LEGAL BULLETIN

from

Associates & Solicitors

(Strategic Legal Counsel)

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CONSUMER PROTECTION

- ***Sri Varadarajan v. HDFC Bank (NCDRC, Dated: 25th March, 2011, Revision Petition No. 1605 of 2010)***

  The respondent Bank having lured the Petitioner to obtain 45 days of credit facilities for payment of his LIC premiums has without any prior information or authorization from the complainant made over-payment to the LIC. The complainant has brought this to their notice and he has exercised his right not to pay the unauthorized payment and has cleared the bill after deducting the over-payment. It was, therefore, open for the respondent Bank to have taken action to reverse the over-payment and not continued with it as arrears and charge interest and late fees thereupon. Since the stand of the respondent Bank before the fora below was that they are commonly concerned with the payment of respective demands made by the insurance companies/biller, they are not aware of the exact terms of the insurance policy of the complainant like premium amount and its period etc. Since this was the main defence, we had called upon the respondent Bank to place on record the bills/demands raised by the Insurance Company with regard to the payment made to the LIC. Despite repeated opportunities, neither any proof of having paid the stated amount towards the premium to the Insurance Company nor any affidavit of a responsible officer of the Bank has been filed by the respondent bank. It is noted that the respondent Bank has not even produced its own account to show that the amount claimed to have been remitted to the LIC has been debited from their account and paid to the LIC. It is, therefore, difficult under the circumstances for to believe that the amount so claimed as due from the complainant had indeed been remitted to the LIC on the face of the specific allegation of the complainant that his instructions covered payment of Rs.2500/- only towards the quarterly premium.

It was held that, while no one can object to the right of the Bank of its lien on the complainant's account and its power to set off, but in the present case the Bank has arbitrarily exercised that power without showing the proof that it had only acted as per the demands received from the LIC on behalf of the petitioner/complainant. The deficiency on part of the respondent Bank, thus, stands clearly established.

- ***Mrs. Rubi (Chandra) Dutta versus M/s. United India Insurance Co. Ltd. (Case No: Civil Appeal No. 2588 of 2011) Dated: 18th March, 2011)***

  Insured bus met with an accident as a result of which not only the body of bus but its internal systems also suffered extensive damage. Claim was lodged with the Insurance Company but it was not settled. Hence, complaint was filed. The lower foras allowed the claim of the appellant. However, the National Commission concluded that the driver of the bus at the relevant point of time was not holding a valid driving licence thus, set aside and quashed the orders passed by District Forum and State Commission. In appeal before the Supreme court it was held that the Copy of the Duplicate Licence issued by Licensing Authority, Murshidabad categorically states that the said duplicate licence in the name of the driver of the bus was issued only after "verification from the original". The Supreme Court held that even if the original application was not available but since the duplicate licence was issued by the same licensing Authority, Murshidabad, it cannot be challenged that the original licence was fake, forged, manufactured or engineered document; therefore, at the relevant point of time driver was holding a valid driving licence to drive the bus. Impugned order of the National Commission was set aside and the respondent was directed to pay the amount of Rs. 2, 72,517/- to the Appellant together with interest at the rate of 9% per annum.

- ***Kajol versus Life Insurance Corporation of India (NCDRC , Dated: 4th April, 2011, Revision Petition No. 50 of 2011)***

  Claims filed by the Complainant under the policy were repudiated by the LIC on the ground that the insured was suffering from tuberculosis since 2004 and had been under-treatment for the same. While filing the policy revival form in both the cases the information relating to this ailment was not disclosed. The Commission held that the law on the need for full disclosure stands clearly enunciated through a string of decisions of the Supreme Court of India ending with a reiteration in **Satwant Kaur Sandhu Vs. New India Assurance Co. Ltd. IV (2009) CPJ 8 (SC).** It was held that a contract of insurance is one of utmost good faith on the part of the assured. "Thus, it needs little emphasis that

when an information on a specific aspect is asked for in the proposal form, an assured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge. It is not for the proposer to determine whether the information sought for is material for the purpose of the policy or not."

- ***National Insurance Company Limited versus M/s Venketshwera (NCDRC, 11th April, 2011, First Appeal No. 450 of 2009)***

  The respondent (complainant) deals in business of footwear. The stock in the shop of the respondent was covered under insurance policy issued by the appellant against damages. The insurance period was between 4.01.2000 to 03.01.2001. On 23.07.2000, the respondent no. 1 (complainant) got shifted the business from shop no. 113, new shoe market, Chhattabazar, Hyderabad to another place at H. No. 1-8-726/41, Plot No. 251, Brundavan Colony, Baghlingampally, Hyderabad, where the respondent was running a garment stitching unit.

  The respondent (complainant) alleged that due to heavy rains the premises were filled with water and, therefore, the stock of the garments and other articles was damaged and / or washed away and became useless.

