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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: The Land Acquisition challenge in India	5
3.	Video: The Bullshit Quotient of Stock Markets	5
4.	Video: The Bullshit Quotient of Compliance in India	5
5.	Video: The Bullshit Quotient of Auditors	5
6.	Video: The Bullshit Quotient of Banking in India	5
7.	Video: The appetite for Bullshit in India	6
	Section II - Print Media	
8.	Comment: Vodafone Vortex Let's not be jubilant when the Government fails to collect taxes from exiting foreigners who've just made a fortune here	6
9.	Comment: Abandoning Aid We should look beyond the smelly classroom and the pain of paying more school fees to the big picture. You may be offended by govt apathy, but don't resist the little it is doing	9
10.	Comment: Dour Desis & Diabolical Diatribes Every joke, parody, humour and lampoon is at some level false despite revealing a great truth	12
	Section – III News	
11.	A. New Legislation and Regulations	15
12.	B. New Case Laws	16

Managing Partner's message

It is with the greatest pleasure, and some humility, that I am able to report the publication of my second book "Bullshit Quotient: decoding India's corporate, social and legal fine print" (Hachette, 2012). The publisher's notification of this event may be viewed at this link:

http://www.hachetteindia.com/TitleDetails.aspx?titleId=32054.

More details of this work can also be found at: http://ranjeevdubey.com/books.html.

It is with equal pleasure that I am able to announce that we have been able to put all our published writings together at one place for the viewing pleasure of all our audience at http://ranjeevdubey.com/index.html. This task has also had the incremental benefit of bringing together all the videos of presentations made on a variety of subjects within 2012 at this link: http://ranjeevdubey.com/videos.html.
With these preliminaries, welcome to the October 2012 issue of Ensouth!
Section I of this issue of Ensouth contains video links of five perspectives on regulatory and legal issues in India - on land acquisition, on stock markets, on auditors, on bankers and on compliance – and one perspective on Indian culture. We do hope that something in this list will inform, engage or at the very least, entertain you.
In our print media section this time, Ensouth offers one perspective each on a new legislation, a new judgment and on an alarming but not new political development in West Bengal.

First up, in **Vodafone Vortex**, we ask why Indian elites are jubilant because the Government failed to collect taxes from an exiting foreign business that just made a fortune out of its investment here especially as an equivalent Indian investor would have paid taxes on the same transaction.

Next, in **Abandoning Aid**, we look beyond the smelling kids from slums and the pain of paying more school fees in the context of the new Right to Education law and ask fundamental questions about India's development imperatives with this question: is it not in the long term interest of business that corporate resources should be expended in educating and training India's workforce from the ground up? 3

Finally, in **Dour *Desis* & Diabolical Diatribes**, we revisit recent events occurring as a result of the humorlessness of our political classes and ask ourselves a fundamental question: since every joke, parody, humor and lampoon is at some level false despite revealing a great truth, have our politicians crossed that thin line between emotional inadequacy and criminality?

Finally, we have now added a news section to our newsletter. Ensouth's quarterly format does not lend itself easily to reporting current events but we do feel that the big picture changes occurring across the legal landscape should be archived within our website for our readers to refer to at will. The News section is a modest initiative in that direction.

We do love feedback!
Warm Wishes

Ranjeev C Dubey
(Managing Partner)

Section I – Videos

Video: The Land Acquisition challenge in India
A historical perspective on why Land Acquisition is such a challenge in India together with a critique of the new Land Acquisition Bill. The two part video may be viewed at:

http://www.youtube.com/watch?v=WTX0o95T_Ak&feature=relmfu

and

http://www.youtube.com/watch?v=ZWKt-EnwKWE&feature=relmfu

Video: The Bullshit Quotient of Stock Markets

The stock market is not a wealth creator for small investors. It is a sophisticated mechanism developed to transfer wealth from small investors to those who operate this market. The Video may be viewed at:

http://www.youtube.com/watch?v=CG2LNXrg5zg&feature=relmfu

Video: The Bullshit Quotient of Compliance in India
Compliance is a challenge in India as a result of a complex of cultural, historical and political factors. The Video may be viewed at:

http://www.youtube.com/watch?v=fqt2r2fBctw

Video: The Bullshit Quotient of Auditors
It is no body's job to discover corporate accounting frauds least of all the Auditor. There are very good reasons why no one wants corporate accounting frauds to be discovered in India. The Video may be viewed at:
http://www.youtube.com/watch?v=clQCa39sXH0&feature=relmfu

