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LABOUR LAW CASE SUMMARY

HALF-YEARLY UPDATE – PART 3

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In the first and second part of this three-part series (available here and here, respectively), we had provided a brief overview of the recent judicial decisions rendered in the period, April, 2020 to September, 2020, by the Supreme Court and various High Courts of India on the following legislations:

(a) Employee's Compensation Act, 1923;
(b) Employees' State Insurance Act, 1948;
(c) Employees' Provident Funds and Miscellaneous Provisions Act, 1952;
(d) Payment of Gratuity Act, 1972;
(e) The Industrial Disputes Act, 1947;
(a) Minimum Wages Act, 1948;
(b) Contract Labour (Regulation and Abolition) Act, 1970; and
(c) Trade Unions Act, 1926.

For the purposes of the instant part of this series, we seek to summarise the judicial decisions under the following segments of law/ legislations:

(a) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH**");
(b) Disciplinary Proceedings;
(c) Service Law of India; and
(d) Shops and Establishments Act.

A. Case Laws under The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

1. Whether the transfer order of an employee during the pendency of an inquiry before the internal committee of the company, is penal in nature?

In the matter of *Saikuttan. O.N* v. *Kerala State Electricity Board Limited*, [WP(C).No. 12087 of 2020 (I) decided on August 11, 2020], the Kerala High Court, while relying on the decision of the Division Bench of the Kerala High Court in the matter of *Gopinathan M.* v. *State of Kerala*, [2014(4) KHC 315], held that, if the transfer of an employee has been done in the interest of the company and other female employees of the company, then such a transfer cannot be said to be a punitive transfer.

2. Whether a writ petition can be entertained in case where the employee has been transferred to a different location?

In the matter of *Saikuttan. O.N* v. *Kerala State Electricity Board Limited*, [WP(C).No. 12087 of 2020 (I) decided on August 11, 2020], the Kerala High Court, while relying on the Supreme Court's decision in the matter of *State of M.P.* v. *S.S. Kourav*, [(1995) 3 SCC 270], held that, if the transfer of an employee is done in consonance with Section 12 (*Action during pendency of inquiry*) of POSH, then such a transfer cannot be said to be one, which is vitiated with *mala-fides*, and the court cannot interfere with such an order.

B. Case Laws under Disciplinary Proceedings

1. Whether a short order passed by a disciplinary authority can be considered as a speaking order?

In the matter of *Hemant Kumar* v. *State of Himachal Pradesh*, [CWPOA No. 229 of 2019 decided on September 10, 2020], the Himachal Pradesh High Court held that, speaking orders do not *ipso facto* mean that they have to be lengthy orders. However, if, such speaking order also enumerates the reasons as to why it has been passed, a short order can be considered to be a speaking order.

2. Whether disciplinary proceedings are maintainable in cases where the charge-sheet was issued before the superannuation of the employee but was served on the employee after his retirement?

In the matter of *Shri Ramesh Chandra Verma* v. *State of Himachal Pradesh*, [CWPOA No.411 of 2019 decided on September 17, 2020], the Himachal Pradesh High Court, while relying on the Supreme Court's decision in the matter of *Union of India* v. *Dinanath Shantaram Karekar*, [AIR 1998 SC 2722], held that, where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service to the employee is essential to initiate the disciplinary proceedings. The theory of 'communication' cannot be invoked, and actual service is required to be proved and established. Therefore, the disciplinary proceedings which was continued against the employee, even after his superannuation, on the basis of charge-sheet, which was never served upon him till his superannuation, was held, *non-est* in the eyes of law and the order on the basis of such disciplinary proceedings by the disciplinary authority, was held to be, *void ab-initio*.

3. Whether a disciplinary authority who is *ad-idem* with the findings of the inquiry officer, is required to give a notice to an employee undergoing disciplinary proceedings?

In the matter of *Rana Majumder* v. *United Bank of India*, [W.P. No. 379 of 2017 decided on May 13, 2020], the Calcutta High Court, while relying on the Supreme Court's judgment in the matter of *Lav Nigam* v. *Chairman and Managing Director, ITI Limited,* [(2006) 9 SCC 400], held that, in case the disciplinary authority differs with the view taken by the inquiry officer, he is bound to give a notice setting out his tentative conclusions. However, in cases where the disciplinary officer is *ad-idem* with the inquiry officer on majority of the charges against the employee and only differs on some minor charges which does not have any substantial bearing on the outcome of the disciplinary proceedings, then the disciplinary authority is not required to give any notice to the employees.

