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MINISTRY OF CORPORATE AFFAIRS

Companies (Removal of Difficulties) Seventh Order , 2014

The Ministry of Corporate Affairs ("**MCA**") vide its Order dated September 4, 2014 has provided for removal of difficulties pertaining to certain sub sections of Section 139 and Section 143 as provided in the Companies Act, 2013 ("**2013 Act**") due to difficulties in the implementation of the same.

Under Section 139(5) and (7) of the 2013 Act, the Comptroller and Auditor General of India ("**CAG**") has been provided powers to appoint an auditor of a government company or any other company owned or controlled, whether directly or indirectly by the Central Government or partly by one or more such State Governments.

Section 143(5) of the 2013 Act provides that the CAG has the power to conduct supplementary audit which does not specifically cover companies "owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments";

In accordance with the powers conferred under Section 470(1) of the 2013 Act, the Central Government has directed in the Order the following removal of difficulties.

1. Short title and commencement:-

(1) This Order may be called the Companies (Removal of Difficulties) Seventh

Order, 2014.

(2) It shall come into force on the date of its publication in the Official Gazette.

2. With respect to Section 143(5) of the 2013 Act, the relevant portion that bears the words “In the case of a Government company” and ending with “required to be audited and” shall be substituted as follows:

“In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor General of India shall appoint the auditor under sub section (5) or sub section (7) of Section 139 and direct such auditor the manner in which the accounts of the company are required to be audited and”.

For further information, please visit the link provided herein.

THE RESERVE BANK OF INDIA

Circular no. 207 of 2014: External Commercial Borrowings in Indian Rupees

The Reserve Bank of India "**RBI**" vide Circular No. RBI/2014-15/207 A. P. (DIR Series) Circular No.25 provides for External Commercial Borrowings ("**ECB**") in Indian Rupees.

1. RBI invites attention to Regulation 6 of Notification No. FEMA.3/2000-RB dated May 03, 2000 according to which Indian resident may raise foreign currency from a non-resident as per the provisions of Regulation 6.

2. RBI with a view to provide great flexibility for structuring ECB arrangements states that non-resident ECB lenders may extend loans in Indian Rupees subject to following conditions:

   a. Lender to mobilise Indian Rupees through swaps with a bank in India

   b. ECB contract complying all conditions for automatic and approval routes

   c. All-in-cost of ECBs should be commensurate with prevailing market conditions

3. RBI provides that for the Purpose of Swaps for ECBs denominated in Indian Rupees, the lender shall set up representative office in India with the prescribed process.

For further information, please visit the link provided herein.

Circular no. 216 of 2014 : Hedging Facilities For FPIs

1. The Reserve Bank of India, vide Circular No. RBI/2014-15/216 A.P. (DIR Series) Circular No.28 has invited the attention of the banks towards the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 dated May 3, 2000. The existing regulations provide for the Foreign Portfolio Investors ("**FPIs**") to approach AD-I Category bank ("**AD-I bank**") to hedging the currency risk on market value of the full investment in equity and/or debt in India on a date which shall be subject to the conditions specified form time to time. The directions provided herein under by the RBI are in accordance with Section 10(4) and 11 (1) of Foreign Exchange Management Act, 1999 ("**FEMA**").

2. The RBI with a view to enhance hedging facilities for FPIs holding the securities under Portfolio Investment Scheme ("**PIS**") as per the schedules 2, 2A, 5 and 8 of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 which is amended and in accordance with the Monetary Policy in the statement of April 1, 2014, has permitted FPIs to hedge coupon receipts that arise in the course of their investments in the debt securities in India which fall due during the following 12 months on a condition that the hedge contracts shall not be eligible for any rebooking or cancellation. However it has been provided that the contracts are eligible to be rolled over on maturity on a condition that the relative coupon amount is yet to be received.

3. It is pertinent to note that the other guidelines and regulations as issued under FEMA which relate to investment in debt securities and hedging facilities for non-resident investors including FPIs remain unchanged.

