THE CONSTITUTION OF INDIA AND SERVICE LAW

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By

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"The Constitution of India and Service Law" is a topic of very wide ambit and however I will make an attempt to deal with the topic in short and brief touching the salient features thereof. It is needless to overstress about the importance of Service Jurisprudence in the field of Law as it is well known to one and all.

Part XIV of the Constitution of India deals with services under the Union and the States. Part XIV-A of the aforesaid Constitution, hereinafter referred to as 'Constitution' in short was introduced by the Constitution of India (42nd Amendment) Act, 1976 and this Part deals with Tribunals. Article 323-A of the Constitution dealing with Administrative Tribunals may be more relevant for our purpose. Articles 32, 226 and 227 of the Constitution may also be referred to for proper and better appreciation of the topic. Articles 14, 15 and 16 under Part III and Articles 73 and 162, Articles 124 to 147, Articles 214 to 237 of the Constitution can also be dealt with incidentally in this regard. Broadly speaking these are the relevant provisions under the Constitution having intimate nexus with the subject in question though several other Articles also may be relevant in a particular given context.

By virtue of the Administrative Tribunals Act, 1985 coming into force, the remedies except provided by Articles 32 and 136 had been abolished and the pending proceedings shall stand transferred to the concerned Administrative Tribunal under Section 29 of the aforesaid Act. The question relating to the constitutional validity of the aforesaid Act and different provisions thereof had been raised more than once and the march of Law in this regard from *S.P. Sampath Kumar v. Union of India* (AIR 1987 SC 386) to *L. Chandra Kumar v. Union of India* (1997 (3) Supreme 147) may be referred to with some significance. The post *Sampath Kumar* case like *J.B. Chopra v. Union of India,* (1987 (1) SCC 422), *M.B. Majukdar v. Union of India* (1990 (4) SCC 501), *Amulya Chandra Kalita v. Union of India* (1991 (1) SCC 181), *R.K. Jain v. Union of India* (1993 (4) SCC 119), *Dr. Mahabal Ram v. Indian Council of Agricultural Research* (1994 (2) SCC 401), had paved the way for a reference being made by the Division Bench of the Apex Court and in *L. Chandra Kumar v. Union of India* (1997 (3) Supreme 147), it was held that clause 2 (d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226, 227 and 32 of the Constitution are unconstitutional and Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would to the same extent be unconstitutional. The jurisdiction of High Courts and Supreme Court under Articles 226, 227, 32 of the Constitution is part of basic structure of our Constitution. The Tribunals created under Articles 323-A and 323-B are possessed of the competence of test the constitutional validity of statutory provisions and rules. All the decisions of these Tribunals will however be subject to the scrutiny before Division Bench of the High Court having jurisdiction. The Tribunals will nevertheless continue to act like Courts of first instance. *P. Samba Murthy v. State of A.P.* (AIR 1987 SC 663) also may be a relevant decision to be referred to in this regard. The decision of the Apex Court in *Chandra Kumar's* case is a landmark judgment in the field of service law. The Benches of the Central Administrative Tribunal and also the State

Administrative Tribunals adjudicating the service disputes, have contributed a lot to the growth of service law and several of the judgments of the respective Tribunals speak well for themselves. 2002 (1) SLJ (CAT) 1 – *Narender Kumar v. Lt. Governor,* 1987 (4) SLR 393 – *Suresh v. P.M.G.* (CAT Madras), 2002 (1) SLJ (CAT ND) – *Narender v. Union of India*, (1986) ATC 486 (CAT ND) – *Pratap v. Lt. Governor,* are certain of them just to mention a few of them since the case law contribution in this regard cannot be dealt with at length.

Recruitment, seniority, promotion, retirement benefits, disciplinary enquiries, imposition of penalties, proportionality thereof are certain of the areas of Service Jurisprudence wherein normally disputes arise to be resolved by the Courts and Tribunals as well.

