Newslex

Issue: May 2011

D. H. LAW ASSOCIATES
ADVOCATES & SOLICITORS

"Law is the embodiment of the moral sentiment of the people" - Blackstone

ANALYSIS OF THE VIDOECON INDUSTRIES LIMITED JUDGEMENT

The Supreme Court of India in its judgment dated 11th May, 2011 in the matter of Videocon Industries Limited v Union of India and another, Civil Appeal No.4269 of 2011, arising out of SLP(C) No.16371 of 2008, has clarified the applicability of the Indian Arbitration and Conciliation Act, 1996 (Indian Act) in relation to the jurisdiction of the India Courts to pass interim orders in contracts where the arbitration clause is subject to other law than the Indian Law.

Government of India owned petroleum resources within the area of India's territorial waters and exclusive economic zones. On 28th October, 1994 a Production Sharing Contract (PSC) was executed between Respondent No. 1 on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited (hereinafter referred to as "the Contractor") in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by Respondent No. 1.

In 2000 disputes arose between the Respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under Clause 34.3 of the PSC. The arbitral tribunal fixed 28th March, 2003 as the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London. Thereafter, on 31st March, 2005 the partial award came to be passed. The Respondent No. 1 challenged the partial award by filing a petition in the

News 10 @ a glance

New Data Storage Norms for Telcos, post Idea 'Lapse':

The central security agencies have taken serious note of destruction of details of nearly 1.2 crore SIM cards belonging to Idea Cellular, terming it as a "security lapse", and worked out fresh guidelines for telecom operators for maintaining records of consumers.

"The incident not only highlights the fact that important data has been completely lost, but also underscores the slow rate at which the digitization of subscriber data was being carried out," it said.

Following this incident, the telecom service providers have been asked to ensure quick and time bound scanning of all CAFs, proper duplication of records with a mirror image in the archives, the stores where the CAF have been kept should have fireproof arrangements and secure from other hazards.

"In case storage and upkeep of CAF is outsourced, the agency, to which the job is outsourced, should never become privy to the requisitions placed by the law enforcement agencies on the service provider for CAF documents," it said.

Security Concern

• Company had outsourced storage and maintenance of two crore consumer applications forms to Jyoti Warehouse;

• The incident came to light when central security agencies carried out inquiries into the fire incident at Jyoti Warehouse;

• After the incident it was found that only 80 lakh forms had been scanned while details of 1.2 crore had been destroyed

High Court of Malaysia at Kuala Lumpur. On being noticed, the Appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of Clause 34.12 of the PSC only the English Courts have the jurisdiction to entertain any challenge to the award.

Thereafter the Respondent No, 1 approached the Delhi High Court seeking inter alia the stay of the arbitral proceedings. The Appellant objected to the maintainability and pleaded that the Courts in India do not have the jurisdiction to entertain challenge to the arbitral award.

The question before the Supreme Court of India was whether the Delhi High Court has the jurisdiction to entertain such a petition especially in view of clause 34.12 of the PSC.

Arbitration clause before the Supreme Court

33.1 Indian Law to Govern
Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.

33.2 Laws of India not to be Contravened
Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

"34.3 Unresolved Disputes
Subject to the provisions of this Contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12. Venue and Law of Arbitration Agreement
The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England"

DoT Rejects IB's 'Phone-Tapping' Call:

The telecom department (DoT) has turned down a demand by intelligence agencies that all operators upgrade their infrastructure to tap phones of at least 1% of their customers. This would have resulted in companies like Bharti Airtel, Vodafone Essar, Reliance Communications and BSNL enhancing their infrastructure to tap one over million phones each, as all of them have over 100 million customers.

Currently, large telcos are mandated to have requisite infrastructure in place to tap 1,000 phones simultaneously. Under the existing framework, only about 15,000 phones can be tapped simultaneously across the country. Telcos had opposed this proposal from the Intelligence Bureau (IB) citing huge capital and operational expenditures involved in upgrading their infrastructure to tap so many phones.

