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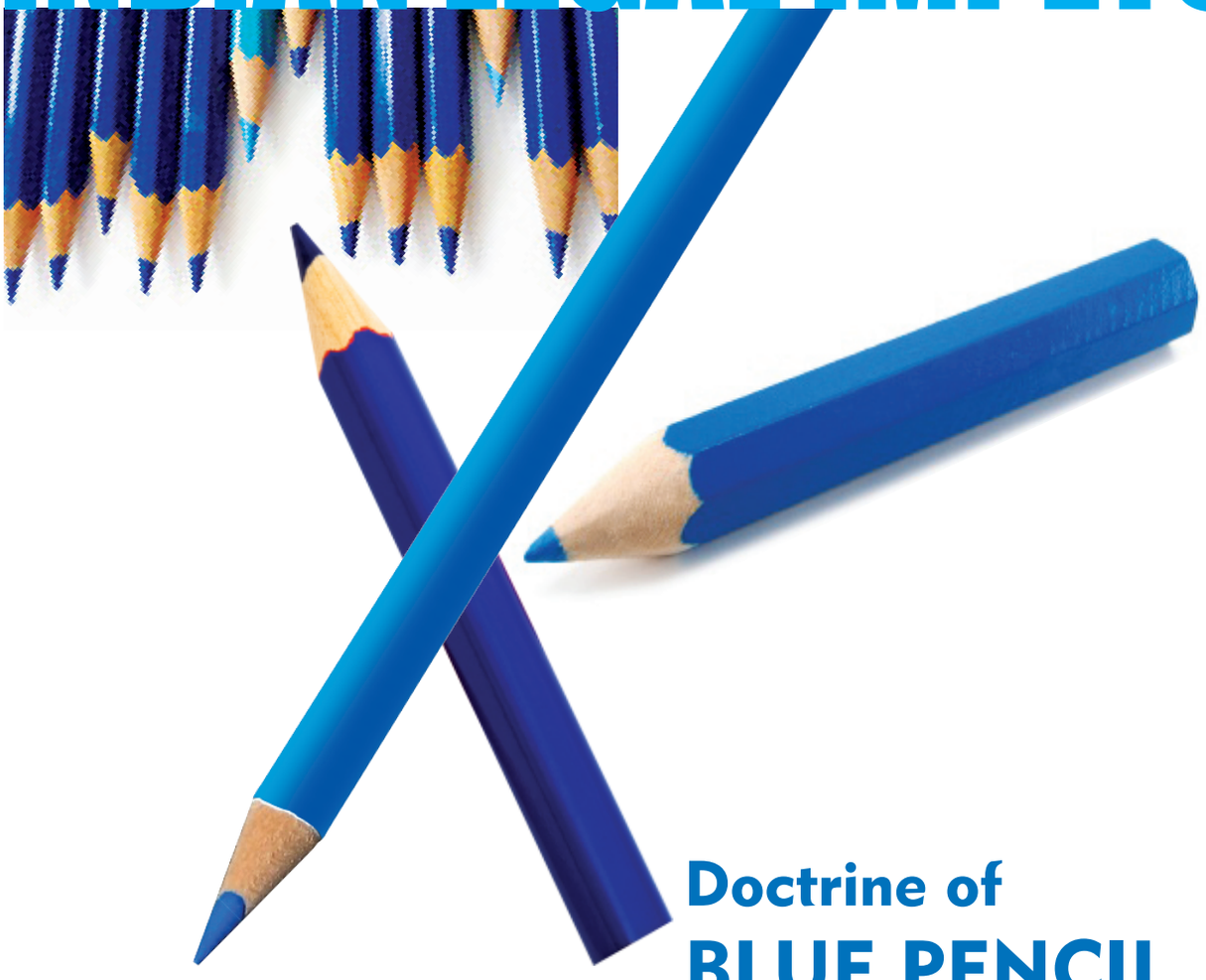

Doctrine of BLUE PENCIL

EDITORIAL

Manoj K. Singh
Founding Partner

Singh & Associates is thankful to all its readers who have always bestowed overwhelming support to us as a result of which we have been successful enough to bring new editions of our newsletter to enlighten the legal fraternity around the world by covering the latest legal developments in India.

The cover article of the current edition deals with the **'Evolution Of Doctrine Of Blue Pencil'** where the evolution and application of the doctrine of blue pencil has been discussed. The next article is on the **'Amendments to Indian Arbitration Act, 1996'** which talks about the objective behind the recent proposed changes under the Ordinance 2015. Further, the article 'Commercial Courts Ordinance, 2015- A Rightful Approach to Judicial Process Reformation' highlighting the need for the establishment of commercial courts in India. Our next article '**Close-Up Whitening Is Not A Toothpaste But Other Form Of Dental Hygiene- As Held By The Hon'ble Apex Court'** discuss about the levy of different excise duty due to the difference in classification of Dental Cleaner and Toothpaste. This edition also covers article on '**Extraordinary Jurisdiction Of The High Court under Article 226 Of The Constitution Reinforced: State Of Kerala V. JS Mose'** which discusses about the jurisdiction of the High Court under Article 226 of the Indian Constitution in case of contracting parties have mutually decided a separate forum for dispute resolution. The banking section of this edition covers an article ' **Decryption Of Wilful Default**' which deals in depth with the concept of willful default. Moving further, our next article **'Doctrine of Foreign Equivalents: A Pragmatic Approach**' discuss about the application of doctrine of foreign equivalents in US and India for trademark issues. Further article '**Payment Banks: The New Facet Of Banking System in India'** discuss about the concept and advantages of payment banks in India. This edition also covers an article called '**Limited Liability versus Traditional Partnership**' which provides a comparative study between the structure of a LLP and simple traditional partnership structure while assessing their applicability. Article '**Anticipatory Bail And Protection of Personal Liberty**' deals with the concept of personal Liberty under Criminal Law. Our last article '**No-Embargo From Recovering Streedhan Even After Judicial Separation**' discuss about the courts' approach towards entertaining the domestic violence cases.

Lastly this issue also includes the latest developments in various fields of law which have been summarized in the Newsbytes Section of the newsletter.

I hope that our esteemed readers find this information useful and it also enables them to understand and interpret the recent legal developments. I welcome all kinds of suggestions, opinion, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in.

Thank you.

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DOCTRINE OF BLUE PENCIL

Vishal Gera

INTRODUCTION

According to Oxford Dictionary of English, Blue Pencil means to censor or to make cuts in a manuscript, film or other work. Blue Pencil was earlier used by the editors to make corrections in the copy. According to Black's Law Dictionary the Doctrine of Blue Pencil is a judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them as opposed to changing, adding or rearranging words. The Blue Pencil rule allows the courts only to strike down the offending provisions and enforce the rest of the agreement.

The general rule of law of contracts is that the illegal parts of a contract are illegal and hence unenforceable. But there are many contract containing one part or a clause as illegal and rest of the other parts as legal. The court in such cases strikes out the illegal part and enforces the legal one when the parts are severable. This is known as the concept of severability. "This is done when the rest of the contract effectuate the intention of the parties."[1] The doctrine of severability created some problem i.e. it does not give power to the court to modify a restrictive covenant in jurisdiction.[2] Based on the doctrine of severability, a new concept was evolved in 1843 in the case of *Mallan v. May* which later came to be known as Blue Pencil.[3] The Blue Pencil Doctrine is mostly applied in cases where the non-compete agreement is a matter of dispute. Any contract in restraint of trade is void. But the courts have started taking different approach and validate such contract if reasonable. In case some clause is overbroad, then the court struck down that part by running a Blue Pencil. Under the Blue Pencil rule, the first approach is to read out the separable unreasonable clauses of the contract and then severing the part by running a blue pencil over it. The courts had widened the scope of application of blue pencil rule by rewriting the overbroad clauses.

1 *Tina L. Stark, Negotiating and drafting contract Boilerplate, 2003, ALM Publication, New York, page no. 541*

2 *Michel S. Sirkin, Lawrence K. Cagney, Executive Compensation, 2006, Law Journel Press*

3 *John Edwad Murry, Jr., Murry on Contracts, 5th Edition, Lexis Nexis Publication*

The rule of blue pencil can be applied only "if the valid stipulation is not affected by the illegality of the other part then the valid part remains intact."[4]

> "In Halsbury's Laws of England (4th Edn. Vol.9), p.297, para 430, it is stated that a contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general."[5]

The courts have started using the blue pencil test in contracts whereby the court may strike the part of the non-compete covenants in order to make the covenant reasonable.[6] This was done to make an unenforceable covenant enforceable.

EVOLUTION OF BLUE PENCIL RULE

"The blue pencil test is sought to be introduced into public law from that field of private law which is concerned with the enforcement of contracts, in particular of contracts in restraint of trade."[7] The 'doctrine of blue pencil' was evolved by the English and American Courts. This rule was established in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd* wherein the court held that that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition but was wide in its application for 25 years.[8] Thus, the court struck down the part by running a blue pencil over it. The term blue pencil was used by Lord M.R. Sterndale in the case of

4 *Mallan v. May, (1843)11 Meeson and Welsby 653*

5 *Beed District Central cooperative bank limited v. state of Maharashtra and ors. MANU/SC/4348/2006 para 7*

6 *Wharton's concise Law dictionary, Universal law publishing co. https://books.google.co.in/books?id=wLT0Vfh0TQsC&pg=PA120&lpg=PA120&dq=wharton+legal+dictionary+blue+pencil*

7 *Thames water Authority v. Elmbridge Borough Council, [1983]1All ER836*

8 *[1894] A.C. 535*

Attwood v. Lamont when he observed that the part of a contract can be severed by running a blue pencil over it.[9] In this case, Justice Bailhache said:

> "Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the Courts will not split up a single restriction expressed in indivisible terms. As Mr. Matthews put it, the Courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise."[10]

All states have not adopted the rule of blue pencil. The states that use this doctrine to enforce the not compete contracts have distinct approaches in its application. There are some states that follow the strict rule of blue pencil and some follow liberal rule of blue pencil. "The strict blue pencil rule does not allow courts to rewrite overbroad non-compete agreements. Instead, the strict approach allows courts only to strike overbroad provisions and enforce what is left of the agreement."[11] Whereas the liberal approach allows rewriting of the overbroad provisions.

The court in the case of *Mason v. Provident Clothing and Supply co. Ltd.*[12] observed that "Blue pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant."[13] The rule of blue pencil should be applied when the true construction of the clause cannot stand the test of reasonability without writing in or deleting some word from the clause[14] and should not be use in such a manner so as to change the whole meaning.[15] A three fold test was should be applied in order to see the applicability of the blue pencil rule:[16]

(a) The unenforceable provision can be severed without the necessity of adding or modifying the wording of what remains.

(b) The remaining terms continue to be supported by adequate consideration.

(c) The severance of the unenforceable provisions does not distort the parties' bargain so much that it materially differs from the contract the parties entered into ("does not so change the character of the contract that it becomes not the sort of contract that the parties entered into at all").

There were many interpretations to this rule of blue pencil. In the case of *Daymond v. South West Water Authority*[17] Lord Bridge had observed that "an appropriate test of substantial severability should be applied. Nonetheless, on his approach there would appear to be at least two forms of the substantial severability test. First, when textual severance is possible, the test takes this form: is the valid text unaffected by, and independent of, the invalid text? Secondly, when textual severance is not possible so that the court must modify the text in order to achieve severance, the court may do this only if it is effecting no change in the substantial purpose and effect of the impugned legislation."[18] Whereas in the case of *Dunkley v. Evans*[19], Lord Lowry had a different view and observed that "an instrument that was on its face ultra vires could be upheld by using blue pencil only if textual severance could occur and if what was left also passed the substantial severance test".[20]

In various cases, the rule of blue pencil has been criticized and the court held that "the blue pencil test could not apply to an unenforceable definition within a non-compete covenant because the amendment would cause other provisions of the contract to be modified."[21]

9 *Attwood v Lamont [1920] 3 K.B. 571*
10 *Supranote 8*
11 *Griffin Toronjo Pivateau, Putting the Blue pencil down: An argument for specificity in non compete Agreements, March 2008, 86 Neb.L.Rev.672(2008), Available at: http:??works.bepress.com/cgi?article=1001&context=pivateau.*
12 *[1913] AC 724*
13 *Mason v. Provident Clothing and supply co. Ltd, [1913] AC 724*
14 *The Littlewoods Organisation Limited v. Paul Melvin Harris, MANU/UKWA/0071/1977*
15 *Polly Peck (Holdings) Plc. and Others v Trelford and Others, [1986] 2 W.L.R. 845*
16 *Beckett Investment Management Ltd & Ors v Glyn Hall & Ors, [2007] EWCA Civ 613*
17 *[1976] 1 All E.R. 39*
18 *Bradley, Judicial enforcement of ultra vires byelaws: the proper scope of severance, P.L. 1990, Aut, 293-300 A.W.*
19 *[1981] 1 W.L.R. 1522*
20 *Supranote 11*
21 *Francotyp-Postalia Ltd v Whitehead, [2011] EWHC 367*

APPLICATION OF BLUE PENCIL RULE IN INDIA

The Indian Contract Act, 1872 provides that any part of the consideration or object is unlawful, and then the contract becomes void.[22] This section also includes the application of Blue pencil rule.[23] In the case of *Babasaheb Rahimsaheb v. Rajaram Raghunath*, the court observed the application of blue pencil in Indian contracts as well be holding that "in an agreement if different clauses are separable, the fact that one clause, is void does not necessarily cause the other clauses to fail"[24]. The court has applied this principle by holding that "the sub-clause making the award 'final and conclusive' was clearly separable from the main clause which made reference to an arbitrator imperative. The existence of the sub-clause or the fact that the sub-clause appears to be void does not in any way affect the right of the parties to have recourse to arbitration and does not make a reference to an arbitrator any the less an alternative remedy."[25] In the case of *D. S. Nakara v. Union of India*[26], the doctrine of severability was applied so as to retain the beneficial part of the relevant memorandum and make the same applicable to the pensioners irrespective of date of their retirement.