Article 14 of the Constitution deals with equality before law. Arbitrary, discriminatory or unreasonable actions always do fall within the purview of this Article. AIR 1996 SC 1145, 1995 (2) SCC (Supp) 182, 1996 (7) SCC 493, 1998 (3) SCC 613, 1996 (9) SCC 133, 1997 (6) SCC 623, 1996 (2) SCC 103 – Decisions where actions were held to be arbitrary or not arbitrary on the touchstone of Article 14 of the Constitution are too many and reference to a few of them can be only illustrative and not exhaustive. The practice of *ad hoc* appointment of teachers for 89 days with one day break was deprecated (AIR 1991 SC 1286). Where a member of the family is already gainfully employed, the other members of such family cannot be appointed on compassionate grounds (1994 (4) SCC 138). It is now well settled that the High Court under Article 226 of Constitution of India cannot sit in judgment over the enquiry officers report or the findings of the disciplinary authority on merits unless the enquiry officers report is perverse or the findings are based on no evidence (1996 (7) Supreme 405). Where there was a cut off date for pensionary benefits and employees who retired prior to that date were treated as a class, it is not violative of Article 14 (AIR 1997 SC 2341). Where an employee was given pension after removal from service on wrong advice, that cannot form the basis for making such a claim (AIR 1997 SC 2268). Where the Government Servant did not make any attempt to have the service record corrected relating to date of birth while in service, it cannot be corrected (AIR 1997 SC 2452). The arbitrary action of Corporations relating to employees can be questioned by way of Writ Petition (AIR 1997 SC 2817). It is a matter of policy of the State Government which in its wisdom decided to create a separate cadre in the State by absorbing the Divisional Accountants working on deputation in the State and who were under the administrative control of the Accountant-General. The Supreme Court cannot give any direction to the State Government to have a different policy (1998 (2) SCC 516). Where the name of the candidate for promotion to the post of A.D.J. appeared in select list and Full Bench of High Court excluded his name, and reasons for such exclusion not disclosed even before writ Court, it was held to be violative of Articles 14 and 16 of the Constitution (AIR 1998 SC 1054). Persons performing different functions having different avenues of promotion cannot be equated (1998 (2) SCC 198). Where a claim is contrary to Service Regulations, Article 14 cannot be invoked on the analogy of the case of yet another person (1997 (6) SCC 488). Where policy decision was taken to include the post of Senior Sub-Judge in Higher Judicial Service, it cannot be said to be violative of Article 14 (AIR 1998 SC 137). The plea that there is no rational basis for denying the right of option to persons who are directly recruited to a post falling in Group B though such right is available to a person promoted from a post falling in a Group Court to post falling in Group B is not tenable (AIR 1997 SC 3536). Where amendment to fundamental rules is not retrospective, employee is not entitled to the benefit of the proviso having retired prior to its insertion (AIR 1998 SC 658). Where an advertisement was made to fill up certain posts of teachers and there were no exceptional circumstances to deviate

