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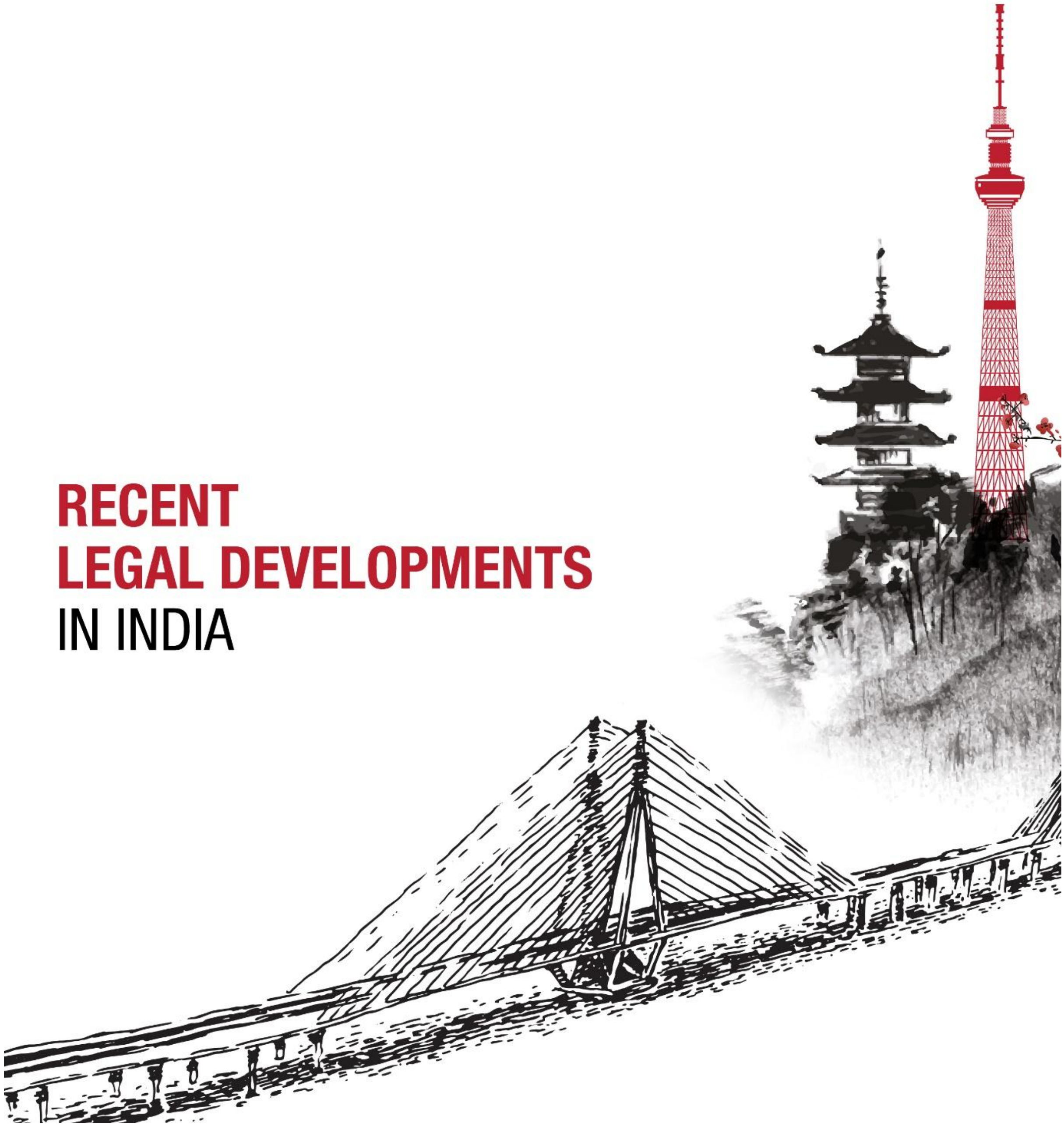

The IndusLaw 日本のニュースレター brings you the key regulatory and legal developments in various sectors in India

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INDUSLAW

INDUSLAW is a multi-speciality Indian law firm with 15 partners and over 85 lawyers across four offices in Bangalore, Delhi, Hyderabad and Mumbai.

We advise foreign and domestic clients with respect to transactions, dispute resolution, business strategies and operations from the perspective of Indian laws and regulations.

