

“Anybody who thinks talk is cheap should get some legal advice” - Franklin P. Jones

## Analysis of the Judgment in the case of Subhankar Biswas Versus Sandeep Meta:

The Hon'ble Supreme Court of India in the case of Subhankar Biswas Versus Sandeep Meta, has upheld that no roving enquiry is permissible against managers of a company, who are accused of committing an alleged offence, unless there is specific allegation against the said manager and also there is averment in the Complaint that the concerned Manager is/was responsible for day-to-day affairs of the Company.

The above case is arising out of the Criminal Complaint filed under Section 19 of the Standards of Weights and Measures Act, 1976 (“Act”) for the alleged violation of Rules 2, 4, 6, 8, 9 & 23 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. On an application filed by the Appellant for compounding of offences, the appropriate authorities have allowed the compounded the offence.

In the Complaint, the allegations were against the Chairman and the Deputy General Manager i.e. the Appellant, and the said Complaint was silent on the specific role of the applicant and the Chairman. The Separate applications were moved by the Applicant as well as the Chairman of the said Company before the Calcutta High Court for quashing of the said Complaint on the ground that the Applicants were not concerned with day-to-day affairs of the Company and therefore they are not to be prosecuted for the offences as alleged in the Complaint. The Calcutta High Court quashed the proceedings pending against the Chairman by observing “Therefore in the absence of any specific averment regarding the role played by Petitioner No.1 M. B. Lal, who is the Chairman of the Corporation and there is nothing to indicate that he was in charge of and responsible to the Corporation relating to its day-to-day affairs of the

## News 10 @ a glance

### **FDI Proposals' Filing for Approval Streamlined:**

Investors seeking government approval for Foreign Direct Investment (FDI) will now have to obtain electronically generated unique number from the concerned authorities before filing requests with the Foreign Investment Promotion Board. The government's move is expected to streamline as well as expedite the process of clearing FDI proposals in key sectors such as telecom, defense, direct to-home and commodity exchange. The FIPB has made it compulsory for investors to fill in a 'Mandatory Preliminary Application' before moving application to the inter-ministerial Board, headed by Economic Affairs Secretary R. Gopalan, for bringing in FDI.

### **'It's Up to Indian Govt. to Defend UBS Licence':**

In the eye of a storm over the Supreme Court's observation on its retail banking licence in the country, Swiss banking major UBS on Tuesday said it is for the Indian government to defend the views and reasons for granting the same. The Supreme Court, during a hearing on black money on Monday, questioned the government's decision to grant licence for retail banking to UBS. “It is for the government to defend UBS' views and reason vis-a-vis the Supreme Court,” Hong Kong-based UBS spokesperson Mark Panday said.

### **Decision on Vodafone's FDI Proposal Deferred:**

A government panel on Wednesday deferred the decision on UK telecom major Vodafone's plea to buy 5.48% in its joint venture firm Vodafone-Essar for about Rs.2,700 crore as comments from the Home and Telecom ministries are awaited. “No decision was taken today. The matter may come up again in the next meeting of FIPB,” a senior finance ministry official said. Vodafone-Essar is a joint venture between UK-based Vodafone Group and India's Essar Group. Mauritius-based Prime Metals, an indirect subsidiary of Vodafone, had approached FIPB for permission to buy about

Corporation at the time of commission of the alleged offence, the present application deserves to be allowed in part and the proceeding against the said Petitioner No.1 M. B. Lal is to be quashed." The Application filed by the appellant was not allowed and therefore he moved the Hon'ble Supreme Court challenging the said order.

The appellant submitted that the allegations against the Chairman of the Company and the appellant being identical and similar, therefore the High Court should have passed the same order for the appellant also.

The Respondent-State's argument was that the identity of the persons involved in the day-to-day affairs of Company was a matter of evidence and the same requires to be proved in trial.

