Newslex

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"The law must be stable, but it must not stand still"
- Roscoe Pound

INDIAN DEPOSITARY RECEIPTS

India Depository Receipts ("IDRs") as a concept was introduced in the year 2000 pursuant to amendments made to the Companies Act, 1956, followed by a series of regulatory changes aimed towards increasing the viability of IDRs in the Indian markets.

An IDR is an instrument denominated in Indian Rupees in the form of a depository receipt created by a Domestic Depository (custodian of securities registered with the Securities and Exchange Board of India) against the underlying equity of the issuing Indian company, to enable foreign companies to raise funds from the Indian securities markets.

Any foreign company that intends to issue IDR's shall have to comply with certain eligibility norms to be eligible to issue such IDRs. Such norms are as specified under:

• the foreign company must have a pre - issue of the paid - up capital and free reserves of at least USD 50 million and have a minimum average market capitalization [during the last 3 (three) years] in its parent country of at least USD 100 million;
• the foreign company must have a continuous trading record or history on a stock exchange in its parent country for at least 3 (three) immediately preceding years;
•the foreign company must have a track record of distributable profits for at le
• the foreign company must be listed in its parent country and must not been prohibited to issue securities by any regulatory body in such parent county it also should have a good track record with respect to its compliance with securities market regulations.

News 10 @ a glance

Department of Telecommunications Unveils New Security Rules, Drops Controversial Clauses:

The Department of Telecommunications ("DoT") unveiled a new security framework on Tuesday that did away with many controversial clauses in existing rules such as mandating foreign equipment companies to put their software in the equivalent of a sealed envelope and submit it to the government. Another controversial clause that stipulates penalties of 100% of the contract value on vendors if any spyware or malware is found in the imported equipment has also been dropped. Instead, any security breach will invite a maximum penalty of Rs.50 crore in addition to criminal proceedings against the mobile phone company.

The new policy also dilutes the earlier rule that mandated vendors to employ only Indian engineers to maintain the networks of local mobile phone companies. The fresh norms say only top personnel with vendors need to be Indians. The names of these individuals will have to be cleared by the telecom and home ministries prior to their appointment. This is in line with the rules for mobile phone companies where top executives are required to be resident Indians. Besides, with wire tapping in the limelight, the changed policy also mandates that mobile phone companies must only appoint Indians as chief technical officer, chief information security officer or as nodal executives for handling monitoring and interception functions across mobile networks.

This facility is similar to that of Enhanced 911, or E911, in the US. Mobile phone companies may oppose this, citing huge capital expenditure. The Cellular Operators Association of India, the body that represents all GSM-based telcos said that the total cost of installing these will be about $5 billion. For this facility to work, all operators will

As per the Securities Exchange Board of India ("SEBI") guidelines, IDR's will be issued to Indian residents in the same manner as domestic shares would be issued. The foreign company shall make a public offer in the Indian markets, and Indian residents can bid in the same method as biding for Indian shares. The issue process to be followed by the foreign company is the same as that entailed by an Indian Company issuing shares. The foreign company shall file a Draft Red Herring Prospectus ("DRHP"), which will be examined by SEBI. The general body of investors will be entitled to read and review the DRHP as it is a public document and shall be available on the SEBI website. Upon receipt of the approval from SEBI the foreign company shall narrow down on the issue dates and shall commence filling the required documents with the Registrar of Companies ("ROC"). Upon receipt of the approval of the ROC the foreign company may commence marketing of the issue. The issue shall be available to the general public for limited period of days, within which any interested investor can submit his/her application forms at the specified centers.

IDR's shall not be automatically fungible into underlying equity shares of foreign company. IDR holders can convert the held IDRs into underlying equity shares only with the prior approval of the Reserve Bank of India ("RBI"). Upon such conversion, the investor's resident in India shall not be permitted to sell the converted IDR for a period of 30 (thirty) days from the date of conversion of such IDRs. In the current scenario the regulations regulating the issuance and the fungiblity of the IDR's do not permit a conversion of equity shares into IDR's after the such IDR's have initially been converted to equity shares i.e. reverse fungibility is not allowed.

