*(P-940)*

# NATIONAL JUDICIAL ACADEMY

# *ADVANCED COURSE FOR JUSTICES HANDLING COMMERCIAL MATTERS*
# (P-940)

## AUGUST 27-30, 2015

## REFERENCE MATERIAL

**COMPILED AND EDITED**
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**NOTE: The Cases in the Reference Material have been edited in order to highlight certain issues for discussion in the programme. Please read the full judgment for a conclusive opinion.**

# SESSION I

# LISTING AGREEMENTS BETWEEN STOCK EXCHANGE & COMPANIES

(2013)1SCC1

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 9813 and 9833 of 2011

Decided On: 31.08.2012

**Sahara India Real Estate Corporation Ltd. and Ors. Vs. Securities and Exchange Board of India and Anr.**

**Hon'ble Judges/Coram:** K.S. Panicker Radhakrishnan and J.S. Khehar, JJ.

The appellants were the companies controlled by Sahara Group. Appellants issued Optionally Fully Convertible Debentures (OFCDs) by way of private placement and filed details of OFCDs in the Red Herring Prospectus (RHP) with the Registrar of Companies (RoC). Appellants have specifically indicated in the RHP that they did not intend to get their securities listed on any recognized Stock Exchange. It was also stated in the RHP that only those persons to whom the Information Memorandum (IM) was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply. SEBI received complaint from 'Professional Group for Investors Protection' alleging that appellants were issuing convertible bonds to the public throughout the country. It was also alleged that appellants were issuing Housing bonds without complying with Rules/Regulations/Guidelines issued by RBI/MCA. Thereafter, SEBI issued summons directing the appellants to furnish the requisite information. Appellants replied that they were not a listed company, nor did they intend to get its securities listed on any recognized Stock Exchange in India and that OFCDs issued by the appellants would not fall u/ss. 55A(a) and/or (b) of Company Act and hence the issue and/or transfer of securities and/or non-payment of dividend or administration of either the company or its issuance of OFCDs, were not to be administered by SEBI and all matters pertaining to the unlisted company would fall under the administration of the Central Government or RoC. It was also submitted that Regulations. 3 and 6 of Regulations would not apply, since there was no public issue either in the nature of an initial public offer or further public offer.

SEBI passed its order and held that OFCDs issued would come within the definition of 'securities' as defined u/s. 2(h) of SCR Act. SEBI also held that those OFCDs issued to the public were in the nature of Hybrid securities, marketable and would not fall outside the genus of debentures. It was further held that the OFCDs issued were debentures and the appellants have designed the OFCDs to invite subscription from the public at large through their agents, private offices and information memorandum. SEBI concluded that OFCDs issued were public issues and the appellants were bound to comply with s. 73 of the Company Act, in compliance with the parameters provided by the first proviso of s. 67(3) of the Company Act. SEBI took the view that OFCDs issued by appellants should have been listed on a recognized Stock Exchange and ought to have followed the disclosure requirement and other investors' protection norms.

On appeal, Tribunal upheld the order passed by the SEBI and directed the appellants to repay within 6 months, the amount collected from the investors, on the terms as set out by the order of the SEBI. Hence, the instant appeal

**Whether SEBI has jurisdiction to administer the provisions of ss. 56, 62, 63, 67, 73 and the related provisions of the Company Act, after the insertion of s. 55A(b) of Company Act w.e.f. 13-12-2000.** Held, so far as the provisions enumerated in the s. 55A of the Company Act, so far as they relate to issue and transfer of securities and non-payment of dividend was concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized Stock Exchange in India. In any other case, i.e. rest of the matters, that was excluding matters relating to issue and transfer of securities and non-payment of dividend be administered by the Central Government in the case of listed public companies and those companies which intend to get their securities listed on any recognized Stock Exchange in India. Explanation to s. 55A of Company Act further clarifies the position so as to remove doubts, saying all powers relating to other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares, should be exercised by the Central Government, Tribunal or the RoC, as the case may be.

In the instant case, SEBI has the powers to administer the provisions referred to in the opening part of s. 55A of Company Act which relates to issue and transfer of securities and non-payment of dividend by public companies like appellants, which have issued securities to 50 persons or more, though not listed on a recognized Stock Exchange, whether they intended to list their securities or not. No illegality in the proceedings initiated by SEBI as well as in the order passed by SEBI and Tribunal and they were accordingly upheld. The order passed by SC in appeals filed by the appellants, praying for extending the time for refund of the amount of Rs.17,400 crores, as ordered by Tribunal, stands vacated and consequently the entire amount will have to be refunded by appellants with 15% interest. Appeals dismissed.

**Whether the public companies was legally obliged to file the final prospectus u/s. 60B(9) of Act with SEBI -** Held, prospectus was the principal medium through which the investors get information of the strength and weakness of the company, its creditworthiness, credence and confidence of promoters and the company's prospects. SEBI, u/s. 60B(9) of Act, as a Regulator was legally obliged to examine whether, upon the closing of the offer of securities, a final prospectus giving the details of the total capital raised, whether by way of debt or share capital and the closing of the securities and other details as were not complete in RHPs, have been filed in a case of listed public company with SEBI. This duty was cast on the Registrar alongwith SEBI in the case of a listed public company and in any other case only the Registrar. Hence, appellants were legally obliged to file the final prospectus u/s. 60B(9) of Act with SEBI, failure to do so attracts criminal liability. Appeals dismissed.

**Whether s. 67 of the Act implies that the company's offer of shares or debentures to 50 or more persons would ipso facto become a public issue, subject to certain exceptions provided therein and the scope and ambit of the first proviso to s. 67(3) of the Act. -** Held, if an offer of securities was made to 50 or more persons, it would be deemed to be a public issue, even if it was of domestic concern or proved that the shares or debentures were not available for subscription or purchase by persons other than those received the offer or invitation. First proviso to s. 67(3) of Act casts a legal obligation to list the securities on a recognized Stock Exchange, if the offer was made to 50 or more persons, which appellants have violated which may attract the penal provisions contained in s. 68 of the Act. Appeals dismissed.

**Legal obligations with regard to Listing of Securities on Stock Exchange -** What s. 73 of the Act casts an obligation on a public company intending to offer its shares or debentures to the public, to apply for listing of its securities on a recognized Stock Exchange once it invites subscription from 50 or more persons and what legal consequences would follow, if permission u/s. 73(1) of Act was not applied for listing of securities. Held, as per the proviso to ss. 67(3) and 73(1) of Act, an application for listing becomes mandatory and a legal requirement. S. 73 of the Act casts an obligation on a public company to apply for listing of its securities on a recognized Stock Exchange, once it invites subscription from 50 or more persons, which appellants have violated and they have to refund the money collected to the investors with interest. Appeals dismissed.

**Scope of Guidelines and Regulations (Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009,) What was the scope and ambit of Guidelines and Regulations and whether appellants have violated the various provisions of the Guidelines and Regulations, by not complying with the disclosure requirements or investor protection measures prescribed for public issue under Guidelines and Regulations, thereby violating s. 56 of the Act.** Held, Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by Regulations. In the instant case, SEBI was not informed of the issuance of securities by the appellants while the Guidelines were in force and appellants continued to mobilize funds from the public which was nothing but continued violation which started when the Guidelines were in force and also when they were replaced by Regulations. Further, it may also be recalled that any solicitation for subscription from public can be regulated only after complying with the requirements stipulated by SEBI. Appellants have violated the Guidelines and Regulations by not complying with the disclosure requirements and investor protection measures for public, and also violated s. 56 of the Act which attracts penal provisions. Appeals dismissed.

**Whether the Unlisted Public Companies (Preferential Allotment) Rules, 2003. framed by the Central Government were applicable to any offer of shares or debentures to 50 or more as per the first proviso to s. 67(3) of the Act and what was the effect of Unlisted Public Companies (Preferential Allotment) Amendment Rules, 2011and whether it would operate only prospectively making it permissible for appellants to issue OFCDs to 50 or more persons prior to 14-12-2011.** Held, 2003 Rules or the 2011 Rules cannot override the provisions of ss. 67(3) and 73 of Act, being subordinate legislations, 2003 Rules were also not applicable to any offer of shares or debentures to more than 49 persons and were to be read subject to the proviso to ss. 67(3) and 73(1) of the Act. Appeals dismissed.

**Whether after the insertion of the definition of 'securities' in s. 2(45AA) of Company Act as 'including hybrids' and after insertion of the separate definition of the term 'hybrid' in s. 2(19A) of the Company Act, the provision of s. 67 of Company Act would apply to OFCDs issued by appellants and what was the effect of the s. 2(h) of Securities Contracts Regulations Act, 1956, Act on it.** Held, the terms 'Securities' defined in the Company Act has the same meaning as defined in the SCR Act, which would also cover the species of 'hybrid' defined u/s. 2(19A) of the Company Act. Since the definition of 'securities' u/s. 2(45AA) of the Company Act includes 'hybrids', SEBI has jurisdiction over hybrids like OFCDs issued by appellants, since the expression 'securities' has been specifically dealt with u/s. 55A of the Company Act.

**Whether OFCDs issued by appellants were convertible bonds falling within the scope of s. 28(1)(b) of the Act, therefore, not 'securities' or, at any rate, not listable under the provisions of Act.** Held, s. 28(1)(b) of the Act indicates that it was only convertible bonds and share/warrant of the type referred to therein, which were excluded from the applicability of the Act and not debentures, which were separate category of securities in the definition contained in s. 2(h) of Act. Contention of appellants that OFCDs issued by them were convertible bonds issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of Act, would not apply, in view of s. 28(1)(b) of Act cannot be sustained.

**Whether SEBI can exercise its jurisdiction u/ss. 11(1), 11(4), 11A(1)(b) and 11B of the 1992 Act and Regulation 107 of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, over public companies who have issued shares or debentures to 50 or more, but have not complied with the provision of s. 73(1) of 1956 Act.** Held, SEBI can exercise its jurisdiction u/ss. 11(1), 11(4), 11A(1)(b) and 11B of 1992 Act and regn. 107 of Regulations over public companies who have issued shares or debentures to 50 or more, but not complied with the provisions of s. 73(1) of 1956 Act by not listing its securities on a recognized Stock Exchange.

**Scope of s. 73(2) of the Act regarding refund of the money collected from the Public.** Held, appellants were legally bound to refund the money collected to the investors, as provided u/s. 73(2) of the Act r/w. r. 4D of the Rules and the SEBI has the power to enforce those provisions.

**Civil and Criminal liability under the Company Act, 1956 -** Held, appellants' conduct invites civil and criminal liability under various provisions like ss. 56(3), 62, 68, 68A, 73(3), 628, 629 and so on of Act

ORDER

We, therefore, find, on facts as well as on law, no illegality in the proceedings initiated by SEBI as well as in the order passed by SEBI (WTM) dated 23.6.2011 and SAT dated 18.10.2011 and they are accordingly upheld. The order passed by this Court in C.A. No.9813 of 2011 filed by SIREC and in C.A. No.9833 of 2011 filed by SHICL, praying for extending the time for refund of the amount of Rs.17,400 crores, as ordered by SAT, stands vacated and consequently the entire amount, including the amount mentioned above will have to be refunded by Saharas with 15% interest. We have gone through each other's judgment and fully concur with the reasoning and the views expressed therein and issue the following directions in modification of the directions issued by SEBI (WTM) which was endorsed by SAT:

236. Saharas (SIRECL & SHICL) would refund the amounts collected through RHPs dated 13.3.2008 and 16.10.2009 along with interest @ 15% per annum to SEBI from the date of receipt of the subscription amount till the date of repayment, within a period of three months from today, which shall be deposited in a Nationalized Bank bearing maximum rate of interest.

237. Saharas are also directed to furnish the details with supporting documents to establish whether they had refunded any amount to the persons who had subscribed through RHPs dated 13.3.2008 and 16.10.2009 within a period of 10 (ten) days from the pronouncement of this order and it is for the SEBI (WTM) to examine the correctness of the details furnished.

238. We make it clear that if the documents produced by Saharas are not found genuine or acceptable, then the SEBI (WTM) would proceed as if the Saharas had not refunded any amount

to the real and genuine subscribers who had invested money through RHPs dated 13.3.2008 and 16.10.2009.

239. Saharas are directed to furnish all documents in their custody, particularly, the application forms submitted by subscribers, the approval and allotment of bonds and all other documents to SEBI so as to enable it to ascertain the genuineness of the subscribers as well as the amounts deposited, within a period of 10 (ten) days from the date of pronouncement of this order.

240. SEBI (WTM) shall have the liberty to engage Investigating Officers, experts in Finance and Accounts and other supporting staff to carry out directions and the expenses for the same will be borne by Saharas and be paid to SEBI.

241. SEBI (WTM) shall take steps with the aid and assistance of Investigating Authorities/Experts in Finance and Accounts and other supporting staff to examine the documents produced by Saharas so as to ascertain their genuineness and after having ascertained the same, they shall identify subscribers who had invested the money on the basis of RHPs dated 13.3.2008 and 16.10.2009 and refund the amount to them with interest on their production of relevant documents evidencing payments and after counter checking the records produced by Saharas.

242. SEBI (WTM), in the event of finding that the genuineness of the subscribers is doubtful, an opportunity shall be afforded to Saharas to satisfactorily establish the same as being legitimate and valid. It shall be open to the Saharas, in such an eventuality to associate the concerned subscribers to establish their claims. The decision of SEBI (WTM) in this behalf will be final and binding on Saharas as well as the subscribers.

243. SEBI (WTM) if, after the verification of the details furnished, is unable to find out the whereabouts of all or any of the subscribers, then the amount collected from such subscribers will be appropriated to the Government of India.

244. We also appoint Mr. Justice B.N. Agrawal, a retired Judge of this Court to oversee whether directions issued by this Court are properly and effectively complied with by the SEBI (WTM) from the date of this order. Mr. Justice B.N. Agrawal would also oversee the entire steps adopted

by SEBI (WTM) and other officials for the effective and proper implementation of the directions issued by this Court. We fix an amount of Rs.5 lakhs towards the monthly remuneration payable to Mr. Justice B.N. Agrawal, this will be in addition to travelling, accommodation and other expenses, commensurate with the status of the office held by Justice B.N. Agrawal, which shall be borne by SEBI and recoverable from Saharas. Mr. Justice B.N. Agrawal is requested to take up this assignment without affecting his other engagements. We also order that all administrative expenses including the payment to the additional staff and experts, etc. would be borne by Saharas.

245. We also make it clear that if Saharas fail to comply with these directions and do not effect refund of money as directed, SEBI can take recourse to all legal remedies, including attachment and sale of properties, freezing of bank accounts etc. for realizations of the amounts.

246. We also direct SEBI(WTM) to submit a status report, duly approved by Mr. Justice B.N. Agrawal, as expeditiously as possible, and also permit SEBI (WTM) to seek further directions from this Court, as and when, found necessary.

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(2013)12SCC152

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 4112-4113 of 2013 (D. No. 201 of 2013)

Decided On: 26.04.2013

**N. Narayanan Vs. Adjudicating Officer, SEBI**

**Hon'ble Judges/Coram:** K.S. Panicker Radhakrishnan and Dipak Misra, JJ.

**Securities and Exchange Board of India Act, 1992, ss. 12A, 15HA, 15J - Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003, regns. 3 and 4 - Companies Act, 1956 - Violation of the provisions of 1992 Act - Artificiality - Manipulation in the financial results - Instant appeal was filed challenging a joint order passed by Securities Appellate Tribunal,**

**upholding the order passed by SEBI restraining appellant for a period of 2 years from buying, selling or dealing in securities and monetary penalty was imposed of 50 Lakhs u/s. 15HA of the 1992 Act**

Held, investigation had revealed that financial results contained in quarterly report filed with stock exchanges contained inflated figures of company's revenue profits, security deposits and receivables. Further, manipulation in financial results of company resulted in price rise of scrip of company and promoters pledged their shares to raise substantial funds from financial institutions. In case of companies whose securities were traded on a public market, disclosure of information about the company was crucial for the accurate pricing of the companies' securities and also for the efficient operation of the market. Thereby, Directors of company had "created artificiality" by projecting inflated figures of company's revenue, profits, security deposits and receivables - Therefore, conduct of Appellant and Ors. was fraudulent and practices they had adopted, relating to securities, was unfair, which attracted penalty provisions contained in Section 15HA read with 15J of SEBI Act.

Appellant was a whole time Director of the company, as regards the preparation of annual accounts, balance-sheet and financial statement and laying of the same before the company at the Annual General Meeting and filing the same before the Registrar of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the company was a registered company. Directors of the companies, especially of the listed companies, have access to inside knowledge, such as, financial position of the company, dividend rates, annual accounts etc. Directors were expected to exercise the powers for the purposes for which they were conferred. Sometimes they might misuse their powers for their personal gain and makes false representations to the public for unlawful gain - Subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of 'acta exteriora indicant interiora secreta' (meaning external actions reveals inner secrets) applied with all force.

Thus, SEBI had rightly restrained Appellant for a period of two years from date of that order from buying, selling or dealing with any securities, in any manner, or accessing securities market, directly or indirectly and from being Director of any listed company and that adjudicating officer had rightly imposed a penalty of Rs. 50 lakhs under Section 15HA of SEBI Act.

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MANU/TN/7566/2006

**IN THE HIGH COURT OF MADRAS**

C.P. No. 167/2004 and C.A. No. 1077/2006

Decided On: 30.10.2006

**Pentamedia Graphics Limited and "Softowers" rep. by Dr. V. Chandrasekaran, Chairman and CEO and Pentamedia Graphics Limited. "Softowers" rep. by Dr. V. Chandrasekaran, Chairman and CEO Vs. The Bombay Stock Exchange**

[Alongwith C.P. Nos. 168, 169, 170 and 171/2004 and C.A. Nos. 1078, 1079, 1080 and 1081/2006]

**Hon'ble Judges/Coram:** Chitra Venkataraman, J.

**Bombay Stock Exchange refused listing of Company on ground that it had violated provisions of Clause 24(f) of Listing Agreement which required prior approval by Bombay Stock Exchange- Whether, Stock Exchange, was justified in its refusal to list the shares of company.**

Held, compliance of provisions of Securities Laws, Stock Exchange requirements and Listing Agreement was absolute if any company wishes to have shares listed thereon. Therefore, from reference of SEBI as regards direction to the Bombay Stock Exchange to grant its approval, it must be noted that an approval to be granted subject to its byelaws. If Bombay Stock Exchange found that terms of arrangement were contrary to its Regulations or requirement under Listing Agreement, same had to be tested in a manner known to law and as provided under Securities and Exchange Board of India Act, 1992. Bombay Stock Exchange, apart from referring to non-satisfaction of listing requirement, had also pointed out to conduct of Transferor Company. Hence, Stock Exchange was justified in its refusal to list shares of company.

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2015(1)SCALE105

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 5027 of 2008

Decided On: 10.12.2014

**Discovery Wel. Mangt. Ser. P. Ltd. Vs. Padmini Engineering P. Ltd.**

**Hon'ble Judges/Coram:** Dipak Misra and U.U. Lalit, JJ.

**Present appeal filed against order of Securities Appellate Tribunal (SAT) whereby it set aside order of Stock Exchange (SE) declining to grant benefit of de-listing of 4th Respondent-Company - Whether Company was required to maintain ten per cent benchmark for public shareholding to remain as listed company**

**Held, as per agreement between Company and Stock Exchange, level of public shareholding fixed for continuous listing was 20 percent which was higher limit. On failure of Company to maintain level of 20 percent, condition for continuous listing would be violated and breached. Public holding of ten percent would not have satisfied requirement of Rule 19(2). The condition for continuous listing would not have been followed by Company, if public shareholding had fallen below 20 percent. Thus, offer of delisting would be successful and would not fail, if public shareholding fell below 20 percent. Ten percent limit would not apply in view of Rule 19(2) as said Rule recognized terms and conditions laid down by recognized stock exchange and stipulated that same would be satisfied for Company to claim continuous listing.**

As we find, 2003 guidelines are applicable and prescribe the procedure for delisting of securities. As per the procedure prescribed, any promoter who desires delisting has to make an offer for purchase of shares in terms of clauses 8.1 to 8.3. The said exercise has to be completed within a period specified in clauses 8.1 and 8.5. The whole process has to be monitored by the Stock Exchange and the Registrar and transfer agency has to ascertain the genuineness of the physical securities tendered, etc. Clause 8.8 has its own signification. Clause 8.8 of 2003 guidelines stipulate that required level of public shareholding must fall below the level of continuous listing. Clause 12.1 of 2003 guidelines, states that the offer of delisting would fail if the public shareholding does not fall below the minimum limit specified by the listing conditions or the listing agreement. It is quite vivid that the 2003 guidelines do not prescribe or fix the required level of public shareholding of continuous listing though the said limit must be breached for an offer of delisting to succeed. It is condign to note that Clause 12.1 refers to minimum limit specified by the listing condition or the listing agreement.

As is evincible, Rule 19(2)(b) provides that at least 10% of each class or kind of securities must be offered to public for subscription through advertisement in newspaper during the time specified and the applications received pursuant to such offer should be allotted as per the conditions postulated. The proviso engrafts states that in case the company does not fulfil the conditions, it shall offer at least 25% of each of the securities to the public for subscription though advertisement in newspaper, etc. within the time stipulated. The opening words of Sub-rule (2) of Rule 19 read "apart from complying with such other terms and conditions as may be laid down by a recognized stock exchange, an applicant company shall satisfy the stock exchange. These words have their own importance. It is clear that Sub-rule (2) gives primacy to the terms and conditions as may be laid down by the recognized stock exchange and the company in question must satisfy the condition imposed by the stock exchange in that regard. As we find, in the instant case, as per the agreement between the company "Hella India" and BSE, the level of public shareholding fixed for continuous listing was 20%. The said limit of 20% is a higher limit. On failure of "Hella India" to maintain the level of 20%, the condition for continuous listing would be violated and breached. Public holding of 10% would not have satisfied the requirement of Rule 19(2). Therefore, when we harmoniously interpret the listing requirement i.e. the agreement with BSE with Rule 19(2) along with 2003 Guidelines, it is apparent and limpid that the condition for continuous listing would not have been followed by "Hella India", if the public shareholding had fallen below 20%. Thus, it has to be held that offer of delisting would be successful and would not fail, if the public shareholding falls below 20%. The 10% limit would not apply in view of Rule 19(2) as the said Rule recognizes the terms and conditions laid down by recognized stock exchange and stipulates that the same must be satisfied for the company to claim continuous listing.

# SESSION II

# AGREEMENTS BETWEEN STOCK EXCHANGE MEMBERS/BROKERS & CLIENTS

2014 Indlaw MUM 1630

**IN THE HIGH COURT OF BOMBAY**

Arbitration Petition No. 447 of 2012

Decided On: 01.12.2014

**ANS Pvt. Ltd. Vs. Jayesh R. Ajmera**

**Hon'ble Judges/Coram:** S.C. Gupte, J.

Instant Arbitration appeal filed challenging an award passed by the Appellate Bench - By the impugned award, the appellate bench of the arbitral tribunal allowed respondent's appeal and set aside an award by the first arbitral tribunal rejecting the respondent's claim pertaining to removal of debits in the respondent's Demat account arising out of certain transactions effected on the Exchange - Appellate bench remanded the matter to the lower arbitral tribunal with certain directions pertaining to the evidence required to be led before the lower arbitral tribunal.

Held, appellate bench particularly directed production of documents pertaining to the RTGS transfers effected from the accounts of the Respondent and his HUF to the Petitioner, as also the opening of the new Demat account in the sole name of the Respondent. Before doing so, the appellate bench did not even consider whether or not the award passed by the lower arbitral tribunal in respect of the two issues concerning the RTGS transfers and the opening of the Demat account was correct or not. Without as much as going through the submissions of the parties and reaching even a prima facie conclusion in that behalf, the appellate bench directed remand of the matter and leading of evidence on the two issues, which were clearly held by the lower arbitral tribunal to be beyond its jurisdiction. The two issues indeed concern third parties, who were not before the arbitral forum and who were not parties to the arbitration agreement. The arbitral tribunal clearly lacks jurisdiction to go into these two issues. Thus, the impugned award of the appellate bench remanding the matter to the lower arbitral tribunal and directing leading of evidence on the two issues, which were held to be beyond jurisdiction of the arbitral tribunal and which conclusion was not reversed by the appellate bench, is clearly beyond the purview of the appellate tribunal and has resulted in palpable failure of justice requiring interference with the impugned award. In that view of the matter, the impugned award of the appellate bench suffers from grave error, which is an error of jurisdiction and which goes to the root of the matter. The impugned award, accordingly, deserves to be set aside. The original award of the first arbitral tribunal not being in existence any more, restoration of such an award is bringing into effect a new award not in existence. This clearly is impermissible within the jurisdiction of this court u/s. 34 of the Act. In that view of the matter, there is no question of restoring the original award passed by the first appellate court. The impugned award, which is the only existing award, being invalid and unsustainable, will, however, have to be set aside. Impugned award is set aside.

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MANU/MH/2272/2014

**IN THE HIGH COURT OF BOMBAY**

Arbitration Petition Nos. 420 and 854 of 2012

Decided On: 17.12.2014

**BMA Commodities Pvt. Ltd. Vs. Kaberi Mondal**

**AND**

**Kaberi Mondal Vs. BMA Commodities Pvt. Ltd.**

**Hon'ble Judges/Coram:** R.D. Dhanuka, J.

**Present petition filed against order whereby, Respondent was directed to pay amount as charges and tax due to trading unauthorizedly in Petitioner's account - Whether Petitioner's was entitled for enhancement of her claim - Held, there was application of mind on part of tribunal in rendering such inconsistent finding in respect of part of award - Petitioner failed to show that tribunal had not considered relevant bye-laws, business rules and directives in award while rejecting substantial part of claim - No separate application was required to be made by claimant for remitting matter back for this limited purpose - Petitioner was not required to make any separate application for invoking provisions of section 34(4) of Act - Tribunal was entitled to take such steps in light of provisions of Act as rejection of part of claim made by Petitioner was concerned**

The directives dated 30th September 2009 issued by the MCX in terms of the provisions of the Rules, bye-laws and business rules of the said exchange, informing the members about the directives issued by the Commission, makes it clear that the members shall execute the trade online only after keeping evidence of the client placing such order, which may be in the form of sound recording and shall keep evidence of having dispatched the contract notes to the client. The members are also required to keep evidence of making the payment to the client on account of the mark to market gains made by the clients.

The business rules of the MCX and in particular 27(2) provides that the contract notes must be delivered within 24 hours of the transaction made by and on behalf of the clients and proof of delivery of the same needs to be preserved by the member. The delivery of contract note to client must be in physical form only unless a client specifically indicates his preference for contract notes in electronic form. If any client needs electronic contract notes, he has to be provided with ECN declaration form via e.mail as per the format and procedure given at Annexure XXVII. It is further provided that such declaration has to be obtained from the client afresh before first April of every financial year by following the same procedure and the same shall be valid for that financial year only. A client can revoke the ECN facility and opt for the contract note in the physical form only by giving seven working day's notice to the member. It further provides that a detailed statement must be sent every month and proof of delivery of the same should be preserved by the member.

It is the case of the claimant that the claimant had not signed any such ECN form and had not made any requisition for supply of contract notes in electronic form. The claimant had collected the hard copies of some of the contract notes when the dispute arose between the parties. A perusal of the record indicates that the respondent could not produce any proof of delivery of the contract note or that the claimant had submitted any ECN form requesting the respondent to deliver contract notes in electronic form. Since the respondent broker has no complied with the directives issued by the Forward Markets Commission and also the business rules issued by the MCX and its bye-laws, the arbitral tribunal ought to have considered these mandatory provisions required to be followed by the broker and could not have accepted such transactions as valid in the account of the claimant. Since the respondent had failed to produce the proof of delivery of the contract notes and also the copy of the ECN form, no cognizance of the copies of such contract notes could have been taken by the arbitral tribunal.

A perusal of record indicates that the respondents have failed to prove that any demand was made by the respondent on the claimant for deposit of any margin money, even if there was a debit balance in the account of claimant on a particular date. On the contrary, the records produced by the respondent itself indicates that the respondent has carried out large number of transactions, including purchase transactions, in the account of the claimant on the date of debit balance. It is thus clear that the claimant would not have given any such instructions to the respondent for carrying out such transactions on behalf of the claimant.

In my view the respondent has failed to produce any proof of any instructions from the claimant to carry out any such transactions or that the transactions were carried out by the claimant herself online or that she was personally present to carry out such transactions in the office of the respondent and also having failed to prove that the respondent had demanded any margin money, which the claimant had failed to deposit and, therefore, the respondent was justified in squaring off of the transactions, standing in the account of claimant. In my view, since the respondent has carried out the transactions without demanding any margin money from the claimant and without any instructions from the claimant though there was debit balance, all such transactions carried out by the respondent, without any instructions and without any demand for margin money, were unauthorised and no such debit could have been made in the account of claimant in respect of such unauthorised transactions. A trading member who has carried out any such transactions in breach of bye-laws of MCX cannot make any claim against the constituent and/or debit any amount to the account of the claimant in respect of such unauthorised transactions.

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(2004)1SCC160

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 8297 of 1997

Decided On: 17.10.2003

**Bombay Stock Exchange Vs. Jaya I. Shah and Anr.**

**Hon'ble Judges/Coram:** V.N. Khare, C.J. and S.B. Sinha, J.

**Enforcement of Arbitration Award against a defaulting member and stock exchange by a non-member in favour of a non-member - Interpretation vis-à-vis rules, bye-laws and the regulations framed under Securities Contract (Regulation) Act, 1956 and Arbitration and**

**Conciliation Act, 1996 as regard the right of a third party to realise his dues out of the corpus of the Defaulters' Committee - Held, the matter be considered afresh by the High Court. The High Court is requested to consider the claims of the respondents in the light of the observations made as also upon directing the Exchange to file a fresh statement of accounts, if it is found meet and proper. Further held, in the event, any doubt or dispute arises, the High Court would be entitled to appoint a competent person as Commissioner to go into the said accounts and submit a report to it at the cost of the Exchange. However, if it is found that the Governing Board has not specified and date in terms of cl. 7 of Bye-law 343, it shall issue such direction/directions as it may deem fit and appropriate for doing complete justice not only to the respondents, but also to the other creditors similarly situated.**

A contract has been defined to mean a contract for or relating to purchase or sale of securities. A contract note however, in terms of Bye-law Note No. 219 includes a contract between a member and a non-member. It is not in doubt or dispute that membership conferred upon a person is a personal privilege. He holds such privilege so long as he complies with the rules, bye-laws and regulations framed by the Exchange. In the event of a default committed by a member, having regard to Rule 53 as also Bye-law 316, he would cease to enjoy any right as such. His right in terms of Rule 54 lapses and vests in the Exchange immediately upon a declaration that he has become a defaulter. His right of nomination in view of Rule 9 ceases upon default and vests in the Exchange. In terms of Rule 10, the membership belongs absolutely to the Exchange free of all rights, claims or interests in such a manner as it may think fit. Rule 16 provides for the order of priority in terms whereof dues of the Exchange and clearing house would have priority, whereafter all the liabilities relating to contract are required to be discharged. Rule 18, however, does not make any distinction between the claim of a member or a non-member. In the event there being any surplus, the amount collected by the Exchange by auctioning the right of membership is to be dealt with in such a manner as the Exchange may think fit and proper. Rule 18, aforementioned, has been held to be valid in Vinay Bubna (supra) by this Court holding :

> "10. The order of priority laid down by the aforesaid Rule 16 ensures that dues to the exchange or to the clearing house have first to be met before the balance amount can be utilised for payment of debts, liabilities, obligations etc. arising out of any contract

made by the former member. If the amount available is insufficient to pay all such debts, liabilities, etc. then the payment is to be made pro rata. If, however, any surplus still remains the same is to be disposed of or applied in such manner as the exchange in general meeting may decide.

11. The High Court, in our opinion, was, therefore, right in coming to the conclusion that on a default being committed the share broker ceases to become a member of the Exchange and all his rights, privileges, etc. as a member come to an end. If he does not clear the dues within six months the governing body then has a right of nomination in respect of such membership. It will be incorrect to state that on the stock broker ceasing to be a member, he still retains any right or interest in the permission which has been granted to him by the exchange to carry on business as a member. The membership card of a share broker is not his personal property which, on default being committed by him and his ceasing to be a member, can be sold and the proceeds distributed amongst his creditors. Rules 53 and 54 leave no manner of doubt that the member's right of membership vests in the exchange after he is declared a defaulter. This view, namely, that the defaulting member can claim no interest in the membership card and can pass none is in consonance with the decision of the Privy Council in Official Assignee of Bombay v. K. R. P. Shroff and Ors. MANU/PR/0022/1932. In that case a member of the Bombay Stock Exchange had lost his membership for being a defaulter. The main question which arose for determination there was whether a card or right of membership of a share broker or the proceeds of sale thereof, when sold, would pass to the assignee in insolvency of the share broker's estate after he had lost his membership for being a defaulter. After referring to the rules of the Stock Exchange in this connection it was observed at p. 190 as follows :

"But although the rules are badly drawn and not in uniform phraseology their result in the case of a member who has lost his membership for being a defaulter clearly enough is that he loses all interest both in the property of the association and in his card. In such a case no interest is reserved in the defaulter's card except to membership of the Association who have suffered by his lapse-in the rules sometimes

> called his creditors-or to the association itself. This seems to their Lordships to be the result of Rules 18, 56, 57 and 82. The defaulting member himself has no interest in the result of the sale provided for under these rules nor can he require a sale to be made. The rules are there for the benefit of his "exchange creditors" and are doubtless enforceable at their instance."