In India, the blue pencil doctrine is not only applicable on covenants dealing with restraint of trade or the non-compete covenants but is also applicable to Arbitration clauses.[27] In the case of *Sunil Kumar Singhal and another v. Vinod Kumar*[28], It was held that the offending part in the arbitration clause can be severed or marked by the blue pencil. The Courts have applied this doctrine to contract where some clause was redundant, unnecessary and opposed to public policy.[29] The court held that if contract for sale of property with eight flats is illegal and void being contrary to building regulations and master plan, the agreement for sale of property with lesser number of flats, if permitted under Section 12, is enforceable.[30]

The Supreme court in the case of *Shin Satellite Public Co. Ltd. v. Jain Studios Limited*, provides that "the proper test for deciding validity or otherwise of an agreement or order is '*substantial severability*' and not 'textual divisibility'. It is the duty of the court to severe and separate trivial or technical part by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the Court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms."[31] Thus, the Indian court affirms the views of Lord Bridge and held that for application of blue pencil rule, substantial severability is necessary.

22 *Section 24, Indian Contract Act, 1872*
23 *Meena R.L., Texbook On Contract Law Including Specific Relief, edition 2008, Universal Law Publication Co., Page no. 132*
24 *(1931) 33 BOMLR 260*
25 *Shin Satellite Public Co. Ltd. v. Jain Studios Limited, AIR2006SC963*
26 *1983 AIR 130*
27 *Union Construction Co. (P.) Ltd. v. Chief Engineer, Eastern Command, AIR 1960 All 72*
28 *2007 Indlaw ALL 2702*
29 *Cipla Ltd. v. Anant Ganpat Patil and Ors, 2008(1)ALLMR526*
30 *Canara Bank v. K.L. Rajgarhia, 2009(157)DLT344*
31 *Supranote 25*

AMENDMENTS TO THE INDIAN ARBITRATION ACT

Rahul Pandey

It is not wisdom but Authority that makes a law. *- Thomas Hobbes*

INTRODUCTION:-

Litigation in India has come to be a time-consuming and expensive affair, and justice usually arrives late or even eludes as justice delayed is justice denied. This injustice is particularly paramount in civil & commercial disputes, where cases remain pending for years. It is in this context that arbitration was considered as an alternate method of dispute resolution to provide an effective and efficient remedy for dispute resolution outside Court. Thus, the Arbitration Act, 1940 (hereinafter "***1940 Act***") was enacted which slowly became outdated and therefore the Law Commission of India along with experts in the field of arbitration proposed amendments to the 1940 Act to make it more responsive to contemporary requirements. Even the Hon'ble Supreme Court of India in the matter of *Guru Nanak Foundation v Rattan Singh* [1] adversely commented upon the workings of the 1940 Act.

Therefore, the Arbitration and Conciliation Act, 1996 (hereinafter "***the Act***"), was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards, and also to define the law relating to conciliation and for matters connected therewith or incidental thereto on the traction of UNCITRAL.

The basic objective behind enacting the 1996 Act was:

(a) To broadly cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(b) To minimize the administrative role of courts in the arbitral process;

(c) To provide that every final arbitral award is enforced in the same manner as if it was a decree of court.

However, the Act also eventually gave rise to various concerns. The Hon'ble Supreme Court in arbitration matters has efficiently construed various provisions of the Act in order to remove ambiguity. Consequently, due to the requirement to bring changes in the Act the Law Commission of India, has now in its 246th report titled, *"Amendment to the Arbitration and Conciliation Act, 1996"* suggested some major changes to the Act. The report sought to find an appropriate path and balance between judicial intervention and judicial control. In view of the said report, the Union Cabinet on 21st October, 2015 approved the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("***the Ordinance***") which was promulgated on 23 October, 2015 after receiving the President's assent.

The Ordinance introduces several significant changes to the Arbitration & Conciliation Act, 1996. The object of these changes is to expedite the arbitration process and reduce court intervention in arbitration proceedings. The major changes introduced in the Act pursuant to the Ordinance are as follows:

(a) The term 'Court', as defined under Section 2(1)(e) of the Act, has been amended and now includes High Courts having jurisdiction to hear appeals from decrees of courts subordinate to it. This amendment is in relation to international commercial arbitrations and more specifically to High Courts which do not exercise ordinary original civil jurisdiction;

(b) The provisions of Sections 9, 27, 37(1)(a) and 37(3) shall also apply to international commercial arbitrations, even if the seat of arbitration is outside India, so long as the award made or to be made is enforceable and recognized under Part II of the Act;

(c) The scope of Section 17 of the Act has been enlarged by giving the tribunal the power to provide interim measures, if applied for, even after the making of the award, but before it is enforced. The amendment to this Section further provides that all orders passed by the tribunal under this Section, subject to any order passed in an appeal under Section 37 of the Act, shall be deemed to be an order of the court and shall be enforceable in a manner as provided under the Code of Civil Procedure, 1908;

(d) A time bound procedure has also been introduced

1. *(1981) 4 SCC 634*

under Section 9 of the Act, whereby when the court passes any interim measure under the said Section, the arbitral proceedings must commence within 90 days of the passing of such interim measures;

(e) No application for interim measure under Section 9 shall be entertained after the arbitral tribunal has been constituted, unless the remedies under Section 17 have been rendered ineffective;

(f) The ordinance has also brought changes in Section 11, to the effect of the addition of sub-section 14 which provides for the determination of fees of the arbitral tribunal as per the rates specified in the newly inserted fourth schedule of the Act;

(g) Under Section 12 of the Act, as of now onwards before the appointment of an arbitrator by the court, the court shall seek a disclosure in writing from the prospective arbitrator as per the newly inserted sixth schedule to clarify any justifiable doubts as regards his independence or impartiality (the grounds for which are enumerated in the fifth schedule of the Act). Further, the addition of sub-section 5 of Section 12 also provides for the ineligibility of a person to be appointed as an arbitrator if his/her relationship with the parties, the counsel or the subject matter of the dispute falls within any of the categories enumerated under the seventh schedule of the Act;

(h) A new Section namely Sec. 31-A has been introduced i.e. Regime for Costs (Loser to Pay). The main objective of including the "costs follow the event" regime is to check the filing of frivolous claims/ applications;

(i) Further, Section 29A has now been inserted in the Act which provides that the award shall be made within a period of 12 months from the date the arbitral tribunal enters upon reference, i.e. the date on which the arbitrator(s) receives a written notice of its appointment; the said period of 12 months may be extended by mutual consent of the parties for a further period not extending 6 months. Furthermore, Section 29A also provides for a penalty to be imposed on the arbitrator by way of reduction of fees, in cases where the timeline as specified under this section has not been adhered to by the tribunal and even entitles the arbitrators to an additional fees as may be agreed between the parties if the award is made within 6 months as opposed to 12 months;

(j) Additionally, the newly inserted Section 29B of the Act provides for a fast track procedure of arbitration. Under the fast track mechanism, the tribunal shall decide the dispute only on the basis of written pleadings, documents and submissions, and no oral hearing shall be conducted unless requested by both the parties or such hearing is called by the tribunal to seek certain clarification, as may be required and the award shall be made within a period of six months from the date the arbitral tribunal enters upon the reference;

(k) Section 34 of the Act has now been amended to the effect that "public policy" has been defined and now an award shall only be considered in conflict with the public policy of India if- the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 (Confidentiality) or Section 81 (Admissibility of Evidence); or if it is in contravention with the fundamental policy of Indian law (which shall not entail a review on the merits of the dispute); or it is in conflict with the most basic notions of morality or justice;

(l) Section 34(2A) has been inserted to include that an award passed in an arbitration other than an international commercial arbitration, may also be set aside, if the court finds that the award is vitiated by patent illegality appearing on the face of the award, however, an award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence;

(m) Lastly, by virtue of the newly inserted Section 36(2), the mere filing of an application under Section 34 of the Act to set aside an award shall not by itself render the award unenforceable, unless the court grants an order of stay on the operation of the award;

CONCLUSION:

The Law Commission in its 246th Report had also suggested amendment in Section 16 to the effect that after sub-section (6) an additional sub-section (7) should be inserted whereby the arbitral tribunal shall have the power to make an award or give a ruling

notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact, or allegations of fraud, corruption etc, but the Ordinance is silent on this aspect.

The Ordinance has laid the foundation in bringing the standards of domestic arbitration at par with international/ institutional arbitration by implementing amendments that make domestic arbitration more cost effective and time efficient. The prime focus of this Ordinance has been to ensure minimal judicial intervention. The proposed amendments are envisaged to be a step forward in making arbitration an easier, faster, and more cost effective method of dispute resolution, coming in terms of its actual legislative intent.

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THE COMMERCIAL COURTS ORDINANCE, 2015- A RIGHTFUL APPROACH TO JUDICAL PROCESS REFORMATION

Abhishek Kumar

INTRODUCTION

The Hon'ble President of India on October 23, 2015 promulgated an ordinance *The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015(hereinafter referred to as "The Commercial Courts Ordinance, 2015")* whereby the ordinance inter alia provided for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value. It is believed that the said ordinance is aimed at speedy disposal of commercial disputes.[1] The said ordinance is the cumulative result of 253rd Law Commission of India Report on "Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015. The aim and objective of the said ordinance is speedy disposal of high value commercial suits[2]. Apparently, Indian Judicial System is often perceived as slow system as a result of inordinate delays. The changing nature of Indian Economy post 1991 era of Liberalization, Globalization and Privatization ["LGP"] has posed a challenge to overhaul the systems vis. a vis. commercial dispute is concerned. At the metamorphosis and the transition of the Indian Economy with that of global economy a need was felt to bring in the commercial courts reforms and hence as a result of concerted and dedicated effort, the Law Commission came up with report which inter alia suggested for establishment of Commercial Courts, and Commercial Divisions and Commercial Appellate Divisions in the High Courts in order to ensure speedy disposal of high value commercial suits. The Hon'ble Delhi High court vide its circular dated 17.11.2015[3] has speedily constituted the Commercial Court

Background of the Ordinance, and the need for establishment of Commercial Courts in India

The genesis and background of the Commercial Courts Ordinance, 2015 lies in the 253rd Law Commission of India Report *on "Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 and certain features of 188th Law Commission of India Report*. Though there were certain defects in 188th Law Commission of India Report viz. *Lack of Original Jurisdiction in all High Courts, difference of pecuniary jurisdiction within the same court, no specific mentioning of possessing any specialized knowledge with respect to commercial transactions disputes*. Moreover, the 188th report did not specifically mentioned that the Hon'ble Judges who will be presiding over the commercial courts will be imparted desired training in the specialized field in order to adjudicate the disputes. Further a major drawback with the then 188th Law Commission of India report was that, it did not clarify that in case of conflict between the original side rules made by the Hon'ble High Court and the Commercial Court Bill which will prevail. Thus as a result of these apparent defects a need was felt to redraft the bill and hence the said bill was accordingly re-drafted in 253rd report.

The Law Commission in its report has succinctly discussed the various factors why the India requires Commercial Courts. Some of the requirements for establishing the Commercial Courts are enumerated as under:-

> ***1. Economic Growth***- An efficient, stable dispute resolution mechanism is pre-requisite in fast moving economy. It is imperative that a quick mechanism ought to be in place to resolve any dispute involving commercial dispute and transaction and more when the lis relates to the solution of quick enforcements of contracts, easy recovery of monetary claims in order to encourage investment and simultaneously generation of economic activity. Indian Judicial delivery system is often perceived as slow system when it comes to time bound dispute resolution. When the stake of the investors are involved, they prefer that the commercial disputes is settled in time bound and

1 *See Section 2 (c) of the Ordinance*

2 *http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf*

3 *http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_EKHUB2HV.PDF*

efficient manner. These factors gain confidence of the stake *holders inter alia Foreign investors, FIIs, Financial institutions and etc.* thus resulting in overall economic growth.

2. Improving legal culture- One of the essence of the Commercial Court Ordinance is that these courts will function as model courts establishing new practices and other features of commercial litigation which can also be extended to all other forms of civil litigation in India. In a way the Law Commission in its report opined that the entire essence and salient feature with respect to practice of Commercial Court will be emulated in all forms of civil litigation in India.

Notable clauses of the Commercial Court Ordinance, 2015

Some of the notable clauses of the Commercial Courts Ordinance, 2015 are stated as under:-

a) Clause 2 (c) **of the Ordinance defines**[4] Commercial dispute. **The said definition is very expansive and** inter alia includes various disputes arising out of ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile, documents including enforcement and interpretation of such documents, issues relating to admirality and maritime law. , carriage of goods.

b) Clause 3 (1) **states about constitution of Commercial Courts- which states that the responsibility of establishing the** Commercial Courts at District Level vests with the State Government. **The same shall be constituted in consultation with the State High court.** The Proviso clause of the Ordinance states that no Commercial Court shall be constituted for the territory over which the High Court has ordinary original civil jurisdiction.