C. Case Laws under Service Law of India

1. What is the difference between transfer of an employee and deputation of an employee?

In the matter of *Union of India* v. *R. Thiyagarajan*, [SLP (C) No.18853 of 2017 decided on April 3, 2020], a Division Bench of the Supreme Court of India, while placing reliance on the judgment of its Co-ordinate Bench in the case of *Prasar Bharti v. Amarjeet Singh*, [(2007) 9 SCC 539], held that, deputation envisages the assignment of an employee of one department/ cadre/ organisation in the public interest. However, on transfer of the services in the case of deputation, the control with regard to the employee would determine whether such employee was deputed or not.

2. Is a candidate who participates in a selection process estopped from challenging the selection criteria?

In the matter of *Ramjit Singh Kardam* v. *Sanjeev Kumar*, [Civil Appeal No. 2103 of 2020 decided on April 8, 2020], a Division Bench of the Supreme Court, while relying on a judgment rendered by its Co-ordinate Bench in the case of *Madan Lal* v. *State of Jammu and Kashmir*, [(1995) 3 SCC 486], held that, the principle of estoppel is not applicable where the selection criteria is not published before the interview and the candidate comes to know of the selection criteria only after the selected list of candidates is published.

3. What determines if a contract is a 'contract for service' or 'contract of service'?

In the matter of *Sushilaben Indravadan Gandhi* v. *The New India Assurance Company Limited,* [Civil Appeal No. 2235 of 2020 decided on April 15, 2020], the Supreme Court, while referring to the principles enunciated by it in various judgments held that, to determine if a contract is 'contract of service' or a 'contract for service', the test should be the one that considers a series of factors.

First, the 'control test' should not only be restricted to the sense of controlling the kind of work that is given, but also to the manner in which it is to be done and this test breaks down when it comes to professionals who may be employed. *Second*, another important test is whether a person employed is integrated into the employer's business or is a mere accessory thereof. *Third*, taking inspiration from English judgments, the court remarked that the 'three-tier test', which inquires whether a wage or other remuneration is paid by the employer, and whether there is a sufficient degree of control by the employer, among other factors, is a test that would be elastic enough to apply to a large variety of cases.

Another important test enumerated by the court when it comes to work to be performed by independent contractors as against piece-rated labourers, is of who owns the assets with which the work is to be done, and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or for oneself.

Further, the Apex Court gave recognition to the economic reality test laid down by the courts of United States i.e. whether the employer has economic control over the workers' subsistence, skill and continued employment and also, the test laid down by the Privy Council in *Lee Ting Sang* v. *Chung Chi-Keung*,[[1990] 2 A.C. 374], i.e. if the person who has engaged himself to perform services, is performing them as a person in business on his own account? However, the Supreme Court in the instant case noted that, no one test of universal application can ever yield the correct result and it is the conglomerate of all the applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Thus, the Apex Court observed that courts can only perform a balancing act weighing all relevant factors which point in one direction as against

those which point in the opposite direction to arrive at the correct conclusion on the facts of each case.

4. Whether a contractual employee has the right to challenge the termination order of the employer even though the employee has no right to seek renewal?

In the matter of *Manisha Priyadarshini* v. *Aurobindo College-Evening*, [LPA 595/2019 decided on May 1, 2020], the Delhi High Court while referring to the Supreme Court's judgment in the matter of *Om Prakash Goel* v. *Himachal Pradesh Tourism Development Corporation Limited Shimla*, [(1991) 3 SCC 291], held that, though contractual or *ad-hoc* employees have no right to insist on renewal of the contract, however, where such termination order is arbitrary, the validity of such termination order becomes a subject matter of judicial review. In the instant case, the validity of the termination order had become a subject of judicial review since the termination order was adjudged to be unreasonable and arbitrary, basis the fact that the employer had continued with the services of other junior employees, on an *ad-hoc* basis and have only deprived the petitioner of the benefit of further *ad-hoc* appointment, without any reasonable cause.