  It was held that the respondent gave mere intimation to the appellant while shifting of the business of foot-ware to the place of his another business. There was no valid acceptance of such offer by the appellant. There was no opportunity for the appellant to examine whether the business place in H. No. 1-8-726/41, Plot No. 251, Brundavan Colony, Baghlingampally, Hyderabad was safe enough to continue the insurance cover. The respondent no. 1 could not have assumed acceptance of his proposal without obtaining the necessary endorsement allowing change of the premises by the appellant. In other words, there was no renovation of the contract of insurance policy. The respondent no. 1 also was facing financial difficulties and was in the process of winding up of the foot-ware business. Under these circumstances, the compensation ought not to have been granted to the respondent no. 1 when there was no valid contract subsisting between the appellant and him and moreover the change of the premises and shifting of the stock from shop no. 113, new shoe market, Chhattabazar, Hyderabad was done without prior consent of the appellant as

well amounted to violation of the terms of the Insurance Policy in view of exclusion clause 9 of the policy which read as under:

The relevant exclusion clause 9 reads as under:-

"Property insured if removed to any building or place other than in which it is herein stated to be insured except machinery & equipment is temporarily removed for repairs, cleaning renovation or other similar purposes for a period not exceeding 60 days."

CIVIL LAW

- ***Deutsche Post Bank Home Finance Ltd. versus Taduri Sridhar & another (Case No: Civil Appeal No. 2691 of 2011, Dated: 29th march, 2011)***

The issue was whether in a section 11 petition under the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator, the appellant could be made a party to the arbitration, even though the appellant was not a party to the arbitration agreement contained in clause (7) of the construction agreement between the first respondent and the developer. It was held that if a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement. The existence of an arbitration agreement in a contract between appellant and first respondent, will not enable the first respondent to implead the appellant as a party to arbitration in regard to his disputes with the developer.

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FINANCIAL LAWS

- ***Guffic Chem P. Ltd. Appellant(s) versus C.I.T., Belgaum & another Respondent(s) Case No: Civil Appeal No. 2522 of 2011 With Civil Appeal No. 2523 of 2011. Dated: 16th March, 2011)***

  In this case the question was whether a payment under an agreement not to compete (negative covenant agreement) is a capital receipt or a revenue receipt. The CIT (A) as well as the Tribunal concluded that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of `50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. However, the High Court reversed the decision of the Tribunal in appeal holding that the compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt .The Supreme Court held that the compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) of the Finance Act, 2002 and that too with effect from 1.4.2003. The impugned judgment of the High Court was set aside and the order of the Tribunal restored.

- ***Narayan Chandra Ghosh versus UCO Bank & others (Case No: Civil Appeal No(s). 2681 of 2011) Dated: 18th March, 2011)***

  The issue was whether the Appellate Tribunal has the jurisdiction to exempt the person, preferring an appeal under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 from making any pre-deposit before entertaining the appeal against the order passed by the Debts Recovery Tribunal. The Supreme Court held that

deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement. The condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal was beyond the provisions of the Act, therefore, the High Court rightly set aside the same.

- ***Commissioner of Customs (Preventive), Mumbai Vs. M. Ambalal & Co. [2011] 196 taxman 584 (SC)***

  The Notification No.247/76-Cus., dated 02-08-1976, issued by the Central Government in exercise of the powers conferred by section 25(1) of the Customs Act, 1962 exempts the articles enumerated in the table annexed, when imported into India, from payment of duty under the Act. The language used in the notification is plain and unambiguous. Therefore, same should be considered in its ordinary sense. From the wording of the above exemption notification, it is clear that the benefit of the exemption envisaged is for those goods which are imported. According to section 2(25)of the Customs Act, 1962, term 'imported goods' has been defined to mean 'any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.' It is necessary that the above definition is read along with section 11, section 111 and section 112 of the Act, which provide for detection of illegally imported goods and prevention of the disposal thereof, confiscation of the goods and conveyances and imposition of penalties, respectively. Under section 111 (d) any goods, which are imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force, shall be liable for confiscation. The goods, which had been seized in the instant case, could not be imported into India without a licence under the Import Control Act, and there was, therefore, a prohibition in law for the import of goods except in compliance with the Import Control Act. It was not the case of the Respondent that the goods were imported with a valid licence. Any import of goods, importation of which is prohibited by law, cannot be valid import under the Act. Goods so imported cannot, therefore, be treated to be lawfully 'imported goods' within the definition of that term in section 2(25). Therefore, the Respondent was not entitled to the benefit of the notification. 'Smuggled goods' will not come within the definition of 'imported goods' for the purpose of the exemption notification, for the reason that the Act defines both the expressions looking at the different definitions given to the two classes of

