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Ensouth

The E-magazine brought to you by

N South

Advocates

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At a Glance

1.	**Managing Partner's Message**	**3**
	Section I - Videos	
2.	**Video: Buffalo Jurisprudence: the Bullshit Quotient of Litigation in India.**	**4**
3.	**Video: Independent Directors: the Bullshit Quotient of the New Fall Guys in Indian Company Law.**	**4**

	Section II - Print Media	
5.	**Comment: Blatant Builder Contracts** While the political governance structure may be buried under coalition compulsions, more than one regulator has stepped in to pick up the gauntlet	5
6.	**SCAM SPOTLIGHT**	
A.	**Bullshit Quotient Of Scams** Since 1947, we have run a crony democracy that puts the eclectic relationship between politician and businessman to the entirely laudable task of giving us a largely functioning democracy of a billion illiterate souls that the entire world more or less grudgingly admires.	7
B.	**AbracaVadra** Real estate is perhaps the biggest generator of political funding in the banana republic of the mango people	10
C.	**The Pontyfication Of Politics Processes** India cannot change as long as we mimic the Romans who, fed up with corruption found catharsis in blood sports	14
7.	**PHILOSOPHICAL ISSUES AROUND LAWS**	
A.	**Linguistics and Laws** In a profession defined by the hyperbole we use to describe our understanding of our world, the simple truth is frequently lost. Eventually, we come to believe that our choice of words is the truth of what we speak. This skews our understanding of legal issues and curveballs the laws we create.	17
B.	**Politically Polarized Paradigms** The Controller and Auditor General's report on the allocation of Coal Mines proceeds from an implied political paradigm and transforms into a criminal process on the basis of 'presumptive' legal facts.	18
C.	**Arbitrary Arbitrations**	20

	Given the reality of arbitration in India, should we be inserting arbitration clauses at all in Indian contracts?	
	Section – III News	
8.	**A. New Legislation and Regulations**	**22**
9.	**B. New Case Laws**	**30**

Managing Partner's Message

This is a first for us: we have a bumper issue! We have a bumper issue because we have lived through truly tumultuous times over the last few years which have impacted both law and politics in our society. Not that the two are not at heart entirely the same thing.

For our video section this time, we offer videos of two lectures that deal with the legal side of Indian social and cultural reality. In the first video, we explore the basic principles of the Indian Buffalo School of Jurisprudence. On this subject, nothing more needs be said! In the second video, we look at the larger impact of the new Company Bill on Board Governance in Indian Corporate life and question the fundamental assumptions on which these provisions were created.

Next, we move on to the radical change that the Competition Commission is spearheading in the manner in which our real estate developers operate their businesses. Here, we review what legal builder contracts will henceforth look like.

Then it is on to our Bumper Featured Special! It seems to me that while we are very quick to be appalled at the repeated and endless scam that emerge out of the woodwork, we have an insufficient understanding of why we have these scams. In our Featured Special, we look at three different scams – Coalgate, Vadragate and the Ponti Chaddha Liquor scam - all of which we argue, are varying manifestations of the same fundamental reality. In the last of these write ups, as a further development of my basic argument in my book Bullshit Quotient, I argue that scams are necessary if we are to fund India's democracy. Since, not everyone has a keenly developed sense of irony, I may add that it is my argument that if we want to free ourselves from these scams, we must find a way to establish laws that will allow those with political ambitions to legitimately fund our democracy.

This brings us to our second Bumper Featured Special: the philosophical issues around laws and our attitudes to them. This section is neither esoteric nor arcane.

Basically, the three articles set out three fairly common sense propositions. First, the way in which we create our laws depend overwhelmingly on the language we use to describe the 'problem' we are trying to address. In short, law is nothing but legislated prejudice. Second, the political paradigm in which we place an event determines the manner in which we then judge it from a legal standpoint. In the Coalgate context, this means that we are using presumptive facts to contrive a crime that does not exist in the statute books.

Finally, we explain a painful practical decision that we have now made. Arbitration by Indian arbitrators unsupervised by a strong arbitral body simply doesn't work in India and we will not support such clauses in contracts we now negotiation on behalf of our clients. I would urge you to read this column even if you read no other because the impact on your business can be very significant.

The final section of this newsletter reports on new laws and new judgments as usual.

Section I - Videos

Video: Buffalo Jurisprudence: the Bullshit Quotient of Litigation in India.

This Video presents a perspective on the truth about litigation in India. In this candid talk, he explains key features of India's endemic legal school of Buffalo Jurisprudence.

He then goes on to reveal the Seven Noble Truths of Litigating in India. The Video may be viewed at:

http://www.youtube.com/watch?v=B3vV9r4sBuw

Video: Independent Directors: the Bullshit Quotient of the New Fall Guys in Indian Company Law.

A candid argument explaining key features of the new Company Law regime followed by a critique of the idea that stake less Independent external Directors can be primary drivers of Governance and Compliance. The speaker argues that the task is in excess of their capacity and criticizes the attempt to make them Fall Guys and face retributive criminal prosecutions and penalties which properly should be focused on others up the corporate food chain.

The Video may be viewed at:

http://www.youtube.com/watch?v=m-iMV1XrsS4

Section II – Print Media

COMMENT

Blatant Builder Contracts

(While the political governance structure may be buried under coalition compulsions, more than one regulator has stepped in to pick up the gauntlet)

Ranjeev C. Dubey

If you believe that half of our ruling elites are culpably criminal while the other half are indefensibly abdicating their sovereign responsibilities, perhaps it's time to take heart that it is not just the judiciary that is trying to keep this country from the heart of darkness. Notwithstanding all the stick that they get - notably the Telecom Regulatory Authority of India (Trai) - I believe that our regulators continue to play a stellar role in keeping us this side of the sanity divide. Case in point: the recent actions of the Competition Commission in restoring sanity in the fine print of construction contracts. Let's review the facts.

In May 2010, the owners of Belaire apartments in Gurgaon went to the Competition Commission of India seeking its protection. They claimed that India's premier builder DLF was abusing its dominant position to impose highly arbitrary, unfair and unreasonable conditions on buyers. Truly, if you don't know your builder contracts, these conditions read like an encyclopedia of inventive ruthlessness. The project was launched without approvals exposing buyers to unnecessary and unknown construction risk. The property was sold as a 19 storey one and then increased to 29 storeys without the consent of the existing buyers. No construction period was specified. The contract between builder and owner was presented to owners months after all payments had been made where for the first time, a litany of harsh clauses were thrust down the owner's throat. Under these terms, DLF could unilaterally change the usage of designated areas and could add more buildings in the complex. Naturally, such buildings would belong to DLF even though they were built on land belonging to the buyers. DLF could change the layout plan, could increase the area of the building, decrease the underlying area of the land owned by the buyers, link one project with another, increase external development charges, all without demur from the buyers. It could charge whatever it wanted for services. DLF was entitled to mortgage land belonging to these owners! It could even abandon the project without liability. DLF retained 10 per cent of the purchase cost as security and could forfeit these sums for all sorts of good and indifferent reasons. As a general proposition, buyer defaults generated extortionist penalties while DLF defaults generated pips and pennies.

For my part, I can add that it is patently unfair to paint DLF out as the villain of the real estate piece. Every builder whose agreements have ever passed through my hands in recent years – and more than a few have – carries similar terms. A great many projects are 'pre launched' to benefit regular clients who then exit in months, and

projects are formally launched without approvals so that booking money can be used to pay for approvals. Payments are unfairly frontloaded, installments can be claimed without corresponding construction on the ground and moneys can be appropriated from one project to another without buyer consent. Clearly, it doesn't take a dominant position to be a rapacious builder, or the writer of unconscionable contracts. I would say DLF contracts were marked to market, and their buildings are certainly better than some others!

So far, given how the law works, DLF's defense of the case has been based largely on legalistic jurisdiction type arguments. DLF has claimed that it is not in a dominant position in Gurgaon which is the 'relevant market'. It has argued that apartment owners are not consumers. The Competition Commission has not been persuaded. In August 2011, it directed DLF to cease and desist from imposing such onerous conditions and imposed a penalty of Rs 630 crore. DLF appealed the order. The appellate authority was not particularly sympathetic, asking only that the substance of the modifications be determined before it heard the appeal.

This is still a work in progress. The case will come up again in October 2012 and the battle no doubt will run and run. Nevertheless, four points need to be made because they are clear enough. First, the real estate business is amongst the largest generators of political funds in India. Everybody and his illegitimate country bumpkin cousin thrice removed know that large tracts of land in fast expanding suburbs of metros are owned or controlled by the political classes. In India, politicians consolidate the land on which private projects are built. Sometimes, these consolidators retain an interest in the project after selling the land to builders. For anyone – legislature, bureaucrat, judge or regulator – to meddle with this 'robber baron' happy hunting ground is to bite into something indigestible and unpredictable. The real estate business is a holy cow if ever there was one and for anyone to take pot shots at this business is a huge risk because you never knows who sits behind which project and takes the bullet.