Yet again in Stock Exchange, Ahmedabad v. Assistant Commissioner of Income Tax, Ahmedabad MANU/SC/0152/2001 : [2001]248ITR209(SC) , this Court upon following the decision of the Privy Council in Official Assignee of Bombay v. K.R.P. Shroff MANU/PR/0022/1932 again held :

> "10. In Official Assignee of Bombay v. K.R.P. Shroff MANU/PR/0022/1932 the Privy Council considering somewhat similar Rules held that a member who has lost his membership for being a defaulter loses all interests both in the property, of the association and in his card. No interest is reserved in the defaulter's card except to members of the association who have suffered by his lapse or to the association itself. The contention urged on behalf of the respondent that Rajesh Shah could not be declared a defaulter after his death and, therefore, on his purported default the question of membership vesting in the Stock Exchange would not arise need not be gone into in the present case for that Rule 9 stipulates that both in case of death or default of a member his right of nomination shall cease and vest in the Exchange. In the case in hand, on the death of Rajesh Shah his right of nomination ceased and vested in the Exchange and his legal representatives and heirs did not exercise the right of nomination by expressing their inability to meet the liabilities of the deceased."

How the card money is to be dealt with has been provided under the rules. A dichotomy, however, has been created under the rules and bye-laws as regard the amount received by sale of membership card and amount recovered from defaulter's other assets. On a plain reading of the rules and bye-laws it appeared that the authority to deal with the card money and the, liability of the members by the Defaulters' committee is different, but having regard to the scheme of distribution of the liabilities of the Exchange, clearing house, members and non-members, all the assets shall be placed at the hands of the Defaulters' Committee. But as would appear from the discussions made hereinafter the application thereof would be separate and distinct.

There lies a distinction between the two sets of arbitration - one between a member and a non-member and another between the member and member of the Exchange. A claim by a non-member against the defaulter who was the member must be considered from a different angle having regard to the fact that although the same relates to a contract, such arbitration is governed by the provisions of the law of the country, namely, the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1998, as the case may be. For the said reasons, only Bye-law 259 mandates that the award shall be filed in the court so as to enable either the defaulting member or the non-member to make such objections in terms of the provisions of the Act, as may be permissible in law. Once an opportunity to file such as objection is provided for and determined, the award shall be made a rule of court and, thus, becomes enforceable in a court of law. The claim of a decree-holder, thus, cannot be pari passu with the claim of the award-holder in the category non-member as it is incumbent upon a non-member to have an award be made a rule of the court before it becomes enforceable. A contract between a member and a non-member is otherwise enforceable in a civil court. By reason of existence of agreement clause only the suit filed by a non-member against a defaulting member can be stayed and/or referred to arbitration. A decree made pursuant to such an award, can also be executed by taking action as against the personal assets of the defaulting member.

The scheme of arbitration between a member and a defaulting member, however, stand on a completely different footing. Not only it is an internal matter of the Exchange, an award made in such a proceeding is an appealable one. Only when determination is made in relation to a claim by and between the member and the defaulting member, the same becomes final and enforceable,

There cannot, however, be any doubt that so long as the claim of the awardees both of members as also non-members are dealt with by the Defaulters' Committee, the Exchange or the Defaulters' Committee would not be a debtor in relation to an awardee. But once the Defaulters' Committee determines such claims and surplus is available at the hands of the Defaulters' Committee, as the surplus amount would become payable to the defaulting members, the same would become an assets of the defaulting member. In other words, other assets continue to remain assets of the defaulting members subject to the vesting thereof for the purposes mentioned in Bye-law 328 and as soon as the purpose is satisfied, the ownership which was under animated suspension or eclipsed would again revive to the defaulting member. The awardees, however, so long as the assets remain under the control of the Defaulters' Committee would be entitled to get their claim on a pro-rata basis and not in its entirety.

If it is held that despite the fact that claims having regard to the priority clause contained in Rule 16 remain in the hands of the Defaulters' Committee and an order of attachment would be enforceable, the same would result in incongruity. Unfortunately no clear picture emerges from the rules and bye-laws as there does not appear to be any provision how the card money as also other assets belonging to the defaulting member can be handled by the Defaulters' Committee. But the rules and bye-laws have to be read harmoniously. They have to be read together so as to make them effective and workable. So read, the Defaulters' Committee constituted in terms of bye-laws would apply to the other assets, dues, payments of the members on a pro-rata basis whereafter the dues of the non-member can be disbursed. While doing so, however, such claims can be determined only having regard to the cut-off date which must be prescribed by the Governing Board in terms of Clause 7 of Bye-law 343. So far as card money is concerned the same must be disbursed having regard to the priority clause contained in Rule 16, in which event, upon discharge of the dues of the Exchange and clearing house, the same has to be distributed to the dues of the members and non-members. It bears repetition to state, that there does not exist any distinction between a member and a non-member in terms of Rule 18 and in the event the amount of the card money available at the hands of the Exchangers not sufficient to satisfy all the claims, the same has to be distributed on a pro-rata basis. However, any amount remaining surplus even thereafter would be subject to a decision of the Governing Board. The Governing Board may in a given situation having regard to the hardship which may be faced by the members and non-members in realising their dues may direct that such amount would be available for disbursement towards the said dues. It. however, we may hasten to add, is free to apply the surplus for a different purpose which, evidently cannot be de' hors the purpose and object for which the Exchange has been constituted.

For the reasons aforementioned, we are of the opinion that the matter be considered afresh by the learned Single Judge of the High Court. The High Court is requested to consider the claims of the respondents in the light of the observations made hereinbefore as also upon directing the Exchange to file a fresh statement of accounts, if it is found meet and proper. In the event, any doubt or dispute arises, the High Court would be entitled to appoint a competent person as Commissioner to go into the said accounts and submit a report to it at the cost of the Exchange. However, if it is found that the Governing Board has not specified any date in terms of Clause 7 of Bye-law 343, it shall issue such direction/directions as it may deem fit and appropriate for doing complete justice not only to the respondents but also to the other creditors similarly situated.

In view of the fact that the respondents here in had obtained a decree in her favour as back as on 15.2.1994, we would request the High Court to consider the desirability of disposing of the matter as expeditiously as possible preferably within four months from the date of this order. This appeal is disposed of on the above terms with no order as to costs.

# SESSION IV

# AGREEMENTS TO PURCHASE SHARES OF LISTED COMPANIES

(2015)2SCC68

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 7390 of 2012

Decided On: 20.08.2014

**I.P. Holding Asia Singapore P. Ltd. Vs. Securities and Exch. Board of India**

**Hon'ble Judges/Coram:** Madan B. Lokur and Kurian Joseph, JJ.

**Regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997-Present appeal filed against order whereby Tribunal held that non-compete agreement was sham and Appellants were liable to pay non-compete fee to public shareholders of target company as was being to be paid to outgoing promoters of target company which was being taken over by Appellants - Whether Appellants were liable to pay non-compete fee to public shareholders of target company as was being to be paid to outgoing promoters of target company which was being taken over by Appellants.**

**Held, Tribunal committed jurisdictional error by misunderstanding scope of Regulation 20(8) of Takeover Code. Ex facie reading of share purchase agreement and non-compete agreement between Appellants and promoter entities, no such conclusion was apparent, nor was it canvassed or pointed out. Therefore, there was no occasion for SEBI to carry out searching enquiry into payment of non-compete fee to Bangur group. Facts suggested that there could be plausible reason for Appellants not paying any non-compete fee to Bangur group. SEBI was in error in splitting non-compete agreement between Appellants and 5 members of Bangur group on one hand and 15 members of Bangur group on other. No indication given in non-compete agreement that it was severable or that there was any intention to split it into two or more distinct parts. Tribunal should have either held that entire non-compete agreement as sham or it ought to have held entire non-compete agreement as genuine agreement. Therefore, Tribunal was not justified in holding that Appellants were liable to pay non-compete fee to public shareholders and impugned order in respect thereof was set aside**

In our view, the Tribunal has made two fundamental errors. In the first place, the Tribunal committed a jurisdictional error by misunderstanding the scope of Regulation 20(8) of the Takeover Code. This Regulation provides that any payment made to persons other than the target company in respect of a non-compete agreement in excess of 25% of the offer price arrived at under sub-Regulation (4) or (5) or (6) shall be added to the offer price. A bare reading of Regulation 20(8) of the Takeover Code makes it quite clear that the jurisdiction of the Tribunal gets triggered only when the non-compete fee is in excess of 25% of the offer price. If the non-compete fee is less than 25% of the offer price (as in the present case), the jurisdiction of SEBI would be exercisable only in an extremely rare case and only if SEBI was in a position to *ex facie* conclude that the transaction involving the takeover of the target company was not bona fide.

We say this because it is imperative to give sufficient elbow room to commercial entities for entering into a business transaction. There are a host of considerations that go into business relations and transactions between different entities. This applies, perhaps more equally, to the takeover of a target company by another corporate body. It was observed in ***G.L. Sultania v. Securities and Exchange Board*** (2007) 5 SCC 133 that "For the acquirer the decision to acquire shares is a commercial decision" and in our opinion, that decision must be respected unless there are good reasons not to do so.

It is for this reason that the Takeover Code as originally framed in 1997 did not contain any provision relating to the payment of non-compete fee. The issue was reconsidered by the Reconvened Committee of Substantial Acquisitions of Shares and Takeovers with Justice Bhagwati as the Chair. On the recommendation of the Reconvened Bhagwati Committee, the Takeover Code was amended in September, 2002 providing, *inter alia*, for a regulatory framework for payment of non-compete fee. That regulatory framework is to be found in Clause (8) of Regulation 20 which was introduced in the Takeover Code with effect from 9$^{th}$ September, 2002. While looking into this issue, the Reconvened Bhagwati Committee felt that it is possible that in some cases the offer price per share does not truly reflect the actual consideration paid and this could be used as a ploy for reducing the cost of acquisition through a public offer.

25. The Reconvened Bhagwati Committee, while being fully aware of the possibility of a misuse of the non-compete fee, nevertheless recommended an elbow room of up to 25% of the consideration which would not be included or factored in for the purpose of reckoning the offer price.

It is quite clear that ordinarily when there is a gap of 25% between the consideration paid to the outgoing promoters and the non-compete fee, SEBI ought not to conduct any inquiry. However, this cannot be treated an absolute proposition and we are quite willing to say that if it appears *ex facie*, without any searching questions being asked or any intricate reasoning, that it appears to SEBI that the difference between the offer price and the non-compete fee is less than 25% but that is nevertheless a disguise or a camouflage for reducing the cost of acquisition through a public offer, then SEBI can certainly delve further into the matter.

In so far as the present case is concerned, on an *ex facie* reading of the share purchase agreement and the non-compete agreement between the Appellants and the promoter entities, no such conclusion is apparent, nor was it canvassed or pointed out. In our opinion therefore, there was no occasion for SEBI to carry out a searching enquiry into the payment of non-compete fee to the Bangur group.

The second fundamental error by SEBI was in splitting the non-compete agreement between the Appellants and 5 members of the Bangur group on the one hand and 15 members of the Bangur group on the other. If the non-compete agreement was a sham as held by the Tribunal, then the entire agreement would have to be held as a sham and the entire transaction would require to be held as a sham transaction. It cannot be, on a reading of the non-compete agreement as a whole, that a part of it is a sham in respect of some of the contracting parties and it is a genuine agreement in respect of the other contracting parties. There is absolutely no indication given in the non-compete agreement that it is severable or that there was any intention to split it into two or more distinct parts.

The absurdity resulting in splitting-up the non-compete agreement can be better appreciated from a hypothetical example. What if the Tribunal had partially agreed with the Appellants and held that the non-compete agreement was valid in respect of say ten or twelve of the promoter entities instead of five? This could happen if the genuineness of the non-compete agreement is examined in relation to each promoter entity, as has been done by SEBI. Does it not, therefore, mean that the non-compete agreement has to be split in twenty ways to decide whether it is genuine or sham in respect of five or ten or twelve of the promoter entities? Can this be said to be a reasonable construction of the non-compete agreement? We are afraid that this surely cannot be the correct way of reading the non-compete agreement and that is why we are of the view that the Tribunal committed a fundamental flaw in holding only a part of the non-compete agreement as a sham. The Tribunal should have either held the entire non-compete agreement as a sham or it ought to have held the entire non-compete agreement as a genuine agreement. The question of a half-way house simply does not arise.

On a consideration of the entire facts of the case, we are of the view that the appeal deserves to be allowed and accordingly it is allowed. The directions and orders passed by SEBI and the Securities Appellate Tribunal are set aside.

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MANU/MH/0998/2010

**IN THE HIGH COURT OF BOMBAY**

Appeal No. 855 of 2003 in Notice of Motion No. 534 of 2002 in Suit No. 509 of 2001 and Notice of Motion Nos. 1308 and 3956 of 2005, 4118 of 2007 and 1973 and 1418 of 2008

Decided On: 01.09.2010

**Messer Holdings Limited Vs. Shyam Madanmohan Ruia and Ors.**

**AND**

**Goyal MG Gases (P) Limited a company duly registered under the Companies Act, 1956 Vs. Shyam Madanmohan Ruia and Ors.**

**Hon'ble Judges/Coram:** A.M. Khanwilkar and A.A. Sayed, JJ.

Transfer of shares - Right of shareholders thereof under Section 111A of Companies Act, 1956 - Held, it is open to the shareholders to enter into consensual agreements which are not in conflict with the Articles of Association, the Act and the Rules, in relation to the specific shares held by them; and such agreement can be enforced like any other agreement. That does not impede the free transferability of shares at all. If the company wants to prohibit the right of the shareholders, it may have to provide for an express condition in the Articles of Association or in the Act and Rules, as the case may be, in that behalf. The legal provision as obtained in the form of Section 111A of the Companies Act does not expressly restrict or take away the right of shareholders to enter into consensual arrangement/agreement in respect of shares held by him. Appeals dismissed.

Non-disclosure of names of Joint-Acquirers of Shares - Validity of transaction challenged on ground of misrepresentation and fraud - Held, if disputed transactions are shrouded by misrepresentation and fraud, such transactions would be void. In the instant case, at no point of time any disclosure was made by Defendant No. 1 about the agreement already executed with Defendant No. 3 to Plaintiff. The act of the Defendant No. 1 and Defendant No. 3 of forming Defendant No. 4 Joint Venture Company was nothing short of misrepresentation and fraud. Therefore, transaction is vitiated.

Challenge to validity of transaction on ground of breach of order of injunction - Held, if a transaction is in violation of the order of the Court, the same would be void (ratio in Keshrimal Jivji Shah v. Bank of Maharashtra applied). In the instant case, transfer of disputed shares in favour of Defendant No. 4 is in violation of the order of the Court. Therefore, transfer of disputed shares in the name of Defendant No. 4 is vitiated and void.

Right of shareholders over assets of company - Held, a shareholder does not have direct right over the assets of the company of which he is a shareholder. The shareholder on buying shares, becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed amongst the shareholders. Therefore, the Defendant No. 4 has no right whatsoever over the assets of the Defendant No. 2-company.

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MANU/MH/0109/2010

**IN THE HIGH COURT OF BOMBAY**

Arbitration Petition No. 174 of 2006

Decided On: 15.02.2010

**Western Maharashtra Development Corpn. Ltd. Vs. Bajaj Auto Limited**

**Hon'ble Judges/Coram:** Dr. D.Y. Chandrachud, J.

Present petition filed under Section 34 of Arbitration and Conciliation Act, 1996 against award passed by arbitrator. Petitioner contended that contract on whose basis award was passed was null and void, therefore, award is unsustainable - Held, party desirous to transfer its shareholding is obligated to furnish first option to other for purchase of shares at relevant rate, as may be agreed to between parties or decided upon by arbitration. Consequence of Clause 7 of protocol agreement, which has been incorporated in Articles of Association, is to preclude sale to or purchase by members of public of shares, which are offered for sale if offer is accepted by petitioner, or as case may be, by respondent within thirty days of receipt of notice. Effect of clause of preemption is to impose restriction on free transferability of shares by subjecting norms of transferability laid down in Section 111A of Act, 1996 to preemptive right created by agreement between parties. This is impermissible.

Section 9 of the Companies Act, 1956 gives overriding force and effect to provisions of the Arbitration and Conciliation Act, 1996, notwithstanding anything to contrary contained in Memorandum or Articles of Company or in any agreement executed by it or for that matter in any resolution of Company in general meeting or of its Board of Directors. A provision contained in Memorandum, Articles, agreement or Resolution is to extent to which it is repugnant to provisions of Act, 1996 regarded as void. Therefore, contract between parties is void - Award passed on basis said contract is unsustainable - Hence award is set aside, petition is allowed.

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(2007)5SCC133

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 1672 of 2006

Decided On: 16.05.2007

**G.L. Sultania and Anr. Vs. The Securities and Exchange Board of India and Ors.**

[Alongwith Civil Appeal Nos. 1704 and 1740 of 2006]

**Hon'ble Judges/Coram:** B.P. Singh and Altamas Kabir, JJ.

**Appellant challenged the valuation of shares of target company by respondent No. 2 and 3 in consultation with merchant bankers on ground that it was not in accordance with parameters laid down in regulation 20 (5) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and the price offered by the share was very low. Tribunal held that valuation of shares was arrived after followings the norms laid down in Regulation 20 (5) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and thus could not be characterized as erroneous, arbitrary or unreasonable. Hence, present appeal**

**Held, valuation of shares is not only a question of fact but also raised complex and technical issues which may appropriately be left at the wisdom of experts. Court will not interfere unless it is shown that some well accepted principle of valuation has been departed from without any reason or that the approach adopted is patently erroneous or that relevant factors have not been considered by the valuer or that the valuation was made on a fundamentally erroneous basis or that the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter. Court will not interfere unless it is shown that some well accepted principle of valuation had been departed from without any reason or some relevant factors had not been considered by valuer. Regulation 20 (5) is not concerned with the price that a particular acquirer may be willing to offer on subjective consideration but is meant to provide guidance to arrive at a fair value of shares. Valuer had not committed any error which may justify interference as they had considered all relevant factors relevant under Section 20 (5).**

Valuation of shares is not only a question of fact, but also raised technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares. If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter. Where a method of valuation is prescribed the valuation must be made by adopting scrupulously the method prescribed, taking into account all relevant factors which may be enumerated as relevant for arriving at the valuation.

Regulation 20(5) applies to infrequently traded shares of a company. It lays down the parameters that must be taken note of and considered in arriving at the valuation. But it must be understood that the parameters laid down are by no means exhaustive. There are many other considerations which may be factored into any valuation process. What the aforesaid Regulation, however, mandates is that the parameters expressly laid down therein must in all cases be considered by the valuer since they are basic and essential to the valuation of infrequently traded shares of a company. If the valuation report discloses non consideration of any of the enumerated parameters, the report shall stand vitiated for that reason. This however does not prevent the valuer from considering other relevant factors according to accepted principles of valuation of shares.

It may also be observed that not any one of the parameters is in itself decisive. All the factors have to be considered and the valuation arrived at. The Regulation itself does not prescribe the weightage to be assigned to different enumerated parameters. As noticed earlier, many imponderables enter the exercise of share valuation. It must therefore follow that the weightage to be given to the different factors that go into the process of valuation, must be left to the wisdom, experience and knowledge of the experts in the field of share valuation. Such being the method of share valuation which involves subjective and objective considerations, there is considerable scope for difference of opinion even amongst experts. Even if the correct principles are applied, different valuers may arrive at different valuations. Each one of them may be right, yet the valuations may differ. Mathematical precision and exactitude are not the attributes of share valuation, for at best the valuation arrived at by an expert is only his opinion as to what the value of the share should be. No doubt the variation may not be very wide between two valuations prepared honestly by two valuers applying the correct approach and the correct principles, but some variation is unavoidable.

The Regulation seeks to protect the interest of an investor by ensuring that he gets a fair price for his shares in the target company. For the acquirer the decision to acquire shares is a commercial decision. The same block of shares may have different value for different acquirers. An acquirer who intends to control the management of the target company by acquisition of the shares in question, without acquiring majority shares, may value the shares differently from an acquirer who is already in management of the Company but wishes to acquire the majority of shares to strengthen his voting rights. A majority shareholder may also wish to acquire shares so as to hold 75% of the equity capital which will ensure passage of special resolutions. Such an acquirer may value the shares differently from his point of view. Similarly a shareholder already holding 75% shares may acquire more shares only to consolidate his holding in the target company. It may not suit his objectives to pay a higher price than the other three categories noticed above.

For the purpose of Regulation 20(5) we are not concerned with the price that a particular acquirer may be willing to offer on subjective consideration or for his special reasons. The Regulation is meant to provide guidance to arrive at a fair value of shares objectively which the acquirer is expected to offer to the shareholders of the target company.

The question there arises as to who shall determine whether the valuation of shares is reasonable and acceptable. Undoubtedly Regulation 20(5) mandates that the offer price shall be determined by the acquirer and the merchant banker taking into account the factors mentioned therein. The Board as the regulator is not bound to accept the offer price which is required to be incorporated in the public offer, if it suspects that the offer price does not truly represent the fair value of the shares determined in accordance with Regulation 20(5). It has therefore been provided that if considered necessary the Board may require valuation of such shares by an independent merchant banker. The purpose is only to ensure that the valuation arrived at is a fair valuation after taking into consideration all the enumerated factors in Regulation 20(5). In doing so the Board has to act prudently and within the limits of its jurisdiction. It cannot object to the price offered by the acquirer unless it has reasons to suspect that the price offered has not been determined fairly taking into account the enumerated factors. In case of doubt, it may require valuation of the shares by an independent merchant banker or chartered accountant. If the valuation determined by the acquirer or his merchant banker agrees with the valuation of the Board's valuer, more or less, then the Board has no option but to accept the offer price of the acquirer. It may suggest changes in the draft letter of offer, but it is doubtful if it can compel the acquirer to improve his offer even if the offer price is found to be fairly arrived at after due consideration of the matters enumerated in the Regulation. We do not wish to express any considered opinion in this regard, because that question does not arise in the facts of this case. The acquirer in the instant case did not challenge, rather accepted the suggestion of the Board to incorporate in his offer document the offer price based on the valuation report of M/s. Patni and Company which was the highest.

There is nothing in the Regulations which requires the Board to pass a reasoned order for all it does as a regulator. Being a regulator the Board has to take various steps, issue directions from time to time and pass appropriate orders. While considering the offer price to be incorporated in the letter of offer it must no doubt apply its mind to the offer price proposed to be incorporated in the letter of offer and the basis thereof. If it finds that the offer price is reasonable and the valuation report is satisfactory it may approve the offer price to be incorporated in the letter of offer. The power of the Board under Regulation 44(f) must be understood in the context of the scheme of the Regulations. Any price which it might "determine" under the aforesaid Regulations must also be determined having regard to the factors enumerated in Regulation 20(5). If it finds that the valuer's report takes into consideration all the relevant factors and the offer price has been determined applying the principles applicable to such valuation, it may have no reason to differ. It may not approve the offer document, if it finds the price offered to be low and unreasonable, applying the parameters laid down in Regulation 20(5). It must, therefore, follow that the Board must approve the price offered unless it is shown that the valuation arrived at must be faulted for non compliance with the Regulations which lay down the norms and parameters which must be observed. It cannot be lost sight of that the scheme of the Regulations is to permit an intending acquirer to make his offer to the shareholders whose shares are sought to be acquired. Despite the regulatory powers of the Board, the offer still remains that of the acquirer and not the Board. The Board has only to be satisfied that the offer made is reasonable and fair and in the interest of the shareholders. In case of doubt it may seek the opinion of another expert valuer which impliedly supports the contention that it is not expected to act as an expert valuer. If there is material on record to show that the Board applied its mind to the offer made and considered it in the light of the relevant provisions of the Regulations and all factors enumerated therein, its decision to approve the offer price to be incorporated in the letter of offer cannot be faulted on the ground that it has not passed a reasoned order. The facts of this case disclose that the Board not only considered the offer document submitted by the acquirers along with the report of the valuer, it took the precaution to seek the opinion of another expert valuer in view of complaints made by some shareholders. The appellants cannot therefore make a grievance that their objections were not given due weight. Thereafter, it also gave an opportunity to the acquirers to get the opinion of another expert valuer. Ultimately the Board reached the conclusion that the share price fixed by the expert valuer appointed by it represented the true and fair value of the shares in question and being the highest was also in the interest of the shareholders. The suggestion of the Board to the acquirers to incorporate in the public offer, the offer price on the basis of the valuation report of M/s. Patni and Company was accepted by the acquirers and the offer price earlier suggested by them was enhanced. We are, therefore, satisfied that the Board acted in a reasonable manner and in consonance with the Regulations. Only after considering all relevant matters it approved the offer price to be incorporated in the public offer document.

It was next contended that the appellate authority also failed to exercise its powers inasmuch as it failed to appreciate that the Board had clearly failed in discharge of its duty and had further failed in not exercising powers conferred upon it which were to be exercised in favour of the investors. We find from the impugned order of the appellate authority that it has considered all aspects of the matter and has reached a firm conclusion that the Board had acted in a judicious manner having regard to all relevant considerations. There were good reasons to reject the valuation reports of M/s. Sanjay Bajoria and Associates and M/s. Anand K. Associates submitted by the appellants.

We have carefully examined the report submitted by Patni and Company. It is quite apparent to us that the report cannot be assailed on the ground that it does not take notice of various factors mentioned in Regulation 20(5)) of the Takeover Code. The valuer has in fact referred to the said Regulations and enumerated the factors to be taken into account. It has thereafter proceeded to make the necessary calculations after giving due weightage to various factors. In doing so the valuer has relied upon the principles approved by this Court in *Hindustan Lever Employees Union* (supra). Learned Counsel for the appellants submitted that the principles approved in *Hindustan Lever Employees Union* (supra) were not relevant and should not have been applied by the valuer. This was because that was a case of amalgamation of two companies and it was in that context that the valuation of the shares had to be determined. It is true that *Hindustan Lever Employees Union* (supra) related to a case of amalgamation but for determining the value of the shares of the companies for the purpose of equivalence and to determine the ratio in which the shares were to be allotted, the valuer had to determine the value of the shares of the amalgamating companies applying the same accounting principles of valuation which are usually applied by the valuer in valuation of shares for other purposes as well. We, therefore, find no substance in the submission of learned Counsel for the appellants that the valuer had committed a mistake in applying the principles approved by this Court in *Hindustan Lever Employees Union* (supra).

Having considered all aspects of the matter, we are satisfied that the valuer, Patni & Company have not committed any such error which may justify our interference. They have considered all the factors relevant under Regulation 20(5)) of the Takeover Code and have adopted a reasonable approach which does not call for interference by us. It may be that views may differ and it is no gain saying that even experts may differ in their conclusions or even reasoning. The court must take notice of this fact and must not interfere unless there are compelling reasons to upset the finding of the expert valuer on grounds such as those enumerated in the earlier part of the judgment or other similar grounds.

We are, satisfied that the Board committed no error in accepting the report of Patni & Co. The Board has acted in a reasonable manner and made its best efforts to secure a reasonable price for the shares of the shareholders. It has exercised its discretion wisely and we find no reason to interfere.

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# SESSION V

# INTELLECTUAL PROPERTY AND THE INTERNET

(2004)6SCC145

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 3028 of 2004 (Arising out of SLP(C) No. 23309 of 2003)

Decided On: 06.05.2004

**Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd.**

**Hon'ble Judges/Coram:** Ruma Pal and P. Venkatarama Reddi, JJ.

**Whether Internet domain names can be said to be word or name capable of distinguishing subject of trade or service made available to potential users of internet? -- Held, yes-- Whether principles of trade mark law and in particular, those relating to passing off, apply?--Held, yes.**

**Appellant company incorporated in 1995 registering several domain names like www.sifynet, www.sifymall.com., www.sifyrealestate.com., etc. in 1999. 'Sify' being coined word and appellant claiming wide reputation and goodwill in name 'Sify'. The Respondent starting business of internet under domain names www. siffynet net. and www.siffynet.com in 2001. The Appellant served notice on respondent to cease and desist from carrying on business in name of Siffynet Solutions (P.) Ltd. or Siffynet Corporation and to transfer domain names to appellant. The Respondent refused-- Trial court granted temporary injunction to appellant on grounds that appellant was prior user of name 'Sify', that it had earned good reputation under said name and that respondent's domain names were similar to those of appellant. The Court held that confusion was likely to be caused in mind of general public by such deceptive similarity. Balance of convenience found in favour of appellant.**

Internet domain name can be said to be word or name capable of distinguishing subject of trade or service made available to potential users of internet. The original role of a domain name was no doubt to provide an address for computers on the internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the commercial field, each domain name owner provides information/services which are associated with such domain name. Thus, a domain name may pertain to provision of services within the meaning of Section 2 (z) of the Trade Marks Act, 1999. A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding online internet location. Whereas a large number of trademarks containing the same name can comfortably co-exist because they are associated with different products, belong to business in different jurisdictions, etc., the distinctive nature of the domain name providing global exclusivity is much sought after. The fact that many consumers searching for a particular site are likely, in the first place, to try and guess its domain name has further enhanced this value". Hence, a domain name can be said to be a word or name which is capable of distinguishing the subject of trade or service made available to potential users of the internet.

An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trademark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trade who is able to establish prior use will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement. The second element that must be established by a plaintiff in a passing off action is misrepresentation by the defendant to the public. The word 'misrepresentation' does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. What has to be established is the likelihood of confusion in the minds of the public, (the word "public" being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion, the Courts must allow for the "imperfect recollection of a person of ordinary memory." The third element of a passing off action is loss or the likelihood of it. The use of the same or similar domain name may lead to a diversion of users which could result from such users mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web site which offers no such services. Such users could well conclude that the first domain name owner had misrepresented its goods or services through its promotional activities and the first domain owner would thereby lose their custom. It is apparent, therefore, that a domain name may have all the characteristics of a trade mark and could found an action for passing off.

However, there is a distinction between a trademark and a domain name which is not relevant to the nature of the right of an owner in connection with the domain name, but is material to the scope of the protection available to the right. The distinction lies in the manner in which the two operate. A trademark is protected by the laws of a country where such trademark may be registered. Consequently, a trademark may have multiple registration in many countries throughout the world. On the other hand, since the internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require world wide exclusivity but also that national laws might be inadequate to effectively protect a domain name. The lacuna necessitated international regulation of the domain name system (DNS). This international regulation was effected through WIPO and ICANN. India is one of the 171 states of the world which are members of WIPO. WIPO was established as a vehicle for promoting the protection, dissemination and use of intellectual property throughout the world. Services provided by WIPO to its member states include the provision of a forum for the development and implementation of intellectual property policies internationally through treaties and other policy instruments.

Balance of convenience in grant of temporary injunction -- Appellant company incorporated in 1995 registering several domain names. The appellant claims wide reputation and goodwill in name Sify. The appellant has been able to establish the goodwill and reputation claimed by it in connection with the trade name 'Sify'. Apart from the close visual similarity between 'Sify' and 'Siffy', there is phonetic similarity between the two names. The addition of 'net' to 'Siffy' does not detract from this similarity. The appellant's internet based business was, from 1999, high profile. The evident media prominence to 'SIFY' and large subscriber base could have left the respondent in no doubt as to its successful existence prior to the adoption of Siffy as part of its corporate name and registration of Siffynet and Siffy.com as its domain names. It would, therefore, appear that the justification followed the choice and that the respondent's choice of the word "Siffy" was not original but inspired by the appellant's business name and that the respondent's explanation for its choice of the word "Siffy" as a corporate and domain name is an invented post-rationalisation.