The interpretation of this clause of the Ordinance is that in the five states which has ordinary original jurisdiction, the Commercial Court will not be set up at the District Level.

c) Further, as regards the experience of being appointed as judge of the Commercial Court the provision stated that the persons having experience in dealing with the commercial disputes to be appointed as Judges of a Commercial Court, from amongst the cadre of Higher Judicial Service in the state.

The clause prescribes two pre-condition for person to be appointed as the Judge of the Commercial Court viz; the judge to be appointed ought to have experienced in commercial disputes and he must come from the cadre of Higher Judicial Service. The pre-requisite of having experience in dealing with the commercial disputes is a sina qua non **for being appointed as Commercial Court judge both in District Court as well as Hon'ble High Court.**

d) Clause 6 and 7 **of the Ordinance prescribed the** Jurisdiction **which stated that** the Commercial Court will have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value arising out of the entire territory of the State over which it has been vested territorial jurisdiction.

Pertinently, the Hon'ble Delhi High Court vide its Circular dated 07th November, has notified the amount of Rs. One Crore to be heard and disposed by the Commercial Division[5]

e) Clause 10, of the Ordinance envisaged the Jurisdiction in respect of arbitration matters.

f) Amendment in CPC with respect to commercial disputes:-

- Further the said Ordinance also brought amendment in CPC in proviso to Section 26 (2), by stating that the affidavit shall be in the form and manner as prescribed under Order VI Rule 15A.

- The Commercial Courts Ordinance, 2015 also brought an amendment in First Schedule of CPC by extending the time for filing the Written Statement within the period of 120 days. Further the amendment categorically stated

4 *http://lawmin.nic.in/la/commercial.pdf*

5 *http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_F9XYN5Y5.PDF*

that no extension for filing the written statement can be granted beyond the expiry of 120 days[6].

- Further, the forms of Pleadings were also amended in case of commercial disputes[7].

CONCLUSION

The era of globalization and global village doctrine has a lot to do with various reports including the World Bank and credit rating up gradation and down rating by the various Credit Rating Agencies. The potential investors analyze the market on the basis of the various factors and one such aspect is Ease of Doing Business published by the World Bank. **Not surprisingly, India was ranked 186 out of 189 nations surveyed in the year 2014 in the category of** Enforcing Contracts[8] **thereby meaning that enforcement of contract in our Country is an uphill task. Therefore, an economic growth and tapping of the investment is a daunting task unless there is an effective mechanism to adjudicate the commercial dispute in time bound manner. Thus, it can be emphasized that the Commercial Courts Ordinance, 2015, tries to smoothen the very judicial process by segregating the commercial disputes from the normal civil litigation for overall economic growth and well being of the nation as the economic growth itself is a vicious circle of all the economic activities taking place.**

6 *Inputs from Amit Shaunak*

7 *See Schedule IV of the Ordinance*

8 *http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf*

CLOSE-UP WHITENING IS NOT A "TOOTHPASTE" BUT OTHER FORM OF DENTAL HYGIENE- AS HELD BY THE HON'BLE APEX COURT

Shipra Makkar & Vijaya Singh

The Hon'ble Supreme Court of India, in a recent ruling of **CCE v M/s Global Health Care Products Partnership firm & Ors**, reported in Civil Appeal Nos 5902-5909 of 2005 very specifically observing the inputs which go into manufacturing of a toothpaste and dental cleaner, classified Close-Up Whitening as a "Dental cleaner" and not a normal "Toothpaste", the excise duty in both the cases being different as classified under different Chapter Headings.

FACTS IN BRIEF:

The Respondent Assessee was engaged in the manufacturing of different brands of toothpaste, which were manufactured exclusively for **M/s. Hindustan Lever Limited, Mumbai (HLL)** including Close-up Red, Close- up Blue, Pepsodent etc., falling under Chapter Heading 3306.10 of the Central Excise Tariff Act [CETA], there being no dispute about the said products.

However, a new product "Close-up Whitening" was introduced by the Assesee and the same was classified under Chapter Heading 3306.90, being a dental cleaner and not "Toothpaste". The Revenue Department treated this classification as erroneous, as according to the revenue there was no such major difference in the new product and the earlier products manufactured by the Assessee, therefore all of them would have classified in the same chapter heading i.e 3306.10. The Revenue Department also suspected that the said new product was misclassified in the said heading in order to evade payment of proper central excise duties by resorting to assessment u/s 4 of the Central Excise Act,1944 (Act) instead of assessment u/s 4A thereof. Certain documents claiming to be incriminating were also seized. On scrutiny of the documents, the Revenue Department noticed that there was difference in the raw materials used for the manufacturing of Close-Up Whitening and other products, there being an additional presence of certain ingredients. However ignoring the said fact, Revenue took a view that the aforesaid differences did not change the essential character of the product in question.

Show Cause Notice [SCN] was issued and subsequent replies filed by the Assesee contending that the product was not a Toothpaste, however Order-in-Original was passed confirming the excise duty demand as mentioned in the SCN. Aggrieved by the Order, the Assesee filed appeals before the Hon'ble CESTAT, Mumbai who went into the details of the said two different products and found the approach of the Commissioner faulty, and allowed the appeal of the Assessee.

The aggrieved Revenue then approached the Hon'ble Supreme Court of India, the only question of dispute being whether the product in question i.e "Close-Up Whitening" is to be classified under sub-heading 3306.90 or 3306.10.

The Hon'ble Supreme Court going into details and after observing the approach taken by both the Commissioner and the Tribunal, found itself in agreement with the approach of the Tribunal having regards to the following cogent reasoning given by it:

(a) The Tribunal had pointed out the differences which have been noted and accepted by the Department itself. From these differences, it is held that ingredients and ratio of all the inputs which go into the manufacturing of a toothpaste and dental cleaner are different and varying. The dental cleaner, in addition, has two more ingredients, namely, Silicon Agglomerate and Bluer Agglomerates, which play an active role as abrasive.

(b) Even the manufacturing process of Close-Up Toothpaste and Close-up Whitening is different. While the total stages for manufacturing Toothpaste were nine, the number of stages for manufacture of Close-Up Whitening were eleven. It takes 120 minutes to manufacture a Toothpaste tube, while it takes 155 minutes to effect the manufacture of Close-Up Whitening.

(c) Statement of one Mr. N.H. Bijlani, the only expert in this case and whose statement was recorded on January 09, 2002, was referred to by the Tribunal. In this statement, Mr. Bijlani has explained the difference between Toothpaste and dental cleaners and has opined that Close-Up Whitening dental cleaner cannot be equated with Toothpaste.

(d) The Tribunal has also found that as per records, classification of the same product in an earlier avtar/brand was acceptable to the Revenue Department as the same was classified under a different name for all these years when the rate of duty under Heading 3306.90 were higher than that under Heading 3306.10. It, thus, observed that mere change of duty and brand name cannot be the reason to alter classification.

(e) Another important aspect, in conjunction with aforesaid features which has to be kept in mind, is that in the instant case even Food and Drug Authorities (FDA) from where prior permission is needed for manufacturing 'Toothpaste' and sale thereof, had not registered the product in question as 'Toothpaste' but as a dental cleaner. It becomes a supporting factor along with other features of the product, which have been taken note of and discussed above.

CONCLUSION:

Based on the above approach and reasoning given by the Tribunal, the Hon'ble Apex Court came to the conclusion that Close-Up Whitening is not "Toothpaste" but a dental cleaner and was rightly classified under chapter heading 3306.90 by the respondent Assesee.

EXTRAORDINARY JURISDICTION OF THE HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION REINFORCED: STATE OF KERALA V. J S MOSE[1]

Sneha Bhatnagar

"High Courts cannot in the exercise of its writ jurisdiction conduct a roving enquiry into the disputed facts of the case arising out of contractual disputes."

High Courts under Article 226 of the Constitution of India are conferred with the extra-ordinary jurisdiction of issuing directions/ writs or processes to state or any person, situated within its jurisdiction, for the enforcement of fundamental rights or exiting legal rights. Consequently, the High Court have very wide jurisdiction to enforce any existing legal rights of person. However, this power is circumscribed and cannot be used to usurp the power and jurisdiction of the other courts and tribunals which have been established to adjudicate disputes arising out of statutes or contracts. In fact, under law, litigants are obliged to not straight away invoke writ jurisdiction of the High Court when effective alternative efficacious remedies are available with the litigants. Moreover, the nature of writ jurisdiction is not adversarial in nature. Consequently, the High Court in the exercise of its writ jurisdiction cannot go into questions of entitlements of rights since the same is adversarial in nature and involves determination of question of existence of rights warranting detailed submission and rebutting of evidences. Henceforth, the writ jurisdiction of the High Courts cannot simply be invoked for determining disputed question of facts arising out of contractual disputes. It is in this backdrop that the apex court had in State of Kerala v. J S Mose set aside the order of the High Court whereby the appellate bench had reversed the decision of Single Judge, whereby the learned Single Judge had refused to interfere with the cancelation order passed by the Secretary, Public Works Department, Road and Projects of the State inter alia terminating the contract awarded to the respondent contractor and forfeiting the security deposit placed by the contractor respondent for the work.

In the above matter, Respondent contractor was awarded a contract by Secretary, Public Works Department, Road and Projects of the State of Kerala for carrying out improvement works to Kannavam-Idumba-Trikadaripoyil Road in Kannur District of Kerala. The Respondent contractor could not complete the contract during the specified time period, thereby resulting in series of extensions by the Appellant Authority. However, the Respondent contractor could not complete the balance work pending under the contract. In view of the above-mentioned, the Appellant Authority cancelled the contract of the Respondent contractor and initiated steps for issuance of new tender for completion of balance work under the above contract. Meanwhile, the Respondent contractor preferred many writ petitions before the High Court under Article 226, praying for extension of time period for completion of contract and also challenged the above-mentioned termination order. One of the writ petition in respect to the above matter was heard by Single Judge who declined to interfere with the above order. Assailing this Single Judge order, Respondent contractor preferred writ appeal before Hon'ble Appellate bench of the High Court whereby the bench not only directed appointment of Commission for taking evidence as to the disputed question of quantum of balance work left under the contract under dispute but the Appellate bench by placing reliance upon the evidence of commission, quashed the order of Secretary of Public Works Department that terminated the above-mentioned contract awarded to the Respondent contractor. It is this backdrop, the Appellate Authority preferred special leave and consequently appeal before the apex court challenging the above-mentioned exercise of jurisdiction by the appellate bench of

1. *Civil Appeal No. 6086 of 2015 @SLP (C) No. 19380 of 2014*

the High Court in the exercise of its writ jurisdiction.

The Apex Court by placing reliance upon its numerous decisions and citing observations of the Court discussed the scope of writ jurisdiction of the High Court under Article 226 of the Constitution of India and held that the High Court cannot in the exercise of its writ jurisdiction undertake a roving enquiry into the disputed question of facts arising out of contractual disputes and set aside termination order passed by the Appellate Authority terminating contract awarded to Respondent contractor and especially in the circumstance wherein the State was not being offered with any opportunity to file objections to the evidence collected through Commission. The apex court categorically reinforced the dictums of its numerous decisions whereby the Court have held that High Court exercising writ jurisdiction are not the proper forums for adjudication of rights and duties arising out of contractual disputes. The apex court observed that generally the disputed question of facts or rival claims arising out of contractual disputes are to be investigated and determined on the basis of evidence which may be led by parties in a properly instituted civil suits/ proceedings rather the courts exercising prerogative of issuing writs.

The apex court further whilst observing dictums of the apex court observed that the High Courts are not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering petitioner right to relief, question of facts also falls to be determined. The Court said that the High Court have definitely jurisdiction to try issues both on facts and law but this exercise of jurisdiction is of discretionary in nature and is to be exercised on sound judicial principles and only in interest of justice. In fact, the apex court quoted paragraphs of the judgment of ABL International Ltd. V. Export Credit Guarantee Corpn. of India Ltd.[1] wherein the apex court had categorically held that there was no absolute bar on the high court for entertaining a writ petition even in case where the same arises out of contractual obligations or involves question of fact. The apex court quoting paragraphs from the above-mentioned judgment observed that in fact writ petition against a state or its instrumentality, arising out contractual obligation is always maintainable and the High Court has plenary jurisdiction to issue writs for the enforcement of existing legal rights which may be exercised also in case where the action of the state is arbitrary in nature and is unreasonable and violates Article 14 of the Constitution. The apex court also observed that the High Court can entertain writ petition where there are disputed questions of interpretation of contract is involved.

In view of the above-mentioned dictums, the apex court observed that the appellate bench of the High Court clearly exceeded its jurisdiction by appointing commission for conducting enquiry as to disputed question of facts of balance work pending under the above-mentioned contract under dispute and quashing the contract termination order as passed by the appellate authority. The Court further observed that appointment of Commissioners can be preferred in those writ matters that involve public interest or are in nature of PIL since the lis is not adversarial in nature. The apex court said that the recourse to the appointment of Commission in to contractual dispute is unwarranted. The apex court further observed that the High Court entertaining various writ petition at the instance of the Respondent contractor for extension of duration of contract is pure abuse of the process of extra-ordinary jurisdiction of the High Court. The apex court held that the Appellate Court should have exercised restraint and proceeded in accordance with law instead of making roving enquiry since it is not only impermissible and not in public interest.