Resident Indians investing in IDR do not fall under the ambit of Foreign Exchange Management Act, 1999 ("FEMA") provisions. However, when an Indian resident converts the IDR into underlying shares is where he shall be caught under FEMA.

Currently the RBI Circular does not allow two way fungibility of IDR's; however, it allows redemption of IDR's to its underlying equity shares after the expiry of 1 (one) year from the date of issue of IDR's (the "Lock-in Period"). The RBI Circular merely provided for a Lock-in Period, it was understood that following the expiry of the Lock-in Period, IDR's would be freely redeemed against the transfer of underlying equity shares, without the requirement of any prior approval from the RBI. This was also a position confirmed by RBI through a specific written clarification sought by our firm on behalf of our clients in December 2010.

In view of the circumstances regarding the fact that the Lock-in Period of

have to install advanced tracking devices on every cell tower, each of which costs up to $13,000 each, according to the COAI.

Secure Call

• The clause that mandated foreign equipment firms to put their software in the equivalent of a sealed envelope and submit it to the government has been done away with.

• The new policy also dilutes the earlier rule that mandated vendors to employ only Indian engineers to maintain the networks of local mobile phone companies

SEBI Asks Promoters to Convert Entire Holding into DEMAT Form:

Market regulator the Securities and Exchange Board of India (SEBI) on Friday asked the promoters of listed companies to convert their entire equity holding in the dematerialized form by September 2011, failing which it will ban trading of such shares in the normal segment of the market.

SEBI said the move is aimed to moderate sharp and destabilising movements in shares of companies and to encourage wider participation of investors and better price discovery. Companies will have to dematerialise the entire promoter holding by September this year. If they fail to do so, the exchanges will shift all such companies to the trade segment, commonly known as 'T' group. Only delivery based trades are allowed in the 'T' group stocks and traders can't square off their positions intraday. Shifting to the 'T' group affects trading volumes in the stock as participation is lower for lack of scope for intra-day buying and selling of shares. "As many promoters still don't have all their shares in the dematerialised form, SEBI requirement is a positive move to improve liquidity," said Motilal Oswal, CMD, Motilal Oswal Financial Services.

About 700 companies listed on the Bombay Stock Exchange have 100% of promoter holding in the physical form, mostly including public sector companies such as Coal India, NMDC, Bhel, Gail, BPCL and Nalco, and also multinational companies such as Hindustan Unilever, Cummins India, Maruti Suzuki and Colgate Palmolive. However, about 2,100 other listed companies have promoter holding partially in the dematerialised form.

Under dematerialisation, shares are converted into an electronic form to avoid problems arising out of mismatch and forgery of signatures and fake certificates. An investor has the option to hold securities either in physical or electronic

the IDR's, SEBI via a Circular aims to put in place a framework for redemption of IDR's. The SEBI Circular acknowledges that the extant regulatory framework does not permit fungibility but only redemption. However, allowing redemption freely in the absence of a two way fungibility could result in the reduction of the number of IDR's listed, thereby impacting its liquidity in the Indian market. To curb such a situation from occurring the SEBI Circular permits redemption of IDR's after the expiry of the Lock-in Period, if only the IDR's are 'infrequently traded' in the stock exchanges. The SEBI Circular further clarifies that 'infrequently traded' shall be calculated by annualized the trading turnover of the IDR's during the 6 (six) calendar months immediately preceding the month of redemption should be maintained at less than 5 (five) percent of the listed IDRs.

The SEBI Circular lays down a procedure wherein the foreign company is required to verify the frequency of trading of IDRs on a half yearly basis (ending on June and December of every year). The foreign company is required to make a public announcement in an English and a Hindi newspaper. The announcement is required to be made within 7 (seven) days of closure of the half year ending on which the liquidity criteria is tested.

The IDR investors will have the right to submit their application to the domestic depository for redemption of their IDR's within a period of 30 (thirty) days from the date of such public announcement. The foreign company is required to complete the redemption process within a period of 30 (thirty) days from the date of receipt of the application for redemption. Pursuant to the redemption the domestic depository is under an obligation to notify the revised shareholding pattern of the foreign company to the concerned stock exchanges within seven days of completion of the process of redemption.