A domain name is accessible by all internet users and the need to maintain an exclusive symbol for such access is crucial. Therefore, a deceptively similar domain name may not only lead to a confusion of the source but the receipt of unsought for services. Besides, the appellants have brought on record printouts of the respondent's website in which they have advertised themselves as providing, inter alia, software solution, integrating and management solutions and software development covering the same field as the appellant. To take a specific example, the respondent's brochure explicitly offers Intranet and Extranet solutions which are also explicitly offered by the appellant. There is clearly an overlap of identical or similar services. It may be difficult for the appellant to prove actual loss having regard to the nature of the service and the means of access but the possibility of loss in the form of diverted customers is more than reasonably probable. Given the nature of the business, it is necessary to maintain the exclusive identity which a domain name requires. In other words, either 'Sify' and 'Siffy' must go. Apart from being the prior user, the appellant has adduced sufficient evidence to show that the public associates the trade name SIFY with the appellant. Weighed in the balance of comparative hardship, it is difficult to hold that the respondent would suffer any such loss as the appellant would unless an injunction is granted. The respondent can carry on its business and inform its members of the change of name. The High Court's finding that no prejudice would be caused to the appellant because it had another domain name was a consideration which might have been relevant if there was a case of bona fide concurrent use and where the right to use was co-equal. The doubtful explanation given by the respondent for the choice of the word 'Siffy' coupled with the reputation of the appellant can rationally lead to the conclusion that the respondent was seeking to cash in on the appellant's reputation as a provider of service on the internet. In view of our findings albeit, prima facie on the dishonest adoption of the appellant's trade name by the respondent, the investments made by the appellant in connection with the trade name, and the public association of the trade name Sify with the appellant, the appellant is entitled to the relief it claims. A different conclusion may be arrived at if evidence to the contrary is adduced at the trial. But at this stage and on the material before the Court, the Court is of the view that the conclusion of the High Court to the contrary was unwarranted.

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MANU/TN/1816/2010

**IN THE HIGH COURT OF MADRAS**

Original Application Nos. 977 and 978 of 2009, Application Nos. 6001, 6380, 6381 and 6382 of 2009 and Application No. 247 of 2010 in C.S. No. 832 of 2009

Decided On: 30.09.2010

**Consim Info Pvt. Ltd., represented by its Director and Chief Executive Officer Mr. Janakiraman Murugavel Vs. Google India Pvt. Ltd. and Ors.**

**Hon'ble Judges/Coram:** V. Ramasubramanian, J.

**Infringement of Intellectual Property Rights under Trade Marks Act, 1999 - Trial Court vacated interim injunction against Defendants 2 to 4, who had matrimonial web portals and advertise their services in search engine Google, by adopted adwords and texts and directed First Defendant/search engine to protect registered trademarks in their adwords - Hence, this Appeal - Whether, Defendants were using registered trade mark in course of trade within meaning of Section 2(2)(b) and (c) and 29(6) and whether such use or application constituted infringement within meaning of Section 29(8).**

**Held, if Defendants 2 to 4 use individual words constituted registered trade marks of Plaintiff in their advertisements and it satisfied ingredients of Section 29(8), then it would constitute infringement. However, Defendants 2 to 4, could not be said to take unfair advantage and acted contrary to honest practices in industrial or commercial matters, within meaning of Section 29(8)(a) of Act, as ingredients of Section 29(8)(b) and (c) were**

**not satisfied. Moreover, terms unfair advantage and honest practices appeared in Section 30 also which prescribed limits on effect of registered trade marks, and its use detrimental to distinctive character of mark against reputation of Plaintiff mark. Therefore, Plaintiff was not entitled to injunctions, as they had failed to pass triple tests of prima facie case, balance of convenience and irreparable hardship. The use of Plaintiff's trade mark by Defendant did not amount to an infringement by principle of estoppel envisaged under Act. Hence, keyword suggestion tool of search engine, could not amount to infringed use, nor it amount to contributory infringement against Plaintiff**

The grievance of the plaintiff is that whenever a websurfer browses the search engine 'google' using as keywords, any of their 22 trademarks or the constituent parts thereof (such as Bharat, Assam, Tamil, Matrimony etc.,) the links to the websites of the defendants 2 to 4 also appear on the right hand side of the page, as "sponsored links". Each sponsored link has (i) an ad title (ii) an ad text and (iii) the URL (Uniform Resource Locator) of the advertiser's website. When the trademark of the plaintiff or a mark which is deceptively similar to it, is used in the ad title or ad text, by a competitor, whose advertisement appears on the sponsored links, an infringement happens, according to the plaintiff. Since the choice of the keyword is made by the advertiser through the keyword suggestion tool provided by the search engine, the contention of the plaintiff is that the search engine is guilty of aiding and abetting such infringement. In other words, the plaintiffs charge the defendants 2 to 4 with direct infringement and passing off. They charge the first defendant with indirect or contributory infringement.

On a perusal of the admitted averments and the averments supported by documents, it is clear (i) that the plaintiff has established that they are the proprietors of registered trade marks (ii) that the defendants 2 to 4 are also engaged in the business of rendering same type of services and (ii) that the defendants 2 to 4 were using at least the words Bharat, Tamil, Matrimony etc., in the adtitle and/or adtext of their advertisements.

In so far as the case on hand is concerned, the words 'Tamil', 'Muslim', etc., are descriptive terms, indicating a race, language, ethnic group or a community and no one is entitled to monopolise the use of these words. Similarly, the word 'matrimony' is descriptive of the state of marriage of a person. The words 'marriage', 'wedding', etc., may all signify the same meaning, though the origin of these words are from different sources. While the word 'wedding' is an english word denoting a marriage ceremony, the word 'matrimony' is derived from the Latin word 'matrimonium' meaning thereby a rite or state of marriage. On the other hand, the word 'marriage' is derived from the French term 'marier' meaning both a legal union of a man and a woman as well as the act or ceremony marking this. The World Book Dictionary states that while the term 'marriage' emphasises the legal union of a man and woman, the term 'matrimony' is a formal and religious word, applied to the religious bond established by the union and the term 'wedding' is the common word for the ceremony or celebration.

Therefore, it is needless to point out that the plaintiff cannot claim monopoly over the individual words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', 'matrimony', 'Bharath' etc. But, the plaintiff has obtained registration of a combination of these words and claims that it is an arbitrary combination of two ordinary words, which have become distinctive. Therefore, the plaintiff claims that by virtue of the registration, they are entitled to prevent others from using these words in such a manner, as would mislead the customers about their origin. In other words, the plaintiff is not aggrieved per se, (and cannot be aggrieved) by the use of these words by the defendants independently and individually. The grievance of the plaintiff is that when the defendants use the very same combination of words with or without a space in-between, it causes confusion in the minds of the consumers. It is also the contention of the plaintiff that despite the combination of words, which constitute their registered trade marks, being descriptive in nature, they have acquired secondary meaning and hence, the plaintiff is entitled to prevent the infringement thereof.

The question as to whether the registered trade marks of the plaintiff have acquired secondary meaning or not, has to be tested only on the strength of the evidence let in. But, irrespective of whether they have acquired secondary meaning or not, the use by the defendants 2 to 4, of the very same combination of words, namely 'Tamil Matrimony', 'Bharath Matrimony', 'Assamese-Matrimony' etc., even if they leave a space in-between the two words, certainly provides a likelihood of confusion. Therefore, under normal circumstances, the plaintiff will be entitled to an injunction, for the simple reason that the others are not entitled to use the very same combination of words with just a space in-between and claim that both these words are just generic or descriptive. As a matter of fact, if the defendants 2 to 4 use one of the words constituting the registered trade marks of the plaintiff, in conjunction with a different word (which is not part of the registered trade mark), the plaintiff would have had no case at all. It must be borne in mind that the same mark test is different from a similar mark test. For instance, if the defendants 2 to 4 use the words 'Tamil Alliance' or 'Tamil wedding' etc., (and yet convey the same meaning), the plaintiff would have had no right to injunct the defendants from using the word 'Tamil' in their advertisements. Similarly if the defendants use the words 'Bharat' or 'Punjabi' or 'Muslim' etc., in conjunction with any word other than 'Matrimony', the plaintiff cannot maintain an action. But the objection of the plaintiff is to the use of the very same combination of words by the defendants, as contained in the registered trademarks of the plaintiff.

Though the objection of the plaintiff to the use by the defendants, of the very same combination of words, is well founded prima facie, the same cannot take them to the desired destination. It is on account of a subsidiary question that would then automatically arise for consideration. That question is as to whether the defendants 2 to 4 would be left with any other choice, to advertise their services, if the use of the combination of the above words is prohibited.

We have already seen that the defendants 2 to 4 are also in the same line of business as the plaintiff. Therefore, they have no alternative except to advertise their services, only in a manner descriptive of such services. For instance, in a website providing services to men and women looking for suitable life partners from Kerala, the defendants would have no alternative except to use either of the 2 words 'Kerala' or 'Malayalam'. While there are a few synonymous terms for the word 'Matrimony', there are no synonyms for the words like 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc. Therefore, there is no way the defendants 2 to 4 could be prohibited from using these words, which have no synonyms. Consequently, even if the plaintiff's case is accepted in total, an injunction could be issued only to the extent of preventing the defendants from using the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc, in combination with the word 'Matrimony'. This would leave the defendants 2 to 4 with a very limited choice, to choose the expression 'Tamil Wedding' or 'Tamil Marriage' or 'Tamil Alliance' etc, instead of the expression 'Tamil Matrimony'. But, the grant of an order which would lead to the consequence of reducing the choice of words available to the competitors, to a very few and resulting in the plaintiff monopolising the English word 'Matrimony', will be very disastrous.

More over, Section 35 of the Act saves the use by any person, of any bona fide description of the character or quality of his goods or services. Therefore, in the light of the fact that there are no synonyms for the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., and also in the light of the fact that any curtailment of the use of the word 'Matrimony' would leave the defendants 2 to 4 with a very limited choice of two or three equivalent words only, the use by the defendants 2 to 4 of the combination of words could only be taken to be an inevitable and unavoidable, even if presumed to be not a bona fide description of the character or quality of their services, saved by Section 35.

In an article titled "*Expressive Genericity: Trademarks as Language in the Pepsi Generation*" 65-Notre Dame L. Rev.397, the author Rochelle Cooper Dreyfuss warned of the danger of losing vocabulary and suppressing expressive communication because of overly broad trademark protection and proposing to solve it by rendering terms "expressively generic" if society wishes to appropriate them for cultural use. Similarly, Prof. Wendy Gordon stated in his article "*On Owning Information: Intellectual Property and the Restitutionary Impulse*" 78 Va.L. Rev.149 that "culture could not exist if all free riding were prohibited within it".

Even before the advent of this issue in the internet age, the Supreme Court (of USA) allowed, in *Saxlehner v. Wagner* 216 US 375 (1910), a natural water producer to use its competitor's mark to identify the product that it was copying. Justice Holmes explained that as long as the defendants did not create confusion about the real source of their product, they were free "to tell the public what they are doing and to get whatever share they can in the popularity of the trademarked product by advertising that they are trying to make the same article and think that they succeed". The Court held that by flagging its product as an imitator of the original, they are not trying to get the goodwill of the name but the goodwill of the goods.

In *Health & Glow Retailing Pvt. Ltd. v. Dhiren Krishna Paul* 2007(35) PTC 474, a similar question came up before me for consideration. But in that case the plaintiff had a word mark as well as a device mark, both registered in their favour. The defendants copied not only the very same word mark "Health and Glow" but also the device mark. Therefore, I found in that case (para 36 of the report) that there was no honest concurrent use, but only dishonest subsequent use, by the defendants in that case. After analysing the precedents on the issue, I also held in para

48 of the decision that the objection relating to inventiveness of a registered mark could be raised only at the pre registration stage. But the case on hand falls under a different category. In Health and Glow, the availability of the choice of synonyms (or equivalent terms), for describing the products and services of the parties, did not arise. But in the case on hand, I have found that out of the 2 words constituting the registered trademarks of the plaintiff, one does not have a synonym and the choice with respect to the other, is limited to a very few words. Therefore, I accept the first defence set up by the defendants 2 to 4, in view of the peculiar features of the case.

The second defence taken by the defendants, on the basis of Sections 15 and 17, cannot be sustained for one simple reason. The plaintiff does not seek an injunction restraining the defendants from making use of the individual words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', 'Matrimony' etc., independently. The plaintiff does not even seek an injunction to restrain the defendants 2 to 4 from using any of the words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc in combination with any word other than 'Matrimony'. The injunction that they seek is to prevent the defendants 2 to 4 from using any of these words 'Tamil', 'Malayalam', 'Telugu', 'Punjabi', 'Assamese', etc., in combination with the particular word 'Matrimony'. Therefore, the second defence taken by the defendants 2 to 4 cannot be accepted.

It is the contention of the defendants that even if they use the individual words or parts of the plaintiff's registered trade marks in their advertisements, such use will not be an use in the trade mark sense, but only in a descriptive sense. This contention has to be viewed in the light of the fact that a web portal rendering online matrimonial services for different sections of the public, will have no alternative, except to describe the nature of the services rendered by them, in their advertisements, with reference to-

(i) the caste/community/race/ethnic group and

(ii) the type of services rendered.

Therefore, the defendants 2 to 4, in my view, cannot be said to be taking unfair advantage of and acting contrary to honest practices in industrial or commercial matters, within the meaning of Section 29(8)(a) of the Act.

The use by the defendants, of the individual words constituting the registered trademarks of the plaintiff, in the advertisements in internet, may not amount to taking unfair advantage of and contrary to honest practices in industrial or commercial matters. The ingredients of Section 29(8)(b) and (c) are also not satisfied, since it is not shown that the use is detrimental to the distinctive character of the mark or against the reputation of the mark. Therefore, i hold that though the use by the defendants would be an use in the course of trade and an use in advertising, such use does not amount to an infringing use, in view of the reasons stated above.

The contention based on the validity of registration, cannot be accepted in view of Sections 31 and 32. Under Section 31(1), the registration of a trade mark is considered prima facie evidence of its validity. Under Sub-section (2) of Section 31, a registered trade mark cannot be held to be invalid in a legal proceeding on the ground that it was not registrable under Section 9. By virtue of Section 32, it is open to the plaintiff to establish in the course of trial that after the registration of the mark, but before the commencement of the legal proceedings, the mark has acquired a distinctive character, in consequence of its use. Therefore, the contention that the trade marks in question ought not to have been registered, cannot be accepted.

Normally an advertisement in a search engine, is triggered when the hands of the websurfer, types a search term, which matches the adwords selected by the advertiser, with or without the help of the keyword suggestion tool. While the search engine may have a control over the selection of keywords by the advertiser, the search engine may not have any control over the surfer, on the choice of a search term. It is also not possible for a search engine to be aware of all the trademarks registered in all the jurisdictions, in respect of all the goods and services. Therefore, the offer of words by a search engine, in their keyword suggestion tool, may not per se amount to an infringing use of a registered trademark, though it may amount to a use in the course of their own trade. It is true that the number of visitors that a site has on a daily basis, may induce the search engine to include the whole or part of the name or title of the site, in the keyword suggestion tool, to enable the competitors of the site to choose those words as adwords. But it may or may not happen with the knowledge that such names constitute registered trademarks. There cannot be a presumption that the inclusion of those names in the keyword suggestion tool, happened with the knowledge of the search engine, about the registration of those words as trademarks. It is only in cases where a completely arbitrary or fanciful name, which has no nexus or connection with the nature of the goods or services, is adopted as a trademark, that the offer by a search engine of that trademark in their keyword suggestion tool, to the competitors of the proprietor of the mark, could be considered as amounting to vicarious or contributory infringement. In cases of the nature on hand, the benefit of doubt would go to the search engine, since the choice of the words Tamil, Matrimony etc., in the keyword suggestion tool, need not necessarily have happened deliberately.

The inclusion of the words Tamil, Matrimony etc., in the keyword suggestion tool of the search engine, would not amount to an infringing use, nor would it amount to a contributory infringement, in view of my findings against the plaintiff vis-a-vis defendants 2 to 4. However, it is made clear that Google has a duty to explain in the course of the main proceedings (suit), the rationale behind the difference in policy adopted by them in different regions.

In the light of the above discussion, I am of the view that the plaintiff is not entitled to the injunctions sought for, as they have failed to pass the triple tests of (i) prima facie case (ii) balance of convenience and (iii) irreparable hardship.

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MANU/DE/3072/2009

**IN THE HIGH COURT OF DELHI**

CS (OS) No. 894/2008

Decided On: 23.11.2009

**Banyan Tree Holding (P) Limited Vs. A. Murali Krishna Reddy and Anr.**

**Hon'ble Judges/Coram:** A.P. Shah, C.J. and Dr. S. Muralidhar, J.

**Action for infringement or passing off of trade mark - Jurisdiction of a forum Court in suits involving internet related disputes - Test of purposeful availment- plaintiff, carrying out its business in Singapore has filed the present infringement suit against the Defendants, who are carrying out their business in Hyderabad on the ground that the Defendants by using the plaintiff's trade mark 'Banyan Tree' by advertising it by opening a website in the said name has infringed their trade mark - Single Judge referred the matter to Division Bench to decide the question of territorial jurisdiction on the ground that both the parties**

**are not located within the jurisdiction of the present Court - plaintiff contented that the present Court has jurisdiction as website of the Defendants is accessible in Delhi and there was one instance of the Defendants' brochure being sent to a Delhi resident for the purposes of sale of property - For the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the Defendants lends jurisdiction to such Court where the suit is filed.**

**Held, for the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in order to satisfy the forum Court that it has jurisdiction to entertain the suit, the plaintiff would have to show that the Defendant purposefully availed itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state.**

**In a passing off or infringement action, where the Defendant is sought to be sued on the basis that its website is accessible in the forum state, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant the plaintiff will have to show prima facie that the said website was specifically targeted at viewers in the forum state for commercial transactions. The plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state resulting in an injury or harm to the plaintiff within the forum state.**

**Territorial jurisdiction - Is it permissible for the plaintiff to establish such prima facie case through 'trap orders' or 'trap transactions' when it is not otherwise shown that the Defendant intended to specifically target customers in the forum state - Held, commercial transaction entered into by the Defendant with an internet user located within the jurisdiction of the forum Court cannot possibly be a solitary trap transaction since that would not be an instance of 'purposeful availment' by the Defendant - It would have to be a real commercial transaction that the Defendant has with someone not set up by the plaintiff**

**itself. If the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test.**

Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. At the outset, this Court does not subscribe to the view that the mere accessibility of the Defendants website in Delhi would enable this Court to exercise jurisdiction. A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction. This Court is therefore unable to agree with the proposition laid down in *Casio India Co. Limited v. Ashita Tele Systems Fvt. Limited* 2003 (27) FTC 265 (Del). The said decision cannot be held to be good law and to that extent is overruled.

*(India TV) Independent News Service Fvt. Limited v. India Broadcast Live Llc And Ors.* 2007 (35) FTC 177 (Del.) appears to be somewhat closer to the development of law in this regard since the decision in *Casio*. In *India TV*, the learned single Judge impliedly doubted the correctness of the decision in *Casio*. The learned single Judge in *India TV* acknowledged that a mere accessibility of website may not be sufficient to attract jurisdiction of the forum court. This, in the considered view of this Court, is the correct position in law. There was no occasion for this Court even in *India TV* to examine the finer aspects of the question of jurisdiction based on the nature of the website, the intention of the host of the website to specifically target viewers outside its jurisdiction, and the effect of hosting such website on audiences outside such state. It appears to this Court that for the purposes of a passing off action or an action for infringement where the plaintiff is not carrying on business within the jurisdiction of the forum court, and where there is no long arm statute, the plaintiff would have to show that the Defendant purposefully availed itself of the jurisdiction of the forum court. It is not enough merely to show that the website hosted by the Defendant is an interactive one. It would have to be shown that the

nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user.

This Court is not able to accept the submission of the learned Counsel for the plaintiff that the test of "purposeful availment" must be replaced by the test of "purposeful avoidance". While the Defendant may in his defence show how he avoided the forum state, the initial burden is on the plaintiff to show that the Defendant "purposefully availed" itself of the jurisdiction of the forum court. The issue of incorporating filters to block access to the website by viewers located outside the forum state will have to be considered while deciding if the Defendant had "purposefully avoided" the forum state. However, that question will arise only if the plaintiff has been able to show that the website of the Defendant is interactive and permits commercial transactions to be concluded by the Defendant with a user of the website.

This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined. For the "effects" test to apply, the plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the plaintiffs business, goodwill or reputation within the forum state as a result of the Defendants website being accessed in the forum state would have to be shown. Naturally therefore, this would require the presence of the plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore the "effects" test would have to be applied in conjunction with the "sliding scale" test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes.

This brings us to the question as to the extent of burden of proof on the plaintiff to prima facie show that the Defendant has purposefully availed of the jurisdiction of this Court. In the present case, it is argued that by enabling customers to go on the website and get a copy of its brochure and make enquiries, the Defendant must be held to have purposefully availed of the jurisdiction of this Court. The question that arises is for the purposes of Section 20(c) CPC, in such circumstances, is ‘what is the extent of the burden on the plaintiff to show prima facie that a part of the cause of action arose within the jurisdiction of the forum court’. This Court holds that in order to prima facie establish that the Defendant purposefully availed of the jurisdiction of this Court, the plaintiff would have to show that the Defendant engaged in some commercial activity in the forum State by targeting its website specifically at customers within that State. This is consistent with the law laid down in *Cybersell* and reiterated later in *Toys R Us.* It is also consistent with the application of the "tighter" version of the "effects" test which is "targeting". In any action for passing off or infringement, it would have to be shown that the Defendant by using its mark intended to pass off its goods as that of the plaintiffs. A mere hosting of a website which can be accessible from anyone from within the jurisdiction of the court is not sufficient for this purpose. Also a mere posting of an advertisement by the Defendant depicting its mark on a passive website which does not enable the Defendant to enter into any commercial transaction with the viewer in the forum state cannot satisfy the requirement of giving rise to a cause of action in the forum state. Even an interactive website, which is not shown to be specifically targeted at viewers in the forum state for commercial transactions, will not result in the court of the forum state having jurisdiction. In sum, for the purposes of Section 20(c) CPC, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant, the plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions. The plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state. Question No. (ii) is answered accordingly.

It may be recalled that the plaintiff has to show that a part of the cause of action in a suit for passing off or infringement has arisen within the jurisdiction of the forum court. Relevant to this, it would have to be shown by the plaintiff that the Defendant "availed" of the jurisdiction of the forum court by commercially transacting with a viewer located in the forum state through the internet. The question is whether this transaction can be a 'trap transaction' that is engineered by the plaintiff itself, particularly when it is not otherwise shown that the Defendant intended to specifically target customers in the forum state.

While in trade mark and infringement cases, trap orders or trap transactions may be used as evidence, the fairness of such transactions is a relevant factor to be considered. Other relevant factors would be the nature of goods or services offered for purchase on the internet. If they require the customer to further physically verify their quality then the mere purchase of such goods through a trap transaction may not be treated as being sufficient evidence of infringement. The facts of each case will determine whether the trap transaction is a fair one and has resulted in a purchase on the internet of goods or services. A lone trap transaction will not be sufficient evidence of infringement or passing off. For the purposes of establishing that a part of the cause of action arose within the jurisdiction of the court, the plaintiff would have to show that the Defendant has purposefully availed of the jurisdiction of the forum court by entering into a commercial transaction with an internet user located within the jurisdiction of the forum court. This cannot possibly be a solitary trap transaction since that would not be an instance of "purposeful" availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown to be obtained using fair means. The plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test. Question (iii) is answered accordingly.

We summarise our findings on the questions referred for our opinion as under:

Question (i): For the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the Defendants lends jurisdiction to such Court where such suit is filed ("the forum court")

Answer: For the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the plaintiff would have to show that the Defendant ‘purposefully availed’ itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state.

Question (ii): In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?

Answer: For the purposes of Section 20(c) CPC, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant the plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions. The plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state resulting in an injury or harm to the plaintiff within the forum state.

Question (iii): Is it permissible for the plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?

Answer: The commercial transaction entered into by the Defendant with an internet user located within the jurisdiction of the forum court cannot possibly be a solitary trap transaction since that would not be an instance of "purposeful" availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test.

# SESSION VI

# INJUNCTIONS IN INTELLECTUAL PROPERTY CASES

(2009)9SCC797

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 6309 of 2009 (Arising out of S.L.P. (C) No. 13933 of 2009)

Decided On: 16.09.2009

**Bajaj Auto Limited Vs. TVS Motor Company Limited**

**Hon'ble Judges/Coram:** Markandey Katju and A.K. Ganguly, JJ.

**Expeditious Disposal of Intellectual Property Suits - Proviso (a) to Order XVII, Rule 1 (2) should be strictly complied with by all Courts. Hearing of suit should proceed on day-to-day basis. Judgment should be given normally within four months from date of filing of suit.**

It is evident that the suit is still pending before the learned Single Judge of the Madras High Court. We are unhappy that the matter has been pending in the High Court at the interlocutory stage for such a long time as the suit was filed in December, 2007 and yet even written statement has not been filed.

Experience has shown that in our country, suits relating to the matters of patents, trademarks and copyrights are pending for years and years and litigation is mainly fought between the parties about the temporary injunction. This is a very unsatisfactory state of affairs, and hence we had passed the above quoted order in the above-mentioned case to serve the ends of justice. We direct that the directions in the aforesaid order be carried out by all courts and tribunals in this country punctually and faithfully. In the present case, although arguments were advanced at some length by the learned Counsel for both the parties, we are of the opinion that instead of deciding the case at the interlocutory stage, the suit itself should be disposed of finally at a very early date.

Hence, without going into the merits of the controversy, we direct the respondent-defendant to file written statement in the suit, if not already filed, on or before the last date for closing of the Madras High Court for Dussehra holidays. We would request the learned Single Judge who is trying the suit to commence the hearing of the suit on the re-opening of the Madras High Court after Dussehra holidays and then carry it on a day to day basis. No adjournment whatsoever ordinarily will be granted and the suit shall be finally disposed of on or before 30th November, 2009. The interim orders of this Court dated 08th June, 2009 and 31st August, 2009 are vacated and substituted by the following directions.

The respondent shall be entitled to sell its product but it shall maintain an accurate records/accounts of its all India and export sales. We are appointing a Receiver to whom the records of such sale shall be furnished every fortnight by the respondent and the same shall be signed and authenticated by a responsible officer of the respondent. A copy of the same shall be given to the appellant also. We are requesting the Hon'ble the Chief Justice of the Madras High Court to forthwith nominate a Receiver in the matter to whom the sale records/accounts will be submitted by the respondent fortnightly, and the Receiver will verify the said sale records/accounts and thereafter submit his Report to the learned Bench of Madras High Court where the suit is pending. A copy of the same will be sent to the parties also. This direction will continue till the pendency of the suit. The remuneration of the Receiver will be fixed by the Hon'ble Chief Justice.

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MANU/WB/0374/2004

**IN THE HIGH COURT OF CALCUTTA**

F.M.A.T. No. 3098 of 2004

Decided On: 14.10.2004

**Bucyrus Europe Limited and Anr. Vs. Vulcan Industries Engineering Company Private Limited**

**Hon'ble Judges/Coram:** A.K. Ganguly and T.K. Dutt, JJ.

**Anton Piller Order in Intellectual Property Suits - Utmost good faith is condition precedent for getting such Order. Order obtained by suppression and misleading of facts cannot be sustained.**

On a proper appreciation of the ratio in *Anton Piller K. G. v. Manufacturing Process Ltd. and Ors.,* reported in 1976 RPC 719, this Court finds that such an order can be passed in the following situations :

(i) where the plaintiff has an extremely strong prima facie case,

(ii) where the actual or potential damage to the plaintiff is very serious, and

(iii) where it was clear that the defendant possessed vital evidence,

(iv) there was a real possibility that the defendant might destroy or dispose of such material so as to defeat the ends of justice,

(v) the purpose of Anton Filler order is the preservation of evidence.

Before passing an Anton Filler order, some safeguards are also to be observed like asking the plaintiff to give an undertaking in damages in case the plaintiff is wrong and the defendant suffers damages as a result of the execution of the order. However, before the Court will grant an Anton Filler order, the plaintiff must be able to convince the Court that he has a strong case and that the order is indeed essential to the ends of justice.

In a later decision, in Systematica Ltd. v. London Computer Centre Ltd., and IDNANI, reported in 1983 Fleet Street Reports 313, Justice Whitford warned against "rather too free a use" of being made of Anton Piller orders by the plaintiff.

In the facts of this case there has been a clear suppression of a very material fact by the appellants while obtaining an ex parts ad interim injunction on the lines of Anton Piller order. Attempt has been made by the learned Counsel for the appellants to bifurcate the case of infringement of design from the infringement of copyright before this Court but from the case which is made out in its petition in the Court below and also in the petition before this Court, it is clear that they were running a combined case of infringement of both. It cannot be contended that by filing the instant proceeding, the appellants were only seeking to protect its copyright. From the prayers which were made before the Trial Court and before this Court, it is clear that the appellants were seeking protection also in respect of their registered designs. Therefore now, the appellants cannot jettison its case on registered designs and urge that it is only for protection of its copyright for which they have come to this Court.

It was pointed out to us by the learned Counsel for the defendants that no injunction order was ever granted by this Hon'ble Court on 5th March, 2003 against them and no Special Officer was appointed. When this was pointed out to the learned Counselor the appellants, the learned Counsel admitted that this was a mistake in the drafting of the pleadings before this Court. It may be pointed out that in the memo of appeal also a similar ground was taken (Ground VIII). So the mistake, apparently, is, very widespread. Therefore the pleading before this Court, when this injunction petition was filed ex parte and on the basis of which the Court granted injunction, suffers not only from suppression of material facts but also suffers on the ground that it contains misleading averments.

Therefore, any ex parte interim order which was obtained from this Court ought to be dissolved on this ground alone. Reference in this connection be made to a judgment of the Division Bench of this Court to which one of us was party in the of *Bengal Club Limited v. Susanta Kumar Chowdhury,* reported in 2002(3) CHN 322. At paragraph 38 of the judgment, the following observations have been made by this Court:

"The question of pleading is of great importance in the context of an ex parte application for injunction. At that stage proceedings before the Court rest on the basis of total good faith on the pleadings. At that stage there is no contested hearing, therefore, the party making the prayer for ex parte ad interim order of injunction must plead the entire facts of the case. Such pleading must be clear, complete and candid".

Going by the aforesaid well-settled principles this Court holds that there was lack of bona fide and good faith in the pleadings on the basis of which an ex parte order of injunction on the line of Anton Piller was obtained from this Court. From the discussion made in the earlier part of this judgment it is clear that utmost good faith of the plaintiff is the condition precedent for granting an injunction on the lines of Anton Piller . Admittedly good faith on the part of the plaintiff is lacking. The Court at an ex parte stage accepted the pleading to be true and correct and passed the order. But if there had been a full disclosure of facts, the Court might not have passed the order. The pendency of cancellation is a relevant fact and cannot possibly be disputed.

From its own pleading in the injunction application it has been stated that the appellant No. 2 carries on the business of marketing of the equipment produced by the appellant No. 1 for the last 10 years in India. Therefore, in the context of this clear admission by the appellant it becomes a disputed question of fact whether its copyright in designs has ceased as a result of its reproduction for more than 50 times by an industrial process by the owner of the copyright or with its licence by any other person. This is such a disputed question of fact that on this an ex parte ad interim order of injunction can not be granted without giving the defendants any chance to refute the plaintiffs claim. In fact no such claim, prima facie, appears to have been made.

Therefore, judging the matter from all possible angles this Court cannot sustain the ad interim order of injunction mainly on the ground of suppression as also on prima facie findings on other grounds pointed out above. Since the ex parte ad interim order of injunction was obtained from this Court by the appellants by suppression of facts, as stated above, as also by misleading facts, stated above, this Court is of the opinion that the appellants have not displayed good faith which is required of them while seeking an ex parte order of injunction.

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(2005)3SCC63

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 1407 of 2005 (Arising out of Special Leave Petition (Civil) No. 14862 of 2004)

Decided On: 25.02.2005

**Dhariwal Industries Ltd. and Anr. Vs. M.S.S. Food Products**

**Hon'ble Judges/Coram:** B.P. Singh and P.K. Balasubramanyan, JJ.

**Balance of convenience in grant of temporary injunction in Intellectual Property Suits - the fact that neither party has a registered trade mark as on the date of the suit cannot stand in the way of entertaining the claim of the plaintiff and granting the plaintiff an injunction in case the plaintiff is in a position to show prima facie that it was the prior user of its mark, that it had a prima facie case and that the balance of convenience was in favour of the grant of an interim injunction.**

The trial court held that the plaintiff has prima facie established prior user of the mark 'Malikchand' by itself and its predecessors. It observed that the question whether the assignments relied on from its predecessors by the plaintiff were genuine and are proved to be genuine was a question that could be decided at the trial and at this prima facie stage there was no reason to discard those documents. The documents relied on by the plaintiff, prima facie showed prior user. After referring to some of the decisions brought to its notice, it held that the plaintiff has established a prima facie case for interim injunction. It was further found by that court that the balance of convenience was in favour of the grant of interim injunction in favour of the plaintiff restraining the defendants from using the mark 'Manikchand' till the final disposal of the suit. On appeal by the defendants, the appellate court reconsidered the relevant aspects in the light of the arguments addressed before it and came to the conclusion that the trial court was justified in granting an order of injunction and the grant of interim injunction by the trial court could not be said to be in exercise of discretion which was either arbitrary or perverse. The appellate court observed that the trial court at this stage was not wrong in coming prima facie to the conclusion that the prior user of the mark was by the predecessors of the plaintiff and the plaintiff.