5. Whether the termination order of a probationer casting aspersions against him/ her requires a disciplinary hearing before such termination?

In the matter of *Dr. Biswarup Sarkar* v. *University of Calcutta*, [W.P. No. 204 of 2019 decided on June 19, 2020], the Calcutta High Court, held that, if the order of termination casts aspersions against a probationer's character or integrity, then the employer cannot terminate the probationer before the conclusion of the disciplinary proceedings. Such termination without completion of the disciplinary hearing will not be construed as termination simpliciter and will be subjected to judicial review.

6. Whether a court can discover the reason of termination when the simpliciter order of discharge of a probationer is camouflaged?

In the matter of *IDMC erstwhile Indian Dairy Machinery Company Limited* v. *Mohini Pessuram Tilwani*, [R/Letters Patent Appeal No. 1225 of 2019 decided on July 24, 2020], the Gujarat High Court while relying on the Supreme Court's decision in the matter of *Chandra Prakash Shahi* v. *State of U.P.*, [(2000) 5 SCC 152], held that, if for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. However, if there are allegations of misconduct and an enquiry is held in order to find out the truth of that misconduct and an order terminating the service is passed basis that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee.

Further, the Gujrat High Court, while placing reliance on the Supreme Court's judgment in the matter of *Gridco Limited* v. *Sadananda Doloi*, [AIR 2012 SC 729] and *Satish Chandra Anand* v. *Union of India*, [AIR 1953 SC 250], held that, if termination of a contract is in terms of the agreement and termination is simpliciter, then, the courts would not interfere with such termination. However, the courts can exercise its power of judicial review in cases where termination though is in accordance with the stipulation of the contract, is proved to be *malafide* or for extraneous reasons.

7. Does a probationer at the end of expiry of the probationary period automatically acquire the status of a confirmed employee? If the answer is in negative, then does a court have the right to quash a termination order of such a probationer?

In the matter of *Savita Gupta* v. *India Post Payments Bank Limited*, [W.P.(C) 3113/2020 decided on

August 4, 2020], a Single Bench of the Delhi High Court while relying on the Supreme Court's judgment in the case of *Durgabai Deshmukh Memorial Sr. Sec. School* v. *J.A.J. Vasu Sena*, [2019 17 SCC 157], held that, there is no deemed confirmation of a probationer. As a general rule, save as expressly provided by a particular rule to the contrary, an order of confirmation will be required for the employee to acquire the status of a confirmed employee. In relation to the question of termination of a probationer, the Delhi High Court held that, the courts can lift the veil, even though the order of termination may be a simple order of termination on the face of it, in order to determine whether the allegations made in the termination order are a "foundation" or a "motive" for the termination. Further, relying on the decision of rendered by a Division Bench of the Delhi High Court in the matter of *Aditya Beri* v. *Ministry of Civil Aviation through its Secretary*, [LPA 578/2013 decided on August 17, 2017], the court held that, punitive termination order in the absence of an inquiry, despite existence of right of termination during probation, can be quashed by the courts.

8. Can an application for voluntary retirement by an employee be treated as an application for resignation from service? What is the pension payable to an employee seeking voluntary retirement?

In the matter of *Asha Ram Suryavanshi* v. *Chhattisgarh Gramin Bank*, [WPS No. 1692 of 2011 decided on June 26, 2020], the Chhattisgarh High Court, by relying on the Supreme Court's decision in the matter of *UCO Bank* v. *Sanwar Mal*, [(2004) 4 SCC 412], held that, under the pension regulations, the expressions "resignation" and "retirement" have been employed for different purposes and carry different meanings. Resignation brings about complete cessation of master and servant relationship whereas voluntary retirement maintains the relationship for the purposes of grant of retiral benefits, in view of the past service. The Chhattisgarh High Court further, while relying on the Supreme Court's judgment in the matter of *Shashi Kala Devi* v. *Central Bank of India*, [(2014) 16 SCC 260], held that, in cases where an employee has the requisite years of qualifying service for grant of pension and where he could, under the service conditions applicable to him, seek voluntary retirement, the benefit of pension has to be allowed by treating the purported resignation letter to be a request for voluntary retirement.

9. Whether services rendered by an employee on contractual basis be counted for computing qualifying service for pensionary benefits?