from the principle of limiting the appointments as advertised, such deviation was held to be improper (AIR 1998 SC 18). Waiting list candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative (AIR 1998 SC 18). Since the responsibilities of officers of State Bank and subsidiary banks are not comparable, principle of equal pay for equal work cannot be invoked (AIR 1998 SC 32). Where respondent was not eligible by virtue of cut off date and he got appointment because of interim orders, in the event of dismissal of W.P. respondent's services are to be discontinued (AIR 1998 SC 91). A senior Subordinate Judge is not included and does not fall within the expression "District Judge" under Article 236 (a) (AIR 1998 SC 137). Where the Genealogy table of family history of employee claiming status of scheduled tribes, is highly doubtful, his claim for promotion on that basis cannot be sustained (AIR 1997 SC 3437). Where Pepsu State was merged with Punjab State, and age of superannuation of employees of former State was not varied, such employees are not entitled to benefits as per Pepsu regulations (AIR 1997 SC 3420). Either absorption or promotion to a post cannot be done unless minimum qualification is there fixed for the post (AIR 1997 SC 3464). Where a particular provision is a qualification as distinguished from classification, plea of discrimination is not sustainable (1997 (11) SCC 597). Sealed cover procedure in case of promotion is applicable only where on the date of consideration of an employee for promotion, he is under suspension or departmental proceedings had been initiated against him (AIR 1998 SC 1094). In the case of appointment withdrawal of offer is within the competency of the employer (AIR 1998 SC 1117). Equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for the Courts (1996 (2) Supreme 434). Ordinarily grant of higher pay to a junior would *ex facie* be arbitrary but if there are justifiable grounds in doing so the senior cannot invoke the equality doctrine (1989 (2) SCC 290). Educational qualifications can be made the basis for classification of employees in State service in matter of pay scales, promotions *etc.,* (1997 (3) SCC 103). The impugned resolution constituting the posts of Meter Readers, Switch Board Attendants and Sub-section Operators into one cadre does not violate the equality clause and cannot be said to be hit by the provisions of Article 14 of the Constitution (AIR 1998 SC 2970). The mere inclusion of name in select list will not confer indefeasible right to be appointed (AIR 1998 SC 3104). Principle of stepping up will not apply in the case where junior had been promoted earlier to a higher post on *ad hoc* basis and on account of such *ad hoc* promotion the junior got his pay fixed at a higher scale (AIR 1998 SC 2992). The determination of *inter se* seniority on the basis of the rule which was not in existence on the date vacancy arose and on the date selection was completed was held to be not proper (AIR 1998 SC 2854). Where a person was promoted in stop gap arrangement and continued as such he was entitled to salary of promotional post and an agreement that he will not claim higher salary is not valid and unenforceable under Section 23 of the Contract Act (AIR 1998 SC 2909). Regulation 11 (3) of the Army Act disentitling Junior Commissioned Officers from receiving pension after dismissal under the Act, is not discriminatory (AIR 1998 SC 3225). Where there were two separate cadres of Research Assistants in a University for which separate minimum qualifications were prescribed and there was a separate selection for these two cadres, the pay of the two cannot be directed to be identical (AIR 1998 SC 3321). Selection and preparation of large list in case of appointments when compared to vacancy position by Service Selection Board had been deprecated (AIR 1998 SC 3268).

Article 15 of the Constitution deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 deals with equality of opportunity

in matters of public employment. Regarding the principle of equality, the provisions of Articles 14 and 16 overlap each other upto some extent (AIR 1977 SC 854). Article 14 protects the employee at every stage of his career (AIR 1984 SC 1499). Right to employment is not a fundamental right and the denial of employment by Government on the basis of past conduct and antecedents of the selected candidates cannot be said to be violative of Article 16 (1983 (2) ALT (NRC) 9). The employer-state should see that considering the nature of work and also the degree of fitness, the employment is given to all citizens and insistence of 100 per cent medical fitness irrespective of the nature of the job is wholly arbitrary and constitutes abuse of power (1983 (1) ALT 408). If a Government Servant, whether temporary or permanent, is removed or dismissed or reduced in rank or otherwise punished without the support of sufficient justification, the Government act would be struck down on the ground of its being arbitrary under Articles 14 and 16 but if the action is wholly supportable under Articles 14 and 16 as not being arbitrary and as having been taken in the public interest such an action can only be struck down as and when it offends literally the conditions imposed by Article 311 (2) of the Constitution (1983 (1) ALT 152). Where persons are holding identical posts they should not be differently treated regarding pay merely because they belong to different departments. Equal pay for equal work set forth in Article 39 (b) is not merely a constitutional goal but an enforceable right when read with Article 14 (1961 (1) SCJ 310). The socially backward classes of citizens are groups other than groups based on caste (AIR 1975 SC 563). Reservations in favour of ex–armed forces and their children were uphold to be valid in the undermentioned cases (AIR 1971 SC 1762, AIR 1979 P & H 56). A rule restricting the practice by doctors in Government service was held to be reasonable and in public interest (AIR 1982 All 439). The questions of transfer in public employment are also governed by Article 16 (AIR 1974 SC 555 at 583). The failure of the Government to appoint a person as District Munsiff, selected by the Public Service Commission on the sole ground that he attended certain meetings was held to be arbitrary (1978 (1) An.WR 21). Where the statutory provisions or rules were violative of Article 16, they were held to be arbitrary and unconstitutional (AIR 1970 SC 422). The rule of the equal pay for equal work is a rule which is as much a part of Article 14 and Article 16 (1) of the Constitution (AIR 1993 SC 286). Where the officer writing a report stated that officer concerned would prove himself efficient provided he controls his temptation for corruption, but had not given particulars of corrupt activities, it will not make remarks vague (AIR 1997 SC 2105). Where some persons were appointed on daily wages for posts of clerks they are not entitled to same pay scale as regular clerks (AIR 1997 SC 2129).