These developments come even as the Centre attempts to tighten phone tapping rules following the controversy over the leakage of tapes of corporate lobbyist Niira Radia, whose phones were put under surveillance between 2008 and 2009 by the Central Board of Direct Taxes.

The home ministry is also in the process of finalising new guidelines on phone tapping and the new rules will include details on all possible scenarios under which different agencies can intercept phone conversations.

All agencies will have to take the home ministry clearance before tapping, and the new rules will also list out precautionary steps to prevent leakage of the intercepted conversations.

Government may Decide on FDI in Multi-Brand Retail by September:

NEW DELHI The government may take a decision on allowing foreign direct investment (FDI) in multi-brand retail by September this year, minister of state for commerce and industry Jyotiraditya Scindia has said. It also expects to announce a new national manufacturing policy in the same period.

NBFCs will need 150-cr Net-owned Funds for PD Entry:

The Reserve Bank of India has said non-banking finance companies (NBFCs), who intend to get into primary dealership business, should have minimum net-owned funds, or NOF, of Rs.150 crore. Banks who intend to expand to primary dealership business should have a minimum net worth of 1,000 crore.

While answering the above question, the Supreme Court of India held that since the law of England is the governing law of the Arbitration Agreement, there is an implied exclusion of Part I the Indian Act and therefore the Indian Court had no jurisdiction to entertain the Petitions of the Respondent No.1. The Supreme Court relied on its earlier decision in the matter of Bhatia International v. Bulk Trading S.A reported in (2002) 4 SCC 105, wherein the Supreme Court had held that Part I of the Indian Act is applicable to all arbitration including international arbitration unless the parties to the arbitration agreement have expressly or impliedly excluded its applicability.

This judgment augers well for international commercial arbitration and is a positive step towards making India a friendly jurisdiction especially when India has received a lot of flak for intervention of the Courts in Arbitration proceedings.

BOMBAY HIGH COURT ON THE DISPUTED SHAPE OF VODKA BOTTLE

A great trademark is appropriate, dynamic, distinctive, memorable and unique. - Primo Angeli

A yet another interesting discussion arose in the matter of Gorbatschow Wodka KG v John Distilleries Limited, Suit No.3046 of 2010, where the Bombay High Court was called upon to opine on the issues concerning the design of a bottle for Vodka. The plaintiff which owned one of the top fifteen premium Vodka brands in the world – "Gorbatschow Wodka", marketed it in a bottle having a distinctive shape and registered in various jurisdictions. The application in India, for the registration is still pending.

The defendant was prepared to launch its Vodka under trademark "Salute", to which plaintiff objected stating that the shape of the bottle was similar to the shape of defendant's bottle which could impose potential deception in the mind of consumers. In the present case, plaintiff sought for an injunction restraining defendant from using the objectionable bottle or any other shape identical or even deceptively similar to the plaintiff's design of bottle.

The Court initially granted ad interim relief subjected to the condition that defendant could market and sell its goods under the trademark "Salute" in a bottle of different shape and packaging.

Plaintiff argued that the shape of its Vodka bottles was distinctive and

Primary dealers, or PDs, are specialized traders in government bonds who have the market making mandate for government bonds and offer two-way quotes on bond trading. The revised guidelines, put up on RBI's website, have also said, in case a primary dealer intends to diversify into other permissible activities, such as brokerage and merchant banking, the minimum NOF shall be 250 crore.

The objective of the proposed review of existing guidelines, according to the central bank, is to make the policy more transparent and ensure that the new primary dealers have sound capital, adequate experience and expertise in the government securities market.

The guidelines propose that subsidiaries of commercial banks with no track record in government securities or financial institutions and companies registered under the Companies Act, 1956, can also be allowed to become primary dealers, but they may need to have experience in the business before applying for primary dealership.

The proposed guidelines cite examples of the selection criteria for primary dealers in other countries and emphasise the importance of sound financials and the ability to add value to the government securities market and participate actively in the government borrowing programme, for any entity to be allowed a licence for the business.