Second, DLF is simply not another large listed company. DLF is this country's premier builder who practically invented private sector real estate development in India. The mutuality of interest between politicians and builders, as I have said, runs deep. DLF is an ocean with a complex web of relationships and 'lihaaz' that stretches to the grand fathers of the current ruling politicians. To take on such a business house is to take on all these relationships, not just the house. No one treads thoughtlessly on such power. And a regulator has. You have to stop dead in your tracks and ponder this paradigm shift.

Third, unless the regulator does a double back flip for reasons we may never know, no matter what legal stratagem is unveiled by DLF or any other builder now, the current state of the template Flat Buyer Agreement is simply unsustainable. The Competition Commission will find against the builders and the appeal courts will agree

with the Competition Commission. It's a question of when, not if. In truth, "when" is here already. As this litigation reaches culmination, the rules by which builder contracts are written will have been determined and those who are still writing old school contracts in 2012 are going to get it in the neck. Builders will do well to immediately change their "attitudes" so to speak. When you have onerous arbitrary clauses which are ultimately not implementable in one pan and Rs 630 crore cash out in the other, to say nothing of legal fees, the scale of justice is truly loaded and good sense favours being reasonable in the first place.

This brings up the fourth point. From where I am sitting, this last point has probably been the greater overall long-term significance. If you are currently engaging in a heart rending lament about the paralysed state of the nation, the lost opportunity of a spluttering economy, a society slowly decaying away as all institutions slowly eat their own tails, and so forth, it is time to pause and take stock. That India is not in the summer of its rosy future is a fact. But that said, we do need to recognise that the absolute proportion of bullshit in any society is a constant. The Bullshit Quotient of this train of thought is that while the political piece of the governance structure may be buried under the load of coalition compulsions, more than one regulator has stepped in to pick up the gauntlet and carry the country forward to its ultimately destiny.

SCAM SPOTLIGHT

A. Bullshit Quotient Of Scams

(Since 1947, we have run a crony democracy that puts the eclectic relationship between politician and businessman to the entirely laudable task of giving us a largely functioning democracy of a billion illiterate souls that the entire world more or less grudgingly admires.)

Ranjeev C. Dubey

Way back in 1973, the Supreme Court of India ruled in the Keshavnanda Bharati case that the Constitution of India had a "basic structure" which could not be obliterated by legislative amendments. In my new book *Bullshit Quotient: Decoding India's Corporate, Social and Legal Fine Print,* I have argued that India's democracy has a basic financing structure which cannot be obliterated without radical legislative measures! At the heart of this structure are neat cash flow pyramids. For some inexplicable reason, these pillars of our democracy are now being condemned as scams. What on earth is this entire obsession with scams? Let me step back.

Using the bore-of-the-month Coalgate only as a very brief illustration, this scam exploded on the scene with the Controller General of Accounts reporting that 57 private parties had received a presumptive gain of Rs 1.86 lakh Crore because coal blocks were taken away from the public sector Coal India and gifted to private parties without public auctions. That delicious figure — Rs. 1.86 lakh Crores — was based on so many

untestable assumptions that most TV talk show hosts were condemned immediately to heavy doses of antibiotic prescription drugs for incurable sore throats!

Now, let's get some perspective here. Coal is a state monopoly or so the Coal Mine (Nationalization) Act 1973 declares. There are two exceptions though: (a) private parties engaged in certain specified end uses including iron and steel manufacture, and (b) coal mining in isolated small pockets or where the block is "not sufficient for scientific and economic development in a coordinated and integrated manner". Given our power woes, every government since 1993 has allotted coal blocks to private power projects and similar. The BJP too. More recently, between June 2004 and March 2011, the coal ministry allotted 195 coal blocks to private players for various reasons of which 115 were awarded to power project companies. Since there are always three sides to every story, it's good to start with the administrative angst side of it as best described by Planning Commission Deputy Chairman Montek Singh Ahluwalia (see I don't want to Criticise the CAG).

In an environment where Coal India was demonstrably unable to develop the coal blocks, what choice was there but to give the coal blocks to private parties? You cannot auction them unless you change the law. Given the shenanigans the BJP has been up to in Parliament in recent years, how would you rate your chances on that? That apart, under the Mines and Minerals Development and Regulation (MMDR) Act, 1957, applicants for mining licenses must be recommended by state governments. Given how regional parties have hustled, muscled and muzzled King Singh around in recent years, how do you rate your chances on ignoring that right? So, says the bureaucracy, there was no choice. This is intellectualization of crass reality for the intellectually refined or Double Speak for Dummies: whatever you prefer boss. The eternal truth is in the other two legs of the grease ball stool.

The second side of the story — the reality of this policy on the ground — is in the rise of yet another generation of carpet baggers. I am obliged to Makrand Gadgil, Aniek Paul and Cordelia Jenkins for summarizing the story of mining baron Manoj Jayaswal in *Mint*. The Abhijeet Group headed by Jayaswal consists of 60 companies which between them have only two small revenue generating road projects: the rest is all "M&A". In this case, M&A means getting coal blocks, showing them to banks and taking out large loans.It also means getting power projects on the strength of the coal linkage, signing PPA's with state governments, getting financial closure as a result, drawing down even more money from the lender consortium and then buying private jets with the money. What remains is then chucked about in flashy celebration. Manoj Jayaswal's daughter's wedding bash in Phuket in 2009 is still being talked about on wedding blogs as the most lavish one ever. In March this year, he appeared on stage looking like Amitabh Bachchan in *Yaarana* complete with disco lit jacket and six skimpily clad European nymphets. At his birthday bash last year, he had the rapper Hard Kaur on stage at his birthday. Prancing about with her was Congress Member of Parliament Vijay Darda! And by the way, Union Coal Minister Sriparkash Jaiswal is named arbitrator in one of Manoj

Jayanswal's cases. I am no prude and I love a fun guy but the bottom line is simply that this edifice is built on allotments of coal blocks, period. Since this country is crawling with Jayaswals, that about brings us to the third side of this sordid story which is as always a political story.

According to the CBI, Darda is a significant shareholder in Abhijeet group companies and he serves on the board of at least two of them. Knowledgeable wags allege that Darda played a stellar role in the rise of Jayaswal.I don't have an agenda on Darda any more than I do on Jayanswal so perhaps it's a good time to talk about the granddaddy of all mining maestro politicians instead? Here is a little total recall for you on the life and times of Madhu Koda.

Koda is the son of a laborer in the iron ore mines of Chaibasa, 160 km from Ranchi, who began his political career as an activist with the All Jharkhand Students Union. He won the 2000 Assembly elections from Jagannathpuram on a BJP ticket. In the 2005 elections, when the BJP denied him a ticket, he contested as an independent and won. He then agreed to support a minority BJP government in the state so long as he was made the minister for mines and geology. Next year, he withdrew his support and put together a coalition of parties to become chief minister between 2006 and 2008, retaining the mines portfolio in this time. That was all the time he needed to put together a kick back kitty of Rs 2000 crore. How did he pull it off? According to the *Outlook* magazine, every recommendation by a state government for the allotment of a mine brought in a bribe of between Rs 10 and 12 crore at that time. Koda cleared 47 mine leases in a single day.

In addition, powerful politicians are entitled to a 25 per cent cut from existing mines as protection money. Koda had a finger in every pie aka coal pile. Third, key Koda aides invested in existing mines and lifted hundreds of tons of material overnight, night after night, without paying royalties to the Government. Finally, Koda charged between Rs 50 lakh and one crore to transfer bureaucrats to 'lucrative' postings. The local Hindi daily *Prabhad Khabar* blew the whistle on Koda but you can see that Koda was hardly the exception, just the first amongst equals! *Prabhat Khabar* by the way is owned by the Usha Martin group, one of the largest mining families in the area. They were not having a great time of it since Koda became chief minister.

The composite picture that emerges of this three legged grease ball stool is the eternal truth about Indian democracy. India sits on vast mineral resources. Indian politicians have created a complex plethora of laws and regulations which arrogates to themselves the absolute power to mate and dole this wealth to their sponsors, clients and cronies for cash and for favors. This money is then used to win elections in the short run and to create great political dynasties in the long run. In turn, those who receive these mining concessions at highly subsidised prices then use these assets to leverage loans, buy infrastructure projects, get more funds and live it up. In this way, entire classes of politicians and industry subsists on this 'system'. Sometimes politicians

become industrialists to close the feedback loop like a snake eating its tail. At other times, industrialists become politicians. Either ways, a great many rags to riches story in India are natural resource usurpation stories.

Sometimes the point boils over. The sheer easy of the usurpation — the need for speed — feeds on itself. When the excess boils out and over the rim of the corruption cauldron in an orgy of excess, screaming scam headlines hit the front pages of hyper ventilating newspapers and prime time TV. Lost in the radio gaga is the fundamental bullshit quotient that this is India as it has been since 1947: a crony democracy that puts the eclectic relationship between politician and businessman to the entirely laudable task of giving us a largely functioning democracy of a billion illiterate souls that the entire world more or less grudgingly admires. Funding elections would be a nightmare but for these cash flows and everyone is a part of it.

