Singh & Associates

ADVOCATES AND SOLICITORS

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INDIAN LEGAL IMPETUS

FOREWORD

Manoj K Singh
Founding Partner

It gives us immense pleasure to bring forth the June 2013 edition of our monthly newsletter "Indian Legal Impetus" summarizing the latest developments in the legal scenario in India.

In light of the continuous growth of opportunities in India, the Government has recently ***liberalized*** the policy of ***Foreign Direct Investment*** in segments that include, telecom sector, single brand retail gas refineries, commodity exchanges, clearing corporations, courier services, credit information firms etc, and introduced ***guidelines of foreign investment*** to encourage participation of foreign investors in the Indian economy. Such development in India will tend to invite an increased number of International Investors including corporations.

With reference to the abovementioned development and opportunities alike, we have addressed the situation of increase of matters on ***cross border insolvency*** and the legal regime that is to be given importance to deal with it and it has been suggested that the UNCITRAL Model Law adopted by United Nations be considered, which provides a uniform perspective to deal with similar situations across the globe in a consistent manner.

An insight is also provided in the related field of Taxation with respect to the ***Cessation of Trading Liability*** of companies, and in what situation the income of the assessee under this category is to be considered under the provisions of the Income Tax Act. An overview of the recent development in the regulations of SEBI on ***buy back shares through open market purchase***, provides a summary of the amendments introduced and its effect in consonance with other applicable regulations.

With respective to core subjects of litigation, we have provided an article which deals with the provisions of '***Bail***', which does not create any distinction between an Indian resident and Non residents in the light of Criminal Laws prevailing in India and another article, which deals with the ***framing of charges*** where it is explained the basis requirements of a fair trial in criminal jurisdiction is to give precise information to the accused as to accusation against such accused under the Criminal Law in India.

Under the development identified in the field of intellectual property we have provided a brief insight of the ***Significance of Statement of Working of Patents in India***, along with its recent notification and requirements etc and the importance and identification of ***Cyber crimes and Cyber laws*** in order to regulate such situations in the country.

We are glad to inform you that Singh & Associates are to extend operations in Singapore shortly. In light of this small, but significant development, we have provided an overview of the importance of the prospects of the practice at the ***Singapore International Arbitration Center*** and its continuous endeavor to provide a wholesome experience to all parties who seek its support under dispute resolution processes for amicable settlement of matters of disagreement.

The newsletter concludes with the quick glimpse of the latest developments in the various fields of law which have been summarized under the heading "**Newsbyte**".

We sincerely hope that our esteemed readers find the information furnished through this issue useful. We welcome suggestions, opinions, queries or comments from our readers. You can also send your valuable insights and thoughts to us @ **newsletter@singhassociates.in**

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LIBERALIZATION OF FOREIGN DIRECT INVESTMENT LIMITS IN 12 SECTORS

Pradhumna Didwania & Yogesh Malhan

Foreign Direct Investment (FDI) in India is subject to certain Rules and Regulations and is subject to predefined limits ('Limits') in various sectors which range from 20% to 100%. There are also some sectors in which FDI is prohibited. The FDI Limits are reviewed by the Government from time to time and as and when the need is felt and FDI is allowed in new sectors where the limits of investment in the existing sectors are modified accordingly. In order to revise the FDI Limits to attract more foreign investment in India, the Union Government constituted a committee named, Arvind Mayaram Committee headed by the Economic Affairs Secretary. On Tuesday, 16th July, 2013, the Government approved the recommendations given by the Arvind Mayaram Committee to increase FDI limits in 12 sectors out of the proposed 20 sectors, including crucial ones such as defense and telecom.

Some of the important changes made in the Existing FDI Limits are provided below:

- FDI Limit in Telecom Sector is increased from 74 per cent to 100 percent, out of which up to 49 per cent will be allowed under automatic route and the remaining through Foreign Investment Promotion Board (FIPB) approval. A similar dispensation would be allowed for asset reconstruction companies and tea plantations.

- FDI in 4 sectors i.e. gas refineries, commodity exchanges, power trading and stock exchanges have been allowed via the automatic route. In case of PSU oil refineries, commodity exchanges, power exchanges, stock exchanges and clearing corporations, FDI will be allowed up to 49 per cent under automatic route as against current routing of the investment through FIPB.

- FDI in single brand retail is to be allowed up to 49 percent under the automatic route and beyond that shall be through FIPB.

- In credit information firms, 74 per cent FDI under automatic route will be allowed.

- In respect of courier services, FDI of up to 100 per cent will be allowed under automatic route. Earlier, similar amount of investment was allowed through FIPB route.

- FDI cap in defense sector remained unchanged at 26%, however higher limits of foreign investment in state-of-the-art manufacturing would be considered by the Cabinet Committee on Security (CCS). Technically, the decision leaves it open for CCS to even allow 100% foreign investment in what the defence ministry will define as "state-of-the-art" segments with safeguards built in to ensure that the technology and equipment are not shared with other countries.

- In the contentious insurance sector, it was decided to raise the sectoral FDI cap from 26 per cent to 49 per cent under automatic route under which companies investing do not require prior government approval. A Bill to raise FDI cap in this sector is pending in the Rajya Sabha.

Some of the sectors in which FDI limits were expected to be increased but did not were, civil aviation, airport, media, multi-brand retail and brownfield (existing firms) pharmaceuticals.

Tabular representations of the key changes proposed under the FDI Limits are as follows :

Sector/Activity	Before the proposal		After the proposal	
	% of FDI /Equity	Entry Route	% of FDI / Equity	Entry Route
Defense Sector	26%	Government Route	No Change	Higher limits of foreign investment in "state-of-the-art" manufacturing would be considered by the CCS

Insurance Sector	26%	Automatic Route	49%	Automatic Route
Telecom Services	74%	Automatic up to 49% Government route beyond 49% and up to 74%	100%	Automatic up to 49% Government route beyond 49% and up to 100%
Tea Plantation	100%	Government Route	100%	Automatic up to 49% Government route beyond 49% and up to 100%
Asset Reconstruction Company	74% of paid-up capital of ARC (FDI+FII)	Government Route	100%	Automatic up to 49% Government route beyond 49% and up to 100%
Petroleum & Natural Gas	49%	Government Route	49%	Automatic Route
Commodity Exchanges	49% (FDI & FII) + [Investment by Registered FII under Portfolio Investment Scheme (PIS) will be limited to 23% and Investment under FDI Scheme limited to 26%]	Government Route (For FDI)	49%	Automatic Route
Power Exchanges	49% (FDI &FII) FDI limit of 26 per cent and an FII limit of 23 per cent of the paid-up capital	Government Route (For FDI)	49%	Automatic Route
Stock Exchanges/ Clearing Corporations	49% (FDI &FII) FDI limit of 26 per cent and an FII limit of 23 per cent of the paid-up capital	Government Route (For FDI)	49%	Automatic Route
Credit Information Companies	49% (FDI & FII)	Government Route	74%	Automatic Route
Courier Services	100%	Government Route	100%	Automatic Route
Single Brand product retail trading	100%	Government Route	100%	Automatic up to 49% Government route beyond 49% and up to 100%

CONCLUSION

In order to liberalize Foreign Investment in India and to attract more number of foreign Investors the Government attempts to maintain a practice to continuously review the Foreign Investment policy. The acceptance of the recommendations to increase the Foreign Investment Limits in the respective sectors will not only attract Foreign Investment in India but will also provide growth opportunities to Indian Companies who can collaborate with Foreign Companies to start business in various new sectors. The withdrawal of requirement of Government Approval for Investment in different sectors will also act as an incentive to initiate various business prospects and will expedite the launch of new projects. ◆◆◆

MODIFICATIONS TO THE EXISTING FRAMEWORK FOR BUY BACK THROUGH OPEN MARKET PURCHASE

Shipra Makkar & Ayush Kaushal

The said modification comes as a result of the Discussion Paper on 'Proposed modifications to the existing framework for buy back through open market purchase' dated 02nd January 2013 by SEBI wherein discussion was held to provide solutions to failure of present policies on buy back through open market.

Here, it shall be worth mentioning that buy back is usually resorted to due to following reasons:

- Return surplus cash to the shareholders; or
- Support share price during periods of temporary weakness; and
- Increase the underlying share value;

NEED FOR THE AMENDMENT

It has been observed by the SEBI that buy back through open market has failed to achieve its objectives in spirit, due to the following reasons:

1. *The companies place buy back orders at their discretion instead of placing them on regular basis and that too at a price away from the market price-*

   Section 77A (4) of the Companies Act, 1956 specifies that every buy back shall be completed within a period of 12 months. Companies, instead of fixing a definitive period for buy back, usually keep the buy back offer open for the entire period of 12 months. However, even after keeping the buy back offer open for such a long time, there have been instances where companies did not buy a single share or failed to achieve the minimum buy back quantity.

2. *There are no provisions that determine the price or quantity permissible for company to buy back-*

   There are no explicit provisions in the Companies Act, 1956 or in the SEBI (Buy Back of Securities) Regulations, 1998 regarding the price or quantity for which the company shall place orders for buying back its shares or the periodicity of placement of such orders. Therefore, on which days, for how long and in what quantity the company will buy back its shares is entirely at the discretion of the company's management. This lack of clarity is further burdened with the fact that disclosure is not made to the public shareholders as to how the discretion will be exercised and what are consideration/basis guiding the management in this regard.

3. *Failure on part of companies to actually execute the buy back process-*

   It has also been observed that many companies took shareholders/board approval for buy back proposals and in some cases even published public notice but did not take a single step to buy the shares.

4. *There are no current disclosure requirements to be fulfilled by company with regards to buy back-*

   The company discloses the maximum price only and eventually purchases the shares near market price which could be significantly lower than the announced price. This may convey a misleading message to the shareholders and to the market. Moreover, buy back from open market has not proved to be beneficial to the shareholders as against the tender offer method in which the company buys back shares at a premium to the market price.

5. *Buy back offer is not successful in enhancing book value of shares.*

   It has been observed that in 75 buy back cases through open market purchases, which closed during the last three financial years (from April 01, 2007 to March 31, 2010), an average of 49.91% of the maximum offer size (as disclosed in public announcement to shareholders) was utilized by the companies for the buy back. This suggests that despite the intention disclosed by companies to their shareholders at the time of making buy back offer, the buy back offer is not used as an opportunity for enhancing the book value of the shares of the company.

THE KEY CHANGES

The Amendment to SEBI (Buy Back of Securities) Regulations, 1998 governing buy-back through open market purchase, as a part of SEBI's constant endeavour to align regulatory requirements with the changing market realities as well as to enhance efficiency of the buy-back process, the following changes to buy back of shares or other specified securities from the open market through stock exchange mechanism have been approved and includes mostly all the changes proposed in discussion held on 02nd January 2013. These changes are aimed towards ensuring lower volatility and reduce unpredictability in the capital markets. Also these changes are likely to affect the rights which the companies possessed before the amendment, in respect of open market transactions.

Following spheres have been introduced with changes:

1. **Cardinal requirement of minimum buy-back:** In the discussion, SEBI observed that companies majorly used buy backs as a medium to support share price during periods of temporary weakness and to artificially increase underlying share value. To prevent misuse of buy back offers by using them as a share-price stabilizing activity, the obligatory minimum amount which a company is required to buy back from its existing shareholders has been increased to 50% of the offer size, against the existing practice of 25%.

   This requirement has been introduced to prevent the manipulation of share prices and if the company fails to fulfill this requirement, then the amount in escrow account would be forfeited subject to a maximum of 2.5% of the total amount taken by company.

2. **Buy Back Period:** Currently, the Buy Back provisions are clearly laid down in section 77, 77(A), of the Companies Act, 1956. Also the Buy Back Regulations of SEBI prescribes certain standards which apply to listed companies. The Companies Act mandates that a company looking to buy back its securities should seek approval of its shareholders by way of a special resolution or a resolution of its board of directors, and such buy-back must be completed within 12 months from the date of the shareholder/ board resolution (Buy Back Period).

   By the amendment, SEBI has limited the Buy Back Period to 6 months, from the time the approval has been sought from the board or shareholders, because practically the companies did not utilize the entire period to carry- out and perform the complete Buy Back.

   However, the provisions of the Companies Act [which remain intact] provide that the Buy Back period of shares extends up to 12 months from the date of the shareholder/board resolution, which upon the amendment will stand contrary to the regulation. This move shall take its toll on flexibility provided by the Companies Act; a point noteworthy here, is that it is yet unclear if SEBI can reduce a time period that is determined by the Companies Act.

3. **Escrow account requirement:** SEBI has introduced the requirement of creating an escrow account on part of the companies, and a deposit has to be made as a security, to ensure that a company which announces a buy-back goes ahead with the proposed transaction. This security shall be equivalent to 25% of the buy-back amount. This move will be happily welcomed by the shareholders as it safeguards their interests. But it is being widely perceived being an unnecessary burden given the 50% mandatory buy-back rule.

4. **Requirements after completion of Buy Back process:** SEBI has changed the duration of the restrictive period for further issue of capital from prevailing 6 months to 1 year, to be calculated from date of closure of the buy back. Although this requirement can be relaxed in discharge of latent obligations.