Our clients are spread across several industry verticals and geographies. Our clients are typically financial institutions, investment funds, foreign multinationals operating in India, domestic corporations, growing Indian companies, start-ups, social enterprises and not-for-profit entities. These organizations usually look to us for sophisticated corporate & financial transactions and complex litigation & dispute resolution proceedings. We work with clients across various sectors including bio-tech, education, financial services, healthcare, hospitality, infrastructure, manufacturing, micro-finance, real estate & construction, rural services, retail including online retail, technology, travel & tourism, telecom and trading.

A. Indian Budget 2017-18: Key Updates

India's Finance Minister presented the Union Budget 2017-2018 (the "**Budget**") before Parliament on February 1, 2017, with promises to boost rural spending and cut taxes for the lower middle classes and small to medium business enterprises.

The key reforms introduced in the Budget are summarized below:

FINANCE AND TAX

i) **Exemptions for start-ups**

The profit-linked deduction exemption available to start-up companies for 3 (three) years out of 5 (five) years[1] has been revised to 3 (three) years out of 7 (seven) years. Extending the window for availing this tax exemption will provide some relief to start-up companies, since many do not turn profitable in the first few years of operation.

However, it is noteworthy that this exemption continues to be allowed only to start-up companies that are covered under the definition of 'start-up companies' under the notification issued by the Department of Industrial Policy and Promotion,[2] and are recognized by the relevant authorities. Further, such start-up companies must have been incorporated between April 1, 2016 and April 1, 2019.

ii) **Funding political parties**

The Budget tightens the rules on the funding of political parties, reducing the maximum cash donation to INR 2,000 (approximately USD 30) and further, requires parties to file income tax returns.

The reduction of cash contributions to finance political parties, while welcome, is likely to lead to cash slicing. An entirely online financing mechanism is perhaps the only way that full accountability and transparency can be brought into the system.

iii) **Funding social programs**

The Budget allocated approximately INR 480 billion (approximately USD 7 billion) (the highest ever) to the national employment guarantee scheme, which is intended to stimulate consumption amongst the lower middle class households, impacted by the fallout from last year's note ban.

Government spending, however, should not be a substitute for private spending (which is less prone to leakage) and the universal roll out of bank accounts to all Indians is a necessary condition for the movement to direct electronic credits to individuals, bypassing the bureaucracy that administers it.

iv) **Withholding rates on interest**

The concessional withholding rate of 5% (five per cent) charged on interest earned by foreign entities in external commercial borrowings, Rupee-denominated bonds, or in bonds and Government of India securities, has been extended to June 30, 2020. Further, transfer of rupee denominated bonds between non-residents is also proposed to be a tax neutral transfer.

v) **Asset Reconstruction Companies**

The Budget anticipates that the SARFAESI Act, 2002, will be amended in order to permit the sponsor of an asset reconstruction company to hold up to 100% (one hundred per cent) of its equity

[1] Section 80-IAC, Income-Tax Act, 1961, accessible at: http://www.incometaxindia.gov.in/Acts/Income-tax%20Act,%201961/2016/Others/section80iac.htm

[2] Notification No. GSR 180(E) dated February 17, 2016, Department of Industrial Policy and Promotion, accessible at - http://dipp.nic.in/English/Investor/startupindia/Definition_Startup_GazetteNotification.pdf

vi) **Agricultural markets**

An expert committee will be constituted to study and promote creation of an operational and legal framework to integrate spot market and derivatives market in the agricultural sector, for commodities trading. The e-NAM3 will be an integral part of the framework. This will be done to bring further reforms for the benefit of farmers.

REAL ESTATE

vii) **Expanding Infrastructure status**

'Affordable housing' will be given 'infrastructure' status. It is expected that this measure will extend many benefits available to the infrastructure sector, to affordable housing projects.

viii) **Tax on notional rental incomes deferred**

At present, houses that are unoccupied after completion certificates are issued are subjected to tax on notional rental income. This tax will now be applied only after a year of receiving the completion certificate, for builders for whom constructed buildings are stock-in-trade.

ix) **Capital gains to be calculated from completion**

For joint development agreements signed for development of property, the liability to pay capital gain tax will arise in the year the project is completed. Deferring this payment of tax is likely to provide clarity, and reduce cash flows into the project.

x) **Calculation of capital gains**

The holding period for computing long-term capital gains from transfer of immovable property will be reduced from 3 (three) years to 2 (two) years. It is proposed to move the base year for indexation from April 1, 1981 to April 1, 2001 for all classes of assets, including immovable property.