For this reason, talking about corruption at election time and then forgetting about it afterwards has always been part of the political *tamasha*. Since it's the same bunch of guys playing musical chairs on the national stage every five years -— protesting corruption when they are in the opposition and changing nothing of the 'system' when they are in power, the drama is really like so many lovers chucking daffodils at each other in an English spring! Perhaps they also meet up in the evening and maybe crack a joke or three about the stuff that went on in the day, the way successful lawyers do in the court canteen after the case has been heard.

I could end this *Fine Print* right here and my point would have been made. But another Bullshit Quotient may well be brewing under our very noses and we need to pause and ponder. In this eternal *leela* of gamesmanship, showmanship and theatre, all of a sudden, one opposition party has gone on a parliament paralyzing war path. So we must ask: wait a minute, aren't these guys cheating? Most tits do get a tat — or is it attacked — so why are they doing it? What happens when these guys form a government? We may even be angry because we really do want all that long standing urgent legislative business to be transacted; when the growth rate falls from 8 to 5 per cent, we can't not care.

This is when you confront the real question. Are you a believer? Do you think this country can be fixed? And do you think the political classes will do it? If you suspend your disbelief and assume for just a moment that one political party is doing the right thing - even if maybe for the wrong reason - then you have to ask yourself if some good may yet come of this legislative paralysis. When you follow this crazy train of thought into the pages of Big History, you may well decide that if you want to change the way this country runs, this price may be well worth paying.

B. AbracaVadra

(Real estate is perhaps the biggest generator of political funding in the banana republic of the mango people)

Ranjeev C. Dubey

People who feed on absurdity must have rolled about on the ground laughing hysterically at the spectacle of a loose political cannon shooting off allegations in all directions through October 2012 with no particular target in mind. Its Diwali time for sure and the rockets are aiming for heaven! Were these farcical incoherent ravings or the dawn of another historical inflection point?

At a pinch I would say both. "Incoherent ravings" because the central conceit of the Vadra Gate story flies in the face of our whole cultural construct. In India, the son-in-law tail unfailingly wags the top dog daddy and you can never be damned for what your son-in-law does or does not do. Conversely, this is also an inflection point because thus far - be it politics in India or mafia gang wars in New York - "civilians" are not fair game for hit men. If you are not in the 'family business' and stay out of politicking or racketeering or whatever the family does, the competition does not make collateral damage out of family connections. Not anymore. Nevertheless, when the dust does settle on Vadra Gate as dust inevitably returns unto dust, the fruitiest piece would undoubtedly be the explicit acknowledgement of real estate as perhaps the biggest generator of political funding in the banana republic of the mango people.

Historically, this has above all been true: since the dawn of agriculture and till the substantial advancement of the industrial age, land revenue has been the chief financier of the political classes. India today remains substantially an agrarian society. Just because the government doesn't tax agriculture any more doesn't mean that agricultural land is not still the primary generator of political revenue. The difference is only that this money has been channeled entirely into the parallel economy. How have we achieved this feat? This particular grease ball sofa on which our political classes recline in genteel generally ill-gotten luxury has four legs.

First, within a decade of Independence, we went about enacting limits to the amount of land that a man could own because naturally, we wanted everyone to be a land owner in the emerging socialist paradise. The Delhi Land Holding (Ceiling) Act 1960 for instance limited land ownership to 30 standard acres. There was no corresponding minimum that a small family was allowed to hold and many owned a few acres in the first place. In this way, we kept the toiling masses on the land, slaving away using primitive methods because they hadn't the education to understand new methods or, the money to buy the tools of the new methods if they did. In the fifty years since, expanding families divided; sub divided and re-subdivided: today, every small plot of land may be owned by 20 or 30 people.

Second, India went about creating laws telling farmers what they may do on their own land. Rural land was to remain rural and it could be only used for what the government thought was an "agricultural purpose". This was a matter of national

importance because we were a poor people who need every inch of land we can to grow enough food to feed our starving people. Naturally, commercial activities that generated a profit or materially expanded the economy or uplifted marginal farmers out of poverty were manifestly not agricultural purposes! The result has been that farmers are engaged in a vicious cycle of low productivity and unyielding self-perpetuating subsistence living. The cumulative effect of these two legs of the grease ball sofa has been the argument that land yields are low because land holdings are small but land holdings can't be increased because it would decrease land yields!

Third, where land can only be used for agricultural purposes, how do we ever set up an industry? As always, our license-quota-permit-*maibaap* government decided to arrogate to itself the power to drive the construction of the temples of modern India to the exclusion of substantially everyone else. For this purpose, it perpetuated a draconian British era land acquisition law that has done more to spread the joys of poverty and disease than most other laws. If you are not a regular reader of Fine print already bored out of your mind with my intermittent return to this subject, you will find a summary of my thoughts in Land Vs Industry**,** Pandora's Real Estate Box and Land Acquisition Angst. I'm not going there again but the upshot of this third leg is that for a long time, the government alone acquired land for private people and it didn't do it for nothing. If you wanted a piece of land, you "lobbied" the government and when enough mutual back scratching had been done, the land ended up in your hands. Of course, the compensation for the land almost never ended up in the hands of the farmer but I am not going there either.

As we now learn, there is a limit to how much misery and violence you can inflict on the powerless without facing an unmanageable backlash. Control of something like a quarter of India has slipped to 'Naxels' and some of what remains is ruled by deliverers of diabolical diatribes like *Didi* whose main claim to political fame is to try and give the land back to the powerless. To this developmental challenge, the government has responded by gleefully maneuvering to avoid acquiring land for private parties at all. Why?

Ask yourself this: how will you privately buy a small plot of the land from each the 18 cousins who hate each other? How do you get them to act in concert? Do you even speak the same language? What is your leverage? You need influence, right? Believe you me, in the village, the man who has that influence is also the man who was made the *sarpanch* and has a voice in the community *Khap*. He is also the man who every politician pursues for his vote gathering abilities. There is a web of relationships out there and it can't be done without political contacts at a high level.Net, net, you need political leverage to buy agricultural land and that leverage is at its highest when there is no law which allows a government to help you get your land for your upcoming industry or whatever.

This brings us directly to the last and fourth leg of our grease ball sofa. Since all you can do with agricultural land is engage in agricultural purposes, only agriculturists are ready to buy agricultural land and most haven't the money to do so. Those who do have the money to do so have no intention of tailgating aromatically flatulent bullocks riding ploughs. This is why agricultural land costs nothing in India and urban land costs the moon. If you want to buy land to set up an industry, the law requires you take permission to change the use of the land. Here in Gurgaon, you go to the Director Town and Country Planning and get approval under the Haryana Development and Regulation of Urban Areas Act. What do you think this means? You know that you can buy land for a hundred rupees and if you get permission to change its use, it will be worth a few thousand. The man who is expected to give you this permission knows it too. Why should he give it to you and what interest has he in making you very rich very quickly?

So who is going to get the land use converted for you? And how are you going to compensate him for it? You could give him a stake in your construction company, and since he is not putting in money to buy shares in your company, you would probably have to give him a loan too. Or you could give him a property for a song, and since the property is reward for services rendered, you need to give him a loan and then reverse the transaction later by some surreptitious means. The real estate business is awash with stuff like this. When people talk about real estate company shares being hammered because of poor corporate governance, I am speechless. Real estate and corporate governance? Whoa!

So should you be surprised if you hear that 15 per cent of all of Gurgaon is owned through a cluster of front and benami companies by one political family? You may hear that another 20 per cent of Gurgaon is owned by other political facilitators and service providers. I have myself as a lawyer steered more than a few Gurgaon infrastructure projects featuring inevitably a significant but very quiet shareholder who had no visible business or domain expertise and no reason to be there. This guy never brings a lawyer, never demands shareholders rights and never displays any nervousness in the negotiation: he doesn't need to because he doesn't think paperwork is what twists necks best!

So when people talks about the print media's "conspiracy of silence" thus far about what has been going on since 1947, I shrug my shoulders and say: but this is what India has always been. You buy land in Kochi because you are amidst the clutch of politically connected people who control the decision to build a particular set of bridges for a new road or not. You then buy the land in various names, making sure the road is aligned along these parcels of land. Then you have the land use converted to residential or commercial and you sell it for billions to people who want to build townships and malls along that road. That's AbracaVadra! Money for nothing, as it has always been in India: Why is Team K having seizures about it now?

So as I sit here pondering the bullshit quotient of Vadra Gate, it comes down to the flowing Ganga and the man who the power to wash his hands in it but doesn't. Everybody who could, did and those who didn't, would, if they knew how to. This is the central truth about real estate in India. Bad mouthing someone because you don't like his mother-in-law, or foster father in law, changes nothing. Deregulating land changes everything. But that topic isn't even on the agenda, and if it was, are you sure it's in your long term interest if you have political ambition?