   This change is contradictory to the period specified by the Companies Act, 1956. Before the amendment, there was no provision for by SEBI for cooling-off period i.e. the period between two Buy Back offers, it was decided by way of a board resolution. Also no cooling-off period is mentioned in the Companies Act. But now the cooling-off period is 1 year. That means a company cannot make another buy-back offer within a period of one year from the date of closure of the preceding offer. This 1 year Cooling-off Period will be applicable to all buybacks (irrespective of whether they are launched following a board or shareholder resolution).

Also, SEBI has allowed the companies to subvert the shares procured in the buy back during the month within 15 days of the succeeding month, provided the last extinguishment is concluded within 7 days of the completion of the offer.

5. **Requirements during Buy back:** SEBI now requires all the information related to shares bought back to be disclosed on a daily basis on the website of the company and the stock exchange on cumulative basis. Before the amendment, the aforementioned disclosure had to be made on a daily, fortnightly and monthly basis.

   To tackle and reduce the unpredictability in the market, SEBI now prevents the promoters of the company from executing any transaction, during the buy-back period, regardless of whether these transactions are on-market or off-market.

6. **Buy Back Method:** In order to increase stability in share prices of a company, SEBI has restricted the Buy Back method only to Tender offer method. SEBI permits the company to buy 15% or more of capital which may include both paid-up capital as well as free reserves. This amendment takes away the freedom of company to choose the method for buy back.

7. **Procedure for Buy back:** Procedure for buy-back of physical shares (odd-lot) has been modified which includes creation of separate window in the trading system for tendering the shares, requirement of PAN/Aadhaar card for verification, etc.

CONCLUSION

Although this amendment comprehensively addresses the concerns apprehended by the regulators of SEBI in the discussion paper of 02nd January 2013, the amendments substantially take away the freedom from the public companies, which currently exist by virtue of the Companies Act.

The modifications to the existing framework for Buy Back through open market purchase have been done by holding the shareholder's interest as the paramount consideration. Now the companies cannot misuse the Buy Back for promotion of their own interest.

Further, this amendment raises a conflict between existing provisions for Buy Back laid down in the Companies Act, 1956. Since a lot of provisions of the Companies Act are not in sync with this amendment, the question is whether SEBI possesses the power to override the Companies Act's provision by this amendment and which one of the two would prevail in an event of a conflict. ◆◆◆

THE NATIONAL FOOD SECURITY BILL, 2013

Madhu, Puja[1]

In December 2011, National Food Security Bill was introduced in the Lok Sabha for the first time to address the issue of food security in a comprehensive manner and with an aim "*To provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matter connected therewith or incidental thereto.*"

On the basis of the report of Standing Committee on Food, Consumer Affairs and Public Distribution, the Union Cabinet cleared the bill on 4th July 2013 and paved a way to make the framework of the proposed legislation simpler by providing more flexibility to States/ Union territories in its implementation and to address some of the important concerns relating to food security. Major highlights of the Bill are discussed hereunder:

- **Targeted Public Distribution System (TPDS):**

The Bill has made provision for the State Government to provide 5 kilograms of food grains per person per month at subsidized prices to person belonging to priority households. Here the word "Priority household" means Households identified by the State Government.

- **Antyodaya Anna Yojana:**

A National Sample Survey Exercise points towards the fact that about 5% of the total population in India sleeps without two square meals a day. Their purchasing power is so low that they are not in a position to buy food grains round the year even at BPL rates. "Antyodaya Anna Yojana" which was launched by the Government of India on 25th December, 2000 specifically targets this 5% population and provides subsidized foodgrains to them. With the current modification in the bill, households that come under this scheme will be provided with 35 kgs of foodgrains per household per month as allotted by the Central Government to the respective States.

- **Maternity Benefits:**

Every pregnant mother and lactating mother will be provided with free meal during pregnancy and 6 months after child birth by the local anganwadis along with maternity benefit of not less than Rs 6000/-.

- **Free meal to Children:**

Children between the age group of 6 months to 6 years as well as children suffering from malnutrition will be provided with free meal by the local anganwadis and children between 6 to 14 years will be provided with one free mid day meal in school except on school holidays to meet the nutritional need of the children.

- **Food Security Allowance:**

The Bill has also made provision for providing food security allowance to the persons who have not received any of the benefits in accordance to the above mentioned schemes.

- **Eligible households:**

Corresponding to the coverage of 75% of rural and 50 % of urban population at all India level, State wise coverage will be determined by the Planning Commission. The work of identification of eligible households is left to the States/UTs, which may frame their own criteria or use Social Economic and Caste Census data. Special concern must be paid to the needs of vulnerable group especially in hilly and tribal areas.

- **Reforms in Public Distribution System:**

The bill has made provision for doorstep delivery of foodgrains, application of information and communication technology (ICT) including end to end computerization, leveraging 'Aadhaar' for unique identification of beneficiaries, diversification of commodities under TPDS and full transparency of records for effective implementation of the Food Security Act.

1. Intern, Student of IIIrd Year, University of Petroleum & Energy Studies, Dehradun

• Women Empowerment:

Eldest woman of eighteen years of age or above will be head of the household for issue of ration card, and if not available, the eldest male member is to be the head of the household.

• Grievance Redressal Mechanism:

There will be a redressal mechanism which will be implemented at the state as well as at the district level, including provisions for establishing call centre and helpline with designated nodal officers. State Food Commission will also be established in order to monitor and review implementation of this act. The States will be allowed to use the existing machinery for District Grievance Redressal Officer, State Food Commission, if they so desire, to save expenditure on establishment of new redressal set up.

• Subsidized Prices and their revision:

Uniform prices of Rs. 3/2/1 per kg for rice/wheat/coarse grains will be applicable to all eligible beneficiaries. It is proposed to fix these prices for the first three years of implementation of the Act.

• Responsibility of Central Government, State Government & local authority:

In case of non supply of food grains to the State Government, the Central Government will be responsible to provide funds to overcome short supply so as to meet the obligations. The State Government is responsible to implement the schemes of various ministries under the guidelines of Central Government. The local authorities will be responsible for the implementation of these schemes in a particular area entrusted upon them.

• Transparency and accountability of records:

There should be transparency of records in regard to the work undertaken and implementation of schemes and to meet such requirement, provisions have been made for disclosure of records relating to PDS, social audits and setting up of Vigilance Committees.

• Penalty for non compliance:

The Bill provides for penalty to be imposed on public servants or authority, if found guilty of failing to comply with the relief recommended by the District Grievance Redressal Officer.

• States to get assistance for intra-State transportation and handling of food grains:

In order to address the concern of the States regarding additional financial burden, Central Government will provide assistance to the States towards cost of intra-State transportation, handling of food grains and FPS dealers' margin. This will ensure timely transportation and efficient handling of food grains.

Discussion on minutes and other documents, notice received by the company, leave of absence, attendance sheet and disclosure under Section 299 of Companies Act is also required.

CONCLUSION

In a recent survey, it was deduced that 22% of the Indian population is undernourished whereas 40% of children below the age of 3yrs are underweight, majority of children aged between 6 to 35 months are anaemic and 33% of the women aged between 15-49 yrs have a BMI below normal. The growth rate and the immunity level of the Indian population have been declining considerably throughout these years. In the current Indian scenario, Food Security Bill is a blessing for the Indian populace who do not have the knowledge as well as access to nutritional food. The bill has however left an open house for discussion by not providing a specific limit for identification of eligible households under Public Distribution System which has been left on the discretion of the government. With the implementation of the Food Security Bill, Indians can have a gleam of hope that their fight for "right to food" will possibly come to an end. It can be suggested, that with the introduction of this Bill, India can guarantee majority of its population quality foodgrains to meet with the above mentioned deficiencies and provide the rightly deserved nutritional security to everyone. ◆◆◆

CESSATION OF TRADING LIABILITY UNDER INCOME TAX ACT, 1961

Pradhumna Didwania

Trading Liability in general terms can be understood as an obligation of a person (Debtor) to pay another person (Creditor) for goods purchased or value received from that other person. A genuine Trading Liability incurred in the course of Business or Profession is a permissible expenditure, in the relevant financial year, under the applicable provisions of the Income Tax Act, 1961, however when some benefit is derived by the Debtor in the form of remission or cessation of such trading liability, then such benefit received by the debtor is to be considered as a Taxable Income under Section 41(1) of the Income Tax Act, 1961. Section 41(1) deals with considering ceased trading liability as deemed profits of business or profession.

SECTION 41(1) OF THE INCOME TAX ACT, 1961

1) *Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year -*

   a. *the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or*

   b. *the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.*

Explanation 1 - For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.

Explanation 2 - For the purposes of this sub-section, "successor in business" means -

i. where there has been an amalgamation of a company with another company, the amalgamated company;

ii. where the first-mentioned person is succeeded by any other person in that business or profession, the other person;

iii. where a firm carrying on a business or profession is succeeded by another firm, the other firm;

iv. where there has been a demerger, the resulting company.

SCOPE OF SECTION 41(1)

In the case of *The Commissioner of Income Tax-III Shri Vardhman Overseas Ltd, ITA NO.774/2009, Date of Decision: 23.12.2011,* Division Bench of Hon'ble High Court of Delhi, made the following Observation with regards to Section 41(1):

> *"The provisions of Section 41(1) have been specifically incorporated in the Act to cover a particular fact situation. The section applies where a trading liability was allowed as a deduction in an earlier year in computing the business income of the assessee and the assessee has obtained a benefit in respect of such trading liability in a later year by way of remission or cessation of the liability. In such a case the section says that whatever benefit has arisen to the assessee*

in the later year by way of remission or cessation of the liability will be brought to tax in that year. The principle behind the section is simple. It is a provision intended to ensure that the assessee does not get away with a double benefit once by way of deduction in an earlier assessment year and again by not being taxed on the benefit received by him in a later year with reference to the liability earlier allowed as a deduction."

Liability is barred by limitation but there are cases where a liability is being carried forward for years in the books of assessee. In such cases, the Income Tax Authorities have considered the liability as ceased/non existent, because of the fact that the liability is being shown outstanding for many years and the assessee has not provided confirmations from the creditors or has failed to provide necessary details like PAN/Address of the creditors or there is no possibility of the creditors claiming their debts in future and applied section 41(1) of the Income Tax Act, 1961 by adding the liability to the taxable income of the debtor. However, the Judicial fora has consistently held that a liability cannot be treated as ceased merely because of the fact that the liability is being carried forward for years and the assessee is not completely able to prove the genuineness of the trading liability, at the time of application of Section 41(1) by the Income Tax Authorities.

In a recent case[1] decided by division bench of Hon'ble Delhi High Court, the following observation was made with regards to Cessation of liability under Section 41(1) of the Income Tax Act, 1961.

"It is well settled that reflecting an amount as outstanding in the balance sheet by a company amounts to the company acknowledging the debt for the purposes of Section 18 of the Limitation Act, 1963 and, thus, the claim by M/s Elephanta Oil & Vanaspati Ltd. can also not be considered as time barred as the period of limitation would stand extended. .... It is well settled that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cession of liability without any possibility of the same being revived. The assessee company having acknowledged its liability successively over the years would not be in a position to defend any claim that may be made on behalf of the liquidator for credit of the said amount reflected by the assessee as payable to M/s Elephanta Oil & Vanaspati Ltd.

We may also add that, admittedly, no credit entry has been made in the books of the assessee in the previous year relevant to the assessment year 2008- 2009. The outstanding balances reflected as payable to M/s Elephanta Oil & Vanaspati Ltd. are the opening balances which are being carried forward for several years. The issue as to the genuineness of a credit entry, thus does not arise in the current year and this issue could only be examined in the year when the liability was recorded as having arisen, that is, in the year 1984-1985. The department having accepted the balances outstanding over several years, it was not open for the CIT (Appeals) to confirm the addition of the amount of 1,53,48,850/- on the ground that the assessee could not produce sufficient evidence to prove the genuineness of the transactions which were undertaken in the year 1984-85."

In another case[2] decided by the Hon'ble Income Tax Appellate Tribunal, Ahmedabad Bench, the following observation was made with regards to Cessation of liability under Section 41(1) of the Income Tax Act, 1961.

"Considering the facts of the case as noted above it is clear that the assessee had continued to show the admitted amounts as liabilities in its balance sheet. The liabilities reflected in the balance sheet cannot be treated as cessation of liabilities. Merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have ceased to exist. It is also a fact that the assessee has not written off the outstanding liabilities in the books of account and the outstanding liabilities are still in existence would prove that the assessee acknowledged his liabilities as per the books of account. Section 41(1) of the IT Act is attracted when there is cessation or remission of a trading liability. The AO shall have to prove that the assessee has

1. The Commissioner of Income Tax Delhi-II vs Jain Exports Pvt. Ltd ,ITA No.235/2013, Judgment delivered on: 24.05.2013
2. Shri Nitin S. Garg vs The A. C. I. T., Circle-4, Surat, ITA No.169, 170, 171 and 172/Ahd/2009, Order Date 04-06-2010

obtained the benefits in respect of such trading liabilities by way of remission or cessation thereof. Merely because the assessee obtained benefit of deduction in the earlier years and balances are carried forward in the subsequent year, would not prove that the trading liabilities of the assessee have become non-existent. It may also be noted here that the assessee has not claimed any deduction of the expenditure in all the assessment years under appeal."