This means that any gains on the sale of immovable property held by a person for a period of more than two years, will be treated as long-term capital gains, and therefore, be taxed only at 20% (twenty per cent) after indexation. Moving the base year for indexation means that the taxpayer will receive increased benefit.

xi) **Long term capital gains on listed shares**

The Budget proposes to restrict the current exemption provided for long term capital gains arising out of the sale of listed equity shares. It is now proposed that this exemption will not be available where the equity shares so transferred was acquired after 1 October 2004 and was not chargeable to securities transaction tax. It is hoped that the Government will notify certain exceptions in this regard.

xii) **Transfer of unlisted shares**

The Budget proposes the introduction of a new Section 50CA, wherein in case of transfer of unlisted shares for less than fair market value ("**FMV**"), the transferor will be deemed to have received the FMV as full value of consideration for the shares.

xiii) **Conversion of preference shares to equity**

Earlier, the conversion of preference shares to equity shares was a taxable transfer and subject to capital gains tax. The Budget now proposes that the conversion of preference shares to equity will be a tax neutral transaction. Further, the period of holding of the converted equity shares will include the period of holding of the original preference shares and the cost of acquisition of the converted equity shares will be the cost of acquisition of the original preference shares.

[3] E-National Agricultural Market. For details, please see - http://www.enam.gov.in/NAM/home/about_nam.html#

xiv) **Thin capitalization rules**

The Budget proposes to introduce a new Section 94B which seeks to cap deductions of interest payouts made to associated enterprises. Accordingly, where interest deductions sought are in excess INR 1 crore, the same would be capped at 30% of the EBITDA of the company.

EASE OF DOING BUSINESS

xv) **Foreign Investment Promotion Board**

As the Foreign Investment Promotion Board (the "**FIPB**") has successfully implemented e-filing and online processing of foreign direct investment ("**FDI**") applications, the FIPB will be abolished in 2017-18.

This move is aimed at achieving greater fund flows into India by easing the regulatory requirements involved in investment.

Also, further liberalization of the FDI policy is under consideration by the Government and 100% (one hundred per cent) FDI is anticipated in the marketing of food products produced or manufactured in India.

xvi) **Infrastructure related dispute resolution**

To streamline institutional arrangements for resolution of disputes in infrastructure-related construction contracts, public-private partnership ("PPP") and public utility contracts, suitable mechanisms will be introduced as an amendment to the Arbitration and Conciliation Act, 1996 and an amendment law will be introduced in this regard.

This proposal is in furtherance to the Government's approval of the new arbitration guidelines issued on August 31, 2016, which were introduced for revival of the infrastructure sector by various measures, including speedy resolution of claims pending in arbitration.

xvii) **Time bound listing**

The Government will put in place a revised mechanism and procedure to ensure time bound listing of identified Central Public Sector Enterprises ("**CPSEs**") on stock exchanges. It was also announced that a new Exchange Trading Fund ("**ETF**") with diversified CPSE stocks and other Government holdings will be launched in 2017-18.

xviii) **Domestic transfer pricing**

The scope of domestic transfer pricing is restricted to situations where one of the entities involved in related party transaction enjoys specified profit-linked deductions.

Hence, the computation of income under Section 92BA and 92C of the Income-Tax Act, 1961, shall include any income from a specified domestic transaction, only if one of the entities enjoys specified profit-linked deduction under Section 80-A (6) or 80-IA (8) of the Income-Tax Act, 1961.
This has been done to reduce the compliance burden for domestic companies.

xix) **Indirect transfer provisions for FPIs**

Indirect transfer provisions under Section 9(1)(i) of the Income-Tax Act, 1961 shall not apply to Foreign Portfolio Investor ("**FPI**") Categories I & II in case of redemption of shares or interests outside India as a result of or arising out of, redemption or sale of investment in India, which is chargeable to tax in India.

Any such incomee derived from the above shall not be taxable as income deemed to accrue in India.

DEMONITISATION

The Budget announced that no transaction above INR 300,000 (approximately USD 4,500) will be permitted in cash.