C. The Pontyfication Of Politics Processes

(India cannot change as long as we mimic the Romans who, fed up with corruption found catharsis in blood sports)

Ranjeev C. Dubey

When two estranged brothers - Gurdeep and Hardeep Chadha - died violently over the ownership of a three acre farmhouse in Delhi on November 17th, 2012, the real moot question was this: how did someone who sold 'pakoras' in front of a liquor vend in Dhanaura, Moradabad in UP in the 1970s end up as the owner of a liquor distribution monopoly throughout Uttar Pradesh, a clutch of sugar mills and distilleries, two paper factories, a beverage factory, several malls, a 25-screen 7000 seat multiplex, dozens of real estate developments and a dozen farmhouses in and around Delhi to speak nothing of 2000 acres of land in South Africa?

Nearly as it can be pieced together from published sources, this is the story. From humble beginnings running a cane crushing machine in the 1960s, late Sardar Kulwant Singh Chadha managed to obtain a license to run his own liquor shop in Moradabad. After elder son Gurdeep aka Ponty joined him in business, the Wave Group - as later called - started to expand its liquor distribution footprint in the Moradabad, Bareilly and Ghaziabad districts of UP. In time, Ponty lobbied to have Meerut converted into a special excise zone and created his first local monopoly. When the Mulayam Singh Yadav Samajwadi Party Government took office in Uttar Pradesh in 2003, he successfully won the support of SP General Secretary Amar Singh. Inevitably, his company Great Value Foods won the Rs. 2000 Crores contract to supply supplementary nutrition to school children under the Integrated Child Development Scheme. This 35 year old scheme is the world's largest program for the health of children under 6 years of age. Notwithstanding the 2004 Supreme Court ruling that such schemes should be run by grassroots women's empowerment and self-help groups alone, Great Value Foods has continued to win successive contracts since!

When the BSP government came to power in 2007, the Mayawati-led BSP government ordered a probe into these deals. While many detractors gleefully rubbed their hands in anticipation of his downfall, Ponty Chadha persuaded the government in 2009 to give him the wholesale liquor distribution rights across the state at what many alleged was an extraordinarily low price so that the difference could allegedly be

delivered directly to those who awarded the contract. You would expect to hear such things, considering that this deal hurt a great many people. Be that as it may, Ponty Chadha now decided which company would supply how much liquor in the state to which of the 4,000 outlets and in what qualities to be sold at what prices. When liquor was sold above the printed MRP, everybody called the upside 'Ponty Tax', it being understood that he was not its final recipient.

Meanwhile, the UP Government's privatisation initiative culminated with a consortium led by Ponty Chadha acquiring several government owned sugar mills for Rs. 206 Crores which the opposition claimed in the UP Vidhan Sabha was 10% of what they were worth. The Controller and Auditor General subsequently criticized the Mayawati government for causing a loss of Rs. 1,200 Crores to the exchequer. Naturally, with this new found manufacturing capacity, the only beer you could find at a great many liquor shops in UP were of the Wave brand. Similarly a great many other shops also offered mainly Wave manufactured rum, whisky and vodka brands. In 2011, liquor retailers in 32 districts of UP got together to stage a mock funeral in Lucknow. By the time the Akhilesh Yadav SP government came back to power in 2012, resentment at these strong arm tactics had reached a crescendo and everybody waited with bated breath for the current term of the excise policy to end in March 2013.

Meanwhile, throughout the Mayawati period, Great Value Foods continued to supply food to poor children under two schemes: the Integrated Child Development Services and the Rajiv Gandhi Scheme for empowerment of Adolescent Girls. The value of these contracts had by then ballooned to Rs. 5000 Crores. In 2011, alarmed media reports encouraged the National Human Rights Commission to conduct a study in Gorakhpur and reported that the food supplied did not contain the ingredients claimed. A Supreme Court appointed Commissioner reported a "shocking state of affairs", observing that private commercial interests had subverted socially beneficial contracts. Shorn of the embellishments, poor kids were being ripped off thousands of Crores of foodstuff.

After the SP government took office in 2012, the tendering process for the Integrated Child Development Services has started afresh for the next period. Its new expanded avatar will roll out in 200 districts covering 91 million children through 1.3 million crèches over the next five years where 2.3 million female health workers will be paid Rs. 3000 or less a month to spear head the fight against child malnutrition. With a budget of Rs. 1.28 Lakh Crores, the scheme is now orders of magnitude larger than when Ponty Chadda got into it! Several bidders are already before the High Court claiming unfair tender terms which incidentally require all bidders to deposit Rs. 45 Crores as earnest money and exclude any bidder who has not handled such contracts worth at least Rs. 25 Crores in the past. In this environment, the life of this uniquely Indian entrepreneur has been prematurely terminated.

Now that we know the story, what is the moral of the story?

When you take a bird's eye view of the Wave Group, you see a liquor distribution business worth Rs 14,000 crore and a midday meal business in UP worth Rs 5,000 going on 9,000 crore. The good health of both businesses depends substantially on the ability to manage Government. The Wave Group has a very substantial real estate business too but the ability to establish such a business also depends on the ability to persuade Government to help establish it. I don't have to draw diagrams on a blackboard to explain how this great fortune was made: Res ipsa loquitur, the thing speaks for itself.

When you take a bird's eye view of Government, you see a sovereign who has gathered tremendous economic power around itself. The sovereign has created laws wrapped in morally righteous hoopla the net effect of which is to allow it to mate and dole thousands of crores of potential benefits funded by tax payer's money to anyone at its pleasure. The liquor business is 'regulated' to control social evil but the result is the generation of vast political booties. Social welfare schemes are established for poor children but the result is misappropriation of truckloads of charity money. These are just two examples of what goes on. These powers are completely unregulated, and in truth are incapable of being regulated because it is backed up by self-serving laws which prevent practically everyone from doing very much about it.

From what I can make out from both electronic and print media, not everyone loves this 'system': notably our urban elites. If we want to do anything about it - and I personally believe that more people bitch about it than want to do anything about it - the first thing we need to do is to accept that this is what India has been doing with tax payer's money for generations. Bureaucratic Doublespeak and Credible Deniability allows crooks to continue the debasement while the rest of us engage in Analysis Paralysis. The second thing we need to recognize is that this is the playing field on which those with either political or entrepreneurial ambition are required to play. In the circumstances, to sit around bad mouthing Ponty Chadha or anyone with his kind of ambition is unkind and unfair. The worst he can be accused of is doing a better job of it than the next realist. Ponty Chaddha's short biography tells us nothing about Ponty Chaddha beyond the fact that he was very good at working the system and will make for a brilliant movie script. It does tell us a great deal about political processes in our polity. As I argued in "Bullshit Quotient", every generation throws up its radical entrepreneurs of which Dirubhai Ambani was the greatest in his generation. Ponty Chaddha is merely radical entrepreneur version Y2K+10++.

This brings up point number three and last. If we do want to translate all that prime time news TV rhetoric against corruption into Modern India Version 2.0, we need to change our 'system' and to do that, we need to think systemically. I suspect a great deal of this type of inquiry will deal with four focus areas: (a) a possible Margret Thatcher type quest for "less government", (b) an exorcism of collaterally motivated laws intended to achieve an effect quite different from what they purport to do, (c) the

dilution of arbitrary political power and the creation of powerful independent regulators, and (d) the strengthening of a powerful judiciary able to enforce its writ. This process will be premised on the foundation that this isn't about individuals, it's about systems.

By the same token, the way to do it for instance would not include encouraging an idealistic officer out of a tax department to satisfy our bloodlust by making wild allegations against everybody powerful, famous or rich. The way to do it would also not include encouraging eloquent members of the political classes to slug it out in TV debates while we lick our lips in ascorbic excitement at all the bloodletting. India cannot and will not change merely because we successfully mimic the behaviour of excitable Romans who, fed up to their gills with the corruption all around them, found both catharsis and solace in cheering lustily while gladiators engaged in a gore-fest at the Coliseum.

PHILOSOPHICAL ISSUES AROUND LAWS

A. Linguistics and Laws

(In a profession defined by the hyperbole we use to describe our understanding of our world, the simple truth is frequently lost. Eventually, we come to believe that our choice of words is the truth of what we speak. This skews our understanding of legal issues and curveballs the laws we create.)