The Hon'ble Supreme Court held that the Chairman and the Manager stood on the same footing and the complaint did not specify their role in the commission of offence under this act. The proceeding against the appellant was quashed. The Supreme Court has set aside the order of the Calcutta High Court passed against the appellant by holding that no distinction is established between the two officers. The Supreme Court has further held that no roving enquiry is permissible in such cases and it is the obligation of the prosecution to provide details of persons responsible in the commission of offence and their specific role in the case, for proceeding with trial.

The above judgment distinguishes that position of the chairman and the manager stand on the same footing and in the absence of specific allegations against an individual responsible for the running of the day-to-day affairs of the Company, the case against the said person should not be proceeded with. It was also held by the Supreme Court of India that in such kind of cases, the burden is on the prosecution to establish their case against the person being prosecuted and that also with specific allegation against the person to be prosecuted with respect to his role in day-to-day affairs of the functioning of the Company and no enquiry be allowed merely on the basis of vague and unsubstantiated allegations.

The above judgment is a positive step as now the roving enquiries against the executives of the corporate companies, who has got nothing to do with the cases/prosecutions launched against the company and where they are also made accused only on the basis of some bald/vague allegations, would be stopped and it will put brake on the frivolous litigation against senior managers and executives of the Company in criminal proceedings.

5.48% stake in Vodafone-Essar from ETHL Communication, a group company of Essar.  
Source: Economic Times and Mint

#### **Govt. Warning to 7 Cos Over Coal, Lignite Blocks:**

Taking forward its crusade against firms sitting idle on coal and lignite blocks, the Coal Ministry has issued warnings to another seven firms, asking them to either develop the blocks or get them cancelled. "The allocatees are hereby warned and directed to develop the blocks immediately. Any further failure in development of the blocks would lead to necessary actions as per the terms and conditions of allocation, including de-allocation," the warning letters said. Four firms -- Assam Mineral Development Corporation, Meghalaya Mineral Development Corporation, Tamil Nadu Electricity Board and Orissa Mining Corporation -- were warned for delaying the development of the Mandakini-B coal block, which was jointly allocated to them, while Orissa Mining Corporation was warned over the Utkal-D coal block.

#### **Exemption for Solar Thermal Power Projects:**

Environment ministry on Friday exempted Solar Thermal Power Projects from green clearance requirements, considering their non-polluting and environment-friendly nature. The ministry, however, asked the State Pollution Control Boards to ensure that the plants are not built in environmentally sensitive areas like wet land and biodiversity spots and agriculture land and asked the project developers to apply for water permits. "It is clarified that Solar Thermal Power Projects are not covered by the provisions of EIA Notification, 2006," the ministry said in a statement. "State Pollution Control Boards before issuing consent to establish under Air and Water Act to such units may ensure and satisfy themselves by undertaking a site visit that the proposed area does not involve any wet land, any agriculture land, ecologically sensitive area, areas rich in biodiversity and areas with large habitation," it said.

#### **Banks against Savings Rate Deregulation:**

Banks have written to RBI stating they are not in favour of a deregulated savings rates regime and such a move would "hurt everybody" in the system. "It is the view of our members that it is not an appropriate time to deregulate the savings rate because of the upward bias in the interest rates currently and the general high rate scenario," Indian Banks Association (IBA) chief executive K Ramakrishnan said. RBI's recent moves to calculate interest rate on a daily basis and increase the interest rate on savings accounts to 4% is already hurting banks, he said, adding that IBA recently wrote to RBI about its reservations.

## Sholay Media & Entertainment Pvt. Ltd. V/s. Vodafone Essar Mobile Services (MIPR) 2011(2)171

Recently, the High Court of Delhi adjudicated on an interesting issue of assignment of copyright.

