

INDIA LEGAL UPDATE is a journal of Rajani, Singhanian & Partners which offers a legal perspective on the new business climate and opportunities in India in keeping with the existing laws, current happenings and events in Corporate India.

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An Update on the Legal Realm

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Dear Readers,

Welcome to the April 2015 edition of India Legal Update!

In this issue, we have presented an overview about 'Open Access' as given under the Electricity Act. Open Access allows eligible consumers (the "**End Users**") of power to buy electricity from the generating companies or trading

licensees (the "**Suppliers**") of their choice and correspondingly the generating companies have the freedom to sell the power to any licensee or to the End Users.

In the 'Legal Suite' section, we have highlighted the recent judgment (*Balwant Rai Saluja vs. Air India Ltd*) in which the Supreme Court employed the concept of the integrated approach of tests for determining the question whether the workmen engaged in canteens through a contractor, could be treated as employees of the principal establishment.

Hope you find this issue interesting and informative.

Look forward to your suggestions and feedback at info@rsplaw.in

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Legal Suite

THE SUPREME COURT FORGES THE INTEGRATED TESTS APPROACH TO DECIDE EMPLOYER-EMPLOYEE RELATIONSHIP IN BALWANT RAI SALUJA VS. AIR INDIA LTD.

By Sunil Kumar

In a recent judgment, the Supreme Court of India was concerned with determination of the relevant factors which could be considered as relevant for ascertaining the question whether a relationship of employer and employee exists in a given case. In *Balwant Rai Saluja vs. Air India Ltd. (2014 LLR 1009)*, the Apex Court while addressing the question whether the workmen engaged in canteens through a contractor, could be treated as employees of the principal establishment, after reviewing several earlier of its own decisions, adopted and applied the 'integrated approach', namely, an integration of all the relevant tests evolved earlier to find a reasonable solution in a problematic case. The Court was required to ascertain whether workmen, engaged as casual or temporary employees by a contractor to operate and run a canteen on the premises of a corporation could be said to be the workmen of the corporation, redusted all the well-established and settled principles and then pronounced, and in fact refashioned, a new and more comprehensive test to answer the vexed question which continues to crop up repeatedly.

Briefly stated the facts in this case were that Air India in the capacity of the principal employer had engaged Hotel Corporation of India (HCI) as a contractor to run a canteen on its corporate premises which was a requirement under the Factories Act, 1948. In terms of the contract between Air India and HCI, the responsibility to run the canteen was absolutely with HCI and the employees for the canteen were provided by the latter. The employees were engaged on a casual or temporary basis by HCI which acted as the contractor for running and operating



the canteen. The employees claimed to be the deemed employees of the management of Air India on the ground that they worked in a canteen which was established on the premises of Air India for the benefit of Air India employees. The claim of the employees went

from the Industrial Tribunal- cum- Labour Court to the High Court and eventually wound up in the Supreme Court of India as the employees appealed the decision of the Lower Courts. Before Supreme Court the main issue for consideration before the Court in the present reference is “whether workers, engaged on a casual or temporary basis by a contractor (HCI) to operate and run a statutory canteen, under the provisions of the Act, 1948, on the premises of Air India, can be said to be the workmen of the said corporation”. In short, what in law was the status of the employees?

The employees backed their claim on the grounds that under the Factories Act they were treated as workmen and since they were working in a canteen established by statute, and since they were workmen and worked under the control of Air India for whose benefit the canteen was being run, they were not under the control of the contractor, who in turn had no control over the management, administration and functioning of the canteen. It was alleged that the employees worked under the supervision and control exercised by Air India's management as HCI also functioned under the control of Air India's management. The concept of control was invoked by the employees as certain judgments of the Court had considered control as a relevant test and examined the nature of the control exercised by the principal employer in those cases. The Court also examined cases where the test of complete administrative control of the management over the contract workers sourced from a contractor had been applied. The Court even referred to certain pronouncements of English Courts in order to gather their approach to employer-employee relationship and noted some relevant conditions like the servant agreeing to work for a consideration to provide his services and skill, agreeing to perform his services subject to the employers control in a sufficient degree and the need for other provisions of the contract being consistent with a contract of service. On the issue of control, the English cases had clarified that control would include the power of the employer to decide how the thing was to be done, the means to be employed for doing it, the time and place where it was to be done and above all such control must exist in a sufficient degree. And yet the Apex Court found cases where earlier rulings qualified that no doubt control was one of the important tests but was not to be taken as the sole test. In some cases to determine the true relationship between employer and employee all other relevant facts and terms and conditions of the contract had also been considered. Thus, on completing a complete tour de force of case law, the Supreme Court felt that what was needed was an integrated approach, meaning thereby that in deciding complex cases it would be necessary to integrate the relevant tests so as to examine whether the employees in question were fully integrated into the employer's business or concern or whether they were independent of the concern although

attached therewith to some extent.

