Lakshmi Kumaran & Sridharan corporate

corporate

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

February 2012 / Issue-7

February
2012

In Focus

- Pre-packed commodity- The controversy continues
- External Commercial Borrowings – Procedures relaxed
- Qualified Depository Participants – Eligibility criteria revised
- No approval for documents of companies having management disputes
- UN body orders India to compensate in arbitration case
- Delay in pronouncement, by itself, cannot be a ground to set aside an award

FEB 2012

Contents

Article

Pre-packed commodity - The controversy continues

By **Divya Jain**

"Metrology is the science of measurement, embracing both experimental and theoretical determinations at any level of uncertainty in any field of science and technology" [1]

The Legal Metrology Act, 2009, enacted in April, 2011, repeals the over three-decades-old cumbersome Standards of Weights & Measures Act, 1976. There are significant changes between the earlier and the new versions of the legislation but the definition of a pre-packed commodity continues to be controversial. The question as to whether a particular commodity qualifies as a pre-packed commodity or not has been discussed not only by various High Courts in the country but also by the Supreme Court.

The High Courts [2] of Andhra Pradesh, Madras and Bombay considered such a question in relation to vacuum cleaners, wristwatches and electrical components/TV sets and VCRs, radios, tape recorders and sunglasses. 'Whether a commodity is incapable of sale in any manner other than in a packaged form' was the test applied by these High Courts while deciding the cases.

The Madras High Court while discussing as to whether televisions, video and audio players or speakers would qualify as 'packaged commodity' pointed out that the definition of pre-packed commodity would have no application to packages which are packed only for the convenience of customers, for safe transportation and for protection during storage and handling. Apex Court also in a recent judgment [3] observed that a package used merely for protection during conveyance or safety would not be pre-packed commodity. The court held that for the package to be treated as a wholesale package, it must not be a secondary package i.e. for safety, convenience or the like.

In the case of *Titan Industries Ltd* [4]. the Bombay High Court dealt with the question whether in the case of sale of watches the provisions of the Standards of Weights and Measures Act and rules thereunder would apply. It was contended by the manufacturer that the watches were kept for display and sale in showrooms and outlets and were sold by the piece. The customers insist upon inspection/checking. It was contended that the goods by their very nature were such that they could not be sold in a packaged form, but had to be allowed to be handled and inspected and even worn by the customer before sale. The Bombay High Court accepted the contention of the manufacturer and held that those commodities which intrinsically require to be packed and without being packed cannot be sold, and merely because they were removed from the package for testing would not cease to be pre-packed commodity. The court, however, clarified that it did not mean that a package, merely because it was packed for protection or safety in the course of conveyance would become a pre-packed commodity.

[1] International Bureau of Weights and Measures (BIPM)

[2] (2002) 1 Mad.L.W (Cri.) 211 Philips India Ltd. v. Union of India

[3] Civil Appeal No. 1119 of 2010

[4] AIR 2006 Bombay 336

The decision of the Madras High Court in *Philips India Limited* v. *Union of India* [5] , dealing with electronic items like TV and the decision of the learned single Judge of the Andhra Pradesh High Court in *Eureka Forbes Limited* v. *Union of India* [6] were followed by the Bombay High Court. The court in the latter case held that a vacuum cleaner is sold as a single piece and when the customer visits the office of the petitioner it is not in a pre-packed commodity nor can it be packed, be deemed as commodity in packed form.

The High Court of Kerala [7] however, differed from the judgments laid down in *Eureka Forbes and Titan Industries.* The court held that interpretation of relevant provisions must be made from the point of view of the consumer and keeping in mind the object sought to be achieved by the statute and intention of the manufacturer, packer or retailer was not relevant in construing the provisions of the relevant statute.

In the landmark judgment of *Whirlpool India Ltd* [8]. the Apex Court while deciding whether refrigerators would qualify as a "pre packed commodity", held that use of the term "or otherwise" in the definition of 'pre-packed commodity' suggests that a commodity packed in any manner in units suitable for sale, whether wholesale or retail, becomes a "commodity in packed form..."

The question of applicability of packaged commodity rules to sunglasses was discussed by Bombay High Court in *State of Maharashtra* v. *Subhash Arjundas Kataria*. The matter went up in appeal to Apex Court [9] which held that, *"We fully agree that the sun glasses are tested by the buyer for his suitability, and therefore, sun glasses, whether it be a frame or glass is not a pre-packed commodity within the definition of the expression "pre-packed" under Rule 2(l) of the Rules, hence, the High Court is fully justified in quashing the notice and allowing the writ petition filed by the respondent".* The court, however, pointed out that the question of applicability of the Standards of Weights and Measures Act and the rules thereunder should be heard by a larger Bench of the Supreme Court.