In the matter of *Kiran Chand Sharma* v*. State of Himachal Pradesh*, [CWPOA No. 698 of 2019 decided on June 30, 2020], a Single Bench of the Himachal Pradesh High Court while relying on the decision rendered by its Co-ordinate Bench in the case of *Ram Krishan Sharma* v*. The Accountant General (A&E) HP*, [C.W.P. No. 3267 of 2019 decided on January 1, 2020], held that, services of an employee appointed on contractual basis in temporary capacity prior to his/ her regularization shall be treated as qualifying service for grant of pension.

10. Can pension or gratuity be withheld by way of executive instruction, in the absence of any statutory rules with regard to the same?

In the matter of *Hari Prasad Das* v. *The State of Jharkhand*, [W.P. (Service) No. 3960 of 2019 decided on July 7, 2020], the Jharkhand High Court while relying on the Supreme Court's decision in the matter of *State of Jharkhand* v. *Jitendra Kumar Srivastava,* [(2013) 12 SCC 210], held that, pension is property within the meaning of Article 300A of the Constitution of India and that, executive instructions not having any statutory backing cannot be termed as law within the meaning of Article 300A of the Constitution of India. Therefore, in the absence of any statutory rules for withholding pension or gratuity, the same cannot be allowed by way of an executive instruction.

11. Whether hiring employees on outsourcing basis through intermediaries can be considered a 'sham'?

In the matter of *G. Srinivasa Chary* v. *The State of Telangana*, [I.A. No. 1 of 2019 in W.P. No. 47675 of 2018 decided on August 7, 2020], the Telangana High Court, while relying on the Supreme Court's decision in the matter of *Hussainbhai* v. *Alath Factory Thezhilali Union*, [(1978) 4 SCC 257], held that, mere contracts are not decisive and that the presence of intermediate contractors with whom the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, it is found that the real employer is the management and not the immediate contractor. Since the contract labour work under the supervision of the principal employer (even if their wages are paid through a contractor), and the duties performed by them are not different from those performed by regular employees of the principal employer holding the same post as that of the contract labour, then "outsourcing of employees" as a method of engaging services of contract labours will be considered to be a sham and a ruse.

12. Whether non-regularisation of services of workers by the statutory body employed through outsourcing agencies contrary to the direction issued by the Supreme Court in *Secretary, State of Karnataka* v. *Uma Devi*, (2006) 4 SCC 1 ("Uma Devi case")?

In the matter of *G. Srinivasa Chary* v. *The State of Telangana*, [I.A. No. 1 of 2019 in W.P. No. 47675 of 2018 decided on August 7, 2020], the Telangana High Court held that, the creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State and the Greater Hyderabad Municipal Corporation ("**GHMC**"), a statutory corporation, but if they did not choose to create a cadre or fill up the available vacancies in accordance with the applicable procedure/ rules, but chose to make appointments of persons creating contractual relationship, their action would be arbitrary. Further, the engagement of such persons through outsourcing agencies/ intermediates for more than 14 (fourteen) years after the decision in the Uma Devi case, without undertaking any exercise to identify regularly the vacancies in the above posts in the GHMC and fill them up as per the applicable rules by properly qualified personnel, and engaging person of "outsourcing" basis through intermediaries/ contractors, is a violation of the law laid down by the Supreme Court in the Uma Devi case and is violative of Articles 14, 16 and 21 of the Constitution of India.

13. Whether the principle '*equal pay for equal work*' applies to outsourced contract labourers?

In the matter of *G. Srinivasa Chary* v. *The State of Telangana*, [I.A. No. 1 of 2019 decided on August 7, 2020], the Telangana High Court held that, the principle '*equal pay for equal work*' laid down by the Supreme Court in the matter of *State of Punjab* v. *Jagjit Singh*, [(2017) 1 SCC 148] also applies to outsourced contract labourers.

14. In the event of delayed payment of retiral benefits/ pensionary benefits, whether interest is required to be paid by the employer?

In the matter of *H. N. Sharma* v. *Government of NCT of Delhi*, [W.P. (C) 1724/2017 decided on August 21, 2020], the Delhi High Court while relying on the Calcutta High Court's decision in the matter of *Padma Nath* v. *State of West Bengal*, [2019 SCC Online Cal 2185], held that, when the employer causes delay in releasing of retiral benefits/ pensionary benefits, the employer is duty bound to pay interest on account of such delay.