Applying the integrated approach to the facts of the case, the Court found that the running of the said canteen and control over its operations was with HCI and the functions of appointment, payment of salary, removal from service, dismissal, and disciplinary action over the canteen staff rested with the HCI. Despite the fact that Air India did exercise some supervision on the quality, skill and performance of the staff, to ensure provision of good quality food and service, the Court ruled that going by the integrated tests approach they were satisfied that the employees of HCI stood on a different footing in as much as they were part of a separate legal entity and different business concern which was set up for carrying out the activity of operating and running of canteen services, nor, applying the test of control did the Court find that Air India exercised absolute and effective control over HCI's employees. All things considered they did not satisfy the tests of employer-employee relationship vis-à-vis Air India which did not qualify as their employer.

Going forward the Supreme Court's ruling in this case is noteworthy for the Courts integration of various tests evolved by it in the past and fashioning an integrated approach to virtually hold that there cannot be a one size fit all approach and complex cases must be resolved by application of a holistic set of tests.

OPEN ACCESS – AN OVERVIEW

By Shisham Priyadarshini, Amish Shroff and Kapish Mandhyan

INTRODUCTION

India is the fourth largest consumer of power in the world, yet ironically, load shedding and low grade power supply are frequently experienced. A part of the problem rests with the geographical disparity of India where the generating companies (*mostly thermal and hydro-electric power plants*) are located at a geographical distance away from major consumption centers (*such as the metropolitan cities and industrial zones*). Such disparity coupled with poor investments in transmission and distribution lines has caused certain areas of the country to be energy surplus but cause certain other areas to have high peak deficiency. Though, the regional transmission and distribution grids are now interconnected to a national grid, major steps are required to be taken in order to ensure 100% electricity availability throughout the nation.

Electricity is a concurrent subject under the Indian Constitution, which means both the Central and State Legislatures have the authority to enact laws on the subject. The Electricity Act, 2003 (the "**Electricity Act**") is the governing legislation on the subject, covering all aspects of electricity in India relating to generation, transmission, distribution, trading and use of electricity. The Electricity Act takes into account the complex ground realities of the power sector in India with the aim to transform this sector.

Prior to the Electricity Act coming into force, the electricity sector was governed by Indian Electricity Act, 1910; Indian Electricity (Supply) Act, 1948; and Electricity Regulatory Commission Act, 1998. The Electricity Act consolidates all the electricity legislations into one Act.

The Electricity Act de-licenses power generation completely (*except for hydro-power projects over a certain size*) and provides for, amongst others, newer concepts like Power Trading, Open Access.

Under the Electricity Act, the term "Open Access" means "*the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.*"

Open Access allows eligible consumers (the "**End Users**") of power to buy electricity from the generating companies or trading licensees (the "**Suppliers**") of their choice and correspondingly, the generating companies have the freedom

to sell the power to any licensee or to the End Users. Simply put, it is a mechanism that provides a choice to the Suppliers to sell power to the End Users without any discrimination while the End Users can source their needs from the most economic Suppliers.

The Electricity Act envisages Open Access in transmission and distribution network. As regard the Open Access in transmission is concerned the same has been allowed earlier. However, in so far as Open Access in distribution is concerned, the law envisages introduction of such Open Access in phases with due consideration of the operational constraints and existence of cross subsidy between consumer categories.

REQUIREMENTS UNDER THE ELECTRICITY ACT

In terms of the Electricity Act, the central transmission utility (Power Grid Corporation of India Limited) and the state transmission utilities along with every person licensed to distribute electricity under the Electricity Act are obligated to provide for Open Access. Open Access can be availed by a Supplier or an End User. A Supplier or End User desirous of utilizing Open Access may approach the respective State Electricity Regulatory Commission ("**SERC**") for obtaining permission for intra-state Open Access (*i.e. within the states*) or the Central Electricity Regulatory Commission ("**CERC**") in the event they are desirous of obtaining inter-state Open Access (*i.e. between the states*). The Supplier or End Users must meet the minimum criteria provided by the SERC or CERC and in the event the Supplier or End User has met the basic criteria and subject to the available capacity of the transmission/distribution licensee, the End User and the Supplier are granted Open Access. Open Access can be sought for three distinct time periods i.e. for short term (*below 3 months*), medium term (*3 months to 3 years*) or long term (*12 years to 25 years*).