Circular no. 217 of 2014 : Upper Age Limit For Whole Time Directors

1. The Reserve Bank of India has vide its Circular No. RBI/ 2014-15/217, DBOD. APPT.BC.No. 40 /29.39.001/2014-15 provided for upper age limit for whole time directors on the boards banks.

2. RBI states that the age limit for the post of Managing Director ("**MD**") & Chief Executive Officers ("**CEO**") and other whole time directors ("**WTDs**") in private sector banks shall be as per the provisions of the Companies Act, 2013 (Section 196(3)).

3. Section 196(3) of the 2013 Act says that no Company shall appoint or continue the employment of any MD or WTD below the age of 21 years or after the age of 70 years.

4. RBI vide this circular therefore provides that the upper age limit for any director shall be 70 years, beyond which no one must continue as a director. Further with the age limit being 70 years for private sector banks the individual banks are also free to prescribe a lower retirement age for MD or WTDs.

For further information, please visit the link provided herein.

Circular no. 234 of 2014 : FDI In India—Issue of Equity Shares under FDI Scheme against Legitimate dues

The RBI vide its Circular No. RBI/2014-15/234 A.P. (DIR Series) Circular No.31 dated September 17, 2014 amended the earlier circular and notification dated October 1, 2004 and October 19, 2012 respectively. The Notification states that an Indian Company is eligible under the automatic route to issue shares and convertible debentures to persons outside India against the lump sum technical knowhow fee, royalty, External Commercial Borrowings and the import payables of capital goods in Special Economic Zones subject to conditions and other applicable laws. The guidelines for issue of shares/convertible debentures under the automatic route are reviewed and are permitted for issue of equity shares provided:

a. The equity shares be issued in accordance with the FDI policy on sectoral caps, pricing guidelines as amended by RBI from time to time.

b. The equity shares issued shall also be subject to the tax laws as applicable to the net funds payable and conversion to equity should be the net of the applicable taxes.

The other conditions in respect of the issue of shares under automatic approval route and the government approval route under FEMA shall remain unchanged. The AD- category I banks have to get this Circular to the notice of their customers.

The directions under this circular are issued in accordance with Section 10(4) and 11(1) of the FEMA without prejudice to the approvals and permissions to be obtained under any other applicable laws.

For further information, please visit the link provided herein.

SECURITIES AND EXCHANGE BOARD OF INDIA

Amendment to SEBI Regulations, 2009

The Securities and Exchange Board of India ("**SEBI**") vide this Circular No. CIR/ CFD/ POLICYCELL/6/2014 has provided for amendments to SEBI Regulations, 2009 dealing with increasing the investment bucket for anchor investor and regulations concerning the preferential issue norms.

1. SEBI Board held a meeting on June 19, 2014 to review the framework of primary markets and revitalize the market including increasing the investment bucket for anchor investor and regulations concerning the preferential issue norms

2. SEBI (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations 2014, coming into effect from August 25, 2014 has modified the SEBI regulations 2009. The SEBI (Second Amendment) Regulations in case of difficulties clarifies that:-

   a. Regulation 43(3) has been revised to allow issuer to fill offer documents with the Registrar of Companies ("**ROC**") on or after date of notification of SEBI.

   b. Regulation 71A, 76, 76A and 76B on preferential issue have been revised and shall apply in case of preferential issuances where notice of general meeting for passing of resolution by shareholders is issued on notification of SEBI.

3. This circular has been issued in accordance with section 11 (1) , 11A of SEBI Act, 1998 with regulation 108 of SEBI Regulations, 2009.

For further information, please visit the link provided herein.

Amendments to Clause 49 of the Equity Listing Agreement

SEBI vide Circular No. CIR/CFD/POLICY CELL/7/2014 has provided for amendments to Clause 49 of the Equity Listing agreement.

