction. While relying on *Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd*,⁸ the Court reaffirmed the well-settled difference between 'seat' and 'venue' – venue is the location where the arbitration may be conducted or held, whereas seat determines the Court having exclusive supervisory jurisdiction over the entire arbitral proceedings and the award.

The Court then referred to *Simplex Infrastructures Ltd v. Jammu & Kashmir Economic Reconstruction Agency*⁹ where the Delhi High Court (dealing with an identical arbitration clause) held that the requirement of the place to be a neutral location cannot be read in isolation by truncating the provision and ignoring the words 'specified in the contract data'. Since the contract data did not provide for any neutral location, the provision itself has no application and the seat would be determined as per CPC.

Relying on *Simplex*, the Court held that in the absence of a designated seat in the agreement, the determination of the Court having jurisdiction over the arbitral proceedings would be as per Sections 16 to 20 of CPC, taking into account factors such as the place(s) where cause of action arose (in whole or in part) and where the defendant resides or carries on business.

The contention that the Delhi High Court could assume supervisory jurisdiction since SCCPL's proposal of Delhi as a neutral venue had not been denied by IWC, was rejected.

The Court concluded that since the tender work was carried out in Lalitpur, Uttar Pradesh, SCCPL is based in Nagpur, and IWC is a government entity based in Uttar Pradesh, no part of the cause of action arose within the territorial jurisdiction of Delhi High Court, and dismissed the petition, granting liberty to SCCPL to approach the competent court.

⁷ (2020) 4 SCC 234

⁸ (2017) 7 SCC 678

⁹ 2024 SCC OnLine Del 5128

Mandatory prior sanction under Section 197(1) of CrPC for prosecuting public servants under PMLA

Enforcement Directorate v. Bibhu Prasad Acharya

Supreme Court of India | November 6, 2024
2024 SCC OnLine SC 3181

The Supreme Court recently held that prior sanction under Section 197(1) of CrPC is mandatory for prosecuting public servants under the Prevention of Money Laundering Act, 2002 (**PMLA**). While upholding the procedural safeguards available to public servants under the Code of Criminal Procedure, 1973 (**CrPC**), the judgment rightly underscores the principle of due process of law in the interplay of general and special criminal statutes. The requirement of prior sanction is consistent with the tenets of justice, equity, and good conscience, safeguarding the integrity of administrative functions while maintaining the rule of law as it shields public servants from frivolous or vexatious prosecutions. However, the judiciary must remain vigilant to prevent instances where the requirement of prior sanction becomes a veil for impunity, allowing the accused to evade accountability under the guise of official duties. Therefore, a balanced approach is required, guided by the principle that no one is above the law.

SUMMARY OF FACTS

The Directorate of Enforcement (**ED**) filed complaints against Bibhu Prasad Acharya (**Acharya**) and Adityanath Das (**Das**) under Section 44(1)(b) of PMLA. At the relevant time, Acharya was the former Vice-Chairman and Managing Director of the Andhra Pradesh Industrial Infrastructure Corporation, and Das was a Principal Secretary in the Andhra Pradesh government.

The complaint alleged that Acharya, in conspiracy with the then Chief Minister YS Jagan Mohan Reddy, illegally allotted 250 acres of land to Indu Tech Zone Pvt Ltd for an SEZ project, violating norms and regulations, and facilitated money laundering by aiding the company in generating illicit proceeds. Das, as Principal Secretary, Irrigation and Command Area Development (I&CAD) Department, was accused of conspiring with the Chief Minister to unlawfully allocate an additional 10 lakh litres of water from River Kagna to India Cement Ltd without approval from the Interstate Water Resources Authority, breaching established rules and procedures.

The crux of the case revolved around whether prior sanction under Section 197(1) of the CrPC was necessary to prosecute Acharya and Das, as both held public office during the commission of the alleged offences. The Special Court had taken cognizance of the complaints, but both Acharya and Das approached the High Court challenging the Special Court's order. Consequently, the High Court quashed the orders on the ground that prior sanction was required. Aggrieved, the ED approached the Supreme Court.

DECISION OF THE COURT

The Supreme Court upheld the High Court's decision, affirming the applicability of Section 197(1) of CrPC to the PMLA. It concluded:

- Both Acharya and Das, as public servants removable only by the sanction of the government, satisfied the first condition under Section 197(1).
- The allegations of wrongful land allotment and water allocation arose in the context of their official duties, fulfilling the second requirement of Section 197(1).
- The overriding provision under Section 71 of PMLA does not negate the application of Section 197 of CrPC as Section 65 of PMLA explicitly allows the CrPC to apply unless inconsistent with the PMLA.

The Supreme Court ruled that cognizance of offences under PMLA could not have been taken without obtaining prior sanction under Section 197(1). However, it left open the possibility for the ED to seek fresh cognizance if sanction is granted.