On receipt of the license from the SERC or CERC, the End User or Supplier may avail Open Access as per the terms and conditions specified in the license. The End User or Supplier however, is liable to pay all charges in relation to the Open Access, including connectivity charges, transmission charges, transmission losses, wheeling charges, cross subsidy surcharge state load dispatch centre charges and regional load dispatch centre charges.

NEED FOR OPEN ACCESS

With the power distribution companies (the "**Discoms**") under heavy debt and losses, the Indian power sector is facing a crisis, the brunt of which is being faced by the End Users. Power supplied through Discoms is often unreliable and causes a

number of problems for smooth functioning of the industries. It, therefore becomes necessary for the industries to have an alternate source of power which is possible through Open Access to ensure better quality and reliability of power for smooth functioning of their assets.

Open Access can therefore theoretically provide a legitimate alternate to the Discoms and provide the End Users a direct connection to the Suppliers, ensuring continual and uninterrupted electricity. The Suppliers are further assured that their generation capacity has been used at its peak efficiency with a constant demand for electricity. Open Access therefore is a win-win situation for the Supplier and the End-User.

Competition is a corner-stone of the Electricity Act. Open Access has been conceived as an important tool to introduce competition in the electricity sector and to ensure choice to the End Users and the Suppliers of electricity. Open Access provides for competition between the Discoms and the Suppliers and also between multiple Suppliers. The End User therefore has the option of choosing the best option among various alternates.

ROAD BLOCKS TO OPEN ACCESS

Although the Electricity Act introduced the concept of Open Access, there is still no actual implementation of Open Access across India and the concept of the Open Access still faces multiple impediments, some of which are as under:

Unfavorable Regulation - The major impediments to successful implementation of Open Access is the nature of regulation with each SERC having the power of regulating intra state Open Access through its own regulation with divergent multiple agencies under its control. Keeping in mind the interest of the Discoms, SERCs are often reluctant to act in the manner which will boost Open Access to achieve the desired results.

Lack of Infrastructure - Open Access is the responsibility of transmission and distribution licensees under the Electricity Act. Open Access is therefore carried out in the current existing transmission capacities of such licensee. The Open Access however is granted on the availability of spare transmission facilities by the licensee. Since such facilities are limited, the complete roll out of Open Access is hampered.

Protectionism - It is clear from the decisions of the SERC that the SERC are indeed attempting to protect the Discoms from competition in Open Access. There are multiple reports of SERC's restricting Open Access by not allowing inter-state Open Access (*as in the case of Gujarat*) or refusing the right of Open Access from electricity exchanges (*as in the case of Maharashtra*). Such protectionism of Discoms by the SERC is in stark opposition to the object of free competition under the

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Electricity Act and is a major roadblock for the successful implementation of Open Access.

Cross Subsidy - SERC is vested with the powers to levy 'cross subsidies'. The cross subsidies levied by the SERC and the distribution licensee are in addition to the wheeling charges and transmission losses and has to be borne by the End Users of the Open Access. The cross subsidy therefore, is a barrier for entry and increases costs associated with Open Access and may make it financially unviable for the End Users to procure electricity from the Suppliers. In effect, a cross subsidy is a negative incentive to Open Access.



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NEWS ALERT

Supreme Court States Section 66A of the IT Act Unconstitutional

Recently, the Supreme Court ruled that 'Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.' The Supreme Court upheld that Section 66A of the Information Technology Act is unconstitutional in its entirety.

Section 66A reads: "Any person who sends by any means of a computer resource any information that is grossly offensive or has a menacing character; or any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult shall be punishable with imprisonment for a term which may extend to three years and with fine."

Source : http://supremecourtindia.nic.in/FileServer/2015-03-24_1427183283.pdf



Listed Companies to appoint Women Directors by 31st March, 2015

The Securities and Exchange Board of India vide its circular dated 17th April, 2014 has made it mandatory for all the listed companies to appoint at least one Woman Director on their Board of Directors by 31st March, 2015 in association with the requirement of Section 149 of the Companies Act, 2013, under corporate governance norms.

Source: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1397734478112.pdf

Non-Resident Deposits – Stat 5 and Stat 8 Returns – Discontinuation

March 11, 2015 - It has been decided to discontinue the submission of Stat 5 and Stat 8 Returns from March 2015 by banks dealing in foreign exchange. Accordingly banks, dealing in foreign exchange will stop sending Stat 5 and Stat 8 Returns (both hard and soft copies) to the Department of Statistics and Information Management, Reserve Bank of India.