CONCLUSION

If a Trading Liability is being shown by an assessee in his books for years it cannot be considered as ceased merely because of the facts that it is being shown for years and the assessee is unable to provide confirmation from the editors or other details from the creditors or the possibility of creditors demanding their money back is minimal. The genuineness of the liability if not questioned by the Income Tax Authorities in the assessment year in which the liability incurred by the assessee came up for scrutiny, then it cannot be questioned at the time of applying Section 41(1) by the Income Tax Authorities. Hence, as long as the amount of the liability is not written off in the books by the assessee or there is some benefit derived to the assessee by way of remission or cessation it cannot be added in the income of the assessee under the provisions of Section 41(1) of the Income Tax Act, 1961. ◆◆◆

INSTITUTIONAL ARBITRATION AND SINGAPORE INTERNATIONAL ARBITRATION CENTRE RULES, 2013: INDIAN OUTLOOK

Anu Goel and Bijoylashmi Das

As quoted by Justice V. N. Khare, Former Chief Justice of India, in his speech at the 30th Annual General Meeting, Indian Council of Arbitration, January 6, 2004;

> *"an **Institutional Arbitration** is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution".*

Institutional Arbitration has been proved advantageous as it not only diminishes the efforts of the parties in formatting the arbitration procedure for resolving the dispute but also limits the ambiguity in relation to the arbitration process. Another advantage of Institutional Arbitration is the appointment of arbitrator. Institutional Arbitration facilitates the appointment of arbitrator from its panel of arbitrators who at all times shall remain independent and impartial[1]. As observed by Justice Mr. M.Y. Eqbal, Chief Justice of Madras High Court in one of his judgment[2] that "*Institutional Arbitration has been defined to be an arbitration conducted by an arbitral institution in accordance with the rules of the institution".*

With the liberalization of the economic policies and opening of the doors for foreign investment, it may not be out of question to apprehend the rising of disputes in such international contracts. The Hon'ble Supreme Court in a recent decision in **Vodafone International Holdings B.V. vs. Union of India and another, SLP(C) No.26529 of 2010**, dated 20.01.2012 observed that "*every strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner".* For that reason, it cannot be overlooked that for the economic growth of the country, wherein foreign companies are involved, mechanism of resolving disputes by way of Institutional Arbitration is very much apposite.

Since International Commercial Arbitration involves parties from different nationalities who are unable to reach consensus on the issues like appointment of arbitrator or procedure to be followed to resolve the dispute and differences amicably, Institutional Arbitration can be considered as the suitable forum for resolving such disputes as it facilitates established and internationally accepted arbitration rules and procedures in relation to the appointment of arbitrator and also provides support and supervision in passing of a rational award.

ARBITRATION INSTITUTION "SIAC" AND INDIA

One of such arbitral institution has been established in Singapore, **SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)**, which has been globally recognized as one of the Premier International Arbitration Institution[3] wherein a wide variety of complex arbitrations were filed, including major telecommunications and infrastructure disputes, financial derivatives arbitration, energy, insurance, IT and joint venture disputes, share sale and purchase shipping and commodity disputes.

There has been an impetus increase in the number of cases filed at the SIAC by the Indian Nationals. A remarkable 49 cases in the year 2012[4] highlights the increasing involvement of India in taking recourse to institutional arbitration as a mechanism for resolution of disputes as it provides a neutral, efficient and reliable dispute resolution system.

1 Rule 10.1 of Singapore International Arbitration Centre Rules, 2013
2 A.K. Balaji versus The Government of India, rep. by its Secretary to Government, Law Department, 4th Floor, A-Wing, Shastri Bhawan, New Delhi - 110001 and Ors., reported at AIR 2012 Madras 124
3 Singapore International Arbitration Centre, CEO's Annual Report, 2012
4 Id

SIAC RULES 2013

The SIAC has announced new rules titled "**SIAC Rules 2013**" along with the Practice Notes for the better administration of cases filed with them that came into force on April 1, 2013. The SIAC Rules 2013 reflects significant refurbishment of the SIAC Rules 2010.

A Court of Arbitration was established[5] with the motive to manage the substantial burden of caseload on the institution. The corporate and business development functions of the Centre will continue to be overseen by the Board of Directors.[6] The Court of Arbitration was delegated with the powers of appointment of the arbitrator[7], determining whether the arbitral proceedings can be conducted in accordance with the Expedited Procedure[8], determining the challenge made by the parties to arbitrator's impartiality and independence[9] and determining the competence of the institution to administer arbitration[10].

The Registrar[11] of the Court of Arbitration is delegated with the power to determine the substantial compliance of the rules of institution in relation to the Notice of Arbitration[12] and to extend or shorten any time limit prescribed for the arbitral proceedings[13].

An entirely new rule which has been introduced is the finality given to the decisions of the President of the Court of Arbitration and the Registrar of the Court of Arbitration. The decision of the abovementioned authority shall be final and binding upon the parties and also the parties shall be taken to have waived any right to appeal or review in respect of any decision of the abovementioned authority to any state court or other judicial authority[14].

A new rule which upholds the principle of party autonomy and granting the parties right to appoint their legal representative in the arbitral proceedings has been introduced wherein "Any party may be represented by legal practitioners or any other representatives[15].

Another significant rule which has been introduced is in relation to witness interviews stating that "it shall be permissible for any party or its representatives to interview any witness or potential witness (that may be presented by that party) prior to his appearance at any hearing", thereby reflecting the practice and expectation of the parties in international arbitral proceedings.

CONCLUSION

On the basis of the above discussion and in the light of the recent updation of the SIAC Rules, it is reflected that Indian Nationals are actively involved in SIAC as not only the part of the institution but also rely on the institution's practice and rules to the extent that Indian Nationals are second highest in filing cases in SIAC in the year 2012. This goes to show that India has considerably adapted itself to the system of Institutional Arbitration and has commendably relied on SIAC Rules in resolving disputes. ◆◆◆

5 Rule 1 of SIAC Rules 2013
6 See at http://www.siac.org.sg/
7 Rules 6 – 10 of SIAC Rules 2013
8 Rule 5 of SIAC Rules 2013
9 Rule 13 of SIAC Rules 2013
10 Rule 25 of SIAC Rules 2013
11 Rule 1.5 of SIAC Rules 2013
12 Rule 3.3 of SIAC Rules 2013
13 Rule 2.5 of SIAC Rules 2013
14 Rule 36 of SIAC Rules 2013
15 Rule 20 of SIAC Rules 2013

ARBITRAL AWARD PASSED IN CHINA: RECOGNITION AND ENFORCEABILITY IN INDIA

Akshay Malhotra

In a recent administrative event on 19th march, 2012 India has declared that Arbitral Awards passed in China (including Hong Kong and Macau) will be recognized and enforced in Indian Courts.

Arbitration in Asia-Pacific has gained popularity over Europe and United States owing to escalating investment in and out of Asian Countries. Recognizing the growing importance of International Arbitration as an undisputed means of resolving international commercial disputes, Indian Ministry of Law and Justice has affirmed that Arbitral Awards passed in People's Republic of China (including special administrative regions of Hong Kong and Macau) on or after 19th march, 2012 may be recognized and enforced in India. This decision will add another state to the list of already existing 44 "*Gazetted-States*", the Arbitral Awards of which are recognized and enforceable in India. An International Arbitral Award to be recognized & enforced in India ought to be passed in a State notified via Government of India Official Gazette. This condition flows from Section 44 of Arbitration & Conciliation Act, 1996. Hence even if an Arbitral Award is passed in a Country which is a signatory to New York Convention, 1958 it would not ipso facto mean that it would be enforceable in India. The enforcement of Awards passed in Arbitration proceedings seated outside the territory of India is governed by Arbitration and Conciliation Act, 1996. The Act is modeled on United Nation Commission on International Trade Law (UNICTRAL) model law.

India is a party to New York Convention, 1958. It became a party to the New York Convention, 1958 on 10th June, 1958 and ratified it on 13th July, 1961. The main aim of this Convention is recognition & enforcement of Arbitral awards passed in the contracting state should not be discriminated and obliges the parties to ensure that such awards are recognized. Presently 146 States are party to the New York Convention, 1958 out of which only 44 States have been Gazetted by Government of India. China is also a signatory to Convention on Recognition and Enforcement of Arbitral Awards (New York Convention, 1958) but it was absent from the list of gazetted territories till now. This was considered to be an incongruity amongst the Arbitral community.

IMPACT ON INDO-CHINESE TRADE RELATIONS

The unparalleled level of trade between India and China has reached an all time high. Indo-Chinese bilateral trade has cropped up from being as low as US $ 2.92 Billion in the year 2000 to US $ 73.9 Billion in the year 2012 making China largest trading partner of India[1]. The trade between India and China is expected to touch US $ 100 Billion by the end of 2015. After the announcement of gazetting China, Sino-India trade is expected to prosper and create new benchmarks in trade relations between India & China. This step taken by the Indian Government will have a constructive effect on the ever so affluent trade between the two countries. Prior to the notification, entrepreneurs from China and India selected Singapore (Singapore International Arbitration Centre) as the preferred seat of Arbitration as China was absent from the list of gazetted states as also fearing the non recognition of Arbitral Awards in India. Now there will be a more evenhanded choice for those deciding between Hong Kong International Arbitration Centre (HKIAC) & Singapore International Arbitration Centre (SIAC). Apart from SIAC & HKIAC there is another well recognized Arbitration Institution in Asia called CIETAC ("*China International Economic and Trade Arbitration Commission*"). CIETAC is the leading and busiest Arbitration Institution in China having its Headquarters in Beijing.

HKIA & CIETAC : EVOLUTION

HKIA Administered Arbitration Rules are based on UNCITRAL model law which has also inspired the Indian

1 http://www.indianembassy.org.cn/DynamicContent.aspx?MenuId=3&SubMenuId=0

Arbitration & Conciliation Act, 1996. Following the notification, Hong Kong International Arbitration Centre was quick to spot the implications of the notification and HKIA's General Secretary Chiam Bao commented in a press event that "*with Sino-Indian trade on increase, this long awaited clarification is welcomed by the Hong Kong's Arbitration Community. We look forward to showcasing India the many attractive features that Hong Kong has to offer as a seat of Arbitration*". HKIAC has also announced revised Administered Arbitration Rules (*the "2013 HKIA Rules*") to ensure their suitability to mounting complexities in International Arbitration Disputes. Key changes to the existing Arbitration rules include.

- *ability to handle multi-party & multi-party disputes,*
- *improvements on expedited procedure,*
- *improved terms and conditions to stream line the Appointment of Arbitrator process and*
- *provision for emergency relief in cases of urgent nature*[2].

The revised HKIA Administered Arbitration Rules will come into force on 1st November, 2013. Revised HKIA Rules and state-of-the-art facilities and exceptional infrastructure will definitely give a tough competition to Singapore as a seat of Arbitration in the disputes involving Indian parties.

Similarly CIETAC has also come up as an Arbitration friendly Institution with the adoption of revised Arbitration Rules which came into effect from 1st May, 2012. Some noteworthy changes to the CIETAC Arbitration Rules include -

- *provision for consolidation of parallel proceedings to be consolidated into a single Arbitration proceeding,*
- *removal of the provision making Chinese as a default language of Arbitration and*
- *ability to choose an arbitral seat which could be a city outside mainland China*[3].

These changes will be welcomed by the Indian parties which used to prefer Singapore as a seat of Arbitration over China and Hong Kong. The change in the CIETAC Arbitration Rules and recognition of its awards in India can revolutionize the ubiquitous trend of choosing Singapore International Arbitration Centre (SIAC) and the parties may be attracted towards CIETAC while choosing a seat of Arbitration when one of the parties is from Singapore to endorse neutrality.

CONCLUSION

The recognition and enforcement of Arbitral Awards passed in China will prove to be an encouraging development for Indian parties engaged in International Trade with Asian Country. This will prove to be a blessing for the Indian parties in conflict with Singaporean entities as now they have a viable substitute to Singapore International Arbitration Centre (SIAC). In cases of Multi party Contract, HKIA & CIETAC will not be excluded as a seat of Arbitration only on the basis of non-recognition of Awards. The Hong Kong and Chinese Governments must take advantage of this development to exterminate the domination of Singapore International Arbitration Centre (SIAC) as a preferred seat of Arbitration and elucidate the implications of the notification to the users of Arbitration. Only time will tell if China/Hong Kong will be able to capitalize on this key opportunity and attract parties with Arbitration disputes. ◆◆◆

2 HKIAC Press Release, 12 June, 2013
3 CIETAC Arbitration Rules

GUIDELINES ON FOREIGN INVESTMENT IN INDIA

Madhu

The Reserve Bank of India vide its circular No. RBI /2013-14/117 A.P. (DIR Series) Circular No 01, dated 04th July 2013, has issued guidelines pertaining to Foreign Investment in Indian Companies for calculation of foreign investment, transfer of ownership/ control of Indian Company and downstream investment by Indian Companies (hereinafter referred to as the "guidelines/new guidelines"). Major Highlights of the guidelines are discussed hereunder.

APPLICABILITY OF GUIDELINES

The said guidelines are to have a retrospective effect, where all foreign Investment made in Indian companies after 13th February 2009, will fall under the preview of the said guidelines. Any foreign investments made before 13th February 2009, as per then existing guidelines are outside the ambit of new guidelines. The Indian companies shall intimate the RBI within 90 days of this circular (i. e. upto 2nd October 2013), through their Authorized dealer bank, the detailed position on non compliance of issue/ transfer of shares/ downstream investment as per new regulatory framework.