Video: The Bullshit Quotient of Banking in India
It is not a Banker's job to protect the small shareholder of a company or even the interest of its own customer. The video may be viewed at this link:

http://www.youtube.com/watch?v=_LhByUo7bd8&feature=relmfu

Video: The appetite for Bullshit in India

A cultural and psychological analysis of why Indians have an unerring appetite to swallow bullshit. The video may be viewed at this link:

http://www.youtube.com/watch?v=SxxXuYaENbg&feature=channel&list=UL

Section II – Print Media

Vodafone Vortex

(Let's not be jubilant when the Government fails to collect taxes from exiting foreigners who've just made a fortune here)

Ranjeev C. Dubey

Why are Indians accused of being self-serving xenophobes? When the Supreme Court first held in January 2012 that Hutchison did not need to pay taxes in India when it sold its Indian telecom business to Vodafone, the English language press seemed to be jubilant that Rs 11,200 Crore of cash had gone out of India's national kitty. Was it because we don't want the infrastructure this money will presumably fund? Or were we so overcome with righteous indignation that we would rather pay more taxes ourselves than have a really sweet bunch of foreign share holders suffer because our tax department is so unethical?

Let's get to the root of the issue. Here is a foreign company incorporated in Hong Kong which sold its Indian telecom business by selling the holding company in Cayman Islands for about Rs 55,715 Crore to another SPV in Cayman Islands owned by Vodafone. Because the sale was made overseas, no one paid any taxes. Now, under Section 9(1)(i) of the Indian Income Tax Act, if income arises directly or indirectly because you transfer a capital asset in India, you have to pay taxes. When you sell a tax haven company which owns an Indian business – and owns nothing else - do capital assets get transferred in India or not? In other words, was a capital asset transferred in India "in consequence of" the share transfer that occurred in Cayman Islands?

When you get past the legal gobbledygook, the question you have to ask is this: to understand what really happened here so that you can tax it, or not, will you "look at" the surface of this transaction or do you "look through" it at its real meaning? Put another way; are you interested in form or in content? On any other day, if this was between two equal private parties in India where you had no prejudices, I suspect you

may say that you prefer substance over form. Who wants to be superficial anyway? Apparently, the English language press loved the superficial view.

The Supreme Court agreed, taking the view that it wasn't going to look through anything unless the law specifically asked it to do so. It observed that looking through was a matter of policy. It noted that Hutchison had paid a lot of domestic taxes in India for the thirteen years it operated in India. It concluded that this was not a case of a sham structure being created only to avoid taxes.

There was a second issue as well. Resident Indians have to pay taxes in India. If you own assets in India, you are deemed to be a resident. Vodafone was at all relevant times a shareholder of Bharti. Didn't that make it resident in India? Vodafone argued that tax presence has to be viewed in the context of the transaction. The entity that held the Bharti shares was not the entity that purchased the Hutchison shares. Basically it was saying that if you incorporate different companies to run different businesses, each of them have to be seen in isolation. Does that sound like slippery slick Willy logic? The Supreme Court didn't agree. It also held that it had to examine the "legal nature" of the transaction and not the indirect transfer of rights and entitlements in India.

