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MONTHLY REPORT FOR March, 2014

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WHOLTIME DIRECTOR – BAJAJ HINDUSTHAN LIMITED

SEBI LAWS – BY SHRI C M BINDAL -9414962454

- In the event of steep fall of price of shares on the first day of trading after the listing of scrip on the stock exchange, clearly indicate that there was malafide conduct and unfair trade practice on the part of stock brokers.
- The Delhi High Court has observed. Section 24 of SEBI Act has since been amended so as to enhance the maximum substantive sentence to ten (10) years, and to prescribe a fine up to Rs. 25.00 crore. The purpose obviously is to deter persons such as the appellants from trapping the gullible investors, by promising them returns which are unrealistic and can never be given. Any unwarranted leniency towards such persons will be highly misplaced, besides being detrimental to the larger interest of the society. In the facts and circumstances of the case, when admittedly all the investors have not been paid and there is no documentary evidence of even a substantial number of them having been paid, I find no good ground for reducing the substantive sentences awarded to the appellants or the fine imposed on them. The Additional Chief Metropolitan Magistrate has held ordered rigorous imprisonment of six months and a fine of Rs.2.5 lac. The Hon'ble Delhi High Court dismissed the appeal. Sunita Bansal Vs. SEBI MANU/DE/0295/2014.
- It is seen that sometime in August 2010 appellant had agreed to advance loan to Gujarat Metallic Coal & Coke Ltd. formerly known as Arvind Chemicals Ltd., ("ACL" for short) by creating lien on 3,75,000 shares of Arvind International Limited held by ACL. In anticipation of getting loan from appellant, ACL transferred 3,75,000 shares of Arvind International Limited to the demat account of appellant on September 13, 2010. Appellant claims to be unaware of such transfer and since the loan transaction did not materialize, said shares were transferred back to ACL on October 26, 2010.
- On investigation SEBI found that transfer of 3,75,000 shares constituted holding 5.35% shares of Arvind International Ltd. and therefore, appellant was required to make disclosure under SAST Regulations, 1997 and PIT Regulations, 1992. Since no such disclosure was made, adjudication proceedings were initiated and by a show cause notice dated June 14, 2013

appellant was called upon to show cause as to why inquiry should not be held for imposing penalty under Section 15A(b) of SEBI Act, 1992 for alleged violation of the provisions of regulation 7(1) and regulation 7(2) of SAST Regulations, 1997 and regulation 13(1) and regulation 13(3) read with regulation 13(5) of the PIT Regulations, 1992. The SAT dismissed the appeal challenging the order imposing a very nominal penalty of Rs.1 lacs. Mrs Komal Nahata Vs. SEBI. MANU/SB/0007/2014.

COMPETITION ACT – BY SHRI PRADEEP K MITTAL-9811044365

- The Competition Commission of India(CCI) has imposed a penalty of Rs. 3.81 crore on Dr. L.H.Hiranandani Hospital, Mumbai for violation of Section 3 & 4 of the Competition Act. The informant Mr. Ramakant Kini had approached CCI alleging that the hospital had abused its dominant position in the area of stem cell banks and did not allow the stem cell of the child to be collected by any other service provider except M/s Cryobank with whom it had an exclusive agreement. Consequent upon detailed investigation by DG-CCI, the Commission had arrived at the conclusion that exclusive arrangements between two undertakings do not accrue any benefit to the consumer and are rather at the cost of consumer. CCI also considered it as an abuse of dominance by Hiranandani Hospital and the conditions put up on its patients that in case one had to avail stem cell banking system, they will only have to avail services of Cryobank, as abusive and violative of Section 4 of the Competition Act. CCI, under Section 27 of the Act, has passed the following order:-

"(a) The agreement of OP hospital with Cryobank for the years 2011-12 and 2012-13 are declared null and void.

(b) The OP hospital shall not enter into a similar agreement with any stem cell bank in future."

- The Commission has also imposed a penalty of Rs.3,81,58,303/- calculated at the rate of 4% of the average turnover of OP hospital. The penalty is to be deposited within 60 days of receipt of the order MANU/PIBU/0187/2014.