B. Foreign Direct Investment – Notifications by DIPP[4] and RBI[5]

1. RBI

Amendment to Regulation 6 of FEMA (Transfer of Issue of any Foreign Security) (Second Amendment) Regulations, 2004

RBI vide its notification- Prohibition on Indian Party from making direct investment in countries identified by the Financial Action Task Force (FATF) as "Non Co-operative countries and territories" dated January 25, 2017 (A.P. (DIR Series) Circular No. 28) has amended Regulation 6 of FEMA (Transfer or Issue of any Foreign Security) (Second Amendment) Regulations, 2004.

At present, there is no restriction on an Indian Party with regard to the countries, where it can undertake overseas direct investment. In order to align, the instructions with the objectives of FATF, on a review, it has been decided to prohibit an Indian Party from making direct investment in an overseas entity (set up or acquired abroad directly as JV/ WOS or indirectly as step down subsidiary) located in the countries identified by the services) as well as special provisions for particular States.

FATF as "non co-operative countries and territories" as per list available on FATF website www.fatf-gafi.org or as notified by the RBI from time to time.

Full text of the notification is available at: https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=10839&Mode=0

[4] Department of Industrial Policy and Promotion or **DIPP** is the nodal government authority having the primary responsibility to promote foreign direct investment in India.

[5] Reserve Bank of India or **RBI** is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.

2. SEBI

Guidelines for participation /functioning of Eligible Foreign Investors and FPIs in International Financial Services Centre

SEBI has released a consultation paper on public issuance of non-convertible debentures having credit rating below investment grade.

Full text of the consultation paper can be accessed from: www.sebi.gov.in/cms/sebi_data/attachdocs/1483532603493.pdf

Guidance note on board evaluation

SEBI on January 5, 2017 provided a guidance note for listed companies on board evaluation.

Board evaluation comprises evaluation of the Board, individual directors and the various committees of the Board. The Companies Act and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 contain provisions for the same.

The purpose of the guidance note is to educate the listed entities and their board of directors about various aspects involved in the board evaluation process and improve their overall performance as well as corporate governance standards to benefit all stakeholders.

Full text of the guidance note is available at: www.sebi.gov.in/cms/sebi_data/attachdocs/1483607537807.pdf

Circular issued in regard to credit of proceeds due to write off of securities held by Foreign Portfolio Investors/deemed Foreign Portfolio Investors

Pursuant to the notification of SEBI (Investor Protection and Education Fund) Regulations, 2009, SEBI has established its own Investor Protection and Education Fund.

The circular released by SEBI provides that in terms of Regulation 4(g) of SEBI (Investor Protection and Education Fund) Regulations, 2009, any proceeds due to:

a) **Disinvestment**: In case a custodian is unable to deliver the securities or ascertain the claimant for the securities that are received subsequent to write off due to any unforeseen circumstances viz. deemed Foreign Portfolio Investor/Foreign Portfolio Investor no longer existing/operating or expiry of SEBI registration/FEMA approval, etc., the sale of these securities through stock exchange and proceeds thereof net of expenses shall be credited to the Investors Protection and Education Fund of SEBI not later than 7 days from the date of receipt thereof.

b) **Corporate benefits**: In case of receipt of corporate benefits in the form of securities arising out of shares written off, the same shall be reported to SEBI in the normal manner. Similarly, corporate benefits received in the form of cash viz. dividend shall be credited to the Investors Protection and Education Fund of SEBI not later than 7 days from the date of receipt of the same.

Full text of the circular is available at: www.sebi.gov.in/cms/sebi_data/attachdocs/1483359407472.pdf

3. FDI

Amendment to the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000

RBI has made amendments in the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000. The amendments, interalia, provide for issue of convertible notes by startup companies which is a new form of raising funds by the startups. This form of raising funds are limited for startups only.

Full text of the notification can be accessed from: https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=10825.

Amendment to FEMA 20/2000– FDI in Commodity Exchanges – conditions revised, deletion of 'Infrastructure Company in Securities Market'

RBI has amended Schedule 1 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 as follows:

Infrastructure Company in the Securities Market		
Infrastructure companies in Securities Markets, namely, stock exchanges, commodity derivative exchanges, depositories and clearing corporations, in compliance with SEBI Regulations.	49%	Automatic

Full text of the notification can be accessed from: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10832&Mode=0

C. Relevant MCA Circulars, Notifications etc.

Companies (Incorporation) Rules, 2014 amended

The MCA vide notification dated December 29, 2016, published Companies (Incorporation Fifth Amendment) Rules, 2016 to amend the Companies (Incorporation) Rules, 2014. The said rules have come into effect from January 1, 2017. Vide the said notification, the MCA has simplified rules for incorporating a company and its conversion into other forms or incorporated entities.