1. This circular is in continuation to the earlier circular dated April 17, 2014. The revised clause 49 would be applicable to listed Companies from October 01, 2014. SEBI sought status of 500 listed companies for compliance with the revised clause 49. Many companies have sought clarification from SEBI regarding the certain provisions to ease the process of implementation.

2. SEBI in order to ensure Companies to comply with the revised Clause 49 has made amendments to clause 49 except clause 49 (II)(A)(1). These amendments are carried out in accordance with section 11 and section 11A of the SEBI Act, 1992.

3. The clause 49 of the listing agreement is applicable to companies whose equity shares are listed on a stock exchange. Compliance with clause 49 is not mandatory in respect of the following companies:

    a. Companies having equity share not exceeding Rs.10 Crore and net worth not exceeding Rs.25 Crore

    b. Company whose equity share capital is listed exclusively on SME and SME-ITP platforms.

4. The Amendments to clause 49 are as follows:-

    a. Amendment to clause 49(II)(B)(1)(C)
    b. Amendment to clause 49 (II)(B)(3)(a)
    c. Amendment to clause 49 (II)(B)(4)(b)

d. Amendment to clause 49 (II)(B)(7)

e. Amendment to clause 49 (IV)(A)

f. Amendment to clause 49 (V)(D)

g. Amendment to clause 49 (V)(F)

h. Amendment to clause 49(V)(G)

i. Amendment to clause 49 (VI)

j. Amendment to clause 49 (VII)(A)

k. Amendment to clause 49 (VII)(B)

l. Amendment to clause 49 (VII)(C)

m. Amendment to clause 49 (VII)(D)

n. Amendment to clause 49 (VII)(E)

o. Amendment to clause 49 (VIII)(A)(2)

p. Amendment to clause 49 (VIII)(F),(G) and (H)

q. Amendment to clause 49 (IX)

For further information, please visit the link provided herein.

INTELLECTUAL PROPERTY RIGHTS— JUDGEMENTS

Agar Distributors & Ors v/s IPAB & ORS

The Division Bench of the Bombay High Court in its judgment on the WP 364/2011, M/s Agar Distributors and Ors. Vs. IPAB and Ors. dated September 18, 2014 ("**Judgment**") have provided clarity on the on the parties right to prove evidence in the appellate proceedings before the Intellectual Property Appellate Board, ("**IPAB**"). It was held that though the IPAB is not bound by Civil Procedure Code ("**CPC**") it will still have to follow the principles of Order 41, Rule 27 of CPC also that "The IPAB is not bound to indiscriminately permit parties to lead further evidence in an appeal. That would be detrimental to proceedings before an appellate forum".

In this case, the registration of trademarks is of China Grass. An opposition was filed by the Petitioner against the Respondent as the Trademark was deceptively similar to that of the Petitioner. But, the Petitioner's application was rejected by the Registrar on the ground of no evidence was filed to prove the earlier usage of the mark. Further, a miscellaneous application was filed before the IPAB to produce evidence which could not be produced before the Registrar. However, the IPAB also dismissed the application. This was then appealed before the Bombay High Court. The Bombay High Court had to decide if IPAB should have allowed the interim application for further evidence based on the interpretations of Section 91 and 92 of the Trademarks Act along with Rules 2 (I) and 8 to 13 of the IPAB (Procedure Rules), 2003. In view of the same, the Petitioner stated that a reading of the provisions states that the applicant can file fresh evidence as and that there shall be no need of affidavits and counter statements if the appeals were to be carried out on the basis of the affidavits that are available with the Registrar. This argument was rejected by the High Court by stating that the IPAB has power to allow any party give additional evidence and that does not mean that the party has a right to lead new evidence at the appellate stage.

The Bombay High Court held that the applicability of Order 41, Rule 27 of the CPC, is based on justice, equity and good sense. The High Court has made a stark distinction between Order 41 Rule 27 (aa) and Rule 27(b). Rule 27 (aa) speaks of the party being allowed to adduce evidence because they could not do so at the time of trial, Rule 27 (b) speaks of the Court itself coming to the conclusion that additional evidence is necessary.