It seems to me that the legal issue is pretty finely balanced. The same issue has been argued in courts around the world and the decision has gone both ways in different countries. Which country wants to be seen to be tricked out of its dues through fancy structuring? If you have no prejudices, you will see that there is a real issue here. It is of course true that traditionally, courts around the world have been comfortable taking any transaction for what it purported to be. Increasingly, in recent years, the mood has changed and courts are inclined to discern the true nature of what is going on in a variety of legal areas. As a result, slick 'structuring' of transactions in order to avoid this or that legal implication is increasingly an uphill task. You could argue that the Supreme Court took the old fashioned view, which is not to say that it is not a highly credible view.

I expect the euphoria in the press has nothing to do with the tax law interpretation issue. Most people have no idea where tax jurisprudence is headed at a global level and couldn't care less. The response was largely emotional. We could as easily have been incensed, not jubilant at the tax discrimination. If a resident Indian had purchased the business in India without all this globetrotting and treaty shopping, he would have paid taxes in India. Why should a foreigner be better placed than an Indian? That apart, those who live here and work here and pay their taxes here could easily want everyone else to pay their taxes too. So when the press went "Ra Ra hurrah!" in January, were we all just congenital tax evaders getting high at some sort of convoluted tax dodgers parade congregating to celebrate the Supreme Court judgment?

Whatever the psychosis we were pandering to, the Finance Minister wouldn't have any of it. He has therefore proposed a new dispensation using three tools to capture this

money. First, by a retrospective amendment, the minister wants to make controlling interest a capital asset with effect from April Fool's day 1962. Nice touch! Next he wants to retrospectively amend the meaning of "transfer" to take in transfers that occur as a result of the sale of shares of foreign companies. Finally, he attacks the problem of indirect transfers by legislating that an asset will be deemed to be situated in India if its value is substantially based on assets located in India.

Indian elites are incensed now. Retrospectively changing laws is being projected as somehow unethical. It's also being seen as circumventing and dishonouring the Supreme Court.

Whatever the 'ethics' of retrospective changes, it certainly has worldwide popularity! Israel is probably not a good example but it promulgated laws after the Second World War which criminalized acts which occurred before Israel existed as a nation! Germany is probably a better example. The German constitution provides for the creation of such laws and I am told that Germany has even created new crimes retrospectively because they violate international laws. They haven't had quite the same luck with retrospective tax legislation with taxable events occurring in Netherlands and Denmark. These nations went to the European Court of Justice which said that national legislation could not be created to offset foreign corporate tax. The result may have been very different if Germany was not a EU member.

It's the opposite in America. The US Supreme Court has ruled that retrospective civil and tax laws may be created but retrospective criminal laws may not. It's the same in Australia, Canada, Finland, France, Indonesia, Sweden, and a host of other countries. Several others around the world, notably Brazil, Iran, Ireland and Norway ban substantially all retrospective legislation. As a general proposition, most countries do not approve of sending people to jail for things they did which were not crimes when they did them. Most countries are quite happy to retrospectively apply civil and tax laws, and that includes India.

Besides, when it comes to taxes, we've been doing it all the time. Recall that in 1983, excise law was changed to capture tax based on the "Maximum Retail Price" as stated on the package of goods. In March 1987, the Central Excise Commission issued a show cause notice to ITC claiming that ITC was selling cigarettes at higher than its specified MRP. In the ensuing litigation, the department claimed that the company could not sell cigarettes at higher than MRP and it had to pay tax on the maximum price at which it actually sold them. In turn, the company claimed that the words 'may be sold' occurring in the definition of sale price meant 'capable of being sold', meaning that the price at which it actually sold cigarettes was not particularly relevant. The Supreme Court agreed with the Company. It held that the language of the notification was clear. Tax was paid on the price printed on the packet. It wasn't for the tax department to launch investigation on whether the cigarettes were actually sold at that price!