SCOPE OF GUIDELINES

The Guidelines issued by the RBI provides the following:

- Concept of direct and indirect foreign investment;
- Method of calculation of total foreign investment in Indian Companies;
- Guidelines for establishment of Indian Companies;
- Guidelines for transfer of ownership and control of Indian Companies from resident to non-resident;
- Downstream Investment by Indian Companies, which is not owned/ controlled by resident entities;

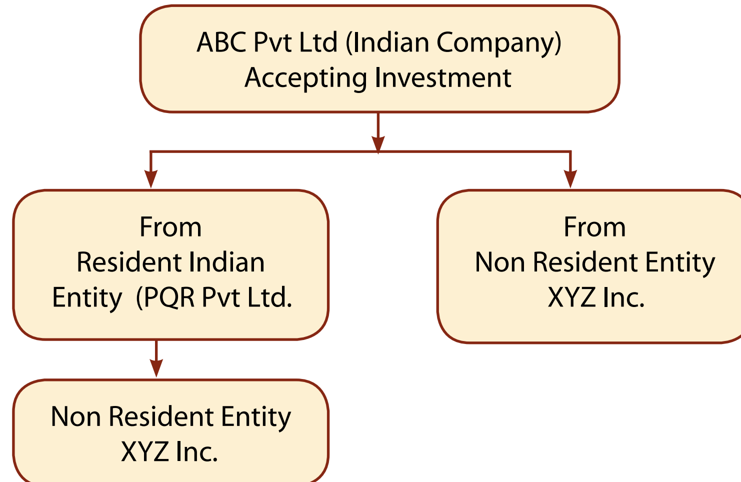
Further RBI has introduced certain definitions by the said guidelines which are discussed hereunder:

1. "Company Owned by resident Indian Citizen": Any Indian Company, in which more than 50% of the capital in the company is beneficially owned by resident Indian Citizen / Indian Companies (i.e., ultimately owned & controlled by Indian Citizens), such company shall be termed as Company Owned by resident Indian Citizen.
2. "Company controlled by resident Indian Citizen": Any Indian Company, wherein resident Indian Citizen have the power to appoint majority of directors will be treated as company controlled by resident Indian citizen for the purpose of these guidelines.
3. "Company Owned/ Controlled by Non-resident": Any Indian Company, wherein more than 50% beneficial interest in the capital is owned by non -resident shall be termed as Company Owned by Non-resident and the Company, in which, non-residents have power to appoint majority of the directors.
4. "Foreign Direct Investment": FDI means investment received by Indian Company from Non-resident entities.
5. "Downstream Investment": Downstream Investment means indirect foreign Investment by one Indian Company in another Indian Company either by way of subscription or acquisition.
6. "Indirect Foreign Investment":Indirect Foreign Investment means Investment in one Indian Company by another Indian Company, (a) which is having foreign Investment (b) which is not owned/ controlled by resident Indian citizen/ Indian Company owned/ controlled by Resident Indian Citizen, (c) which is owned/ controlled by non residents. However indirect foreign investment in 100% owned subsidiaries of operating- cum investing/ investing companies will be limited to foreign investment in operating- cum investing/ investing companies.

DIFFERENCE BETWEEN DIRECT & INDIRECT FOREIGN INVESTMENT

A. Investment by Non- resident Entity directly in Indian Company will be termed as Direct Foreign Investment

B. Investment by Non Resident entity through Indian Resident entity owned / controlled by it will be termed as Indirect Foreign Investment.



CALCULATION OF TOTAL FOREIGN INVESTMENT

A. Computing of Direct Foreign Investment: All Investment made directly by non-resident entities in Indian Company shall be counted under Direct Foreign Investment.

B. Computing of Indirect Foreign Investment: All indirect investment made by investment company in Indian company shall be counted under Indirect Foreign Investment.

Exception: indirect foreign investment in 100% owned subsidiary of operating cum investing/ investing company shall be limited to foreign investment in operating cum investing/ investing company. This exception, is limited to only situations where the entire capital of the downstream subsidiary is owned by the holding company.

Every Indian Company shall ensure compliance with this method of calculation at every stage of investment in the company.

FURTHER OBLIGATIONS

1. Indian Company are required to furnish full details of foreign investment/ ownership details/ control over company information to Government of India while seeking approval for accepting foreign investment under approval route.
2. Details regarding inter-se agreement between shareholders having effect on change in constitution of Board of Directors and voting rights etc. shall be informed by the Indian Companies operating in sector requiring prior approval of Government for accepting Foreign Investment.
3. Indian Company having sectoral cap, shall ensure that balance equity (beyond sectoral cap) shall be beneficially owned in the hands of resident Indian Citizens and Indian Companies owned & controlled by Resident Indian Citizens.
4. Companies operating in Information & Broadcasting and Defence Sector, wherein sectoral cap is less than 49%, shall ensure that

- The Company shall be owned & controlled by resident Indian citizen and Indian Companies owned & controlled by resident Indian Citizen;
- Largest Indian Shareholder shall hold atleast 51% total equity;
- While counting the shareholding of largest equity shareholding, equity holdings of sector banks, Public Financial Institution shall be excluded;
- Here the word largest Indian shareholder means and includes (i) an Indian shareholder, which encompasses (a) his relatives, (b) Company/ Group of companies in which he or his HUF have management & controlling interest and (ii) Indian Company / Group of Indian Companies under same management where Indian Company refers to company in which resident Indian/ his relative/ his HUF jointly or singly holds at least 51% shares.
- Resident Indian shall enter into an agreement to act as single unit for the purpose of satisfying all the conditions of the above clause.

5. Where the beneficial interest is held by non resident entity in terms of section 187 of Companies Act, 1956, such investment shall be treated as Foreign Investment.
6. Calculation method discussed above shall not apply to Insurance companies.

ESTABLISHMENT OF INDIAN COMPANIES/ TRANSFER OF OWNERSHIP & CONTROL OF INDIAN COMPANIES

Companies operating in sectors/ activities with cap including defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites are required to obtain prior Government/ FIPB approval in following situation:

1. For establishing a company (not owned/ controlled by a resident entity) in above referred sector with foreign investment;
2. For transfer of ownership/ control of said company from resident Indian Citizens/ Company owned & controlled by resident Indian Citizen to non-resident entity through amalgamation/ merger/ demerger/ acquisition etc;
3. Companies operating in sector, where 100% foreign investment is allowed under automatic route are excluded from the preview of this clause;
4. Following shall be considered for calculating Indirect Foreign Investment under this clause:
    - Downstream investment by Indian Company not owned/ controlled by resident entity;
    - Portfolio investment by FII, NRI, QFI as on 31st march of Previous year;
    - Investment in Form of Foreign Direct Investment, Foreign Venture Capital Investment, Investment in ADR/ GDR/ FCCB.

DOWNSTREAM INVESTMENT BY INDIAN COMPANY NOT OWNED & CONTROLLED BY RESIDENT ENTITY:

1. Indian Company not owned & controlled by resident Entity shall comply with all relevant entry route sectoral conditions alongwith following conditions, before making any downstream investment in another Indian company:
    - Indian Company shall intimate Department Of Industrial Policy & Promotion and Foreign Investment Promotion Board within 30 days of such investment
    - Downstream investment shall be supported by its board resolution and shareholders agreement, if any.
    - It shall comply all applicable SEBI/ RBI guidelines pertaining to issue/ transfer/ pricing/ valuation of shares.
    - For making downstream investment, Indian Company shall use the funds brought from abroad.
    - Only an Indian investment Company may use the internal funds for making downstream investment, subject to compliance with following conditions:

- It shall obtain prior requisite government/ FIPB approval regardless of amount & extent of foreign investment.
- In addition to this, Core Investment Companies (CIC) shall follow RBI regulatory framework for CICs.
- Prior Government/FIPB approval is required for making foreign investment in Indian Company which does not have any operation or downstream investment and on initiating the downstream investment; it will have to comply with the relevant sectoral condition on entry route, conditionality and caps.

2. W.e.f. 31st July 2012, Investment by Banking Company incorporated in India and owned by non-resident entity/ies under corporate Debt Restructuring, or other loan restructuring mechanism, or in trading books, for acquisition of shares due to defaults in loans shall not be counted as Indirect Foreign Investment. However their strategic downstream investment, in their subsidiaries, joint ventures and associates shall be treated as Indirect Foreign Investment.

RESPONSIBILITY FOR COMPLIANCE

At the first instance FDI recipient Indian Company is responsible for ensuring compliance with all applicable FDI rules/ regulations/ guidelines. It shall obtain a certificate from its statutory auditor on annual basis on status of compliance with FDI legal framework and mention the same in its Directors Report in Annual Report. If the auditor has given qualified report, the Company shall immediately intimate Foreign Exchange Department, Regional Office of Reserve Bank of India in whose jurisdiction the Registered office of the Company is located and obtain an acknowledgement from the Regional Office of having intimated it of the qualified auditor report.

CONCLUSION

Adoption of common calculation method in all the sectors can be considered as one of the effective steps taken by the RBI, which has simplified and rationalized the computation process. However, the guidelines, has not discussed the issue of "difference between Foreign Investment & Economic interest of non-resident" and it remains subject to open interpretation. ◆◆◆

CROSS BORDER INSOLVENCY: INDIAN LAW VIS A VIS INTERNATIONAL LAW: UNCITRAL MODEL

Mithilesh Kumar

The rapid growth of global economy has led to widespread international trade and this expansion in international trade has brought with it increasing possibilities of cross border insolvency proceedings. In its simplest form, Cross Border Insolvency may involve insolvency proceedings in one country with its creditors located in another country/countries on the other hand in the most complex of cases it may involve subsidiaries, assets, operations and creditors in dozens of nations.

One of the most noteworthy features of international insolvency law is the lack of legal structures either formal or informal to deal with insolvency that transgresses the national borders. Expansion and growth of international trade has made aspects such as choice of law and the conflicts that may arise in circumstances of adverse municipal laws, an important consideration in the context of global economy. Companies may be connected to more than one jurisdiction either by foreign creditors that may press claims or by having assets or branches in more than one country which in turn would result in decrees that may be passed in different legal jurisdictions resulting in further complexities in enforcement and recognition.

In the above pretext, the issue of Cross Border Insolvency poses a serious challenge to India. There are inadequate provisions in the Indian common law regime to enable the Indian courts to recognize and enforce the rights and claims of the foreign creditors and the judgment passed by the courts in foreign jurisdiction. Above all there are no provisions in the existing insolvency legislation or in any enactments in India to deal with Cross Border Insolvency cases. In the light of the above said circumstances it has been strongly suggested that India should adopt the United Nations Commission on Trade Law (UNCITRAL) Model Law on Cross Border Insolvency which would be an ideal solution in the present circumstances.

THE MODEL LAW[1]

According to UNCITRAL, a legal body within the United Nation system in the field of International Trade, national insolvency laws were either ill equipped or lagging behind to deal with the cases of Cross Border Insolvency. The problem has always been that each country has its own way of dealing with the issues of Cross Border Insolvency and various national insolvency laws and practice are simply too diverse. Some countries have signed treaties with each other but there has never been a uniform approach to resolve Cross Border Insolvency issues.

Recognizing the need for certainty and clarity on these issues, UNCITRAL adopted the text of Model Law on Cross Border Insolvency issues on 30 May 1997. This Model Law was approved by resolution of United Nations (UN) General Assembly on 15 December 1997.

KEY PROVISIONS

The Model Law focuses on four components identified as key elements for the conduct of Cross Border Insolvency cases: Access, Recognition, Relief (Assistance) and Cooperation

(A) ACCESS

This provision gives the representative of foreign insolvency proceedings and the creditors a right of access to the courts of an enacting state to seek assistance to appoint and authorize a representative of the local proceedings, being conducted in an enacting state, to seek assistance elsewhere.

(B) RECOGNITION

One of the key objectives of Model Law is to establish simplified procedures for recognition of qualifying

1 Can be seen at www.uncitral.org

foreign proceedings in order to avoid time consuming legislation and to provide certainty with respect to decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying proceedings and appointing the foreign representatives of those proceedings provided it satisfies specified requirements. Qualifying foreign proceedings should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceedings or non main proceedings taking place where the debtor has an establishment. Recognition of foreign proceedings under Model Law has several effects, principal amongst them is the relief accorded to assist the foreign proceeding.

(C) RELIEF

The basic principle of model law is that the relief considered necessary for the orderly and fair conduct of Cross Border Insolvency should be available to assist the foreign courts. By specifying the relief that is available, the Model Law imports the consequences of foreign law in to the insolvency system of the enacting states.The element of the relief available include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application , an automatic stay upon recognition of the main proceedings and relief at the discretion of the court for both main and non main proceedings following recognition.

(D) CO-OPERATION AND CO-ORDINATION

These proceedings address cooperation among the courts of the states where the debtor's asset is located in coordination of concurrent proceedings concerning that debtor. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. The Cooperation between the courts and foreign representative and between foreign and local representatives is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decision that would best achieve the objective of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

INDIAN POSITION

The existing law in India does not provide legal foundation to resolve a matter relating to international insolvency. In India bankruptcy procedures are still governed by an age old statute that has worn out the passage of time. The Provincial Insolvency Act 1920 and the Presidency Town Insolvency Act 1909, both are extremely outdated legislations and seem to be totally incapable to deal with the issues of Cross Border Insolvency, which is a concept that is only about a decade and a half old.

