

# PKMG LAW CHAMBERS

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MONTHLY REPORT FOR JANUARY, 2013

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**SEBI/SECURITIES LAWS - BY SHRI C.M.BINDAL FCS-9414962454**

- Securities and Exchange Board of India (Mutual Funds) (Second Amendment) Regulations, 2012. No.LAD-NRO/GN/2012-13/17/21502 dated 26<sup>th</sup> September, 2012.
- Inventory Management for market makers of SME exchange/trading platform. No. CIR/MRD/DSA/31/2012 dated 27<sup>th</sup> November, 2012.
- Review of the securities lending and borrowing framework. No. CIR/MRD/DP/30/2012 dated 22<sup>nd</sup> November, 2012.
- Mini derivative (futures and options) contract on index (Sensex & Nifty) discontinued. No. CIR/DRMNP/4/2012 dated 20<sup>th</sup> November, 2012.
- Amendments to SEBI (Mutual Funds) Regulations, 1996. No.IMD/DF/24/2012 dated 19<sup>th</sup> November, 2012.
- Additional information for grant of certificate of initial/permanent registration as debenture trustee (to be submitted along with Form A)- Press Release dated 26<sup>th</sup> November, 2012.
- Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Amendment Regulations, 2012 – Clause relating to mis-selling of units of a mutual fund scheme in regulation 4 inserted. Notification No. LAD-NRO/GN/2012-13/25/5455 dated 11<sup>th</sup> December, 2012.
- Rajiv Gandhi Equity Savings Scheme, 2012. No. CIR/MRD/DP/32/2012 dated 6<sup>th</sup> December, 2012.
- Informal Guidance – With regard to inter-se transfer under SEBI Takeover Regulations, 2011.

**LEGAL CASES:**

- **IP HOLDING ASIA SINGAPORE PTE LTD. V. SECURITIES AND EXCHANGE BOARD OF INDIA (2012) 111 CLA 612 (SAT):** The SAT decided that non-compete fee agreed to be paid to the promoters

selling the company cannot be paid to public shareholders merely because they belong to promoter group but are not capable of competing at all, thus upheld the Board decision that public shareholders are not entitled to non-compete fee. [**SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997; Regns. 10 and 12]**]

- **V K KAUL V. ADJUDICATING OFFICER, SECURITIES AND EXCHANGE BOARD OF INDIA (2012) 111 CLA 629 (SAT):** The SAT decided that no fault can be found with the finding arrived at by the adjudicating officer that the non-executive independent director of the parent company had traded in the scrip of the target company in the name of his wife, when he was in possession of unpublished price sensitive information that one of the group companies was to purchase a large number of shares of the target company for which funds were being arranged by the parent company, when, as per admitted facts, funds for purchasing shares were made available by the husband to whom sale proceeds after sale were also transferred, and it was he who had instructed the stock broker for the transaction on phone. [**SEBI (Prohibition of Insider Trading) Regulations, 1992; Rgns. 3 and 4 read with s. 15G(i) of SEBI Act, 1992]**]

**COMPETITION ACT – BY SHRI PRADEEP K MITTAL-9811044365**

- The complainant grievance is that after Opposite Party had made its own group company a dealer in Mumbai, the informant was being offered product at higher price as compared to the new dealer. The orders placed by it were not being given priority whereas the orders placed by Mumbai dealer, were being delivered and given priority and the deliveries booked by informant were being delayed on false pretext. The informant was being discriminated also in respect of supply of spare parts. The Commission held that since the Opposite Party is not dominant, there is no ground for directing DG to investigate the matter as there is no prima facie case either under Section 3 or under section 4 of the Act. Exclusive Motors (P) Ltd Vs/ Automobili Lamborqhini MANU/CO/0092/2012.
- The Competition Commission held that mere fact that the opposite party was a dominant enterprise in the relevant market is not a violation of

the Competition Act. It is to be considered whether there was an abuse of the dominant position by the Opposite Party. The information given by the informant shows that the opposite party has treated the informant at par with all other exhibitors and had not exercised any discrimination. The rate and the terms & conditions of exhibition were same for the informant and others. The rate of booking of the venue was not different for the informant but was same for all. The mere fact that the opposite party while prescribing the rate for the year 2013 made an enhancement on previous rate by 15% instead of usual 10% would not amount to abuse of dominant position. It has not been shown by the informant as to how the rental fixed by the OP was unfair. PDA Trade Fair Vs. ITPO MANU/CO/0086/2012.