Consequently, the Supreme Court set aside the order of the appellate bench of the High Court.

In conclusion, the apex court clearly demarcated the jurisdiction of the high court under Article 226 of the Constitution of India and held that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution.

2 (2004) 3SCC 533

ANTICIPATORY BAIL AND PROTECTION OF PERSONAL LIBERTY

Brijesh Yadav

CONCEPT OF PERSONAL LIBERTY

The concept of Liberty can be traced back to the origin of civilization as every man was born free. The Liberty of life, if given without honour and dignity, would lose all its significance and meaning and life itself would not be worth living. Overcoming the rules of Jungle which functioned in the absence of laws, the state was formed as a means to fulfill certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens. As the state grew in its complexity, the concept of personal liberty emerged and with time, it evolved as an indispensable part of Human Rights around the world.

Personal liberty, as understood in Law, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." It is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian Territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual and personal liberty in this sense is the antithesis of physical restraint or coercion.

CONCEPT OF LIBERTY UNDER CRIMINAL LAW

Under Criminal law, the Indian Legislature, appreciating the value of Personal Liberty and Freedom as enshrined under Article 21 of the Constitution of India has incorporated Sec 437,438 & 439 of the Code of Criminal Procedure, 1973. While the Sections 437 & 439 deals with persons who have been arrested, Section 438 deals with persons apprehending arrest.

APPREHENSION OF ARREST

Section 438 is commonly referred as anticipatory bail and the parameters for granting anticipatory bail has been set by the Hon'ble Apex Court of the country in the landmark judgment of *Bhadresh Bipinbhai Sheth Vs. State of Gujarat and Ors (AIR 2015 SC 3090)*. It is clear that Liberal Interpretation of Section 438 must me made otherwise it would hinder the basic Right of Personal Liberty and Freedom of an Individual guaranteed by the Indian Constitution.

While in the above referred case the other factors taken into considerations were that the offense for which the anticipatory bail was being applied allegedly happened 17 years ago and for which the charge was only framed in 2014 and in the meantime the conduct of the appellant was very decent and the appellant always attended the proceedings regularly and there was nothing to allege that he has tried to influence the witnesses or he may flee the course of justice if granted an anticipatory bail.

The Hon'ble Supreme Court also relied upon the judgment S*iddharam Satlingappa Mhetre Vs. State of Maharashtra and Ors. (AIR2011SC312)* where in it laid down certain factors for grant of anticipatory bail.
There can be no straight Jacket formula for granting of the Anticipatory bail but the basics considerations that should be kept in mind are as under

- The nature and seriousness of the proposed charges
- The context of the events likely to lead to the making of the charges
- A reasonable possibility of the applicant's presence not being secured at the trial
- A reasonable apprehension that witnesses will be tampered with
- The larger interests of the public or the State.

Another important observation which came after the pronouncement of this Judgment was regarding the interpretation of expression **"may, if it thinks fit"** in Section 438(1) of the Code. The Court pointed out that it gives discretion to the Court to exercise the power, keeping in view the prima facie facts and circumstances of a particular case or not, and once such a discretion is there, **merely because the accused is charged with a serious offence may not by itself be the reason to refuse the grant of anticipatory bail if the circumstances are otherwise justified.**

Therefore, as law has been recently laid by the Hon'ble Supreme Court the nature of the offence alleged would not overshadow the grounds for grant of anticipatory bail, but the judge would be bound to consider them.

SINGH & ASSOCIATES
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NO EMBARGO FROM RECOVERING STREEDHAN EVEN AFTER JUDICIAL SEPARATION

Vishal Gera & Rahul Pandey

INTRODUCTION

The Apex Court, recently in the case of *Krishana Bhattacharjee v. Sarathi Choudhary,* has look forward for a more sensitive approach from the courts towards cases of domestic violence. In this case, the appellant has filed a special leave petition to get back her *Stridhan* from her husband. Earlier she had filed an application under section 12 of the domestic violence act but was rejected on the grounds that she has ceased to be an 'aggrieved party' under section 2(a) of the 2005 Act and is barred by limitation. The court in this case observed the purpose of the legislation and expected a more sensitive approach from the courts towards applications filed under this act. The court held that "before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised."[1]

The court in this case held that the status of parties is not severed because of judicial separation and depriving a woman of her *Stridhan* would be a continuing offence and thus the woman is considered as an aggrieved person and the application is not barred by time.

DOMESTIC VIOLENCE ACT

Domestic violence, generally, is referred to as violence or abuse against the spouse. In India, women have been victim of domestic violence since ages.[2] However, an attempt has been made by various legislations to protect women from domestic violence. One such attempt is the Protection of Woman from Domestic Violence Act, 2005 which was enacted to "provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family or for matters connected therewith and incidental thereto."[3] The act is a social legislation[4] and the approach of the Court always has to be to uphold the parliamentary intentions and give it a liberal interpretation.[5]

It is settled principle of law that domestic violence is per se not an offence but its institution or occurrence enables a woman to approach the Court for multination reliefs.[6] The Act provides that an aggrieved person can file an application for relief against any kind of domestic violence before the magistrate for grant of relief.[7] In the case of *Tarun Mahant and Others v. Surbhi Mahant*[8]:

> The Protection of Women from Domestic Violence Act, 2005 is a beneficial legislation, specifically brought in to provide for more effective protection of the rights of women, who are victims of violence of any kind, occurring within the family and for matters connected therewith or incidental thereto. Expression "domestic violence" would include cruelty in all forms, whether it is mental, physical, sexual, verbal, emotional or economic. The Act provides for the right of women to secure housing. The Courts are empowered to pass protection orders as and when deemed necessary, if there is threat to the life or property of the women. Under all circumstances, rights of women need to be protected.

According to the Act, Domestic violence means the conduct of respondent which harms or injures the aggrieved person or her property or threatens to injure the same.[9] Domestic violence includes physical, sexual, emotional, verbal and economic abuse.[10] Economic abuse means deprivation of any economic or financial

1 *Crl. Appeal No. 1545 of 2015; Para 4*
2 *http://www.un.org/en/globalissues/briefingpapers/endviol/*
3 *Preamble, The Protection of Women from Domestic Violence Act, 2005*
4 *Abhiram Gogoi v. Rashmi Rekha Gogoi, (2011)4GLR276*
5 *Hema Rawal and Ors. v. Prashant Sharma, 2015(2) JCC1351*
6 *ibid*
7 *Section 12, The Protection of Women from Domestic Violence Act, 2005*
8 *2013(2)ShimLC1092*
9 *Section 3 of the Act*
10 *Explanation I-III of section 3 of the act*

resources which includes *Stridhan* also. Woman is an absolute owner of *Stridhan*.[11] Before any application before the magistrate it is necessary to ensure whether the application was made by an aggrieved party or not.

AGGRIEVED PERSON: EXTENTION OF ITS SCOPE AFTER JUDICIAL SEPARATION

Aggrieved person means any woman, who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.[12] Therefore, it is clear that apart from the woman who is in a domestic relationship, any woman who has been, in a domestic relationship with the Respondent, if alleges to have been subjected to act of domestic violence by the Respondent comes within the meaning of "aggrieved person". Now, "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family[13] . "This means that aggrieved person can be a woman from a relationship between a married man and woman or an unmarried man and woman as the expression use is 'related by marriage or through a relationship in nature of marriage.' The relationship in the nature of marriage can be described as committed intimate relationship."[14]

In order to appreciate the scheme of the Act, each term shall be liberally construed so as to extend more effective protection to women like in the case where subsequent decree of divorce is obtained then also domestic violence act would be applicable for the domestic violence committed before divorce.[15] Therefore, the scope of the term 'aggrieved person' should be wide so that "both hapless and helpless person can approach the court under compelling circumstances."[16]

The question arises here is that whether the wife from an annulled marriage or wife from a judicial separation can be considered as an 'aggrieved person' under this Act. Annulment of marriage by a decree of divorce severe the status of husband and wife whereas in judicial separation the parties live separately but their status of husband and wife remains unchanged. Thus, the approach in the case of judicial separation should be different than that in the case of divorce. To verify whether the judicially separated wife can be an aggrieved person, it is required to see if she comes under the purview of the definition laid down in the act. For an aggrieved person, one must be:

i. a woman;

ii. in or had been in a domestic relationship with the husband;

iii. allege to have been subjected to domestic violence.

Now in the case of judicially separated wife, she undisputedly fulfils the first ingredient. Now for the second ingredient, the wife is not in a domestic relationship with the respondent but she had been in a domestic relationship. In the case of *V.D. Bhanot v. Savita Bhanot*[17], the court held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the Act and thus, it can be concluded that a judicially separated wife is also entitled to protection as an aggrieved party under this act as she had shared the domestic household with the respondent in the past.

LIMITATION PERIOD: APPLICATION ON CLAIMS OF STRIDHAN

Where there is a right there is a remedy. But this remedy can be limited by the concept of limitation period. It provides that expiry of limitation period extinguishes the possibility of remedy but there still exists a right.[18] This may mean that right under domestic violence act is also limited by time and after the expiry of a prescribed time, there is no remedy left with the aggrieved person. The violation of protection order under this Act would attract the procedure of summary trial as laid down in Cr.P.C[19] and section 468 of Cr.P.C

11 *Pratibha Rani v. Suraj Kumar and Anr., AIR 1985 SC 628*
12 *Section 2(a) of the Act*
13 *Section 2(f) of the Act*
14 *Indra Sarma v. V.K.V. Sarma, AIR2014SC309*
15 *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori, 2015ALLMR(Cri)2912*
16 *Supranote 1*
17 *(2012) 3 SCC 183*
18 *Donal Nolan, Andrew Robertson, Rights and Private Law, Bloomsberry publishing co. page no. 224*
19 *Section 14(c) of the Act*

would govern the limitation period for the same.[20] In the case of *Inderjit Singh Grewal v. State of Punjab*,[21] the court held that section 468 Cr.P.C. is applicable on the Act.

In this case, the applicant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO) on 22.05.2010 after the judicial separation which was made before the magistrate on 1.6.2010 but the magistrate issued the notice to the respondent on 14.2.2011. The deprivation arose when she demanded for *Stridhan* in January 2010 when the husband stopped the payment of maintenance. The relevant date for computation of limitation period should be the institution of complaint and not the date of taking cognizance by the magistrate.[22] "Under the provisions of the Protection of Women from Domestic Violence Act, 2005, it has to be decided with respect to the cause of action arising out of bundle of facts and not on the basis of isolated incidents. Cause of action would continue to subsist if the wife is driven out of the matrimonial house; has threat to her life; is not maintained or she has no money for upkeep of her children, which is subsisting even till date. In any event, the Court has the power to extend the period of limitation under the provisions of 473 of the Code of Criminal Procedure."[23]

In case of continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.[24] A continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury.[25] Continuing offence is a type of crime which is committed over a span of time.[26] The deprivation of *Stridhan* is continued over a span of time and thus held to be a continuing offence. Also, "Section 468 Cr.P.C refers to duration of the punishment to determine limitation. To invoke section 468 Cr.P.C, not only cognizance of the offence is required but it should refer to the punishment, on conviction, so as to determine the limitation. Section 12 of the Act of 2005 does not provide it to be a complaint requiring cognizance of the offence or duration of punishment while passing the order. In absence of the aforesaid, section 468 Cr.P.C. cannot be applied"[27] and hence the claim for *Stridhan* is not barred by limitation. Section 468 of Cr.P.C. has no application to the application under Section 12 of the Act of 2005.[28]

NEED OF A SENSITIVE APPROACH

As discussed in the aforesaid case, the courts are required to acquire a sensitive approach towards such kind of cases and it is the duty of the court to scrutinize the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is legally sound and correct. The courts must "keep in view the physical and mental conditions of the parties, their character and social status"[29]. The court viewed that "there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."[30] "The role of courts, under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner"[31] In the case of *Yama v. Ankit Manubhai Patel*[32], the court emphasizes on the fact that a more sensitive approach is required in such cases. The courts must be more vigilant in such type of cases and adjudicate on merit. The decision of the Apex court has thus established the application of domestic violence act even after judicial separation.

20 *Rule 15(6) of the Protection of Woman from Domestic Violence Rules*
21 *(2011) 12 SCC 588*
22 *Japani Sahoo vs Chandra Sekhar Mohanty, AIR 2007 SC 2762*
23 *Supranote 8*
24 *Section 472 of The Code of Criminal Procedure*
25 *Balakrishna Savalram Pujari Waghmare and Ors. v. Shree Dnyaneshwar Maharaj Sansthan and Ors, AIR 1959 SC 798*
26 *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath and Ors., (1991) 2 SCC 141*
27 *Pankaj Sharma and Ors. vs. Priyanka Sharma, 2015ALLMR(Cri)413*
28 *Shaikh Ishaq Budhanbhai vs. Shayeen Ishaq Shaikh & Ors, 2014 (10) RCR (Criminal) 640*
29 *A. Jayachandra v. Aneel Kaur, AIR2005SC534*
30 *Surinder Singh v. State of Haryana, AIR2014SC817*
31 *Kundula Bala Subrahmanyam and Anr. v. State of Andhra Pradesh, (1993) 2 SCC 684*
32 *2015(3)Crimes481(Guj.)*

DECRYPTION OF WILFUL DEFAULT

Raj Dutt & Priya Dhankhar

"*Willful Default*" means a conscious abstention by an obligor from doing that which reasonably and under the terms of the obligation he should have done. The words "willful default" do not mean ***negligence or carelessness***. The word willful means intentional and the word default means transgression. Willful default, as the term means more than involuntary, inadvertent, negligent, mistaken, careless, or accidental default. It means an intentional designing failure to do or not to do something required; an affirmative wrong.