- Competition Commission of India (CCI) has imposed a penalty of Rs.62.31 crore on three engineering companies for violation of Competition Act concerning forming a Cartel with respect to a tender for an Indian Railway undertaking. A penalty of Rs. 1.91 crore has been imposed on M/s Stone India Ltd., Rs. 5.70 crore on M/s Faiveley Transport Rail Technologies India Ltd and Rs. 54.70 crore on M/s Escorts Ltd. The penalty has been worked out on the basis of 2% of average turnover of these companies for the three financial years from 2009-10 to 2011-12. The tender relates to purchase of Feed Valves where three vendors quoted almost identical prices.
- The penalty has been imposed after CCI took up a case of suo motto basis based on information given by M/s Diesel Loco Modernisation Works(DLMW), a unit of Indian Railways at Patiala, Punjab. MANU/PIBU/0124/2014.
- Competition Commission of India (CCI) has ordered investigation under Section 26(1) of the Competition Act in respect of information filed by M/s Wardha Power Company Limited (Informant) against Western Coalfields Limited (WCL) and Coal India Limited(CIL). The Informant had alleged that WCL and CIL have abused their dominant position and the various clauses of the Fuel Supply Agreement were discriminatory. CCI formed prima facie opinion that a case was made out against WCL and CIL for investigation for contravention of Section 4 of the Competition Act and it is a fit case to be investigated by DG. The report of DG is to be submitted within 60 days from receipt of the order. MANU/PIBU/0102/2014.

CENTRAL EXCISE –BY SHRI PRADEEP K MITTAL-9811044365

- In case four show cause notices have been issued to an assessee and there is a one order of adjudication deciding four show cause notices, then only appeal is maintainable and four appeals are not required to be filed. Sun Pharmaceuticals Ind Ltd Vs. CCE 2014(300)ELT 242 (Tri).
- The scrap of iron and steel, copper and brass arising out dismantling of old plant and machinery is not liable to payment of excise duty. CCE Vs. Ballarpur Industries Limited 2014(200) ELT 181 (Punjab & Haryana).

- In case the order in original has been passed by an authority outside Delhi and first appeal has also been heard by an authority Delhi and then the Appeal will not be maintainable before Delhi High Court – just because the assessee is a Large Tax Payer and the Large Tax Payer unit of the Department is located in New Delhi. The appeal dismissed on the ground of lack of jurisdiction. CCE Vs. Whirpool of India Ltd 2014(200) ELT 182 Delhi DB.
- In case the tone and tenor of the Show cause Notice clearly shows that it has been issued pre-determined mind by the department – just to confirm the demand – such SCN is liable to be quashed and the Department is directed to issue fresh Show Cause Notice in accordance with law. SBQ Steel Ltd Vs. CCE 2014(300) ELT 185 (AP).
- The High Court has directed, while remanding the case, before the CESTAT to decide the issue in the light of the judgment of the Hon'ble Supreme Court, the CESTAT did not decide the issue without discussing the judgment of the Supreme Court and High Courts in details and but decided in a cryptic manner, the order of Tribunal is liable to be set aside and Tribunal is directed to decide the issue afresh. CCE Vs. Zenith Fibres Ltd 2014(300) ELT 197 (Guj).
- Where the issue has been decided in their own case by the tribunal and subsequently the larger bench of the Tribunal deciding the very same issue against the assessee, then the longer period of limitation is not invocable by the Department in view of the previous judgments of Tribunal in their own case on the very same issue. CCE Vs. NR Aggarwal Industries 2014(300) ELT 213 (Guj DB).
- When there is a provisional assessment and during which the excess payment of duty has been made, after completion of provisional assessment, it is found that there is a excess payment of duty and when the sought to be refunded, there is no question of unjust enrichment under Section 11B of Central Excise Act. CCE Vs. Goetze India Ltd 2014 (300) ELT 215 (P&H).
- In case the appeal along with stay application is pending before Commissioner (Appeal) and the same could not be heard due to reasons not attributable to the appellant, the department

cannot recover the demand pending hearing of such stay application. The High Court restrained department from recovering the demand. Rittal India (P) Ltd Vs. Union of India 2014(300) ELT 226 (Kar).

- There is no evidence that the appellant has been served with the copy of the order in original and the appellant obtained certified copy from the Range Office, the period of limitation shall be counted from the date of supply of certified copy from the range office and the appeal, being filed within a prescribed period, is within limitation. Shree Renuka Sugars Ltd Vs. CCE 2014(300) ELT 271 (Tri).