Regarding the argument based on delay and latches and acquiescence, the appellate court took the view that the present action was triggered off by the filing of a suit by the defendants in the High Court of Bombay seeking to restrain the user of the mark "Malikchand" by the plaintiff and under the circumstances the claim for interim injunction could not be rejected on the ground of delay and latches when both sides seemed to agree that the marks were similar. The appellate court also took note of the number of prosecutions initiated against the defendants under the Prevention of Food Adulteration Act in respect of Pan Malsala and Gutkha sold under the name 'Manikchand' and indicated that the plaintiff would be seriously prejudiced and its reputation affected, if the defendants are allowed to carry on their trade in these products under the name 'Manikchand'. Thus, finding no reason to interfere with the grant of interim injunction by the trial court, the lower appellate court dismissed the appeal filed by the defendants, but directed the trial court to try and dispose of the suit within a period of six months from the date of receipt of a copy of its order.

The principles governing the grant of interim injunction are well settled and do not require to be repeated. The interim injunction has been granted in favour of the plaintiff in this case mainly on the finding that there was prior user of the mark "Malikchand", if not by the plaintiff, by his assignors and the use of the mark "Manikchand" by the defendants in respect of Pan Masala and Gutakha and Supari commenced only at a later point of time. This prima facie finding of prior user was arrived at by the trial court relying on the deeds of assignments produced by the plaintiff and some documents and affidavits produced in support of its claim. Some inconsistencies in the claim of the defendants were also referred to. The High Court, in appeal, appreciated that the main contention on behalf of the defendants regarding prior user claimed by the plaintiff was based on a challenge to the assignments relied on by the plaintiff and the documents filed in support. The High Court noticed that the plea was that the entire series of documents were forged or manufactured for the purpose of litigation and hence were not reliable. The High Court felt that a wholesale condemnation of the documents produced by the plaintiff as forged or got up, could not be made at this interlocutory stage and this question seriously raised on behalf of the defendants has to be decided only at the trial. In other words, the High Court took the view that at this stage there was no reason for it to discard the various documents relied on by the plaintiff to establish prior user, first by its predecessors and then by itself, on the ground that they were not genuine.

As has been noticed already, the prima facie establishment of prior user goes a long way in enabling the plaintiff to claim an injunction in a passing-off action. While considering the balance of convenience, the question of delay and latches might be a relevant aspect to be considered, but once that aspect has been adverted to and an interim injunction granted by the trial court and confirmed by the High Court in appeal, this Court may not be justified in refusing the grant of interim injunction on the ground of delay and latches. In any event, this was a case where both sides were trying to assert their respective rights and the litigations were the result of such attempts. The High Court had adverted to this aspect while confirming the order of injunction. We see no reason to interfere on this ground at this prima facie stage.

Prima facie, it appears to us that the mark "Malikchand" was being used, though not much publicized by the original user, leading to the alleged acquisition of the right to use the mark by the plaintiff. The defendants appear to have started the use of the mark "Manikchand" in a large scale at a subsequent point of time. As noticed by the High Court, both sides had used their respective marks for some time. The litigation arose when the defendants herein approached the

High Court of Bombay seeking to prevent the use of the mark "Malikchand" by suing what they thought was the proprietor of the business. It was then that the present plaintiff came forward with the suit seeking an injunction against the user of the mark "Manikchand" by the defendants. To some extent it may be possible to conceive that the present suit by the plaintiff was a counter-blast to the suit filed by the defendants in the High Court of Bombay; but at the same time, the point made by the High Court that the plaintiff probably was apprehensive of its mark being annihilated, had approached the trial court for relief based on its prior user of the mark. It was in this context that the High Court took the view that the application for interim injunction could not be rejected on the ground of delay and latches. We also feel, that we cannot completely brush aside the argument of counsel for the plaintiff, that the case of delay and latches has not been properly projected on behalf of the defendants in their pleadings either in the trial court or in the appellate court, though no doubt that aspect has been projected seriously before us by learned counsel for the defendants and to some extent is covered by the pleadings in the written statement.

It is one thing to say that this Court, if it were exercising its original jurisdiction, might have refused an interim injunction on the ground that the plaintiff was not prompt in approaching the court for relief or that having allowed the defendants to use the mark for some time, no occasion had arisen for preventing the user by the defendants by way of an interlocutory injunction. But this Court is not exercising its original jurisdiction and is, in fact, exercising only the jurisdiction under Article 136 of the Constitution of India in a case where both the trial court and the appellate court have granted the injunction, considering the circumstances available in the case. In such a situation, the question is whether this Court ought to interfere with the grant of interim injunction on the ground of delay and latches, as canvassed for by counsel for the defendants. It appears to us that it may not be proper for this Court, in an appeal of this nature and on the facts of this case to interfere with the discretion exercised by the trial court and the appellate court in that behalf on this ground. Now that the trial court had granted the interim injunction which had been affirmed by the High Court and the same had been in force for at least seven months or more, we do not think that it will be appropriate to modify the order by permitting the defendants to keep separate accounts of their sale of these products especially since the products are being marketed under a different name, subsequent to the order of injunction passed by the trial court.

In the broader context of this case, we cannot also ignore what has been noticed by the High Court in its order. The High Court has noticed that a number of cases under the Prevention of Food Adulteration Act have been registered against the defendants on the basis of alleged adulteration of the products marketed by the defendants. Even otherwise it is stated, that Gutakha and Pan Masala that are marketed are harmful to health. If they are harmful as claimed, what would be the consequence, when they are adulterated, is an aspect that requires anxious consideration by the authorities concerned. The State cannot ignore the mandate of Article 47 of the Constitution. Any way, that aspect is referred to us only for the purpose of reinforcing the conclusion that ultimately, in the exercise of discretion by this Court, it may not be necessary to interfere with the order of interim injunction granted by the courts below.

Thus, on the whole, we are satisfied that the courts below cannot be said to have erred in thinking that the balance of convenience was in favour of the grant of interim injunction in favour of the plaintiff. In any event, we are satisfied that a case for interference under Article 136 of the Constitution of India is not made out in this case. We, therefore, decline to interfere with the order of the High Court and dismiss this appeal. We direct the trial court to comply with the direction of the High Court and complete the trial and disposal of the suit, in any event, within a period of six months from this date.

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MANU/DE/0381/2009

**IN THE HIGH COURT OF DELHI**

FAO (OS) 188/2008

Decided On: 24.04.2009

**F. Hoffmann-LA Roche Ltd. and Anr. Vs. Cipla Ltd.**

**Hon'ble Judges/Coram:** A.P. Shah, C.J. and Dr. S. Muralidhar, J.

**Grant of interim injunction in infringement of Pharmaceutical Patent - Plaintiff's prayer for grant of an interim injunction, to restrain the Defendant/Respondent from manufacturing, offering for sale, selling and exporting the drug Erlotinib, for which the plaintiff No. 2 claimed to hold a patent jointly with Pfizer Products Inc. was declined by the**

**Single Judge - Whether patent in the instant case was vulnerable to challenge even though it survived the challenge at the pre-grant stage**

**Held, Patent Act does contemplate multiple challenges to the validity of a patent. Mere registration of the patent does not guarantee its resistance to subsequent challenges. A patent which survives the pre-grant and post-grant challenges can still be made vulnerable on grounds different from the ones raised at those stages. Challenge can be in the form of a counter claim in a suit on the grounds set out in Section 64. Sections 92 and 92A contemplates that the Central Government can step at any time by invoking the provision for compulsory licencing by way of notification. Therefore, the fact that there is a mechanism to control the monopoly of a patent holder (Section 84 and Section 92) and to control prices (by means of the drug price control order) will not protect an invalid grant of patent. In the present case, the grant of a patent to the plaintiffs for Erlotinib Hydrochloride as a mixture of Polymorphs A and B will not ipso facto entitle them to an interim injunction if the Defendant is able to satisfy the court that there is a serious question to be tried as to the validity of the patent.**

**Whether Applicant for a patent of a pharmaceutical product is bound to disclose the details of all other applications made by the Applicant for grant of patent of derivatives or forms of such product - Held, in an application seeking ad interim injunction in a suit for infringement of patent, it would be incumbent on the plaintiffs to make a full disclosure of the complete specification of the product whose patent is claimed to have been infringed - plaintiffs to disclose to Court the x-ray diffraction data of the product, particularly if it is a pharmaceutical drug. Plaintiffs have to make an unequivocal disclosure that the patent they hold covers the drug in question; whether there are any other pending applications seeking the grant of patent in respect of any derivatives or forms of the product for which they already hold a patent and the effect of such applications on the suit patent. If these details are not furnished Court cannot form a view on whether the plaintiff has made out a prima facie case.**

**Element of public interest in grant of patent in pharmaceutical products - Held, element of public interest is not alien to the scheme of the Patents Act, 1970 as patents are granted to**

**make benefit of the patented invention available at reasonably affordable prices to the public. If a patented invention is not available to the public at reasonably affordable price a person can seek a compulsory licence on a patent. In the present case, no doubt that the product in question is a drug for cancer treatment at the terminal stages and is not readily available in India. Further, price of the plaintiff's tablet is Rs. 3200 which is beyond the reach of many patients as against Respondent's product which is manufactured in India and priced at Rs. 1600 per tablet. Hence, public interest in greater public access to a life saving drug will have to outweigh the public interest in granting an injunction to the patent holder .**

Summary of conclusions

(i) The failure by the plaintiffs to bring the facts concerning the filing of the subsequent applications for grant of a patent in respect of the Polypmorph B form of the compound to the notice of the Controller of Patents at the time of consideration of their application for patent for the compound of a combination of Polymorphs A and B was not consistent with the requirement of a full disclosure.

(ii) The change in the stand of the plaintiffs that the earlier patent U.S.'498 (in respect of a mixture of Polymorphs A and B) did not disclose Polymorph B free of Polymorph A by stating that it covered all known and unknown forms of the compound, would admittedly have a direct impact on the question of patentability of either a compound of Polymorphs A and B or of Polymorph B free of Polymorph A. This made the full disclosure by the plaintiffs of all the facts pertaining not only to the "umbrella' compound but the crystal or other forms of the product to the Controller of Patents imperative. Such disclosure would have impacted the decision on the patentability of compound of Polymorphs A and B. When the defendant therefore questioned the validity of Patent No. 196774 on the above ground, it did raise a more than credible challenge.

(iii) In an application seeking ad interim injunction in a suit for infringement of patent, it would be incumbent on the plaintiffs to make a full disclosure of the complete specification of the product whose patent is claimed to have been infringed. The plaintiffs will also have to disclose to Court the x-ray diffraction data of the product, particularly if it is a pharmaceutical drug. The plaintiffs have to make an unequivocal disclosure that the patent they hold covers the drug in question; whether there are any other pending applications seeking the grant of patent in respect of any derivatives or forms of the product for which they already hold a patent and the effect of such applications on the suit patent.

(iv) The failure by the plaintiffs to disclose the complete specification of the product and the facts concerning the pending applications for Polymorph B led to the learned Single Judge not having the occasion to consider if in fact the suit patent covered Tarceva. Had these facts fully disclosed in the plaint and the entire specification of the patent held by the plaintiff together with X-ray diffraction data of Tarceva and Erlocip filed along with the plaint, it is possible that the plaintiff may have had difficulty in showing that the patent held by it (No. 196774) covered Tarceva as well.

(v) To the extent that the defendant has raised a serious doubt whether the plaintiffs in fact hold a patent for the product sold in the tablet form as Tarceva, the plaintiffs must be held not to have been able to cross the first hurdle of showing that they have a prima facie case in their favour for grant of an order restraining the defendant from marketing Erlocip. The plaintiffs therefore ought to have been refused injunction for their failure to make out a prima facie case.

(vi) Notwithstanding the above, assuming that the plaintiffs held a patent for the product which was the subject matter of the suit for infringement, the grant of such patent to the plaintiffs will not ipso facto entitle them to an interim injunction if the defendant is able to satisfy the court that there is a serious question to be tried as to the validity of the patent. In the present case, the defendant has raised a credible challenge to the validity of the patent by raising a serious triable and substantial question that renders it vulnerable to challenge.

(vii) The question of general public access in our country to life saving drugs assumes great significance and the adverse impact on such access which the grant of injunction in a case like the instant one is likely to have, would have to be accounted for. This Court finds no ground to differ with the reasoning or the conclusions arrived at by the learned Single Judge on this aspect.

(viii) The defendant has been able to demonstrate prima facie that the plaintiffs do not hold a patent yet for the drug Tarceva, which is the Polymorph B form of the substance for which they hold a patent. Secondly, the defendant has raised a credible challenge to the validity of the patent held by the plaintiffs. In such circumstances, the public interest in greater public access to a life saving drug will have to outweigh the public interest in granting an injunction to the plaintiffs.

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(2002)2SCC147

**IN THE SUPREME COURT OF INDIA**

Decided On: 09.11.2001

**Mahendra & Mahendra Paper Mills Ltd. vs. Mahindra & Mahindra Ltd.**

**Hon'ble Judges/Coram:** D.P. Mohapatra and Shivaraj V. Patil, JJ.

**Appellant was restrained by Interim order to use in any manner defendant's corporate name - whether High Court committed error in allowing respondent's prayer for Interim Injunction. Respondent has been using the words 'Mahindra and Mahindra' in its companies and business concerns for over five decades. The name has acquired distinctiveness and secondary meaning in business circles. Any attempt to use it by another person would create impression of connection with respondent's company. Respondent's claim for passing off action against appellant whether or not acceptable to be decided by Court on basis of evidence placed before it. Prima facie case against appellant established therefore order of injunction rightly passed.**

The question that arises for determination in this case is, whether on the facts and circumstances of the case, the High Court committed an error in granting the plaintiff's prayer for interim injunction?

This question has been considered by different High Courts and this Court in umpteen cases from item to time. On analysis of the principles laid down in the (sic) certain recognised parameters relating to the matter have emerged. Without intending to be exhaustive some of the principles which are accepted as well settled may be stated thus; that whether there is a likelihood of deception or confusion arising is a matter for decision by the Court, and no witness is entitled to say whether the mark is likely to deceive or to cause confusion; that all factors which are likely to create or allay deception or confusion must be considered in combination; that broadly speaking, factors creating confusion would be, for example, the nature of the market itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in course of trade, and others.

The plaintiff has been using the word "Mahindra" and "Mahindra & Mahindra" in its companies/business concerns for a long span of time extending over five decades. The name has acquired a distinctiveness and a secondary meaning in the business or trade circles. People have come to associate the name 'Mahindra' with a certain standard of goods and services. Any attempt by another person to use the name in business and trade circles is likely to and in probability will create an impression of a connection with the plaintiffs' group of companies. Such user may also effect the plaintiff prejudicially in its business and trading activities. Undoubtedly, the question whether the plaintiffs' claim of 'passing-off action' against the defendant will be accepted or not has to be decided by the Court after evidence is led in the suit. Even so far the limited purpose of considering the prayer for interlocutory injunction which is intended for maintenance of status quo, the trial Court rightly held that the plaintiff has established a prima facie case and irreparable prejudice in its favour which calls for passing an order of interim injunction restraining the defendant-company which is yet to commence its business from utilising the name of 'Mahendra' or 'Mahendra & Mahendra' for the purpose of its trade and business. Therefore, the Division Bench of the High Court cannot be faulted for confirming the order of injunction passed by the learned single Judge.

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(2004)3SCC90

**IN THE SUPREME COURT OF INDIA**

Decided On: 22.01.2004

**Midas Hygiene Industries P. Ltd. and Anr. Vs. Sudhir Bhatia and Ors.**

**Hon'ble Judges/Coram:** S.N. Variava and H.K. Sema, JJ.

**Interim injunction in suits of trademark infringement-- Injunction granted by Single Judge was vacated by the Division Bench on the ground of delay and laches. Held, in cases of infringement either of Trade Mark or of Copyright normally an injunction must follow.**

**Mere delay in bringing action is not sufficient to defeat grant of injunction. Grant of injunction becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.**

The law on the subject is well settled. In cases of infringement either of Trade Mark or of Copyright normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest.

In this case it is an admitted position that the Respondents used to work with the Appellants. The advertisements which had been issued by the Appellants in the year 1991 show that at least from that year they were using the Mark LAXMAN REKHA on their products. Not only that but the Appellants have had a Copyright in the Marks KRAZY LINES and LAXMAN REKHA with effect from 19th of November, 1991. The copyright had been renewed on 23rd of April, 1999. A glance at the cartons used by both the parties shows that in 1992 when the Respondent first started he used the mark LAXMAN REKHA in cartons containing colours red, white and blue. No explanation could be given as to why that carton had to be changed to look almost identical to that of the Appellant at a subsequent stage. This prima facie indicates the dishonest intention to pass off his goods as those of the Appellants.

In our view on the facts extracted by the learned Single Judge this was a fit case where an interim injunction should have been granted and should have been continued. In our view the Division Bench was entirely wrong in vacating that injunction merely on the ground of delay and laches. Under the circumstances, the impugned order is set aside and that of the trial court is restored.

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(2010)2SCC142

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 1360-1361 and 1362 of 2005

Decided On: 05.01.2010

**Skyline Education Institute (Pvt.) Ltd. Vs. S.L. Vaswani and Anr.**

**Hon'ble Judges/Coram:** Tarun Chatterjee, G.S. Singhvi and B.S. Chauhan, JJ.

**Suit by appellant for permanent injunction against respondents to discontinue use of word 'Skyline' in their educational institutions. Single Judge of High Court granted temporary injuncyion despite having found that word 'Skyline' was neither invented nor specific word and was a generic word being used by thousands of persons and institutions. Division Bench on appeal substantially vacated modified injunction order passed by single Judge. Held, Division Bench should have set aside order of single Judge in its entirety. Hence, modified injunction granted by single Judge vacated in its entirety. When the Division Bench found that the single Judge ought not to have given direction restraining the respondents from starting new courses in business management etc. and directed them to append a note in the advertisement that they are not related to the appellant, then it should have set aside the order of the single Judge in its entirety. The omission on the part of the Division Bench of the High Court to do so calls for a corrective action by the Supreme Court.**

Once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.

A little journey in the backdrop of the case shows that the only ground on which the appellant sought temporary injunction against the respondents was that the word 'Skyline' is a specific/distinct word and being a prior user, it was entitled to seek a restraint against the respondents from using that word in the name of the Institute of Engineering and Technology established by them. The learned Single Judge, after examining the rival pleadings and material placed before him recorded a well reasoned finding that the appellant has failed to make out a prima facie case. The learned Single Judge opined that the word 'Skyline' is a generic word because the same is being used by thousands of persons and institutions as part of their trading name or business activities. The learned Single Judge noted that while the plaintiff is neither approved by AICTE nor affiliated with any university, the respondents have obtained the requisite recognition and affiliation from the concerned statutory bodies and 240 students have already been admitted in the five years course and held that grant of injunction in terms of the prayer made by the appellant will be inequitable. The Division Bench independently considered the entire matter and expressed its agreement with the learned Single Judge that the appellant has failed to make out a prima facie case for grant of injunction. The Division Bench also agreed with the learned Single Judge that the word 'Skyline' was a generic word because it was being used by a large number of people in India and abroad. The Division Bench then held that after recording adverse findings on the issues of prima facie case, balance of convenience and equity, the learned Single Judge was not justified in directing the respondents not to undertake in courses in management, tour and travels, etc. and append a note in the advertisements that their institute has no concern, whatsoever with the appellant's institution. Accordingly, the Division Bench substantially vacated the modified injunction order passed by the learned Single Judge.

The findings recorded by the learned Single Judge and Division Bench on the crucial factors like prima facie case, balance of convenience and equity are based on a correct and balanced consideration of various facets of the case and it is not possible to find any fault with the conclusions recorded by them that it is not a fit case for restraining the respondents from using the word 'Skyline' in the name of the institute established by them. It has not been disputed on behalf of the appellant that the word 'Skyline' is being used as trade name by various companies/ organizations/business concerns and also for describing different types of institute/institutions. The voluminous record produced by the respondents before this Court shows that in India as many as 117 companies including computer and software companies and institutions are operating by using word 'Skyline' as part of their name/nomenclature. In view of this, it is not possible to agree with the learned Counsel for the appellant that the Skyline is not a generic word but is a specific word and his client has right to use that word to the exclusion of others.

There is another reason for declining the appellant's prayer for grant of temporary injunction. The appellant is shown to have started Skyline Business School in 1997 as one of its division but has conveniently not mentioned that it had started another institution under the aegis of Asian

Educational Society housed in the same building where the appellant claims to have its registered office. After three years of starting Skyline Business School, the Director of the appellant vide his letter dated January 4, 2000 permitted the President, Asian Educational Society to use the trade mark Skyline Business School, name and the logo albeit without disclosing as to when Skyline Business School was registered under the Trademarks Act, 1999. Thereafter, Skyline Group's Asian Educational Society through its President, Shri Kamal Puri entered into an agreement dated 9.12.2001 with Manipal Academy of Higher Education (deemed university) for establishing a branch campus at Skyline Business School, Delhi. Sikkim Manipal University also approved Skyline Business School as a University Study Center for taking management programme under distance education despite the fact that the Skyline Business School is not recognized or approved by AICTE/UGC. In 1996, University of Oxford approved the appointment of a center in the premises of the appellant at Laxman Public School, Hauz Khas Enclave, New Delhi for Certification in Leisure Studies and in Travel and Tourism. In 1997, Skyline Business School entered into a Memorandum of Cooperation with University of Lincolnshire and Humberside, U.K. whereby the latter agreed to offer its BBA (Hons.) Tourism course through a center established at the appellant's campus. In large number of advertisements issued in the name of the appellant or Skyline Business School, it has not been made clear that they are neither approved nor recognized by any of the statutory bodies like, AICTE, UGC, etc. Of course, in some of advertisements, it has been mentioned that the degrees/diplomas purported to be awarded by the Skyline Business School are not recognized by Government of India, State Government, UGC/AICTE. All this lends sufficient credibility to the observations made by the Division Bench of the High Court that the present litigation is to have more commerce in education and less education in commerce and gives an impression that functioning of the appellant is shrouded in mystery and those seeking admission in the courses organised by it may find themselves in serious trouble at any given point of time because the degrees and diplomas awarded in the name of foreign universities are not recognised by statutory bodies/authorities in India.

Even an unregistered prior user of a name can institute action for passing off and seek injunction against the subsequent user of the same name by proving that misrepresentation by the defendant to the public that the goods/services offered by him are that of the plaintiff and such misrepresentation has caused harm to the goodwill and reputation of the plaintiff or the plaintiff demonstrates that it has suffered loss due to such representation, but, in view of our conclusion that the appellant has failed to make out a case for interference with the discretion exercised by the High Court not to entertain its prayer for temporary injunction, we do not find any valid ground to entertain and accept the argument of the learned senior counsel.

When the Division Bench found that the learned Single Judge ought not to have given direction restraining the respondents from starting new courses in business management etc. and directed them to append a note in the advertisement that they are not related to the appellant, then it should have set aside the order of the learned Single Judge in its entirety. The omission on the part of the Division Bench of the High Court to do so calls for a corrective action by this Court.

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(2001)5SCC95

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 3415-3420 of 2001

Decided On: 01.05.2001

**Uniply Industries Ltd. vs. Unicorn Plywood Pvt. Ltd. & Ors.**

**Hon'ble Judges/Coram:** S. Rajendra Babu and K.G. Balakrishnan, JJ.

**Injunctions in Intellectual Property Rights Suits - Temporary injunction can only be granted when strong prima facie case has been established in its favour as to honest and concurrent use of trade-mark in question.**

Considering the nature of pleadings in the two suits filed by the parties, it is clear that there is common field of activity between two parties in respect of goods and trade marks sought to be used by either are identical. Inasmuch the areas of activity and the nature of goods dealt with or business carried on being identical and the trade marks being of similar nature, the only question that needs to be decided is as to who is the prior user.

Some courts indicate that even prior small sales of goods with the mark are sufficient to establish priority. The test being to determine continuous prior user and the volume of sale or the degree of familiarity of the public with the mark. Bona *fide* test of marketing, promotional gifts and experimental sales in small volume may be sufficient to establish a continuous prior use of the mark. But on some other occasions courts have classified small sales volume as so small and inconsequential for priority purposes. Therefore, these facts will have to be thrashed out at the trial and at the stage of grant of temporary injection a strong *prima facie* case will have to be established. It has also to be borne in mind whether the appellant had also honestly and concurrently used the trade marks or there are other special circumstances arising in the matter. The courts below have merely locked at what the prima case is and tried to decide the matter without considering the various other aspects arising in the matter.

# SESSION VII

# PASSING OFF ACTION IN DESIGN INFRINGEMENT

2007(7)SCALE608, (2007)6SCC1

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 2576/2007 (Arising out of S.L.P.(C) No. 59/2006)

Decided On: 18.05.2007

**Heinz Italia and Anr. Vs. Dabur India Ltd.**

**Hon'ble Judges/Coram:** B.P. Singh and H.S. Bedi, JJ.

Before the use of a particular mark can be appropriated it is for the plaintiff to prove that the product that he is representing had earned a reputation in the market and that this reputation had been sought to be violated by the opposite party. The principle of similarity could not to be very rigidly applied and that if it could be prima facie shown that there was a dishonest intention on the part of the defendant in passing off goods, an injunction should ordinarily follow and the mere delay in bringing the matter to Court was not a ground to defeat the case of the plaintiff. It bears reiteration that the word "Glucon-D" and its packaging had been used by Glaxo since 1940 whereas the word "Glucose-D" had been used for the first time in the year 1989. In *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd.* it has also been held that in the case of a passing off action the similarities rather than the dissimilarities have to be taken note of by the Court and the principle of phonetic "similarity" cannot be ignored and the test is as to whether a particular mark has obtained acceptability in the market so as to confuse a buyer as to the nature of product he was purchasing. The Court observed that the both Glucon-D and Glucose-D are items containing glucose and to us it appears that there is remarkable phonetic similarity in these two words. The colour scheme of Glucose-D and Glucon-D is almost identical with a happy family superimposed on both. In determination of passing off, the colour scheme and the overall effect of the packaging has to be seen. The Supreme Court held that the packaging of Glucose-D is Glucon-D is so similar that it can easily confuse a purchaser. Mere fact that the respondents have time and again made small changes in their packaging is an attempt to continue to mislead the purchaser and to make it more difficult for the appellants to protect their mark, which the record shows has acquired an enviable reputation in the market which is sought to be exploited by the respondent. Impugned order set aside and application for ad-interim injunction of appellants allowed.

(2008)10SCC657

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 3185 of 2008 (Arising out of S.L.P. (C) No. 16321 of 2006)

Decided On: 01.05.2008

**Bharat Glass Tube Limited Vs. Gopal Glass Works Limited**

**Hon'ble Judges/Coram:** A.K. Mathur and Altamas Kabir, JJ.

Designs Act, 2000 - New or original design means a design which has been invented for the first time or has not been reproduced earlier by anyone. Protection of new or original design is with reference to a particular object on which it is applied. Registration of design in question was obtained for the purpose of applying it to glass sheets. No evidence was produced to show that another design with which comparison was sought to be made had earlier been applied to glass sheets. Furthermore, the burden of proof was on the party which assailed the validity of the design.

Comparison sought to be made with printout of an earlier design downloaded from the website of the UK Patent office. Held, comparison could not be done properly between two designs as reproduced on glass sheet and printout. Besides, there was no evidence that earlier design had also been reproduced on glass sheet.

The concept of design is that a particular figure conceived by its designer in his mind and it is reproduced in some identifiable manner and it is sought to be applied to an article. therefore, whenever registration is required then those configuration has to be chosen for registration to be reproduced in any article. The idea is that the design has to be registered which is sought to be reproduced on any article. therefore, both the things are required to go together, i.e. the design and the design which is to be applied to an article. In the present case, the design has been reproduced in the article like glass which is registered. This could have been registered with rexin or leather. therefore, for registration of a particular configuration or particular shape of thing which is sought to be reproduced on a particular article has to be applied. As in the present case the design sought to be reproduced on a glass-sheet has been registered and there is no evidence to show that this design was registered earlier to be reproduced on glass in India or any other part of the country or in Germany or even for that matter in United Kingdom, therefore, it is for the first time registered in India which is new and original design which is to be reproduced on glass sheet. Design in question therefore can not be held to be lacking in novelty and originality and hence, the registration is not liable to cancellation.

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2013 Indlaw DEL 1319

**IN THE HIGH COURT OF DELHI**

**Case No : CS(OS) 384/2008, CS(OS) 1446/2011, I.A. No. 11874/2012, I.A. No. 9537/2011, I.A. No. 13404/2012**

**Decided on15 May 2013**

**Mohan Lal, Proprietor of Mourya Industries and another Vs. Sona Paint and Hardwares and another**

**Hon'ble Judges/Coram:** Rajiv Shakdher, S. K. Kaul, Manmohan Singh, JJ.

**(A) Whether the suit for infringement of registered Design was maintainable against another registered proprietor of the design under the Designs Act, 2000.** Held, s. 22 of 2000 Act protected a registrant against piracy of his design. S. 22(1)(a) of 2000 Act made it unlawful for any person to apply for the purposes of sale or cause to be applied any article in a class of articles in which the design was registered, that design or any fraudulent or obvious imitation of that design except with the license or written consent of the registered proprietor . That prohibition extended to anything that may be done to enable the registered design to be infringed in the manner described above. S. 22(1)(b) of 2000 Act extended the prohibition to even articles imported for sale without the consent of a registered proprietor which otherwise was article belonging to a class in which the design is registered. Similarly, S. 22 (1) (c) of 2000 Act made it unlawful to publish or expose or cause to be published or exposed for sale that article by a person who has the knowledge that the design or any fraudulent or obvious imitation has been applied to any article in any class of articles in which the design was registered without the consent of the registered proprietor. S. 22(2) of 2000 Act provided for penal consequences in the form of damages. Second proviso to S. 22(2) mandated that a suit for infringement could not be instituted in a court below the court of a District Judge. S. 22(3) of 2000 Act enabled the defendant in an infringement suit, where an allegation of piracy had been made qua the defendant to plead in his defence grounds, which were available u/s. 19 of 2000 Act, for cancellation of a registered design. S. 22(4) of 2000 Act required that a suit in which a defence in terms of s. 19 of 2000 Act was pleaded, the same should be transferred to the HC for decision. S. 22(5) of 2000 Act provided that, when a decree was passed in a suit u/s. 22(2) of 2000 Act, a copy of the decree would be sent to the Controller who would cause necessary entries to be made in the Register of Designs. Composite reading of provisions would show that a plaintiff was entitled to approach the court and plead that his registered design was unique and that the defendant registrant (in a case where he has a registration in his favour as against one who applied an unregistered design to articles in the class of articles qua which registration was obtained) had obtained registration which was neither new nor significantly distinguishable when compared to the plaintiff's registered design. Assertion in the suit was a right of monopoly. It was quite possible that the defendant on the other hand apart from pleading as part of his defence, those very grounds which were available u/s. 19 of 2000 Act to seek cancellation of the plaintiff's registration might be able to establish that his registered design was new or original or even significantly distinguishable from that of the plaintiff. Therefore, the submissions made by parties that one registered design holder could not sue another registered design holder failed to appreciate the nature of the suit. Suit for infringement sought to assert the monopoly rights of the plaintiff based on the uniqueness, newness and the originality of his design qua the defendant registrant. Entry by the Controller of Designs in the Register of Designs, was only a prima facie evidence of any matter so directed to be done by 2000 Act or authorised to be entered in the Register of Designs.

**(B) Whether there could be an availability of remedy of passing off in absence of express saving or preservation of the common law by 2000 Act and more so when the rights and remedies under the Act were statutory in nature.**

Held, passing off action simply put was an action filed to vindicate one's claim that the defendant by employing misrepresentation (whether intentional or not) was seeking to represent to the public at large that his goods were those of the claimant and such a mis-representation had caused or was likely to cause substantial damage to the goodwill/reputation which was attached to the plaintiff's goods.

Therefore, in a passing off action the plaintiff would have to establish the following ingredients–

(i) That there was goodwill or reputation attached to the goods or services which the plaintiff offers, in the mind of the purchasing public, i.e., the consumers, who associate or were in a position to identify such goods or services by virtue of trademark used, which could include the get-up, tradedress, signs, packaging, label, etc.

(ii) That the defendant had employed mis-representation which made the consumers believe that the defendants goods were those of the plaintiff. It was no defence in an action of passing off that the mis-representation was unintentional or lacked fraudulent intent.

(iii) And lastly, that the defendant's action had caused damage or was calculated to cause damage.