Equally, according to the Reserve Bank of India ("***RBI***") master circular on wilful defaulters dated 1 July, 2015 ("***Master Circular on Wilful Defaulters***") a Wilful Default is deemed to have occurred in any of the following four circumstances (See Para 2.1.3 of the Master Circular on Wilful Default):

a. When there is a default in repayment obligations by the unit (company/individual) to the lender even when ***it has the capacity to honour the said obligations***. There is deliberate intention of not repaying the loan.

b. The Unit has defaulted in meeting its payment obligations to the lender and has ***not utilized the funds for the specific purpose*** **for which finance was availed but has** ***diverted for other purposes***.

c. The Unit has defaulted in meeting its payment obligations to the lender and ***the funds have been siphoned*** **off so that the funds have** ***not been utilized for the purpose*** **for which it was availed, nor are the** ***funds available with the unit in the form of other assets***. Thereby meaning, no assets are available which justify the usage of funds.

d. The Unit has defaulted in meeting its payment obligations to the lender and ***has also disposed off or removed the movable fixed assets or immovable property*** **given for the purpose of securing a term loan** ***without the knowledge of the Bank***.

In addition to the above the RBI has also mandated that the default to be categorized as wilful must be ***intentional***, ***deliberate*** **and** ***calculated***. **This is further substantiated by the view taken by the Hon'ble High Court of Madras in the case of Orchid Chemicals and Pharmaceuticals Limited v. K. Raghavendra Rao**[1].

Further, the Master Circular on Wilful Defaulters (See Para 2.1.3) also provides that the identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents.

As regards guarantors, the RBI has vide an amendment dated 09.09.2014, amended the provisions relating to the classification of guarantors as wilful defaulters. The Master Circular on Wilful Defaulters clearly provides for provisions to be followed in the case of Group Companies and for Non Group Corporate and individual guarantors.

As per the Master Circular on Wilful Defaulters, it is only in the case where the unit is a "willfully defaulting unit" that the corporate guarantor could be proceeded against by the lender for declaring as a Wilful Defaulter, subject of course to the condition that such corporate guarantor, despite having sufficient means to make payment, refuses to comply with the demand of the lender, the RBI has however failed to crystallize the term "*sufficient means*". The same is further substantiated by RBI's following statements, published in the print media (Business Standard) on 10 September 2014,

"Where a banker has made a claim on the guarantor ……. If this guarantor refuses to comply with the demand by the creditor or banker, despite having sufficient means to clear the dues, such a guarantor will also be treated as a wilful defaulter."

As per the Master Circular on Wilful Defaulters, as in the case of group companies, it is only in the case where the unit is a "willfully defaulting unit" that the Non group corporate/individual guarantor could be proceeded against by the lender for declaring as a Wilful Defaulter, subject of course to the condition that such individual/Non group corporate guarantor, despite having sufficient means to make payment,

1 *(2015)1MLJ162*

refuses to comply with the demand of the lender.

Most importantly, the Master Circular on Wilful Defaulters now clearly provides that such classification as wilful defaulter of Non Group Corporate Guarantors /Individual Guarantors would only be applicable prospectively, i.e. in the cases of guarantees provided after 9 September, 2014 and not to cases where guarantees were taken prior to this date.

Further, as regards directors, the Master Circular on Wilful Defaulters provides for different provisions for a non-promoter / non-whole time director as opposed to promoter director or an "officer in default" as defined under Section 2(60) of the Companies Act, 2013.

This differentiation in classification of directors as wilful defaulters has been bought about by the judgment of the Hon'ble High Court of Gujarat in the case of Ionic Metalliks v. Union of India[2], wherein the Hon'ble High Court opined that all the directors cannot be held liable for the default in the repayment of the loan which might be for varied reasons beyond the control of such directors. The Hon'ble High Court held that the classification of all directors of a willfully defaulting unit as "wilful defaulters" was a direct infringement on the right of such a director to carry on trade and business under Article 19(1)(g) of the Constitution of India, and shatters the concept of the identity of a company different and distinct from its directors without providing any safeguards. Thus, the provisions of the Master Circular on Wilful defaulters relating to classification of directors as wilful defaulters was held to be arbitrary, unreasonable, violative of Article 19(1)(g) of the Constitution of India, and as a result struck down.

Following the decision of the Hon'ble High Court of Gujarat, the RBI Master Circular on Wilful Defaulters now clearly states that "*except in very rare cases, a non-whole time director should not be considered as a wilful defaulter*". The RBI Master Circular on Wilful Defaulter clearly demarcates the rare situations in which a non-whole time Director can be considered as a wilful defaulter as:

a. He was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or,

b. The wilful default had taken place with his consent or connivance.

Further, the Master Circular on Wilful Defaulters also provides the mechanisms for identification of wilful defaulters by any bank/lender. The Master Circular on Wilful Defaulters casts the responsibility primarily and solely on the banks. The lender/bank must not misuse its powers or discretion. The banks/lenders are responsible for putting in place a transparent mechanism for classifying a unit as a wilful defaulter. The Master Circular on Wilful Defaulters makes the banks responsible for not misusing the penal provisions and limits the scope of the discretionary powers of the bank to the barest minimum (See Para 2.5).

A lender/bank should have evidence of wilful default on the part of the company/unit, which should be duly examined. The examination of the evidence of wilful default on the part of the company/unit (in possession of the bank/lender at the relevant time) must be by a Committee (as stated in the Master Circular).

The Master Circular on Willful Defaulters contemplates a two stage enquiry by banks and financial institutions in identifying and reporting instance of wilful defaults. The first stage contemplates that a decision to classify a borrower as a wilful defaulter is entrusted to a committee of "Higher Functionaries" headed by the Executive Director and consists of two General Managers / DGMS as may be decided by the Board of the bank or financial institution. The object of entrusting the decision to a committee of higher functionaries is with a view to imparting objectivity in identifying cases of wilful default. The circular requires that a decision taken on classification of willful defaulters should "be well documented and supported by requisite evidence". The decision has to "clearly spell out the reasons for which the borrower has been declared as a willful defaulter vis a vis RBI guidelines". The circular, also postulates that after the committee makes a preliminary decision regarding borrowers wilful default, the borrower should be suitably advised about the proposal to classify him as a wilful defaulter along with the reasons in support thereof.

The initial decision on the classification of an entity as a wilful defaulter has to be objective and has to be well

2 *2015GLH(2)156*

documented and supported by requisite evidence. The reasons on the basis of which the borrower has been declared as a wilful defaulter in relation to the guidelines of the Reserve Bank of India have to be spelt out. It is this decision of the committee in the first stage that forms the basis of the intimation that is furnished to the borrower at the second stage of the proposal to classify him as a wilful defaulter. Therefore in the second stage, the borrower has to be informed of the proposal along with the reasons in support thereof. Otherwise the opportunity granted to make a representation would not hold any meaning or relevance.

It is trite law that the bank is obligated to provide the materials on which it relies, so that the unit can meet with the same. The acts and omissions by the bank in failing to provide such materials amount to violation of the principles of natural justice.

It is settled law, that mere failure on the part of the borrower to repay the amount of loan by itself does not entail the liability of being termed as "willful default" and thereby a "willful defaulter". Further, the bank ought to have material on the basis of which it proposes to classify the unit as a wilful defaulter and the same should be prima facie disclosed to the unit so that it can make good its case. For example, if it is the case of the bank that there is adequate cash-flow and good net-worth and despite that the unit has failed in the repayment of the loan then the bank is obligated to disclose the source of information regarding the adequate cash-flow and good net-worth.[3]

Further, it is also settled law that a show cause notice bereft of basic details, material particulars, reasoning, evidences, solid allegations, and precision and clarity deserve to be quashed and set aside. A bank should also furnish and disclose to the unit the evidence of wilful default on the part of the unit as available with the bank at the relevant time; the documents, papers and materials available with the committee at its meeting; and the date, records and proceedings pertaining to the meeting of the committee including its minutes for each hearing related to the unit.

CONCLUSION:

Thus, contrary to popular belief, the Master Circular on Wilful Defaulters issued by the RBI is not unconscionable or unjust. The RBI has tried to create a balance between the securing the interests of the banks as well as the interests of the borrowers. However, in today's scenario, it is one of those peculiar cases where all the efforts of RBI in securing this balance could be lost during implementation or due to non-awareness.

3 *Ionic Metalliks v. Union of India 2015GLH(2)156*

SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

DOCTRINE OF FOREIGN EQUIVALENTS: A PRAGMATIC APPROACH

Himanshu Sharma

"A different language is a different vision of life": Federico Fellini

Language is the mirror through which you can see and learn the soul of a nation. Language breaks the barriers of communication and establishes an atmosphere where the welfare of people flourishes. Language may also some time create confusion as in the case of trademark registration where there are various words which may be generic in one language and applied for registration in a country where people are not familiar with the language or vice versa. In this kind of a situation the doctrine of foreign equivalent comes into picture wherein foreign words from common languages are translated into English to determine the genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks.

THE USE OF DOCTRINE IN US:

The doctrine is prevalently used time and again by US Courts when questions are raised regarding the registration of trademarks in a foreign language.

In ***Palm Bay Imports, Inc v. Veuve Clicquot Ponsardin Maison Fondee EN 1772***[1], *in the original case the Board held that Palm Bay's VEUVE ROYALE was confusingly similar to VCP's mark THE WIDOW, in part because under the doctrine of foreign equivalents, an appreciable number of purchasers in the U.S. speak and/or understand French, and they "will translate" applicant's mark into English as "Royal Widow."*

In appeal Court held that "Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks. When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, the doctrine of foreign equivalents will not be applied".

The court however, affirmed the Board's decision that a likelihood of confusion exists between the applicant's VEUVE ROYALE mark and the opposer's marks VEUVE CLICQUOT PONSARDIN and VEUVE CLICQUOT and affirmed the Board's refusal to register Palm Bay's VEUVE ROYALE mark.

The above case is an example of a situation wherein the trademark applied was not a generic word in the language in which it is applied, and customers can translate the word in English and get confused.

WORDS WHICH ARE GENERIC IN ONE LANGUAGE:

Apart from the above mentioned situation there may also be a situation wherein a word which is generic in one language is applied for registration in a country where a different language is used by the people of that country. The businesses today are not country centric but are planned for international expansion when opportunity arrives. Therefore to tackle the problems which may arise in future by the use of generic words as trademark in different languages the courts have adopted a separate view in these cases.

In ***Otokoyama Co. v. Wine of Japan Import Inc***[2]., in the original suit for injunction the U.S. District Court for the Southern District of New York rejected the contention of the defendant that the word Otokoyama is a generic term in Japanese language and hence not capable of being registered as a trademark. The trial court also refused to consider evidence that the Japanese trademark office had denied trademark protection for the plaintiff's mark, based on the generic nature of the word otokoyama and provided injunction to Plaintiff against the use of trademark by the defendant. The defendant appealed to the US Court of Appeals for the Second Circuit, stating that the trial court's decision in both instances was in error. The US Court of Appeals for the Second Circuit vacated the preliminary injunction, declaring that the validity of the plaintiff's trademark was cast into doubt by evidence that the underlying term was generic in Japan.

The circuit court held that *"the same rule applies when*

1 *396 F.3d 1369 (2005)*

2 *175 F.3d 266 (1999)*

the word designates the product in a language other than English. This extension rests on the assumption that there are (or someday will be) customers in the United States who speak that foreign language.".…. "[b]ecause of the diversity of the population of the United States, coupled with temporary visitors, all of whom are part of the United States' marketplace, commerce in the United States utilizes innumerable foreign languages. No merchant may obtain the exclusive right over a trademark designation if that exclusivity would prevent competitors from designating a product as what it is in the foreign language their customers know best.".…… "Courts and the U.S. PTO apply this policy, known as the doctrine of 'foreign equivalents,' to make generic foreign words ineligible for private ownership as trademarks……..

The US Court of Appeals for the Second Circuit further held that *"Whether a foreign decision is relevant in a trademark case in our courts depends on the purpose for which it is offered. The fact that a litigant has been awarded or denied rights over a mark in a foreign country ordinarily does not determine its entitlement to the mark in the United States. The foreign court decision is not admissible if that is the purpose of the offer. But if . . . the foreign decision is competent evidence of a relevant fact, it is relevant and admissible to prove that fact." The defendant had offered the Japanese Patent Office's decision to prove that the word otokoyama in Japanese refers to a type of sake. The circuit court held that it was error for the district court to have excluded the Japanese Patent Office's decision, under these circumstances.*

Therefore a completely different approach is adopted by the courts in cases where a trademark applied is generic in a language different from the one used in the country where it is applied for registration. In these cases courts are of the view that a word which is generic in nature and is the only way to describe a product even though in a different language even then the monopoly rights cannot be given to anybody. It will certainly hamper the business of others as they would not be able to describe there products with that word.

INDIAN PERSPECTIVE:

In India the doctrine is not used in many cases but the same has been borrowed by the Indian Courts whenever a similar question is raised regarding the registration and infringement of trademarks.