Although IDR's offer an easy and convenient way for Indian investors to gain equity exposure in foreign companies this instrument has not been very popular with issuers since it was introduced in 2000. It is hoped that the economic recovery in foreign markets will encourage foreign companies to use this instrument to attract investments from Indian investors.

form. However, Sebi has notified that settlement of trades in listed securities should take place only in demat mode. Last September, SEBI had said that only shares of those companies would be allowed to trade in the normal segment where at least 50% of non-promoters holdings are in the dematerialised form. However, a lot of firms were unable to fulfill this requirement. Consequently, exchanges shifted their securities to the trade segment.

GoM on Coal to Meet on July 14 to Fix Green Hurdles:

The Group of Ministers (GoM) on Coal is likely to meet for the fourth time on July 14 instead of July 2 to try and resolve issues hurting the production of coal in the country amid an ever-widening demand and supply gap, which is expected to reach 137 million tonnes in 2011-12. "The next meeting of GoM is likely to be held on July 14 instead of July 2," an official in the Coal Ministry said. Six coal projects allotted to firms like ADAG, Essar, and the Aditya Birla Group for fuelling their thermal power plants, which have been stalled due to pending environmental approvals, are likely to be discussed in the upcoming meeting. The coal blocks that are likely to come up for discussion are the Mahan and Chhatrasal blocks in Madhya Pradesh, Morga-II and Parsa in Chhattisgarh and Ashok Karkata and Chakla in Jharkhand, sources had said.

Compensate Taxpayer for Late-Night Raid, Rights Panel tells I-T:

The Human Rights Commission (HRC) of Bihar has ordered the Income-Tax Department to pay monetary compensation to a taxpayer who was interrogated up to late hours during a two-day raid last year.

Justice SN Jha of Human Rights Commission of Bihar gave this order on a complaint filed by Rajender Singh, the owner of Bhargo Saw Mill in Patna, who, along with his family members, had been kept awake in the night by taxmen during their raid from September 8 to 10, 2010. The Commission said while I-T officials can conclude the raid at their own time, they have no right to violate basic human rights and cause physical and mental torture to persons they are interrogating. If the officer in charge needs to interrogate for longer hours, he should stop at a proper time and resume the interrogation the next day, the Commission observed. "But continuing the process without any break or at odd hours up to 3.30 am, forcing the taxpayer and his family members to remain awake is a torturous act which cannot be countenanced in a civilised society," said the Commission's order. The Human Rights Commission, however, held that it would

PFIZER PRODUCTS INC. & ANR. ("PLAINTIFFS") V/S. B. P. SINGH TYAGI & ANR. ("DEFENDANTS") CS (OS)NO.2297/2007

In the past, we have written about the proactive approach of Indian Judiciary in granting damages, injunction orders etc and cited instances. This pronouncement takes it a step frontward and is much appreciated by the companies, especially international players who feel more conducive while operating in Indian market.

The Court in this matter categorically highlighted the peculiar nature of the pharmaceutical industry vis-à-vis infringement and deliberated why one needs to have a different standard and perspective when posed to address sensitive issues of infringement in pharmaceutical industry.

The brief facts of the matter are:

1. Pfizer is a large multinational pharmaceutical company which enjoys a global reputation for the high quality and efficacy of its product.

2. Defendant was manufacturing and marketing a cough syrup under the mark OREX which is deceptively and phonetically similar to plaintiff's mark COREX.

3. On enquiry, the plaintiffs discovered that the defendants are manufacturing and marketing a cough syrup under the mark OREX which is similar to plaintiff's mark.

4. The defendants, as alleged by the plaintiff, have thus adopted a mark which is deceptive similar to their registered mark OREX and are thereby trying to maliciously capitalize upon the goodwill and reputation of the plaintiffs.

5.The plaintiffs also alleged that there is apparent likelihood of the customers getting induced to believe that the product offered by the defendants was of the same quality as the products of the plaintiff-companies are and they may also believe that the defendants have some connection or association with the plaintiff-companies or have licensed or authorized the product being sold by the defendants under the trademark OREX.