Source : http://rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=9605

Budget 2015: A comprehensive bankruptcy code like US style Chapter 11

The government will move quickly next fiscal to bring out a bankruptcy law, on par with the Western world, to end the decades-old bane of unscrupulous promoters gaming the banking system.

"The government is looking at an age-old law, which has lost its utility and was misused, and

they are looking to replace it with the new code to take care of the new circumstances," said **Ravi Singhania, managing partner, Rajani, Singhania & Partners**. "If the administration is made to take care of assets efficiently, like the US Chapter 11, it would add value to the economy."



http://articles.economictimes.indiatimes.com/2015-03-01/news/59642290_1_bankruptcy-law-banking-system-march-2014

New rules on cards for startup listing on stock exchanges

A new definition, separate trading platform and higher entry barrier to discourage risk averse small investors will form the contours of a new set of rules to enable startups to list on stock exchanges.

"Knowledgeable investors understand the worth of these companies and, therefore, we find such high valuations for these firms. Though, the Indian retail market may not be able to understand their business, operations and valuations, institutions in India would be better placed in understanding their businesses," said **Sanjay Israni, senior partner, Rajani, Singhania & Partners**.

http://articles.economictimes.indiatimes.com/2015-03-27/news/60553820_1_many-startups-stock-exchanges-post-issue-capital

Insurance Bill: JV partners, owners may be locked in power tussle

The passage of the Insurance Bill by the Rajya Sabha may well be the easier part of bringing in foreign funds into Indian companies as promoters and private equity investors burn the midnight oil on these companies' valuations.

"It is a unique situation where

foreign promoters are allowed to increase stake, but the bargain will happen on a price that is commercially viable to both partners," says **Ravi Singhania, managing partner, Rajani, Singhania & Partners**. "There will be conflicts. Foreign promoters will not like to remain passive investors and since

management control is in the hands of Indian promoters, they will have more power to cash in on other rights."

http://articles.economictimes.indiatimes.com/2015-03-18/news/60249528_1_foreign-promoters-insurance-bill-insurance-act

In the NEWS

US retail investors seek SEC nod to invest in Indian companies via unsponsored ADRs

Like money managers in Hong Kong, Singapore and London, individual investors in the US will now try their luck with a new product to bet on India.

"In unsponsored ADRs, investors would have control of underlying assets, which is not available with p-notes. Also globally, owning stock through p-notes could attract attention of global regulators," said **Prem Rajani, managing partner, Rajani, Singhania and Partners**.

"Unsponsored ADRs will be issued depending on the demand and it will be subject to minimum offer size. These ADRs will also have to comply with maximum FII limit set by the company. It must be noted that this will be treated as FDI investment," said **Sangeeta Lakhi, senior partner, Rajani, Singhania & Partners**

http://articles.economictimes.indiatimes.com/2015-02-20/news/59339973_1_such-adrs-p-notes-exide-industries

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You may need Rs 10 lakhs to invest in a start-up IPO

The Securities and Exchange Board of India (Sebi) has prescribed a ticket size of one million rupees (Rs 10 lakh) for individual investors who want a piece of the start-up pie.

"The high ticket size will ensure that high net worth and institutional investors, who understand such companies, will be able to invest. It will be too big a risk for an investor wanting to invest just Rs 50,000," says **Sanjay Israni, senior partner, Rajani, Singhania & Partners.**

"The only negative aspect of this start-up framework is that they will be listed separately and will not be part of the main exchange. You won't see much trading in them till the time they come to the main board... Exempting promoters from the three-year post-IPO lock-in is important. These are high growth companies and are in regular need of investments. The lock-in exemption will also help promoters monetise".

http://www.business-standard.com/article/markets/you-may-need-rs-10-lakhs-to-invest-in-a-start-up-ipo-115033000676_1.html

Business Standard

Rajani, Singhania & Partners

In the NEWS....contd



Bombay High Court asks Centre to secure RoC website against corporate hijacking

Raising serious concerns over the sanctity and credibility of digital signatures, the Bombay High Court has asked the Registrar of Companies (RoC) under the Ministry of Corporate Affairs (MCA) to prevent any kind of corporate hijacking or other frauds on its website using forged digital signatures.

"Our clients discovered that Form DIR 12 had been fraudulently filed showing appointment of some

unknown persons -- Abhishek Tripathi and Shaikh Zameer Yusuf -- as DDPL's directors using digital signatures obtained due to forged documents and filing fraudulent board and shareholders resolutions," said **Ashish Parwani, partner, Rajani, Singhania & Partners**, which represented DDPL and its directors in the court.

<http://www.dnaindia.com/money/report-bombay-high-court-asks-centre-to-secure-roc-website-against-corporate-hijacking-2070672>

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