Street Signs:

Foreign institutions have pulled out almost Rs.2,600 crore out of Indian stocks in the past three days, after the Reserve Bank of India's higher-than-expected policy rate increases on Tuesday. The move has heightened worries among investors that the central bank may not stop at such aggressive monetary policy tightening unless inflation doesn't mellow. Higher interest rates, along with elevated commodity prices, would hurt corporate expansion plans and profits, analysts said.

"The rate hike means greater vigilance on private capex (capital expenditure). The downside risk is that capex slows creating further supply bottlenecks as we head into 2012 and higher inflation — not a pleasant situation for equities," Morgan Stanley analysts said in a recent report. Stock investors fear a repeat of the situation in 2008, when the central bank raised policy rates successively to contain inflation. Higher interest rates squeezed companies' profitability and forced many firms to postpone their capex plans. This upset earnings forecasts of investors, who

constituted as a fundamental part of its goodwill and reputation. Defendant's design of bottle was registered under the Designs Act, 2000. Plaintiff stated that it cannot represent a valid defence to an action for passing off.

Defendant contended that its bottles of Vodka having a distinctive shape, with a distinctive trademark "Salute", distinctive label and a peculiar packaging style and tradedress, could not be confused by the general public with the bottles of plaintiff. Referring to the prices at which the Vodka bottles were sold, that is, INR 650 to INR 750, defendant also argued that the intended customers are rich, educated and intelligent and there is no likelihood of confusion or deception that could arise.

As the design of the bottle was not registered in India, it would trigger the provisions of passing off, but definitely would require the application of such principles from a different perspective as the facts of the instant case call for.

Defendant procured the registration of the design under the Designs Act, 2000 in 2008 after conducting extensive search for similar marks. The registration of defendant's design was prior to the first use of the plaintiff's bottles in India; the duty casted upon defendant to make a reasonable enquiry was duly discharged. Defendant also vehemently contended that they exercised due care, diligence and caution in adoption and registration of the design and were under no legal or common law mandate to conduct a search in the international market.

In the light of the facts stated, issued raised, arguments advanced and authorities cited, the Court inter-alia held that plaintiff prima facie established its trans border reputation as well as reputation in Indian market. The Court noted that plaintiff adopted the instant shape randomly, to solely give the product a peculiar and distinctive appearance which did not have a functional character.

Plaintiff also stated the background of the design that it is based on the architecture of Russian Orthodox Church - a bulbous structure. The shape of defendant's bottle relied primarily on the same bulbous structure. Defendant could not give a bona fide explanation for adopting the impugned shape for its bottle.

If defendant was allowed to dilute the distinctiveness and exclusivity of the mark of plaintiff, it would embolden other infringers to invade upon the proprietary right of plaintiff.

had bought stocks that had baked in even 2011 earnings.

Compliance: Foreign Bank CEOs Responsible, Says RBI:

MUMBAI Concerned over the way foreign banks are functioning in the country, RBI on Wednesday said their Indian CEOs would be responsible for oversight of regulatory and statutory compliances. "It has been decided that for all foreign banks operating in India, the CEO would be responsible for effective oversight of regulatory and statutory compliance as well as the audit process and the compliance thereof in respect of all operations in India," RBI said.

More SBI Branches To Have Green Channels:

BERHAMPUR, ORISSA SBI will introduce "green-channel banking" at more of its branches to promote paper-less work and to facilitate faster transactions for customers, SBI sources said. All major transactions, including withdrawals, deposits and remittances up to Rs.40,000, will be made through green-channel banking, the bank's general manager (network-II), Devendra Prasad said on Wednesday.

RBI has marked a portion of bank lending for developmental activities, which it calls the priority sector:

• What is priority-sector lending?
Banks were assigned a special role in the economic development of the country, besides ensuring the growth of the financial sector. The banking regulator, the Reserve Bank of India, has hence prescribed that a portion of bank lending should be for developmental activities, which it calls the priority sector.