- The Commission has held that to attract provisions of the section 4 of the Act, the dominant position of the enterprise needs to be examined under explanation (a) to section 4 of the Act. Even though the opposite party is alleged to be a leading real estate developer in the relevant market, there is no material on record to hold it a dominant enterprise in the relevant market. The informant has cited certain factors like economic power of OP and sole dependence of informant on the OP but without giving any specific data to support his contention. Information available in public domain shows that many building projects were in progress in the above area namely Vipul Gardens, Aravali Heights-II and III, M2K Country, M2K Country Heights, Avalon Rangoli, Vardhman Springdale, Lotus Green City, Gurgaon Extension, Gurgaon Extension-II, Raheja Highway Arcade, Piyush Horizon, Parsvnath Pleasant, Cubix, Tivoli Holiday village, Bestech Parkview Delight, etc. and these also provided the services of development and sale of residential units in Dharuhera in the State of Haryana.
- The Commission further held that as such, dominance of OP in the relevant market is prima facie not established and so there is no question of abuse of the same. The Commission finds that no prima facie case was made out for directing the Director General to carry out investigation into the matter under Section 26(1) of the Act. A K Jain Vs. Dwarkadhis Projects (P) Ltd MANU/CO/0087/2012.
- The complainant had extensive chit transactions and failed to make payments with regard to the chit transactions to the opposite party. The Claimant approached this Commission after he had a dispute with opposite party in implementation of a settlement between parties in respect of various decrees against him. The OP may be a large chit fund company in the State of Andhra Pradesh and may be in dominant but mere dominance per se cannot be acted against by the Commission. To invoke the jurisdiction of the Commission a prima facie abuse or misuse of the dominance is to be shown as per the provisions of section

4 of the Act. The relief sought by the complainant is to direct the opposite party to settle the issues amicably with him which does not fall within the purview of the Act. There is no competition concern raised by the informant.. In the light of the above facts and situation, the Commission finds that no prima facie case is made out against the opposite party. Therefore, the matter is hereby closed under section 26(2) of the Act. Sreeram Murthy Vs. Shriram Chits Ltd MANU/CO/0083/2012.

**CENTRAL EXCISE -BY SHRI PRADEEP K MITTAL-  
9811044365**

- If the cenvat credit has been availed in respect of the period prior to registration with the Service Tax Authorities but actually utilized after the getting the Registration Certificate from the Service Tax authorities, the Cenvat Credit cannot be denied. C Metric Solution (P) Ltd Vs. CCE 2012(286) ELT 58 (Tri).
- The inputs which had gone into the manufacture of final products i.e. sugar and in the process, the bagasse i.e. waste or residue emerges (which is not dutiable, the contention of the Department that the proportionate cenvat credit on inputs would be liable to be reserved on bagasse (since it is not dutiable) is rejected and demand is set aside – as the Department failed to establish which of the inputs had gone into the manufacture of bagasse. Kisan Sahkari Chini Mills Ltd Vs. CCE 2012 (286) ELT 51 (Tri).
- The order passed after the six months from the date of conclusion of personal hearing and the order did not deal with the issues specifically raised in the appeal despite directions by the High Court in the first round of litigation, the order is bad in law and is liable to be set aside and quashed. Synefra Engineering & Constructions (P) Ltd Vs. CCE 2012(286) ELT 10 Bom.
- When there is judgment of single member of CESTAT in their own case in their favour and also judgment of other bench but one judgment of CESTAT of single member against them against which appeal has been filed before High Court and the same is pending for consideration, the appellant is entitled to unconditional stay order without the requirement of pre-deposit on the above basis. Maharashtra Seamless Ltd Vs. CCE 2012 (286) ELT 93 Tri.
- The petroleum, being highly volatile, changes its volume depending upon the temperature under which it is kept. Because of the peculiar nature of petroleum, it cannot be alleged that there was under-valuation

on the ground of volume of oil gets reduced. Indian Oil Corporation Ltd Vs. CCE 2012(286) ELT 105 (Tri).