The test to determine whether a commodity qualifies as a packaged commodity should be whether by the very nature of the goods, they can be sold without being pre-packed. If the intention of the legislature or the rule-making authority was to include every commodity which was packed then the rule itself could have stated that every commodity which is packed or in other words comes to the retailer in a packed form will be a pre-packed commodity.

Courts have held that the PC Rules and Act are consumer welfare legislations and the objective of such legislation is to protect the rights of ultimate consumers, yet it would be relevant at this point of time to note that the law with reference to packaged commodities is yet to be settled.

[The author is Principal Associate, Corporate Division, Lakshmikumaran & Sridharan, New Delhi]

[5] 2002 Writ LR 140

[6] AIR 2003 Andhra Pradesh 275

[7] Union of India v Godrej - GE Appliances Ltd, order dated 9-4-2008

[8] AIR 2008 SC 397

[9] Civil Appeal No. 1117 of 2010 – 2012 (275) E.L.T. 289 (S.C.)

NOTIFICATIONS & CIRCULARS

External Commercial Borrowings – Procedures relaxed

Designated AD category-I banks have been delegated powers to approve requests for reduction in loan amount of External Commercial Borrowings (ECBs). These banks have also been empowered to consider changes in drawdown schedule where original average maturity period is not maintained and for reduction in all-in-cost of ECB.

Hitherto, AD Category-I banks were required to refer such matters to the Foreign Exchange Department of Reserve Bank of India for necessary approval. RBI's A.P. (DIR Series) Circular No.75 dated 7-2-2012 issued in this regard, while simplifying the procedure also prescribes certain conditions including filing of ECB-2 monthly returns in respect of the Loan Registration Number. In case of ECBs availed under the automatic route, requests for reduction in the loan amount may be approved by AD Category-I banks if the same has consent of the lender, average maturity period is maintained with no change in other terms and conditions of the borrowing. AD Category-I banks can also approve changes in the drawdown schedule resulting in further changes in the original average maturity period for ECBs availed under both automatic and approval routes. As for reduction in all-in-cost of the ECB, such specified banks can grant approval if there is consent of the lender with no other change in terms and conditions.

Advance receipts against export of goods – AD banks empowered to allow in specified cases

AD Category- I banks have been permitted to allow exporters to receive advance payment for export of goods which would take more than one year to manufacture and ship after receipt of payment. Hitherto, prior permission of Reserve Bank of India was required for receipt of such advance by the exporters. RBI A.P. (Dir Series) Circular No. 81, dated 21-2-2012 issued in this regard also lists some conditions like ensuring that export advance received by the exporter is utilized to execute export and not for any other purpose i.e., the transaction is a bona-fide transaction and that the rate of interest, if any, payable on the advance payment shall not exceed London Inter-Bank Offered Rate (LIBOR) + 100 basis points. As per the circular, documents covering the shipment should be routed through the same authorised dealer bank and in the event of the exporter's inability to make the shipment, RBI's prior approval is required for refund of unutilized portion of advance payment or interest.

Qualified Depository Participants – Eligibility criteria revised

The eligibility criteria for a SEBI registered Depository Participant (DP) to act as qualified Depository Participant has been revised. DP shall have net worth of Rs. 50 crore or more, shall be either a clearing bank or clearing member of any of the clearing corporations, shall have appropriate arrangements for receipt and remittance of money with a designated AD bank, shall have systems and procedures to comply with FATF standards, prevention of money laundering provisions and SEBI circulars and has to obtain prior approval of SEBI before commencing activities for qualified foreign investors. Circular No. CIR/IMD/FII&C/4/2012 dated 25-1-2012 issued by SEBI while allowing credit of dividend payments to QFIs for investment in Indian mutual funds also revises the maximum retention period of QFI's funds in single rupee pooled account.

No approval for documents of companies having management disputes

Ministry of Corporate Affairs has clarified that in case of companies where the Director is aggrieved with his cessation in the company and has filed complaint in the Investor Complaint Form, the ROC will mark the company as having management dispute. General Circular No. 1/2012 dated 10-2-2012 issued in this regard states that till such dispute is settled, documents filed by the company and by the contesting groups of Directors will not be approved and will not be available for public viewing in the registry.

Portfolio Management - SEBI (Portfolio Managers) Regulations, 1993 amended

The Securities and Exchange Board of India (Portfolio Managers) Regulations, 1993 stands amended vide SEBI Notification dated 10th February, 2012. Lower monetary limit for acceptance of funds or securities by Portfolio Manager has now been enhanced to Rs.25 Lakh from Rs.5 Lakh. The portfolio manager hence would not be allowed to accept funds or securities worth less than Rs.25 Lakhs. The new limit shall be applicable to both new clients and fresh investments by existing clients.