• Are there minimum limits?
The limits are prescribed according to the ownership pattern of banks. While for local banks, both the public and private sectors have to lend 40% of their net bank credit, or NBC, to the priority sector as defined by RBI, foreign banks have to lend 32% of their NBC to the priority sector.

• What is net bank credit?
The net bank credit should tally with the figure reported in the fortnightly return submitted under Section 42(2) of the Reserve Bank of India Act, 1934. However, outstanding deposits under the FCNR (B) and NRNR schemes are excluded from net bank credit for computation of priority sector Lending target/subtargets.

The court categorically rejected and struck down the argument of defendant that if the intended consumer is rich, educated and effluent, there is no possibility of deception. The court delved into the intricacies, deliberating on the basis of this argument and held that while those who were educated or affluent had the ability to discern, consumers who did not belong to the aforesaid category were more likely to be deceived. The argument of defendant would create a situation where the remedy of passing off shall never be available if the goods are intended to be sold to the effluent and educated class, rendering the remedy of passing off illusory. The class of purchasers was undoubtedly a relevant consideration but the case cannot be decided solely based on this factor in isolation from other relevant circumstances.

Reaching a logical conclusion, plaintiff made out a prima facie case, the balance of convenience weighed in favour of plaintiff which had an established reputation. If defendant was allowed to launch its product, it would cause irreparable injury to the established goodwill and reputation of plaintiff. Accepting the arguments of plaintiff, ascertaining the facts of the case, and applying laws of injunctions, the Court restrained defendant from using the objectionable bottle and / or any other shape identical/deceptively similar to plaintiff's mark in relation to its products/business in any manner whatsoever.

This pronouncement is yet another milestone which Indian judiciary crossed and reiterated its stance of protecting the rights of the "right" right holder, drawing the explicit and appropriate synergy, striking the perfect balance of rights and filling the unaddressed vacuums in law. This shall certainly act as an assisting precedent for situation to arise in future with similar issues.

• Are there specific targets within the priority sector?
Domestic banks have to lend 18% of NBC to agriculture and 10% of the NBC has to be to the weaker section. However, foreign banks have to lend 10% of NBC to the small-scale industries and 12% of their NBC as export credit. However, for the balance, there are a vast number of sectors that banks can lend as priority sector. The Reserve Bank has a detailed note of what constitutes a priority sector, which also includes housing loans, education loans and loans to MFIs, among others.

• What has been the experience so far?
It has been observed that while banks often tend to meet the overall priority sector targets, they sometimes tend to miss the sub-targets. This is particularly true in case of domestic banks failing to meet their sub-targets for agricultural advances. One of the reasons banks often site for not lending to this sector is that recovery is often difficult.

• Is there any penal action in case of non-achievement of priority sector lending target by a bank?
Domestic banks having a shortfall in lending to priority sector/agriculture are allocated amounts for contribution to the Rural Infrastructure Development Fund (RIDF) established in Nabard. In case of foreign banks operating in India, which fail to achieve the priority sector lending target or sub-targets, an amount equivalent to the shortfall is required to be deposited with Sidbi for one year.

DoT to Review Practices of 20 Nations for New Policy:

To incorporate best practices in the National Telecom Policy (NTP) 2011, the Telecom Ministry plans to study telecom licensing and regulatory policies of 20 developed and developing countries. According to official sources in the Department of Telecom (DoT), it is planning to hire a senior telecom consultant to undertake this study and assist its group for formulation of NTP 2011 on licensing and convergence issues.

The consultant hired for the job will analyse and inform DoT advantages and disadvantages of the policy adopted by various countries and skim out the best practice out of them. The DoT Group formed for NTP'11 will also look at merits and demerits converged services being provided in these countries and scope of new services that can be incorporated in the Indian telecom network.

The analysis and suggestion of the consultant will be apart from inputs being taken by telecom

minister Kapil Sibal during round-table discussion with industry.

At present, countries like Israel provide location based services which give real-time information on location of a mobile user but India is yet to open this space because of various reasons mainly related to security and privacy of a user. DoT is also in mood of providing preferential treatment for indigenously manufactured goods. However, this move had been opposed by telecom service providers.