Ranjeev C. Dubey

In a profession defined by the hyperbole we use to describe our understanding of our world, the simple truth is frequently lost. Eventually, we come to believe that our choice of words is the truth of what we speak. This skews our understanding of legal issues and curveballs the laws we create. Allow me to illustrate. When a poor man builds a hut by trackside, an 'encroacher' has 'illegally occupied' government land 'in defiance' of the law under the protection of 'slumlords'. When I build a house in an illegal colony like Delhi's Sainik Farm, I am 'harassed' by 'corrupt' inspectors in search for 'bribes' who 'interfere' with my property. Clearly, our attitude to the issue directs the language we use. I have a better example. In an endless public campaign to demonize three wheeler drivers who, for urban elites, seem to personify rapacious opportunism like no other, 'rude and aggressive' drivers are intermittently accused of 'harassing' citizens and 'demanding' double fares 'taking advantage' of rush hour. We don't stop to ask why it costs four times more to register a private auto rickshaw than a small car, why commercial auto rickshaw licenses are concentrated in the hands of so few or why these licensees are charging extortionist daily rentals from the drivers. Airlines on the other hand, who doubled their fares last June, were 'struggling' carriers, 'reeling' under the impact of 'unsustainable prices' and "uneconomic low fares" who were able to 'recoup' some of their losses. We do ask why "tax payer's money" is used to "subsidize" Indian Airlines which then "undercuts" the other airlines causing "tremendous losses" to the whole industry. This is how form becomes substance. When laws get made, the

language in which the addressable issue is framed determines legislative attitude. Thus, I argued in my last presentation at Lex Witnesses' Real Estate Summit that we are proceeding to frame a patently unfair land acquisition law because we see conversion of farms to golf clubs as 'development' and original 'owners' as 'claimants'.

If we saw acquisition as 'land grab', landowners as 'victims' and compensation as 'peanuts for helpless peasants', the laws we make would change radically. Historically, this is how it has always been. When the British Government ejected indigenous people from their community owned forests, their 'relationship with the forest' was 'settled'. When plains dwellers lost title to their lands to a newly created class of zamindars, agricultural land was thus subject to a 'permanent settlement'. The point here is not to change the "language" of legal issues to favour peasants and victimize industry. That is replacing one prejudice with another, one propagandist line with another, one demagogue with another, one emotional appeal with another and, most of all, one moral judgment with another. To make fair and just laws, we need legal discourse free of moral judgment and semantic spin. Why do I say so? In our cynical world of high pitched demagoguery, it is always easy to trash any argument in favor of self-restraint and rationality. Nevertheless, when moral judgment becomes the driver of political discourse, the result is usually tragedy. We must acknowledge that laws will always favor someone at the cost of someone else, so laws will always be political. We need political discourse free of moral judgment. History has proved as much. Just so I don't get caught up in emotional debates on the interpretation of Indian history, let me use an example from another global power. The Ming Dynasty was undoubtedly a high point in Chinese history. Why did the Ming Dynasty fall? When you get past the patchy tax collection and the corrupt bureaucrats, it comes down to the neo Confucian philosophy of Wang Yangming who, during the reign of the emperor Wanli (1572-1620), set forth the proposition that everyone has "innate knowledge of the good". In demanding that people act on their beliefs, he demanded that every individual including those in government must make a moral judgment on everything he did or didn't. This was not so far from European Individualist Humanism (which mercifully never informed European history).

This exaggerated moral responsibility really meant that the Ming government became hostage to individual moral choices as officials each decided who would act in what way based on what that individual believed was correct. So simple governance choices were really moral choices and it became impossible to find a middle ground, which lies at the heart of political compromise. Government was undermined, terminally so. Within twenty years of the emperor's death, the dynasty was destroyed by incoming Manchu invaders. May I submit that we who have the ability to make and interpret laws have no business becoming hostage to such prejudice? Let us confer together and rethink our legal landscape so we may not hurtle towards a self-righteous suicide.

B. Politically Polarized Paradigms

(The Controller and Auditor General's report on the allocation of Coal Mines proceeds from an implied political paradigm and transforms into a criminal process on the basis of 'presumptive' legal facts.)

Ranjeev C. Dubey

Whatever else the Controller and Auditor General of India may have achieved in exposing the 2G and Coalgate scams, he has certainly introduced us to a new vocabulary of criminal law. Here's a sampler. In November 2010, the CAG reported that by failing to auction spectrum in a transparent manner, depending on the assumptions you are willing to make, the Central Government had caused a 'presumptive loss' to the exchequer of between Rs. 45,614 Crores and Rs. 1.39 Lakh Crores. Gratifying as the admission of 'presumption' was, it remained unclear exactly how this was a 'loss to the exchequer'. Recall that India had originally auctioned telecom licenses in 1995 to outrageously exaggerated bids. Mobile service unveiled at Rs. 16 a minute, a price point so absurd that the Government had no choice but to bail out the nascent industry by converting those mind boggling license fees into revenue shares. At the time, I don't recall anyone talking about 'presumptive losses to the exchequer'. Indeed, you would be off the reality curve to make that argument today because arguably, the Government has over the years made more money directly and indirectly taxing telecom companies than the telecom industry has made profits! The Finance Ministry will probably make even more money before the Vodafone Vortex is vanquished. In the larger scheme of things, it is inconsequential that Telecom Minister Sukh Ram was convicted of corruption for having a trunk load of money under his bed. Bear also in mind that India subsidizes food for the poor, electricity for farmers and diesel for SUV drivers.

In one way or another, every budgetary sop is a 'presumptive loss' to the exchequer. All laws favour someone and hurt someone else. Just because they hurt the government's pocket doesn't make them criminal. I have much more to say on this subject in my recently released new book 'Bullshit Quotient: decoding India's corporate, social and legal fine print' (Hachette 2012) so I will move on to another term that has found itself into our criminal lexicon. In March this year, CAG put out a draft report stating that private parties had received a 'presumptive gain' of Rs 1.86 lakh Crore because coal blocks were allotted to private parties without public auctions. Lost in the god awful din of hyper ventilating talk show hosts on TV was the fundamental fact that the Coal Mine (Nationalization) Act 1973 makes two exceptions to the State's monopoly over coal: (a) captive use in specified industries including iron and steel, and (b) isolated coal blocks or those too small to mine economically. Given our power woes and developmental ambitions, every government since 1993 has allotted coal blocks to private power projects and similar.

That apart, under the Mines and Minerals Development and Regulation (MMDR) Act, 1957, applicants for mining licenses must be recommended by state governments

who have jealously guarded this right. Legislative amendment is necessary to change this and Parliamentary stalemate being what it is in the last two years, we will surely do this as easily as breed pigs with wings. Notwithstanding the underlying 'presumption', the result of this report was a CBI registered FIR and an on-going investigation. This is deeply disturbing. I am not for a moment suggesting that these, that, or all for that matter all, coal block allocations were not preceded by corresponding benefit to specific politicians. Madhu Koda's Rs 2000 Crores kickback is too recent to forget. Clearly, a whole generation of carpet baggers has gone from rags to riches overnight riding on the back of great skill in converting under-priced public assets into private wealth in exchange for bribes to powerful politicians. The core legal point here concerns the direction our judicial structure is taking. Georg Wilhelm Friedrich Hagel argued that nothing final can be said of any era till that era has ended.

As lawyers and intellectual elite, our task is to be alert to flows of events that take us away from the civil society we are trying to build. Given the scam fixated mind-set that has seeped into national consciousness, we cannot but distrust the idea that law can presumes a bunch of facts and uses that to register an FIR which accused persons are then called on to defend. When you get past the high decibel rhetoric, what you have here is a political paradigm transforming into a criminal process on the basis of 'presumptive' legal facts. This should concern us all because we are all potential victims of such presumptive crimes. I am deeply concerned that if Mr P Chidambaram should see it fit to reduce my income tax like he did the last time he was Finance Minister, the presumptive gain to me will be the basis of a police investigation. It's scary.

C. Arbitrary Arbitrations

(Given the reality of arbitration in India, should we be inserting arbitration clauses at all in Indian contracts?)

Ranjeev C. Dubey

Why is it that CFO's don't ask searching questions about all the 'legal' clauses we lawyers insert into commercial contracts? I mean stuff like Force Majeure, Representation and Warranties, Indemnities, Termination, Arbitration clauses… Is it because it's very remote and unlikely to come to pass? Is it because it's all mindless gobbledygook anyway? Or is it because legal stuff is the next best thing to a holy cow in the life and times of the average CFO and therefore off limits? Whatever it is, this much is true: in my 33 years of law practice, some of the highest fees I ever got paid were for fixing problems arising out of contracts with bad termination clauses! At the same time, some of the biggest legal bills that my clients ever paid were for thoughtlessly inserting arbitration clauses into agreements.

Let me stop here and make sure I have your attention. Every arbitration my firm does has three arbitrators because, in our low trust society, no one wants to risk the

plot on just one. At least two out of three arbitrators in every case we handle are retired high court judges. No significant arbitration that we have handled in the last ten years has lasted less than five years and perhaps 30 hearings, not including the adjournments. Any lawyer worth having before a retired high court judge takes you down Rs. 50,000 a hearing plus the price of the pre hearing conference. The lawyers who brief this lead lawyer charge as much. Each of the arbitrators will also charge Rs. 50,000 a sitting. Then there is venue cost, travel costs, secretarial costs and what else besides. Any which way you look at it, we are talking about an entry level burn rate of Rs. 2 lakhs a hearing for midsize local cases. If you need to fly your lawyers out of town, your burn rate just tripled. If you assume 30 hearings as typical, every arbitration clause you sign is going to cost you Rs 60 lakhs or more! I'd say you have reason to ask some very searching questions about what you are signing.