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

- The rate of service tax payable would be at the rate prevailing on the day of rendering service and not when the payment has been received for such rendering of service. Commissioner of Service Tax. Ratan Singh Builders (P) Ltd 2014(33) STR 242 (Delhi).
- The Order in Original has been passed on 29.12.2008 but no appeal has been filed till 30.10.2010 on the premises that the order has been received by the appellant. The party obtained under RTI Act, copy of dispatch register from the Department in which there is no dispatch entry for dispatch of such order. The appeal filed is within time and is entertainable. Divya Tourism (P) Ltd Vs. CCE 2014(33) STR 249 (Tri).
- The export benefits are similar to activities relating to business. If the service tax has been paid to a party for the purpose of processing and securing the export incentive, the party is entitled to take cenvat credit on such credit. CCE Vs. Ahmedabad Strips (P) Ltd 2014(33) STR 291 (Tri).
- The service tax paid on charges payable to the Commission Agent who had been engaged for the purpose of sale of sugar, the party is entitled to take cenvat credit. Seksaria Biswan Sugar Factory Ltd Vs. CCE 2014(33) STR 292 (Tri).
- Labour hutment and kisan sheds mainly for the purpose of providing temporary shelter and relief for resting of workers and cane growers, these facilities are in relation to

manufacturing activity and, therefore, service tax paid on construction of aforesaid sheds/hutments, the cenvat credit would be allowable. Similarly, the service tax paid on availing "Vastu Service" for construction of new building is also eligible service for the purpose of availing cenvat credit. Bajaj Hindusthan Limited Vs. CCE 2014(33) STR 305 (Tri).

- When the committee of two Chief Commissioner signed the authorization on two different dates, it means there was no meeting of minds of two Chief Commissioners and hence it could be inferred that there was no application of minds. The notes must disclose meaningful discussion, consideration and application of minds of the committee comprising of two Chief Commissioners CCE Vs. LR Sharma & Co 2014(33) STR 319.(STR).
- Where the order-in- original is merely posted by Registered Post and there is no proof of delivery. The order of the commissioner (appeal) dismissing the appeal only on the ground of limitation is not sustainable. The Commissioner (Appeal) is directed to take up the appeal. Bharat Sanchar Nigam Ltd Vs. CCE 2014(33) STR 332 (Tri).
- The movement of sugar bags from floor of the mills to a godown or from one godown to another godown does not amount to Cargo Handling Services as it involves of loading and unloading of sugar bags to the trucks or other vehicles, which is not the case here and, therefore, no service tax is leviable on "Cargo Handling Service". CCE Vs. Harbhaja Lal Rampal 2014 (33) STR 351. Tri.

COMPANIES ACT 1956 - BY SHRI PRADEEP K MITTAL-9811044365

- Rama Peer Trader Vs. scot Innovation Wires & Cables (P) Ltd 2014(207) DLT 57. The court has analysed various documents which were filed in defence to the winding up petition yet the court has held that the winding up petition is maintainable.
- The Respondent Company got number of opportunities to make payments of admitted dues of the Petitioner Bank and despite this, no payments is made to the Petitioner Bank. The respondent company is liable to be wound up and the official

liquidator is appointed as a provisional liquidator of Respondent Company. Chinatrust Commercial Bank Vs. Liliput Kidswear Limited 2014(206) DLT 754. Delhi.

- The date of presentation of winding up petition under Section 433(e) of Companies act, 1956, shall be considered the date when the proceeding for winding up shall be deemed to have commenced for the purpose of Section 441(2) of Companies Act, 1956. OL of Kritika Rubber Industries (P) Ltd Vs. Canara Bank 2014(118) CLA 89 (Karnataka).
- The decision to extend the financial year could be taken before the expiry of the financial year or before the expiry of extended period of financial year (which is sought to be extended). For example, if the financial year is ending on 31st March, 2013, the decision could be taken either on 29 or 30 March, 2013 it could be taken before 30th June, 2014 if the decision is taken to extend the financial year upto 30th June, 2014. Dinesh Saini Vs. Union of India 2014(118) CLA 86 (Delhi).
- Where the petition filed under Section 397 and 398 filed by one party before the Company Law Board is a counter-blast to the civil suit for partition of properties filed by the other party, then the action of the other party, even if oppressive in the sense that no notice of board meetings have been given, yet would not justify the winding up of the company on just and legal grounds. Prem Kuamr Jain Vs. Geotracers Mobile Resources 2014 (118) CLA 30 CLB.
- The petitioner cannot be permitted to agitate the issue of misappropriation of funds if he has signed the annual accounts. Further, the removal of director cannot be agitated unless the company is in the nature of quasi-partnership. At the same time, where the petition has been filed to keep oneself away from the possible liability of money on the basis of recovery proceedings initiated by the bank under Securitisation Act and Debt Recovery Act. The Petition is not maintainable. Bharat Savla Vs. Hirak Plastics (P) Ltd 2014(118) CLA 136 (CLB).
- In case the petitioners have been removed as a director in the EGM of the company and the special notice was served upon them and in the meeting which notice was considered, they attended the Board Meeting, they cannot allege that they had no notice of EGM and they, being the permanent directors, cannot be removed as a Director of the company. The acts of

