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ET:8. ADJUDICATION MECHANISM

(Chapter IX of IT Act)

(Updated as per Information Technology (Amendment) Act 2008)

In the previous paras we have learned about the application of the act and some important definitions. The discussion has been made on legal recognition for electronic signatures and electronic records. In this lesson we will through light on provisions of the act that provides for adjudication mechanism and procedure; list out the power and functions of Adjudicating Officer and the Cyber Appellate Tribunal(CAT)and the procedure followed by the Cyber Appellate Tribunal in adjudication process. Besides this the act also lays down various Penalties, compensation for different offences and also what is the liability of Intermediaries.

The Act provides for the adjudicating mechanism for the contravention of the provisions of the act, the adjudicating officers has been given powers to adjudicate upon any allegations of contravention of the provisions of the Act or rules or regulations made there under. The Cyber Appellate Tribunal, earlier called Cyber Regulations Appellate Tribunal (CRAT) has been constituted for the purpose of hearing appeals arising from the decisions of the adjudicating officer and the Controller under various provisions of the Act.

Synopsis:

- **ADJUDICATING OFFICER: *Power and Functions***

- ***Composition of CYBER APPELLATE TRIBUNAL***
 - *Chairperson and Members of CAT are appointed*
 - *Appeal to Cyber Appellate Tribunal*
 - *Procedure of adjudication to be followed by the Cyber Appellate Tribunal.*
 - *Powers of Cyber Appellate Tribunal.*

- **PENALTIES, COMPENSATION - IT ACT**
 - *Offences and their punishments as provided under the Information Technology Act*
 - *Power to investigate the offences under the Information Technology Act.*
 - *Liabilities of intermediaries.*

ET 9. ADJUDICATING OFFICER

The Act provides for the adjudicating mechanism for the contravention of the provisions of the Act, the adjudicating officers have been given powers to adjudicate upon any allegations of contravention of the provisions of the Act or rules or regulations made there under. Section 46 of the Act provides for appointment, powers of adjudicating officer as follows:

1. **Eligibility**: The Central Government shall appoint any officer **not below the rank of a Director to the Government of India or an equivalent officer of a State Government** to be an adjudicating officer **for holding an inquiry** (sec 46(1)).
2. **IT & Judicial Experience**: Adjudicating officer must **possess such experience in the field of Information Technology and also such Legal or Judicial experience** as prescribed by the Central Government (see sec 46(3)).

Appointment & Powers: Section 46 of the Act provides for appointment, powers of adjudicating officer as follows:

3. The Central Government shall appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry (sec 46(1)). However no person can be appointed as adjudicating officer unless he possess such experience in the field of Information Technology and also such legal or judicial experience as prescribed by the Central Government (see sec 46(3)).
4. The adjudicating officer is required to hold an inquiry in the manner prescribed by the central government to adjudge whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made there under, which renders him liable to pay penalty or compensation. (sec 46(1)).
5. The adjudicating officer has to provide reasonable opportunity to the person charged with contraventions under the act, to make representation of his case and on the basis of inquiry made under sub-section (1) of sec 46, if the adjudicating officer is satisfied that the person has committed the contravention, then, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section.

6. The powers of the Adjudicator however have been now limited for claims up to RS 5 crores. For the claim for injury or damage exceeding rupees five crore, the power of adjudication shall vest with the competent court (sec 46(1A)).
7. Every adjudicator has power of civil court as conferred on cyber appellate tribunal under sec 58(2).

8. Powers of the Adjudicator

i. **Hold Inquiry & Adjudge Upon Complaints_ :**

The adjudicating officer is required to hold an inquiry in the manner prescribed by the central government to adjudge whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made there under, which renders him liable to pay penalty or compensation.(sec46(1)).

ii. **Power of Civil Court:**

- **Every adjudicator has power of civil court** as conferred on CyAT under sec 58(2). For the purpose of adjudication, **the officer is vested with certain powers of a civil court** [S. 46(5)] e.g; summing, discovery & production of docs/e-docs; receiving evidence on affidavits, issuing commissions for examination of docs & witnesses etc. all proceedings before it shall be deemed to be judicial proceedings
- **including the power to enforce certain criminal penalties** and must follow **basic principles of natural justice** while conducting adjudications [S.46(2)]. Hence, the adjudicating officer u/s 46 is an important quasi-judicial authority.
- **Reasonable Opportunity:** The adjudicating officer has to provide reasonable opportunity to the person charged with contraventions under the act ,to make representation of his case and on the basis of inquiry made under sub-section (1) of sec 46 .
- **Quasi-judicial authority** :Hence, the AO u/s 46 is an important **quasi-judicial authority**.
- **EXECUTION of AOs order:** Assuming that the order of the AO becomes final, the only way of recovering dues under such an order would be to institute a Civil Suit (based on the AO's order), obtain a decree and execute the same

- iii. **Power to impose such penalty or award such compensation**:if the adjudicating officer is satisfied that the person has committed an act in contravention, then, he **may impose such penalty or award such compensation** as he thinks fit in accordance with the provisions of that section.
- o **COMPENSATION**:, may award compensation for losses suffered as a result of contraventions of ss. 43 and 43A. (see Schedule), **Limited for claims up to RS 5 crores**: and exercises jurisdiction over claims for damages up to `5.00 CRORES [section 46(1A) of the Act].
 - o **IMPOSE PENALTIES**: In addition, the quasi-judicial adjudicating officer **may impose penalties, thereby vesting him with some of the powers of a criminal court** [s. 46(2)],
 - o **Award Damages**, the quantum of which is to be determined after taking into account factors including **unfair advantage, loss and repeat offences** [s. 47].
 - o **Adjudging the quantum of penalty/Damages**: The adjudicating officer **may impose penalties for any of the offences** described in SS 43, 44 and 45 of the Act; **Rule 5 of the same draft Rules prescribes that while adjudging the quantum of penalty (U/SS 43, 44 or 45), the adjudicating officer shall have due regard to the following FACTORS**:
 - a. the **amount of gain of unfair advantage**, (quantifiable), made as a result of the default;
 - b. the **amount of loss** caused to any person as a result of the default;
 - c. the **repetitive nature** of the default.
 - o **Competent court**: For the claim for injury or damage exceeding Rs. **5 Crores**, the **power of adjudication shall vest with the competent court (sec 46(1A))**.
Section 61 of the IT Act – **‘No court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed under this Act or the Cyber Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. Provided that the court may exercise jurisdiction in cases where the claim for injury or damage suffered by any person exceeds the maximum amount which can be awarded under this Chapter.’**