Protective discrimination envisaged in Articles 16 (4) and 16(4A) is the armour to establish the equilibrium between equality in law and equality in results as a fact to the disadvantaged. The principle of reservation in promotion provides equality in results (1997 (5) Supreme 1). In the case of liberalized pension scheme decisions in *D.S.Nakara* case was not given a complete go by in subsequent decisions of Supreme Court (AIR 1997 SC 1081). Where there was a doubt about the equivalence of degree possessed by applicant, in *viva voce* test, asking him to wait and intervening him after other candidate does not adversely affect his performance (AIR 1997 SC 1048). The Government having laid down a system for holding admission tests, is not entitled to do away with the requirement of obtaining the minimum qualifying marks for the special category SC/ST/OBC candidates (AIR 1997 SC 1120). Where requisition was given for filling up of only four vacancies and the Selection Board selected 28 candidates and recommended their names for appointment, it is without jurisdiction (AIR 1997 SC 3007). Where Government granted some project amenities and allowances only to the employees stationed within the project area

and denied the same to employees though engaged in project were stationed not within the project area but in Taluk Headquarters and elsewhere such grant of project amenities cannot be held to be discriminatory (AIR 1997 SC 3008). Even if in some cases erroneous promotions had been given contrary to the Service Rules and consequently such employees have been allowed to enjoy the fruits of improper promotion, an employee cannot base his claim for promotion contrary to Rules in Courts (AIR 1997 SC 3108). Even though there is a single post if the Government have applied the rule of rotation and roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidates belonging to the reserved categories at the point on which they were eligible to be considered such a rule is not violative of Article 16 (AIR 1997 SC 3074).

In *Jasubai Rani v. State of Punjab* (AIR 2002 SC 60) it was held that fixing of cut-off date prior to appointment *i.e.,* at the time of issuing advertisement under Rule 5 of Punjab Panchayat Secretaries (Recruitment of Conditions of Services) Rules, is permissible. In *Nanda Kumar Nair v. Philip* 2002 (1) SLJ (SC) it was held that a Tribunal cannot ignore the pleadings. In *Jagannadha Rao v. State of A.P.* (2002 (1) SLR 136) it was observed that transfer does not include promotion. In *State of U.P. v. Ansari* (2002 (1) SLR 301) adverse remarks and observance of principles of natural justice had been dealt with. The concept of principles of natural justice and Service Jurisprudence by itself is a topic of special significance.

Article 309 of the Constitution deals with Recruitment and Conditions of Service of persons serving the Union or a State. In *Ramesh v. State of Bihar* (AIR 1978 SC 327) it was held that unless rules are framed under Article 309, qualifications can be laid down by executive order. In *Nakara v. Union of India* (AIR 1983 SC 130) it was held that classification of pensionary benefits on the basis of retiring date is not founded on any rational principle. See AIR 1990 SC 1782 – *Krishna v. Union of India*. In *Ramendra v. Jagdish* – AIR 1984 SC 885, it was held that executive power is co-extensive with its legislative power. See AIR 1966 SC 1947, AIR 1980 SC 1246, AIR 1972 SC 1767.

Article 309 has to be read subject to Articles 233 and 234 of the Constitution in the case of Judicial Officers. See AIR 1966 SC 1987, AIR 1967 SC 1427, AIR 1981 SC 561.

