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OCT 2010

NEWS LETTER

Beware of everything that is untrue, stick to truth and we shall succeed, may be slowly but surely.

Swamy Vivekananda



VODAFONE DECISION CAN IMPACT M & As



The Indian Income Tax Department follows you wherever you go.....

Vodafone Group has filed an appeal with the Indian Supreme Court challenging a recent decision of the Bombay High Court which said that it had to pay tax on a transaction in which Hong Kong-based Hutchison had sold an equity stake in an Indian telecom company to it.

The Income Tax Department had issued a show cause notice to Vodafone in 2007, saying that it should have withheld tax when it cleared payments to Hutchison. The UK-based global telecom giant subsequently filed a petition against this in Mumbai. The case was heard in 2008, and in December that year, the High court dismissed Vodafone's petition. The company then appealed this in the Supreme Court that sent the matter back to High Court to establish whether the Indian tax department has jurisdiction on the transaction.

The current Bombay High Court judgment identifies two parts to the transaction: one of a controlling interest that was through a share transfer in Cayman Islands (Cayman Islands-based Hutchison Telecommunications International) comprising a maximum of 52% stake; the second related to contractual agreements, in the form of options that increased Vodafone's rights to

67%. In its transaction, Vodafone acquired 52% from Hutchison in an overseas transaction while 15% was held by Analjit Singh and Asim Ghosh, who were in India.

The order then goes on to say parts of the transaction for which an Indian link is established can be taxed by the I-T department. The court has left that decision in the hands of the assessing officer, and at this point has not assigned a value to the tax liability. The Court was of the view that the transaction was a composite one and the department will have to assess the specific part of the income that had sufficient nexus with the territory of India.

A decision of the Bombay High Court has tipped the equation in favour of the Indian taxman, as the court has accepted its jurisdiction over Vodafone's India acquisition.

The Bombay High Court decision in favour of the income tax department demand for capital gains tax from Vodafone has major implications both for the government and for prospective merger and acquisition deals involving Indian firms.

LEGAL WORLD UPDATES

**Corporate Laws****Oppression and mismanagement – whether terms of settlement are binding between parties – Held, Yes**

Companies Act, 1956, Sections 397 and 398 – oppression and mismanagement – settlement between parties, the parties consented to and participated voluntarily in the process of mediation and agreed to the terms of settlement dated October 12, 2009, relating to the valuation of the share. The Petitioner filed applications seeking implementation of the terms of settlement signed and recorded before the mediators. The respondents contended that the terms of settlement were only interim in nature and it contained only a brief outline of issues and it was not a final settlement.

Decision: Application allowed.

Once the parties and the mediators sign the terms of settlement and the settlement reports were submitted to the Company law board, no further correspondence in any manner would change the nature of the concluded mediation and the terms of the settlement. The terms of settlement were binding on the parties and legally enforceable.

[*Ashok kumar Aggarwal V Gopal Corporation Pvt. Ltd.*, before CLB]

Labour laws

Payment of gratuity Act – Sick Industrial Company – suspension of legal proceedings – payment of gratuity – Appeal from controlling authority – pre-requisite condition of deposit of gratuity amount – whether appeal can be accepted without depositing the gratuity amount – Held, No.

The Petitioner Company declared sick and a scheme for revival had been framed. The employee of the Petitioner's contractors had filed applications before the controlling authority seeking

gratuity from the Petitioner and the Authority had directed payment of gratuity. Petitioner preferred appeal against the order of the controlling authority, seeking waiver of the pre-requisite condition of deposit of gratuity amount determined by the controlling authority.

Decision: The application was rejected and the Petitioner was directed to deposit the amount which was a condition precedent for preferring an appeal under section 7(7) of the 1972 Act.

Section 7(7) of the Payment of Gratuity Act, 1972, is mandatory in nature and the provisions of sections 22(3) and (4) of the Sick Industrial Companies (Special Provisions) Act, 1985, will not have any effect. The Payment of Gratuity Act, 1972 and Sick Industrial Companies (Special Provisions) Act, 1985 are Independent Acts operating in different fields. To entertain appeal under section 7(7) of the 1972, Act the Appellant is required to deposit the gratuity amount.

[*Cement Corporation of India Ltd V Regional Labour Commissioner (Central)*, Karnataka High Court]

Civil Laws

Admissibility of an unregistered sale deed in a suit for specific performance of the contract. Held, Admissible.

On 05.12.2007 at the time of examination of Plaintiff Witness 1, the unregistered sale deed dated 27.02.2006 was tendered for being marked. The counsel for the defendants objected to the said document being admitted in evidence being an unregistered sale deed. The trial court by its order sustained the objection and refused to admit the sale deed in evidence. The Plaintiff unsuccessfully challenged the order of the trial court by filing revision petition before the High court and hence filed this appeal by special leave.

Decision: Having regard to the provision to section 49 of the Registration Act, 1908, the trial court erred in not admitting the unregistered sale deed dated 27.02.2006 in evidence and the High Court ought to have corrected the said order by setting aside the order of the trial court.