15. In the event similarly placed employees are denied same benefits, whether it would amount to breach of Article 14 of the Constitution of India?

In the matter of *H. N. Sharma* v. *Government of NCT of Delhi*, [W.P. (C) 1724/2017 decided on August 21, 2020], the Delhi High Court by relying on the Supreme Court's decision in the matter of *State of*

Uttar Pradesh v. *Arvind Kumar Srivastava*, [(2015) 1 SCC 347], held that, denial of same benefits to identically/ similarly placed employees amounts to violation of Article 14 of the Constitution of India.

16. Whether an employee has a right to claim salary for a period in which the employee has worked and discharged duties in the absence of non-extension of an agreement?

In the matter of *Mrs. Ruby Jadon* v. *State of Madhya Pradesh*, [W.P. No. 27370/2019 decided on September 11, 2020], the Madhya Pradesh High Court, while relying on Supreme Court's decision in the matter of *People's Union For Democratic Rights* v. *Union of India*, [(1982) 3 SCC 235] and the Allahabad High Court's decision in the matter of *Rekha Singh* v. *Union of India*, [(2018) 4 All LJ 145], held that, for the purpose of enforcing a right to claim remuneration for the work discharged in the absence of non-extension of an agreement, the employee need not establish the legality of his appointment or continuance in service but has to merely establish due discharge of his duties. Once the employee establishes the discharge of his duties as assigned by the employer, the burden shifts upon the employer to either deny the discharge of duties by the employee or to pay the due remuneration to the employee for the work done.

17. What is the scope of judicial review in transfer order of an employee?

In the matter of *Sunita Kumari* v. *State of Himachal Pradesh*, [CWP No. 4074 of 2019 decided on September 10, 2020], a Division Bench of the Himachal Pradesh High Court, by relying on the decision of its Co-ordinate Bench in the case of *Puran Chand* v. *State of Himachal Pradesh*, [CWP No. 2225 of 2020 decided on July 14, 2020], held that, there is only a limited scope of judicial review by courts/ tribunals against a transfer order, i.e., the courts can intervene only when the transfer order is found to be in contravention of the statutory rules or is *malafide*.

18. What is the difference between work-charged establishment and regular establishment?

In the matter of *State of Gujarat* v. *Ranchhodbhai Shamjibhai Nakum*, [R/Letters Patent Appeal No. 47 of 2018 decided on September 11, 2020], the Gujarat High Court while relying on the Supreme Court's decision in the matter of *State of Rajasthan* v. *Kunji Raman*, [AIR 1997 SC 693], held that, a work-charged establishment means, an establishment in which the expenses, including the wages and allowances of the staff, fare are chargeable to 'works'. The court further held that, the work−charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work and from the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed.

The court also enumerated that a work-charged establishment differs from a regular establishment because of the fact that a regular establishment is permanent in nature.

The court also highlighted the fact that, so far as employees engaged on work−charged establishments are concerned, not only their recruitment and service conditions but the nature of work and duties to be performed by them, are not the same as those of the employees of the regular establishment and therefore, a regular establishment and a work−charged establishment are two separate types of establishments and the persons employed on those establishments thus, form two separate and distinct classes.

D. Case Laws under Shops and Establishments Act

1. **Whether the jurisdiction of the concerned authority to entertain the validity of an order of termination is ousted in the event the establishment concerned was exempted from the provisions of the Andhra Pradesh Shops and Establishments Act, 1988 (Telangana Shops and Establishments Act, 1988) ("S&E Act") on the date of order of termination but not on the date of filing of appeal?**

   In the matter of *Cognizant Technology Solutions India Private Limited* v. *the Appellate Authority of the A.P. Shops and Establishments Act, 1988*, [W.P. No. 17453 of 2017 decided on May 4, 2020], the Telangana High Court has held that, for the concerned authority to determine its jurisdiction to entertain the validity of termination of an employee, the concerned authority needs to see whether the establishment concerned was exempted from the provisions of the S&E Act on the date of order of termination and not on the date of filing of appeal.

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