- When the MS rounds, is used for creating hole in the furnace so that molten metal comes out through that hole and in the process, the MS round get melt and is reduced to smaller size and after repeated use, it is reduced to such a size which cannot be used further and is scrapped. The Tribunal has held that MS rounds rightly qualify as "input" which is used in or relation to the manufacture of finished goods. CCE Vs/ Sova Ispat Alloys Ltd.
- The supply of finished goods to the SEZ/developers have to be treated as export in terms of Section 2(m) of SEZ Act as also for the purpose of custom duty, excise duty and these have not to be treated as mere deemed exports. Surya Roshini Ltd Vs. CCE 2012(285) ELT 518. Tri.
- The semi-finished goods and finished goods lying in stock on the date of coming into force of exemption notification. In case the credit has been legally taken and utilized on dutiable final products, is not required to be reversed if subsequently, the finished goods became exempt – Rule 6 of Cenvat Credit Rules, 2004. CCE Vs. Mount Everest Minerals Water Ltd 2012(285) ELT 543. (Tri).
- When the cars had been cleared/sold to dealers on principal to principal basis. The dealer is offering three free services to the customers. The price of the car also includes the expenses incurred for providing three free services. Therefore, expenses incurred for providing three free services is liable to be excluded from the "transaction value" at which the excise duty has to be calculated and paid to the Government. Maruti Suzuki India Ltd Vs. CCE 2012 (285) ELT 546.

### **SERVICE TAX –BY SHRI PRADEEP K MITTAL-9811044365**

- In case, the insurance cover taken on vehicles, though in the name of the director of the company but actually utilized for the purpose of work of the company and for the purpose of easy transfer financing period is over, cenvat credit on service tax paid for insurance cover would be allowed. Further, in case the Director has performed both for the manufactured goods and traded goods, then the proportionate cenvat credit would be allowable. Mobile phones used by the Director of the company, the cenvat credit would be permissible. Valco Industries Ltd Vs. CCE 2012(286) ELT 54 (Tri).
- The erection of temporary structure for conducting business function such as trade fair, exhibition, stall, by use of metal pole, hangers, stalls,

temporary lighting, floorings, cannot be equated with the taxable services "erection, installation and commissioning". The words "erection, commissioning and installation to be understood with the terms "plant, machinery and equipments and hence no service tax can be demanded under the head "erection, installation and commissioning. Amanulla Khan Vs. CCE 2012(28) STR 508 (Tri).

- In case the Cenvat Credit has been taken for the period prior to the date of registration with the Service Tax Authorities, would be allowable after the date of registration and the Assessee is entitled to take and utilize the Cenvat Credit after obtaining the registration for the period prior to the date of registration. C Metric Solution (P) Ltd Vs. CCE 2012(28) STR 460 (Tri).

**COMPANIES ACT 1956 - BY SHRI PRADEEP K MITTAL-9811044365**

- The person holding a court decree in his favour cannot be treated as a secured creditor for the purpose of Scheme of Arrangement under Section 391 of the Companies Act, 1956 and he would remain be unsecured creditor only. The order of sanction of scheme of arrangement under section 391 do not automatically stay of proceedings under Section 138 of NI Act. The words "proceedings" used under Section 391 (6) of Companies Act, 1956 would not include, in its sweep, "criminal proceedings" , inter-alia, under Section 138 of NI Act. Spice Jet Ltd Vs. Malanpur Steel Ltd 2012 (194) DLT 507 Delhi DB.
- On a Scheme of Arrangement under Section 391 of the Companies Act, the High court has sanctioned a reduction of capital as provided under Section 100 and 103 of the Companies Act, 1956, the Regional Director cannot insist that the scheme be sanctioned with the word and "reduced" in its corporate name once the Stock Exchange did not insist to the addition of word "reduced" in the name. Integra India Group Co Ltgd 2012 (109) CLA 309 (Guj).
- The appointed date for the Scheme of Amalgamation could be even prior to the date of incorporation of the transferee company since the transfer has to take place only on the appointed date and the transferee company must be in existence on the effective date. Satkar Fin Cap[ Ltd 2012 (111) CLA 22 (Delhi).
- Unless some is brought in the register of member, person cannot held to be shareholder and would not qualify under Section 399 to file a petition under Section 397 Oppression and Mis-management especially

when the proceedings is pending before the CLB and more particularly when the company has declined to bring on record as a transferee in the absence of any proper authority being obtained from any Civil Court dealing with Succession of those shares. Ajit Kumar Aggarwal Vs. Nischintapur Tea Co Ltd 2012(111) CLA 225 Cal DB.