To state brief background of the case, Sholay Media & Entertainment Ltd. ("Plaintiffs") acquired all rights in the film Sholay and were enjoying their rights in various areas such as caller tunes, ring tones, etc. Vodafone Essar Mobile Services Ltd. and Vodafone Essar Ltd. ("Defendants") are cellular service provider which are also offering various value added services such as ringtones, caller tunes, etc, to their subscriber. Through a Deed of Assignment, the predecessor of the Plaintiffs granted certain rights in the film Sholay to Polydor of India, which further assigned the rights through an assignment deed to Universal Music Pvt. Ltd.

Universal Music Pvt. Ltd. further executed a deed in title to Phonographic Performance Pvt. Ltd., which is a company engaged in the business of carrying on copyright business of its members in sound recording and under that authorization they have been authorized to administer recording and reproduction rights for ringtones in respect of the music catalogue of Universal Music Pvt. Ltd.

They are further authorized to grant license to make, market, and sell true tones/ring back tone, etc. using sound recording of Universal Music Pvt. Ltd. By an agreement dated 15th September, 2006 with Phonographic Performance Pvt. Ltd, Vodafone Essar Pvt. Ltd. have been granted all rights for exploitation of sound recording on mobile cellular services.

The Plaintiffs submitted that the Deed of Assignment between their predecessors and Polydor India Ltd. extended only to the right to make records for sale and distribution and the right to communicate the sound recording by way of radio broadcast.

The remaining rights were, however, reserved by the predecessor of the Plaintiffs and they have continued to exploit those remaining rights. Also that, rights in respect of value added services for mobile phones neither existed nor were in contemplation of parties at the time of assignment. Plaintiffs further alleged that Defendants have been commercially exploiting the copyright work of the film Sholay on mobile and digital platforms without obtaining any license or permission from the Plaintiffs and are offering value added services in the form of ringtones, etc. created from the soundtrack of the film Sholay, thereby, infringing the copyright

Source: Economic Times and Mint

### **Govt. Notifies Freeing of MRP of P&K Fertilizers:**

The government on Friday notified the Cabinet decision to allow fertilizer firms to fix the retail price of phosphatic (P) and potassic (K) nutrients, such as DAP, but asked them to keep the rates at 'reasonable level'. In April, the Cabinet had allowed firms to increase DAP price by up to Rs.600 per ton over and above the maximum retail price (MRP) of Rs.10,750 a tons prevailing then. "The market price of subsidized P and K fertilizers, including DAP, will be open and will be fixed by the fertilizer companies at reasonable level," Fertilizer Ministry said in a notification issued on Friday. Under the nutrient-based subsidy (NBS) regime introduced from April 1, 2010, the retail prices of 22 varieties of P & K fertilizers have been freed. For the 2011-12 fiscal, government raised NBS of P&K fertilizer to insulate companies from high global prices, but restricted them from hiking the MRP beyond Rs.600/t.

### **Pressing for Strong IPR Regime in FTA with India: EU**

The European Union has informed the WTO that it is pressing for inclusion of strong IPR regime in the free trade agreement under negotiations with India even as the Commerce Ministry has maintained that New Delhi will not yield to the EU on this issue. The 27-nation bloc gave this input to the World Trade Organization (WTO) which has recently completed a Trade Policy Review of the EU. According to the policy document, the EU has concluded FTAs with Central America, Colombia and Peru, which include detailed provisions on effective protection and enforcement of Intellectual Property Rights (IPR). "A similar approach is being followed in on-going FTA negotiations with India, MERCOSUR, and Singapore and in non-preferential cooperation agreements with China and Russia," it said.

### **Final IPO Norms for Life Insurance Co IPOs by July:**

Insurance watchdog IRDA on Tuesday said the final guidelines to allow life insurance companies to raise funds from the capital market will be out by this month-end. "With regard to life companies, the work on IPO guidelines is more or less complete and we would be going for gazetting the same as regulation very shortly, perhaps toward the end of this month," IRDA chairman J Hari Narayan told reporters on the sidelines of a FICCI event here. For life companies, the clause mandating a three-year track record of profitability as a pre-condition for tapping the capital markets has been removed in the draft guidelines, he said. As per the draft norms, only

which the Plaintiffs holds in the film Sholay.