**(C) Whether the conception of passing off as available under the Trade Marks could be joined with the action under 2000 Act when the same was mutually inconsistent with that of remedy under 2000 Act.**

Held, design could be used as a trade mark and if by virtue of its use, goodwill was generated in the course of trade or business, it could be protected by an action in the nature of passing off. Argument advanced against maintainability of a passing off action was founded on the following points of contention.

(i) That once a design was registered, it could not be registered as a trade mark;

(ii) Rights qua a design were not rooted in common law.

(iii) On the expiration of the rights, that was after the conclusion of the statutory period of protection, which was a maximum of 15 years, the design fell within public domain and, therefore, ought to be available freely to the public for use.

(iv) Unlike the 1999 Act, which saved passing off remedy, by an express provision in the form of s. 27(2) of 1999 Act; there was no such provision in 2000 Act, and therefore, by necessary implication, there was legislative intent reflected, which was that, a passing off remedy ought not to be made available to a registered design.

Contentions were found to be flawed for the reason that while 1999 Act conferred certain statutory rights qua a registered trade mark, it did not deprive a user of an unregistered trade mark the right to protect the misuse of his mark by a defendant who was in possession of a registered trade mark. Therefore, in so far as a design, which was registered under 2000 Act was concerned, it might not have the statutory rights, which a registered trade mark has, under 1999

Act, it would certainly have the right to take remedial steps to correct a wrong committed by a defendant by instituting a passing off action. If such an action was instituted, plaintiff would have to demonstrate that the registered design was used by him as a trade mark which, in the minds of the purchasing public was associated with his goods or services which, had acquired goodwill/reputation which was worth protecting. Therefore, the argument that since there was no saving clause in 2000 Act as found in S. 27(2) of 1999 Act, and consequently such remedy ought not to be made available qua a registered design, which was used as a trade mark, was completely without merit. As was obvious, such a passing off action would be based on a plea that the design, which was an unregistered mark, was being used by the plaintiff for the purposes of business and that the plaintiff's goods and/or services had acquired a reputation and/or goodwill, which were identified in the minds of the consumers, by associating the design / the mark, with the goods and / or services. In other words, the plea would be that the design which was being used as a mark identified the plaintiff, as the source of the goods supplied or services offered. Plaintiff would not have to look to 2000 Act, for instituting such an action. Therefore, argument that the legislature by not incorporating a similar provision, such as S. 27(2) of 1999 Act, had by necessary implication excluded the availability of such like remedy to a plaintiff, who used a registered design, as his trade mark, was untenable.

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2015 Indlaw DEL 2564

**IN THE HIGH COURT OF DELHI**

**Decided on 24 April 2015**

**Amit Jain v Ayurveda Herbal and others**

**Case No :** I. A. No. 18023/2014 in CS (OS) No. 2689/2014

**Hon’ble Judges/Coram:** Manmohan Singh, J.

**Infringement of designs - Grant of injunction - Section 30 of Designs Act, 2000/Act - Whether suit for permanent injunction restraining infringement of designs, passing off, delivery up, rendition of accounts against Defendants is sustainable - Held, This Court observed that prima facie, designs in question were not novel, prior-published. Same were otherwise at present not protectable under Section 30 of Act. Moreover Plaintiffs name has not been entered in register after assignment. Therefore, on date of filing of suit by Plaintiff for infringement of same very designs was not maintainable. Further question of passing**

**off did not arise, once it was noticed by Court that goodwill and reputation does not attach with design which was also not new or original, colour combination was different and both products were sold under different brand name. Hence no prima facie case of infringement of design or passing off has been made out by Plaintiff.**

(i) In the case of Dabur India Limited v. Rajesh Kumar, 2008 (37) PTC 227(Del) 2008 Indlaw DEL 473, the court held as under :

*"In cases of design, the Court while granting interim injunction must keep in mind that the design must be validly registered and there must be some novelty and originality in the designs sought to be protected and it must not have been re published. No specific novelty has been mentioned by the plaintiff in the design of the bottle, neither any specific novelty has been mentioned in the registration certificate. The registration certificate only gives bottom view, top view and side view of the bottle. There is no specific dimensional ratio of the bottle given in the design as bottles are manufactured by most of the manufacturers for containing specific quantity of liquid by measurement. Normally these bottles are made 50 ml, 100 ml, 200 ml, etc. Since all the manufacturers manufacture bottles for such quantities, the bottles of same quantity are bound to have almost same height if they have same bottom circumference. Unless, plaintiff had any claim over specific ratios of the dimensions which were not pre- existing, there can be no novelty in the bottle. Similar designs are being used by many leading companies from the time much before the registration of this design by the plaintiff. I, therefore, consider that the plaintiff is not entitled for interim injunction. The application of the plaintiff is hereby dismissed."*

(ii) It was expressed by Buckley L.J. on the question of quantum of novelty in Simmons v. Mathieson & Cold, (1911) 28 R.P.C. 486 in these words:

*"In order to render valid the registration of a Design under the* Patents and Designs Act, 1907, *there must be novelty and originality, it must be a new or original design. To my mind, that means that there must be a mental conception expressed in a physical form which has not existed before, but has originated in the constructive brain of its proprietor and that must not be in a trivial or infinitesimal degree, but in some substantial degree."*

(iii) In Phillips v. Barbro Rubber Company (1920) 37 R.P.C. 233, Lord Moulton observed that while question of the meaning of design and of the fact of its infringement are matters to be judged by the eye, it is necessary with regard to the question of infringement, and still more with regard to the question of novelty or originality, that the eye should be that of an instructed person, i.e. that he should know what was common trade knowledge and usage in the class of articles to which the design applies. The introduction of ordinary trade variants into an old design cannot make it new or original. He went on to give the example saying, if it is common practice to have or not to have, spikes in the soles of running shoes, any man does not make a new and original designs out of an old type of running shoes by putting spikes into the sales. The working world, as well as the trade world, is entitled at its will to take, in all cases, its choice of ordinary trade variants for use in particular instance, and no patent and no registration of a design can prevent an ordinary workman from using or not using trade knowledge of this kind. It was emphasized that it is the duty of the Court to take special care that no design is to be counted as "new and original design" unless it is distinguished from that previously existed by something essentially new or original which is different from ordinary trade variants which have long been common matters of taste workman who made a coat (of ordinary cut) for a customer should be left in tender whether putting braid on the edges of the coat in the ordinary way so common a few years ago, or increasing the number of buttons or the like, would expose him for the prescribed years to an action for having infringed a registered design. On final analysis, it was emphasized that the use of the words "new or original" in the statute is intended to prevent this and that the introduction or substitution of ordinary trade variants in a design is not only insufficient to make the design "new or original" but that it did not even contribute to give it a new or original character. If it is not new or original without them, the presence of them cannot render it so.

It is rightly held in the cases decided that in the matter of novelty the eye is to be the ultimate test and the determination has to be on the normal ocular impression. In order to know its newness or originality it is necessary that a design identical with or even materially similar to the relevant design should not have been published or registered previously. A slight trivial or infinitesimal variation, from a pre-existing design will not qualify it for registration. Taking into account the nature of the article involved, the change introduced should be substantial. It is not necessary to justify registration that the whole of the design should be new, the newness may be confined to only a part of it but that part must be a significant one and it should be potent enough to impart to the whole design a distinct identity, unless registration is sought for the said part alone.

It is important to keep in mind that if an improvement made in the design known before should be more than a mere workshop improvement by combining of old known part of the design with new integers which have no novelty, it does not qualify the new design under the eyes of the Act as the same would not involve the exercise of novel and new design. There must be novelty in the design over what is old.

From the comparison of the products already available in the market and earlier design registration obtained prior to the date of registration of assignor and/or by the plaintiff, it is clear that all the designs claimed by the plaintiff are either prior publish or trade variant.

Dis-similarities pointed out by the counsel for the plaintiff of the earlier products available in the market and prior registrations are negligible. The other most important aspect of the present case is that there are no pleadings on behalf of the plaintiff that there is a mandatory requirement in law to register the assignment in favour of the assignee of designs after the assignment of designs. S. 30 of the Act stipulates that where a person becomes entitled by assignment transmission or other operation of law to a Copyright in a registered design, he has to make an application, in the prescribed form, to the Controller to register his title and it is only when change is made in the Register in the name of such person that he becomes entitled to claim ownership of the design.

A reading of sub-ss. (1) and (3) of S. 30 shows that when ownership of registered design is claimed by a successor person or company, either by assignment or by transmission or by operation of law, such assignment, transmission or by operation of law of the copyright to a design has to be registered with the Controller of Designs within six months from the date of execution of instrument, assignment or transmission of the copyright in the registered design to successor person. The period of six months is limited under sub-s. (3) of S. 30. Subs. (5) clearly provides that a document or instrument in respect of which no entry has been made in the register in accordance with the provisions of sub-ss. (1) and (2) shall not be admitted in evidence in any Court in proof of the title to copyright in a design or to any interest therein unless the Court for reasons to be recorded in writing otherwise directs.

In the present case, admittedly, the assigned designs were registered in the name of Naveen Kumar Jain who had assigned the same in the name of plaintiff for a total sum of Rs.3,000/- as consideration along with goodwill. However, the plaintiff on the date of filing of the suit was not registered as subsequent owner with the Controller of Designs in terms of sub-s. (1) to S. 30 and therefore, the certificate of registration on which the plaintiff claim is based, the design in question cannot be, prima facie, read in evidence in view of the provisions of subs. (5) of S. 30 of the Act. The plaintiff did not have any valid right to file the present suit unless the assignment is duly registered. During the course of hearing, the plaintiffs' counsel has informed the court that the application for registering the assignment is pending. Therefore, on the date of filing of the suit by the plaintiff for infringement of same very designs was not maintainable. The question of passing off does not arise, once it is noticed by the Court that the goodwill and reputation does not attach with the design which is also not new or original, colour combination is different and both products are sold under different brand name. None of the judgment referred by the plaintiff helps the case of the plaintiff.

From the entire gamut of the matter, it appears to the Court that the plaintiff is not entitled for interim injunction on the following reasons:-

(i) Prima facie, the designs in question are not novel, prior- published. The same are otherwise at present are not protectable under S. 30 of the Act. The plaintiff's name has not been entered in the register after assignment. Thus, plaintiff has not made prima facie case of infringement of design or passing off. None of the decisions referred by the counsel help the case of the plaintiff in view of facts and circumstances in the matter.

(ii) The plaintiff is guilty of not disclosing the pleading of first suit which was withdrawn, though liberty was granted in second suit. There was no disclosure of first suit and he obtained the relief for seizure of goods through local commissioners. In case true disclosure would have been made, the said may not have been granted.

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# SESSION VIII

# COMPULSORY LICENSING IN PHARMACEUTICAL PATENTS

AIR 2014 BOM 178

**IN THE HIGH COURT OF BOMBAY**

**Bayer Corporation A Corporation Organized under the laws of the State of Indiana, Unites States of America v Union of India and others**

Decided on 15 July 2014

**Hon'ble Judges/ Coram:** M. S. Sanklecha, Mohit S. Shah JJ.

Petition u/art. 226 of the Constitution of India challenged the order passed by the Tribunal which upheld the grant of Compulsory License to the Respondent by the Controller of Patents (Controller) granting. The Compulsory licence was in respect of the petitioner's patented invented drug.

**Whether the respondent/Natco make efforts to obtain voluntary licence from the Patent holder/Bayer**

Held, the High Court had examined the correspondence between the respondent and the petitioner. It was on the basis of examination of evidence i.e. exchange of letters between the parties in the context of s. 84(6) of the Act that both the authorities concluded that effort was made by respondent to obtain for voluntary licence. That concurrent finding of fact was based on appreciation of evidence before the authorities. HC also found that the petitioner's response dt. 27-12-2010 to respondent's request for a Voluntary licence very clearly recorded its refusal to grant voluntary licence to the respondent. That so called window in the petitioner's response for respondent to approach was illusory as it was open only if the respondent had anything to add to the application already made. Therefore, HC found no reason to interfere with the findings of the authorities under the Act. HC held that the second condition precedent for consideration of application for compulsory licence namely an effort to obtain a voluntary licence was satisfied by respondent. Therefore the consideration of the application by respondent for grant of Compulsory Licence to the Controller could not be faulted nor the impugned order could be faulted.

**Whether the reasonable requirements of the public had been satisfied by petitioner.**

Held, it was submitted that the burden/onus was on respondent to establish that the reasonable requirement of the public was not satisfied with regard to the patented drug. That the petitioner submitted respondent failed to do. HC found that in the scheme of the Act it for the applicant while filing an application for Compulsory Licence in terms of s. 87 of the Act to make out a prima facie case that one or all the grounds stated in s. 84(1) of the Act were prima facie attracted/applicable in respect of a patent for which the Compulsory Licence was sought. It was only on prima facie satisfaction of the Controller that the patent holder was called upon to file its opposition to the grant of its patent to the respondent by invoking compulsory licence. At that time it was for the patent holder in its opposition to aver and thereafter lead evidence to show that the reasonable requirement of the public with regard to the patented drug was satisfied. Best evidence with regard to the extent the patent holder was making available the patented drug was within the knowledge of the patent holder i.e. petitioner. That information the petitioner had to furnish in support of its opposition only after the Controller was prima facie satisfied that the applicant had made out a prima facie case in support of its application. Thus the initial burden was admittedly on the respondent to make out a prima facie to the satisfaction of the Controller and only after that the petitioner was required to establish with facts in its possession that the reasonable requirement of the public was not satisfied. Therefore, HC did not find any substance in the objection.

**Whether the supplies by infringers of the patented drug was to be considered/taken into account to determine the satisfaction of the reasonable requirement test.**

Held, obligation to meet the reasonable requirement of the public was of the patent holder alone either by itself or through its licensees. That was so as the application for compulsory licence sought a licence u/s. 84 of the Act from the patent holder. S. 84(6) of the Act, required the Controller while considering the application for compulsory licence to consider the measures taken by the patent holder to make full use of the patented invention. One more fact as held by the Tribunal which could not be lost sight of is that the petitioner in its Form 27 filed with the Controller on yearly basis has not included Cipla's sale of the infringed patented drug as participating in meeting the reasonable requirement of public. Petitioner placed reliance upon CIPA Guide to Act 6th Edition by the Chartered Institute a Patent Attorneys which opined to the effect that an infringer's goods could also be taken into account to consider the availability of the goods for the purpose of satisfaction of the reasonable requirements of the public. However, the

CIPA Guide to Act dealt with the patent law as in existence in England. Moreover, it appeared to be a view which was not supported by any reasoning. Therefore, being a mere ipsi dixit of the Institute, HC did not find any reason to accept the opinion in CIPA Guide to Patents as it was bereft of any justification.

**Meaning to be given to the words 'adequate extent'.**

Held, aspect of adequate extent would vary from article to article. So far as luxury articles were concerned the meeting of adequate extent test would be completely different from the meeting of adequate extent test so far as medicines were concerned. In respect of medicines the adequate extent test had to be 100% i.e. to the fullest extent. Medicine had to be made available to every patient and it could not be deprived/scarified at the altar of rights of patent holder. In fact that was the mandate of Parliament by providing for Compulsory Licensing. That would also be in accord with Doha Declaration 2001 which inter alia reiterated flexibility to member countries so as to ensure access to medicines for all. Undisputedly the requirement of all the patients were not being met by the patented drug. Thus, HC found no merit in the petitioner's submission that it had met the reasonable requirement of the public in respect of the patented drug u/s. 84(1)(a) of the Act.

**Whether the patented drug available to the general; public at reasonably affordable price.**

Held, petitioner submitted that before deciding whether the patented drug was available to the public at reasonably affordable price it was necessary for the authorities to first determine what was the reasonably affordable price in respect of the patented drug. That would be evident from reading of s.84(1)(b) with s. 90(1)(iii) of the Act. It was mandated by s. 90(1)(iii) of the Act that the Controller should ensure that the patented drug was available at reasonably affordable price. HC was of the view that the Act itself did not bestow any powers of investigations with regard to the reasonably affordable price and therefore, the authorities did not have the where withal/personnel to carry out the exercise. Thus, the same had to be arrived at on the basis of the evidence led by the parties before it of their respective prices. Obligation of the authorities under the Act was with regard to grant, control and revocation of patent and not price determination of the patented invention. It was for this reason that s. 90(1) (iii) of the Act on which reliance was being placed does not direct the Controller to fix the reasonably affordable price but only directs the Controller to endeavor to ensure/secure the patented article was available at reasonably affordable prices. As rightly pointed out by respondent, the Controller while exercising his jurisdiction u/s. 84 of the Act for grant of compulsory licence was essentially adjudicating a lis between the patent holder and the applicant for the compulsory licence. In that lis, any other person who was opposed to the grant of Compulsory Licence could also file its notice of opposition to the Controller. It was axiomatic that while deciding a lis it was not open to an adjudicator to become a participant in the lis. Therefore, the evidence led by the parties and impeached by the other side would form the basis of determining reasonably affordable prices. That reasonably affordable price had to be determined on the basis of the relative price being offered by the patent holder and the applicant after hearing other interested parties opposing the application. Therefore, in the instant case the price at which the petitioner was selling the patented drug was at about Rs.2,84,000/- per month of therapy and the applicant was offering the same at Rs.8,800/- per month of therapy. In such a case the reasonably affordable price had to necessarily be the price of the respondent as it by itself established that the price of the petitioner was not a reasonably affordable price.

**Whether the application for compulsory licence ought to have been adjourned by the Controller.**

Held, in the instant case the petitioner was granted the patent in India in 2008. Petitioner also had manufacturing facilities available in India. Petitioner had led no evidence before the authorities to indicate what steps they have taken and with what promptitude the same was taken for the purposes of working the patent in India after 2008. Patent holder i.e. petitioner had led no evidence before the authorities in support of its submission that application for compulsory licence should be adjourned in view of the petitioner satisfying the requirement of s.86 of the Act. In the circumstances, HC found no fault with the order of the Controller refusing to adjourn the application for compulsory licence.

**Terms & Conditions for grant of compulsory licence**

Held, during the course of its submission the petitioner submitted that the impugned order of the

Tribunal was not sustainable in law as it was based on Ayyangar Committee report on the ground that report essentially dealt with process patent scenario and not product patent regime. It was also submitted that the Tribunal in its impugned order had held that proceedings u/s. 84 of the Act were in public interest. If proceedings were in public interest it was submitted that the Tribunal and the authorities under the Act should have independently examined and determined the reasonable requirement of the public as also the reasonably affordable price as contemplated in s. 84(1)(a) and 84(1)(b) of the Act. Objection was dealt with by HC separately while considering the provisions of s. 84(1)(a) and 84(1)(b) of the Act. Observations of the Tribunal that the proceedings u/s. 84 of the Act were in public interest was in view of the fact that the entire basis of grant of compulsory licence was based on the objective that patented article was made available to the society in adequate numbers and at a reasonable price. These were matters of public interest. Law of patent was a compromise between interest of the inventor and the public. In instant case, HC was concerned with patented drug i.e. medicines to heal patients suffering from Cancer. Public interest was and should always be fundamental in deciding a lis between the parties while granting a compulsory licence for medicines/drugs. Therefore, objection was also without any merit.

# SESSION IX

# BASIC DISPUTES UNDER SALE OF GOODS ACT

MANU/TN/5174/2011

**IN THE HIGH COURT OF MADRAS**

Writ Petition (MD) No. 8856 of 2010 and M.P. (MD) Nos. 1, 3 and 5 of 2010

Decided On: 08.12.2011

**A.M.K. & Co. Vs. Deputy Chief Materials Manager, Southern Railway & Ors.**

**Hon'ble Judges/Coram:** V. Ramasubramanian, J.

The following issues arise for consideration:

(i) Whether in terms of Clause X of the General Conditions, providing an alternative remedy of referring the dispute to arbitration, the writ petition is barred?

(ii) Whether the writ jurisdiction of this Court is barred in view of the fact that the dispute between the parties lies in the realm of contract?

(iii) Whether the stipulation for payment of ground rent for the delay in taking delivery, is enforceable, in view of the distinction between GAH and GAJ series and the distinction between the released and unreleased materials? and

(iv) Assuming that ground rent is payable, do the Railways have the right to proceed against the material or against the petitioner?

Issues (i) and (ii):

It is not difficult to resolve these two issues. It is common knowledge that in every Government contract, there are always two sets of conditions, namely, (i) General Conditions and (ii) Special Conditions. The General Conditions contain several stipulations applicable to all types of contracts. It is in the General Conditions that clauses relating to interpretation, disputes, resolution of disputes, etc. are incorporated. These General Conditions are applicable to all contracts, except to the extent that they are excluded by the stipulations contained in the Special Conditions. The Special Conditions are always contract specific. They contain the description of material proposed to be sold or purchased, the qualifications for participation in the tender, the

Special Conditions for participation as well as payment and conditions relating to delivery. Therefore, the General Conditions and Special Conditions are always read together as complementary to each other insofar as Government contracts are concerned.

But, the Special Conditions would always contain a reference to the General Conditions, by prescribing that in respect of matters not covered by the Special Conditions, the covenants contained in the General Conditions would, apply. Normally, in all tenders floated by the Government and Government departments, the foot-note will make a reference to the General Conditions. Alternatively, at least the contract awarded to the successful tenderer, would contain a clause, referring to the General Conditions. Therefore, a person participating in a tender would become bound by the terms stipulated in the General Conditions, if a reference is made to the General Conditions (i) either in the tender schedule, (ii) or in the contract.

Unfortunately, neither the catalogue, nor the Terms and Conditions accompanying the catalogue, contained a reference to the General Conditions, insofar as the case on hand is concerned. After the auction was over and the petitioner became the successful tenderer, he was issued with a Bid Sheet, followed by a sale advice. Even in the Bid Sheet and the sale advice, there was no reference to the General Conditions. Once it is seen that in none of the pre-contract or post-contract documents, there is any reference to the General Conditions, an auction purchaser cannot be bound by the arbitration clause contained in the General Conditions. It is the fundamental principle of the law of arbitration that a person who is not a party to an arbitration agreement, cannot be referred to arbitration. Section 7(3) of the Arbitration and Conciliation Act, 1996, requires an arbitration agreement to be in writing. Under Section 7(4), an arbitration agreement will be construed to be in writing, if it is contained (i) in a document signed by the parties, (ii) in an exchange of letters or other means of communication which provide a record of the agreement, or (iii) in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. None of the three alternatives provided in Section 7(4) is present in this case. The General Conditions which contain an arbitration clause, is neither made part of, nor even referred to, either in the tender catalogue or in the Terms and Conditions accompanying the tender catalogue, or in the Bid Sheet or sale advice. Therefore, there is no arbitration agreement in existence between the parties. If there is no arbitration agreement between the parties, there cannot be a reference of the dispute to arbitration. Section 2(1)(h) of the Act defines the expression "party" to mean a party to an arbitration agreement. The petitioner herein is not a party to an arbitration agreement, contained as part of the General Conditions, since no reference is made to the General Conditions in any of the documents either pretender or post-tender. Therefore, the objection of the respondents that the petitioner has an alternative remedy of raising a dispute and having it referred to arbitration, is not sustainable.

Insofar as the jurisdiction of this Court under Article 226, in respect of contractual matters is concerned, the issue is no longer res Integra. The Courts have consistently held that (i) where the contract is statutory in character, or (ii) where a public law element is involved, or (iii) where the action of the Government or Government department is unfair or unreasonable or arbitrary, the jurisdiction of this Court is not ousted. In a recent decision in *Central Bank of India v. Devi Ispat Ltd.*, 2010 (11) SCC 186, the Apex Court summarised the position as follows:

From the case law it is clear that (a) in the Contract if there is a clause for arbitration, normally a writ Court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the state and if any action on the part of the State is wholly unfair or arbitrary, writ Courts can exercise their power.

In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in various judgments of the Supreme Court. Therefore, the present writ petition is maintainable, If the petitioner is able to demonstrate that the respondents have acted unfairly, unjustly and unreasonably. To see if they have done so, we may have to go to the other issues arising for consideration. Therefore, let me now move on to the other Issues.

Issues (iii) and (iv):

In simple terms, the issues arising on the merits of the case are--(i) whether the liability to pay ground rent formed part of the contract, (ii) if the stipulation for payment of ground rent was part of the contract, whether it is enforceable In law, and (iii) whether the non payment of ground rent by the petitioner, would have anything to do with the delivery of the material now lying at the location.

It is an admitted fact that all the Lots put up for auction formed part of GAJ series. The Terms and Conditions accompanying the catalogue contained a stipulation for payment of ground rent, in respect of GAH series. According to the respondents, this has happened by a small mistake. The respondents contend that despite the Terms and Conditions referring only to GAH series, the petitioner understood the stipulation as relating to GAJ series also..

A tender document, under the law of contracts, is an invitation to offer. The bids made by the participants constitute the offer. On the hammer striking the table in an auction, the offer is accepted. Acceptance is to offer, like a lighted match stick to a train of gun powder. Therefore, the moment the offer made by the highest offeror or any one else is accepted, the contract is born.

An agreement enforceable by law, is always founded upon the consensus ad idem between the parties. Therefore, it is always open to a party to a contract to show that his consent was vitiated by fraud, coercion, undue influence, misrepresentation or mistake. It is also open to a party to show that the parties were not ad idem on a particular fact, at the time of entering into the contract.

The stand of the petitioner is that on 19.1.2010, the date of the auction, there was no stipulation for payment of ground rent, in respect of GAJ series, though there was a stipulation in respect of GAH series. This is established by the catalogue and the Terms and Conditions. But, none of the 72 Lots put up for auction on 19.1.2010 related to GAH series. All of them related only to GAJ series. Therefore, it was open to the petitioner to contend that on 19.1.2010, the consent of the parties were not ad idem, insofar as this aspect is concerned. But, this contention will hold good only till a contra evidence is shown. By his own letters of request dated 8.3.2010, 7.4.2010, 15.4.2010, 10.5.2010, 20.5.2010 and 3.6.2010, the petitioner himself had shown that he understood the stipulation for payment of ground rent as relatable to GAJ series. It was only in the letter dated 3.6.2010 addressed to the General Manager that the petitioner raised the question of legitimacy of the demand for the first time. Therefore, it is clear that the petitioner and the first respondent had identity of mind even on 19.1.2010 with regard to the stipulation. Hence, he cannot today put the catalogue to legal scrutiny and contend post facto that his understanding as on 19.1.2010 was different.

Once it is clear that the liability to pay ground rent formed part of the contract, the next question that would arise for consideration is as to the nature of the stipulation. This question arises in view of certain special circumstances, namely, that the material was not lying either in a godown or depot or Railway yard, occupying a storage space belonging to the Railways. Moreover, the rate at which ground rent is made chargeable, is stipulated not on the basis of the space occupied by the material, but on the basis of the value of the material. Normally, rent is something that co-relates to the space occupied, irrespective of the value of the material that occupies the space. In view of these special circumstances, it is necessary to examine the nature of this stipulation.

As seen from Condition No. 9 of the Terms and Conditions, ground rent is payable beyond a period of 50 days from the date of the auction, at the rate of 0.5% of the value of the material. Therefore, if a person bags the contract for the purchase of some material from the respondents and he fails to take delivery of the product for a period of 200 days, beyond the free time allowed, he would have to pay twice the value of the contract (200 times 0.5% is equivalent to 100%). Therefore, such a stipulation can at the most be understood only as a clause in terrorem. Some times, it is also called as a "no contest clause", that is designed to threaten a contracting party, so that the party honours his obligations duly and promptly.

The enforceability of such a clause in a contract is to be traced to Section 74 of the Contract Act, 1872. Section 74 speaks of two types of cases, namely, (i) where the contract fixes an amount to be paid in case of its breach, and (ii) where the contract provides for any other stipulation by way of penalty. The explanation to Section 74 makes it clear that even a stipulation for increased interest from the date of default, may be a stipulation by way of penalty. If the stipulation is by way of penalty, what is recoverable from the defaulting party, is only a reasonable compensation not exceeding the stipulated penalty. The only exception to the application of Section 74 is

Government contracts under which the performance of a public duty is imposed. But, the second explanation to Section 74 makes it clear that a person who enters into a contract with Government, does not necessarily undertake thereby any public duty or promise to do an act in which the public is interested.

In *Fateh Chand v. Balkishan Dass*, AIR 1963 SC 1405, it was held by the Supreme Court that the Court has the jurisdiction to award such compensation, as it deems reasonable, having regard to all the circumstances of the case, but not exceeding the penalty stipulated. This jurisdiction of the Court was held to be unqualified except as to the maximum stipulated. The Court also pointed out that though the aggrieved party is entitled to receive compensation irrespective of the proof of actual damage or loss, Section 74 does not justify the award of compensation when in consequence of the breach, no legal injury at all has resulted.

The stipulation for payment of ground rent, as pointed out earlier, is only a stipulation in the nature of penalty, falling under the second category of cases covered by Section 74 of the Contract Act. This is for two reasons, namely, (a) that the quantum is unconscionably huge that in a period of 200 days, the ground rent will exceed the value of the material, and (b) that the ground rent is fixed not on the basis of the storage space occupied by the material, but on the basis of the value of the material occupying the space.

There is also one more reason as to why this stipulation can be taken only to be a stipulation in the nature of penalty. The material in question is actually a bridge. Irrespective of the semantics involved in the expressions "released material" and "unreleased material", the fact remains that the contract awarded to the petitioner was for cutting the girders from the bridge and removing them. The bridge was not stored in any godown or depot belonging to the Railways. It may be true that the land on which the bridge was constructed belongs to the Railways. But, it was not occupying a storage space as in the case of other materials lying in the godown or depot. Therefore, the Railway was not rendering nor was expected to render any service to the petitioner, by keeping the material in safe custody. Since the sale transaction had been completed and the petitioner had paid the value of the material in full, it was the look out of the petitioner to safeguard the material sold to him. If, for instance, any theft had taken place or the bridge had been washed away in a huge flood, the Railways would have washed its hands off, on the ground that the sold material was lying there at the risk of the petitioner. On the contrary, if the material was lying at the godown or depot of the Railways, they may not be in a position to wriggle out of their obligation for the safety of the material.

To say that they would not accept responsibility for the safety of the material after 50 days of the completion of the transaction and also to say at the same breath that they would charge ground rent beyond 50 days without any corresponding obligation, would strike at the root of the fundamental principles governing the law of contracts. As pointed out by the Supreme Court in *Fateh Chand*, the respondents must show the sufferance of a legal injury, by the breach of the contract on the part of the petitioner, to enable them to enforce the stipulation for ground rent. Alternatively, they must at least show the rendering of any service, such as the provision of a storage space. In the absence of both, the claim for ground rent, especially when the material sold is a bridge, cannot be sustained. At the most, the stipulation for payment of ground rent can be taken only to be a clause intended to make the petitioner cut and remove the material within a reasonable time.

Under Section 19 of the Sale of Goods Act, 1930, the property in specific or ascertained goods, is transferred to the buyer at the time intended by the parties. The intention of the parties is to be gathered (i) from the terms of the contract, (ii) the conduct of the parties, and (iii) the circumstances of the case. The rules for ascertaining the intention of the parties is to be gathered from Sections 20 to 24, unless a different intention appears. The rules to be found in Sections 20 to 24 can be summarised as follows:

1) If the contract is for sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, if the contract is an unconditional contract. This is irrespective of whether the time for payment of price or time for delivery or both, is postponed or not;
2) If the contract is for sale of specific goods which are not in a deliverable state and the seller is bound by the terms, to put the goods into a deliverable state, the property passes on only after the seller does such a thing and the buyer has notice thereof;

3) If the contract is for sale of specific goods in a deliverable state, but the seller is bound to do something to weigh, measure, test or ascertain the price, then the property passes on after such an act is done by the seller and the buyer has notice thereof;

4) If the contract is for the sale of unascertained or future goods by description and goods of that description in a deliverable state are unconditionally appropriated to the contract by either of the parties with the assent of the other, the property in the goods passes on;

5) Where in pursuance of a contract, the seller delivers the goods to the buyer or to a carrier or other bailee for transmission to the buyer, without reserving the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract; and

6) When goods are delivered to the buyer, either 'on approval' basis, or 'on sale or return' basis, or on other similar terms, the property passes the moment the buyer signifies his approval or acceptance.

Keeping in mind the principles enunciated in Sections 19 to 24 of the Sale of Goods Act, if we look at the case on hand, the following undisputed facts emerge:

(a) (i) that the offer of the petitioner was accepted on 19.1.2010 and a sale advice was issued;

(b) (ii) that the Lots were divided into two parts and the respondents have already issued two delivery orders, one on 12.2.2010 and another on 8.3.2010, directing the petitioner to cut the girders from the bridge and remove them;

(c) (iii) that the petitioner has already paid the full sale price of the material;

(d) (iv) that about 140 MT out of 448.080 MT of material had already been cut and removed by the petitioner; and

(e) (v) that nothing remains to be done on the part of the respondents, to complete the sale.