- If the charge is not registered with the ROC within 30 days from the date of creation, such charge is not "secured charge" and the debt cannot be held to a "secured debt" for purpose of Section 529 and 529A of the Companies Act, 1956. IFCI Ltd Vs. Official Liquidator 2012(111) CLA 238 Cal.
- The Karnataka High Court has dismissed the Company Appeal against the order of the company law board dismissing the company petition under Section 397 Oppression and Mis-management in which the petition has challenged the non-allotment of shares so as to qualify under Section 399 of the Companies Act, 1956 for filing a petition. The High Court has held the issue cannot be subject matter of company appeal as the non-allotment of shares should be challenged in an appropriate proceedings. S Sreedhar Vs. Mahabaleshwar Auto Industries (P) Ltd 2012(111) CLA 262 Karnataka.
- The Company Law Board, in an appropriate course, while dismissing the company petition under Section 397 since the petitioner failed to make out a case of oppression and mis-management, grant a relief in exercise of powers under Section 402 of the Companies act, 1956 to do substantial justice between the parties by directing to bring back the siphoned off funds and to part ways on receipt of fair valuation of shares. Dev Bhushan Nohria Vs. Kinetic Marketting (P) Ltd 2012 (111) CLA 285.
- In a petition under Section 397 for oppression and mis-management, if an application is filed seeking amendment of the petition, the correctness of the contents of said application is not required to be examined at the time of consideration as to whether the said application is required to be allowed or not, and the liberal view has to be taken for permitting the amendment so long as character remains the same. Tamil Nadu Water Investment Co Ltd Vs. Aidqua Holdings 2012 (111) CLA 307 CLB.
- The directorial complaints can be looked into in a petition under Section 397 if the company is a family company and there is no notice for meeting and in a arbitrary and planned manner, decision has been taken against the petitioners depriving them of their directorship. The directorship is liable to be restored. Abdul Latheef Meera Sahib Vs. Tacle Sanitaryway (P) Ltd 2012(111) CLA 329.



- The petition under Section 397 of Companies Act, 1956 is maintainable if the petition is not enforcement of MOU and the relief sought can be entertained de hors the MOU, although it would be unfair to ignore the MOU while considering the rights of the petitioner as a shareholder/directors and direct them to approach the civil courts. Abdul Latheef Meera Sahib Vs. Taceel Sanitaryway (P) Ltd 2012(111) CLA 329.
- The existence of arbitration Clause will not take away the jurisdiction of the company court to wind up the company as the arbitrator has no power to order for winding up of the company. Even otherwise, the invocation of arbitration clause arises if there is a dispute, if the amount is undisputed, the question of referring the parties to arbitration does not arise. Integrated Boardcasting Co (P) Ltd Vs. Nettlink Ltd 2012 (111) CLA Snr. 11 AP = 2012 (114) SCL 541.

**ARBITRATION & CONCILIATION ACT, 1996 - BY SHRI PRADEEP  
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- Under Section 34 of the Act, not all mistakes could be corrected by the court on a petition under Section 34 of the Act, but only those mistakes/errors of patent illegality, without jurisdiction, or biasness or against the public policy, the award is liable to be corrected. NTPC Ltd Vs. Marathon Electrics Motors India Ltd 2012(194) DLT 404 Delhi DB.
- In case the persons named in the arbitration agreement as the Arbitrator to adjudicate the disputes between the parties, are no more available to act as a arbitrator, the parties can appoint the substitute arbitrator in case the arbitration agreement does not prohibit such appointment. ACC Ltd Vs. Global Cements Ltd 2012(109) CLA 314 SC.
- The executing court cannot go behind the judgment and decree i.e. Award. The executing court has no jurisdiction to hold that the Award passed by the Arbitrator is without jurisdiction in as much as when the arbitration proceedings commenced, there existed no dispute – although it is undisputed that neither the borrower nor the guarantor paid the amounts to the lender i.e. L&T Finance Ltd Vs. Braham Pal 2012(194) DLT 534.
- When any of the contracting party accepts a condition of extension of time for a completing supplies, later on, that party cannot challenge those condition on the plea of “arbitrariness or “economic duress or coercion”. When one of the parties has accepted modified conditions of

the contract relating to time by which the goods were to be supplied and the price at which the goods were to be supplied, the contract stood modified. BSNL Vs. Himachal Futuristic Communications Ltd 2012(194) DLT 661.