Consequently, the Plaintiffs, in the instant case, sought injunction against infringement of their copyright by the Defendants.

Universal Pvt. Ltd., being one of the defendants, argued that the Plaintiffs have no rights to the sound recording of the film Sholay since it stood assigned to them. They vehemently contended that the rights to them were confined to physical records and radio transmission. Defendants claimed that through an agreement dated 15th September, 2006 with Phonographic Performance Pvt. Ltd., they have been granted all rights for exploitation of sound recording on mobile cellular services.

Thus, the main dispute that arose between the parties was whether an absolute right to use the sound tracks, including songs and music by way of ringtones, etc were assigned to Polydor of India vide Assignment Deed or the right to use the soundtrack on digital and mobile platform continue to vest in the Plaintiffs.

Regard may be had to Section 18 of the Copyright Act, 1957, which provides that the owner of the copyright in the work may assign, the copyright to any person, either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof.

It further provides that where the assignee of a copyright becomes entitled to any rights comprised in any copyright, he becomes the owner of the copyright so assigned and in respect of the rights which are not assigned, the assignor is treated as the owner of the copyright.

Hence, the question as to whether the assignment to Polydor of India extended to all the rights of the sound recording or only to some of them would depend solely on the construction of the terms of the assignment deed.

The difference in the interpretation of the definition "record" and the scope of "any other device" within its meaning under the Assignment Deed is the bone of contention.

As per the assignment deed, "record" shall mean and include disc, tape, including magnetic tape or "any other device" of whatsoever nature in which sounds are embodied so as to be capable of being reproduced there from and all as such devices presently known or that may hereafter

insurance companies that have completed 10 years of operation and have strong financials will be allowed to access the capital market. Insurance firms planning public offers have to seek 'formal approval' from the regulator and then approach SEBI for final approval, the draft norms had said.

#### **Govt. to Buy Back Rs.6,945-cr Fertilizer Bonds at Discount:**

The government will buy back bonds worth Rs.6,945 crore from fertilizer companies at a discount and compensate for 50% of their losses. Unable to take higher fertilizer subsidy on the Union Budget, the government has resorted to issuance of bonds worth Rs.27,500 crore to domestic fertilizer companies towards payment of its subsidy bills in 2007-08 and 2008-09. Of which, the Centre has already re-purchased bonds worth Rs.20,555 crore from the fertilizer companies to provide them with liquidity. "The government has agreed to buy back the remaining Rs.6,945 crore worth fertilizer bonds from next week," a senior fertilizer ministry official told PTI. The Cabinet Committee on Economic Affairs (CCEA) has given its nod to a proposal to allow the government to buy back the outstanding fertilizer bonds, the official said. The government will re-purchase bonds from fertilizer companies at a discount and will reimburse 50% of losses, estimated at over Rs.700 crore, occurred in the buy-back of bonds, the official said. The ministry has issued a circular in this regard and intimated as many as 16 companies, including IFFCO, about the buy back from next week. According to the circular, the Indian Farmers Fertilizer Cooperative Ltd (IFFCO) is eligible to redeem bonds worth Rs.3,319 crore. The second biggest possible redemption would be for Indian Potash Ltd. Rs.1,432 crore.

Source: Economic Times and Mint

#### **COURT ROOM NEWS**

- The High Court of Delhi in the case of N&S&N Consultants SRO V SRM Exploration (P) Ltd reported in (2011)2 CompLj 306 (Del) has held if a Guarantor Company owes a debt, a winding up Petition is maintainable even if the Statutory notice under Section 434 of the Companies Act, 1956 has not been issued.
- The Bombay High Court in the case of Bade Miya (partnership firm), Mumbai V Mubin Ahmed Zahurislam reported in (2011) 3 MhLj 813 has held that an unregistered partnership firm can institute a suit for injunction and damages against the infringement of a registered trademark and passing off.
- The Allahabad High Court in the case of

be developed and known but excluding the sound track associated with a Cinematograph Film.