oppression must involve an element of lack of probity and fair dealing to a member in the matter of proprietary rights as a shareholder. The acts of non-payment of dividend, non-payment of loan and rent, these are all proprietary rights of shares which can be challenged before civil court and not before Company Law Board. Prashant Despande Vs. Med Heal Pharma (P) Ltd 2014(118) CLA 154 CLB.

- The Company Law Board cannot be direct the company to Form No.32 where the letter of resignation of a director was discussed in the meeting and after discussion, the board decided to reject the letter of resignation. SR Nair Vs. All time Power Technologies (P) Ltd 2014(118) CLA 230 CLB.
- The party for many years god not enquire about the quarterly board meetings and annual general meetings of the company, though fully educated persons and further did not bother for their remuneration and their dividends and further more never wanted to incur the liabilities by way of personal guarantee to be given to the bank for financial limits, such persons do not have interest in the company. Bhola Waman Vs. Laxman Waman 2014(118) CLA 233 (CLB).
- If the purchaser of the shares produced the (a) share certificates (b) share transfer deeds (c) and payment of purchase consideration and (d) otherwise, there are no fetters in transfer of shares, the company cannot refuse the transfer of shares and rectify the statutory records. 3A Capital Services Ltd Vs. Sanghi Spinners India Ltd 2014(118) CLA 262 (CLB).
- A petition under Section 397 of Companies Act, 1956 for oppression and mis-management would be maintainable under Section 399 of Companies Act, 1956 even if there is a support of other shareholders by way of consent letters. The shareholding on the day of filing of petition would be enough and would only be considered, however, subsequent changes in the shareholdings shall have to be dis-regarded. Once sellers of shares has sold the shares, he would lose all rights over the shares and the purchaser would be free to use them. Bhagwati Developers (P) Ltd Vs. Peerless General Finance & Investment Ltd 2013(117) CLA 475 (Calcutta DB).
- The grievance of alleged contravention of SEBI Act or its Regulations cannot be agitated in a petition under Section 397 and 398 of the Companies Act, 1956 since the SEBI has its own

administrative and quasi-judicial machinery and, therefore, issues of contravention of SEBI and its regulations to be raised before SEBI and before its appellate forum i.e. Securities Appellate Tribunal. MKJ Enterprises Ltd Vs. Bhansari Engineers Polymers Ltd 2013(117) CLA 489 Clb.

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

- The surety and guarantor who had given personal guarantee for ensuring repayment of debts/loans payable to the bank and financial institutions shall not be entitled to protection of Section 22(1) of SICA if the bank and financial institutions have commenced recovery proceeding before DRT or under SECURITISATION ACT, as these proceedings are not in the nature of "suit". The "suit" as appearing in Section 22 of SICA shall remain restricted to only suit filed under CPC. Therefore, the surety and guarantor shall not be entitled to protection of Section 22 of SICA and recovery proceedings against them shall continue. Inderjeet Arya Vs. ICICI Bank Ltd 2014(118) CLA 1 SC.
- In a proceedings under Section 138 of NI Act for dishonor of cheque, for drawing a presumption under Section 118 of NI Act against drawer of cheque, it should first be established by the complainant that the complainant is a debtor either for supply of goods/services or lent the money and only then the drawer of the cheque shall be called upon to discharge his burden that he is not liable to pay the amount under the cheque. John K Abraham Vs. Simon C Abraham 2014(118) CLA 4 SC.
- Where the bank is exercising its powers under the SECURITISATION ACT in respect of company which is under liquidation, the sale of properties of company which is under liquidation is not bad in law nor illegal even if the OL has not been associated while disposing off the assets of such company. Kotal Mahindra Bank Ltd Vs. Megnostar Telecommunications (P) Ltd 2014(118) CLA 44 (Delhi).
- Where are number of sale deeds floating in respect of the very same immoveable property and it is the case of the petitioner that he never executed the alleged and purported sale deed (and on the basis of very same sale deed, the bank claims

mortgage in their favour), these issues could be tried by the Civil Suit before the Civil Court and not before the Debt Recovery Tribunal, who is jurisdiction is summary in nature. The party is also entitled to interim relief of possession and title of suit property. Ashok Kr Raizada Vs. Bank of Rajasthan 2014(207) DLT 10.Delhi.