Full text of the amendment regulations is available at:

http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationFourthAmendmentRules_01102016.pdf

The Companies (Incorporation) Amendment Rules, 2017

The MCA on January 25, 2016 made Companies (Incorporation) Amendment Rules, 2017, which shall come into effect on January 30, 2017. The said rules have substituted the existing form INC 11, with a new one and states that the certificate of incorporation of the Company shall mention the permanent account number of the Company where if it is issued by the Income Tax Department.

Full text of the notification is available at: http://www.mca.gov.in/Ministry/pdf/IncorporatinRules_27012017.pdf

D. Infrastructure Sector Updates

The draft regulations on GERC (Forecasting, Scheduling, Deviation Settlement and Related Matters of Solar and Wind Generation Sources) Regulations, 2017

Gujarat Electricity Regulatory Commission has prepared and published draft regulations for forecasting and scheduling for wind and solar projects called the Draft Regulations on GERC (Forecasting, Scheduling, Deviation Settlement and Related Matters of Solar and Wind Generation Sources) Regulations, 2017 in exercise of powers conferred under section 181 of the Electricity Act, 2003. The primary objective is two-fold - a) facilitating large-scale grid integration of solar and wind generating stations; and b) maintaining grid stability and security.

Earlier Odisha, Madhya Pradesh, Karnataka, Tamil Nadu, Rajasthan, Jharkhand, Andhra Pradesh and Chhattisgarh had published their draft DSM regulations on forecasting and scheduling in relation to wind and solar projects. However, Karnataka is the only state that has published final regulations thus far.

The draft regulations are open for stakeholders' objections/suggestions until 16 February, 2017.

Full text of the draft regulation can be accessed from: http://www.gercin.org/uploaded/document/8f42601e-b8dd-4f6f-9a08-f6d3f08dc662.pdf

Procurement of electricity on a' finance, own and operate' basis

The Ministry of Power has issued guidelines for the procurement of electricity for medium term from power stations set up on a 'finance, own and operate' basis. The guidelines include standard bidding documents comprising the model request for qualification, model request for proposal and model agreement for procurement of power.

Full text of the guidelines can be accessed from: http://powermin.nic.in/sites/default/files/webform/notices/Medium_term_Guidelines.pdf

E. Telecom Regulatory Updates

Consultation paper on "Approach towards Sustainable Telecommunications"

TRAI has released a consultation paper on "Approach towards Sustainable

Telecommunications" on January 16, 2017. Further, stakeholders are requested to furnish their comments to TRAI by February 13, 2017. TRAI, in its paper, has sought views on the approach for calculating the carbon footprint, need for auditing carbon footprint of a telecom network by a third party auditor and its mechanism as well as formulas suitable for calculation of carbon footprints from grid supply and diesel-power sets.

Full text of the Consultation paper is available at: http://www.trai.gov.in/sites/default/files/Consultation_Paper_16_jan_2017.pdf

SC issues notice to Whatsapp and Facebook over privacy concerns

The Indian Supreme Court on January 16, 2017 questioned Whatsapp's privacy policy and sought a response from the (Indian) Central Government, TRAI, Facebook Inc and its Indian subsidiary on a plea challenging the messaging service provider's decision to share 160 million Indian users' data with Facebook.

F. Employment

Amendment to the Employees' State Insurance (Central) Rules, 1950

The Employees' State Insurance (Central) Rules, 1950 have been amended ("Rules").

The amended Rules have revised the wage limit for coverage of an employee under the Employees' State Insurance Act, 1948 from INR 15,000/- (Indian Rupees Fifteen Thousand only) to INR 21,000/- (Indian Rupees Twenty One Thousand only).

Full text of the amendment is available at: http://esic.nic.in/backend/writereaddata/file/1e1207c7c4a23e8f08d0a15b10af6d8b.pdf

Insured Woman under the ESI Central Rules, 2017

Effective from 20th January, 2017, by virtue of amendment in the ESI Rules, an insured woman shall be entitled to 26 weeks maternity leave. However, an insured woman having two or more than two surviving children shall be entitled to receive maternity benefits during a period of twelve weeks of which not more than 6 weeks shall precede the expected date of confinement.