Principle: Document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

[*S.Kaladevi V V.R.Somasundaram & Ors.*, before Hon'ble Supreme Court]

Criminal Law

Power to grant regular bail includes the power to grant interim bail.

The Hon'ble Supreme Court while rejecting the special leave to grant anticipatory bail to the petitioner. Held, the petitioner may apply for regular bail before the court concerned and along with the said application, he may file an application for interim bail pending disposal of the regular bail application. [The Hon'ble Supreme Court in earlier occasions had also held that interim bail can be considered, in judgments reported in (2009) 4 SCC 437, (2009) 7 SCC 559].

Principle: The power to grant regular bail includes the power to grant interim bail. This power is inherent in the power to grant bail, particularly in view of Article 21 of the Constitution of India.

[*Mukesh Kishanpuria V State of West Bengal* (Supreme Court)]

ARTICLE – REMEDIES AGAINST BREACH OF CONTRACT

In the day-to-day affairs of today's world, not a single day passes without reference or discussions about some contracts, whether it is rendering service, employment, supply, distribution or purchase. We enter into contracts so many times in a day that 'contract' has become an indispensable part of our life. When we purchase milk or newspaper in the morning or go to movie in the evening, you are entering into a contract. Such being the scenario, discussions on the subject or consequences of any breach of contract or avoidance or non-compliance of obligations is of vital importance.

CONTRACT LAW

Contract law is based on number of Latin legal principles, out of which 'consensus ad idem' is the most important, which means a meeting of the minds between the parties i.e. an agreement among them. It is said to be part of private law because it does not bind the state or person that are not parties to the contract. Consequently, the contracts are voluntarily and require an "exercise of the will of the parties".

A contract an agreement between two or more persons, creating an obligation upon them to fulfill or not to fulfill some duties laid down specifically in the agreement. The agreement creates a legal relationship of rights and duties on the parties and if these obligations in the agreement are not fulfilled, then action could be taken against the default party in the court of law.

If parties to a contract follow the terms and conditions of it and if they honour all the covenants perfectly, there is no need for a discussion on the consequences of a breach. But, we all know that depending upon the various business circumstances and newly emerging situations in the

corporate field, one of the parties entering into the contract may sometime withhold himself from complying with the obligations under a contract. In such an eventuality, the remedies available to the aggrieved party who had believed in the words of the party in default and acted upon the same should be studied and understood. This will help an entrepreneur to transact with his counterparts in the business world more wisely and efficiently.

REMEDIES FOR BREACH

A contract being a correlative set of rights and obligations for the parties would be of no value, if there were no remedies to enforce the rights arising there under. The Latin maxim 'Ubi jus, ibi remedium' denotes where there is a right, there is a remedy.

The remedies for breach of contract are:

1. Suit for damages or compensation
2. Suit for specific performance
3. Suit for injunction
4. Suit for rescission
5. Punitive damages

The law on this issue is dealt with in two statutes viz., The Specific Relief Act, 1963 and The Indian Contract Act, 1872.

SUIT FOR DAMAGES

The word 'damages' means monetary compensation for the loss suffered. Whenever a breach of contract takes place, the remedy of 'damages' is the one that comes to mind immediately as the consequence of breach. The aggrieved party may seek compensation from the party who breaches the contract.

When the aggrieved party claims damages as a consequence of breach, the court takes into account the provisions of law in this regard and the circumstances attached to the contract. The

amount of damages would depend upon the type of loss caused to the aggrieved party by the breach. The court would first identify the losses caused and then assess their monetary value.

Section 73 of the Indian Contract Act, 1872 lays down the basic guidelines for identifying the losses. Section 73 reads as follows:

“Compensation for loss or damage caused by breach of contract: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss of damage caused to him thereby, which naturally arose in the usual course of things from such breach or which, the parties knew when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

Keeping in view the provisions of section 73 and the court judgments, the aggrieved party would be entitled to one of the following types of damages, depending upon the circumstances of the case:

A. General or ordinary damages.

Damages arising naturally and directly out of the breach in the usual course of the things.

B. Special damages.

Compensation for the special losses caused to the aggrieved party by the special circumstances attached to the contract.

C. Exemplary damages.

Damages for the mental or emotional suffering also caused by the breach.

In Ghaziabad Development Authority V Union of India (*AIR 2000 SC 2003*), the Hon'ble court held that in case of breach of contract mental anguish not a head of damages in ordinary commercial contract.

In order to claim damages, party has to plead specifically the manner in which he suffered the loss. [*State V Pratibha Prakash Bhawan AIR 2005 Ori 58*]. The Plaintiff to the suit must prove damage and the amount of the damage. [*AIR 1962 SC 366*]

LIQUIDATED DAMAGES AND PENALTY

Where the contract itself addresses the issue of consequences of a breach and stipulated a penalty, section 74 of the Indian Contract Act will come into play. When such a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, to receive from the party who has broken the contract a reasonable compensation not exceeding the amount so named.