- If no ground raised before the Arbitrator that the claim of one of the parties is time barred, the said ground cannot be raised before the Court while filing Objection under Section 34. When the cause of action last arose is mixed question of fact and law and cannot be appreciated in the petition. Raj Kishan & Co Vs. NTPC 2012(194) DLT 314.
- Even the agreement which contains arbitration clause has been terminated for any reason whatsoever, the arbitration clause shall survive and shall not get perished, inoperative or extinguished, for the purpose of determination of disputes arising " in respect of" or with regard to or under the contract. Magna Leasing & Finance Limited Vs. Potluri madhvilata 2009(10) SCC 103.

## **CORPORATE LAWS - BY SHRI PRADEEP K MITTAL-9811044365**

- In the proceedings where there is a challenge to award of contract by the Government, the court does not sit as an appellate body or as a technical evaluation committee and the role of the court is to ensure that the fair, transparent and non discriminatory process has been followed. Bal Pharma Limited Vs. Union of India 2012 (193) DLT 364 Delhi DB.
- The Bank/Financial Institutions under the provisions of SECURITISATION ACT, have over-riding powers including that of provisions of Companies Act, 1956. In case the borrower company is in liquidation, for initiating proceedings under Section 13 of Securitisation Act for recovery of possession of immovable property which is subject matter of mortgage and also under the possession of the OL, no permission of the Company Court is required and the OL is directed to de-seal the property and hand over the possession to the auction purchaser. Kotak Mahindra Bank Ltd Vs. Megnostar Telecommunications (P) Ltd 2012 (193) DLT 371 (Delhi DB).
- The protection of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 shall not be available to the "sick industrial company" against the continuation of suit for recovery of money unless the dues are admitted by sick company in a Rehabilitation Scheme or admitted before the court where the suit is filed and is pending, the

protection of Section 22 shall not be available FMI Investment (P) Ltd Vs. Montari Industries Limited 2012(194) DLT 687.

- The provisions of Section 138 of NI Act shall not applicable in case the cheque has been issued towards reciprocal promises or as a security or failed consideration. The prima-facie, it must be shown that the cheque has been issued towards debt payable by the issuer of the cheque. Deepshika Kumari Vs. Leela Infrastructure & Mining (P) Ltd 2012 (111) CLA Snr 15 Delhi.

## **CIVIL LAW - BY SHRI PRAVEEN K MITTAL - 9810826436**

- The benefit of Section 14 of Limitation Act shall be available only if it is shown that the petitioner was pursuing a remedy in a court without jurisdiction in a bona fide manner and with due diligence, which, in other words, the proceedings must be pursued before trial court, appellate court or revisionary court between the same parties. However, if the party has been pursuing before Ombudsmen of the Bank and later on with Reserve Bank of India, it cannot be said that the remedy has been availed before the Court and, therefore, benefit of Section 14 of Limitation Act, (i.e. pursuing the remedy before the wrong court), shall not be available. Ahalavath Organics Limited Vs. State Bank of Mysore 2012(194) DLT 698.
- The time for filing execution petition stand commence only from the date decree enforceable and the decree shall become enforceable only when the appeal, filed had been disposed off or the decree has not at all been challenged. The merger of original decree into appellate decree takes place irrespective of the fact that the appellate court affirms, modifies or reverse the lower court order. R P Punj Vs. Punj Sons (P) Ltd 2012 (192) DLT 662 (Delhi DB).
- If there is no pre-estimate of genuine losses and damage has been kept in the contract/agreement and, therefore, Section 74 of the Contract Act has no application. The case has to be decided on the touchstone of Section 73 of the Contract Act.
- Though the payment of property tax is primarily liability of the owner of the premises to the municipal corporation under the Act, yet the parties, may with mutual consent, agree that the lessee/tenant shall be bear the cost of the property tax payable for the tenanted premises. The arbitrator derives authority from the contract and if the contract provides for the payment of tax by the tenant, then the arbitrator shall be bound by it even as per Section 28(3) of the Arbitration & Conciliation Act.,1996, which clearly says that the arbitrator shall follow

the terms of the contract. Amitpal Ahuja Vs. MTNL 2012(194) DLT 332. Delhi High Court.

- In Raghbir Saran Charitable Trust Vs. Puma Sports India (P) Ltd., 2012(191) DLT 183 it has been held that clause in the agreement would actually determine who is to pay the service tax. However, for the purpose of levy of service tax, the statutory authority under the law will raise the demand only on the person liable to make such payment.

Your suggestions and contributions are of great importance to us. Please give us your FEEDBACK, so that this Bulletin may be made of real use to you. Please write to us with your views and contributions at: **pkmittal171@yahoo.com or pkmittal171@gmail.com**

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