6. The plaintiff therefore sought injunctions, restraining the defendant from manufacturing, marketing or advertising any product under the mark OREX or any other mark which is identical or deceptively or confusingly

give an opportunity to the I-T department to contest its order to compensate the applicant monetarily. The complaint filed by Singh had also alleged that the officials misbehaved with family members. The Commission, however, did not take cognisance of it as it required determination of facts which was beyond the commission's purview.

In a corporate repo bond, banks, corporate & PDs pledge with each other to raise short-term money:

• What is corporate repo bond?
Banks, corporate and primary dealers pledge corporate bonds with each other to raise short-term money. It is similar to banks pledging government securities (gsec) with RBI to raise short-term money. Unlike pledging of g-secs, here the borrower who pledges corporate bonds does not receive the entire value of the bond.

• When did RBI allow repo in corporate bonds?
RBI guidelines on repo in corporate debt securities came into effect on March 1, 2010.These guidelines were amended in December 2010 as the market participants demanded a reduction in hair-cut margins. It was reduced from a flat rate of 25% to a band of 10-15%, depending on the rating of the corporate bond. According to the amended guidelines, the settlements had to be made within two days of the deal.

• How does the repo in corporate bonds work?
Investor A, who needs finance for an interim period, can issue these bonds while entering into an agreement with investor B that at a given point of time he would buy back the bond from investor B, though the bond issuer would have to suffer a hair-cut margin of 10-15%, which will vary according to the credit rating of the bond.

• How active is the repo in corporate bonds in India?
Only five deals have been reported so far. Companies that have issued corporate bonds in India are REC, PFC, HDFC and NHB.

• Why has repo in corporate debt not taken off?
Lack of market participation could be because of lenders or issuers maintaining a cautious approach as well as due to lack of proper trade guarantee mechanism. Also, the hair-cut margin of 10-15%, (which is the margin enjoyed by the investor on the day the agreement is reversed), is still very high from the investors' point of view considering the volatility in corporate debt market does not demand such a high hair cut. Interest rate is determined over-the-counter, but there is no mechanism for efficient discovery of prices. There is no centralised clearing agency like

similar to plaintiff's registered trademark COREX. The plaintiffs have also sought rendition of accounts for the profit earned by the defendants by infringing plaintiff's trademark and by passing off their goods as the goods of the plaintiff. The plaintiffs also sought damages amounting to Rs.2,00,200/- from the defendants.

7. The plaintiffs claimed that they have been manufacturing their product under the mark COREX in India since 1964 and are also the registered proprietor of the trademark COREX.

The Court referred to the much celebrated judicial pronouncement on the similar factual matrix in Pfizer Products, Inc. and Anr. vs. Vijay Shah and Ors.(CS(OS) No. 2244/2007). Court examined the right claimed by the plaintiffs in respect of the trade mark COREX. It inter alia observed that Section 28 of Trade Marks Act, 1999 gives to the registered proprietor of the trade mark, the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark. In a case based on infringement of this statutory right, it is necessary for the plaintiff to prove that his registered trade mark has been used by the defendant, though no such use is required to be established in an action for passing off. It is also a settled proposition of law that if the defendant resorts to colorable use of a registered trade mark such an act of the defendant would give rise to an action for passing of as well as for infringement.

However, in a case of passing off, it is imperative to note that if the defendant is able to establish that on account of packaging, get up and other writing on his goods or on their packaging, it is possible to clearly distinguish his goods from the goods of the plaintiff, he may not be held liable.

This does not discount the settled position of law that while adopting the mark, the defendant is required to exercise utmost honesty and in no circumstances intend to ride upon the goodwill generated by the plaintiff's mark.

Reiterating the earlier verdicts, the Court in this matter held that a competitor cannot, in any manner, usurp the goodwill and reputation of another by adopting a mark similar to the established mark of its competitor.

The Court emphatically stated that it cannot be oblivious to the fact that drugs such as cough syrups are available over the counter and without

the Clearing Corporation of India (CCIL) for central government securities.