The problems with arbitrations in India are of course numerous and complex. Because arbitrators are largely ex-judges, arbitrations mimic court cases with protracted procedures and endless delays. You don't get there faster because you are not in court. In truth, you can never be sure that you won't start arbitration by going to court. As I candidly described in my recently published book Bullshit Quotient: decoding India's corporate, social and legal fine print, we are governed in India by the Buffalo School of Jurisprudence by which he who wields the stick is the owner of the asset. Parties rush to court to get stay orders the moment the dispute begins. It is only after the interim status has stabilized that everyone settles down to a leisurely arbitration in a swanky environment at extortionist cost.

The swanky bit doesn't help at all. Court Fees are fixed but arbitration costs are not. The daily wages model secures that no player in the game truly wants the sinecure to end. Given the average age of the tribunal and the energy levels of the bar, hearings are a leisurely 'cuppa tea' interrupted with frequent trips to the cookie jar on the side table. The hearings, such as they are, are interrupted even more often by a succession of boring and prolonged '*hamare zamaane main'* stories about shenanigans in the *munsif* magistrate's court or was it the sub judge third class in 1960, or was it 1953?

There is too the mind set with which the dramatis personae approach arbitrations. Arbitration is something you do when you don't have anything else to do. Dates get fixed on long weekends, after court hours, during vacations, between vacations, between weddings, outside pregnancies and so forth. It's an entertaining game - this date fixing - with complex negotiations but the end game still looks like long jumping super rabbits in red capes on steroids coming down to touch base on life's calendar in two and three day clusters every few months. On any given date, no one remembers what happened the last time around.

Truth be told, a somber environment of purposefulness does not always inform the proceedings. On the contrary, the dominant emotion may well be one of entitlement and privilege. We have never had arbitration where the arbitrators did not care at all

about which class of airline seat they were transported, which brand of hotel they were booked in, which quality of room they were checked into, what quality of specialty cuisine they partook in and what other facilitations were offered as a matter of course. We have been asked to purchase brand new very expensive designer leather bags for arbitrators so that they may carry the arbitration papers with dignity. We have been asked to provide companion tickets to wives, and worse, secretaries too. We have been asked to arrange show tickets for arbitrators. We have paid for landline calls to relatives in America from the suites of high end hotels when we could have lent our mobile phones to the same august personality and saved tens of thousands of rupees. There is a whole environment of subtle extortion out there that CFOs will do well not to resist.

The brew thickens because arbitrators are not always young, energetic people who are impatient to delivery quick effective justice to the parties. The Constitution of India retires its judges at an age because it believes that every human being has a Best before Date. This is not true of arbitrations. By the time you see an end to your arbitration, you could just as easily have a geriatric arbitrator with a Teflon mind to which nothing sticks writing an incomprehensible award that bears no relationship to the arguments made before him. How do you discount this business risk?

At the best of times, it's the slow boat to a possible award out there but the biggest problem is that it doesn't end because someone received an award. Indian courts are more enthusiastic than most others to intervene in arbitrations after the award has been made. I don't blame the courts at all: quite the contrary. Indian arbitrators do some very strange things. I have a case where arbitrators have 'punished' a client with an additional potential liability of Rs. 250 Crores because the client's lawyer had to leave the venue early to address a part heard before the Supreme Court.

The upshot of all this is that you inevitably get a leisurely and very expensive arbitration that is then followed by a prolonged and equally expensive litigation. I often get asked what we need to do to fix the problem. The simple logic of the situation would require you to write fixed times and fixed fees into your arbitration clauses. That is easier said than done. The claim could be a rupee or it could be Rs. 100 Crores? How will you define the cap? It's the same problem with time. The complexity of the issues determines the time you need. And what happens if you don't get an award in time? The arbitration is superseded, you make a fresh start in courts and any timeline you agree on becomes meaningless? Considering that you will end up in court anyway, isn't it smart to dispense with all the buffet spreads and exotic malts you are going to pay for during your arbitration enroute to the final frontier in court and cut to the chase?

Section III – News

A. New Legislation & Regulations

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2012[1]

The Hon'ble Supreme Court was faced with an issue of sexual harassment of women at work place in a landmark case of *Vishaka Vs State of Rajasthan* (1997 (7) SCC 323). The Hon'ble Supreme Court while passing a judgment in the case noted in those days that present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment at work places. The Hon'ble Supreme Court issues a set of guidelines and directed that the said guidelines would be strictly observed in all work places until a suitable legislation is enacted by the legislature.

Today, after 15 years of issuance of directive in Vishaka's case, the Union of India has legislated an act to prevent, prohibit and redress the Sexual Harassment of Women at Workplace. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2012 ("The Act") was notified on and is applicable from February 27, 2013.

The salient features of the Act are:

(i) ***Sexual Harassment at workplace*** includes, implied or overt either promise of preferential treatment in employment or threat of detrimental treatment in employment or threat about the present or future employment status. A conduct which interferes with work or created an intimidating or offensive or hostile work environment shall also constitute sexual harassment. A woman would also be deemed to be sexually harassed if there is 'humiliating conduct constituting health and safety problems'.

(ii) ***Employer is duty bound to*** constitute an Internal Complaints Committee. The Internal Complaint Committee shall receive the complaint from the women aggrieved of a sexual harassment and act upon such complaint in accordance with the Act. The Employer is further duty bound to provide a safe working environment, sensitize the workers about the sexual harassment policy, assist the woman employee in initiating prosecution of the oppressor or initiate a criminal action against a third party oppressor.

(iii) ***Woman employee aggrieved by a sexual harassment*** may file a complaint with the appropriate authority under the Act. Aggrieved employee may either choose to reconcile her dispute, settle the complaint or choose to initiate criminal proceedings under the Act against the perpetrator.

[1] http://ncw.nic.in/PDFFiles/sexualharassmentatworkplacebill2005_Revised.pdf

(iv) ***During the pendency of the enquiry*** into the complaint, aggrieved woman may request employer for a transfer to another work place or a leave or any other relief.

(v) ***If the perpetrator is found to be guilty*** than employer shall take action for misconduct in accordance with the provision of the service rules / conduct rules or policies governing disciplinary matters applicable to the perpetrator. In the event there are no services or disciplinary rules in effect, the employer may obtain a written apology from the perpetrator, suspend him or terminate his employment.

(vi) ***The identity of the aggrieved woman and witness shall be kept confidential*** and shall neither be disclosed in accordance with the Right to Information Act, 2005 nor to public, press and media in any manner.

Criminal Law (Amendment) Ordinance, 2013[2]

The **Criminal Law (Amendment) Ordinance, 2013** is promulgated on February 3, 2013 to amendment the provisions of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973. This amendment is promulgated to incorporate offence in relation to sexual harassment in Indian Penal Code and make consequential amendments to the Indian Evidence Act and Code of Criminal Procedure, 1973;

The Ordinance makes the following amendments to the Indian Penal Code:

(i) ***The offence of causing or an attempt to cause grievous hurt by administering acid*** is committed, if a person causes damage, deformity, burns, maims or disfigures or disables any part of body of another person by throwing or attempting to throw acid with an intention to cause or with a knowledge that he is likely to cause grievous hurt. The offence is punishable with an imprisonment of a term of ten years which may extend to a imprisonment for life and with fine which may extend to ten lakh rupees. In the event, the person is guilty only for an attempt to cause grievous hurt by throwing an acid, he shall be liable for an imprisonment of five years which may extend to seven years and shall also be liable to fine.

(ii) ***An offence of sexual harassment*** is committed if acts or behavior of a person includes (i) physical contact and advances involving unwelcome and explicit sexual overture; or (ii) a demand or request for sexual favour; or (iii) making sexually colored remarks; or (iv) forcibly showing pornography; (or any other unwelcome physical, verbal or non-verbal conduct of sexual nature. A person found to be guilty of

[2] http://pib.nic.in/newsite/erelease.aspx?relid=91979

committing sexual harassment shall be punishable with an imprisonment of five years or with fine or with both.

(iii) ***An offence of assault to women with the intent to disrobe*** is committed if a person assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in public place. A person guilty of such an offence shall be punishable with an imprisonment of three years which may extend to seven years and with fine.

(iv) ***An offence of voyeurism*** is committed when a person watches or captures the image of a woman engaging in a private act in circumstances where she would usually have expectation of not being observed either by the perpetrator or any other person at the behest of the perpetrator. If a person is found to be guilty of such an offence he shall be punished with an imprisonment of one year which may extend to three years for the first conviction and for the second conviction, he could be sentenced to an imprisonment of seven years.