As you can guess, the Government wasn't about to tolerate this blatant violation of law's intent. In Jan 2005, in the wake of the judgment, it issued an ordinance empowering the revenue authorities to change excise rules retrospectively. It also enlarged the definition of 'sale price' to mean "the higher of MRP or maximum selling actual price". Now, here is the dodgy part. Under Section 5 of the ordinance, the court's power to subject this section to a judicial review was excluded. As a general proposition, courts are not very happy to see their own jurisdiction excluded. But ITC wasn't going to pay lawyers twice, especially as retrospectivity is thin ice to skate on. It made a deal with the Government, letting go the Rs. 250 Crores it had deposited with the Government and keeping the Rs. 453 Crores more that the Government wanted it to pay. Sound like a blackmail payoff, doesn't it? I think you can make some very realistic assessment about what happens next in the Vodafone case because Vodafone has little to gain by a second round of litigation and the Government needs the money now, not in ten years.

The question we should be asking ourselves though is where our self interest lies. We know that globally, the Government's view is gaining in popularity. For sixty years, we have been cry-babies of the license permit quota raj asking for tax breaks before every budget. For sixty years, our general attitude has been to treat the Government like the local thug it really is. For sixty years, we have seen ourselves as smart when we ripped the Government off and slyly winked at our friends to say "le lee na?" We know that we cannot grow as a nation unless we spend money on public schemes. Somebody has to pay taxes or we are going nowhere. If we want change - and progress - how about changing our attitude? Like not being jubilant when the Government fails to collect taxes from exiting foreigners who've just made a fortune in our country and are off with the booty.

Abandoning Aid

(We should look beyond the smelly classroom and the pain of paying more school fees to the big picture. You may be offended by govt apathy, but don't resist the little it is doing)

Ranjeev C. Dubey

Given the number of upper crust ladies from swanky neighborhoods who brave the flies under the hot tin roofs of slum side schools just to make sure that innocent children of impoverished families get half a chance of getting ahead in life, what is this ballyhoo about the Right to Education Act? Is it about rich kids losing seats to poor kids? Is it about paying more school fees? Or is it about ill-mannered smelly kids amidst the baba loge?

Either ways, I am bewildered by the legal argument before the Supreme Court that to

foist poor children on a rich man's school violates the fundamental right of every Indian "to practice any profession or to carry on any occupation, trade or business" under Section 19(1)(g) of the Constitution of India. To understand what got us to this bizarre point, let's first understand the facts. The Right of Children to Free and Compulsory Education Act, 2009 provides that every school, even if it is unaided, is obliged to reserve 25 per cent of its class I admissions for disadvantaged social groups. It also provides that if a school has not received aid - not even subsidized land – the Government will reimburse the school the amount "not exceeding" what it was spending per child in government schools. The Society for Unaided Private Schools of Rajasthan challenged the legality of this law. The majority of the judges rejected the challenge.

This could not have been a surprise. Article 21A of the Constitution expressly obliges the state to "provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine." Since this is something the government has to do, the Society for Unaided Private School was compelled to claim a breach of their right to carry on a profession. In a country where you need a dozen licenses to sneeze, leave alone carry on a profession, this wasn't much of an argument. The judges also said that since this law obliges the state to provide such education, and the state is but its people, "the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society."

In fairness, the dissenting judgment of Justice Radhakrishnan provided a thought provoking counter intuitive view. Since Section 21A of the constitution places an obligation on the Government, to extend the constitutional obligation to private schools is to inflict indefensible violence on the language of the law. He states that it makes no sense to ask strangers to pay for the education of poor children when the parents of these same poor children have no such obligation. It surely is absurd to say that this is my kid but it's your problem.

The Court has of course pronounced on the law but the debates go far beyond the law. Many wonder if this law will ultimately culminate in the state abdicating its responsibility to poor children entirely. Many others cannot understand why the state will neither provide free education nor allow 'for profit' schools. A great many also don't buy into the 'we will compensate the unaided private schools' storyline. Everyone knows what it costs to get money out of a Government department. Here is a state obligation that has been instantly transformed into the stuff of scam screaming TV news headlines in the years to come.