The Law Commission of India[2] took up the revision of these insolvency laws on reference made to it by the government. In the year 1964 the commission proposed a comprehensive Insolvency Legislation for India which was not acted upon by the government As far as the Companies Act, 1956 is concerned the foreign companies are dealt as unregistered and covered under the heading of the unregistered companies. It suffers from short comings, due to absence of any provisions dealing with foreign proceedings, foreign representatives and foreign judgment in India.

In the year 1999, the Government of India set up a High Level Committee headed by Justice V.B. Balkrishna Eradi[3], retired judge of the Supreme Court of India for remodeling the existing laws relating to insolvency and winding up of companies to bring them in tune with the international practices in this field. One of the main recommendations of the committee was that the part VII of the Companies Act, 1956 should incorporate new substantive provisions to adopt the UNCITRAL Model Law and that the Model Law itself may be incorporated as schedule to the Companies Act, 1956 which will apply to all cases of cross border Insolvency.

2 26th Report on Insolvency laws which was submitted to law Minister in the year 1964
3 Eradi Committee submitted its report to the Prime Minister on 31st August 2000

Some important recommendations of Eradi Committee, the Companies Act (second Amendment) Act 2002 was passed but unfortunately this amendment has ignored to provide any framework for Cross Border Insolvency with recognition of foreign proceedings. Hence the current position is that if a foreign company is taken in to liquidation outside India, its Indian business will be treated as separate matter and will not be automatically affected unless an application is filed before Insolvency Court for winding up its branches in India. This problem can however be resolved through the machinery of Coordination and Cooperation between foreign courts provided by the UNCTIRAL Model Law.

Thus the adoption of UNCITRAL Model law for Cross Border Insolvency issues will enable India to meet the demands of the globalization of economy and to deal with international insolvency on the world forum. This will radically change the orientation of Indian Law in the present scenario of insolvency cases and make it suitable for dealing with the challenges arising from globalization and increasing integration of Indian economy with the world economy.

CONCLUSION

The globalization of trade and commerce has produced international pressure on nations to enact laws and provide institution that can deal with variety of Cross Border Insolvency issues. In absence of specific legislation for dealing with cross border Insolvency, courts in India are yet to be prepared to deal with the plethora international Insolvency issues. Such absence can impede India's growth to enhance and enrich its economic status in a drastic manner. Judicial involvement and devotion in regulating economic aspects is nothing but a natural corollary to its economic development. UNCITRAL Model Law on Cross Border Insolvency has the potential to confer an opportunity to India to equip its judiciary to regulate one such economic aspect- Cross Border Insolvency by empowering its courts to extend coordination to foreign courts and accrue benefits out of the reciprocating coordination. ◆◆◆

SIGNIFICANCE OF STATEMENT OF WORKING OF PATENTS IN INDIA

Saipriya

AFTER RECENT DEVELOPMENT

Indian Patent Office has recently made available in its website (http://www.ipindia.nic.in/) all the statements of working (Form 27) filed by the patentees for the year 2012. In light of such a development, the article discusses briefly on the provisions mentioned in the Indian Patents Act, 1970 regarding the working of patented inventions on a commercial scale as well as the significance of the same for the grant of compulsory licenses.

WORKING REQUIREMENT FOR PATENTS

As per Section 83 of the Indian Patents Act, 1970, that patents are not granted '***merely to enable patentees to enjoy a monopoly on a patented article***',[1] but '***to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay***'[2]. Consistent with the goal of technology transfer, '***the protection and enforcement of patent rights contribute to … technological innovation, … the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations***'[3]

THE MANDATORY REQUIREMENT TO FURNISH DETAILS OF WORKING OF PATENTS

Section 146(2) of the Patent's Act, 1970 requires patentees and licensees to submit a statement of commercial working of the invention (Form 27) to the Controller every year. Such statements can be published by the Controller General for public viewing. Failure to submit information on statement of working is punishable and attracts a hefty fine which may extend up to Rs.10 lakh. Further according to Section 122, providing false information regarding working of an invention is considered as an offence and is punishable with imprisonment up to six months and a fine, or both.

DETAILS REQUIRED IN FORM 27

The relevant information is to be submitted by patentees and licensees in a Statement Regarding the Working of the Patented Invention, as per Form 27 are as follows,

1. Whether the patented invention has been worked or not worked;
    a. if not worked, the reasons for not working and the steps being taken for the working of the invention.
    b. if worked, the quantum and value (in rupees) of the patented product;
        i) manufactured in India;
        ii) Imported from other countries along with the details of each country;
2. The licenses and sub-licenses granted during the year;
3. Whether the public requirement has been met, at a reasonable price either partly, adequately or to the fullest extent.

NOTIFICATION BY PATENT OFFICE

The Patent Office issued a public notice on February 12, 2013 directing all patentees and licensees to submit Form-27 applications for the year 2012 by the end of March 2013.

The older issues of Gazette of India contained information relating to the commercial working of the patented invention. Such information published were

1 Section 83(a) of Indian Patents (Amendment) Act, 2005
2 Section 83(b) of Indian Patents (Amendment) Act, 2005
3 Section 83(c) of Indian Patents (Amendment) Act, 2005

the patent number, date of patent, name and address of the patentee as well as the title of the invention. This practice was discontinued in the past few years. On 24th June, 2013 this practice was revived as the Patent office made available all of the "Statements of Working" filed by all patentees for the year 2012.

It is evident from the aforesaid, that the requirement of furnishing a statement regarding working of the patented inventions on a commercial scale in India is mandated under the Indian Patents Act, 1970 mainly in the context of Compulsory Licenses (CLs). According to Section 84 (1), at any time after three years after the grant of a patent, any person interested may apply to the Controller for a compulsory license on the patent on grounds that, inter alia, the reasonable requirements of the public with respect to the patented invention have not been satisfied or the patented invention is not available to the public at reasonably affordable price or the patented invention is not worked in the territory of India.

There are two provisions which mention the 'local working' and importation of the patented invention. Section 83(b) clearly states that patents are not granted merely to enable the patentees or patent licensees to enjoy the monopoly for the importation of patented article. Section 84 (7) (e) states that the reasonable requirement of the public are deemed to have not been met when the working of the patented invention in the territory of India on a commercial scale is being hindered by the importation from abroad of the patented article by the patentees or the licensees. Therefore, it is observed that such a provision does not bar the importation of patented article to India. However, if such an act results in preventing or hindering the working of the product in India, then it would be deemed that the reasonable requirement of the public is not met, and would be considered as a ground for the grant of CLs.

LOCAL WORKING OF PATENTS

In terms of local working of the patented invention with regard to compulsory licensing it is observed that most of the leading pharma companies have their manufacturing unit in India. Therefore the patents of foreign manufacturers who import the patented invention to India are liable for compulsory licensing. Also, as India is a signatory of TRIPS agreement, it is pertinent to assess the TRIPS compatibility of local working requirement of the patented invention. According to Article 27(1) [4] which is titled as 'Patentable Subject matter' it is stated that patent rights will be enjoyed without discrimination as to whether a product is imported or produced locally.

From the aforesaid, the suitability of local working of a patented invention with regard to the transfer of technology as far as India is concerned depends on variety of factors and not simply the statutory requirements mentioned in the Patents Act.

BENEFITS OF PUBLISHING WORKING DETAILS OF PATENTS BY PATENT OFFICE

In all, the publication of 'Statement of working' of the patented inventions filed by the patentees as well as the license holders creates a new dimension on assessing how the patent system is being used in the country. Such information provided by the patent office shall aid the generic pharmaceutical companies in determining the patents which are ripe for compulsory licensing. Also, the actual technology transfer happens with the working of patents rather than the number of patents granted in a country. ◆◆◆

4 http://www.wto.org/english/tratop_e/trips_e/t_agm3c_e.htm#5

AN OVERVIEW OF CYBER LAWS VS. CYBER CRIMES: IN INDIAN PERSPECTIVE

Rohit K Gupta

Due to immense increase in the use of Internet and dependency of individuals in every field, a number of new crimes related to Computer and other gadgets based on internet have evolved in the society. *Such crimes where use of computers coupled with the use of Internet is involved are broadly termed as **Cyber Crimes**.*

GOVERNING LAWS

There was no statute in India for governing Cyber Laws involving privacy issues, jurisdiction issues, intellectual property rights issues and a number of other legal questions. With the tendency of misusing of technology, there arisen a need of strict statutory laws to regulate the criminal activities in the cyber world and to protect the true sense of technology **"INFORMATION TECHNOLOGY ACT, 2000" [ITA-2000]** was enacted by Parliament of India to protect the field of e-commerce, e-governance, e-banking as well as penalties and punishments in the field of cyber crimes. The above Act was further amended in the form of **IT Amendment Act, 2008 [ITAA-2008]**.

The ITA-2000 defines 'Computer' means any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. The word 'computer' and 'computer system' have been so widely defined and interpreted to mean any electronic device with data processing capability, performing computer functions like logical, arithmetic and memory functions with input, storage and output capabilities and therefore any high-end programmable gadgets like even a washing machine or switches and routers used in a network can all be brought under the definition.

SCOPE AND APPLICABILITY

The scope and applicability of ITA-2000 was increased by its amendment in 2008. The word 'communication devices' inserted having an inclusive definition, taking into its coverage cell phones, personal digital assistance or such other devices used to transmit any text, video etc like what was later being marketed as iPad or other similar devices on Wi-fi and cellular models. Though ITA-2000 defined 'digital signature', however said definition was incapable to cater needs of hour and therefore the term 'Electronic signature' was introduced and defined in the ITAA -2008 as a legally valid mode of executing signatures. This includes digital signatures as one of the modes of signatures and is far broader in ambit covering biometrics and other new forms of creating electronic signatures not confining the recognition to digital signature process alone.

The new amendment has replaced Section 43 with Section 66. The Word "hacking" used in Section 66 of earlier Act has been removed and named as "data theft" in this section and has further been widened in the form of Sections 66A to 66F. The section covers the offences such as the sending of offensive messages through communication service, misleading the recipient of the origin of such messages, dishonestly receiving stolen computers or other communication device, stealing electronic signature or identity such as using another persons' password or electronic signature, cheating by personation through computer resource or a communication device, publicly publishing the information about any person's location without prior permission or consent, cyber terrorism, the acts of access to a commuter resource without authorization, such acts which can lead to any injury to any person or result in damage or destruction of any property, while trying to contaminate the computer through any virus like Trojan etc. The offences covered under section 66 are cognizable and non-bailable. Whereas, the consequence of Section 43 of earlier Act were Civil in nature having its remedy in the form of damages and compensation only, but under Section 66 of the Amendment Act, if such act is done with criminal intention that is mens rea, then it will attract criminal liability having remedy in imprisonment or fine or both.

ADJUDICATION

Adjudication powers and procedures have been dealt in Sections 46 and thereafter. As per the Act, the Central Government may appoint any officer not below the rank of a director to the Government of India or a state Government as the adjudicator. The I.T. Secretary in any state is normally the nominated Adjudicator for all civil offences arising out of data thefts and resultant losses in the particular state. Very few applications were received during first 10 years of existence of the ITA, that too in the major metros only. However, the trend of receiving complaint under ITA is rapidly growing. The first adjudication obtained under this provision was in Chennai, Tamil Nadu, in a case involving ICICI Bank in which the bank was told to compensate the applicant with the amount wrongfully debited in Internet Banking, along with cost and damages. There is an appellate procedure under this process and the composition of Cyber Appellate Tribunal at the national level, has also been described in the Act. Every adjudicating officer has the powers of a civil court and the Cyber Appellate Tribunal has the powers vested in a civil court under the Code of Civil Procedure.

THE MAJOR ACTS, WHICH GOT AMENDED AFTER ENACTMENT OF ITA

THE INDIAN PENAL CODE, 1860

The Indian Penal Code was amended by inserting the word 'electronic' thereby treating the electronic records and documents on a par with physical records and documents. The Sections dealing with false entry in a record or false document etc (e.g. 192, 204, 463, 464, 464, 468 to 470, 471, 474, 476 etc) have since been amended as 'electronic record and electronic document' thereby bringing within the ambit of IPC. Now, electronic record and electronic documents has been treated just like physical records and documents during commission of acts of forgery or falsification of physical records in a crime. After the above amendment, the investigating agencies file the cases/ charge-sheet quoting the relevant sections from IPC under section 463,464, 468 and 469 read with the ITA/ITAA under Sections 43 and 66 in like offences to ensure the evidence and/or punishment can be covered and proved under either of these or under both legislation.

THE INDIAN EVIDENCE ACT 1872

Prior to enactment of ITA, all evidences in a court were in the physical form only. After existence of ITA, the electronic records and documents were recognized. The definition part of Indian Evidence Act was amended as "all documents including electronic records" were substituted. Other words e.g. 'digital signature', 'electronic form', 'secure electronic record' 'information' as used in the ITA, were also inserted to make them part of the evidentiary importance under the Act. The important amendment was seen by recognition of admissibility of electronic records as evidence as enshrined in Section 65B of the Act.