In this case the Court stated that the public interest is facing risk. Earlier to passing this judgment, there was no clarity provided of the extent to which the principles of CPC could apply to the IPAB. The Bombay High Court held that Order 41, Rule 27 shall now apply in full fledge to IPAB.

For further information, please visit the link provided herein.

Radhe Krishna Products v/s Parshottambhai Dharamshibhai Lunagriya

Vide its order dated August 28, 2014 in Radhe Krishna Products Vs. Parshottambhai Dharamshibhai Lunagriya, the Hon'ble Gujarat High Court pronounced a comprehensive decision with respect to the multiple passing off actions on a particular trademark, whereby the holder of the mark can file separate suits for each defendant (separate mark) use with respect to its mark.

Petitioner No. 1 (Original Defendant) is in the business of processing and selling edible lime used in pan masala. The Petitioner claimed to be selling their product under the name 'Babu Chuna', 'Shree Bhole Bapa Parcel', 'Babu Parcel' and 'New Patel Parcel Chuna' since 2006. Whereas the Respondent (Original Plaintiff) claimed to have been the prior user of the mark 'Babu' with respect to the business of selling lime.

In July 2012, the Respondent (Original Plaintiff) then filed a suit for copyright infringement and passing off (hereinafter "**First Suit**") in relation to the defendant's mark Bhole Bapa Parcel. In September 2012, the Petitioners filed a suit against the Respondent for trademark infringement. During pendency of the first suit, the Respondent filed another suit for trademark infringement (hereinafter "**Second Suit**") in another court in relation to the Petitioner's mark Babu Parcel.

The Petitioner herein aggrieved by rejection of their application filed under Order VII Rule 11(a) and (d) of the CPC, by the order of the trial court in Civil Suit No. 65 of 2012 had filed the subject Petition. It is against this order, the Petitioners filed the present writ petition seeking to quash the trial court's order.

The Petitioners had argued that the Original plaint does not etch out a distinct cause of action and thus was subject to be rejected under Order VII Rule 11(a) However the Hon'ble Gujarat High Court relying on T. Arivandandam vs. T.V. Satyapal [(1977) 4 SCC 467], Reptacos Breh and Co. Ltd. vs. Ganesh Property

[(1998) 7 SCC 184], held that while considering an application under the said provisions a Court must take into consideration only the averments made in the plaint, read as a whole. Since it was observed by the Hon'ble Gujarat High Court upon examination of the plaint that the Respondents had clearly expressed and defined the cause of action, the contention of the Petitioners under Rule 11(a) is rejected.

Further the Petitioners contended that since the Second Suit was not maintainable under Order II Rule 2 and Order XXIII Rule 1(4), respectively, and because it falling squarely under the definition a composite suit. Thus, the Petitioner sought the rejection of the Plaint under Order VII Rule 11(d) on being barred by law.

With respect to the contention regarding the Composite Suits, the Hon'ble High Court since the Second Suit was only for passing off and not for copyright infringement, thus can be maintained as one suit. Thus, its not a Composite Suit.

With respect to the Order II Rule 2 which discourages multiplicity of suits, the Hon'ble High Court held that both suits were on different cause of actions and such distinction was ascertainable as such. The Hon'ble High Court explained that a 'cause of action' is said to be the same if the two cases are identical in substance and the evidence required to be led is similar or identical and relied on Gurbux Singh vs. Bhooralal [AIR 1964 SC1810] and Bengal Waterproof Ltd. vs. Bombay Waterproof Mfg. Co. [AIR 1997 SC 1398] to support their observation.

Further with respect to the separate reliefs being claimed, as being contrary to the Section 135 of the Trade Marks Act, 2003, the Hon'ble High Court relied on Island Records V. Tringheld that though only the relief of damages or count of profits are available to the Plaintiff, they can mention both such reliefs in their suit with an option of choosing at a later stage of the proceedings.