There is too the argument that this law reeks of the psychology of poverty. We need better education and that includes more schools. To start a hundred new schools is very different from claiming a share of existing schools and forgetting about starting new ones. In behaving like a school yard bully grabbing another child's tiffin, the state is

betraying exactly the same mindless lack of imagination that has brought state aided education to this sorry pass in India. There is something quintessentially India about this. We are happy to vote for reservations, but we don't want to vote for a government that creates jobs by stimulating the economy. Thus, claiming a share in someone else's education pie scores better with voters than a government that opens a thousand new schools. From this perspective, one can be forgiven for being cynical about the judiciary promoting quotas in schools while also simultaneously preventing private schools from raising fees to help pay for this free education.

In a sense, none of this matters. What matters is that 29% of government schools have no permanent building, 23 per cent teachers are untrained, 56 per cent schools have no toilets for girls, 27 per cent don't offer any drinking water and, please hold your horses, 9 per cent of all government schools have only one teacher for all classes. I think the last statistic is tosh. School teachers in several schools around my hill home in Jammu and Kashmir run taxis and patisa shops and rarely show up for work. The odd teacher who does show up can't possible teach children between the ages of 6 and 14 at the same time so she organizes PT for half the day and games for the rest. In comparison, the private schools in the same village of 3,000 people are overflowing and spilling onto the road. We need to change a few things.

We also need to be pragmatic. Sixty years of post-independence experience has established beyond doubt that the government is simply incapable of running schools. We have to recognize that talent is born in all kinds of economic environments and that affirmative action works. You may be offended by Government apathy about education, but that is not the same as resisting the little that the Government is doing. If we want our Government to do more, we should support this little initiative and then ask for more.

At the end of the day, this really is about what we urban elites want to do with the idea of India. We are quick to sit around bitching and bleeding about the all-round deterioration of values and pontificate about the lack of this or that. Perhaps we should instead look beyond the smelly classroom and the pain of paying more school fees to the big picture. I am not too sure it's about the money. Would I rather pay some faceless bureaucrat another educational cessor trust my children's school to educate a few more kids? I am none too sure its charity either. Labor costs are rising exponentially in India. We are not producing enough employable skilled people at a speed we should. My law firm already has people from where the hell is that place like Ballia in UP and a village four hours out of Hardwar. Talent is everywhere. If we want to take India forward and ourselves in the bargain, it's in our interest to support any initiative that will allow the country to reach down and pick the crowd up.

Dour Desis& Diabolical Diatribes

(Every joke, parody, humour and lampoon is at some level false despite revealing a great truth)

Ranjeev C. Dubey

When HRD Minister Kapil Sibal dispensed with his charming smile and apologized to placard-waving legislators because a school book reproduced a 1949 cartoon depicting Dr Ambedkar astride a snail and being horse-whipped by Nehru to speed up the constitution writing process, we waived it off dismissively as the shenanigans of attention deficit politicians. But when Professor Ambikesh Mahapatra found himself in police custody because he circulated a cartoon suggesting that Mamata Banerjee plotted in Satyajit Ray movie style to "vanish" former nominee railway minister Dinesh Trivedi, the paranoid humourlessness of India's current political classes was just a little harder to see. The difference perhaps was in the blatant misuse of Section 66A(b) of the Information Technology Act to put a harmless academic in jail for cracking a joke.

Is it true we have no sense of humour? Anyone who has watched the spectacle of Archana Puran Singh or Navjot Singh Siddhu falling about helplessly slapping the judges table in uncontrolled glee at the worst form of lame duck parody on national TV would not need convincing. Long after Laurel and Hardy went out of fashion, we still find it funny when a man slips on a banana peel and breaks his hip. Much of the time, we don't even know who the joke is on. When BBC Top Gear's Jeremy Clarkson ran through India in December 2011 reviewing his cars as he joked about Indian food, loos and trains, we saw it not as him admitting his inability to adapt to our environment but as an affront to our country. It didn't strike us that fitting a potty into the boot of a Jaguar is a self-deprecating joke about the dodgy stomachs of Brits in India. Is the Delhi Belly a joke on vulnerable foreigners, or on the seat of India's government? Does it help or hurt that the Jaguar is an "Indian" car?