THE BANKERS' BOOKS EVIDENCE (BBE) ACT 1891:

Before passing of ITA, a bank was supposed to produce the original ledger or other physical register or document during evidence before a Court. After enactment of ITA, the definitions part of the BBE Act stood amended as: "'bankers ' books' include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank whether kept in the written form or as printouts of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device". When the books consist of printouts of data stored in a floppy, disc, tape etc, a printout of such entry ...certified in accordance with the provisions ....to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and (b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorized persons; the safeguards adopted to prevent and detect unauthorized change of data ...to retrieve data that is lost due to systemic failure or ....

The above amendment in the provisions in Bankers Books Evidence Act recognized the printout from a computer system and other electronic document as a valid document during course of evidence, provided, such print-out or electronic document is accompanied by a certificate in terms as mentioned above.

ISSUES NOT COVERED UNDER ITA

ITA and ITAA is though landmark first step and became

mile-stone in the technological growth of the nation; however the existing law is not sufficed. Many issues in Cyber crime and many crimes are still left uncovered.

Territorial Jurisdiction is a major issue which is not satisfactorily addressed in the ITA or ITAA. Jurisdiction has been mentioned in Sections 46, 48, 57 and 61 in the context of adjudication process and the appellate procedure connected with and again in Section 80 and as part of the police officers' powers to enter, search a public place for a cyber crime etc. Since cyber crimes are basically computer based crimes and therefore if the mail of someone is hacked in one place by accused sitting far in another state, determination of concerned P.S., who will take cognizance is difficult. It is seen that the investigators generally try to avoid accepting such complaints on the grounds of jurisdiction. Since the cyber crime is geography-agnostic, borderless, territory-free and generally spread over territories of several jurisdiction; it is needed to proper training is to be given to all concerned players in the field.

Preservation of evidence is also big issue. It is obvious that while filing cases under IT Act, very often, chances to destroy the necessary easily as evidences may lie in some system like the intermediaries' computers or sometimes in the opponent's computer system too.

However, most of the cyber crimes in the nation are still brought under the relevant sections of IPC read with the comparative sections of ITA or the ITAA which gives a comfort factor to the investigating agencies that even if the ITA part of the case is lost, the accused cannot escape from the IPC part.

CONCLUSION

Society as on today is happening more and more dependent upon technology and crime based on electronic offences are bound to increase. Endeavor of law making machinery of the nation should be in accordance with mile compared to the fraudsters, to keep the crimes lowest. Hence, it should be the persistent efforts of rulers and law makers to ensure that governing laws of technology contains every aspect and issues of cyber crime and further grow in continuous and healthy manner to keep constant vigil and check over the related crimes. ◆◆◆

FRAMING OF CHARGES: AN OVERVIEW

Sugandha Nayak

One basic requirement of a fair trial in criminal jurisprudence is to give precise information to the accused as to the accusation against him. This is vitally important to the accused in the preparation of his defence. In all trials under the Criminal Procedure Code the accused is informed of the accusation in the beginning itself. In case of serious offences the Code requires that the accusations are to be formulated and reduced to writing with great precision & clarity. This "charge" is then to be read and explained to the accused person[1].

Charge serves the purpose of notice or intimation to the accused, drawn up according to specific language of law, giving clear and unambiguous or precise notice of the nature of accusation that the accused is called upon to meet in the course of trial[2].

RELEVANT LEGAL PROVISIONS OF CRIMINAL PROCEDURE CODE (CRPC)

• Section 211 & Section 212 specifies about Contents of Charge and mentioning of particulars as to time and place of the alleged offence in the charge.

This rule is to an extent relaxed in a case of criminal breach of trust or of dishonest misappropriation. When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates. It is obvious that the relaxation given by the above rule is applicable only in case of criminal breach of trust or dishonest misappropriation and not in case of any other offence like theft, falsification of accounts under Section 477-A of the IPC, cheating etc.

This rule is intended to cover cases of persons who showed a deficiency in the accounts with which they were entrusted but who could not be shown to have misappropriated this or that specific sum[3].

- Section 213 talks about; when manner of committing offence must be stated:

When the nature of the case is such that the particulars mentioned in sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner is which the alleged offence was committed as will be sufficient for that purpose.

- Section 214 gives a rule for interpreting the words used in the charge: It provides that in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

BASIC PROCEDURE REGARDING CHARGE & ITS TRIAL

The initial requirement of a fair trial in criminal cases is a precise statement of the accusation. The code seeks to secure this requirement, first, by laying down in Sections 211 to 214 of CrPC as to what a charge should contain; next, stipulating in Section 218 of CrPC that for every distinct offence there should be a separate charge; and lastly, by laying down in the same section that each charge should be tried separately, so that what is sought to be achieved by the first two rules is not nullified by a joinder of numerous & unconnected charges[4].

SECTION 218 READS AS SEPARATE CHARGES FOR DISTINCT OFFENCES

The object of section 218 is to save the accused from being embarrassed in his defence if distinct offences are

1 *This procedure is followed in trials of warrant cases & trials before courts of session.*
2 *VC Shukla v. State through CBI 1980 Cri LJ 690, 732*
3 *Shiam Sunder v. Emperor, AIR 1932 Oudh 145,147*
4 *Sanatan Mondal v. State, 1988 Cri LJ 238 (Cal)*

lumped together in one charge or in separate charges & are tried together[5]. Another reason is that the mind of the court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the court trying him on one of the charges not to be influenced by the evidence against him on the other charges. The strict observance of Section 218(1) may lead to multiplicity of trials, therefore exceptions, in suitable cases, have been provided by Section 218(2) in Sections 219,220,221 & 223. The effects of non-compliance with provisions regarding charge would be considered later. It would however be useful to allude to the decision of the Supreme Court in context of non-compliance with Section 218. In every case, in which a departure from the requirements of Section 218 has occurred, the question before the courts is, whether the omission to frame the required charge has or has not in fact occasioned a failure of justice by prejudicing the accused in his defence, & whether he has thus been deprived of a fair trial[6].

POWER OF COURT TO ORDER SEPARATE TRIAL IN CASES WHERE JOINDER OF CHARGES OR OF OFFENDERS IS PERMISSIBLE

The basic rule regarding charge is that for every distinct offence there shall be a separate charge & for every such charge there shall be separate trial. The only exceptions recognized are contained in Sections 219,220,221 & 223 of CrPC. Therefore separate trial is the rule and the joint trial is an exception. The sections containing the exceptions are only enabling provisions. A court has got the discretion to order a separate trial even though the case is covered by one of the exceptions enabling a joint trial[7]. A joint trial of a very large number of charges is very much to be deprecated even though it is not prohibited by law. A separate trial is always desirable whenever there is risk of prejudice to the accused in a joint trial. The Supreme Court has taken the view that it is the option of the court whether to resort to Section 219,220 & 223 of the Code or whether to act as laid down in Section 218 and that the accused has no right to claim joinder of charges or of offenders[8].

APPLICABILITY OF PROVISIONS RELATING TO JOINDER OF CHARGES TO CASES WHERE NO CHARGE IS FRAMED

As will be seen later, in all summons cases though it is necessary to state to the accused the particulars of the offence of which he is charged, it is not necessary to frame a formal charge. In such cases a question may arise whether the provisions relating to joinder of charges & of offenders are applicable to such proceedings. The Code does not make any express provision in this regard. However the courts have taken the view that these provisions are equally applicable in summons cases also[9].

AMENDMENT/ALTERATION OF CHARGE

According to Section 216 (1) of CrPC, any court may alter or add to any charge at any time before judgment is pronounced. The section invests a comprehensive power to remedy the defects in the framing or non-framing of a charge, whether discovered at the initial stage of the trial or at any subsequent stage prior to the judgment.

The code gives ample power to the courts to alter or amend a charge whether by the trial court or by the Appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it & putting forward any defence open to him, on the charge finally preferred against him[10]. The court has a very wide power to alter the charge; however, the court is to act judiciously and to exercise the discretion wisely. It should not alter the charge to the prejudice of the accused person[11].

5 Aftab Ahmad Khan v. State of Hyderabad, AIR 1954 SC 436
6 Willie Slaney v. State of MP, AIR 1956 SC 116
7 Chunnoo v. State, AIR 1954 ALL 795
8 Ranchhod Lal v. State of MP, AIR 1965 SC 1248
9 See Supra Note 11
10 Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166
11 Harihar Chakravorthy v. State of W.B., AIR 1954 SC 266

WITHDRAWAL OF REMAINING CHARGES ON CONVICTION ON ONE OF SEVERAL CHARGES

Section 224 of CrPC states that when a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent, of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges and such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into, or trial of, the charge or charges so withdrawn.The section is applicable where the accused in convicted of one of several distinct charges before the other charges are tried. It is necessary that the several charges made must be in respect of distinct offences and the section will not apply where the several charges are made under Sections 220(3), 220(4), or Section 221.

EFFECTS OF OMISSION TO FRAME, OR ABSENCE OF, OR ERROR IN CHARGE

Under Section 215 & 464 of CrPC object is to prevent failure of justice where there has been only technical breach of rules not going to the root of the case as such. The two sections read together lay down that whatever the irregularity in framing of a charge, it is not fatal unless there is prejudiced caused to the accused[12]. The object of the section is to prevent failure of justice where there is some breach of the rules in the formulation of the charge. However, the section also makes it clear that insignificant irregularities in stating the particulars of the offence will not affect the trial or its outcome. In order to decide whether the error or omission has resulted in a failure of justice the court should have the regards to the manner in which the accused conducted his defence & to the nature of the objection.

The object of the charge is to give an accused notice of the matter he is charged with. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective. Nor could a conviction recorded on charged under wrong provisions be reversed if the accused was informed of the details of the offences committed and thus no prejudice was caused to him[13]. The mere omission to frame a charge or a mere defect in the charge is no ground for setting aside a conviction. Procedural laws are designed to subserve the ends of justice & not to frustrate them by mere technicalities.

CONCLUSION

In a criminal trial the charge is the foundation of the accusation & every care must be taken to see that it is not only properly framed but evidence is only tampered with respect to matters put in the charge & not the other matters[14].

In framing a charge during a criminal trial, instituted upon a police report, the court is required to confine its attention to documents referred to under Section 173[15].

The judge needs to be only convinced that there is a prime facie case, where there is no necessity to adduce reasons for framing charges. However, the magistrate is required to write an order showing reasons if he decides to discharge the accused[16].

The sections dealing with charge do not mention who is to frame the charge. The provisions dealing with different types of trials however provide that it is always for the court to frame the charge. The court may alter/ add to any charge at any time before the judgment is pronounced.

But if a person has been charged, the court cannot drop it[17]. He has either to be convicted or acquitted[18]. All this has an important bearing on the administration of justice. ◆◆◆

12 Kailash Gir v. V.K. Khare, Food Inspector, 1981 Cri LJ 1555, 1556 (MP)
13 SS Rout v. State of Orissa, 1991 Cri LJ 1595
14 Ramakrishna Redkar v. State of Maharashtra, 1980 Cri LJ 254 (Bom)
15 State of J&K v. Sudershan Chakkar, (1995) 4 SCC 181
16 Omvati v. State (Delhi Admn.), (2001) 4 SCC 38
17 State of Maharashtra v. B.K. Subbarao, 1993 Cri LJ 368 (Del)
18 Prakash Chander v. State (Delhi), 1995 Cri LJ 368 (Del)

LAW OF INJUNCTION: TEMPORARY INJUNCTION

Puneet Garg

Under India Legal System, the law relating to injunction has been provided in the Specific Relief Act, 1963. Injunction is categorized in two form i.e. Permanent Injunction and Temporary Injunction. Section 37 of Specific Relief Act, 1963 provides that "*temporary Injunction are such as are to continue until a specified time, or until the further order of the court, and they may be granted at any stage of a suit.*" The procedure for seeking temporary injunction has been provided under Order XXXIX of the Code of Civil Procedure, 1908. However, an injunction being discretionary equitable relief cannot be granted when equally efficacious relief is obtainable in any other usual mode or proceeding.

In ***Agricultural Produce Market Committee Case***[1], the Hon'ble Apex Court has held that "a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."

The Hon'ble Apex Court through catena of judgments like landmark judgment in ***Gujarat Bottling Co. Ltd. Case***[2], held that the Court needs to follow certain guidelines while considering an application for grant of temporary injunction, some of which are briefly stated hereunder:

- The applicant seeking relief of temporary injunction shall have to establish a prima facie case in his favour. For this purpose, the Court will not examine the merits of the case rather only the basic facts on which it is established that the applicant has a prima facie case to contest. Thereafter the applicant also has to establish that the allegations / averments made in the application on which the temporary injunction is sought are plausible.

- The court will also examine the conduct of the applicant and such conduct needs to be examined even at the stage where the application for setting aside an order under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 is filed.

- The court has to examine the balance of convenience i.e. the balance of comparative loss caused to the applicant and the respondent in the case of not passing the order.

- The court will first of all will examine what is the extent of loss that would be caused to the applicant if the order is not passed and also whether it is reparable by monetary compensation i.e. by payment of cost. Then it will examine the loss suffered by respondent if the order is passed and thereupon it has to see which loss will be greater and irreparable. The party who would suffer greater loss would be said to be having balance of convenience in his favour and accordingly, the court will pass or refuse to pass the order.