Therefore, the property in the goods had already passed on to the petitioner. In other words, what is lying at the location is a property belonging to the petitioner, over which, the respondents do not even have a lien. The respondents have not reserved unto themselves, the right of disposal, in terms of Section 25(1) of the Sale of Goods Act. Under Section 25(1), it was open to the Railways to reserve the right of disposal of the goods, until certain conditions are fulfilled. But, they must have done so by the terms of the contract. This is clear by the language used in Section 25(1). Neither the catalogue, nor the Terms and Conditions of auction, nor even the impugned order or the counter affidavit shows that the respondents reserved, by the terms of the contract, the right of disposal, for non fulfillment of certain conditions. Therefore, the title in the goods had already passed on to the petitioner.

As a result, the property is today lying there at the location, at the risk of the buyer. If the respondents claim that the property in the goods had not passed to the buyer, then, the respondents have to suffer the consequences of Section 26, which states that the goods remain at the seller's risk, until the property therein is transferred to the buyer. The first proviso to Section 26 makes it clear that where delivery is delayed through the fault of either the buyer or the seller, the goods are at the risk of the party in default, as regards any loss which might not have occurred but for such fault.

In other words, if the respondents take a stand that the property in the goods had not passed, then, they must accept that the goods remain at their risk. But, the respondents have been prudent enough not to take such a stand. Therefore, there is no denial of the fact that the property in the goods had passed on to the petitioner.

Once it is concluded that the property in the goods had passed, then it follows as a necessary corollary that the petitioner is entitled to cut and remove the material, irrespective of any claim for ground rent made by the respondents, assuming without admitting that such a claim is valid. Therefore, the respondents cannot today prevent the petitioner or deny access to the petitioner, to cut and remove the balance material lying at the location, on the ground that they have a claim for ground rent. Since the property in the goods had passed, since the respondents have not retained a right of disposal and also since the respondents have no lien over the property, they have no legal basis to prevent the petitioner from cutting and removing the material.

At the most, the only thing that could be done by the respondents is to sue the petitioner for recovery of the actual value of the loss or damage suffered by them on account of the delay on the part of the petitioner in cutting and removing the material. This could be done by them in terms of Section 74 of the Contract Act. But, when they do so, they must prove the sufferance of actual legal injury. If and when they file a suit, the prescription of 0.5% per day would act as a cap on the claim.

But, the above right is only a right to sue for the actual loss or damage. This right to sue will not enable the respondents to stop the petitioner from cutting and removing the material. The respondents have not shown even prima facie, that they have suffered any loss or injury on account of the delay on the part of the petitioner in cutting and removing the girders on the bridge. But on the contrary, the petitioner has actually suffered loss. Apart from the fact that the petitioner has already paid the full purchase price of the material along with VAT, IT, CESS, etc., way back in March 2010, but taken delivery of only about 30% of the material, part of the material has also fallen into the sea-bed.

It is clear that while the respondents do not appear to have suffered any actual loss or damage, due to the delay on the part of the petitioner in taking delivery, the petitioner has obviously suffered substantial loss on three counts viz., (i) the opportunity cost of the investment on a material, 70% of which he could not take delivery for the past 20 months, (ii) the additional cost to be incurred for recovering the material, due to the subsequent developments, and (iii) the reduction in the quantity and quality of material that could be recovered, due to the subsequent developments. Hence, the refusal of the respondents to permit the petitioner to cut and remove the material, the property in which had already passed on to the petitioner, is highly unfair and unreasonable. Therefore, to the extent of permitting the petitioner to take his material, the writ petition is maintainable, despite the dispute lying in the realm of a contract.

But without taking evidence, it is not possible to award any damages to the petitioner, for the loss that he has actually sustained. Moreover, it is also not possible in a writ petition to quantify the loss that has arisen on account of his own contribution. Therefore, the only thing that could be done in this writ petition, having regard to my findings on the question of the passing of title to the petitioner, is to allow the petitioner to take his material, with liberty to the parties to work out the question of damages for loss and injury before a Civil Court. In view of the above, the writ petition is allowed and a direction is issued to the respondents to permit the petitioner to cut and remove the girders and other material that they have purchased in the auction held on 19.1.2010 under Lot No. GAJ 64, without any obstruction. The petitioner shall carry out the work without detriment or injury to the Railway bridge or line adjoining the bridge in question. The respondents are directed to render all co-operation to the petitioner and the petitioner shall complete the job on or before 31.3.2012, so as to avoid any hardship to the Railway traffic. Though I have recorded a prima facie finding that the claim for ground rent is not enforceable and that the respondents have not proved any actual loss or injury, I leave it open to the Railways, if they so choose to do, to file a suit before an appropriate Civil Court, for recovery of the value of the actual loss or injury, if any, suffered by them, on account of the delay on the part of the petitioner in cutting and removing the material. Similarly, it is also open to the petitioner, after taking away his material, to sue the respondents for recovery of the value of the actual loss or damage suffered by him, due to any act of omission and commission that could be attributed to the respondents. But, the same shall not stand in the way of the petitioner cutting and removing the material. The respondents shall permit the petitioner to commence the operations of cutting and removing the material.

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AIR1979Cal142

**IN THE HIGH COURT OF CALCUTTA**

A.F.O.D. No. 102 of 1971

Decided On: 31.07.1978

**The Board of Trustees of the Port of Calcutta Vs. Bengal Corporation Pvt. Ltd.**

**Hon'ble Judges/Coram:** R.M. Datta and Salil Kr. Hazra, JJ.

**Commercial - merchantable quality - Section 16 of Sale of Goods Act, 1930 - question of implied terms as to quality or fitness of goods under Section 16 raised - contended that Proviso to Section 16 (2) did not apply - correctness of test certificates had not been proved - in any event defective nature of goods was not apparent on ordinary examination and cannot be detected before user - implied condition was that goods should be of merchantable quality - but goods supplied were not so - held, Section 16 (2) can also be invoked by buyer.**

Under Section 16(1) of the Sale of Goods Act, 1930, the requirements which must be satisfied to import a condition that the floods shall be reasonably fit for any particular purpose are that the buyer must make known to the seller the particular purpose for which the goods are required, in the circumstances showing, the seller realised or ought to have realised that the buyer was relying on the seller's skill or judgment and the goods shall be of a description which it is in the course of the seller's business to supply. In such a case, there is an implied condition that the goods shall be reasonably fit for such purpose.

Section 16(2) relates to all sales by description. Under this Sub-section to import a condition that the goods are of merchantable quality, the goods must be bought by description and seller must deal in goods of that description. The goods of that description implies goods of the same kind as those bought, The words "that description" refer to and mean the actual description by which the goods which are the subject matter of the contract were bought. (See *Ashington Piggeries v. Hill (Christopher) (H. L. (E))* (1971) 2 WLR 1051 per Lord Diplock). The word "merchantable" can only mean "commercially saleable", If the description is a familiar one it may be that in practice only one qua-lity of goods answers that description then, that quality and only that quality ia merchantable quality (See *Hard-wick Game Farm Case* (1969) 2 A.C 31 at p. 75, per Lord Reid).

On the facts of this case, the learned Judge found that the wire ropes supplied by the sellers were of non-rotating type and buyer made known to the seller the purpose for which the wire ropes were required. The purpose was for use in cranes. There is no doubt that this was the particular purpose for which the ropes were required. The learned Judge also accepted that this was so, but held that the buyer did not rely on seller's skill or judgment. The learned Judge also held that there is no oral or documentary evidence that the buyer relied on seller's skill or judgment or that the goods were of a description which it was in the course of plaintiff's business to supply.

From the evidence tendered it appears that the buyer accepted the recommendation of the plaintiff that the goods manufactured by the Japanese manufacturer would conform to British Standard Specification for use in cranes and on the basis of buyer's selection of goods the seller accepted the offer. It has also been proved that the plaintiff company is the dealer of the wire ropes and agent of the Japanese manufacturers. Therefore, in my opinion, the learned Judge was not correct in his view that there is no evidence that the buyer relied on the seller's skill and judgment, or that the goods were of description which it was in the course of plaintiff's business to supply. Both the parties went to trial with full knowledge that question of applicability of Section 16 was in issue. They had ample opportunity to adduce their evidence thereon and had fully availed themselves of the same. In the circumstances, the absence of a specific pleading that the buyer made known to the seller the purpose for which the goods were required so as to show that the buyer relied on the seller's skill or judgment or that the goods were of description which it was in the course of seller's business to supply was a mere irregularity which resulted in no prejudice to the parties. (See *Nagubai Ammal v. B. Shama Rao.* [1956]1SCR451 .

In the instant case, that the wire ropes were required for use in cranes, but also all essential facts exist showing that the defendant buyer relied on plaintiff seller's skill or judgment for supply of such goods and that the goods were of description which it was seller's duty to supply as agent of the Japanese manufacturers. In this respect, I have taken into consideration the relevant facts, evidence and circumstances of the case and also the legitimate inferences from the facts admitted or proved. In this case, the wire ropes were sold for the particular purpose, namely, for use in cranes and as such the plaintiff seller must have undertaken that wire ropes should be fit for that purpose. At the time of purchase of goods for a particular purpose, very seldom the purchaser tells the seller "Look. I am relying on your judgment and skill that the goods would be fit for the particular purpose for which the same are required". I am inclined to think that if the seller was told that the goods were required for a particular purpose such statement suffices to show that the buyer relied on seller's skill or judgment without any further evidence on this point. In any event, n the instant case, there was ample evidence on behalf of the defendant Port Commissioner that reliance was made on the skill and judgment of the plaintiff seller and the plaintiff chose the Japanese manufacturers as their principal for manufacture of the particular type of wire ropes according to British Standard Specification for use in cranes and the defendant buyer relied on the choice of the plaintiff in this respect. This being so, there was an implied condition that the wire ropes should be reasonably fit for the declared purpose. (See *Bristol Tramways & Carriage Co. Ltd. v. Fiat Motors, Ltd.* (1910) 2 KB 831 ).

28. For the above reasons, in my view, Section 16(1) of the Sale of Goods Act applies under the facts of this case and, I am unable to share the same view as taken by the learned trial Judge on this point.

Now, on question of applicability of Section 16(2) I am also unable to share the same view with the learned trial Judge that Section 16(2) does not apply. In my view it does. The goods supplied by the seller were not of merchantable quality. It is true that merchantable quality has not been denned in the Sale of Goods Act. No exhaustive definition has been laid down in any judicial decisions. But, following the definition given by Farewell, L. J in *Bristol Tramways Co.'s* case : (1910) 2 KB 831 at pp. 839-840, this Court in *G. Mckenzie & Co. (1919) Ltd v Nagendra Nath Mahalanabish* : 50 Cal WN 213 said :

> "When an article is sold by description, it may be regarded as a sale of an article of that description, which is free from any latent defect which, if known at the time, will make it unmerchantable."

I will quote here the tests laid down in *Randall v. Newson;* (1876 2 QBD 102 :

> "If a man sells an article he thereby warrants that it is merchantable,--that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it for that purpose." In Bristol Tramways, etc. Carriage Co. Ltd. v. Fiat Motors Ltd. (1910) KB 831 , Farwell, LJ gave another explanation of the phrase 'merchantable quality' which I would like to quote here:

> "The phrase in Section 14(2) is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of has offer to buy that article whether he buys for his own use or to sell again."

In *Grant's* case: 1936 AC 85 at p. 99-100 Lord Wright observed :

> "Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does

> not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make." In view of the law quoted above, it seems to me that the goods supplied by the seller were not of merchantable quality as the same were not suitable for the purpose for which the same were required. The goods were bought by description and the seller should have supplied the same reasonably fit for use in cranes.

According to the letter of the defendant dated August 17, 1964, the average life of such ropes should have been two to two-half years; but, in fact, the same could be used for much less period. The proviso to Section 16(2) also does not apply; because, Section 16(2) deals with defects which ought to have been revealed upon examination. In this case, the defects were latent defects which could not be detected on apparent examination of the goods in Japan, The defect in the wire ropes could only be detected after their user in cranes,

In any event, as the defective nature of the goods was not apparent on ordinary examination, and could not be detected before user in cranes, the proviso to Section 16(2) is not attracted. Therefore, there was implied condition that the goods should be of merchantable quality, but the two reels supplied by the seller were not so. In the above view of the matter Section 16(2) can also be invoked by the defendant buyer.

The only other point which remains is the question of remedy for breach of warranty by the seller under Section 59 of the Sale of Goods Act. Such breach gives rise to the claims of damages on the part of the buyer. The case in the written statement is that the defendant was compelled to use the said two reels of defective wire ropes to unload food-grains as quickly as possible to relieve food scarcity.

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AIR2011SC523, (2011)1SCC460

**IN THE SUPREME COURT OF INDIA**

Special Leave Petition (C) Nos. 21178-21180 of 2009

Decided On: 24.11.2010

**C.N. Anantharam Vs. Fiat India Ltd. and Ors. etc.**

**Hon'ble Judges/Coram:** Altamas Kabir and Cyriac Joseph, JJ.

**Manufacturing Defect in Vehicle – Suit for replacement of vehicle and refund of cost -** National Consumer Disputes Redressal Commission directed delivery of vehicle to Petitioner after having the same properly checked by independent technical expert who would have to certify that vehicle was free from any defect when it was delivered

What emerges is the question as to whether the manufacturing company and by extension the dealer/agent was under any compulsion to replace the vehicle itself when the engine of the vehicle from which certain noises were allegedly emanating had been replaced. It has been explained that an engine operating on diesel makes a rattling noise which does not occur in petrol driven engines and that there was really no manufacturing defect in the vehicle as complained of by the purchaser. In such circumstances, the order passed by the National Commission, impugned in these Special Leave Petitions, does not appear to be unreasonable. For whatever reason, except for a mere 800 kilometers the Petitioner has not used the vehicle after it was delivered and has, on the other hand, made several complaints in an attempt to prove that there were manufacturing defects in the vehicle. The National Commission has taken all these matters into consideration in giving the impugned directions regarding delivery of the vehicle to the Petitioner after having the same properly checked by an independent technical expert who would have to certify that the vehicle was free from any defect when it is delivered.

From the facts as disclosed, it appears that apart from the complaint relating to noise from the engine and the gear box, there was no other major defect which made the vehicle incapable of operation, particularly when the engine was replaced with a new one. However, in addition to the directions given by the National Commission, we direct that if the independent technical expert is of the opinion that there are inherent manufacturing defects in the vehicle, the petitioner will be entitled to refund of the price of the vehicle and the lifetime tax and EMI along with interest @ 12% per annum and costs, as directed by the State Commission.

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(2006)3SCC721

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 1273 of 2006 (Arising out of SLP (Civil) No. 24699 of 2003)

Decided On: 24.02.2006

**Indochem Electronic and Anr. Vs.Addl. Collector of Customs, A.P.**

**Hon'ble Judges/Coram:** S.B. Sinha and P.K. Balasubramanyan, JJ.

**Sale of Goods Act, 1930 (Central Act 3 of 1930)--Section 12--Right to reject goods on breach of warranty--Though there is no right to reject the goods on breach of warranty, such breach will give rise to a claim for damages, which may extent to the price of the goods. -** Appellant challenged order of the National Consumer Disputes Redressal Commission, which confirmed order of State Commission. Respondent approached State Consumer Disputes Redressal Commission, Hyderabad, alleging that the EPABX telephone system supplied by appellant was not working properly and was always faulty and hence sought for a direction to the appellant for repayment of full cost of EPABX system. Petition was allowed directing appellant to refund the price of EPABX with 12% interest from the date of filing the petition and take back the machine. National Commission dismissed the appeal confirming the order of State Commission. Appellant contended that after the period of warranty, it had no obligation to maintain the system and even for a breach of warranty, there cannot be a direction to take back the goods.

The Supreme Court held that although in terms of sub-section (3) of Section 12 of the Sale of Goods Act, 1930 no right accrues to a purchaser to reject the goods on breach of stipulation of warranty, the same would not mean that the extent of damages cannot be equivalent to the price of the goods in as much as such a power has specifically been conferred upon the Commission. It is true, where a stipulation in a contract of sale is a warranty, its breach may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated; but, where a stipulation in a contract of sale is a condition, its breach may give rise not only to a claim for damages but also generally to a right to treat the contract as repudiated.

**Extension of period of warranty can be inferred from conduct of parties-** From the aforementioned conduct of the appellant itself, it may be inferred that it voluntarily undertook to meet the requirements of the respondent relating to mal-functioning etc. of the said system despite expiry of the period of warranty. For all intent and purport, the period of warranty, thus, stood extended. As the defects in the system including manufacturing defects, if any, were found not only during the period of warranty but also during the extended period, and as the appellant itself undertook to attend to the complaints received in that behalf, in our opinion, it is too late for it now to contend that in view of the fact that the period of contract or warranty expired, it had no liability therefor. By reason of its own conduct, the appellant made representation to the respondent that despite expiry of period of warranty, maintenance of the system to the respondent's satisfaction was its contractual obligation. The contract in view of such representation on the part of the respondent does not come to an end. The contract, if looked in the light of the surrounding circumstances evidently pointed to the intention of the parties and as gathered from the contract itself that the representation of the appellant should have been treated as warranty for an extended period.

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(2014)7SCC1

**IN THE SUPREME COURT OF INDIA**

Decided On: 06.05.2014

**Kone Elevator India Pvt. Ltd. Vs. State of Tamil Nadu and Ors.**

**Hon'ble Judges/Coram:** R.M. Lodha, C.J.I., A.K. Patnaik, S.J. Mukhopadhaya, Dipak Misra and F.M. Ibrahim Kalifulla, JJ.

Petitioner is engaged in manufacture, supply and installation of lifts involving civil construction - Sales Tax Appellate Tribunal, opined that, nature of work is a "works contract", for erection and commissioning of lift cannot be treated as "sale". On a revision being filed, High Court of Andhra Pradesh affirmed view of Tribunal and dismissed Tax Case (Revision) filed by Revenue. State of Andhra Pradesh preferred special leave petition wherein leave was granted and matter was registered as Civil Appeal No. 6585 of 1999 and by judgment dated 17th February, 2005 in Kone Elevators , view of High Court was overturned. State Government called upon Petitioner to submit returns treating transaction as sale.

Whether a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" or a "works contract"?

Held, it is settled law that, substance and not form of contract is material in determining nature of transaction. No definite rule can be formulated to determine question as to whether a particular given contract is a contract for sale of goods or is a works contract. Preparatory work has to be done taking into consideration as to how lift is going to be attached to building. Nature of contracts clearly exposit that, they are contracts for supply and installation of lift where labour and service element is involved. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. In respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site, i.e., building, and prepared for delivery.

Further conclusion, as had been reached in *Kone Elevator India Private Limited v. State of Tamil Nadu and Ors. (2010) 14 SCC 788*, was based on bedrock of incidental service for delivery. It would not be legally correct to make such a distinction in respect of lift, for contract itself profoundly spoke of obligation to supply goods and materials as well as installation of lift which obviously conveyed performance of labour and service. Hence, fundamental characteristics of works contract are satisfied. Therefore decision rendered in *Kone Elevators* did not correctly lay down law and it is, accordingly, overruled.

# SESSION X

# BASIC DISPUTES UNDER PARTNERSHIP ACT

(2014)3SCC645

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 10426-10427 of 2013 (Arising out of SLP (C) Nos. 22473-22474 of 2013)

Decided On: 19.11.2013

**Leela Shashikant Purandare Vs. Arvind Vishnu Govande (dead) through L.Rs.**

**Hon'ble Judges/Coram:**

G.S. Singhvi and V. Gopala Gowda, JJ.

Suit for declaration and possession of suit property filed by respondent. Trial court and lower appellate court concurrently held that respondent not entered into any partnership with appellant and that she had unauthorisedly occupied suit property and made construction for doing business. Appellant could not prove that she was in possession of suit property as partner of firm. Appellant could not defend suit filed by respondent on strength of unregistered partnership deed allegedly executed between her and respondent. Findings of courts below are pure findings of fact amply supported by evidence produced by parties. Appellant to handover vacant possession of suit property to legal representatives of respondent. Appellant directed not to induct any person in suit property in any capacity whatsoever or alienate same to any other person. Appeal dismissed with cost quantified at Rs 50,000.

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(2004)3SCC155

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 131 and 132 of 2004 (Arising out of SLP(C) Nos. 24783/2003 and 72/2004)

Decided On: 09.01.2004

**Firm Ashok Traders and Anr. etc. Vs. Gurumukh Das Saluja and Ors. etc.**

**Hon'ble Judges/Coram:** R.C. Lahoti and Ashok Bhan, JJ.

**Indian Partnership act, 1932 - Section 69 (3)--Arbitration and Conciliation Act, 1996--Section 9--Unregistered firm--Application under Section 9 of Arbitration Act for interim measure of protection--Whether maintainable in view of bar of Section 69 (3) of Partnership Act?--Held, yes prima facie--Application under Section 9 is not suit--Right conferred under Section 9 is on party to arbitration agreement--Section 69 of Partnership**

**Act has no bearing on right of party to arbitration clause to file application under Section 9 of Arbitration Act.**

Sub-sections (1) and (2) of Section 69 of Partnership Act strike at the very root of the jurisdiction of the Court to entertain a suit to enforce a right arising from a contract, if the applicability of Section 69 is attracted. By virtue of Sub-section (3), the bar enacted by Sub-sections (1) and (2) applies also to a claim of set-off or 'other proceedings to enforce a right arising from a contract' which, in the submission made by the learned counsel for Groups "B" and "C", includes a proceeding commencing on an application under Section 9 of the Arbitration & Conciliation Act.

In our opinion, which we would term as prima facie, the bar enacted by Section 69 of the Partnership Act does not affect the maintainability of an application under Section 9 of Arbitration & Conciliation Act.

Arbitration & Conciliation Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of Arbitration & Conciliation Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of Arbitration & Conciliation Act to mean a party to an arbitration agreement'. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in *Sundaram Finance Ltd*. v. *NEPC India Ltd*. [1999]1SCR89 the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a "party' to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under Clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal. Under the scheme of Arbitration & Conciliation Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the Arbitration & Conciliation Act. The relief sought for in an application under Section 9 of Arbitration & Conciliation Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of Arbitration & Conciliation Act.

14. In *Jagdish Chandra Gupta's case* the Constitution Bench approved of a liberal and full meaning being assigned to the phrase "other proceedings' in Sub-section (3) of Section 69 of the Partnership Act untramelled by the preceding words 'a claim of set-off. The Court refused to countenance the plea for interpreting the words 'other proceedings' ejusdem generis with the preceding words 'a claim of set-off'. *M/s. Shreeram Finance Corporation* (supra) calls for the effect of bar created by Section 69 being determined by reference to the date of Institution of the suit and not by reference to any subsequent event. In *Delhi Development Authority's case,* this Court held Section 69 of Partnership Act applicable to an application under Section 20 of the Arbitration Act, 1940 as such an application (under the scheme of that Act) would be included within the meaning of 'other proceedings' in Section 69(3) of Partnership Act. In *Kamal Pushpa*

*Enterprises*, this Court held that the bar under Section 69 of Partnership Act is not applicable at the stage of enforcement of the award by passing a decree in terms thereof because the award crystallises the rights of the parties and what is being enforced at that stage is not any right arising from the objectionable contract. None of the cases throws any direct light on the issue at hand, Rather, the undercurrent of dictum in *Kamal Pushpa Enterprises* lends support to the view we are tentatively taking herein.

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(2014)7SCC255

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 3148 of 2014 (Arising out of Special Leave Petition (Civil) No. 4267 of 2013)

Decided On: 04.03.2014

**Lalitkumar V. Sanghavi (D) Th. L.Rs. Neeta Lalit Kumar Sanghavi and Anr. Vs. Dharamdas V. Sanghavi and Ors.**

**Hon'ble Judges/Coram:** B.S. Chauhan, Jasti Chelameswar and M. Yusuf Eqbal, JJ.

**Arbitration and Conciliation Act, 1996 - Section 32--Arbitral proceedings--Termination of--Arbitral proceedings stood terminated--Only remedy is to approach arbitral Tribunal seeking recall of its decision to terminate arbitral proceedings--Order passed by arbitral Tribunal not capable of being corrected by High Court under Article 226 or 227 of the Constitution--Apprehension of appellants that they would be left remediless is without basis in law--Appellants at liberty to approach appropriate court for determination of legality of termination of arbitral proceedings.**

The undisputed facts are that the parties herein are carrying on some business in the name and style of a partnership firm constituted under a partnership deed dated 20th October 1962. The partnership deed provided for the resolution of the disputes arising between the partners touching the affairs of the partnership by means of an arbitration. In view of certain disputes between the partners (details of which are not necessary for the present purpose) the original applicant filed arbitration application No. 263/2002 Under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act', for short) before the Chief Justice of the Bombay High Court which was disposed of by an order dated 21st February, 2003 by a learned Judge of the

Bombay High Court, who was the nominee of the Chief Justice under the Act. The relevant portion of the order reads as follows:

Considering that applicant Respondent No. 1 have appointed two arbitrators, Justice H. Suresh, Retired Judge of this Court is appointed as presiding arbitrator. The arbitral tribunal so constituted to decide all disputes including claims and counter claims of the parties arising from the controversy. In case Respondents do not cooperate with the matter of appointment of third arbitrator, applicant initially to bear the made part of final award in the position, application disposed of accordingly.

By his order dated 29th October, 2007, the presiding arbitrator informed the Appellants that the arbitration proceedings stood terminated. The relevant portion of the order reads as follows:

The matter is pending since June, 2003 and though the meeting was called in between June, 2004 and 11th April, 2007, the Claimant took no interest in matter. Even the fees directed to be given is not paid.

In these circumstances please note that the arbitration proceedings stands terminated. All interim orders passed by the Tribunal stand vacated.

6. In response to the said communication, the original applicant, through his lawyer, communicated to the arbitrators and also the advocates of the Respondents herein that the order of the arbitrators dated 29th October, 2007 does not reflect the true factual position of the matter. The relevant portion of the letter reads as follows:

The Hon'ble Arbitral Tribunal is therefore requested to kindly revoke the said letter dated 29th October 2007 and modify the same and kindly record that the proceedings are being terminated due to non compliance of orders/directions as also non payment of fees and charged by the Respondent No. 1

7. On 17.1.2008, the original applicant filed arbitration application No. 44/2008 with prayers (insofar as they are relevant for the present purpose) as follows:

a) this Hon'ble Court be pleased to appoint some fit and proper person as arbitrator for entering reference and adjudicating upon the disputes in respect of M/s. Sanghavi Brothers.

b) the Respondent No. 1 to 4 be directed to deposit a sum of Rs. 1,00,000/- towards costs of arbitration and fees of the Arbitrator.

That application came to be dismissed by the order under appeal in substance holding that such an application invoking Section 11 of the Act is not maintainable-with an observation that "the remedy of the application is by filing a writ petition not an application Under Section 11 of the Act".

Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the Appellant lies in invoking the jurisdiction of the High Court Under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in ***S.B.P. and Co.*** *v.* ***Patel Engineering Ltd.*** (2005) 8 SCC 618. The relevant portion of the judgment reads as under:

It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged Under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting Under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal Under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. <u>We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being</u>

corrected by the High Court Under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

That need not, however, necessarily mean that the application such as the one on hand is maintainable Under Section 11 of the Act.

On the facts of the present case, the applicability of Sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, Sub-section (2), Sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided Under Section 14(2)".

The expression "Court" is a defined expression Under Section 2(1)(e) which reads as follows:

> Section 2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not-include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

Therefore, the apprehension of the Appellant that they would be left remediless is without basis in law. The Appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order dated 29th October, 2007 by which the arbitral proceedings were terminated.

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(2010)2SCC407

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 6933-6934 and 4411-4412 of 2002

Decided On: 05.01.2010

**Mohd. Laiquiddin and Anr. Vs. Kamala Devi Misra (Dead) by L.Rs. and Ors.**

**AND**

**Smt. Kamala Devi Misra (Dead) by L.Rs. and Ors. Vs. Mohd. Laiquiddin Khan and Anr.**

**Hon'ble Judges/Coram:** Tarun Chatterjee and V.S. Sirpurkar, JJ.

**a) Whether the High Court was justified in permitting the Respondents in raising a question for the first time in second appeal, which was not in the pleading before the Trial Court or the First Appellate Court?**

The new plea which was allegedly raised before the High Court for the first time was that all assets of the firm including the land and building shall be dealt with under Section 48 of the Act and the proceeds shall be disbursed to the two partners in accordance with the respective shares as per the partnership deed. The High Court as can be seen from the record had dismissed this plea. The Respondents have not appealed against the said finding of the High Court. That apart, when a question of law is raised on the basis of the pleadings and evidence on record which might not have been raised before the courts below, it is difficult to hold that such question of law cannot be permitted for the first time before the High Court. Therefore, we do not see how the Appellants are aggrieved by this finding of the High Court even assuming the High Court had formulated a new question of law, which was not raised before the Courts below.

In the case of *Hardayal Gir v. Sohna Ram* 1970 (3) SCC 635 this Court had set aside the judgment of the High Court which allowed the plaintiff to raise a plea of misrepresentation, raised for the first time in the second appeal. In that case, however, the High Court held that the contract had become unenforceable on account of the plea of misrepresentation. Hence, the defendant in that case was indeed aggrieved as the High Court had allowed a plea which he could not have defended properly. In the case at hand, the plea in question, assuming it had been raised for the first time, had been rejected by the High Court, and there had been no appeal from the said finding.

**b) Whether the High Court was justified in holding that there had been dissolution of the partnership firm on account of death of a partner?**

Dissolution of a partnership firm on account of death of one of the partners is subject to the contract entered into by the parties. Clause 22 of the Partnership deed clearly states that death of any partner shall not have the effect of dissolving the firm. However, in the facts and circumstances of the case, we are not in a position to give absolute effect to this clause of the deed of partnership.

In order to arrive at the conclusion that the partnership firm stood dissolved on account of death of one of the partners, the High Court had rightly placed reliance on *Smt. S. Parvathammal v. CIT* 1987 ITR 161 wherein it was held that A partnership normally dissolves on the death of the partner unless there was an agreement in the original partnership deed. Even assuming that there was such an agreement in a partnership consisting of two partners on the death of one of them the partnership automatically comes to an end and there is no partnership which survives and into which a third party can be introduced.

In the light of aforementioned case, it is clear that when there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise. A partnership is a contract between the partners. There cannot be any contract unilaterally without the acceptance by the other partner. The Appellants, the legal representatives of original plaintiff (since deceased) was not at all interested in continuing the firm or constitute a fresh firm and they cannot be asked to continue the partnership, as there is no legal obligation upon them to do so as partnership is not a matter of heritable status but purely one of contract, which is also clear from the definition of partnership under Section 4. Therefore, the trial court was justified in holding that the firm dissolved by virtue of death of one of the partners and the first appellate court as well as the High Court have taken the correct view in upholding the same.

**c) Whether the High Court was justified in permitting the Respondents to remove the movables from the disputed property, contrary to the deed of partnership entered into between the original plaintiff and the original defendant?**

Under the Indian Partnership Act, 1932, property which is brought into the partnership by the partners when it is formed or which may be acquired in the course of the business becomes the property of the partnership and a partner is, subject to any special agreement between the partners, entitled upon dissolution of a share in the money representing the value of the property.

It is true that there was no intention from either of the parties to treat these properties as the properties of the firm. A careful perusal of Clause 24 clearly indicates that the land as well as the building with the fixtures etc., to be vested with the original plaintiff (since deceased), after the expiry of term of 42 years. It is also true that directing the delivery of the entire property to the appellant would cause prejudice to the rights of the Respondents and would put him to loss. As noted hereinabove, the partnership got dissolved on the death of the original plaintiff (since deceased), it would be reasonable to allow both the parties to take their respective properties. The Appellants are entitled to the exclusive possession of the land and the Respondents are entitled to take away the movables from the property and recover the value of the buildings and structure embedded to the land. It has to be assessed by the technically qualified person. The Appellants are liable to pay the value of the remaining structures after adjusting the amount if any due to the Appellants.