goods; imported and smuggled, and if the two were to be treated as the same, then there would be no need to have two different definitions. In order to understand the true meaning of the term 'imported goods' in the exemption notification, the entire scheme of the Act requires to be taken note of. 'Imported goods' for the purpose of the Act is explained by a conjoint reading of section 2(25), section 11, section 111 and section 112. Reading these sections together, it can be found that one of the primary purposes for prohibition of import referred to in section 11(2) is the prevention of smuggling. Further, in the light of the objects of the Act and the basic skeletal framework that has been enumerated above, it is clear that one of the principal functions of the Act is to curb the ills of smuggling on the economy. In the light of these findings, it would be antithetic to consider that 'smuggled goods' could be read within the definition of 'imported goods' for the purpose of the Act. In the same light, it would be contrary to the purpose of exemption notification to accord the benefit meant for imported goods on smuggled goods.

In the instant case, it was the finding of the High Court that the respondent had imported diamonds of foreign origin without a valid licence and that finding had become final.

TAXATION

- ***Commissioner of Commercial Taxes & others Appellant(s) versus Chitrahar Traders Respondent(s). (Case No: Civil Appeal No. 2686 of 2011, Dated: 16th March, 2011)***

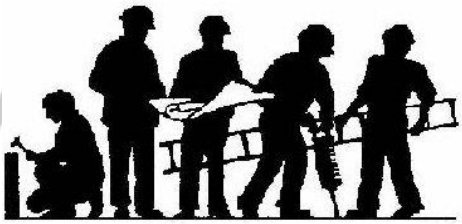
In this case levy of sales tax on sale of scrap was in question. An agreement was entered into between the Company and MSTC for disposal of condemned plant. A dispute arose thereafter as to whether sales tax is leviable and payable on the said articles @ 4% as the plant and machinery was sought to be sold as scrap or whether the respondent is liable to pay sales tax @ 12% with 5% surcharge also. The Sales Tax Department held that the respondent is liable to pay sales tax @ 12% along with 5% surcharge. A writ petition was filed. The Division Bench held that what were sold were scrap and not plant and machineries as such and therefore the learned Single Judge was justified in holding that the respondent is liable to pay sales tax only @ 4%. In appeal it was held that the agreement for disposal of plant clearly proves and establishes that what was sought to be sold was iron and steel scrap and rejected/condemned and obsolete secondary arisings, etc. Terms and conditions of e-auction indicates that what was being sold was scrap. The machineries were dismantled by using the explosives and were transported out of the premises in trucks as steel scrap. The sale has taken place after about 36 years of the purchase of the machineries and the affidavit of the Neyveli Lignite Corporation clearly proves and establishes that those machineries have become obsolete and the plant and machineries have become condemned articles thus, what was sold and purchased by the respondent are nothing else but scrap. There was no interference with the findings of the High Court.

- ***Joint Commissioner of Income-tax Vs. Rolta India Limited[2011] 196 taxman 594/9 taxmann.com 36 (SC)***

  Sections 115J and 115JA of the Income tax Act, 1961 are special provisions. Section 207 envisages that tax shall be payable in advance during any financial year on current income in accordance with the scheme provided in sections 208 to 219 (both inclusive) in respect to the total income of the assessee that would be chargeable to tax for the assessment year immediately following that financial year. Section 215(5) defines what 'assessed tax' is, i.e., tax determined on the basis of regular assessment so far as such tax relates to income subject to advance tax. In the instant case, the evaluation of the current income and the determination of the assessed income had to be made in terms of the statutory scheme comprising section 115J/115JA. Hence, levying of interest was inescapable. The assessee was bound to pay advance tax under the said scheme of the Act. Sections 115J and 115JA are special provisions which provide that where in the case of an assessee, the total income as computed under the Act in respect of any previous year relevant to the assessment year is less than 30 per

cent of the book profits, the total income of the assessee shall be deemed to be an amount equal to 30 percent of such book profit. The object is to tax zero-tax companies. Section 115JA was inserted by the Finance Act, 1996 with effect from 01-04-1997. After insertion of section 115JA, section 115JB was inserted by the Finance Act, 2000 with effect from 01-04-2001. It is clear from reading of section 115JA and 115JB that the question, whether a company is liable to pay tax under either provision, does not assume importance because specific provision(s) is/are made in the section saying that all other provisions of the Act shall apply to the MAT company. Similarly, amendments have been made in the relevant Finance Act providing for payment of advance tax under sections 115JA and 115JB. So far as interest leviable under section 234B is concerned, the section is clear that it applies to all companies. The pre-requisite condition for applicability of section 234B is that the assessee is liable to pay tax under section 208 and the expression 'assessed tax' is defined to mean the tax on the total income determined under section 143 (1) or under section 143 (3) as reduced by the amount of tax deducted or collected at source. Thus, there is no exclusion of section 115J/111JA in the levy of interest under section 234B. The expression 'assessed tax' is defined to mean the tax assessed on regular assessment which means the tax determined on the application of section 115J/115JA in the regular assessment.