Take another example. In January 2012, US talk show host Jay Leno took a potshot at republican senator Mitt Romney by suggesting that he had so much money he could live in the Golden Temple in Amritsar. It didn't strike us that Leno may have been suggesting that Romney was so rich he thought he was God. We were not delighted Leno suggested that Harmandar Sahib is the world's most opulent building. Leno could as easily have used a photo of Versailles. Absurdly, I can see us being equally upset if Harmandar Sahib's name didn't figure in every list of the world's prettiest buildings. Heads you lose I'm pissed off, tails I win I'm pissed off.

The Leno outrage is especially hard to understand because the Sikh community is probably the most self-deprecating in India. It could be the religious thing though. Obviously, there are religious things the Sikhs will joke about and other things they will not. This is true of most communities. Humour is undoubtedly an elusive animal and very culture and context specific. There are hosts of subtle distinctions here, not readily

apparent to those who have not been inducted into the intuitive side of cultural sensitivity. If you haven't lived the reality, you don't know where the line is. But then, you may ask: if we know that the guy making the joke doesn't understand where the line is, why can't we wave it off as poor taste and poorer judgment?

The reason we can't see it is the reason that someone who has everything is still paranoid defensive. When ShirishKunder's tweeted "I just heard a 150 crore firework fizzle" on the commercial failure of the movie Ra One, the actor Shah Rukh Khan reacted with violence. This was not about good or bad humour, or having a sense of humour: it was about being hostile aggressive. The truth is we Indians are exactly how we appear in our Hindi movies: neurotic, insecure, hyper-sensitive and emotional. The subject of humour or lack of it is not even in the same frame.

What is in the same frame though is the thin line between emotional inadequacy and criminality. When we react to a joke about our work, our life or our country with violence, we have crossed the line into criminality. That the police don't want to make a case out of every slap that finds a cheek in India is neither here nor there. Violence is criminal, whether it's a slap to a face or a knife to the gut. It's equally criminal to illegally deprive a college professor of his personal liberty because you don't like his joke. So, as I go back and examine the diabolical diatribes of Didi, I think that the danger in this intolerance is more than another side show in the eternal Indian political tamasha. I sure as hell am not laughing about the absurdity of perhaps India's most cultured state being ruled by its not most cultured citizen. I think we have a serious crisis here which we need to address as a nation. It comes in two parts.

Part A of this crisis is our propensity to resort to violence when we get laughed at. This is a law and order situation and we need to treat it as such. If self-restraint is what we want, tut tutting the whole thing off dismissively is not the approach of choice. Retribution works, for those with something to lose anyway. Part B of this crisis is the existence of laws that are designed to abuse basic individual liberty. Section 66A(b) of the Information Technology Act which put Mahapatra in jeopardy is a very good example. It allows the state to jail people for three years simply for electronically sending "any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will." Every joke, parody, farce, wit, humour and lampoon is at some level false even though at another philosophical level, it may reveal a great truth. If you allow such laws to be applied, every philosophical insight you don't get in a joke is a crime and every halfwit too slow to get it is a complainant.

Consider the impact of this law in the context of religious matters. Most opinions we have on the nature of the spiritual world could well be false. Most certainly, they cannot be proven to be true to a legal standard. Even the Sangh parivar doesn't make that claim. As I recall, the Babri Masjid argument was predicated on faith, not historic data. From a purely legal standpoint, if you send me a pious do goody email with a divine

reference, as a practicing agnostic, I am entitled to be experience annoyance, inconvenience, insult or ill will in which case, please prepare to occupy Raja's just vacated cell. Conversely, if I send you an email premised on an agnostic world view, you are entitled to be annoyed and it will be my turn in the slammer. So too a Christian mail in Hindu hands, et al. This is not a law any liberal society can justify or defend. Any which way I look at it, if we are going to keep laws like this on our statute books, we are going to end up like those half past dead near cadaverous citizens in totalitarian societies who can't smile without fearfully wondering about the legal and political implication of doing so.