In the case of ***Aktiebolaget Volvo of Sweden vs . Volvo Steels Ltd . of Gujarat (India) (MANU/MH/0076/1997)*** the Hon'ble High Court of Mumbai had discussed the doctrine and its application in the following terms.

The dispute in this case was regarding the use of the trademark VOLVO by the defendant. One of the contention of the defendant in favour of adoption of the mark was that the word 'Volvo' is not an invented word of the plaintiffs' being a Latin word meaning 're-rolling', 'to roll up', 'to roll together' and 'form by rolling' and since the defendants' products were ultimately to be used for rolling the word 'Volvo' was selected by the defendants as part of their corporate name.

The Hon'ble High Court of Bombay applied the doctrine of foreign equivalent and discussed the same as below:

Under the 'doctrine of foreign equivalents', foreign words are translated into English and then tested for descriptiveness or genericness. However, the 'doctrine of foreign equivalents' is not an absolute rule, for it does not mean that words from dead or obscure languages are to be literally translated into English for descriptive purposes. The test is whether, to those buyers familiar with the foreign language, the word would have a descriptive connotation. Foreign words from dead languages such as Classical Greek, or from obscure languages such those of the Hottentots or Patagonisans might be so unfamiliar to any segment of the buying-public that they should not be translated into English for descriptive purposes. However, words from modern languages such as Italian, French, Spanish, German, Hungarian, Polish etc. will be tested for descriptiveness by seeing whether the foreign word would be descriptive to that segment of the purchasing public which is familiar with that language."

Further it was held that "A rigid, unthinking application of the 'doctrine of foreign equivalents' can result in a finding quite out of phase with the reality of customer perception. The doctrine should be viewed merely as a guideline and applied only when it is likely that the ordinary purchaser would stop and translate the word into its English equivalent. Thus, use of a term such as 'LA POSADA motor hotel' would not be generic or descriptive even though 'la posada' is roughly equivalent to the English word 'the inn'.

If the foreign word is very similar to its English equivalent such as OPTIQUE for eyeglass, AROMATIQUE for toilet water or SELECTA for beer, it would be descriptive under the rationale of the misspelling rule. Or, for some products, customers are familiar with an often used foreign term,

such as 'Blanc' for white wine and champagne. Similarly, if the product is specifically directed to an ethnic customer group in the United States, such customers may be likely to take the foreign word in its original meaning such that translation for trade mark purposes is appropriate. Thus, if canned ham is directed at a Polish speaking market, use of the phrase MARKA DOBRA SZYNKA meaning mark of a good ham would be treated as descriptive."

On the basis of the above discussion the court rejected the contention of the defendant and provided relief to the plaintiff.

The doctrine is used in cases where the words applied for trademark registration are from the language known by the contemporary society and not for words which are from ancient and extinct languages. It is not a general rule to use this doctrine in all cases and it is to be used when there is likelihood that the customers may translate the world easily and get confused with the meaning of the word in English.

CONCLUSION:

On the basis of the above discussion and cases we can conclude that the doctrine of foreign equivalents is to be used on the basis of facts and circumstances of each case. It should not be used as a general rule and should not be applied blindly in each and every case. The first and foremost criterion for applying the doctrine is to look into the knowledge of the consumer of the area where the mark is to be applied. If the people know the language and can translate the trademark then the question of likelihood of confusion is to be considered. In case the word in question is generic in one language and is only one expression by which the goods can be acknowledged then the protection may not be provided even if the language is not know to the people of the country. Further with the liberalization and migration of people, there is likelihood that the population of a country certainly contains people from different countries knowing different languages hence the possibility of confusion may arise.

PAYMENT BANKS: THE NEW FACET OF BANKING SYSTEM IN INDIA

Shivam Hargunani

INTRODUCTION:

Amidst the conventional players in the banking system of India which are commercial banks, scheduled banks, non-scheduled banks, regional rural banks and co-operative banks, a new kind of banking network is on the rise. The Committee on Comprehensive Financial Services for Small Businesses and Low Income Households (Chairman: Dr. Nachiket Mor) in its report released in January 2014[1] examined the issues relevant to payment network and universal access to savings and recommended the licensing of payment banks to offer financial services to the hitherto excluded segments of the population. On 19th August, 2015, the Reserve Bank of India (RBI) granted "in principle" approval[2] to the following 11 applicants to set up payments banks under the Guidelines for Licensing of Payments Banks issued on 27th November, 2014:

1. Aditya Birla Nuvo Limited
2. Airtel M Commerce Services Limited
3. Cholamandalam Distribution Services Limited
4. Department of Posts
5. Fino PayTech Limited
6. National Securities Depository Limited
7. Reliance Industries Limited
8. Shri Dilip Shantilal Shanghvi
9. Shri Vijay Shekhar Sharma
10. Tech Mahindra Limited
11. Vodafone m-pesa Limited

The "in-principle" approval granted by RBI will be valid for a period of 18 months, during which time the applicants have to comply with the requirements under the Guidelines and fulfill the conditions as may be stipulated by the RBI. The applicant entities were examined on the basis of their financial track record and governance issues.

IMPLICATIONS OF THIS APPROVAL:

This is the first time since banks were nationalized, that private sector business groups have been able to get RBI's approval for banking services.

The RBI statement also said that "going forward, the Reserve Bank intends to use the learning from this licensing round to appropriately revise the Guidelines and move to giving licenses more regularly, that is, virtually "on tap". The Reserve Bank believes that some of the entities, who did not qualify in this round, could well be successful in future rounds".

The RBI issued draft guidelines for licensing of payments banks on 17th July, 2014[3], finalized guidelines on 27th November, 2014[4], and clarifications on the guidelines on 1st January, 2015[5].

The RBI in its statement also said that "on being satisfied that the applicants have complied with the requisite conditions laid down by it as part of "in-principle" approval, the Reserve Bank would consider granting to them a license for commencement of banking business under Section 22(1) of the Banking Regulation Act, 1949. Until a regular license is issued, the applicants cannot undertake any banking business." The RBI received as many as 41 applications to set up payments banks.

The payment banks, soon to be established, will be permitted to acknowledge and raise deposits of amount up to Rs 1 lakh and pay interest on such amount. Be that as it may, payment banks, although not permitted to lend or issue credit cards, can provide debit cards

1 *Available at: https://rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=727.*

2 *Available at: https://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=34754.*

3 *Available at: https://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=31646.*

4 *Available at: https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=32615.*

5 *Available at: https://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=32911.*

(effectively providing connectivity to ATM networks of all banks) and internet banking facilities.

Further, payment banks are also allowed to access payment gateways and process cross-border remittances that are in the nature of personal payments and current account remittances. Additionally, payment banks can enable transfers and offer services such as usual payments of bills, and purchases in cashless transactions through mobile phone. Hence, a user of such services would be able to transfer his money directly to bank accounts at nearly no cost being a part of the gateway that connects banks. Therefore, the RBI anticipates that payment banks will enable every Indian to have a bank account by providing low transaction costs. RBI places its trust on technical advancement and hopes to introduce such people, who are devoid of any formal bank account, to the modern banking system of India.

The state will be one of the greatest recipients of benefits from the payments banking system as banks are the chief investors in government bonds. Anticipating low costs due to introduction of payment banks is also justified due to the significant force of intense competition in providing banking services. This would prove to ensure quality in services and consequentially would be very beneficial for the customers.

Although, there are certain obvious challenges that may be faced by the payment banks as well. According to the Intermedia's Financial Inclusion Insights' (FII) survey report of 2014 on Financial Services Use and Emerging Digital Pathways, "across all demographic groups the majority of people use cash for a range of transactions including grocery payments, paying utility bills and school fees, buying airtime top-ups for mobile phones, and sending and receiving money for support and allowances". The report further goes on to say that, "Regardless of demographic or geographic groups, money for regular support and allowances is largely received in cash and delivered personally, or by friends and relatives". As per the above mentioned report, "The majority also receive their wages for primary jobs in cash – although, in the most populated cities of India, between 13 and 31 percent said they receive their wages through direct deposit to their bank accounts". Another highlight of the FII survey report is that, "Respondents said the most important advantages of cash are easy access and its utility for making regular transactions; although they do acknowledge maintaining their funds in cash increases the risk of theft, encourages higher spending and inhibits saving. Although 82 percent consider cash to be the best tool for small to medium transactions, for large transactions, banks are preferred by 59 percent. However, for 28 percent, cash is the best tool even for large transactions."[6]

CONCLUSION:

Wallet transactions may rise significantly with the introduction of payment banks. Mobile banking enables the users to utilize the service of cash-less banking. In such transactions, the mobile phone of the user will act as a debit or credit card, removing the need for cash payments.

Consequently, in the long-run, RBI also hopes to eliminate black money in the financial system.
Providing licenses to payment banks is a huge step forward for the Indian banking system and it will be essential for the government to provide a regulatory framework that helps payments banks to exist peacefully and ensure the trust of consumers which is another barrier in itself to pass. Payment banks may gain significant market share if they are sufficiently innovative and provide better customer service than the public sector banks. Payment banks are expected to revolutionize the banking system of the country. Hence, mobile wallets may be the future of retail banking.

6 *Available at: http://finclusion.org/wp-content/uploads/2014/05/FII-India-Wave-One-Research-Report.pdf.*

LIMITED LIABILITY PARTNERSHIP VERSUS TRADITIONAL PARTNERSHIP

By Mansi Chaturvedi

INTRODUCTION

Today, many people before commencing their own business ventures have to face a very difficult question of how to structure the venture. Should they opt for a simple traditional partnership, or for a limited liability partnership (LLP). This is often a very confusing situation. One must remember that every business has to be judged based on its dynamics before the structure is chosen. Over the past few of years, LLP has gained a lot of popularity among entrepreneurs because of its numerous advantages. This article covers a comparative study between the structure of a LLP and a simple traditional partnership structure while assessing their applicability.

INDIAN PARTNERSHIP ACT, 1932

As per the Indian Partnership Act, 1932, "***Partnership***" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The relation of partnership is created by contract. The general duties of the partners are to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner, his heir or legal representative. Every partner of a simple traditional partnership has to indemnify the firm for any loss caused to it by his fraudulent conduct in the course of the business of the firm. The mutual rights and duties of the partners of a firm are determined by a contract between the partners, and such contract may be express or implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or implied by a course of dealing. Every partner of a simple traditional partnership firm is liable jointly with all the other partners and also severally, for all the acts of the firm done while he is a partner of the firm. The partners of a partnership firm continue to be liable even after the dissolution of the firm to third parties for any act done by any of them which would have been an act of the firm, if done until public notice is given for the dissolution of the firm. All the losses of a partnership firm including deficiencies of capital are to be paid first out of profits of the partnership firm, then out of the capital of the partnership firm, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits of the firm.

LIMITED LIABILITY PARTNERSHIP ACT, 2008

Limited liability partnership entities are a world wide recognized form of business organization introduced in India by way of the Limited Liability Partnership Act, 2008. A limited liability partnership, popularly known as LLP combines the advantages of both a company and a partnership into a single form of organization. LLP is an alternative corporate business form that gives the benefits of the limited liability of a company and the flexibility of a partnership. Section 2(q) of the Limited Liability Partnership Act, 2008 defines "***Partner***", in a limited liability partnership, as any person who becomes a partner in a limited liability partnership in accordance with a limited liability partnership agreement. A LLP is considered as a separate legal entity and any change in the partners of a LLP does not affect the existence, rights or liabilities of the LLP. For incorporation of a LLP, an application form in the manner of Form-2 is be filled with the Registrar of Companies. Every LLP is required to have at least two designated partners who are individuals and atleast one of whom is a resident of India. An individual may only become a designated partner in a LLP with his prior consent to act as such to the LLP by filing Form 9. A LLP has to file Form 4 (details of the Designated Partner) along with the fee mentioned therein, with the Registrar within 30 days of the appointment of an individual as a designated partner. A designated partner has to obtain a Designated Partner Identification Number (DPIN) by filling an application electronically (in the manner of Form 7) to the Central Government and after obtaining the provisional DPIN, the applicant has to submit the physical copy of the application along with documentary evidence to get a regular DPIN within 60 days from the date of obtaining the provisional DPIN. As per the Limited Liability

Partnership Act, 2008, a designated partner is liable for all acts, matters, and things as are required to be done by the LLP in respect of compliance of the provisions under the Limited Liability Partnership Act, 2008, and also liable for all penalties imposed on the LLP for any contravention of the provisions of the Limited Liability Partnership Act, 2008.

The mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners, are governed by the Limited Liability Partnership Agreement entered into between the partners of the LLP, or between the LLP and its Partners, as the case may be. A partner of a LLP is not personally liable, directly or indirectly for an obligation of the LLP whether arising in contract or otherwise, and shall be liable for the obligation of the LLP by reason of being a partner of the LLP, however, a partner shall not be personally liable for the wrongful acts or omissions of any other partner of the LLP.

Only partners who act with the intent to defraud creditors or for any fraudulent purpose have an unlimited liability for all or any of the debts or other liabilities of the LLP and such partners or designated partners of such LLP are liable to compensate the loss or damage caused to any person by virtue of such acts and/or omissions. The obligation of a partner to contribute money or other property or other benefit or to perform services for a LLP is as per their Limited Liability Partnership Agreement.