EMPLOYMENT STATUS OF CONTRACT LABOUR



- ***General Manager(OSD), Bengal Nagpur Cotton Mills v/s Bharat Lal & Anrs.***
  In this case, the Supreme Court has said that two tests to decide if a contract employee is a direct employee of the principal employer are:

  1. *Whether the employee receives his/ her salary from the principal employer; and*
  2. *Whether the employee works under the control and supervision of principal employer.*

In this case, the appellant company, Bengal Nagpur, had a service agreement with second respondent, a contractor, who appointed the respondent, Bharat Lal, as a security guard on the premises of appellant. Subsequently, the contractor dismissed Lal from services and five years later lal filed an application in Labour Court for his termination to be declared illegal under Section 31(3) of Madhya Pradesh Industrial Relations Act 1960.

The Labour court allowed lal's application. This was appealed in Industrial Court, which confirmed labour court's order and held that the agreement of contractor with appellant company was a sham and respondent should be treated as an direct employee of Bengal Nagpur. This was also affirmed by the High Court.

Setting aside all the rulings/ orders, the Supreme Court while applying above mentioned tests held that Lal had failed to prove that he had been paid directly by Bengal Nagpur; and he was working under direct control and supervision of Bengal Supervision.

FORMER VEHICLE OWNERS MAY BE LIABLE FOR ACCIDENTS

- ***Pushpa & Others V/s Shakuntala & Others***

In this case, the Supreme Court has held that a vehicle seller who had taken no steps to register its change of ownership could not escape liability in event of the vehicle being involved in accident.

The case arose following a road accident in which three people were killed. They were travelling in a truck owned by an individual named Salig Ram, who bought the vehicle in February 1993 from one Jitendra Gupta. However, neither Gupta nor Ram had registered change of ownership of the vehicle. The vehicle was insured by Oriental Insurance and policy had been taken by Ram in Gupta's name.

The dependents of two of the deceased claimed compensation from Insurance company and Gupta. Both Motors Accident Claims Tribunal and Himachal Pradesh High Court held that Gupta was not liable since he was no longer the owner of the vehicle.

On appeal, the Supreme Court reversed the decision and held that Gupta is liable.

MEDIA LAWS

- ***Government of U.P. issues notification to license cable operators***

The State Government of U.P. vide its Notification No. K.A. NI. -6-397/ XI-M(3)/ 09 – Uttar Pradesh Cinemas (Regulation) Act, 955-3-1956-2011-Order-(03)-2011 dated 31.03.2011, has issued 4th amendment to Uttar Pradesh Cinemas (Regulation of exhibition by means of a video) Rules 1988 and formulated "Uttar Pradesh Cinemas (Regulation of exhibition by means of a video)(Fourth Amendment) Rules 2011.

Through this notification, the U.P. Government has made it compulsory for all cable operators in the State to register and obtain license from government by paying a fee of Rs. 2400/- per annum. Further, Cable Operators shall also be required to pay Rs. 100/- per annum per connection. The notification comes into force with immediate effect.

According to Government, concerned authorities will start conducting raids from May 2011 onwards in order to detect unlicensed cable operators. The new amendment includes provision for registration of FIR and arrest thereon of the errant cable operators.

Please note that this licensing is in addition to the present system wherein cable operators are required to obtain registration from postal authorities under Cable Television Networks (Regulation) Act 1995.

Cable television dealers, Dish antenna dealers and video libraries have also been brought under the net of new amendment. These entities shall also be required to pay an annual license fee to carry out their operations.

- ***SC stays TDSAT order and raises rates for DTH operators***

  The Supreme Court has stayed an order of TDSAT dated December 16 2010, wherein TDSAT set aside TRAI notification dated July 21, 2010 mandating that Broadcasters charge from DTH and IPTV operators only up to 35% of the rates payable by cable operators for their channels.

  A bench comprising Justices R.V. Raveendran and and A.K. Patnaik stayed the above mentioned order of TDSAT. The Apex Court also increased the price limit and fixed the same to 42% instead of 35%. The Apex court ruling came on a petition filed by TRAI challenging the TDSAT order.

  Broadcasters were earlier charging DTH operators half of what they got from the cable operators. However vide its Notification dated July 21, 2010 TRAI has said that a new wholesale tariff structure would be effective from September 1 2010, whereby Broadcasters can only charge up to 35% of the rates they charged from cable operators from DTH, IPTV and HITS operators.

  Earlier various Broadcasters have moved TDSAT against the impugned notification of TRAI dated July 21, 2010 contending that TRAI had acted in an arbitrary and unreasonable manner while fixing the tariff structure and capping the limit to 35%.