India and Singapore to Exchange Tax Information:

India and Singapore on Friday amended the Double Taxation Avoidance Agreement (DTAA), a move that will help both the countries exchange banking and tax related information more effectively. "This amending Protocol will go a long way in strengthening relationship between India and Singapore and facilitate mutual co-operation by effective exchange of information in tax matters between two countries," the Central Board of Direct Taxes (CBDT) said. The two nations have adopted internationally agreed standard for exchange of information in tax matters. This includes the principles incorporated in the OECD Model Article on 'Exchange of Information' and requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes.

Big Bazaar, Food Bazaar Brought Under Future Value:

Pantaloon Retail India (PRIL) on Monday said it has completed realignment of its business by transferring its value retail formats — Big Bazaar and Food Bazaar — to Future Value Retail (FVRL). In a filing to the Bombay Stock Exchange, the company said the High Court of Bombay on March 25, 2011, has approved the scheme of arrangement between PRIL and FVRL and their respective shareholders. "With this, all format and other brands pertaining to value retail business comprising brands like Big Bazaar and Food Bazaar now vests with FVRL. It completes the realignment process of the retail business of the company (PRIL) between the company (PRIL) and FVRL," the filing said.

New Norms for Filling Board Vacancies in PSUs:

The government has modified the guidelines for filling board-level vacancies in state owned companies in time and also to help the Central Public Sector Enterprises (CPSEs) to improve performance. Under the new guidelines issued by the Public Enterprises Selection Board (PESB), the exercise to appoint board level functionaries would be initiated 16 months prior to the anticipated date of vacancy. Earlier, the process was started one year in advance. However, if the ministry's comments are not received within 15 days, the PESB shall finalise the same on the basis of existing description.

production of a medical prescription, in all parts of the country. Consumers from villages possessing average intelligence may not like to strictly examine the label of the cough syrup which they find in the shop when the names of the two products are phonetically similar and the packaging of the product and other distinguishing features, if any, are not adequate to enable him to distinguish the product which he finds in the shop with the product which he intends to purchase.

Regard may be had to the following observations:
1. the trading channels and intended customers are identical for the products under both the marks;
2. similarity in four out of five characters in both the marks;
3. the marks are not just phonetically similar, but structurally, conceptually and visually similar too. Considering the phonetic similarity between the name COREX and OREX and a number of similarities in the packaging and label and the products being manufactured and sold by the plaintiffs as well as the products being manufactured and sold by the defendants, both being cough syrups, there is a strong likelihood of customer possessing an average intelligence and particularly those living him in small towns and villages buying the infringed products on the assumption that they were buying the product of the plaintiff, which is reputed and well- known cough syrup.

The infringed products might not be of high standards and the consumers are bound to associate the quality of the product of the defendants with the plaintiff, which may adversely affect not only the reputation but also the business interests of the plaintiffs.

Considering the facts of the case and the external considerations, the Court passed the decree of injunction and further held that with a view to deter the defendants from indulging in similar acts in future, it is necessary that some punitive damages are awarded to the plaintiffs.

CONCLUSION:

Every industry has a peculiar nature to offer. More caution is to be exercised and much wider parameters are to be considered while dealing in pharmaceutical industry. It is uncontested that marks in pharmaceutical industry are more prone to infringement. A medicinal product launched in any country, by its very nature, in no time gathers international attention. Courts need to apply different standards deciding cases on merits in each sector.

Duty-Free Import of Goods Allowed from Afghanistan:

India has extended duty-free market access to Afghanistan as part of its economic package for Least Developed Countries (LDCs). Under the scheme, the import of most products from the neighbouring country will be allowed at zero duty. India's Duty-Free Tariff Preference (DFTP) scheme, launched by Prime Minister Manmohan Singh in 2008, provides preferential duty access on products comprising 92.5% of global LDC exports. The DFTP scheme grants duty-free access on 85% of India's total tariff lines. The scheme is to be implemented over a period of five years through five equal tariff reductions of 20% each on the current applied rates to bring down the duty rate to zero. Some of the products of interest for LDCs which are covered include cotton, cocoa, aluminium ore, copper ore, cashewnut, cane sugar, readymade garments, fish fillets and non-industrial diamonds.