CONCLUSION

In the current scenarios the major concern of many people is related to regulations and accounts. People choose to form a simple traditional partnership as they do not want the additional burden of the legal regulations and secretarial norms that come along with forming a LLP. A traditional partnership is easier from a regulatory point of view, however, all the basic procedures such as getting a Service Tax / VAT registration, a PAN & TAN Card, opening a fresh bank account, and an IEC still have to be complied with, even if in the case of a simple traditional partnership. Additionally, if a person's income is above the taxable limit, he/she needs to file tax returns irrespective of whether he/she opts for a simple partnership or a LLP.

Thus, if a person wants to enter into a partnership registered under the provisions of the Indian Partnership Act, 1932, the partner's rights and liabilities are determined by the mutually agreed terms and conditions of their contract and such rights and liabilities upon the mutual agreement may be restricted. However, a partner of a traditional partnership firm is jointly and severally liable for the all the acts and liabilities of the firm. Further, the loss of a partnership firm is compensated as per the percentage of shareholdings of the respective partners in the Firm. To enter into a partnership, the partnership deed is to be registered with the registrar as per the Indian Partnership Act, 1932.

Whereas, by entering in to a limited liability partnership agreement, the partner of a LLP shall only be liable for the acts agreed under the LLP Agreement. The partner of a LLP shall not be jointly and severally liable for the acts of the LLP and/or the other partners of the LLP; unless the said wrongful act is conducted by the partner himself or has indulged into any activity having any fraudulent purpose. Although, for the Incorporation of a LLP, several forms need to be filed with the Registrar and certain licenses are to be obtained as mentioned herein above. Therefore, if a person wants to enter into a partnership and does not want to attract any liability for any act of the other partners, the suitable recourse would be to opt for a LLP.

NEWSBYTES

FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF ANY FOREIGN SECURITY) (AMENDMENT) REGULATIONS, 2015

The Reserve Bank of India issued notification no. FEMA 359/2015-RB [G.S.R. 921(E), dated 2-12-2015], whereby it has amended Regulation 21 of Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 (Notification No. FEMA 120/2004-RB dated July 7, 2004).

The Regulation 21 provides for prohibition on issue of foreign security by a person resident in India, save as otherwise provided in the FEMA or in sub regulation 2 of regulation 21. The RBI has now amended the sub regulation 2(ii) and a proviso has been inserted after regulation 21(2)(ii), as provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, change / prescribe for the automatic as well as the approval route of FCCBs, any provision or proviso for issuance of FCCBs. FCCBs beyond US $ 500 million by a person resident in India.

Similarly, an insertion has been done after sub regulation 2(iii) provided that under these Regulations, the Reserve Bank may, in consultation with the Government of India, change / prescribe any provision or proviso for issuance of FCEB's.

FOREIGN EXCHANGE MANAGEMENT (BORROWING OR LENDING IN FOREIGN EXCHANGE) (AMENDMENT) REGULATIONS, 2015:

The Reserve Bank of India issued notification no. FEMA 358/2015-RB [G.S.R. 920(E), dated 2-12-2015], whereby it has amended Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB dated 3rd May 2000).

The Reserve Bank amended Schedule I which deals with conditions w.r.t borrowings in foreign exchange under automatic route whereby it may now, in consultation with the Government of India, prescribe any provision or proviso regarding various parameters listed in Schedule I or any other parameter as prescribed by the Reserve Bank. Further, while prescribing such parameter it will also prescribe the date from which any or all of the existing proviso will cease to exist, in respect of borrowings from overseas, whether in foreign currency or Indian Rupees, such as addition/ deletion of borrowers eligible to raise such borrowings, overseas lenders/investors, purposes of such borrowings, change in amount, maturity and all-incost, norms regarding security, pre-payment, parking of ECB proceeds, reporting and drawal of loan, refinancing, debt servicing, etc.

Similarly, the Reserve Bank also amended Schedule II which deals with conditions w.r.t. Borrowing s in Foreign exchange under the approval route whereby it may now, in consultation with the Government of India, prescribe for the approval route, any provision or proviso regarding various parameters listed in Schedule II or any other as it deems fit.

FOREIGN PORTFOLIO INVESTORS (FPIS) HAVE BEEN ALLOWED TO BUY CORPORATE BONDS

The Reserve Bank of India issued A.P. (DIR Series) Circular No.31 RBI/2015-16/253, dated November 26, 2015, wherein the Foreign Portfolio Investors (FPIs) have been allowed to buy NCDs/bonds that are either fully or partially under default in repayment of principal on maturity or principal installment in the case of amortizing bond. RBI said that the revised maturity period of such NCDs/bonds, restructured based on negotiations with the issuing Indian company, should be three years or more. All future investments by Foreign Portfolio Investors (FPI) in NCDs/bonds shall now be required to be made in securities with a minimum residual maturity of three years.

The FPI which proposes to acquire such NCDs/bonds under default should disclose to the Debenture Trustees the terms of their offer to the existing debenture holders/beneficial owners from whom they are acquiring. Such investment should be within the overall limit prescribed for corporate debt from time to time (currently Rs. 2443.23 billion). All other existing

conditions for investment by FPIs in the debt market remain unchanged.

IPR TIDBITS

- Recently the Department of Industrial Policy & Promotion (DIPP) has released a new set of draft rules amending the Patent Rules, 2003 for public comments. It is interesting to note that DIPP has introduced various amendments in the Patent law where the most important are in the patent working rules and the new draft rules (Rule 24C) provides for an expedited examination of applications on a few grounds, the most prominent of them being connected to manufacturing in India.

- Recently, the Appointments Committee of the Cabinet issued a notice appointing Shri. Om Prakash Gupta as the new Controller General of Patents, Designs and Trademarks (CGPDTM) (JS Level), Mumbai for a period of five years from the date of assumption of charge of the post or until further orders, whichever is earlier vice Shri. Chaitanya Prasad. Shri. Om Prakash Gupta would be succeeding Shri. Rajiv Aggarwal who had additional charge since March 2015. Shri. Om Prakash Gupta is from the 1992 IAS Batch and was previously the General Manager, B.E.S.T, Mumbai.

DRAFT TRADEMARKS (AMENDMENT) RULES, 2015 BY THE CGPDTM

Recently, the CGPDTM (Controller General of Patents, Designs and Trademarks) issued a notification publishing the Draft Trademarks (Amendment) Rules, 2015 and inviting comments and suggestion from the public with respect to the same. The provisions of the draft include many important changes that will be brought in the fields of trademarks in case the rules are enforced. The rules contain substantial changes in the procedural law applicable to the registration of trademarks. Additionally, the new rules also propose to change the Form nos. and the requisite fees. For e.g., currently the official fees for filing an application for registration of a trademark in a single class is INR 4000, which as per the notification dated 14th August, 2014 is proposed to be increased to INR 8000/- in the draft rules. We now look forward for the final draft and the amended rules which would be enforced by the MINISTRY OF COMMERCE AND INDUSTRY (DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION) after analyzing the suggestions and comments of the public.

DRAFT TRADEMARKS (AMENDMENT) RULES, 2015 BY THE CGPDTM

Recently, the CGPDTM (Controller General of Patents, Designs and Trademarks) issued a notification publishing the Draft Trademarks (Amendment) Rules, 2015 and inviting comments and suggestion from the public on the same. The provisions of the draft include many important changes that will be brought in the fields of trademarks in case the rules are enforced. The rules contain substantial changes in the procedural law applicable in the registration of trademarks. Apart from the same, the new rules will also change the Form nos. and the requisite fees as well. For e.g. the official fees for filing an application for registration of a trademark in single class which was INR 4000 after the notification dated 14th August, 2014 has been increased to INR 8000/- in the draft rules. We now look forward for the final draft and the amended rules which would be enforced by the MINISTRY OF COMMERCE AND INDUSTRY (DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION) after analyzing the suggestions and comments of public.

RBI ISSUES NOTIFICATION AMENDING THE REGULATIONS REGARDING PERMISSIBLE CAPITAL ACCOUNT TRANSACTION.

By FEMA NOTIFICATION NO. 345/2015-RB, Dated: November 16, 2015. The Reserve Bank of India has broaden the meaning of the term "*real estate business*" under the **Foreign Exchange management (Permissible Capital Account transaction) Regulations, 2000** which now for the purpose of these regulations shall also include within its meaning Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

RBI ISSUES NOTIFICATION AMENDING THE REGULATIONS REGARDING TRANSFER OR ISSUE OF

SECURITIES BY A NON-RESIDENT.

By FEMA NOTIFICATION NO. 345/2015-RB, Dated: November 16, 2015. The Reserve Bank of India has made the following amendments to the **Foreign Exchange management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000;**

1. Clause "*(iig)*" has been added in regulation 2 defining *"Investment Vehicle*" as entities registered & regulated under SEBI regulations which shall include Real Estate Investment Trust (REITs) governed by the SEBI REITs Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012

2. Clause *"(xi A)"* has been added in regulation 2 defining *'Unit"* as beneficial interest of an investor in an investment vehicle which shall include shares or partnership interests.

3. Clause "*(10)"* has been added in regulation 5 which states A person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh), including an Registered Foreign Portfolio Investor (RFPI) or a non-resident Indian (NRI) may acquire, purchase, hold, sell or transfer units of an Investment Vehicle.

4. The words *shares or convertible debentures or warrants, and shares or convertible debentures or warrants of an Indian company* have been substituted by shares or convertible debentures or warrants of an Indian company or units of an Investment Vehicle. This substitution shall have no effect in the qualification clause of Regulation 9(1) beginning with *"Further"* and ending with *"subject to lock-in period requirement".*

5. Clause "(vi)*"* has been added in regulation 12 a non-resident who holds units of an Investment Vehicle, may pledge such units to secure credit facilities being extended to the non-resident investor.

Schedule 11 has been added, it provides the following conditions for Investment by a person resident outside India in an Investment Vehicle (IV).

1. The payment shall be made by an inward remittance through the normal banking channel.

2. A person who has acquired or purchased units in accordance with this Schedule may sell or transfer in any manner as per regulations framed by SEBI or directions issued by RBI.

3. Downstream investment by an IV shall be regarded as foreign investment if neither the Sponsor nor the Manager nor the Investment Manager (IM) is Indian 'owned and controlled' as defined in Regulation 14 of the principal Regulations.

    a. Provided that for sponsors or managers or investment managers organized in a form other than companies, SEBI shall determine that whether it is foreign owned and controlled or not.

    b. Explanation 1: Ownership and control is clearly determined as per the FDI policy. 'Control' of the AIF should be in the hands of 'sponsors' and 'mangers/ investment managers'. In case the 'sponsors' and 'managers/investment managers' of the AIF are individuals, for the treatment of downstream investment by such AIF as domestic, 'sponsors' and 'managers/investment managers' should be resident Indian citizens. As ownership and control cannot be determined in LLP under the extant FDI policy, a LLP shall not act as sponsor or manager/investment manager.

    c. Explanation 2: The extent of foreign investment in the corpus of the IV will not be a factor to determine as to whether downstream investment of the IV concerned is foreign investment or not.

4. Downstream investment by an IV that is reckoned as foreign investment shall have to conform to the sectoral caps and conditions / restrictions, if any, as applicable to the company

in which the downstream investment is made as per the FDI Policy or Schedule 1 of the principal Regulations.

5. Downstream investment in an LLP by an IV that is reckoned as foreign investment has to conform to the provisions of Schedule 9 of the principal Regulations as well as the extant FDI policy for foreign investment in LLPs.

6. An AIF Category III with foreign investment shall make portfolio investment in only those securities or instruments in which a Registered Foreign Portfolio Investor is allowed to invest under the principal Regulations.

7. The IV receiving foreign investment shall be required to make such report and in such format to RBI or to SEBI as may be prescribed by them from time to time.

AMENDMENTS IN CONSOLIDATED FDI POLICY, 2015 AS PER DIPP PRESS NOTE DATED NOVEMBER 24, 2015

The Government of India, Ministry of Commerce and Industry, Department of Industrial Policy & Promotion (DIPP) (FC-I Section) has vide its Press Note no. 12/2015 dated 24.11.2015 has amended various provisions of Consolidated FDI Policy Circular of 2015 (FDI Policy) dated 12th May 2015. The amendment issued vide the said Press Note is as follows:

1. **Introduction of Definition of Manufacture:**

   - In Regulation 2 of the FDI Policy, the definition of Manufacture has been added before the definition of Limited Liability Partnership, i.e. in Regulation 2.1.25, Manufacture is defined as "Manufacture, with its grammatical variations, means a change in a non-living physical object or article or thing-(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct objet or article or thing with a different chemical composition or integral structure.

   - Accordingly Change in 6.2.5: The provision regarding Manufacturing of items reserved for production in Micro and Small Enterprises (MSEs) has been amended and now it states that FDI in manufacturing is allowed upto 100% through automatic route also that the manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce without Government approval.

2. **Changes w.r.t Limited Liability Partnership (LLP)**

   - Change in 3.2.5, Now FDI is permitted under the automatic route in LLPs subject to the conditions which include the following:

     - FDI is permitted under the Automatic route in LLPs operating in sectors/ activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance condition. Earlier FDI in LLPs was allowed through government route only.

     - An Indian Company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under Automatic Route and there are no FDI-linked performance conditions;

   - Change in 2.1.7: Definition of "Control" is amended and now the present definition of *'Control'* will be read as "Control, shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements.

     Further, in case of LLP, "Control" will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP.

   - Similarly there are Changes in 2.1.28: Definition of "Owned" is amended and now the present

definition of "Owned" will be read as, a Company is considered as "Owned" by resident Indian Citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian Companies, which are ultimately owned and controlled by resident Indian Citizens.