- The court has the power also to ask the party to deposit security for compensation or to give an undertaking for the payment of the compensation, if ordered.

It is to be understood that relief of temporary injunction cannot be sought for some right which would arise in future. Similarly, an injunction cannot be obtained to restrain a party from filing a suit. In ***Seema Arshad Zaheer Case***[3], the Hon'ble Supreme Court has indicated the salient features of prima facie case as under:

> *"The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands."*

1 *1Agricultural Produce Market Committee Vs. Girdharbhai Ramjibhai Chhaniyara – AIR 1997 SC 2674*
2 *2Gujarat Bottling Co. Ltd. Vs. Coca Cola Co. – AIR 1995 SC 2372*
3 *3Seema Arshad Zaheer & Ors. Vs, Municipal Corporation of Greater Mumbai & Ors. – (2006) 5 Scale 263*

However, in ***Best Sellers Retail India (P) Ltd. Case***[4], the Hon'ble Supreme Court observed that prima facie case alone is not sufficient to grant injunction and held that:

> *"Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable."*

Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 provides for ex-parte temporary injunction in the cases of *extreme urgency*. However, Rule 3 does not stipulate a separate application for ex-parte injunction rather such an application should be a part of an application for a bi-parte temporary injunction and in such application an urgency shall be shown by the applicant so as to warrant the passing of an ex-parte injunction/order. However, such an order has to be temporary. The essential safeguards in this regard are briefly stated as under:

- The matter should be urgent and overwhelming.
- The other elements for the grant of temporary injunction order as explained in the Gujarat Bottling case shall be existing.
- The court shall record reasons for the grant of ex-parte order.
- It is the duty of the applicant to serve a notice to the other party after the order has been passed and such notice shall be coupled with a copy of the application, the plaint, the affidavit and any other document which were filed in support of the application. Upon serving such notice, the applicant shall on the same day of the order or on the next day file an affidavit of his having served such a notice.
- Under Order XXXIX Rule 3A of the Code of Civil Procedure, 1908, it is a mandate for the Court that after passing such an ex-parte order, it shall continue with the bi-parte proceedings and shall dispose of the application within 30 days. However, the said 30 days period is not the upper limit for ex-parte orders i.e. the ex-parte order will not get automatically vacated upon the lapse of 30 days rather it can further be extended beyond 30 days in extreme cases.

The Hon'ble Supreme Court in Morgan Stanley Case5, inter alia observed the under mentioned guidelines for grant of temporary injunction besides others:

- Where irreparable or extremely serious injury will be caused to the applicant, ex-parte order can be passed;
- The court shall examine the time when the plaintiff got notice of the act complained;
- If the plaintiff has acquiesced to the conduct of the respondent then ex-parte temporary injunction shall not be passed;
- The applicant shall be acting in utmost good faith; and
- Such an order shall be for a temporary period.

CONCLUSION

In view of the aforesaid, it can be concluded that grant of temporary injunction cannot be claimed by the party as a matter of right nor can be denied by the Court arbitrarily. However, the discretion to be exercised by the Court is guided by the principles mentioned hereinabove and depends on the facts and circumstances of each case. The party seeking relief not only has to establish prima facie case but also the irreparable loss that would be caused in case of denial to grant relief and that the balance of convenience lies in his favour. Thus rational behind the provision of Order XXXIX of the Code of Civil Procedure, 1908 as laid down by Hon'ble Supreme Court in the case of M. Gurudas and Ors.[6], can be summarized as "***While considering an application for injunction, the Court would pass an order thereupon having regard to prima facie, balance of convenience and irreparable injury***". ◆◆◆

4 *4Best Sellers Retail India (P) Ltd. vs. Aditya Nirla Nuvo Ltd. – (2012) 6 SCC 792*
5 *5Morgan Stanley Mutual Fund Vs. Kartick Das – (1994) 4 SCC 225*
6 *6M. Gurudas and Ors. Vs. Rasaranjan and Ors. – AIR 2006 SC 3275*

THE REAL ESTATE (REGULATION AND DEVELOPMENT) BILL, 2013

Sharad Sharma

After much delay and deliberation The Real Estate Regulation and Development Bill, 2013 **["Bill"]** has been approved by the Union Cabinet on June 4, 2013, though this bill is yet to be approved by Parliament i:e lok sabha or the lower house of the parliament and the Rajya Sabha or the upper house of the parliament The bill will be notified as a statute once it receives the assent of the President of India for its implementation across all States and Union Territories in the country.

The passing of this Bill is best stated as a delayed step of the Indian government towards regulation of real estate sector. This Bill aimed to create a Real Estate Regulatory Authority and an Appellate Tribunal that will act as a watchdog for the housing sector, primarily towards protecting consumer interests while creating an alternative redress mechanism for any disputes that may arise.

This bill also aims to provide a uniform regulatory environment in the real estate sector which is laced with black money, corruption, red tapism, land mafias and corruption. The core objective of this Bill are twofold i:e to ensure sale of immovable properties in an efficient and transparent manner and to protect the interest of consumers in the real estate sector.

APPLICABILITY OF THE BILL

The proposed Bill has limited its applicability to residential real estate only i.e. housing and any other independent use ancillary to housing. The Bill defines

- "real estate project" as the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of a colony into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or buildings and includes the development works thereof

- "apartment" whether called dwelling unit, flat, premises, suite, tenement, unit or by any other name, means a separate and self-contained part of any immovable property located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for residential purposes, or for any other type of independent use ancillary to the purpose specified and includes any covered garage, whether or not adjacent to the building in which such apartment is located which has been provided by the promoter for the use of theallottee for parking any vehicle, or as the case may be, for the residence of any domestic help employed in such apartment

MAJOR HIGHLIGHT OF THE BILL

The provisions of this Bill are applicable only to residential projects.

- **Prior approval before launch and advertisement-** This bill contains provisions restricting launch of projects or advertisements unless all approvals are received and all the agents are not expected to facilitate the sale of immovable property which are not registered with the Authority and to maintain books of accounts, records and documents.

- **Mandatory deposit of fund-** It makes mandatory upon the promoters to deposit 70 per cent or such lesser per cent as notified by the government to cover the construction cost of the project of funds in a separate bank account to ensure timely completion and prevent fund diversion.

- Registration of real estate project and real estate agent - The bill also ensures mandatory registration of real-estate projects and real-estate agents with the Authority, except when the land proposed to be developed is less than 1000 square meters. This provision is likely to provide another level of protection to buyers while also preventing concerns regarding money laundering by the non-organised broker community.

- Disclosing of mandatory information - The real - estate agents / developers are now required to disclose material information such as details of the promoters, project, layout plan, plan of development works, land status, carpet area (as opposed to super area) and number of the apartments booked, status of the statutory approvals and disclosure of proforma agreements, names and addresses of the real estate agents, contractors, architect, structural engineer etc on the Authority's website.

- Restriction on taking advance - Prohibition on taking more than ten percent as advance from the buyers without a written agreement and also the developers/ agents are required to refund to buyers the full amount in case of delay of projects.
- Liability/ Penalty – The Bill prescribed for Civil and criminal liability for the contravention of various provisions of the Bill, such as, imprisonment up to three years or a penalty up to ten per cent of the estimated cost of the real estate project for projecting out misleading information in advertisements or prospectus
- Real estate regulatory authority – The Bill give the power to establish one or more Real Estate Regulatory Authority in each State/UT, or one Authority for two or more States/UT, by the Appropriate Government, specifying their functions, powers, and responsibilities to exercise oversight of real estate transactions. The Bill shall also appoint adjudicating officers to settle disputes between parties, and to impose penalty and interest.

REAL ESTATE REGULATORY AUTHORITY – POWERS AND FUNCTIONS

- The Authority will act as a nodal agency to co-ordinate efforts regarding development of the real estate sector and render necessary advice to the appropriate Government to ensure the growth and promotion of a transparent, efficient and competitive real estate sector.
- The authority shall ensure compliance of the obligations cast upon the promoters and the allottees and to cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers
- To host and maintain a website of records of all real estate projects within its jurisdiction as database, with all details as provided in the application for registration under the Act, for projects, for which registration has either been granted or cancelled as the case may be;
- To make recommendations on protection of interest of the allottees, measures to improve the processes and procedures for clearance and sanction of building plans and development projects from the Competent Authority; and construction and maintenance of structurally safe, environmentally sustainable, and low cost buildings, apartments and properties and any other form of assistance or advocacy to promote competition and efficiency in the real estate sector.
- Regulatory Authority shall have the power to call for information, conduct Investigations, and make inquiry in the affairs of promoters where it considers expedient so to do it
- Regulatory Authority has the power to Issue directions to promoters and allottees from time to time and such directions are binding on all concerned.
- Powers of the Regulatory Authority consequent upon lapse of or cancellation of registration of the promoter to recommend to the Competent Authority to have the remaining development works,carried out from the proceeds of the enforcement of bank guarantee and recover charges incurred on the said development works due from the promoter.
- The Regulatory Authority shall have powers to regulate its own procedure and shall be guided by the principles of natural justice and shall have all the powers as are vested in a Civil Court under the Code of Civil Procedure,1908

PENALTIES

1. Any promoter who fails to register in accordance with the provisions of the Real Estate (Regulation and Development) Bill,2013 shall be punishable with imprisonment for a term which may extend to three years, or a penalty which may extend to ten per cent of the estimated cost of the real estate project, or with both.

2. If any promoter contravenes any other provisions of this bill, other than that provided above, or the Rules or Regulations made , he shall be liable to a penalty which may extend to five percent of the estimated cost of the real estate project.

3. Any promoter who willfully fails to comply with orders of the Authority shall be liable to a minimum penalty of one lakh rupees for every day during which such default continues, which may extend to five percent of the estimated cost of the real estate project.

4. Any promoter who willfully fails to comply with the orders of Appellate Tribunal shall be punishable with imprisonment for a term which may extend to one year or with a penalty which may extend to ten percent of the estimated cost of the real estate project, or with both. ◆◆◆

EX-PARTE INTERIM INJUNCTION BY THE DELHI HIGH COURT AGAINST APRICA PHARMACUTICALS

Suchi Rai & Vivswan Kanwar[1]

In a Patent Infringement suit initiated by **Merck Sharp And Dohme Corporation and Anr** (hereinafter Plaintiff) for permanent injunction for restraining **Aprica Pharmaceuticals Private Limited** (hereinafter Defendant) from infringing the registered patent of the plaintiff in respect of *Sitagliptin* and its derivatives salt, Delhi High Court in an order dated 17/06/2013, granted an ex-parte interim injunction against defendant.

RELIEFS IN SUIT FOR INFRINGEMENT

Section 108 (1) of the Patents Act, 1970 provides for the Reliefs in suit for infringement. It states that –

> *"The reliefs which a court may grant in any suit for infringement include an injunction (subject to such terms, if any, as the court thinks fit) and, at the option of the plaintiff, either damages or an account of profits."*

EXPLAINING INJUNCTION

A patent owner in India has injunction as one of the remedies available against an alleged infringer to prevent future infringement. There are two types of injunctions available in a patent-infringement lawsuit. One is preliminary injunction, which, is granted very early and it restrains the defendant from infringing the patent during the pendency of litigation. In the event the winning of trail by the plaintiff, the preliminary injunction will be converted into a permanent injunction. Generally,courts have set forth four requirements for granting a preliminary injunction:

- The plaintiff has demonstrated a reasonable likelihood of success on the merits of the case (i.e., that the patent in issue is valid and infringed).
- The plaintiff will be irreparably harmed if the injunction is not issued.
- The threatened harm to the plaintiff outweighs the harm the injunction may inflict on the defendant.
- The injunction will serve the public interest.

In the instant case though the learned judge has pronounced the decision based on the first two requirements but has not explained as to how are these requirements applicable.

CONTENTION OF THE PLAINTIFF

[2]Plaintiff is the registered Patent owner in India for the said molecule Sitagliptin and its derivatives salt, which are sold as drugs Januvia and Janumet (Patent in concern for order is Indian Patent No. 209816). The plaintiffs further submits that the defendant is seeking to launch medicine with the identical salt which would be an infringement of the patent of the plaintiff as the said molecule has been invented by plaintiff who holds patent in over 102 countries for the said drug. Huge investment has been made in the invention of the said molecule and the sales in India alone is in crores and launching the product by infringing the patent will cause irreparable loss and injury to the plaintiff.

OBSERVATION OF THE COURT

[3]In this order Justice, Sanjeev Sachdeva, observed that the plaintiff has established a prima facie case on merits and if ex parte injunction is not granted to the plaintiff and defendant is able to launch the product, irreparable loss and injury would be caused to the plaintiff which cannot be compensated in terms of money. Balance of convenience is in favour of the plaintiff.

PRECEDENTS ON SIMILAR EX-PARTE ORDERS

The Delhi HC in 2011 had passed a similar order in the case of Vifor (International) Ltd V. D Mohan Rao And Ors.[4]

1 Legal Intern
2 CS(OS) 1236/2013
3 CS(OS) 1236/2013
4 MIPR2011(3)1

ANALYSIS OF THE ORDER

The court in Ramrameshwari Devi & Ors. vs Nirmala Devi & Ors[5] laid down various general principles to grant ex-parte decisions. Among many other grounds one ground is that:

- Whether irreparable or serious mischief will ensue to the plaintiff.