Section III - News

A. New Legislation & Regulations

➢ New Legislation & Regulations

Consolidated FDI Policy: downstream investments by banking[1]

Foreign Direct Investment Policy ('FDI Policy') prescribes guidelines for downstream investments by an Indian Company, which has received an investment in accordance with the FDI Policy. GOI has revised the guidelines in relation to downstream investments by banking companies. The revised guidelines issued through Circular 2 (2012 Series) shall come into force on July 31, 2012.

Revised circular provides that any downstream investment made by banking companies incorporated in India (owned and/or controlled by Non-Residents) pursuant to corporate debt or loan restructuring arrangements, or in trading books, or acquisition of shares due to loan defaults, will not be considered for the purposes of calculating indirect foreign investment. GOI has further clarified that a strategic investment by such banking companies in their subsidiaries, joint ventures and associates will continue to be considered to be indirect foreign investment and subject to the FDI Policy.

Consolidated FDI Policy: permitting investments from Pakistan[2]

GOI has revised paragraph 3.1.1 of the FDI Policy to permit a citizen of Pakistan or an entity incorporated in Pakistan to make investments in India.

External Commercial Borrowing ('ECB') for working capital for civil aviation sector [3]

A civil aviation company can raise ECB for working capital requirements with prior approval of Reserve Bank of India ('RBI').

Airline companies registered under the Companies Act, 1956 and possessing scheduled operator permit license from Director General of Civil Aviation ('DGCA') for

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[1] Press Note No.2 (2012 Series)
http://dipp.nic.in/English/Policies/Policy.aspx

[2] *Ibid*

[3] RBI/2011-12/523 A. P. (DIR Series) Circular No. 113

passenger transportation are eligible to avail ECB for working capital. RBI shall permit civil aviation companies to raise ECB after considering cash flow, foreign exchange earnings and the capability to service the debt. ECB shall have a minimum average maturity period of three years.

The overall ECB ceiling for the entire civil aviation sector would be USD 1 Billion and the maximum permissible ECB that can be availed by an airline company will be USD 300 Million. This limit can be utilized for working capital as well as refinancing of the outstanding working capital Rupee loan(s) availed from domestic banks. RBI does not permit a rollover of an ECB raised in accordance with this policy. The policy permits a company to meet the liability to repay the ECB from foreign exchange earnings. The policy does not permit the company to use its income in Indian Rupees to meet the ECB liability.

B. New Case Laws

MCX Stock Exchange Limited v/s Securities Exchange Board of India and others[4]

Multi Commodity Exchange of India ('MCX') and Financial Technologies (India) Limited ('FTIL') are shareholders of MCX Stock Exchange Limited ('MCX Exchange'). Securities and Exchange Board of India ('SEBI') granted to MCX Exchange a conditional approval to operate a stock exchange in accordance with the Securities Contract and Regulations Act ('SCRA'). Upon fulfillment of conditions, MCX Exchange applied to SEBI for an approval to deal in interest rate derivatives market, equities, futures and options on equity and wholesale debt segments and in other segments. This application for approval was rejected by SEBI on the ground that MCX Exchange has not fulfilled the requirements of Regulations 8 of the Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognized Stock Exchanges) Regulations, 2006 ('MMIPS Regulations'). The rejection was challenged by way of a writ petition; the order of SEBI was challenged before the High Court of Bombay. The Hon'ble High Court of Bombay held that Regulations 8 of MMIPS Regulations prescribes that a person resident in India shall not hold more than 5% shares in a stock exchange individually or with persons acting in concert. The MCX and FTIL had to dilute their shareholdings in accordance with Regulations 8 of MMIPS Regulations to comply with the condition laid down in the approval. Regulations 4 prescribes mode in which equity stakes are diluted to comply with the MMIPS Regulations. However, modalities prescribed in terms of Regulations 4 of the MMIPS Regulations do not apply to stock

[4] (2012) 2 Comp LJ 473 (Bom)

exchange, which does not have trading members. Therefore, as long as there is a genuine divestment of the equity stake of the promoters in excess of the limit prescribed by Regulations 8, which would fulfill the requirements of regulations 8.