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(2009)5SCC608

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 7438 of 2000

Decided On: 20.03.2009

**V. Subramaniam Vs. Rajesh Raghuvandra Rao**

**Hon'ble Judges/Coram:** Markandey Katju and G.S. Singhvi, JJ.

**Dissolution of Unregistered Partnership - Constitutional validity of Section 69(2A) of Indian Partnership Act, 1932 -** Suit for dissolution of unregistered partnership between Appellant and Respondent filed by Appellant. Respondent contended suit not maintainable in view of Section 69(2A) of Indian Partnership Act as amended by the Maharashtra Partnership Amendment Act, 1984 (which deprives a partner in an unregistered firm from recovery of his share in the property of the firm or from seeking dissolution of the firm). The Trial Court held

Section 69(2A) of the Act was unconstitutional being violative of Article 14 and 19(1)(g) of the Constitution. Reference made to High Court - High Court held Section 69(2A) not unconstitutional. The Supreme Court held that in view of Sub-section 2A of Section 69 a partner in an unregistered partnership firm in State of Maharashtra cannot file suit for dissolution or for accounts of dissolved firm or realize properties of dissolved firm unless duration of firm was only six months or its capital upto Rs. 2000 only. Partnership firm, whether registered or unregistered, is not a distinct legal entity. Hence, property of firm really belongs to partners of firm. Sub-section 2A deprives partner of unregistered firm from recovery of his share in property of firm or from seeking dissolution of firm. Effect of the amendment is that partnership firm can come into existence and function without registration but cannot go out of existence - It will result in a situation where in case of disputes amongst partners the relationship of partnership cannot be put an end to by approaching Court of law. Dishonest partners, if in control of business or if stronger, can deprive other partners of his dues from partnership. This could result in extreme hardship and injustice as the Aggrieved partner would be left without any remedy. He can neither file suit to compel mischievous partner to co-operate for registration nor resort to arbitration. The restrictions placed by Sub-section 2A of Section 69 introduced by Maharashtra Amendment Act are arbitrary, excessive and cannot be regarded reasonable. Arbitrariness and unreasonableness violates Articles 14 and 19(1)(g) of the Constitution. Hence, sub-section 2A of Section 69 as introduced by the Maharashtra Legislature clearly violates Articles 14, 19(1)(g) and 300A of the Constitution and is ultra vires and unconstitutional.

# SESSION XI

# BASIC DISPUTES UNDER CARRIAGE ACT

(2010)4SCC114

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 5611 of 1999

Decided On: 17.02.2010

**Economic Transport Organization Vs. Charan Spinning Mills (P) Ltd. and Anr.**

**Hon'ble Judges/Coram:** K.G. Balakrishnan, C.J., R.V. Raveendran, D.K. Jain, P. Sathasivam and J.M. Panchal, JJ.

Loss of insured goods entrusted to carrier on account of accident--Insurer compensated losses and assured executed letter of subrogation cum-special power-of-attorney in favour of insurer--Complaint by assured represented by insurer and insurer--Presumption of negligence under Section 9 of Carriers Act available--District Forum rightly allowed complaint--No interference called for.

The loss of consignment by the assured and settlement of claim by the insurer by paying Rs. 4,47,436 is established by evidence. Having regard to the presumption regarding negligence under Section 9 of Carriers Act, it was not necessary for the complainants to prove further that the loss/damage was due to the negligence of the appellant or its driver. The presumption regarding negligence was not rebutted. Therefore, the District Forum was justified in allowing the complaint brought by the assured (first respondent) represented by the insurer and the insurer for recovery of Rs. 4,47,436. The said order was affirmed by the State Commission and the National Commission.

Whether presumption of negligence of carrier under Section 9 of Carriers Act available in proceeding under Consumer Protection Act- Held, Section 14 (1) (d) of Consumer Protection Act does not operate to relieve carrier against presumption of negligence created under Section 9 of Carriers Act.

It is no doubt true that Section 14 (1) (d) of the Consumer Protection Act, 1986 (Act) contemplates award of compensation to the consumer for any loss suffered by consumer due to the negligence of the opposite party (carrier). Section 9 of Carriers Act, 1865 does not lay down a proposition that a carrier will be liable even if there was no negligence on its part. On the other hand, it merely raises a presumption that when there is loss or damage or non-delivery of goods entrusted to a carrier, such loss, damage or non-delivery was due to the negligence of the carrier, its servant and agents. Thus, where the consignor establishes loss or damage or non-delivery of goods, it is deemed that negligence on the part of the carrier is established. The carrier may avoid liability if it establishes that the loss, damage or non-delivery was due to an act of God or circumstances beyond its control. Section 14 (1) (d) of the Act does not operate to relieve the carrier against the presumption of negligence created under Section 9 of the Carriers Act.

(3)Consumer Protection Act, 1986--Sections 2 and 12--Complaint--Loss of insured goods entrusted to carrier due to accident--Settlement of claim by insurer--Subrogation--Assignment by assured to insurer--Maintainability of complaint by insurer--Matter referred to and answered by Constitution Bench--Principles elaborated.

The Supreme Court held -

(a)The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong-doer (service provider).

(b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c)The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a letter of subrogation-cum-assignment executed by the assured.

(d) Oberai, (2002) 2 SCC 407, is not good law insofar as it construes a letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

The principles relating to subrogation can be summarized thus :

(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrong-doer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a letter of subrogation, reducing the terms of subrogation, the rights of the insurer vis-a-vis the assured will be governed by the terms of the letter of subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrong-doer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled to the entire amount recovered from the wrong-doer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

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MANU/DE/3230/2011

**IN THE HIGH COURT OF DELHI**

RFA No. 425/1999

Decided On: 02.08.2011

**International Airport Authority Vs. Televista Electronics (Pvt.) Ltd.**

**Hon'ble Judges/Coram:** Valmiki J. Mehta, J.

Court decreed suit for recovery of money against Appellant/Defendant, on account of Appellant/Defendant having lost goods of Respondent/Plaintiff which were in its custody - Hence, this Appeal - Whether, Respondent/Plaintiff was bound to have made Airlines, i.e. M/s. KLM Airlines as a party and since M/s. KLM Airlines had not been made party to suit it was bad for non-joinder of necessary party. Held, bailor could directly sue sub-bailee with respect to value of goods which had been lost. Further, there could not be a defense that Appellant will not be liable because of a contract of Appellant with M/s. KLM Airlines which provides that in case of any loss or damage Appellant shall be indemnified by carrier. Trial Court had rightly held that contract between Appellant and carrier KLM Airlines shall operate inter se Appellant and Airlines. It could not, in any manner, alter or take away liability of Appellant towards Respondent whose consignment was lost. Court rejected statement that suit was bad because of non-joinder of M/s. KLM Airlines or there was no privity of contract with Appellant and Respondent. Thus, Appellant could not be sued and that Appellant could be exempted by virtue of Clause 8(1)(c) of its contract with M/s. KLM Airlines.

Whether, there was no privity of contract of Appellant with Respondent and Appellant was not liable to Respondent - Held, liability could have been either of carrier, who was bailee or of sub-bailee, who was Appellant. Accordingly, liability of original bailee could be governed by Air Act and liability of sub-bailee could be in accordance with Act and not Contract Act. If carrier could simply avoid its strict liability under various Acts pertaining to carriage of goods by simply making a sub-bailment, and this could not be done because same will defeat intention of Carriers Acts. Therefore, liability of a carrier under various Acts pertaining to carriage as Air Act, 1972, Carriers Act, 1865 was a strict liability more or less equal to that of an insurer. Thus, normal law of bailor and bailee could not apply to exempt a carrier who of course was a bailee, but shall be governed by special provisions of Carriage by Air Act, 1972. Hence, bank guarantee given by Respondent for releasing amount in its favour stands discharged.

MANU/TN/1051/2010

**IN THE HIGH COURT OF MADRAS**

Appeal Suit No. 113 of 2003

Decided On: 16.06.2010

**Jaihind Roadways Pvt. Ltd. by its Divisional Manager Vs. Hindustan Motors Limited and The Oriental Insurance Company Ltd. rep. by their Divisional Manager**

**Hon'ble Judges/Coram:** P.R. Shivakumar, J.

Civil - Damages - Trial Judge held that Appellant being a common carrier was liable to pay suit claim for non-delivery of suit consignment and decreed suit directing Defendant/Appellant to pay a sum together with a subsequent interest - Hence, this Petition - Whether, Appellant was liable to pay compensation for loss of consignment as goods were transported at owner's risk - Held, liability of a carrier to whom goods were entrusted for carriage was that of an insurer and carrier had to deliver goods safely, undamaged and without loss at destination, indicated by consignor. There was a clear admission regarding involvement of driver and cleaner in commission of offence. Cleaner was arrested and driver was yet to be arrested - Therefore, though there was a special contract to effect that goods were transported at owner's risk, since loss had occurred due criminal act of servant/agent of Appellant and Appellant was liable to pay compensation to first Respondent owner of goods.

Whether, Respondents were entitled to a decree against Appellant and Plaintiffs and were entitled to interest - Held, as per contract of insurance between 1st Plaintiffs as 2nd Plaintiff paid the value of the goods to the first plaintiff as evidenced by Ex.A12, subrogation letter. In terms of Section 10 of Carriers Act, claim was made by first Plaintiff within six months. Thereafter, for several communications made by the first Plaintiff through its Recovery Agent and by 2nd Plaintiff, after settlement of claim of first Plaintiff, Appellant was disputing its liability. By letter of subrogation, 2nd Plaintiff had got into shoes of 1st Plaintiff and thus became entitled to recover compensation for loss of goods from Appellant. However in order to avoid any technical plea, they have chosen to file suit jointly expressing no objection for a decree being passed in favour of 2nd Plaintiff lone or in favour of both Plaintiffs . Therefore, finding of Trial Court that Appellant was bound to pay value of goods, deserved to be confirmed.

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(2000)4SCC553

**IN THE SUPREME COURT OF INDIA**

C.A. No. 1 of 1997

Decided On: 27.03.2000

**Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd.**

**Hon'ble Judges/Coram:** Saiyed Saghir Ahmad and D.P. Wadhwa, JJ.

**Section 6 of Carriers Act, 1865 - matter related to liability of carriers - liability of carriers to whom goods entrusted for carriage is that of insurer and absolute in terms - carriers has to deliver goods safely, undamaged and without loss at destination indicated by consignor - Section 6 enables carriers to limit his liability by special contract - but carriers would still be liable if any loss or damage caused to goods on account of his own negligence or criminal act or that of his agents and servants.**

The liability of a carrier to. whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without lose at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.

"OWNER'S RISK" in the realm of commerce has a positive meaning. It is understood in the sense that the carrier would not be liable for damage or loss to the goods if it were not caused on account of carrier's own negligence or the negligence of its servants and agents. In Burton v. English (1863) 12 QBD 218 and again in Wade v. Cocker line (1905) 10 CC 47, it was held that in spite of the goods having been booked at "OWNER'S RISK", it would not absolve the carrier of its liability and it would be liable for the loss or damage to the goods during trans-shipment or carriage. These decisions granted absolute immunity to the carrier, but they have lost their efficacy on account of subsequent decisions in Sevens sons v. Cliffe S.S. Co. (1932) 1 KB 490, which was considered in Exercise Shipping Co. Ltd. v. Bay Maritime Lines Ltd. (The Fantasy) (1991) 2 LR 391 (Queen's Bench Division), in which it was observed as under:

The question whether words such as "at charterer's risk" can operate as an exemption cause in favour of a party otherwise liable for negligence was decided by Mr. Justice Wright (as he then was) in Sevens sons Travaruaktiebalag v. Cliffe Steamship Co. (1931) 41 LI LR 262 : (1932) I KB 490. He considered the authorities in detail and concluded:

It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charters' risk", standing alone and apart from any other exception in the charter- party, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness... I think that the words standing by themselves have also to be read as limited to losses and damages where there has been no negligence on the part of the shipowner or his servants. He went on to consider the charter-party terms in that case which also included an exceptions clause. Clause 11. He held that that clause should have its full effect whereas if "at charterers' risk" had included an exception of negligence, it might not have done so.

That judgment has been followed since 1932, for example in the Stranna (1937) 57 LI LR 231 : (1937) p. 130 and East & West Steamship Co. v. Hossain Brothers (1968) 2 LR 145 (Supreme Court of Pakistan) and it has not, so far as I am aware, been dissented from.

In Mitchell v. Lane. & Y.R., 44 LJQB 107 : LR 10 QB 256, it was held that "OWNER'S RISK" only exempts the carrier from the ordinary risks of the transit and does not cover the carrier's negligence or misconduct. So also, in Lewis v. The Great Western Railway Company 3 QB 195, the words "OWNER'S RISK", were held to mean, "at the risk of the owner, minus the liability of the carrier for the misconduct of himself or servants."

Thus the expression "AT OWNER'S RISK" does not exempt a carrier from his own negligence or the negligence of his servants or agents. We may now consider the facts of this case.

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MANU/MH/0641/2012

**IN THE HIGH COURT OF BOMBAY**

Suit No. 793 of 1980

Decided On: 11.05.2012

**The National Textile Corporation Ltd. Vs. K.L. Kapadia & Ors.**

**Hon'ble Judges/Coram:** R.S. Dalvi, J.

Breach of contract on account of lack of proof of delivery - Whether the Plaintiffs prove that under the contract of carriage, Defendant No. 2 committed breach of the same by delivering the goods to the Defendants No. 1 without obtaining discharge of the Lorry Receipt? Held, it was the responsibility of Defendant No. 2 to deliver to Defendant No. 1 and prove it by the signature of receipt of Defendant No. 1 on the lorry receipts. This was not shown by Defendant No. 2. The terms of the lorry receipts show the contract between the Plaintiff and Defendant No. 2 which the Plaintiff made on behalf of Defendant No. 1 having regard to the fact that consignments were to be delivered as per the invoices of the Plaintiff to Defendant No. 1. Defendant No. 2 would be liable to the Plaintiff for the amounts on the invoices which the Plaintiff would have been able to recover from Defendant No. 1 if the Plaintiff could have shown and proved the delivery to Defendant No. 1. And such proof would be contained in only the lorry receipts returned by Defendant No. 2 to the Plaintiff duly signed by Defendant No. 1 in acknowledgment of the delivery. Non obtaining a receipt would, therefore, constitute a breach of the contract. It tantamounts to a negligent act or an act in breach of trust reposed by the Plaintiff in Defendant No. 2 to deliver the goods and evidence delivery. For such default by Defendant No. 2, it would have to bear the compensation under Section 73 of the Indian Contract Act, 1872. Consequently the Plaintiff would be entitled to receive from Defendant No. 2 compensation for the loss and damage caused to the Plaintiff by non-delivery or lack of proof of delivery of the goods sent to Defendant No. 1 which is the amount under the invoices of the Plaintiff drawn upon Defendant No. 1 which the Plaintiff could have claimed from Defendant No. 1 by proving the delivery of the goods to Defendant No. 1 through the lorry receipts got acknowledged by Defendant No. 2 from Defendant No. 1 evidencing the delivery of goods. Consequently the Plaintiff has proved the breach committed by Defendant No. 2 in delivery of the goods under the consignments.

Whether the Plaintiffs prove that the Defendant No. 1 has committed breach of the contract by not retiring the documents against payment in respect of the suit goods? Held, Defendant No. 1 has not admitted receipt of the goods sought to be delivered by the Plaintiff. Defendant No. 1 has in fact shown that the few months thereafter the Plaintiff delivered the goods under 3 bills which came to be paid by Defendant No. 1 and which payment has been receipted by the Plaintiff. Defendant No. 1 has claimed that all the consignments delivered on a single date could not have been paid by Defendant No. 1 and that the delivery should have been staggered over a period of days. Defendant No. 1 has admitted that it has not made payment when the goods were presented by the Plaintiff's banker through State Bank of India. However it is denied that the goods were received by Defendant No. 1. The fact of the receipt claimed by the Plaintiff is not proved by the Plaintiff in the absence of the lorry receipts duly discharged showing the receipt of goods upon payment and that is because of the breach and default of the part of Defendant No. 2 in not obtaining receipt or such discharge. Besides the receipts of the goods relied upon by Defendant No. 2 pursuant to the admission of Defendant No. 1 under a letter dated 24th June, 1979 has not been proved by Defendant No. 2. Such receipt is, therefore, not proved and cannot be presumed by the Court. Consequently the breach by Defendant No. 1 is not proved.

Whether the Defendant No. 2 prove that Defendant No. 2 delivered goods under Lorry Receipts to Defendant No. 1? Held, the evidence led by Defendant No. 2 of its partner and sought to be corroborated by its employees DW. 3 & DW. 4 is not credible and is in fact seen to be false. It is, therefore, required to be rejected. Consequently Defendant No. 2 has not proved that Defendant No. 2 delivered the goods under the lorry receipts to Defendant No. 1.

Whether the Plaintiffs are entitled to a decree either jointly or severally against the Defendants or Defendant No. 2 in the sum of Rs. 84,931.48 p. with interest on the sum of Rs. 89,468.06 at the rate of 6 per cent per annum as claimed in the plaint? Held yes, the Plaintiff is entitled to the decree as prayed against Defendant No. 2. The Suit is thus decreed as prayed against Defendant No. 2. The Plaintiff shall be entitled to encash the demand drafts given by Defendant No. 2 for part of the Plaintiff's claim and deposited in this Court.

MANU/TN/0724/2005

**IN THE HIGH COURT OF MADRAS**

C.M.A. No. 289 of 1997

Decided On: 13.06.2005

**Shivashankar Textiles rep. by it's Proprietor Vs. The Union of India (UOI) owning Southern Railway by it's General Manager and The Union of India (UOI) owning Northern Railway by it's General Manager**

**Hon'ble Judges/Coram:** R. Balasubramanian and S. Ashok Kumar, JJ.

Civil - Compensation - Section 103(2) of Railways Act and Rule 3(1)(iii) of Railway Rules, 1990 - Tribunal held that Railway was not liable to meet claim of Applicant as quantified by him but they were liable to pay only as per declared weight of goods as compensation - Whether, order of Tribunal was justified.

Held, Exs.B.1 and B.2 proved that unless consignor declared value of goods, monetary liability of Railway Administration was only under Section 103(1) read with Rule 3(1)(iii) of Rules. Since consignor had not declared value of goods and paid such percentage charge as may be prescribed. However, consignor could not legally claim that he was entitled to be paid entire value of that portion of non-delivered goods. When rights of consignor and Railway Administration were governed by Statutory provision Railway Administration was no liable for entire value of goods entrusted to them. Therefore, Railway Administration might call upon every consignor to declare value of goods and pay percentage charges on such value of goods. Thus, Claims Tribunal did not suffer from any illegality and accordingly it was sustained.

(2002)2SCC273

**IN THE SUPREME COURT OF INDIA**

Decided On: 09.01.2002

**National Insurance Co. Ltd. Vs. Sky Gems**

**Hon'ble Judges/Coram:** D.P. Mohapatra and K.G. Balakrishnan, JJ.

**Insurance - CIF Contract - Precious stones exported by respondent stolen or lost in transit - No payment made by consignee - Insurance premium paid in Indian Currency and respondent continued to have title over the goods - Had the title passed to the consignee and if they had preferred the claim the insurance amount would have been payable in London in Pound Sterling - National Commission wrong in making directions to the insurance company to pay the amount in Pound Sterling merely on the ground that the policies issued by them stated that the insurance amount was payable at London**

Held, it is clear that the right of the buyer to claim policy amount would arise when he obtained title to the property and he must produce the documents of transfer. Here, the buyer was not in possession of any such documents of title. The letter written by the consignee, M/s. Emdico (London) Limited on 8th April, 1991 clearly shows that they had not paid the value of the missing merchandise and had suggested to M/s. W.B. Webster & Co. that the claim may be settled with the respondent-Sky Gems in India. The consignee could not produce any documents concerning their title to the goods before M/s. W.K. Webster & Company and this evidently shows that the title had not passed to the consignee at London. The insurable interest over the goods continued to be with the respondent. Under such circumstances, the respondent is not entitled to receive the payment in Pounds Sterling.

The respondent has paid the insurance premium in Indian currency and continued to have title over the goods as it never passed to the consignee. Had the title passed to the consignee, and if they had preferred the claim, the insurance amount would have been payable in London in Pound Sterling. The National Commission did not notice these points and directed the appellant to pay the amount in Pound Sterling mainly on the ground that the policies issued by them stated that the insurance amount was payable at London.

Having regard to the facts and circumstances of the case, we do not think that the appellant is liable to pay the insurance amount in Pounds Sterling. We set aside the direction of the National Commission to pay the amount in Pounds Sterling and hold that the respondent is entitled to get Rs. 28,30,000 with interest @ 18% from the date on which it preferred the claim petition before the appellant, till payment. The respondent is also entitled to receive Rs. 20,000 towards costs ordered by the National Commission.

# SESSION XII

# BASIC DISPUTES UNDER CONTRACT ACT

(2013)10SCC114

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 1517 of 2013 (Arising out of S.L.P. (C) No. 2490 of 2008)

Decided On: 21.02.2013

**A.S. Motors Pvt. Ltd. Vs. Union of India (UOI) and Ors.**

**Hon'ble Judges/Coram:** T.S. Thakur and Gyan Sudha Misra, JJ.

**Contract for collection of fee for use of National Highway terminated on grounds of violations including complaints of collection of excess fee from vehicles passing through Toll Plaza. Performance security forfeited – Grant of partial relief of quashing of revocation of bank guarantee by High Court held to be unjustified.**

The appellant was indulging in malpractices and was abusing its position as a contractor, putting the public at large to unnecessary harassment and exaction of money not legally recoverable from them. The material collected could and was rightly made a basis for the termination of contract by the competent authority. The appellant had breached the contractual stipulations and had undeservedly enriched itself before it turned to the Court to claim relief in the extraordinary writ jurisdiction of the High Court on equitable considerations. Such an attempt could and ought to have been frustrated by the High Court, as indeed has been done, no matter only partially. Without a proper estimation of the excess received by the appellant, it was not open to the respondent to invoke the bank guarantee and recover the entire amount of covered by the same. The High Court was, in that view, correct in holding that invocation of bank guarantee was not justified having regard to the fact that the Authority had already recovered the penalty levied by it and also forfeited the performance security amount of ` 2,20,00,125 in the form of bank drafts furnished by the appellant.

(2011)3SCC710

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 2276 of 2011 (Arising out of SLP (C) No. 9134/2009)

Decided On: 02.03.2011

**Bharat Petroleum Corporation Ltd. Vs. Chembur Service Station**

**Hon'ble Judges/Coram:** H.L. Gokhale and R.V. Raveendran, JJ.

Where an employer or principal permits the use of its premises, by its employee or agent, such use, whether loosely referred to as `possession' or `occupation' or `use' by the employee or the agent, is on behalf of the employer/principal. In other words, the employer/principal continues to be in possession and occupation and the employee/agent is merely a licensee who is permitted to enter the premises for the limited purpose of selling the goods of the employer/principle. The employee/agent cannot claim any `possession' or `occupation' or `right to use' independent of the employer/principal who is the licensor. In such cases if the employee is terminated from service, he cannot obviously contend that he is in "occupation" of the premises and that he can be evicted or dispossessed only by initiating action in a court of law. Similarly the agent who is permitted to enter the premises every day to sell the goods cannot, on termination of the agency, contend that he continues to be in exclusive occupation of the premises and unless evicted through a court of law entitled to continue in occupation. This is because licence that is granted to the employee/agent is a limited licence to enter upon and use the premises, *not for his own purposes or his own business,* but for the purposes of the employer/principal, to sell its goods in the manner prescribed by the employer/principal and subject to the terms and conditions stipulated in the contract of employment/agency in regard to the manner of sales, the prices at which the goods are to be sold or the services to be rendered to the customers. In such cases, when the employment or agency is terminated and the employer/principal informs the employee/agent that his services are no longer required and he is no longer the employee/agent, the licence granted to such employee/agent to enter the retail outlet stands revoked and the ex-employee/ex-agent ceases to have any right to enter the premises. On the other hand, the employer/principal who continues to have possession will be entitled to enter the premises, or appoint another employee or agent, or legitimately prevent the ex-employee/ex-agent from entering upon the premises or using the premises. In such cases, there is no need for the licensor (that is the employer or the principal) to file a suit for eviction or injunction against the ex-employee or ex-agent. The licensor can protect or defend its possession and physically prevent the licensee (employee/agent) from entering the outlet.

In this case, the DPSL Agreement clearly demonstrated that licence granted by the Appellant enabled the licensee (Respondent) to enter upon the retail outlet premises only for the limited purpose of using the facilities (that is Motor Spirit/HSD Pumps, storage tanks etc.) for purposes of sale of Appellant's Motor Spirit, HSD, Motor oils, Greases or other motor accessories (together referred to as `Products of the Appellant') as a licensee of the Appellant at the prices specified by the Appellant. The Respondent could not sell any other goods or the products of any one else. It could not charge a price different from what was stipulated by the Appellant. The Respondent could not enter the outlet premises if the licence granted to the Respondent to sell the Appellant's petrol and petroleum products was terminated. In other words, the Respondent-licensee had no licence to enter the petrol pump premises or use the `facilities', if it could not sell the products of the Appellant. The relevant terms of the DPSL agreement extracted in para 17 above show that the licence was given to the licensee to enter the Appellant's outlet premises and use the equipment/facilities provided by the Appellant for the exclusive purpose of sale of the products of the Appellant. This has been completely lost sight of by the courts below.

It should be noted that the Appellant has installed specialized equipments (that is HSD/Petrol/oil dispensers/pumps attached to storage tanks through pipes/fittings) and the licence given to the Respondent was to *enter upon the premises to use the said equipment/facilities* provided by the Appellant for the purpose of sale of the Appellant's products (that is motor spirit, HSD, motor oil, grease etc.) at the rates/prices fixed by the Appellant. If the Respondent could not sell these petroleum products on account of suspension/termination, there is no occasion or need for the Respondent to enter upon the outlet premises as it cannot sell any other goods or use the outlet for any other purpose. Therefore the licence to enter and use the outlet premises also comes to an end when the licence is terminated or supply of Appellant's products is stopped. Clause 15 of the DPSL Agreement specifically provides that on revocation or termination of the licence for any cause whatsoever, the licensee shall cease to have any right to enter or remain in the premises or use the facilities. As the licence is only to enter the Appellant's outlet premises to use the facilities for sale of Appellant's petroleum products, if the licence to use the Appellant's facilities for sale of Appellant's products comes to an end and supply of Appellant's products for sale by the Respondent is stopped, there is no question of the licensee entering the outlet premises at all or remaining in the outlet premises or using the outlet premises.

To reiterate, the permission granted to the Respondent by the Appellant to enter the outlet premises is for the purposes of using the equipments/facilities belonging to the Appellant installed in the outlet, to sell the products of the Appellant. Under the licence (DPSL) agreement, the Respondent cannot enter the premises for any purpose other than for using the facilities or equipment installed by the Appellant or for any purpose other than selling the petroleum products of the Appellant. Therefore the licence to enter the premises and the licence to use the facilities/equipment is incidental to the licence to sell the products of the Appellant as a licensed dealer, distributor or agent. There is no licence in favour of the licensee to use the premises or use the facilities independent of the licence to sell the goods of the Appellant. Further the agreement makes it clear that the agreement does not create any tenancy rights in the premises; that it is terminable by 90 days notice on either side and it is terminable by the Appellant even without giving such notice in the event of breach. Therefore there cannot be an injunction restraining the Appellant from entering upon its outlet premises or using the outlet for its business or inducting any new dealer or agent.

The occupation by the Respondent was not occupation on its own account, but occupation on behalf of the Appellant. Therefore the Respondent was not in `occupation' of the outlet in its own right for its own proposes, but was using the outlet and facilities in the possession and occupation of the Appellant, to sell the Appellant's products in the manner provided in the DPSL Agreement. In such a situation, the agent who is called as the licensee does not become a deemed tenant. The Respondent could not claim the protection of any rent control law as a tenant. Consequently, the Appellant is entitled to continue in possession of the petrol pump premises and use it for its business. The Appellant is also entitled to lawfully prevent the Respondent from entering upon the premises. The trial court is directed to dispose of the suit expeditiously, on the basis of the evidence, in accordance with law, keeping in view the legal position explained above.

2015(6)SCALE479

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 2803, 1969, 2072, 5376, 9116 of 2014, Writ Petition (Civil) Nos. 1056, 971 of 2014 and 180 of 2015

Decided On: 14.05.2015

**Bharti Airtel Ltd. and Ors. Vs. Union of India (UOI) and Ors.**

**Hon'ble Judges/Coram:** Jasti Chelameswar and R.K. Agrawal, JJ.

License granted under Section 4(1) of Act, 1885 was contract between Licensor and License. In Union of India and Anr. v. Association of Unified Telecom Service Providers of India and Ors. (2011) 10 SCC 543 the Supreme Court held that once a licence is issued under the proviso to Section 4(1) of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence including the definition are part of a contract between the licensor and the licensee.

From the language of the relevant clauses of the licences which are noted earlier, it is clear that the Licensees have no automatic right of renewal/extension on the expiry of the original tenure of the license. Under contract neither Licensor nor Licensee had right to insist that other party should continue with contract. The contract only provided for extension of the period of license at the sole discretion of the Licensor subject to the condition that the Licensee makes an application seeking an extension during the 19th year of the currency of the licence.

Such licences are in the nature of largesse from the State. No doubt, the authority of the State to distribute such largess is always subject to the condition that the State must comply with the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. Even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of license should be "on such conditions and in consideration of such payments as it thinks fit", must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of license must be non-discriminatory. The conditions contained in the licenses in question stipulate that the term of the license could be extended on mutually agreed terms, if the Government of India deems it expedient. The obligations of the Government of India flowing from the Constitution as well as a statute necessarily require the Government of India to grant licences as rightly pointed by the Tribunal (TDSAT) only "in public interest and for public good".

The conditions of licences/contracts in whatever language provided for consideration for the extension of a licence are necessarily required to be interpreted in consonance with the obligation of the Licensor/Union of India under the Constitution and the laws. Otherwise, the contract would be rendered void for being inconsistent with public policy, the principle expressly incorporated Under Section 23 of the Indian Contract Act, 1872.

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MANU/SC/0869/2015

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 6086 of 2015 (Arising out of SLP (C) No. 19380 of 2014)

Decided On: 14.08.2015

**State of Kerala and Ors. Vs. M.K. Jose**

**Hon'ble Judges/Coram:** Dipak Misra and Prafulla C. Pant, JJ.

The present appeal, by special leave, assails the correctness of the judgment dated 24.02.2014 passed by the High Court of Kerala at Ernakulam in W.A. No. 1912/2013 whereby the Appellate Bench has reversed the decision of the learned Single Judge rendered in W.P. (C) No. 22541 of 2013 whereunder he had declined to interfere with the order of the Secretary, Public Works Department, Road and Projects of the State terminating the contract awarded to the Respondent and forfeiting the security deposit placed by the contractor for the work to the state and further stating that the work had been put an end to at the cost and risk of the contractor.

The thrust of the matter is whether the Appellate Bench in intra-court appeal arising from a petition under Article 226 of the Constitution, should have carried out the exercise that it has done and eventually quashed the order terminating the contract by the competent authority of a Department on the ground that it was passed on erroneous facts, for the Respondent contractor, as per the Commission's report, had done higher percentage of work. We would not like to comment anything on the order passed by the learned Single Judge as that was not challenged by the State before the Appellate Court in appeal. The learned Single Judge had directed measurement to be carried out prior to floating of tender for the balance work. That direction, as is evident, has been accepted by the State.

A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved.

In *State of Bihar v. Jain Plastics and Chemicals Ltd.* (2002) 1 SCC 216, a two-Judge Bench reiterating the exercise of power Under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated:

> It is to be reiterated that writ petition Under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the Respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion Under Article 226. …..Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

In *National Highways Authority of India v. Ganga Enterprises* (2003) 7 SCC 410, the Respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that disputes relating to contracts cannot be agitated Under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil* (2000)6SCC293, *State of U.P. v. Bridge and Roof Company (India) Ltd.* (1996)6SCC22 and *Bareilly Development Authority v. Ajai Pal Singh* (1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr. Dave, however, relied upon the cases of *Verigamto Naveen v. Govt. of A.P.* (2001) 8 SCC 344 and *Harminder Singh Arora v. Union of India* (1986) 3 SCC 247. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.

In *Gunwant Kaur v. Municipal Committee, Bhatinda* (1969) 3 SCC 769, it has been held thus:

> 14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition Under Article 226 merely because in considering the Petitioner's right to relief questions of fact may fall to be determined. In a petition Under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

> 15. From the averments made in the petition filed by the Appellants it is clear that in proof of a large number of allegations the Appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification Under Section 4 by the Collector.
>
> 16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the Respondents, and should have proceeded to try the petition instead of relegating the Appellants to a separate suit.

[Emphasis added]

In *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553, a two-Judge Bench after referring to various judgments as well as the pronouncement in *Gunwant Kaur* (supra) and *Century Spg. And Mfg. Company Ltd. v. Ulhasnagar Municipal Council* (1970) 1 SCC 582, has held that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* the Supreme Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

From the above discussion, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

While laying down the principle, the Court sounded a word of caution stating that while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corporation v. Registrar of Trade Marks* (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

A reference to *Noble Resources Ltd. v. State of Orissa and Anr.* (2006) 10 SCC 236 would be seemly. The two-Judge Bench referred to the *ABL International* (supra), *Dwarkadas Marfatia and Sons v. Board of Trustees, Port of Bombay* (1989) 3 SCC 293, *Mahabir Auto Stores v. Indian Oil Corporation* (1990)3SCC752 and *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* (2004)3SCC214 and opined that although the scope of judicial review or the development of law in this field has been noticed hereinbefore, particularly in the light of the decision of this Court in *ABL International Ltd*., each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (See *Binny Ltd. v. V. Sadasivan* (2005) 6 SCC 657 and *G.B. Mahajan v. Jalgaon Municipal Council* (1991) 3 SCC 91.)