Further, in case of LLP, it will be considered as owned by resident Indian citizens if more than 50% of the investment in such an LLP is contributed by resident Indian Citizens and/or entities which are ultimately 'owned and controlled by resident Indian Citizens' and such resident Indian Citizens and entities have majority of the profit share.

- Change in 3.10.4.2: The conditions provided for Downstream Investments under this clause were only applicable for Indian companies but now the same conditions have been extended to LLPs.

3. **Change w.r.t foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian companies (regardless of its ownership or control):**

   - Change in 3.10.3.3: Earlier Government approval was needed for infusion of foreign investment into an Indian Company which does not have any operations and also does not have any downstream investments, regardless of the amount or extent of foreign investment. The said Regulation is now has been amended and accordingly , For undertaking activities which are under automatic route and without FDI linked performance conditions, Indian Company which does not have any operations and also does not have any downstream investments, will be permitted to have infusion of foreign investment under automatic route. However, approval of the Government will be required for such companies for infusion of foreign investment for undertaking activities which are under Government route, regardless of the amount or extent of foreign investment. Further, as and when such a company commences business(s) or make downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

Change w.r.t Swap Shares

- Change in 3.5.6: Now Government approval is not required for investment in automatic route sectors.

4. **Addition of new Para after Para 3.1.3 of the FDI policy**

   - "A company, trust and partnership firm incorporated outside India and owned and controlled by non resident Indians can invest in India with special dispensation as available to Non-resident Indians under the FDI policy"

5. **Changes in Guidelines for establishment of Indian companies/ transfer of ownership or control of Indian companies, from resident Indian citizens to non-resident entities, *in sectors with caps*.**

   - Change in 3.6.2:

     - Words *"in sectors with caps"* has been replaced by *"in sectors under government approval route"*, meaning thereby the guidelines will only be applicable to sectors under government approval route only.

     - The whole paragraph beginning and ending with *"In sectors/activities…… Government approval/FIPB approval would be required in all cases where"* has been replaced by *"foreign investment in sectors/activities under government approval route will be subject to government approval where"*

     - A company, trust and partnership firm incorporated outside India and owned and controlled by non-resident Indians or an investment by NRIs will be eligible for investment under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations will be deemed to be

domestic investment at par with the investment made by residents.

6. **Changes w.r.t levels of Approvals for Cases under Government Route**

   - Change in 5.2: w.r.t to condition requiring foreign equity inflow of and below Rs. 2000 Crores, Rs. 2000 Crores has been substituted with Rs.5000 Crores.

7. **Changes w.r.t Plantations**

   - Change in 6.2.2:Coffe plantation, rubber plantation, cardamom plantation, palm oil tree plantation, olive oil tree plantation have been added in the permitted list of activities along with the existing Tea sector and tea plantation.

8. **Changes w.r.t Defence**

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951	49%	Government route upto 49% Above 49% to Cabinet Committee on Security (CCS) on case to case basis, wherever it is likely to result in access to modern and 'state-of art' technology in the country.	49%	Automatic upto 49%, above 49% under government route on case to case basis wherever it is likely to result in access to modern and 'state-of art' technology in the country.

Change in 6.2.7.1: Broadcasting Carriage Services;

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
.2.7.1.1(1)Teleports(setting up of up-linking HUBs/Teleports); (2)Direct to Home (DTH); (3)Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability); (4)Mobile TV;(5)Headend-in-the Sky Broadcasting Service(HITS)	74%	Automatic up to 49% Government route beyond 49% and up to 74%	100%	Automatic up to 49% Government route beyond 49%
6.2.7.1.2 Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs))	49%	Automatic	100%	Automatic up to 49% Government route beyond 49%

Change in 6.2.7.2: Broadcasting Content Services;

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreigna Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
6.2.7.2.1 Terrestrial Broadcasting FM (FM Radio), subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for	26%	Government	49%	Government
6.2.7.2.2 Up-linking of 'News & Current Affairs' TV Channels.	26%	Government	49%	Government
6.2.7.2.3 Up-linking of Non-'News & Current Affairs'TV Channels/ Down-linking of TV Channels.	100%	Government	100%	Automatic

Consequent to the increase in sectoral cap in certain activities of the sector, Para 4.1.3(v) (d) has also been amended, Earlier it was applicable where the sectoral cap was less than 495 but now it is applicable where the sectoral cap is upto 49%

1. **Change in 6.2.9.3: Air Transport Services**

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
Non-Scheduled Air Transport Service	74% FDI (100% for NRIs)	Automatic up to 49% Government route beyond 49% and up to 74%	100%	Automatic

2. **Change in 6.2.9.4: Other services under Civil Aviation sector**

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
Ground Handling Services subject to sectoral regulations and security clearance	74% (100% for NRIs)	Automatic up to 49% Government route beyond 49% and up to 74%	100%	Automatic

3. **Change in 6.2.13:Satellites- establishment and operation**

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
6.2.13.1 Satellites- establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	74%	Government	100%	Government

4. **Change in 6.2.18.5: Credit Information Companies (CIC)**

Sector/Activity	As per the Consolidated FDI Policy, 2015		As per the DIPP Press Note amending the Consolidated FDI Policy, 2015	
	Foreign Investment Cap	Entry Route	Foreign Investment Cap	Entry Route
6.2.18.5.1 Credit Information Companies	74% (FDI+FII/ FPI)	Automatic	100%	Automatic

1. **Change in 6.2.18.5.2:Other Conditions**
   Condition 3 i.e.*"Investment by a registered FII/FPI under the Portfolio Investment Scheme would be permitted up to 24% only in the CICs listed at the Stock Exchanges, within the overall limit of 74% for foreign investment."* has been removed.
2. **Changes w.r.t Construction Development: Townships, Housing, Built-up Infrastructure**
   - Change in 6.2.11.2
     a. Now, each phase of the development project would be considered as a separate project for the purpose of FDI policy.
     b. Clause A & B of 6.2.11.2 has been removed along with clause (ii), (iii), (iv), (v) and (vii) under the note of 6.2.11.2.
     c. A foreign investor will now be permitted to exit and repatriate foreign investment before the completion of the project under the automatic route, provided that lock-in-period of three years, calculated with reference to each tranche of foreign investment has been completed.
     d. The above condition will not apply to Hotels & Tourist Resorts, Hospitals, Special Economic Zone (SEZs), Educational Institutions, Old Age Homes and Investment by NRIs
     e. Transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in-period nor any government approval.
     f. Earning of rent/income on lease of the property, not amounting to Transfer, will not amount to real estate business.
     g. Definition of the term *"Transfer"* , in relation to FDI policy on the sector has been provided.
3. **Changes w.r.t Guidelines for Cash & Carry Wholesale Trading/Wholesale Trading (WT)**
   - Change in 6.2.16.1.2 (f) :
     a. Earlier a Wholesale/Cash & carry trader was not allowed to open retail shops to sell to the consumer directly
     b. Now,it has been amended and Wholesale/ Cash & carry trader can now open retail shops to sell to the consumer directly subject to the conditions given in 6.2.16.3.
     c. Also that the Wholesale/Cash & carry trader will have to maintain separate books for retail business.
4. **Changes w.r.t Single Brand product retail trading**
   - Change in 6.2.16.3 :
     a. Earlier retail trading, in any form, by means of e-commerce, was not permitted, for companies with FDI, engaged in the activity of single-brand retail trading but now this clause has been removed.
     b. This procurement requirement as given in clause (e) would have to be met annually from the commencement of the business i.e. opening of the first store. earlier it was to be met in the first instance, as an average of five years total value of the goods purchased, beginning 1st April of the year during which the first tranche of FDI was received.
     c. A Note has been added after the clause 4, stating various conditions which were not there earlier.
5. **Addition of new Sector / Activity: Duty Free Shops**
   - 6.2.15.5 which states the following, has been added after 6.2.16.4

Sector/Activity	Foreign Investment Cap	Entry Route
6.2.16.5 Duty Free Shops	100%	Automatic

   i. Duty Free Shops would mean shops set up in custom bonded area at International Airports/ International Seaports and Land Custom Stations where there is transit of international passengers.
   ii. Foreign investment in Duty Free Shops is subject to compliance of conditions stipulated under the Customs Act., 1962 and other laws, rules and regulations.
   iii. Duty Free Shop entity shall not engage into any retail trading activity in the Domestic tariff Area of the country.
6. **Changes w.r.t Banking- Private Sector**
   - Changes in 6.2.18.2.2.4(i): In the case of FIIs/ FPIs the maximum aggregate limit of 49% of the total paid-up capital has been substituted with 75% of the total paid-up capital.

IMPORTANT NOTICE

For all Indian Patentee/ licensee

PATENTS

Working Statement- Legal deadline and procedures

Introduction:

Statement of working is a disclosure provided by the patentee or the licensee to the Indian patent office stating if the patent is commercially exploited in India to meet the reasonable requirements of the public.

Governing statute:

- Statement of working of the patent as per Section 146(2) of the Indian Patent Act and rule 131 can be submitted in Form 27 each year within 3 months from the end of the calendar year.
- In addition to the above intended disclosure, the controller at any time, if required, may ask the patentee or the licensee to provide details in writing as to what extent the patent has been commercially exploited in India, as per Section 146(1).
- Forms and Details to be furnished in the statement
- On Form 27 (in duplicate) - duly verified by the patentee or the licencee or his authorised agents in India.
- Details to be furnished:
- The patented invention: {} Worked {} Not worked
- (a) If not worked: reasons for not working and steps being taken for working of the invention.
- (b) If worked: quantum and value (in Rupees), of the patented product:
- i) Manufactured in India
- ii) Imported from other countries (give country wise details)
- (ii) licenses and sub-licenses granted during the year;
- (iii) State whether public requirement has been met partly/adequately/to the fullest extent at reasonable price.

Procedure for submission of Working Statement:

- On receipt of working statement instruction from client, due diligence of the Patent is performed from IP India database "IPAIRS", which includes:
- Checking of Patent details viz. Patent number, Application number, Patentee/ licensee name are cross checked from the website and further same from the details provided by the client for respective patent.
- On clearance of details furnished on Form 27, submission of Form 27 at the respective office will be performed. The respective offices for submission of working statement are Delhi, Mumbai, Chennai and Kolkata.
- On successful submission of Form 27, invoice along with filing receipts has been sent to client via respective channel.

Legal consequence of the filing and Non filing of Working Statement

- Filing of working statement discloses the various details of the Patent granted in India. Such information includes worked/ not worked, manufactured/ imported, licensed/ non license and public requirement met or not by the Patentee or the licensee.
- Non filing of working statement impose "penalty" on the licensee/ patentee.
- If a patentee or licensee refuses or fails to furnish information required under Sec 146 of the Patents Act, 1970, the patentee or licensee will be punished with fine, which may extend up to Ten lakh rupees under Section 122(1)(b). Further, providing wrongful information or statement can impose the patentee /licensee to imprisonment up to six months or fine or both under Section 122(2).

Working Statement act as a tool in various IP proceedings.

No official fees for submission of working statement at the Indian Patent office.

Easy to file and act as a mechanism for "Patent work in force" till 20 years of the Patent validity.

Examples for Advantage of filing Working Statement in India:

1. Information provided in the statement of working is used while deciding on applications for compulsory license on patents. For example, in the case of first compulsory license in India where Natco was granted a compulsory licensee to a patent, which was held by Bayer, covering the Nexavar drug. The Intellectual property Appellate Board [IPAB] relied substantially on the information submitted by Bayer corresponding to the patent, while granting the license.
2. In case of infringement, the patent owner, as relief, can seek injunction and damages or an account of profit under Section 108. The information submitted in statement of working can be used by the court to estimate the damages that may be awarded. On the other hand, in case statement of working is not filed, the alleged infringer may argue that the patent owner might not have encountered any damages in view of the missing statement of working.
3. In case of estimating the worth/value of a patent and to help a potential licensee to negotiate the fee for obtaining a licence based on the value of the patent working statement hold lot of importance. Further, working statements may prove to be of significant importance from a business merger or a business takeover perspective, as patents can form a significant part of the intangible assets of a company, and a good patent portfolio along with the information about its working may help companies in negotiations. Also, small scale industries (SMEs) may customize resources spent in research and development (R&D) according to the prospering technology pertaining to their field, based on information gathered from filed working statements. Thus, data about working of inventions provides an idea about the effectiveness and commercial capability of inventions, for valuation of patent portfolios and compulsory licensing.

Fee and Charges:

In India we Singh and Associates, Advocates & Solicitors adopt fast and error free practise for filing of working statements in India. We charge a nominal professional fee for submission of working statement for Patent which is Euro 42 or USD 52.

Note:

1. Submission of working statement doesn't involve any official fee.
2. Due to an increment in the stamp fee (Maharashtra Stamp (Amendment) Act, 2015) for Power of Attorney which is now increased from INR 100 to INR 500 (Euro 8). In case of working statement where we don't have PoA from Applicant and client instructed to file along with new PoA (prepared by us) with Form 27, then a slight increment of Euro 8 shall be levy in professional fee.

Our Working Statement services and patent related services consist of the following:

- Scrupulously monitor your patent renewal deadlines and working statement reminder, and issue prior reminders accordingly, facilitating your concentration on other activities of your choice.
- Providing information well in advance on the requirements of documents related to patent renewal and working statement, or any new patent registration.

Further, in case of LLP, "Control" will mean right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of the LLP.

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