A co making a public issue of securities has to file a Draft Red Herring Prospectus with SEBI through an eligible merchant banker prior to filing a prospectus with the Registrar of Companies":

• What is Draft Red Herring Prospectus?
A company making a public issue of securities has to file a Draft Red Herring Prospectus (DRHP) with capital market regulator Securities and Exchange Board of India, or SEBI, through an eligible merchant banker prior to the filing of prospectus with the Registrar of Companies (RoC). The issuer company engages a SEBI registered merchant banker to prepare the offer document. Besides due diligence in preparing the offer document, the merchant banker is also responsible for ensuring legal compliance. The merchant banker facilitates the issue in reaching the prospective investors by marketing the same.

• Where is DRHP available?
The offer documents of public issues are available on the websites of merchant bankers and stock exchanges. It is also available on the SEBI website under 'Offer Documents' section along with its status of processing. The company is also required to make a public announcement about the filing in English, Hindi and in regional language newspapers. In case, investors notice any inaccurate or incomplete information in the offer document, they may send their complaint to the merchant banker and / or to SEBI.

• What does Sebi do with the DRHP?
The Indian regulatory framework is based on a disclosure regime. SEBI reviews the draft offer document and may issue observations with a

This case is yet another landmark, which might not have any novel principles of law, but surely portrays the progressive approach of Indian Judiciary towards awarding favorable pronouncements and imposing deterrent effect on the infringer.

At the backdrop of globalization and considering the quantum of foreign investments India attracts, this judgment surely paves the way towards a more protective, progressive and evolved trademark regime in India which is much called for.

ARBITRATION CLAUSE IN THE SUIT FOR MORTGAGE IS NON ARBITRABLE

The Hon'ble Supreme Court of India in the matter of Booz Allen and Hamilton Inc. V SBI Home Finance Ltd & Ors reported in (2011) 5 SCC 532 has held that the enforcement of a mortgage by sale can be tried only by court and not by an arbitral tribunal. It was further held that when a court is when an application under Section 8 of the Arbitration and Conciliation Act, 1996 (ACT), the Court should must decide on the issue of arbitrability.

In the instant case, one Capstone Investment Co. Pvt. Ltd and one Real Value Appliance Pvt. Ltd availed loan from SBI Home Finance Ltd. The loan availed was secured by the two companies mortgaging the flats owned by them

Pursuant thereto both the companies entered into a leave and License agreements with the Booz Allen and Hamilton, the Appellant before the Supreme Court. A Security Deposit Agreement was entered between Capstone Investment Co. Pvt. Ltd, Real Value Appliance Pvt Ltd, Booz Allen and Hamilton and SBI Home Finance Ltd which contained the Arbitration clause, which reads as under:

"In case of any dispute with respect to creation and enforcement of charge over the said shares and the said Flats and realization of sales proceeds there from, application of sales proceeds towards discharge of liability of the Parties of the First Part to the parties of the Second Part and exercise of the right of the Party of the Second Part to continue to occupy the said Flats until entire dues as recorded in Clause 9 and 10 hereinabove are realized by the party of the Second Part, shall be referred to an Arbitrator who shall be retired Judge of Mumbai High Court and if no such Judge is ready and willing to enter upon the reference, any Senior Counsel practicing in Mumbai High Court shall be appointed as the Sole Arbitrator.

view to ensure that adequate disclosures are made by the issuer company/merchant bankers in the offer document to enable investors to make an informed investment decision in the issue. It must be clearly understood that Sebi does not 'vet' and 'approve' the offer document. Also, SEBI does not recommend the shares or guarantee the accuracy or adequacy of DRHP. SEBI's observations on the draft offer document are forwarded to the merchant banker, who incorporates the necessary changes and files the final offer document with SEBI, Registrar of Companies (ROC) and stock exchanges. After reviewing the DRHP, the market regulator gives its observations which need to be implemented by the company. Once the observations are implemented, it gets final approval & the document then becomes RHP (Red Herring Prospectus).