We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International* (supra) was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the Respondent and quashed the order of termination of contract. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers Under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the Respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest.

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2015(5)SCALE615

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 4043 of 2015 (Arising out of SLP (C) No. 10173 of 2011) and Civil Appeal Nos. 4044-4046 of 2015 (Arising out of SLP (C) Nos. 14188-14190 of 2011)

Decided On: 28.04.2015

**Central Bank of India and Ors. Vs. C.L. Vimla and Ors.**

**Hon'ble Judges/Coram:** Jasti Chelameswar and Pinaki Chandra Ghose, JJ.

The questions that need to be decided are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In *Ram Kishun and Ors. v. State of U.P. and Ors.* (2012) 11 SCC 511, this Court has held that "*in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor."* The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.

In the case of *Ram Kishun* (supra), this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed:

> "Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance."

In the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception.

After a thorough reading of the Form of Guarantee for Advances & Credit Generally, attention has been drawn to Clause 2 where Respondent No. 1, C.L. Vimala and one of her sons N. Ramesh Babu, have stated under the relevant part of the clause as under:

> *2)......in relation to the subject matter of this guarantee or any judgment or award obtained by you against the principal debtor shall be binding on us....*

The Supreme Court has held in *United Bank of India v. Bengal Behar Construction Co. Ltd. and Ors.* (1998) 8 SCC 653, that the Clauses in the letter of guarantee are binding on the guarantors as follows:

> "In view of the above, the question regarding confirmation of the decree against the guarantors now needs to be settled. ................. we see no reason why the guarantors should not be made liable under the letters of guarantee, the terms whereof clearly stipulate that on the failure of the principal debtor to abide by the contract, they will be liable to pay the amount due from the principal debtor by the Appellants. *Clause 15 of the letter of guarantee, in terms states that any action settled or stated between the bank and the principal debtor or admitted by the principal debtor shall be accepted by the guarantors as conclusive evidence. In view of this stipulation in the letter of guarantee, once the decree on admission is passed against the principal debtor, the guarantors would become liable to satisfy the decree jointly and severally."* (Emphasis supplied)

Thus, we see no reason why the Joint Memo, which states compromise arrived at between the Central Bank of India and the principal debtors, would not bind C.L. Vimla when Under Clause (2) she has admitted that any judgment or award obtained by the Central Bank of India against the principal debtor would bind the parties.

The mere fact of ignorance cannot be a valid ground. The Respondent, C.L. Vimala and her son, N. Surya Bhagavan who signed the joint memo, were residing in the same house. We see no reason why the Respondent would not know of the joint memo, when she could have by reasonable means made herself aware of the proceedings.

It appears that Respondent No. 1 Smt. C.L. Vimla filed writ petitions one after the other, being Writ Petition No. 6625 of 2006 filed on 1st June, 2006, and another writ petition, being Writ Petition No. 8186 of 2006, was filed by her two sons on 20th June, 2006. The said writ petitions were also dismissed by the High Court. Smt. C.L. Vimla had life interest of 1/6th share in the property in question. It is not in dispute that Smt. C.L. Vimla was residing with her son Respondent No. 3 and was under his care and custody and it appears from the facts that the said

Respondent No. 3 categorically stated before the State Legal Services Authority on his behalf and on behalf of other Defendants, including his mother, the Respondent No. 1, in respect of the settlement dated 20th March, 2004. We have further noticed that the Court on a number of occasions granted time to deposit the amount to meet the liabilities of the bank by the Respondents. But it appears that, time and again, they have failed to comply with the orders.

The Respondent Nos. 3 to 8 who were actual owners of the property in dispute have remained ex-parte throughout, i.e. from the date of filing of Miscellaneous Petition dated 29th April, 2006, challenging the award dated 20th March, 2004. Respondent No. 1 had the only right of residence in respect of the property in question. She did not dispute the fact that she was the guarantor in the transaction by which her sons took loan from the Central Bank. It is also not in dispute that the property was mortgaged with the Bank.

We cannot brush aside the fact that Respondent Nos. 4, 6 & 7 filed a claim petition before the Recovery Officer on 4th January, 2007 claiming their share of balance of sale proceedings after adjustment of the dues of the Central Bank which shows that the parties to the dispute have accepted the award passed by the Lok Adalat. It appears to us that the High Court did not consider the said facts and further it has escaped from the mind of the High Court that the auction purchaser has purchased the auctioned property for sale consideration of Rs. 3.27 crores and 25% of the sale consideration was duly paid on 5th October, 2006 and furthermore on 19th October, 2006, the balance amount of sale consideration was duly paid by the auction purchaser. We have further noted that the sale was confirmed on 15th November, 2006. The sale certificate was also issued in favour of the auction purchaser after paying the requisite stamp duty and registration fees which, as pointed out to us on behalf of the auction purchaser, to the tune of Rs. 30,73,800/-. It is also not in dispute that auction purchaser was put in possession of the property and is still in possession of the property since the sale certificate was issued and registration was made in his favour. It is submitted on behalf of the auction purchaser that he has purchased the property by availing private borrowing for the said property and he is paying nearly Rs. 5 lakhs per month as interest.

Therefore, the equity and good conscience also has to play a role in the matter in question on the given facts and after considering the conduct of the Respondents in the matter. In these circumstances, we feel that it would not be proper for us at this stage to set aside the sale, as has been done by the High Court without taking into consideration all these facts. Further, the High Court has failed to appreciate these facts and wrongly held that the auction purchaser is a party to the negligence of the Recovery Officer and, accordingly, the sale was set aside. In our opinion, the auction purchaser had nothing to do in holding the auction. Rather he deposited the money after bonafidely participating in the auction and, in fact, suffered for long time to pay a price by participating in auction proceedings.

In these circumstances, we further noticed that the principal debtors were not prepared to pay back the amount to the Bank and did not choose to defend themselves properly. The conduct of the principal debtors also cannot be overlooked by us.

Accordingly, we set aside the order passed by the High Court and hold that since the auction purchaser has already paid the full amount of sale consideration and is in possession of the property in question for more than about 8 years, for equity and good conscience, we do not intend to interfere with his possession and we, therefore, set aside the order passed by the High Court, and allow these appeals.

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(2013)1SCC641

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 7134 of 2012 (Arising out of SLP (C) No. 8950 of 2010) and Civil Appeal Nos. 7135-7136 of 2012 (Arising out of SLP (C) Nos. 26514-26515 of 2011)

Decided On: 28.09.2012

**Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Ors.**

**Hon'ble Judges/Coram:** S.H. Kapadia, C.J.I., A.K. Patnaik and Swatanter Kumar, JJ.

Section 45 is a provision falling under Chapter I of Part II of the Arbitration and Conciliation Act, 1996 which is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multiparty agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the prerequisites under Sections 44 and 45 read with Schedule I.

Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

The provisions of Section 45 of the Arbitration and Conciliation Act, 1996 would prevail over provisions of C.P.C. When the court is satisfied that agreement is enforceable, operative and not null and void it is obligatory on court to make reference to arbitration and pass appropriate orders in relation to legal proceedings before court in exercise of its inherent powers.

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2011(8)SCALE301

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 6437 of 2011 (Arising out of Special Leave Petition (C) No. 28251/2008) and Civil Appeal No. 6438 of 2011 (Arising out of Special Leave Petition (C) No. 31269/2008)

Decided On: 08.08.2011

**Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates P. Ltd. and Anr.**

AND

**Ramaniyam Real Estates P. Ltd. Vs. Citadel Fine Pharmaceuticals and Anr.**

**Hon'ble Judges/Coram:** G.S. Singhvi and A.K. Ganguly, JJ.

The question is whether from the facts of this case vendor can raise a defence to the suit for specific performance of the contract that time being of the essence of this contract, the Court cannot order its specific performance when Plaintiff failed to discharge its part of the contract within time and when after expiry of time, the contract was cancelled by the vendor in terms of Clause 9 of the Contract.

The settled law seems to be that in a case for specific performance of contract relating to immovable property time is not normally of the essence. However, this is not an absolute proposition and it has several exceptions. Reference in this connection may be made to the decision of Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* reported in (1915-16) 43 I.A. 26. Viscount Haldane delivering the judgment for the Judicial Committee of the Privy Council held that the law applicable to this question is contained in Section 55 of the Indian Contract Act and the learned Law Lord was of the opinion that Section 55 of the Indian Contract Act does not lay down any principle which is different from those which obtain under the law of England with regard to contracts for sale of land. It was further held that in cases relating to specific performance, equity, which governs the rights of the parties, does not look always at the express term of the agreement but at the substance of it in order to ascertain whether the parties named a specific time within which completion was to take place and whether the parties in substance intended that the completion should take place within a reasonable time. The learned Law Lord made it clear that equity can operate in the construction of a contract "unless excluded by any clearly expressed stipulation". However, it was made clear that equity will not assist where there has been undue delay on the part of one party to the contract and one party has given notice to the other party that the defaulting party must complete the contract within a definite time. A further caution was added by saying that equity will not assist when other circumstances will result in injustice on application of equitable principle. The aforesaid principles in *Jamshed Khodaram* (supra) were accepted by a three-Judge Bench of this Court in the case of *Gomathinayagam Pillai and Ors. v. Palaniswami Nadar* AIR 1967 SC 868.

From the terms of agreement in this case which have been set out in the earlier part of the judgment it is clear that the time is of the essence and this is clearly stipulated and understood by the parties having regard to the previous correspondence and also having regard to the laid down terms of the contract and especially when the consequence of non completion of the terms by purchaser within the stipulated time was spelt out in Clause 9.

In a case where time is of the essence of the contract, the consequence of non-performance of such term has been very succinctly explained by *Chitty on Contracts, (Volume 1, Thirteenth Edition, Sweet & Maxwell in paragraph 21-015)* that in determining the consequences of a stipulation that time is to be "of the essence" of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a non-essential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence. In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction. *Fry in his Treaties on the Specific Performance of Contracts (Sixth Edition)* has stated that time is originally of the essence of the contract whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied. Time may be implied as essential in a contract from the nature of the subject matter with which the parties are dealing. In a contract relating to commercial enterprise, the Court is strongly inclined to hold time to be essential, whether the contract is for the purchase of land or for such purposes or more 'directly for the prosecution of trade.

In the present case, the purchaser is admittedly in the business of building construction and is entering with agreement for purchasing the plot on commercial basis. The instant case relates to a contract in commercial transaction and the Court can take judicial notice of the fact that in the city of Chennai the price of real estate is constantly escalating and the clear intention of the parties, as it appears from the stipulations of the agreement, was to treat time as the essence of the contract. Having regard to the aforesaid principles the court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the Plaintiff-purchaser who has failed to perform his part of the obligation within the time stipulated.

In *K.S. Vidyanadam and Ors. v. Vairavan* (1997) 3 SCC 1 this Court explained how discretion is to be exercised by the Court before granting specific performance. This Court held that in cases of urban properties in India it is well known that prices are going up sharply over the last few decades particularly after 1973 and that the Court cannot be oblivious of the reality of constant and continuous rise in the value of urban properties. In that context the time limit set in the contract has to be strictly construed. In the case of **Vidyanadam** (supra) there is no such strict stipulation as time being of the essence of the contract as is in the instant case even then the Court refused to grant the relief of specific performance.

46. In *Vidyanadam (*supra) reference was made to a Constitution Bench judgment of this Court in *Chand Rani (Smt.) (Dead) by L.Rs. v. Kamal Rani (Smt.) (Dead) by L.Rs.* (1993) 1 SCC 519, the Supreme Court formulated the proposition that even where parties have expressly provided time to be of the essence of the contract, such a stipulation will have to be read along with other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. The learned Judges indicated the following circumstances which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week the work undertaken remains unfinished after the expiry of time. The Constitution Bench held that such clauses would be construed as rendering ineffective the express provision relating to time being of the essence of contract.

In the instant case, in the said agreement no such clause, as aforesaid, exists. Rather the stipulation as time being of the essence of the contract was specifically mentioned in Clause 10 and the consequences of non-completion are mentioned in Clause 9. So from the express terms of the contract and the commercial nature of the transaction and the surrounding circumstances make it clear that the parties intended time in this case was intended to be of the essence of the contract.

On a combined reading of Section 9 of the Specific Relief Act and Section 55 of The Indian Contracts Act it is clear that in this case the vendor as a promise, was within its right to terminate the contract by sending the letter dated 4th September, 1996 in terms of Clause 9 of the Contract while returning the advance money of Rs. 10,00,000/-. It is clear that the Plaintiff has not discharged its burden within the time specified and is not entitled to a specific performance of the contract. Therefore, the approach of the High Court both by the Single Judge and the Appellate Bench cannot be sustained.

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MANU/SC/0313/2015

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 1440-1441 of 2015 (Arising out of SLP (C) Nos. 35365-35366 of 2012)

Decided On: 04.02.2015

**Construction & Design Services Vs. Delhi Development Authority**

**Hon'ble Judges/Coram:** T.S. Thakur and A.K. Goel, JJ.

The Respondent awarded a contract to the Appellant for constructing a sewerage pumping station. The contract contained the clause stipulating that in the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete. The Appellant failed to complete construction and the contract was terminated. The Superintending Engineer of the Respondent levied compensation of Rs. 20,86,446/- for delay in execution of the project. The High Court dismissed the suit of the Respondent for payment of compensation, holding that the Respondent had not treated the time fixed for performance of the contract as of essence and the compensation stipulated in the agreement was in the nature of penalty. The basis for levy of compensation had not been indicated so as to determine whether the compensation claimed was reasonable. On appeal, the High Court reversed the previous decision.

The Supreme Court disposed off the appeal and held that the said pumping station was of public utility to maintain and preserve clean environment, the absence of which could result in environmental degradation by stagnation of water in low lying areas. Delay also resulted in loss of interest on blocked capital. In these circumstances, loss could be assumed, even without proof and burden was on the Appellant who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if technically the time was not of essence, it could not be presumed that delay was of no consequence. Even if there is no specific evidence of loss suffered by the Respondent, the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis.

It could be presumed that delay in executing the work resulted in loss for which the Respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. The Respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material, but it did not do so. It will be fair to award half of the amount claimed as reasonable compensation.

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(2010)11SCC186

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 6077 of 2010 (Arising out of S.L.P. (C) No. 11505 of 2010)

Decided On: 30.07.2010

**Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Ors.**

**Hon'ble Judges/Coram:** P. Sathasivam and Anil R. Dave, JJ.

**Whether, Petition was maintainable to enforce a contractual obligation of State or its instrumentality by an aggrieved party - Held, if instrumentality of State acts contrary to public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of Constitution of India in its contractual or statutory obligation, Petition would be maintainable - However, a legal right must exist and corresponding legal duty on part of State and if any action on part of State was wholly unfair or arbitrary, writ courts can exercise their power - Hence, High Court was fully justified in issuing a writ of mandamus for return of its title deeds - Appeal dismissed.**

It is clear that, (a) in the contract if there is a clause for arbitration, normally, writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of

India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power.

The writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs. In the case on hand, it is not in dispute that the appellant- Bank, being a public sector Bank, discharging public functions is "State" under Article 12. In view of the settlement of the dues on the date of filing of the writ petition by arrangement made through another Nationalized Bank, namely, State Bank of India and the statement of accounts furnished by the appellant-Bank subsequent to the same i.e. on 14.05.2009 is 0.00 (nil) outstanding, we hold that the High Court was fully justified in issuing a writ of mandamus for return of its title deeds. In the light of the above conclusion, we are unable to accept the claim of the appellant-Bank and on the other hand, we are in entire agreement with the direction issued by the learned Single Judge affirmed by the Division Bench. Consequently, the appeal of the Bank is dismissed. The appellant-Bank is directed to return the title deeds deposited by the respondent-Company within a period of two weeks from today.

(2014)1SCC686

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 1557 of 2004 with Civil Appeal Nos. 1553, 1548, 1555, 1556, 1549, 1552, 1551, 1558, 1550, 1559, 1543, 1542, 1546, 1544, 1545 and 1547 of 2004

Decided On: 17.01.2013

**Export Credit Guarantee Corpn. of India Ltd Vs. Garg Sons International**

**Hon'ble Judges/Coram:** B.S. Chauhan and V. Gopala Gowda, JJ.

**Doctrine of Contra Proferentum does not apply in case of commercial contracts since the clauses of the contract are bilateral and mutually agreed upon in the commercial contract.**

Principles of law in interpretation of contract of insurance - It is a settled legal proposition that while construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well-settled, that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed in order to determine the extent of the liability of the insurer. Therefore, the endeavor of the Court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties.

The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the insurance company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon. Thus, it is not permissible for the Court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the Court, by way of which it interferes in the terms of an insurance agreement is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement.

(2011)1SCC429

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 9821-9822 of 2010 (Arising out of S.L.P. (C) Nos. 14985-14986 of 2010), Civil Appeal Nos. 9824-9825 of 2010 (Arising out of S.L.P. (C) Nos. 15008-15009 of 2010) and Civil Appeal No. 9826 of 2010 (Arising out of S.L.P. (C) No. 17435 of 2010)

Decided On: 22.11.2010

**J.P. Builders and Anr. Vs. A. Ramadas Rao and Anr.**

**Hon'ble Judges/Coram:** P. Sathasivam and Anil R. Dave, JJ.

**Enforceability of Contract - Section 16(c) of the Specific Relief Act, 1963 -** The words 'ready' and 'willing' imply that the person was prepared to carry out the terms of the contact - Distinction between readiness and willingness is that the former refers to financial capacity and the latter to the conduct of the Plaintiff wanting performance and generally, readiness is backed by willingness. Section 16(c) puts a condition precedent for obtaining relief of grant of specific performance. Initiating Party in a suit for specific performance, must allege and prove a continuous readiness and willingness to perform the contract on his part from the date of the contract.

In the instant case, pursuant to assertion in the form of specific plea in the plaint and correspondence in the form of letter, followed by assertion in the witness box at the time of trial, impugned findings rightly concluded that the Plaintiff has proved and complied with the mandates provided under Section 16(c) of the Specific Relief Act - Accordingly, based on materials placed on record, specific assertion in the plaint, oral and documentary evidence as to execution of agreement, part-payment of sale consideration and financial capacity to execute the sale deed, bank statements, the Plaintiff proved his readiness and willingness to perform his part of obligation under the contract - Impugned finding correct and to be upheld

**Contingent Contracts -** If the condition prescribed or even described in the contract is impossible, such contracts become void and not enforceable in terms of Section 32 of the Indian Contract Act, 1872. In the instant case only the execution of the sale deed was postponed to a future date. Merely because the contract insisted settlement of a loan of the bank and handover the title deeds to the Plaintiff from the bank are not impossible events in the light of the performance made by the Plaintiff, the contract in question did not come to an end on this ground and such contract is not a contingent contract and undoubtedly, the Court has jurisdiction to grant relief in terms of the contract. Contract in question is capable of performance and the contention that it is a contingent contract and incapable of performance held to be not acceptable.

**Right of Marshalling - Exercise thereof by subsequent purchaser under Section 56 of the Transfer of Property Act, 1882 - Whether such right available to a decree holder in a suit for specific performance and relief can be granted in the absence of any pleading and issue before the Trial Court - Held,** the concept as in Section 56 applies to sales in a manner similar to Section 81 of the Transfer of Property Act which applies to mortgages alone. Section 56 deals with the concept of marshalling in a transaction involved in subsequent sale. Doctrine of marshalling rests upon the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds. In the instant case in view of the sale agreement which resulted into decree for specific performance, the Plaintiff was entitled to insist upon Defendants to have the mortgage debt satisfied out of the properties not sold to the Plaintiff and in any case if the sale proceeds are not sufficient then to proceed against the said suit properties. Plaintiff was under an impression that the Trial Court would grant the entire relief as claimed and did not anticipated that he could get a part of relief sought for by him. There was no occasion for the Plaintiff to raise the plea of marshalling at the time of filing of the suit. Even otherwise the plea of marshalling being pure question of law based upon the decree obtained for specific performance cannot simply be thrown out merely because the same was not specifically pleaded. When a party is able to secure substantial relief, namely, decree for specific performance with clearance of mortgage amount, it is the duty of the Court to mould the relief so as to render substantial justice between the parties - Impugned finding held to be correct - However, this doctrine should not be permitted to become a device for destructing the sanctity of contract and Court should also not apply the doctrine of impossibility to assist a party which does not want to fulfill its obligations under the contract.

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2013(13)SCALE151

**IN THE SUPREME COURT OF INDIA**

Civil Appeal No. 9466 of 2003

Decided On: 22.10.2013

**Mary Vs. State of Kerala and Ors.**

**Hon'ble Judges/Coram:** C.K. Prasad and V. Gopala Gowda, JJ.

The doctrine of frustration ordinarily excludes further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act.

Rule 5(15) in no uncertain terms provides that "on the failure of the auction purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall be forfeited to Government". From a plain reading of Rule 5(15), it is evident that on the failure of the auction purchaser to execute the agreement whether temporary or permanent, the deposit already made by auction purchaser towards earnest money and security money shall be forfeited. Undisputedly, the Appellant was declared as auction purchaser and, in fact, she had deposited 30% of the bid amount, that is, 7,68,600/- in terms of Rule 5(10) of the Rules. It is further an admitted position that the Appellant did not execute a permanent agreement or for that matter, did not execute the privilege. Hence, in terms of Sub-rule (15) of Rule 5, the money deposited by her is liable to be forfeited. When the aforesaid principle is applied, as the appellant had not carried out several obligations as provided in Sub-rule (10) of Rule 5 and consequently, by reason of Sub-rule (15), the State was entitled to forfeit the security money. In the face of the specific consequences having been provided, the Appellant shall be bound by it and could not take benefit of Section 56 of the Contract Act to resist forfeiture of the security money.

The duty to act fairly is sought to be imported into the statutory contract to avoid forfeiture of the bid amount. The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field to ensure rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action. But, in our opinion, it certainly cannot be invoked to amend, alter, or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract.

It is one thing to say that a statutory contract or for that matter, every contract must be construed reasonably, having regard to its language. But to strike down the terms of a statutory contract on the ground of unfairness is entirely different. Viewed from this angle, we are of the opinion that Rule 5(15) of the Rules cannot be struck down on the ground urged by the Appellant and a statutory contract cannot be varied, added or altered by importing the doctrine of fairness. In a contract of the present nature, the licensee takes a calculated risk. Maybe the Appellant was not wise enough but in law, she can not be relieved of the obligations undertaken by her under the contract.

The Constitution Bench in *Mazdoor Congress* 1991 Supp (1) SCC 600 explicitly observed in unequivocal terms that doctrine of reasonableness or fairness cannot apply in a commercial transaction, i.e. where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction. It is not possible for us to equate a contract of employment with a contract to vend arrack. A contract of employment and a mercantile transaction stand on a different footing. Thus, in a contract under the Abkari Act and the Rules made thereunder, the licensee undertakes to abide by the terms and conditions of the Act and the Rules made thereunder which are statutory and in such a situation, the licensee cannot invoke the doctrine of fairness or reasonableness.

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(2011)4SCC741

**IN THE SUPREME COURT OF INDIA**

C.A. No. 1535 of 2011 (Arising out of SLP (C) No. 27198 of 2008)

Decided On: 09.02.2011

**Pramod Buildings and Developers (P) Ltd. Vs. Shanta Chopra**

**Hon'ble Judges/Coram:** R.V. Raveendran and A.K. Patnaik, JJ.

Specific Performance of Contract - Burden of Proof - Article 136 of the Constitution of India, 1950 - Division Bench of High Court dismissed Appeal and affirmed judgment of Single Judge holding that Plaintiff-Appellant was not ready and willing to perform contract in terms of agreement and had failed to tender stipulated amount within stipulated date - However, Court granted decree for refund of earnest money with interest from date of payment till date of repayment - Challenge against thereto - Hence, the present Appeal - Held, in suit for specific performance burden lies on Plaintiff to prove readiness and willingness to perform his obligations in terms of contract - Exhaustive correspondence between parties discloses that Appellant was not ready to pay balance amount as agreed under agreement of sale but insisted on additional security from Defendant qua property tax, thus he could not claim readiness and willingness to perform his obligations - However, Defendant seller proved readiness and willingness to perform her part of agreement by signing and attending Registrar's office to execute sale deed - Concurrent findings of fact by Courts below not interfered in exercise of power under Article 136 of the Constitution

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2013 Indlaw SC 862

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPEAL NO. 7306 OF 2013 (Arising out of SLP(C) No. 20367 of 2009)**

**I.S. Sikandar (D) by LRs Vs. K. Subramani & ORS.**

**Hon’ble Judges/Coram:** G.S. Singhvi and V. Gopala Gowda JJ.

**Suit for Specific Performance of agreement for sale of immovable property- Plaintiff’s failure to perform his part of essential terms of agreement within stipulated time – Reiterated, the terms of agreement, conduct of the parties and surrounding circumstances should be examined by the court.**

Agreement in clause fixes 5 months period for execution and completion of sale transaction and providing for extension of period of 2 months in case of delay in obtaining permission from Urban Land Ceiling and Income Tax authorities and consequent delay in payment of layout charge by the plaintiff vendee. Another clause in the agreement provides for payment of specified sum by defendant vendors to appellant in case of defendant’s failure to comply with the terms of the agreement and forfeiture of advance amount of consideration paid by plaintiff to defendants in case of plaintiff's failure to comply with terms of agreement. The purpose of execution of sale agreement state was the dire need of money due to death of earning member of the family. The Plaintiff failed to perform his part of the agreement within the stipulated time of 7 months and even within further extended period allowed in the legal notices issued to the plaintiff warning that the default would entail termination of agreement. The agreement was thereafter terminated by the defendant. The suit for specific performance was filed 11 months after expiry of the limitation period stipulated in the agreement. Held, the sale deed was required to be executed within 7 months. The plaintiff had failed to perform his part of the agreement and hence, specific performance of the agreement cannot be enforced.

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(2014)6SCC677

**IN THE SUPREME COURT OF INDIA**

Arbitration Petition No. 34 of 2013

Decided On: 28.05.2014

**Swiss Timing Limited Vs Organising Committee, Commonwealth Games 2010**

**Hon'ble Judges/Coram:** S.S. Nijjar, J.

Keeping in view the aforesaid observations made by this Court in *Reva Electric Car Co. Private Limited v. Green Mobil* (2012) 2 SCC 93, there is no reason to accept the submission that since a criminal case has been registered against the Chairman of the Organising Committee and some other officials of the Petitioner, this Court would have no jurisdiction to make a reference to arbitration. The concept of separability of the arbitration clause/agreement from the underlying contract has been statutorily recognised by this country Under Section 16 of the Arbitration Act, 1996. Having provided for resolution of disputes through arbitration, parties can not be permitted to avoid arbitration, without satisfying the Court that it will be *just and in the interest of all the parties* not to proceed with the arbitration. Section 5 of the Arbitration Act provides that the Court shall not intervene in the arbitration process except in accordance with the provisions contained in Part I of the Arbitration Act. This policy of *least interference* in arbitration proceedings recognises the general principle that the function of Courts in matters relating to arbitration is to *support arbitration process*. A conjoint reading of Section 5 and Section 16 would make it clear that all matters including the issue as to whether the main contract was *void/voidable* can be referred to arbitration. Otherwise, it would be a handy tool available to the unscrupulous parties to avoid arbitration, *by raising the bogey of the underlying contract being void*.

Whenever a plea is taken to avoid arbitration on the ground that the underlying contract is void, the Court is required to ascertain the true nature of the defence. Often, the terms "*void*" and "*voidable*" are confused and used *loosely* and *interchangeably* with each other. Therefore, the Court ought to examine the plea by keeping in mind the relevant statutory provisions in the Indian Contract Act, 1872, defining the terms "*void*" and "*voidable*".

However, it would not be possible to shut out arbitration even in cases where the defence taken is that the contract is *voidable*. These would be cases which are covered under the circumstances narrated in Section 12 - unsoundness of mind; Section 14 - absence of free consent, i.e. where the consent is said to be vitiated as it was obtained by Coercion (Section 15), Undue Influence (Section 16), Fraud (Section 17) or Misrepresentation (Section 18). Such a contract will only become *void* when the party claiming lack of free consent is able to prove the same and thus rendering contract *void*. This indeed is the provision contained in Section 2(j) of the Indian Contract Act. In exercising powers Under Section 11(6) of the Arbitration Act, the Court has to keep in view the provisions contained in Section 8 of the Arbitration Act, which provides that a reference to arbitration *shall* be made if a party applies not later than when submitting his first statement on the substance of the dispute. In contrast, Section 45 of the aforesaid Act *permits* the Court to decline reference to arbitration in case the Court finds that the agreement is *null and void, inoperative or incapable of being performed*.

To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract *void*, necessary plea can be taken on the basis of the conviction to resist the *execution/enforcement* of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is *void* or *voidable*, it would have the wholly undesirable result of delaying the arbitration. Therefore, the Court ought to act with caution and circumspection whilst examining the plea that the main contract is *void* or *voidable*. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is *void* on a meaningful reading of the contract document itself without the requirement of any further proof.

In the present case, it is pleaded that the manner in which the contract was made between the Petitioner and the Respondent was investigated by the CBI. As a part of the investigation, the CBI had seized all the original documents and the record from the office of the Respondent. After investigation, the criminal case CC No. 22 of 2011 has been registered, as noticed earlier. It is claimed that in the event the Chairman of the Organising Committee and the other officials who manipulated the grant of contract in favour of the Respondent are found guilty in the criminal trial, no amount would be payable to the Petitioner. Therefore, it would be appropriate to await the decision of the criminal proceedings before the arbitral tribunal is constituted to go into the alleged disputes between the parties.

The defence of the contract being void is now-a-days taken routinely along with the other usual grounds, to avoid/delay reference to arbitration. Such ground needs to be summarily rejected unless there is clear indication that the defence has a reasonable chance of success. In the present case, the plea was never taken till the present petition was filed in this Court. Earlier, the Respondents were only impressing upon the Petitioners to supply certain information. Therefore, it would be appropriate, let the Arbitral Tribunal examine whether there is any substance in the plea of fraud now sought to be raised by the Respondents.

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(2008)13SCC597

**IN THE SUPREME COURT OF INDIA**

Civil Appeal Nos. 6341-6342 and 6375 of 2003, 1, 537 and 2015 of 2004 and 3448 of 2006

Decided On: 14.05.2008

**Bharat Sanchar Nigam Ltd. Vs. BPL Mobile Cellular Ltd.**

**Hon'ble Judges/Coram:**
S.B. Sinha and L.S. Panta, JJ.

**Modification of contract entered into between parties - Section 8 of Indian Contract Act -**

There cannot be any doubt whatsoever that the circular letters cannot ipso facto be given effect to unless they become part of the contract. We will assume that some of the respondents knew thereabout. We will assume that in one of the meetings, they referred to the said circulars. But, that would not mean that they are bound thereby. Apart from the fact that a finding of fact has been arrived at by the TDSAT that the said circular letters were not within the knowledge of the respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs.

A contract entered into by the parties, it will bear a repetition to state, must be certain. It must conform to the provisions of the Indian Contract Act. Ordinarily, the word `prescribed' would mean prescribed by Rules. Section 7(2)(ee) of the Indian Telegraph Act provides for the Rule making power for the purpose of laying down the tariff. We may not be understood to be laying down a law that in absence of any statutory rule framed under the Indian Telegraph Act, no contract can be entered into. In absence of any statutory Rule governing the field, the parties would be at liberty to enter into any contract containing such terms and conditions as regards the rate or the period stipulating such terms as the case may be. The matter might have been different if the parties had entered into an agreement with their eyes wide open that the circular letter shall form part of the contract. They might have also been held bound if they accepted the new rates or the periods either expressly or sub silentio. When on the basis of terms of the contract, different rates can be prescribed, the same must be expressly stated. When the word `prescribed' is not defined, the same, in our opinion, would mean that prescribed in accordance with law and not otherwise.

In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of `acceptance sub silentio'. But, there is nothing on record to show that such a course of action was taken. The respondents at no point of time were made known either about the internal circulars or about the letters issued from time to time not only changing the tariff but also the basis thereof.

We will assume that the contention of the learned Additional Solicitor General that the internal circulars are issued for their application by the local officers. If they have committed a mistake, the same could be rectified.

Indisputably, mistakes can be rectified. Mistake may occur in entering into a contract. In the latter case, the mistake must be made known. If by reason of a rectification of mistake, except in some exceptional cases, as for example, where it is apparent on the face of the record, mistake cannot be rectified unilaterally. The parties who that would suffer civil consequences by reason of such act of rectification of mistake must be given due notice. Principles of natural justice are required to be complied with. The fact that there was no mistake apparent on the face of the records is borne out by the fact that even the officers wanted clarification from higher officers. The mistake, if any, was sought to be rectified after a long period; at least after a period of three years. When a mistake is not rectified for a long period, the same, in law, may not be treated to be one.

If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.