Article 311 of the Constitution deals with dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. In *Purshottam v. Union of India* (AIR 1958 SC 36) it was held that the object of this Article is to afford protection to a class of persons who otherwise shall hold the office during pleasure. In *Agarwal v. Hindusthan Steel* (AIR 1970 SC 1150) it was observed that neither Legislature nor Executive can make a rule under Article 309 so as to override Article 311 (1) and (2). See AIR 1964 SC 423 – *Wadhwa v. Union of India*, AIR 1961 SC 1245 – *Jagannath v. State of U.P.* There cannot be dismissal or removal by authority subordinate to appointing authority. See AIR 1955 SC 70, AIR 1982 SC 1407, 1971 (2) SCC 349, AIR 1979 SC 1912, AIR 1983 SC 324, AIR 1967 SC 459, AIR 1970 SC 1255. The delegation of power to dismiss had been dealt with in *Shamser v. State of Punjab* (AIR 1974 SC 2192) and *Union of India v. Julsuram* (AIR 1985 SC 1416). For the scope and ambit of expression 'Civil Post' See: AIR 1977 SC 747, AIR 1981 SC 53, AIR 1967 SC 884, AIR 1984 SC 161, AIR 1958 SC 36, AIR 1965 SC 360, AIR 1961 SC 1245, AIR 1977 SC 1677. The law relating to "reasonable opportunity" is very well developed. See: AIR 1955 SC 160, AIR 1958 SC 300, AIR 1971 SC 752, AIR 1961 SC 1070, AIR 1966 SC 1313, AIR 1998 SC 937, AIR 1963 SC 1719, AIR 1963 SC 175. The different facets of this field can be relating to inquiry into charges, nature of enquiry, form of enquiry, right of representation, law of evidence and principles

of natural justice, supply of Enquiry Officer's report, appellate authority recording reasons and these are only illustrative and not exhaustive.

In *Sudhakar Prasad v. Government of A.P.*, (2001 (1) SCC 516), it was held that power of Central Administrative Tribunal to punish for contempt is constitutional. The jurisdiction of powers of Service Tribunals had been dealt within the under noted decisions:-

2001 (2) SCC 118, 2001 (9) SCC 526, 2001 (4) SCC 43, 2001 (9) SCC 240.

Bias in case of rank favouritism was dealt with *in A.K. Doshi v. Union of India* (2001 (4) SCC 43). In *Abdul Majeed v. State of Kerala* (2001 (6) SCC 292) what can be termed as back door appointment had been discussed. In *Surya Kanta Kadam v. State of Karnataka* (AIR 2000 SC 2415) concept of hostile discrimination was discussed. Normally in departmental enquiries, the acquittal in criminal proceedings, charges, charge-sheet, procedure, assistance for defence, principles of natural justice, penalties, proportionality thereof, appeal, revision and review are certain of the aspects wherein litigations crop up. The different facets of natural justice in relation to this branch may be to specify a few – Hearing, bias, fairness in procedure, principles of evidence, reasonable opportunity, recording reasons, non-supply of document, non-furnishing of enquiry report, judicial review. The contribution of the Apex Court, different High Courts and Service Tribunals as well to this branch is really note worthy. The case law on the subject being vast, only certain had been referred to above.

It is no doubt true that there is some dissatisfaction expressed from several quarters over the functioning of the Administrative Tribunals *vis-à-vis* service disputes. In a system there will be certain ills and also certain advantages. Hence instead of pleading for total abolition of the said system, better to suggest remedial measures for the further effective functioning of these Institutions which were established after giving a serious thought over the same.

SPEEDY MATRIMONIAL RELIEF

By

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Marriage is a solemn and sacred institution which means a life long companionship coupled with rights and obligations. The sanctity is still preserved in our society and efforts are being made in the entire Globe by right – thinking persons to preserve the institutions of Marriage. The marriage Acts have been passed keeping pace with the changes in the outlooks and aspirations of the people and thus the concept of marriage has under gone a seachange. But the preservation of marriage has assumed utmost importance for the safety and security in human life. If marriage breaks Home breaks and the life of the children will be in a confused state. The repeated slogan is that 'couple can break the marriage but not the parents has lost its significance and the number of single mothers is increasing alarmingly.

It is an admitted fact that there is an upsurge in Matrimonial cases for Divorce, Nullity of marriage, judicial separation *etc*. Now there are family Courts in some districts and the initiative taken by the Central Government through the Ministry of Law to establish family Courts in each district is a welcome step indeed.