Clause 6A of rule 2 of the ESI Central Rules following clause has been added.

'(6A) – "insured woman" means a woman who is or was an employee in respect of whom contribution is or were payable under the Act and who is by reason thereof, entitled to any of the benefits provided under the Act and shall include:-

i) a commissioning mother who as biological mother wishes to have a child and prefers to get embryo implanted in any other women;

ii) a woman who legally adopts a child of up to three months of age.'

The full text of the notification is available at: http://esic.nic.in/backend/writereaddata/file/d027f5d4bd093ba7dc10500eed6f15ad.pdf

G. Intellectual Property Law

Permitted user of Trademark

The Division Bench of the Delhi High Court in its recent judgment has reversed the decision of the Single Bench and held that a "permitted user" of a trademark cannot institute a suit for trademark infringement, as provided in the Act and that a foreign "registered proprietor" (having no office or principal place in India) cannot institute a suit for trademark infringement in the location of the "permitted user" and get the benefits of Section 134(2) of the Trade Marks Act, 1999 (Act), which allow for institution of trademark infringement suit in the principal place of business of "registered proprietor" or "registered user". Section 134(2) recognizes plaintiff's principal place of business or residence as an additional territorial forum, where a suit for trademark infringement could be instituted.

Facts in brief:

US-based Exxon Mobile Corporation ("Exxon"), registered proprietor of the trademark EXXON in India but without an Indian office, filed a suit for trademark infringement and passing off against the user, P.K. Sen, of EXON ENGINEERING CORPORATION before the High Court of Delhi. The Delhi Court was chosen as the forum for the suit as the wholly owned subsidiary of Exxon ("Exxon India") and a "permitted user" of its marks in India, had its registered office in Delhi. P.K. Sen's offices are located in Kolkata and the cause of action arose in Kolkata. Exxon and Exxon India jointly instituted the suit. The Single Judge allowed the suit on ground that the Explanation to Section 134(2) of the Act - which is "for the purposes of section 134(2) "person" (instituting the suit) includes the "registered proprietor" and the "registered user" – is inclusive in nature and would include a "permitted user" too. This preposition of the Single Judge in effect went against Section 53 of the Act, which specifically prohibits institution of a suit for trademark infringement by a "permitted user". Aggrieved by the decision of the Single Judge, Sen filed the present appeal before the Division Bench.

Division Bench's findings:

The Division Bench reversed the decision of the Single Judge on the grounds that even though the definition of a "person", as given in the Explanation, cannot be restricted to a "registered proprietor" and a "registered user", it would not include a "permitted user" suing for an infringement of a trademark as there is an express prohibition under Section 53 of the Act.

The Division Bench held that if the word "person" in the Explanation to Section 134(2) – that determines territorial jurisdiction – includes a "permitted user", then it would mean that while on the one hand Section 53 bars a "permitted user" from instituting any proceeding for infringement, Section 134(2) would yet regard him as a "person" instituting the suit for determining jurisdiction. This interpretation would be contrary to the terms of the enactment. It was held that as Exxon India, a "permitted user", is outright disentitled to institute a suit for trademark infringement in India, it cannot be covered by the expression "person instituting the suit" under the Explanation to Section 134(2) to determine territorial jurisdiction.

Consequently, it was held that the Delhi courts would not have the territorial jurisdiction to entertain the present suit.

The full text of the order is available at:
http://lobis.nic.in/ddir/dhc/BDA/judgement/04-01-2017/BDA04012017FAOOS2902016.pdf

H. Competition Case laws

The Competition Commission of India ("CCI") has passed an order under section 27 of the Competition Act 2002 ("Act") holding seven companies guilty for the breach of section 3(3)(d) and 3(1) of the Act for cartelization and bid rigging under in relation to supply of cement to the government of Haryana and has imposed a penalty of approximately INR 142 crores on them.

The CCI has reasoned that the collusive behavior was determinable by (i) quoting of unusually higher rates than previous years (ii) quoting supply amounts such that the total tendered amount was equal to that supplied by all parties together (iii) quoting of rates enabling one of the seven parties to become the primary beneficiary at different points of time (iv) SMSs and calls made and their heightened frequency during the period close to the date of tender amongst the officials of the parties.

The full text of the order is available at:
http://www.cci.gov.in/sites/default/files/Ref%20Case%20No%2005-2013_0.pdf

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