(v) ***An offence of stalking*** is committed if a perpetrator follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such person, or whoever monitors the use by a person of the internet, email or any other form of electronic communication or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes in the mental peace of such person.

(vi) ***An offence of trafficking of person for exploitation*** is committed if a person (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by using threats, or force, or coercion, or abduction, or fraud, or deception, or by abuse of power, or inducement for exploitation. A perpetrator shall be liable for an imprisonment of three years which could be extended to a life imprisonment provided certain other conditions are met.

(vii) ***The offence of rape is replaced by a sexual assault*** which has a wider definition than term rape. An offence of sexual assault is committed if a person penetrates private parts of another person either with any body part or any other object, applies his mouth to private parts or touches private parts of a person, against such other persons will or without the other person's consent. It is explained that consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non verbal communications, communicates willingness to participate in the specific act. It is further clarified that in the event a person does not physically resist the act of penetration shall not by reason only of that fact, be regarded as consenting to the sexual activity. A person guilty of an offence of sexual assault shall be sentenced to imprisonment for a period of seven years which may extend to imprisonment for life. Further, a person guilty of an offence of sexual assault during the

course of commissioning sexual assault inflicts an inquiry which causes the death of the person or causes the person to be in persistent vegetative state, shall be punished with rigorous imprisonment.

(viii) ***An offence of sexual assault by a person in authority*** is committed if a person being in fiduciary relationship (including a public servant or superintendent of jail or a person being in the management of hospital) abuses such fiduciary relationship to induce or seduce any person and has sexual intercourse with that person, such person shall be guilty of sexual intercourse not amounting to sexual assault.

(ix) ***An offence of sexual assault by a gang*** is committed if a person is sexually assaulted by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of sexual assault regardless of gender. The person found to be guilty of such an offence shall be sentenced to imprisonment of life and shall be liable to pay compensation to the victim.

Licensing of New Banks in Private Sector

Background

The history of private sector banks in India could be divided into two phases. The first phase was prior to the year 1993, when approximately 16 private sector banks were operating in India. In the year 1993, Reserve Bank of India issued license to 12 more private sector banks including Axis Bank, Kotak Mahindra, Yes Bank and IDBI Bank.

In the year 2010-11, the finance minister made an announcement in his Budget Speech that the Reserve bank of India shall issue guidelines for 'Licensing of New Banks in Private Sector' ('Guidelines'). These Guidelines were finalized in the month of February 2013. Along with these Guidelines, the Government of India ('GoI') has also brought some amendments to the Banking Regulation Act, 1949, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 and had made some consequential amendments through The Banking Laws (Amendment) Bill, 2012.

The Reserve Bank of India, in furtherance to the recommendations of Narasimham Committee and Raghuram Rajan Committee, had initiated a process to draft a policy paper on banking structure in India. This policy paper on banking structure in India shall be released within a period to another two months.

Guidelines:

The salient features of the Guideline are stated hereinafter:

(i) ***An entity owned and controlled by resident Indians shall be eligible*** to promote a bank through a wholly owned Non-Operative Financial Holding Company ('NOFHC'). The shareholders or promoters of existing Non Banking Financial Institutions shall also be eligible to apply for a banking license in accordance with these Guidelines.

(ii) ***RBI shall consider that the shareholders / promoters of NOFHC are fit and proper*** for grant of license on the basis of their credentials, integrity and financial performance. RBI may obtain confidential reports from various other government departments in respect of the shareholder / promoters of the proposed NOFHC. The business activities of the promoters / shareholders should be such that it places the banking system at risk.

(iii) ***The shares of NOFHC shall be held*** in the following manner; (i) individuals (each individual shareholder shall not hold more than 10%); and (ii) more than 51% or more by a public company where public does not hold less than 51%. The NOFHC shall hold all the financial services entities. Further the share of the NOFHC shall be held by non financial service entities.

(iv) ***The activities which are outside the banking activity***, such as specialized services such as insurance, broking etc. and other services such as leasing, credit cards etc. shall be carried out through a entity other than the entity that undertakes banking activity under the NOFHC. The NOFHC shall not be permitted to set up a new financial services entity for at least three years from the date of commencement of business. Any change in shareholding beyond 5 percent of, within promoter group, shall take place with prior approval of RBI.

(v) ***The minimum paid up capital*** for a bank shall be INR 5 Billion. The NOFHC shall hold at least 40 percent of such paid up capital. The shares held by NOFHC shall have a lock in period of five years. NOFHC shall hold and maintain 40% of the voting equity capital for a period of five years. The voting equity capital could be raised through public issue or private placement. The shareholding of NOFHC shall be reduced to 20 percent of the paid-up voting equity capital within a period of 10 years, to 15% within a period of 12 years. The bank shall maintain a minimum capital adequacy ratio of 13 percent of its risk weighted assets. The NOFHC shall along with other subsidiaries maintain a minimum capital adequacy of 13 percent of its risk weighted assets. The bank shall get its shares listed on a stock exchange within a period of three years from the date of commencement of business.

(vi) ***The bank shall be regulated*** through the Banking Regulations Banking Regulation Act, 1949, Reserve Bank of India Act, 1934, Foreign Exchange Management Act, 1999, Payment and Settlement Systems Act, 2007, and other guidelines issued by the RBI & SEBI.

(vii) ***The aggregate foreign shareholding (FDI, NRIs & FIIs) shall not exceed 49%*** of the paid up voting equity capital for the first 5 years from the date of licensing of the bank. A Non – resident shareholder shall not hold more than 5 percent of the equity shareholding.

(viii) ***The NOFHC shall have to follow corporate governance guidelines*** laid down by RBI from time to time. A person who is a director on the Board of NOFHC shall not act as a director on any other NOFHC. 50% of the Board of the NOFHC shall be constituted of independent directors. The ownership and management of the NOFHC shall be separate. The Board of NOFHC shall constitute a nomination committee and a remuneration committee.

(ix) ***The NOFHC shall have to follow prudential norms on stand alone and consolidated basis.*** The Prudential Norms that NOFHC shall have to follow on standalone basis are related to classification, valuation and operation on investment portfolio, income recognition, Asset Classification and Provisioning pertaining to Advances. Apart from prudential norms NOFHC shall follow Guidelines in respect of liquidity management, reserve funds, dividends, interest rate risk and leverage of its paid – up capital. On consolidated basis, NOFHC shall be obliged to maintain capital adequacy, prepare consolidated financial statement and other prescribed requisite statements in accordance with Basel II and Basel III norms.

(x) ***The application for grant of license*** shall be made to the RBI in accordance with Rule 11 of the Banking and Regulation (Companies) Rules, 1949 along with requisite information. Application shall be screened by RBI and thereafter referred to High Level Advisory Committee. The High Level Advisory Committee shall give its recommendations to RBI. The RBI, after considering the recommendations shall grant an in-principle approval which shall remain valid for a period of one year.

The Banking Laws (Amendment) Act, 2012

In furtherance to its objective to grant license for private banks, the Government of India ('GoI') has amended the Banking Regulation Act, 1949 (the 'Act'), the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980. The amendments are made by way of introducing the Banking Laws (Amendment) Act, 2012 ('Amendment').

The amendments that are made to the Banking Regulations Act, 1949 are as follows:

(i) Prior to Amendment, the provisions of the Act were such that a banking company was not entitled to issue preference shares. In terms of the present amendments, a banking company can issue preference share with prior approval of RBI. Further the preference shareholders shall not be entitled to exercise

voting rights if in case the banking company is not able to pay dividend. These provisions override provisions of the Companies Act, 1956.

(ii) Prior to Amendment the Act provided that no person shall hold shares of banking company that entitles him to exercise more than 10% of voting rights. Subsequent to Amendment, the Act provides that RBI may enhance this limit of 10% to 26%.

(iii) A new provision is incorporated in relation to regulation of acquisition of shares or voting rights. A restriction is imposed from transferring shares or voting rights of the banking company in such a manner that enables an acquirer to exercise more than 5% of voting rights or hold 5% of the paid up share capital. However, any such transfer could take place after RBI grants an approval. Such approval shall be granted by RBI provided certain conditions are met. The approval of RBI to transfer shares may be subject to certain conditions in relation to 'fit and proper' criteria.

(iv) A banking company was under an obligation in terms of the Act to maintain a cash reserve of 3 percent of the total demand and liabilities. In terms of the Amendment, the RBI shall inform the cash reserve by way of an official gazette. The RBI shall further charge a penal interest on the shortfall in cash reserve. The RBI also has the power after the Amendment in the Act to exempt a banking company from application of section related to cash reserve.

(v) The Act proposed to insert new provisions that would enable RBI with Establishment of Depositor Education and Awareness Fund.

(vi) In terms of the new provisions RBI shall have power to call for the records in relation to 'associated companies' of the banking companies and inspect books of accounts of such associated companies.