Since the two suits are filed in respect of two different and distinct trademarks there is no unity or identity in cause of action. The Hon'ble High Court held that in the first suit the cause of action is related to the Petitioner’s use of the ‘Bhole Bapa’ trademark whereas in the second suit is in relation to the petitioner’s use of the ‘Babu’ trademark. Since, there are two different trademarks there is no unity of subject matter and the causes of action are different as well.

For further information, please visit the link provided herein.

Jenson & Nicolson (I) Ltd V/s The Joint Registrar of Trade Marks

Jenson & Nicolson (India) Ltd. (“**Petitioner**”) in the case of Jenson & Nicolson (I) Ltd v/s The Joint Registrar of Trade Marks is in the business of making paint materials, varnishes and other such products. They applied for registration of a mark ‘Umbrella Synthetic Enamel’ to the Trade Marks Registry at Kolkata, in the year 1998 for its enamel paints. The mark was advertised and an objection was filed to its registration by the Respondents. The Registrar sent a notice to the Petitioners stating that such an objection had been filed and sought a reply to the same. The notice was however returned to the Registrar with a remark saying “Left” on account of change in address. In the year 2009, the Registrar declared the application to have been abandoned by operation of Section 21 (2) of the Trade Marks Act of 1999 on account of no response having been made to the said notice of opposition. Pursuant to the same, the Petitioner filed an appeal along with an application for condonation of delay before the IPAB pointing out change in address in the year 2003 and therefore were not served the notice. The IPAB dismissed the appeal on the grounds that the notice of change of address was not conveyed to the Registry and that no other sufficient cause arose for condonation of delay.

Pursuant to the abovementioned dismissal by IPAB, the Petitioner has filed the present petition before the Hon’ble High Court of Delhi.

The Petitioner stated that the address of the agent was specified for the purpose of communications and other services with respect to the abovementioned application, and no such notice had been served to them. They also stated that the change in address had been notified to the concerned Registry.

The Respondents on the other hand, argued that the Hon'ble High Court of Delhi did not have the jurisdiction to deal with the present petition as the Petitioners were resident in Kolkata and had initiated proceedings in the IPAB at Kolkata as well. The only reason that the proceedings had been shifted to Delhi was due to a consent order that was passed. Neither parties are residing or carrying out business in Delhi, therefore raising preliminary objection on the jurisdiction of the Hon'ble High Court of Delhi.

Hence, the Hon'ble High Court of Delhi laid down two main issues for its consideration. Whether the IPAB had erred in not condoning the delay of eighty two days in preferring an appeal against the order passed by the Joint Registrar. And, whether this Court has the territorial jurisdiction to entertain the petition and, if so, whether in the given facts and circumstances, the Court should entertain the petition given that the proceedings before the IPAB emanated from an application filed before the Registrar of Trademarks at Kolkata.

On considering the issues, the Hon'ble High Court of Delhi points out that by virtue of the 15th and 42nd Amendment to the Constitution, Article 226(2) was introduced by which a cause of action element was introduced in the jurisdiction conferred on the High Courts in writ proceedings.

The Hon'ble High Court of Delhi also considered the question of forum conveniens and held that since the parties had agreed by mutual consent to shift the proceedings to the IPAB in Delhi, they could not now raise the argument that a proceeding in Delhi inconvenienced them.

In its analysis regarding whether or not the delay ought to be condoned, the court observed that it was admittedly the case that the Petitioner or its agent had not been served notice, and that they had in fact intimated the change of address to the Registry. Therefore, since there was no *mala fide* reason as to the delay, the application for condonation should have been allowed.

The Hon'ble High Court of Delhi then turned its attention to the question of the address of the Petitioner's agents being the service address for the purpose of the abovementioned applications. The Hon'ble High Court of Delhi opined that the since the application for registration of the mark contained the agent's address for the purpose of services on behalf of the Petitioner, no power of attorney, as argued by the Respondents, was required to be submitted to the Registry.

For further information, please visit the link provided herein.

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Warm Regards,

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