In the instant case according to the learned judge the plaintiff has prima facie shown that irreparable loss to them would ensue. On this count this order is correct. But if a holistic view is taken the other deficiencies in the case are as follows:

(i) The 'Claims' of the patent are not even reproduced or discussed in the order. How can an ex-parte order be granted without even referring to the main claims?

(ii) The Court does not explain how it has assumed jurisdiction especially when the Defendant is situated in Ahmedabad and not Delhi.

Furthermore in cases of preliminary injunction, the plaintiff is required to post a bond for securing any damages that the defendant will suffer if the preliminary injunction is later found to be improperly granted assuring him that if something arises after the preliminary injunction is issued, such as, invalidation of the patent is proved, the defendant can recover the costs and damages for ceasing the manufacture.

No such bond has been secured in the instant case.

CONCLUSION

The issuance of a preliminary injunction is a remedy to be used only to preserve the status quo between the parties. In many cases, the issuance of a preliminary injunction effectively ends the matter for all practical purposes between the parties, and acts as indicator of defeat to the defendant. Achieving preliminary injunctions through such ex-parte order is not a healthy judicial practice particularly in the Patent cases due to their complex nature. The Supreme Court of India in cases earlier cases of Union of India v. Era Educational Trust[6] & Morgan Stanley Mutual Fund v. Kartick Das[7] has the slammed the general practice of granting ex-parte interim injunctions in civil suits laying down several general principles for granting such orders.

Alternatively it is suggested that the interim injunction phase should be done away with altogether in complicated patent disputes and the matter should directly be assessed on issues of validity and infringement in the trail stage, after looking into expert evidence etc. ◆◆◆

5 2011)162PLR32
6 2000 5SCC57
7 1994 SCC (4) 225

NEWSBYTE

I. INDIA CONTINUES TO REMAIN A DESIRED DESTINATION FOR FDI AND FII: FINANCE MINISTER P. CHIDAMBARAM

"Increased Domestic Production of Oil, Coal & Restraining Gold Consumption can Contain CAD; India Continues to Remain a Desired Destination for FDI and FII – P. Chidambaram"

The Union Finance Minister, Mr. P. Chidambaram, while addressing the agenda of the meeting, 'The Current Account Deficit- Implications and Measures to Contain the Deficit' of the Parliamentary Consultative Committee of the Ministry of Finance said the present two major concerns are the extent of Current Account Deficit (CAD) and it's financing. Therefore the only way to contain CAD than to draw from the reserves is by increasing the country's domestic production of oil & coal and limiting the consumption of gold since we are heavily dependant on import of items like oil, coal and gold, for which we must introduce appropriate policies for long term measures.

For overcoming the situation, the Union Finance Minister stated that the government is keeping a track at the FDI caps to see whether the same is serving any purpose and will be re-examined if not. He further informed that despite the difficulties faced by the country, the Government was able to finance the CAD and also added that an amount of around US $ 3 billion has been deposited in the forex reserves in the year 2012-13. He was confident that the CAD will be again financed this year without taking anything from the reserves of the country and that efforts have been made to increase the productive activities in the country by reviving stalled projects. For this purpose the Ministry has compiled a list of about 215 stalled projects, where the banks have already funded more than Rs. 7 lakh crores.

The Minister observed that as the world economies are in recession including all European economies except Germany and where USA is showing some positive signs of revival, however, as far as India is concerned, Mr. P. Chidambaram said it continues to remain a desired destination for FDI and FII.

II. ENFORCEMENT OF MADRID PROTOCOL IN INDIA

India has adopted the Madrid Protocol which enables an applicant to file application for the registration of a trademark in more than one designated countries of his choice. With a notification issued by the Trademarks Registry of India on 8th July, 2013, the long awaited provisions related to Madrid Protocol have come into force in India. Consequently, the provisions of Trademarks (Amendment) Act, 2010 and Trade Mark (Amendment) Rules, 2013 are implemented from 8th July, 2013 which enable and facilitate the international registration of trademarks under the Madrid protocol.

The major benefit of this enactment is that from now onwards, any person or legal entity who has an effective and bona fide trade establishment in India and has got a trademark registered in India or has applied for a trademark in India, can apply for an international registration of his trademark. The applicant can also mention the designated countries in the international registration Form MM2 in which he wants to protect his trademark.

III. AMENDMENT OF COMPANIES (DIRECTORS INDENTIFICATION NUMBER) RULES, 2006

Notification No. G.S.R. 173(E) dated March 15, 2013.

The Central Government, in exercise of the powers conferred by clauses (a) and (b) of sub-section (1) of section 642 read with section 266A, 266B, 266D and 266E of the Companies Act, 1956 (1 of 1956) has notified the Companies Director Identification Number (Amendment) Rules, 2013, thereby amending the Companies Director Identification Number Rules, 2006.

In the Companies (Directors Identification Number) Rules, 2006, after rule 7, the following rule is inserted, namely: -

Rule 8: Cancellation or Deactivation of DIN

The Central Government or Regional Director (Northern Region), Noida or any officer authorized by the Regional Director, upon being satisfied on verification of particulars of proof attached with the application received from any person seeking cancellation or deactivation of DIN, in case -(a) the DIN is found to be duplicate (b) the DIN was obtained by wrongful manner or fraudulent means; (c) of the death of the concerned individual;(d) the concerned individual has been declared as lunatic by the competent Court; (e) if the concerned individual has been adjudicated an insolvent;

In the above situations, the allotted DIN shall be cancelled or deactivated by the Central Government

or Regional Director (NR), Noida or any other officer authorised by the Regional Director (NR): Provided that before cancellation or deactivation of DIN under clause (b), an opportunity of being heard shall be given to the concerned individual.

IV. RBI'S CIRCULAR CLARIFYING THE EARLIER CIRCULAR DIRECTING NBFCs NOT TO BE PARTNERS IN PARTNERSHIP FIRMS

Notification No.DNBS(PD).255/CGM (CRS) 2013 dated June 11 , 2013

The Reserve Bank of India, having considered it necessary in public interest and being satisfied that, for the purpose of enabling the Bank to regulate the credit system to the advantage of the country, it is essential to amend the Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 (hereinafter referred to as the said Directions), contained in Notification No. DNBS.192/DG(VL)-2007 dated February 22, 2007, in exercise of the powers conferred by Section 45JA and Section 45L of the Reserve Bank of India Act, 1934 (2 of 1934) and of all the powers enabling it in this behalf, and hereby directs that the said Directions shall be amended with immediate effect.

In para 19A, of the said Directions under the title, "NBFCs not to be partners in partnership firms", after sub-para(2) the following sub-para shall be inserted, namely:-"(3) In this connection it is further clarified that;

a. Partnership firms mentioned above will also include Limited Liability Partnerships (LLPs).

b. Further, the aforesaid prohibition will also be applicable with respect to Association of persons; these being similar in nature to partnership firms."

NBFCs which had already contributed to the capital of a LLP/Association of persons or were a partner of a LLP/Association of persons are advised to seek early retirement from the LLP/Association of persons. This direction of the RBI has come in the backdrop of RBI having coming across some NBFCs which have large investments in / contributed capital in partnership firms.

V. RBI ON EXTERNAL COMMERCIAL BORROWINGS (ECB)

1. ECB Policy for 3G spectrum allocation

The Reserve Bank of India (RBI) vide RBI/2012-13/543 A.P. (DIR Series) Circular No. 114 dated June 25, 2013 has decided that External Commercial Borrowings (ECB) window for financing 3G spectrum Rupee loans which are still outstanding in telecom operator's books of accounts, will be open upto March 31, 2014.

Under the existing guidelines relating to ECB for spectrum allocation, the payment for spectrum allocation may initially be met out of the Rupee resources by the successful bidders, to be refinanced with a long term ECB, under the approval route, subject to the condition that ECB should be raised within 12 months from the date of payment of the final installment to the Government.

2. ECB for working capital under Civil Aviation Sector till 31st December, 2013

The Reserve Bank of India (RBI) vide RBI/2012-13/545 A.P. (DIR Series) Circular No. 116 dated June 25, 2013 has reviewed and decided that the scheme of availing of ECB for working capital for civil aviation sector will continue till December 31, 2013. It has been clarified by the RBI that availing of ECB shall be subject to the condition that all other aspects of the ECB policy shall remain unchanged.

3. Discontinuance of facility for availing ECB in Renminbi

The Reserve Bank of India (RBI) vide RBI/2012-13/546 A.P. (DIR Series) Circular No. 117 dated June 25, 2013 has reviewed the scheme of ECB in Renminbi (the official currency of the People's Republic of China) and decided that the scheme may be discontinued with effect from the date of issue of this circular.

Under the extant guidelines, Indian companies in the infrastructure sector are allowed to avail of ECB in Renminbi (RMB) under approval route subject to an annual cap of USD one billion pending further review. The RBI has mentioned that since the facility of ECB in Renminbi (RMB) had remained unused so far, it has decided to discontinue the same.

4. RBI Broadened the end uses of ECB

The Reserve Bank of India (RBI) vide RBI/2012-13/552 A.P. (DIR Series) Circular No.119 dated June 26, 2013 has decided to bring into force with immediate effect the modifications, that include the following as a part of import of capital goods by the companies for the use in the manufacturing and infrastructure sectors as permissible end uses of External Commercial Borrowings (ECB) under the automatic / approval route as the case may be applicable: (a) import of services;(b) technical know-how; and (c) payment of license fees.

The above shall however, be subject to the following

conditions:

(i) There should be a duly signed agreement between the service provider and the borrower company;
(ii) The original invoice raised by the service provider as per the payment schedule in the agreement should be duly certified by the borrower company;
(iii) Declaration by the importer that the entire expenditure on import of services will be capitalised;
(iv) Declaration by the importer that entire expenditure on import of services forms part of project cost; and
(v) AD category – I bank has to ensure the bonafides of the transaction

Further, all other aspects of the ECB policy, such as eligible borrower, recognized lender, end-use, all-in-cost ceiling, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements etc. shall remain unchanged.

VI. TAS INSETTLE PATENT LITIGATION MATTER WITH HOFFMANN-LA ROCHE

Intas Pharmaceutical limited, drug manufacturer based in Ahmadabad, India and it's wholly owned subsidiary United States based Accord Healthcare Inc. has entered into settlement with pharmaceutical giant Hoffmann-La Roche to resolve pending patent litigation regarding XELODA tablets, generically known as Capecitabine tablets which are used in cure of metastatic breast and colorectal cancers. Hoffmann-La Roche had filed patent infringement suit against Accord Healthcare and Intas Pharmaceutical, upon its submission to the U.S. Food and Drug Administration (USFDA) of an Abbreviated New Drug Application (ANDA) for a generic version of Xeloda tablets.

As per the settlement and license agreement between the Hoffmann-La Roche and Intas, Roche will grant a license to Accord to enter into US market a generic version of Xeloda tablets ahead of its patent exclusivity period and the patent infringement suit instituted by the Roche will be dismissed. Further terms and conditions of the agreement are kept confidential.

VII. BUYBACK OR PREPAYMENT OF FCCBS TO BE CONTINUED TILL 31ST DECEMBER, 2013

The Reserve Bank of India (RBI) vide RBI/2012-13/544 A.P. (DIR Series) Circular No. 115 dated June 25, 2013 has reviewed and decided that the existing scheme of Buyback / Prepayment of Foreign Currency Convertible Bonds (FCCBs) under the approval route which had expired on March 31, 2013, may be continued till December 31, 2013. Thereafter, the same shall stand discontinued, considering the developments in the global financial markets as stated in the circular.

VIII. RBI ENHANCES TIME LIMIT FOR REPORTING UNDER EXPORT OF GOODS AND SERVICES – PROJECT EXPORTS

Reserve Bank of India (RBI) vide RBI//2012-13/548 A.P. (DIR Series) Circular No.118 dated June 26, 2013 has increased the time limit in terms of which an exporter undertaking Project Exports and Service contracts abroad will submit form DPX1, PEX-1 and TCS-1 to the Approving Authority (AA). The existing guidelines required exporters to submit the forms within 15 days of entering into contract for grant of post-award approval. With the issue of this present circular the time limit has been extended and the exporters will be now be required to submit the forms within 30 days of entering into contract for grant of post-award approval.

IX. SUPREME COURT GRANTS RELIEF IN POWER THEFT CASE

The Hon'ble Supreme Court pronounced a recent judgment on 25 June 2013 wherein it has provided relief to those who are facing Power theft cases. The Supreme Court declared that in any pending case related to the power theft, such consumer's electricity supply cannot be disconnected. Justice AK Patnaik while heading the Vacation bench ordered the BSES to restore Power supply within 48 hours at the premises of the concerned consumer /aggrieved who is a resident at Vasant kunj, New Delhi. The court said that it was the duty of the Power company to supply electricity to all owners in all premises.

On the issue, of the power company's refusal to grant a meter connection in the name of the consumer, as the consumer was not the owner of the premises, but was facing such a situation from 2010 and whose power was disconnected, the court clarified that power should be restored in the new consumer's name, event if the original consumer did not want the connection subject to formalities and payment by the New consumer.

The Supreme Court further stated that "***If a landlord does not pay up, the tenant has to be given power connection. We don't want any dispute to come in the way of supply of electricity***". The court observed that-section 43 of the electricity Act obliges a power company to supply electricity to an owner or an occupier on request. ◆◆◆

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