(vii) The RBI in the event of (i) public interest; (ii) for preventing affairs of a banking company being conducted detrimental to the interest of the depositor; (iii) for securing proper management of a banking company may supersede the Board of Directors of the banking Company. After supersession, the Board of Directors of the banking company shall be managed in accordance with the provisions of the Act.

(viii) Further certain provisions of the Indian Contract Act, 1872, Indian Stamp Act, 1899, Reserve Bank of India Act, 1934 and certain other acts are also modified consequently.

SEBI amended SEBI (Employee Stock Option Scheme & Employee Stock Purchase Scheme) Guidelines, 1999 and Equity Listing Agreement.[3]

Securities and Exchange Board of India ('SEBI') has, vide its circular dated January 17, 2013 bearing no. CIR/CFD/DIL/3/2013, introduced the following amendments to the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999 (ESOP Guidelines) and the Equity Listing Agreement:

(i) A new clause 22B is introduced in the ESOP Guidelines stipulating that employee stock option scheme or stock purchase scheme shall not involve acquisition of Companies own securities from the secondary market.

(ii) Clause 35C is introduced in the Equity Listing Agreement in the following terms:

(a) The issuer to ensure compliance with the revised SEBI Guidelines with respect to all new employee benefit schemes involving the securities of the company; and
(b) The issuer shall also ensure that all existing employee benefit schemes, i.e., schemes framed and implemented by the company involving dealing in the securities of the company in the secondary market, before 17 January, 2013 are aligned with and made to conform to the revised SEBI Guidelines by 30 June 2013.
(c) Companies which have existing employee benefit schemes that do not conform to the ESOP Guidelines (as amended by the Circular) are now required to inform the details of their schemes to the stock exchanges, in the prescribed format, within 30 days of the date of issue of the Circular, i.e., February 16, 2013 and disseminate the prescribed information on their website.

B. New Case Laws

Qatar Airways V/S Shapoorji Pallonji & Co.[4]

Whether a foreign company owned and controlled by the State of Qatar and by its ruling family is a 'Foreign State' within the meaning of Section 86(1) of the Code of Civil Procedure, 1908 and therefore consent of Central Government is required for instituting a suit against such foreign company?

The Bombay High Court has held that the suit is based upon a contractual relationship between the parties. Therefore the foreign company is not a foreign state

[3] http://www.sebi.gov.in/cms/sebi_data/attachdocs/1358405632526.pdf

[4] MANU/MH/0032/2013

within the meaning of Section 86 (1) of Code of Civil Procedure, 1908. The foreign company has a distinct legal personality and such legal personality finds recognition in the contractual relationships. Further, contractual relationships of a foreign company in India would be subject to the jurisdiction of a competent court in this country.

Vidur Impex and Traders (P) Ltd. and Others V/S Tosh Apartments (P) Ltd. and Others[5]

Whether Court can direct Impleadment of any person as party at any stage of the proceedings?

In this case the Hon'ble Supreme Court has held that the broad principles which should govern the disposal of an application for impleadment. It states that the court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct Impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit. Further, a necessary party is a person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court. Also a proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favor or against whom a decree is to be made, and if a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment.

Re: M/s. Northgate Technologies Limited[6]

What is the scope of judicial scrutiny in case a scheme of arrangement is submitted before the High Court in accordance with the provisions of Section 391-394 of the Companies Act, 1956?

The High Court should examine whether the proposed scheme of compromise and arrangement is violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same. The High Court has also to satisfy itself that the members or class of members or the creditors or the class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to them. It must also

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[5] MANU/SC/0663/2012, **Equivalent Citation:** AIR2012SC2925, (2012)4CompLJ433(SC), 2012(132)DRJ24, JT2012(7)SC531, 2012(4)RCR(Civil)308, 2012(7)SCALE448, (2012)8SCC384

[6] MANU/AP/0362/2012 **Equivalent Citation:** [2012]172CompCas438(AP), (2012)4CompLJ472(AP)

ensure that the scheme as a whole is also just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

Unless the scheme is shown to be contrary to any law or is such as to shock the conscience of the court or is patently unfair to the members or creditors or any class of them, or is against public interest or against public policy, the court should not come in the way of business by rejecting a bona fide scheme under Section 391.

Reserve Bank Of India V/S C.R.B. Capital Markets Ltd.[7]

Whether a scheme under sections 391-394 of the companies act is maintainable in a winding up petition filed by the Reserve Bank of India under section 45 MC(1) of the Reserve Bank of India Act, 1934?

The Court has held that a scheme should not violate any statutory provision. Further, while a scheme under section 391/392 can be considered by the company court even during the pendency of the winding up petition filed by RBI under section 45 MC of the Reserve Bank of India Act, 1934, such a scheme cannot be sanctioned if it is in violation of any of the statutory provision including the provisions of Chapter III-B of RBI Act.

Whether a scheme under section 391-392 could set aside Quasi-judicial orders passed by a statutory authority like SEBI constituted under the Securities and Exchange Board of India Act, 1992?

In terms of Section 391(1) of the Companies Act, 1956, the company court could, stay the commencement or continuation of any 'suit or proceeding' against the company on such terms as it thinks fit until the application is finally disposed of. Therefore, whatever the stay that may be granted under this provision, the same would apply only till the application under section 391 is finally disposed of. Such an application gets finally disposed of when it is either rejected or when the scheme is sanctioned. While sanctioning the scheme, there is no power to stay proceedings any further, that is, after the application for sanctioning the scheme is disposed of. The Court further held that the Quasi-judicial orders passed by a statutory authority like SEBI or orders passed by the RBI and the Income Tax Authorities under special enactments cannot be set aside while sanctioning a scheme under section 391.

Indeen Bio Power Limited v. Dalkia India Pvt. Ltd[18]

[7] MANU/DE/5536/2012

[8] Arb P No. 184/2012, Judgment delivered on January 21, 2013

In a case where the existence or non-existence of the arbitration agreement is in dispute, whether it's the court that would decide upon the dispute or the matter could be referred to an arbitration tribunal?

The court has held that Section 16 (1) of the Arbitration and Conciliation Act, 1996 grants the arbitral tribunal, the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. The court further held that the power that is exercised by the court in terms of Section 11 of the Arbitration and Conciliation Act, 1996 are administrative in nature.

Jitendra Nath Singh V/S Official Liquidator And Others[9]

Whether all secured creditors along with the workmen have pari passu charge over all the properties or assets of the company?

The Hon'ble Supreme Court held that a Secured Creditor has only a charge over a particular property or asset of the company offered to the secured creditor as security and the unsecured creditors have rights over all other properties or assets of the insolvent company. The court also concluded that the secured creditor and dues of the workmen in proportion calculated in terms of Section 529A are liable to be paid in preference to all other dues but are pari passu inter se. A statutory charge has been created in the first limb of the proviso to clause (c) of the sub-section (1) of Section 529 of the Companies Act in favor of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor.

Whether mere institution of a petition by a secured creditor before a court or a forum of competent jurisdiction per se leads to an inference that the secured creditor stood outside the winding up proceedings ?

The Hon'ble Supreme Court held that this would not tantamount to an inference that the secured creditor stood outside the provisions of the winding up proceedings unless it takes some effective steps to pursue those proceedings and realizes its security de hors the specific performance under the act. The secured creditor has the option to either realize his security or relinquish his security. The secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding up proceedings. If the secured creditor opts to realize his security, he is entitled to realize his security in a proceeding other than the winding up proceeding but has to pay to the liquidator the costs of preservation of the security till he realizes the security.

Shane Duff V/S Essel Sports Private Limited[10]

[9] 2013(1) Comp.L.J. 101(SC)

[10] http://www.manupatrafast.com/pers/Personalized.aspx

If the named an Arbitrator expires does the arbitration clause itself gets invalidated and/or does not survive and as such the Chief Justice or his designate under Section 11 of the said Act cannot fill the vacancy occasioned by the death of the sole Arbitrator?

After considering sections 14 an 15 of the Arbitration and Conciliation act the High court concluded that, both the provisions if read would show what is terminated is the mandate of the Arbitrator and not the provision for arbitration. Section 11(2) thereafter provides that in the event of vacancy in the Arbitral Tribunal and the parties not agreeing to appoint an Arbitrator, any aggrieved party can move under Section 11(5) of the said Act requesting the Chief Justice or his designate to fill in the vacancy. Thus, the Act itself contains provisions for reconstitution of the Tribunal even in the case where the named Arbitrator expires.

Whether a substituted arbitrator can be appointed in case the appointed arbitrator withdraws, in accordance with the arbitration?

The court held that provisions of Section 15(2) of the Arbitration and Conciliation Act, 1996 provides that the appointment of the substitute arbitrator has to be done in accordance with the rules that were applicable to the appointment of the original arbitrator who was being replaced. The Hon'ble Court further held that in case of any subsequent vacancy, the substituted arbitrator can be appointed only in accordance with the agreement entered into between the parties.

(2009) 10 SCC 293