Disciplinary proceedings can continue after retirement only if formal charge memo is issued prior to the cessation of employment

SBI v. Navin Kumar Sinha

Supreme Court of India | November 19, 2024
2024 SCC OnLine SC 3369

The Supreme Court recently held that disciplinary proceedings can continue after retirement, however, only when the formal charge memo is issued prior to the cessation of employment. The decision ensures that employees are not subjected to disciplinary action indefinitely unless the process has already begun pre-retirement, reinforcing the need for employers to adhere to strict timelines in initiating disciplinary proceedings while securing better protection for employees' post-retirement rights. The decision also raises questions about the potential abuse of extended service periods to extend an employer's ability to initiate disciplinary proceedings. It suggests that disciplinary proceedings should be time-bound and not be used as a means to prolong an employee's vulnerability to action after retirement.

SUMMARY OF FACTS

The case revolved around disciplinary proceedings initiated against Navin Kumar Sinha ([Sinha](#)), an officer of the State Bank of India ([SBI](#)), after his superannuation.

Sinha, who joined SBI in 1973, was due to retire in December 2003 but received an extension of service until October 1, 2010. Allegations arose regarding Sinha sanctioning loans to family members without authorisation, irregular documentation, and other banking violations during his extended service period.

SBI issued a show-cause notice in 2009 and later suspended Sinha. However, the formal charge memo initiating disciplinary proceedings was issued only on March 18, 2011, i.e., five months after his extended service period ended.

SBI imposed a penalty of dismissal on Sinha in 2012, which he challenged before the Jharkhand High Court. Both the Single Judge and Division Bench ruled in his favour, declaring the proceedings void.

SBI appealed to the Supreme Court on the twin issues:

- Can disciplinary proceedings be initiated after an employee's superannuation, including extended service periods?
- Does participation in such proceedings or receipt of subsistence allowance extend the employer-employee relationship?

DECISION OF THE COURT

The Court observed that SBI Officers (Determination of Terms and Conditions of Service) Order, 1979 as well as SBI Officers Service Rules, 1992 allow disciplinary proceedings initiated before an officer's cessation of service to continue post-retirement at the discretion of the Managing Director or the competent authority. The officer is deemed to be in service solely for the conclusion of such proceedings.

However, since disciplinary action commences only upon the issuance of a formal charge memo, in Sinha's case, the charge memo issued in 2011 came after his extended service period had ended in October 2010. Consequently, the proceedings and the resulting penalty of dismissal were deemed to lack jurisdiction and were declared void.

The Supreme Court dismissed SBI's appeal, affirming that:

- Disciplinary proceedings initiated after an employee's retirement, including the period of extended service, are void unless expressly permitted by service rules.
- Superannuation marks the severance of the employer-employee relationship unless disciplinary proceedings had already been initiated.

Widowed daughters are eligible for compassionate appointments under DoPT guidelines

Punita Bhatt v. BSNL

Allahabad High Court | November 11, 2024
2024 SCC OnLine All 6958

Underscoring the evolving stance of the judiciary on gender equality and the rights of women in employment, the Allahabad High Court recently held that widowed daughters are eligible for compassionate appointments. By broadening the interpretation of ‘daughter’ to include widowed daughters, the High Court has advanced the principle of substantive equality, addressing systemic biases embedded in outdated policies. The judgment also serves as a reminder of the need to update employment policies to reflect contemporary social realities, and paves the way for a more inclusive interpretation of guidelines for compassionate appointments, emphasising justice and fairness for all dependent family members, regardless of gender or marital status. While this decision sets a progressive precedent, its effective implementation will require concerted efforts by all stakeholders.

SUMMARY OF FACTS

Punita Bhatt sought compassionate appointment following the demise of her father, Om Prakash Bhakta, who worked with Bharat Sanchar Nigam Ltd (BSNL). Her application was grounded in the assertion that she, as a widowed daughter, was dependent on her father for sustenance after losing her husband.

Despite affidavits from her family confirming their consent to her appointment, BSNL rejected her application. The rejection was based on the guidelines under the Department of Personnel and Training (DoPT) memorandum dated October 9, 1998, which defined ‘dependent family members’ eligible for compassionate appointments. The memorandum did not explicitly include ‘widowed daughters’ within this definition.

Aggrieved, Punita approached the Central Administrative Tribunal (CAT), which upheld BSNL’s stance, constraining her to file the present writ petition before the Allahabad High Court on whether a widowed daughter could be considered a ‘dependent family member’ under the guidelines for compassionate appointments, despite the lack of express inclusion in the DoPT memorandum of 1998?

DECISION OF THE COURT

The Allahabad High Court overturned the CAT’s decision, recognising that the term ‘daughter’ in the DoPT guidelines should include widowed daughters, provided they were dependent on the deceased parent at the time of death.

The High Court observed that the term ‘daughter’ in the guidelines is inclusive and not restricted by marital status. A widowed daughter retains her status as a dependent if she lacks other means of livelihood. The criterion for eligibility under compassionate appointment should be dependency on the deceased employee, not marital status.

Excluding widowed daughters from compassionate appointments violates Articles 14, 15, and 16 of the Constitution of India, which guarantee equality, non-discrimination, and equal opportunity in public employment.

The High Court directed BSNL to reconsider Punita’s application under the weightage point system, ensuring that her claim is evaluated without discrimination based on her marital or widowed status.



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