9.5 Distinction between Compensation and Damages:

Compensation is a sum of money awarded by a civil court, before or along with the primary decree, **to indemnify a person for injury or loss.**

- Compensation is usually awarded **to a person who has suffered a monetary loss** as a result of the **acts or omissions** of another party.
- Its **quantification** is usually guided by **principles of equity**. [See *Shantilal Mangaldas* AIR 1969 SC 634 and *Ranbir Kumar Arora* AIR 1983 P&H 431].

Damages: On the hand, damages are **punitive** and,

- in addition to restoring an **indemnity to wholeness**, may **be imposed to deter an offender, punish exemplary offences, and recover consequential losses,** amongst other objectives.
- Damages that are punitive, while not judicially popular in India, are **usually imposed by a criminal court in Common Law jurisdictions.** They are **distinct from civil and equitable actions.** [See the seminal case of *The Owners of the Steamship Mediana* [1900] AC 113 (HL)].
- Unfortunately, S.46 uses the terms “**damage**”, “**injury**” and “**compensation**” interchangeably without regard for the long and rich jurisprudence that finds them to be different concepts.

9.6 Scope of Powers of the A.O under I.T Act.

The Act also contemplates the appointment of an Adjudicating Officer for **inquiring into and adjudicating contraventions under the Act.**

The IT Act provides for "**Penalties and Adjudication**" (Chapter IX) and **for "Offences"** (Chapter XI).

Chapter IX provides for **penalties and adjudication**- - consists only of five **Sections 43 to 47** of the Act. Section **43** is titled "**Penalty for damage to computer, computer system etc.**" which states that “

if any person unauthorisedly accesses, downloads, copies, induces viruses etc. into any computer or computer network, he shall be liable to pay damages by way of compensation not exceeding Rs. 5 Crores to the person so affected.(it Amend act 2008)”

(It can be argued that the maximum liability that can be imposed is qua the person so affected. In other words, if ten persons are aggrieved, each of them could be entitled to Rs. One Crore for damages. Therefore, a person contravening Section 43 can be made liable to pay an amount greater than Rs. 5 Crores, in case more than one person is affected by his actions.)

However, what is more significant is that although the heading of Section 43 provides for **"Penalty for damage to computer, computer system etc."**, **nowhere in the text of the Section is the word "penalty" found.** Moreover, a mere contravention of Section 43 would not result in damages being imposed. **For a person claiming damages, he/she would first have to establish the following:**

- a. That there was a **contravention** of Section 43;
- b. That the **contravention resulted in an unfair gain or advantage** to the person contravening
- c. That the contravention **resulted in loss to the claimant;**

The claimant would then have to quantify the loss in monetary terms to establish his claim before the Adjudicating Officer. It is only **on the basis of the claim so established**, that the **Adjudicating Officer can pass an order** directing the person, who has contravened Section 43, **to pay damages.**

Section 44 provides for PENALTY for failure to furnish information as required under the Act, rules or regulations and **Section 45 provides for "residuary penalty"**. Unlike Section 43(damage payable to effected persons/s only) , a contravention of **Sections 44 and 45 would result in a person being made liable to pay "penalty" which would accrue to the State.**

Section 46(1) of the Act provides **for the appointment of an Adjudicating Officer** for the purpose of adjudicating under Chapter IX whether any person has contravened any provisions of the Act. Although Section 46(1) is slightly confusing, a careful scrutiny of it would reveal that the Adjudicating Officer is empowered only to determine contraventions under Sections 43, 44 and 45 of the Act and nothing else. There have been

differences of opinion as to what exactly are the powers and jurisdiction of the Adjudicating Officer. There is a general opinion that the Adjudicating officer would be competent to entertain and adjudicate all disputes, contraventions and offences relating to the IT Act. However, a careful reading of the relevant provisions of the Act make it clear that **the powers and jurisdiction of the Adjudicating Officer is in fact very limited.**

Chapter XI of the Act deals with "offences" and provides for punishment of fine and/or imprisonment for committing offences like tampering with computer source documents, hacking and other offences prescribed therein. *The trial of these offences would not fall within the Adjudicating Officer's jurisdiction.*

This is all the more clear when one considers the fact that the Adjudicating Officer has been conferred with the powers of a Civil Court under Section 46(5) of the Act. The **trial of offences** committed under Chapter XI of the IT Act would therefore still be before the **Jurisdictional Magistrate(or any competent court) under the provisions of the Code of Criminal Procedure.**

To sum up, the **jurisdiction of an Adjudicating Officer** appointed under the provisions of the IT Act would extend only to:

- a. Determining the extent of damages payable by a person contravening Section 43, to the person so affected;
- b. Determining the amount of penalty payable by a person for his failure to furnish information, returns, etc. as required under the Act or its Rules; and
- c. Determining the amount of penalty/damages payable by a person for contravening the provisions of the Act, Rules or Regulations for which no separate penalty is provided.