• How is DRHP useful to investors?
DRHP provides all the necessary information an investor ought to know about the company in order to make an informed decision. It contains details about the company, its promoters, the project, financial details, objects of raising the money, terms of the issue, risks involved with investing, use of proceeds from the offering, among others. However, the document does not provide information about the price or size of the offering.

COURT ROOM NEWS

• The CLB, Kolkata Bench in the matter of Anil Kumar Poddar V/s. CESC Ltd. CP No. 596 (167) KB of 2010, has held that Section 167 of the Companies Act, 1956 can be invoked only when the company has defaulted in holding the AGM within the period specified in Section 166 of the Companies Act, 1956.

• The High Court of Calcutta in the matter of Newage Commercial (P) Ltd. Anr. V/s. Registrar of Companies, reported in (2011) 102 CLA 312 (CAL) held that if step by step procedure is not followed for issuance of notices to the company before declaring the company to be a defunct company, it would result in the violation of principles of natural justice.

• The Delhi High Court in the matter of Vodafone Essar Ltd. & Ors. reported in (2011) 2 CLJ 317 (Del) has held that the company by way of an arrangement can transfer its property to another company by way of a gift and the same is permissible under Section 391 of the Companies Act, 1956.

The Arbitrator will be required to cite reasons for giving the award. The arbitration proceedings shall be governed by the Arbitration and Conciliation Ordinance 1996 or the enactment, re-enactment or amendment thereof. The arbitration proceedings shall be held at Mumbai."

After there being defaults in making the repayments, SBI Home Finance Ltd filed a Suit inter alia seeking redemptions of monies through sale of the suit properties, declaration for seeking the possession of the flats and also for vacationing of the flats by Booz Allen and Hamilton.

The Appellants filed an application under Section 8 of the Act before the Hon'ble Bombay High Court seeking a stay on the Suit filed by SBI Home Finance Ltd and the parties to be relegated to Arbitration.

The Hon'ble Bombay High Court dismissed the Application of the Appellants on the ground that SBI Home Finance Ltd was seeking to enforce its rights against the borrowers i.e Capstone Investment Co. Pvt. Ltd, Real Value Appliance Pvt Ltd under the mortgage and therefore the parties need not be referred to Arbitration.

The Hon'ble Supreme Court of India after framing various issues concluded that, "An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear

IPR International News

Trademark rejected because of derogatory words:

USPTO rejected an application for trademark registration filed by a Chinatown dance-rock band. The band wanted to register a trademark with the term SLANT. The registry denied registering their brand name with the reason that it consists of "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage" and also that amongst Asians it is a deprecating term.

Siemens Patent infringement Suit:

Patent infringement complaint over the technology of light-emitting diode was filed by Siemens in Hamburg against the US and German branches of Samsung Electronics and LG Electronics. The said technology is used in flat panel Television sets and bulbs having LED lights. Siemens also filed its complaint before the Washington and Delaware District Courts as well as International Trade Commission.

IPR India News

The High Court of Calcutta in the matter of K. C Das Pvt. Ltd. and Anr. V/s K. C. Das, reported In MIPR 2011 (2) 0032*, by partly allowing the appeal has held that it is an inherent right of an individual to do a business in his name or that of his predecessor. Mere possibility of causing any confusion cannot be a ground to restrain that person from continuing his business in the name of his.

The High Court of Delhi in the matter of Rajesh Garg V/s Mr. Tata Tea Ltd. and Anr., reported In MIPR 2011 (2) 0055*, dismissing the petition held that the Petitioner's act was with the intention of driving monetary benefits by portraying its products as that of the defendant's. The offence will be cognizable if it is committed with respect to the eatables and related trademarks.

that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals)."

The Hon'ble Supreme Court thus held that the suit for enforcing the mortgage by sale impliedly has to be tried by a court and not the arbitral tribunal. Also, by this judgment the Supreme Court also stated that certain proceedings which are non-arbitrable and stated "The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34 (2) (b) and 48 (2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

Thus, by this judgment the Hon'ble Supreme Court of India has held that suit for enforcement of mortgage by sale has to be tried only by a court and not by an arbitral tribunal.