Also there is major issue on pricing and allocation of spectrum among telecom companies.

DoT, Trai Differ Over Licence Cancellation:

The telecom department (DoT) is set to inform sector regulator Trai that only 15 licences can be considered for cancellation against the latter's recommendations that a total of 69 mobile permits of five telecom operators, including joint ventures of international operators like Telenor, Emirates Telecommunications and Sistema, be terminated for failure to rollout services and for delayed launch of mobile services.

A pan-India mobile company has 22 licences as it requires a separate permit for each region. In November 2010, Trai had asked the government to clean-up the scam-tainted telecom sector and take stern action against erring telcos, including canceling 69 of the 122 mobile permits issued by former telecom minister A Raja for failure on the part of these companies to roll out services on time. Two telecom department officials said that Trai's methodology for accessing the rollout of networks was flawed and added that this would be communicated to the regulator within the next few days. The DoT, in an internal note, reviewed by ET, has also pointed out that the Trai had not considered several delays, such as getting airwaves and clearances from different government departments, while calculating if companies had rolled out services as stipulated in their contracts. Existing laws mandate mobile companies to provide commercial services in at least 10% of the district headquarters by the end of the first year. The telecom ministry can fine mobile phone companies Rs.5 lakh a week per circle for the first 13 weeks of delay. The fine then increases to Rs.10 lakh each for the next 13 weeks, followed by Rs.20 lakh for delays up to 26 weeks. If services are not rolled out after 52 weeks of obtaining the licences, then the permit can be cancelled and the spectrum that comes bundled be taken back.

Deadlock

• Trai had recommended that a total of 69 mobile permits of five telcos be terminated for failure to rollout services and for delayed launch of mobile services;

• Two telecom dept officials said Trai's methodology for accessing the rollout of networks was flawed and this would be communicated to the regulator within the next few days.

COURT ROOM NEWS

• The Supreme Court of India in the case of Indian Oil Corporation Ltd. V/s. SPS Engineering Ltd., reported in AIR 2011 SC 987, has held that Under Section 11 of the Arbitration Act, the Court (the Chief Justice or his designate) will exceed his jurisdiction if he decides the claim for extra costs, claimed barred by res-judicata and Limitation.

• The Hon'ble Supreme Court of India in the case of Eureka Forbes Ltd. V/s. Allahabad Bank, reported in (2010) 6 SCC 193, has held that as per Section 2(g), the bank can raise a claim against any person on account of or in the course of any business activity undertaken by the Bank and also held that Word 'debt' under Section 2(g) of the Recovery Act is incapable of being given a restricted or narrow meaning by the Courts.

• The High Court of Kerala in the case of BPL Ltd. and Ors. V/s. Pegasus Assets Reconstruction (P) Ltd, reported in ILR 2011 (1) Kerala 637, has held that in cases of transfer of secured assets of a company (Petitioner) by assets reconstruction company and subsequent transfer by banking company to another assets reconstruction company by successive assignments are neither prohibited in any manner nor are contrary to any provisions of the RDDB Act or Banking Regulation Act, 1949.

• The High Court of Delhi in the case of Kotak Mahindra Bank Ltd. V/s. Hermonite Associates Ltd., reported in MANU/DE/3634/2010, has held that the if the Statutory Notice under Section 434 of the Companies Act for winding up the Company is returned with unserved remarks on account that the Registered office of the Company is closed and shut, the service of the Statutory Notice will be deemed to have been served upon the Company.

• The Supreme Court of India in the case of Raj Kishore V Prem Singh reported in AIR 2011 SC 382, has held that in a case where the parties have entered into a transaction of sale and also executed an agreement for re-conveyance of the property sold, time stipulated for re-conveyance is the essence of the contract. The Court relying upon its earlier view reiterated that time is not

normally the essence of the contract in contracts relating to immovable property, however, the same does not apply to contracts for re-conveyance of the immovable property.