The Court held that the word “device” in the Agreement Deed is interpreted to include digital device considering that it is only another facet of physical device and, therefore, should be included in the definition of the term “record” used in the deed and that would give rights to the defendant to exploit the sound recording on the digital as well as mobile platform.

The Delhi High Court, thus, directed that the Vodafone Mobile Essar Services can continue to use the sound recording of the film Sholay and held that the same did not amount to infringement of copyright.

### ANALYSIS OF THE JUDGMENT IN FUERST DAY LAWSON LTD. V/S. JINDAL EXPORTS LTD.

The Hon’ble Supreme Court of India in its judgment dated 8<sup>th</sup> July, 2011 in the matter of *Fuerst Day Lawson Ltd. V/s. Jindal Exports Ltd.* has settled the issue whether a Letters Patent Appeal [“LPA”] is maintainable under Section 37 or 50 of the Arbitration and Conciliation Act, 1996 (1996 Act).

The Appeal in the Supreme Court was filed from the orders passed by the the Delhi High Court and one from the Calcutta High Court. The applications filed by the respective Respondents in these cases, for enforcement of the foreign award in their favour were allowed by orders passed by a single judge of the High Court. Against the orders of the single judge, the Petitioners filed appeals before the Division Bench of the respective High Court. The Division Bench of the Delhi High Court had held that such appeals are not maintainable, however, the Calcutta High Court took a contrary view.

The Hon’ble Supreme court analyzed the availability of an appeal under the relevant clause of the Letters Patent in cases arising under different Acts. The Court stated that the Hon’ble Supreme Court had held that LPA is maintainable against a judgment given by a single judge under:

- (i) *Section 76(1) of the Trademarks Act, 1940- National Sewing Thread Co v James Chadwick*<sup>1</sup>
- (ii) *Section 6 of the Specific Relief Act, 1963 -Vinita Khanolkar v Pa*<sup>2</sup>
- (iii) *Section 54 of the Land Acquisition Act, 1894 -Sharda Devi v State*

<sup>1</sup> AIR 1953 SC 357

<sup>2</sup> (1998) 1 SCC 500

Yogendra Singh V Ranbir Sharma reported in (2011) 2 CompLJ 136 (ALL) has held that it is not necessary to make specific averment in the complaint if the Accused is the a Managing Director or Joint Managing Director then and by virtue of their position they are liable to be proceeded with for offences under the Prevention of Food Adulteration Act, 1954.

• The Andhra Pradesh High Court in the case of Jyothi Turbo Powers Services Pvt. Ltd. V Shenzhen Shandog Nuclear Power Construction Co. Ltd., reported in MANU/AP/0137/2011 has held that if the Court has concluded that it has no jurisdiction to entertain the application, then no interim reliefs can be granted under Section 9 of the Arbitration and Conciliation Act, 1996. The only course open to the Court is to reject the application to enable the parties go before the competent Court instead of giving decision on merits, because if it proceeds and records findings on merits, it would affect the proceedings before the competent court, which has jurisdiction to entertain the application under Section 9 of the Act.

### IPR India News

• The High Court of Calcutta in the matter of Tea Board India V/s. I.T.C. Ltd., reported In MIPR 2011 (2) 0160\*, has held that, it is the exceptionality of the mark that is protected even in case of indistinctiveness even if there is no likelihood of confusion.

The passing off issue in reference to the Geographical Indications is to be dealt with unlike same discussed in Trade Mark law.