RATIO DECIDENDI

Delay in pronouncement, by itself, cannot be a ground to set aside an award

The Delhi High Court, in its judgment dated 7-2-2012, has held that delay in pronouncement of award by the arbitrator has not been specified as one of the grounds under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an award. The court held that it would be straining the language of specified provisions to hold that delay in pronouncement of an award would, by itself, place it in "conflict with the public policy of India" within the meaning of Section 34 (2)(b)(ii)ibid. The court noted the arbitrator who passed the order had expired and fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings. [Peak Chemical Corporation Inc. *v. National Aluminum Company Limited* - O.M.P. No. 160/2005 and O.M.P. No. 454/2005].

Construction of shopping complexes/malls – Prior permission under specified statutes required

The Delhi High Court, by its judgment and order dated 23-1-2012, has held that residential complexes do not fall within the ambit of the Water (Prevention and Control of Pollution) Act, 1974 whereas for shopping malls and commercial shopping complexes, prior consent under said provisions is required. The High Court noted that Section 25(1) of the Water Act would apply where a building is proposed to be constructed to set up an industry or carry on an operation or a process and this would mean that said Act would not apply to buildings housing residential apartments/units. The Court further held that when construction activity commences in respect of shopping malls and commercial shopping complexes, prior consent to establish the same is required as per Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 in view of the expanded definition of the expression "industrial plant" but, for residential complexes, neither consent to establish nor consent to operate is required under the said statute [*Delhi Pollution Control Committee* v. *Splendor Landbase* Ltd. - LPA No. 895 / 2010].

Stock trading when not 'insider trading'

Securities Appellate Tribunal has held that there cannot be a case of insider trading when it has been demonstrated, through the trading pattern, that same was not based on unpublished price sensitive information. In the impugned case, the tribunal held that a person who was in possession of unpublished price sensitive information which, on becoming public was likely to cause a positive impact on the price of the scrip, would only buy shares and would not sell them before such information became public and would immediately offload the shares after such information coming to the public domain and this was not the case before it. The Tribunal while allowing the appeal also noted that the husband of the appellant had already relinquished his interest as promoter in the company [*Chandrakala* v. *AO, SEBI* – Appeal No. 209 of 2011 dated 31-1-2012].

No cartelization when price increase due to other factors

The Competition Commission of India has upheld the Director General's finding of absence of cartel among glass manufacturers as there was no evidence of an agreement or action in concert among such manufacturers. The Commission while noting that the price rise was due to the rise in price of the raw materials constituting upto 25% of the manufacturing cost, held that mere instance of price parallelism was not an evidence of existence of any cartel and that for such cartel to exist price parallelism must be supported by an evidence of an agreement or collusion or action in concert. It was also noted that not only new players but even the established players were incurring losses in some segments of float glass. The investigation were conducted by the DG *suo motu* on the basis of an article in media stating that the domestic industry had formed a cartel and was not allowing imports by seeking levy of anti-dumping duty [In Re: *Glass Manufacturers of India* – MRTP Case No. 161/2008 decided on 24-1-2012].

NEWS NUGGETS

UN body orders India to compensate in arbitration case

International Commercial Arbitration has of late, seen a flurry of activity and nations like Australia have voted against investor state arbitration clause in bilateral treaties. The UNCITRAL (United Nations Commission on International Trade Law), in a recent decision ruled that India had violated the Bilateral Trade Investment Agreement (BIT) with Australia and awarded full compensation for losses suffered by White Industries, Australia. The issue related to entitlement to bonus as per the terms of the contract between Coal India Limited and White Industries to develop an open cast mine at Piparwar and achieve set production targets. ICC arbitration tribunal had earlier found in favour of White Industries and declared an award which the latter sought to enforce through Indian Courts. The question as to whether an Indian court can set aside a foreign award remains open. On application by White Industries, the UNCITRAL found that the BIT described 'investment' in the broadest terms and a claim to money was 'investment'. Though the Government of India had substantial control over the activities of Coal India, it could not be held responsible for its activities. However by inordinate delay in deciding the fate of the award India had failed to provide effective means to enforce investor rights and was in breach of the BIT.

Court comes to the rescue of ex-partner in recovering dues

A dispute involving erstwhile partners and a company presented some interesting questions before the Karnataka High Court. One of the partners was also a director in a company to which the other partner had extended a loan. The latter moved a petition to wind up the company on non-repayment of the loan of Rs. 24 lakhs, which was reflected in the balance sheet of the company. The director (partner) sought to prove that it was fully capable of discharging all legal debts and that consequent to series of leasing and transactions the petitioner owed about Rs. 30 lakhs to the company. However, noting that the director had also signed as partner of the firm on the purported lease transactions, the court held that the documents could not held as genuine. Also, it was not a case where merely to enforce a disputed liability, winding of the company was sought. Ruling in favour of the petitioner, the court also said that even if the partnership had ceased to exist, any party (representing the partnership in this case) may bring action against a partner for recovering amounts due. The amount deposited with the court was ordered to be transferred to the arbitration proceedings pending between the parties.