- If the person is not a managing director, joint managing director or signatory to the cheque, then role of the each of other directors must be spelt out clearly in the complaint under Section 138 of NI Act – otherwise complaint under Section 138 of NI Act against all other directors is not maintainable and is liable to be quashed. Swastick Polyvinyls (P) ltd Vs. B M Gupta 2014(207) DLT 131.
- The bank guarantee is a contract arrived between the beneficiary and the bank and independent of contract between the beneficiary and the party at whose instance bank guarantee has been furnished. In the letter of invocation of bank guarantee, it is not necessary to state the exact amount of losses and damages suffered by the beneficiary and it could be done at a later stage. Indu Projects Ltd Vs. Union of India 2014(207) DLT 4A (CN).

CIVIL LAW - BY SHRI PRADEEP K MITTAL -9811044365

- While considering the application for amendment of the plaint, normally merits of the case of the plaint is not required to be discussed and test and where the amendment is sought to decide the question in controversy, the amendment is required to be allowed and cannot be rejected. Employer Provident Fund Organisation Vs. Sewa International Fashions 2014 (206) DLT 762. Delhi.
- If statutory notice of winding up has been sent by Speed Post and the remarks is there that the office closed or left without address, there shall be presumption of service since the statutory requirement was that service had to be effected at the registered office. HDFC Bank Ltd Vs. Prem Power construction (P) LTD 2014(206) DLT 569. Delhi.
- The terms of a registered documents can be varied or changed with by way of a registered documents only. If the terms of

contract required by law to be reduced in the form of a document have been proved according to Section 91 of Indian Evidence Act, no oral evidence can be led to contradict, vary, add or subtract the terms of the written documents. If the rent agreement is not unregistered, it cannot be read in evidence – even if the stamp duty had been paid on rent agreement, rent under rent agreement cannot be said to be for collateral purpose. The parties has not paid stamp duty and avoided the transaction from the eye of the Income tax Department, there is no equity in their favor and are barred from any relief. Kusum Enterprises Vs. Vimal Kochhar 2014(207) DLT 172.

- The findings recorded by the trial court are not binding upon the appellate court even if no cross-objections have been filed by the party in response to the appeal of one of the parties. It is always open to the appellate court to question the findings recorded by the trial court. Non-cross examination on particular aspect of deposition of witness, amounts to acceptance of that part of deposition. If the witness does not appear in the witness box for the purpose of his cross-examination, the presumption has to be drawn that the case set up by him is not true and correct. Surrender Rode Vs. Madan Mohan 2014(207) DLT 206. Delhi.

ARBITRATION & CONCILIATION ACT, 1996 - BY SHRI PRAVEEN K MITTAL-9810826436

- Where there are serious allegation of fraud and malpractice which are required to be tried, in that event, the arbitrator will not be competent to try such serious allegation as the jurisdiction of the arbitrator is summary in nature and these issues can be tried only by the civil court. Before the appointing the judge, the arbitrator is required to apply his mind as the nature of dispute and whether the dispute is governed by the arbitration clause. Satish Vs. Gujarat Tele-Links (P) Ltd 2014(118) CLA (snr) 1 (Bombay DB)
- The Supreme Court held that Section [16\(2\)](#) of Arbitration & Conciliation Act, 2006 mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section [4](#) provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet

proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object. Union of India Vs. Pam Developers (P) Ltd MANU/SC/0127/2014 SC.

- The Supreme Court held that while considering the counter-claim of the Respondent, provisions of Section 3 of Limitation Act, has to be considered and decide as to whether the counter-claim raised are within limitation and if the same are not within limitation, counter-claim are liable to be rejected and not at all to be considered on merits. Voltas Ltd Vs. Rolta India Ltd MANU/SC/0099/2014 SC.

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