• The High Court of Calcutta in the matter of Godfrey Phillips (India) Ltd. V/s. I.T.C. Ltd., reported In MIPR 2011 (2) 0147\*, has held that the effect of removal of any mark is applicable from the date of relevant judgment unlike the effect of declaration of invalidity of registration.

of Bihar<sup>3</sup>

(iv) *Section 299 of the Indian Succession Act, 1925 -Subal Paul v Malina Pau*<sup>4</sup>

(v) *Order 21 of the Code of Civil Procedure, 1908 to set aside a sale* *PS Sathappan v Andhra Bank*<sup>5</sup>

The Court stated that on the other hand LPA is not maintainable against a judgment given by a single judge under s. 39(1) of the Arbitration Act, 1940 *Union of India v Mohindra Supply*<sup>6</sup>

From the above reasoning, the Hon'ble Supreme Court then examined the correlation between three arbitration legislations—Section 39 of the Arbitration Act, 1940 [“the 1940 Act”], Section 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 [“the 1961 Act”] and Sections 37, 49 and 50 of the 1996 Act.

The Court whilst examining the aforesaid provision stated that Section 39 of the 1940 Act is similar or equivalent to Section 37 of the 1996 Act which provides that an appeal would lie from **the following orders and from no others**.

Order under 39 of the 1940 Act is defined as

An order -

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award:

PROVIDED THAT the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

[Insofar as relevant for the present, Section 37 of the 1996 Act, is very

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<sup>3</sup> (2002) 3 SCC 705

<sup>4</sup> (2003) 10 SCC 361

<sup>5</sup> (2004) 11 SCC 672

<sup>6</sup> AIR 1962 SC 256

similar to Section 39 of the 1940 Act as quoted above.]

Similarly, Section 50 of the 1996 Act provides, in Part II of the Act, that **an appeal shall lie from the order** refusing to refer the parties to arbitration under Section 45 or enforce a foreign award under Section 48. **It does not contain the expression "and from no others"**.

Section 50 of the 1996 Act is as under:-

50. Appeal able orders.-(1) An appeal shall lie from the order refusing to-

- (a) refer the parties to arbitration under Section 45;
- (b) enforce a foreign award under Section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Section 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 reads as:-

6. Enforcement of foreign award.-(1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Whilst analyzing the aforesaid provisions, the Supreme Court held "Once it is seen that Part I and Part II of the Act are quite different in their object and purpose and the respective schemes, it naturally follows that Section 37 in Part I (analogous to Section 39 of the 1940 Act) is not comparable to Section 50 in Part II of the Act. This is not because, as Mr. Sundaram contends Section 37 has the words in parentheses "and from no others" which are not to be found in Section 50 of the Act. Section 37 and Section 50 are not comparable because they belong to two different statutory schemes. Section 37 containing the provision of appeal is part of a much larger framework that, as seen above, has provisions for the complete range of law concerning domestic arbitration and international commercial arbitration. Section 50 on the other hand

contains the provision of appeal in a much limited framework, concerned only with the enforcement of New York Convention awards. In one sense, the two sections, though each containing the appellate provision belong to different statutes.”

The Supreme Court further held that there was a potent reason to construe Section 50 narrowly as under Section 6(1) of the 1961 Act, a foreign award was enforced in India by a court pronouncing judgment “according to the award”. Thus, meaning that it was the decree of an Indian court embody a foreign award that was enforced, and Section 6(2) of the 1961 Act provided that no appeal would lie from that decree except where the decree is “in excess of or not in accordance with the award”.

The court thus concluded that:

“72. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in P. S. Sathappan) was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.

73. We, thus, arrive at the conclusion regarding the exclusion of a letters patent appeal in two different ways; one, so to say, on a micro basis by examining the scheme devised by Sections 49 and 50 of the 1996 Act and the radical change that it brings about in the earlier provision of appeal under Section 6 of the 1961 Act and the other on a macro basis by taking into account the nature and character of the 1996 Act as a self-contained and exhaustive code in itself.

74. In light of the discussions made above, it must be held that no letters patent appeal will lie against an order which is not appeal able under Section 50 of the Arbitration and Conciliation Act, 1996.”