The Hon'ble Supreme court in *Fateh Chand V Balkishan Das [AIR 1963 SC 1405]*, had held that the jurisdiction of the court to award compensation under section 73 in case of breach of contract is unqualified except as to the maximum stipulated, and compensation has to be reasonable. This section has to be read in conjunction with section 74, section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not the actual loss is proved.

There is no impediment or any obstacle for the parties to a contract to make provisions of liquidated damages for specific breaches only, leaving other types of breaches to be dealt with as unliquidated damages. There is no principle which requires that once the provision of liquidated damages has been made in the contract, in the event of breach of one of the parties, such clause has to be read covering all types of breaches although parties may not have intended and provided for compensation in express terms of all types of breaches. [*Steel Authority of India V Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63.*]

In *Oil and Natural Gas Corporation Ltd V Saw Pipes Ltd [AIR 2003 SC 2629]*, the Supreme court laid down the following guidelines:

1. Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming is entitled to the same;
2. If the terms are clear and unambiguous stipulating liquidated damages in case of the breach of the contract, unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, the party who has committed the breach is required to pay such compensation and that is what is provided in section 73 of the Contract Act.
3. Section 74 to be read along with section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of the contract.
4. In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is a genuine pre-estimate by the parties as the measure of reasonable compensation.

SUIT FOR SPECIFIC PERFORMANCE

In certain cases of breach of a contract, damages may not be an adequate remedy. Then the court may direct the party in breach to carry out his promise according to the terms of the contract. This is an order of the court requiring performance of a positive contractual obligation. But in general, courts do not wish to compel a party to do that which he has already refused to do. Part II of the Specific Relief Act, 1963 lays down detailed rules on the specific performance of contracts.

Specific performance is not available in the following circumstances:

- Damages provide an adequate remedy.

- Where the order could cause undue hardship.
- Where the contract is of such a nature that constant supervision by the court would be required.
- Where the party seeking the order has acted unfairly.

Cases where specific performance may be ordered:

- Where there exists no standard for ascertaining the actual damage caused to the aggrieved party by the non-performance.
- Where monetary compensation will not be adequate relief.
- Where the act to be done is in the performance of trust.
- In general the court will only grant specific performance where it would be just and equitable to do so.

SUIT FOR INJUNCTION

An injunction is an order of the court requiring a person to perform a negative obligation. But for performance of the positive terms of the contract, the aggrieved party may seek other remedies.

The right to relief by way of injunction is contained in part III of the Specific Relief Act, 1963. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in addition to or in substitution of injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Clause (e) of section 41 specifically provides that no injunction can be granted to prevent the breach of contract the performance of which would not be specifically enforced. Section 42 provides for injunction to perform negative agreement. Section 42 states; if the court is unable to compel the specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided Plaintiff has not failed to perform the contract.

SUIT FOR RESCISSION

The breach of contract no doubt discharges the contract, but the aggrieved party may sometimes need to approach the court to grant him a formal rescission, i.e., cancellation, of the contract. This will enable the Plaintiff to be free from his own obligations under the contract.

PUNITIVE DAMAGES

Punitive damages are damages intended to reform or deter the defendant. Although the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will in fact receive all or some portion of the punitive damage award. Punitive damage are often awarded where compensatory damages are deemed an inadequate remedy. The court may impose them to prevent under-compensation of plaintiffs, to allow redress of undetectable torts and taking some strain away from the criminal justice system.

Presented by Hemanth, for suggestions and information please email hemanth@hemanthassociates.com

Q & A



Answer to few recent queries received by us.....

N.I Act & Bank matter - blank cheque and validity

What is the effect of issuing a blank cheque?

Where the cheque is signed leaving blank all other particulars and handed over to the payee authorizing him to fill up the blanks, it is valid in law. When such a cheque is dishonoured, section 138 of Negotiable Instrument Act applies.

Decision relived: *S.R Muralidhar V G.Y Ashok, Karnataka High Court*

For what period a cheque is valid?

A cheque is valid for a period of six months, as provided in the Negotiable Instrument Act.

Civil & Service matter – Injunction against strike

Whether strike, demonstration and dharan in front of industry/depot be forbidden?

Strike per se is not forbidden; at the same time it should not interfere with the smooth working and impede the ingress and egress of the organization (as held in *Bharat Sanchar Nigam Ltd case*). Holding demonstration and dharan are recognized rights, but cannot be allowed to be exercised in a manner which cause harm and/or prejudice to the rights of others. The courts have authority to fix distance within which demonstrations or dharans can be forbidden (reliance placed on *Asian Hotels Employees Union & other V Asian Hotels Ltd.*). In *Standard Chartered Grindlays Bank Ltd case*, Bank was entitled to temporary injunction to restrain the

employees union and its members from committing any tortuous acts interfering and/or obstructing the normal function of the banking business.

Civil matter - adverse possession – Claim

Whether occupant in possession for long time with permission can claim adverse possession?

Party in possession of the property with the consent or permission of the true owner, cannot legally claim for a title only by adverse possession.

Relied on a recent Judgment reported in *2010 (2) Civil.L.J 808*.



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