Integrated Broadcasting Co. (P.) Ltd. v/s Nettlinx Ltd[5]

The issue before the High Court of Andhra Pradesh was that whether inter se disputes between erstwhile and present management can be a ground to refuse admission of a winding up petition. The Hon'ble High Court of Andhra Pradesh held that a change in the share holding pattern or management of a company is of no consequence. A company is a separate legal entity from its shareholders. The inter se disputes between erstwhile and present management cannot be a ground to refuse admission of a winding up petition.

Another issue that came before the Hon'ble High Court for adjudication was that whether mere existence of an arbitration clause would bar exercise of jurisdiction by a court under section 433(e) of the Companies Act. The Hon'ble High Court of Andhra Pradesh held that the jurisdiction of the company court will not be taken away by mere existence of an arbitration clause. The claim in a petition or winding up is not for recovery money.

Re: Indo Rama Textile Ltd.[6]

Indo Rama Synthetics Limited ('IRSL') by way of a scheme of arrangement ('Scheme') demerged the spinning business to Indo Rama Textile Limited ('IRTL'). Spentex Industries Limited ('SIL') merged with IRTL. IRSL acted contrary to the Scheme and withdrew all common facilities, which were made available to the Applicant. An application was filed by SIL under Section 392(1)(b)3 of the Companies Act alleging that the demerger was not performed in accordance with the conditions laid down under the scheme. SIL alleged that clause 17 of the scheme required that the demerger should satisfy the condition of a tax neutral demerger as provided in the Income Tax Act, 1961. Therefore retaining common property and making it available to the resulting Company as a resource under a contract was not in accordance with the conditions that were stipulated for a tax exempt merger. In other words, the scheme of arrangement was not given full effect. The Hon'ble High Court of Delhi held that such an interpretation would amount to re writing of the scheme. The High Court further held that scheme has to read in totality. Further, Hon'ble High Court cannot interfere with the scheme, which had sanction of shareholders.

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[5] [2012] 114 SCL 541 (A.P.)

[6] MANU/DE/ 3434/2012

M/s. Dakshin Shelters P. Ltd. v/s. Geeta S. Johari[7]

A Development Agreement ('Agreement') was executed between the parties on February 7, 2006. On certain disputes having arisen between the parties, a notice was sent by the Ms. Geeta S Johri to Dakshin Shelters, invoking the arbitration clause in the agreement and nominating a former Judge of High Court of Andhra Pradesh on her behalf.

Clause 25.1 of the above said agreement stated that disputes relating to this agreement or its interpretation shall be referred to the arbitration or arbitral tribunal, consisting of three arbitrators ('Tribunal'), one each to be appointed by the parties thereto and the third to be appointed by the two arbitrators so appointed.

Dakshin Shelters objected to the appointment of an arbitrator in the grounds that there exist no arbitral disputes between the parties. This reply from the petitioner necessitated the filing of an application by Ms. Geeta S Johri in accordance with Section 11 of the Arbitration & Conciliation Act, 1996.

On hearing the parties the Designate Judge appointed a Senior Advocate as an arbitrator on behalf of the petitioner. It was also ordered that the arbitrator nominated by the respondent and the arbitrator appointed by the Designate Judge on behalf of the petitioner are required to appoint the third arbitrator.

The order of the Designate Judge was challenged through SLP. Petitioner also contended that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. Hon'ble Supreme Court held that petitioner's right to appoint its arbitrator in terms of clause 25 of the agreement got extinguished once it failed to appoint the arbitrator on receipt of notice. The Hon'ble Court held this stance as the failure on the part of Dakshin Shelters to appoint its arbitrator on receipt of the request to do so from Ms. Geeta S Johri and held that the Designate Judge committed no error in nominating an arbitrator on behalf of Dakshin Shelters.

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[7] MANU/SC/0151/2012