Legal Decisions[1]

Income-tax Act

LD/61/85

Katira Construction Ltd.

Vs.

Union of India

March 4, 2013 (GUJ)

Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings engaged in infrastructure developments, etc.

Explanation to section 80-IA added with retrospective effect from 1.4.2000 providing that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in nature of a works contract awarded by any person and executed by an undertaking or enterprise, cannot be seen as a retrospective levy, even if one were to accept that withdrawal of a deduction would amount to a fresh levy; challenge to its vires must fail

Sub-section (4) of section 80-IA as is well known, provides for certain deduction of income from the eligible business and primarily pertains to infrastructure development. By adding the impugned *Explanation vide* Finance Act No. 2 of 2009 w.r.e. from 1.4.2000, the Legislature provided that nothing contained in the section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person and executed by an undertaking or enterprise.

The case of the petitioners is that the impugned *explanation* below sub-section (13) to section 80-IA provides for a levy of tax which was hitherto unknown. It is, therefore, urged that the Court should examine the reasonableness of such provision particularly when the same is brought into operation with retrospective effect. Section 80-IA(4) provides for deduction under certain circumstances. If such deductions are withdrawn with retrospective effect, surely there would be a case of providing for a levy which was till then not known. In that context, if the impugned *explanation* provides for withdrawal of the deductions, that too, retrospectively, question of judging the reasonableness thereof in the background of the same being made retrospectively applicable from a long period of time would certainly arise. The question, however is, does this *explanation* provide for a fresh levy? In other words, did the Legislature in introducing the impugned explanation materially change the exemption which existed till such *explanation* was introduced? This is the crucial test which would ultimately decide the outcome of these petitions. To put it differently, if the effect of the *explanation* is to withdraw the existing deductions, the question of the same being unreasonable or arbitrary would arise.

The Gujarat High Court held as follows:

Ordinarily legislation uses an *explanation* for filling up a gap in statute or removing some ambiguity or making explicit which was otherwise implicit. However, it is an accepted proposition that if the language of the *explanation* is plain and suggests departure from the above conventional usage of an *explanation*, full effect to the contents of the *explanation* would be given as would emerge from the plain language of the provision.

Therefore, from both the angles, namely, whether the *explanation* aims to expand the prevailing provision and whether being in the nature of a tax statute, such change can be permitted with retrospective effect, it would be crucial to discern the true effect of such explanation. The impugned *explanation* below sub-section (13) to section 80-IA starts with an expression for the removal of doubts, it is hereby declared that and provides that nothing contained in this section shall apply to in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person including the Central or State Government and executed by the undertaking or enterprise referred to in sub-section (1). Thus the *explanation* in question was introduced for the removal of doubts and it declared that nothing containing in sub-section (4) would apply to a business in the nature of works contract. Sub-section (4) of section 80-IA even after amendment of 2002, envisaged deduction in case of any enterprise carrying on the business of developing or operating

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

and maintaining or developing, operating and maintaining any infrastructure facility. Thus, the Legislature by way of the impugned amendment distinguished between the cases of developing/operating and maintaining/developing, operating and maintaining any infrastructure facility from the works contract awarded by any person, be it the Central or the State Government, executed by the undertaking or enterprise seeking such an exemption. That there is an intrinsic difference between developing an infrastructure facility and executing a works contract can hardly be disputed.

What the *explanation* aims to achieve is to clarify that deduction under section 80-IA(4) would not be available in case of execution of works contract. The fact that such interpretation of the existing provisions of sub-section (4) of section 80-IA, even without the aid of the *explanation*, was possible is not disputable. As noted, subsection (4) of section 80-IA even after the amendment in the year 2002 envisaged deduction in case of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility. Even without the aid of the *explanation*, it was possible to contend that such expression did not include an enterprise executing a works contract. Particularly, bearing in mind the observations made by this Court in the case of *CIT v. Radhe Developers, (2012) 341 ITR 403 (Guj)*, here would certainly be a demarcation between developing the facility and execution of works contract awarded by an agency engaged in developing such facility.

The issue may be examined from the angle of legislative changes. In the earlier portion of this judgment, that from the inception in the year 1996, benefits under such deduction, then covered under sub-section (4A) of section 80-IA were available to an enterprise engaged in developing, maintaining and operating any infrastructure facility. From time to time, legislative changes have been made to suit the requirements of the changing conditions.

Thus, at the very first stage, deduction was made available to draw additional resources for fulfilling the requirements of the country of rapid improvement in infrastructure such as, expressways, highways, airports, ports, etc. in which areas development was found to be deficient. Adopting the module of BOT or BOOT utilised by several other countries in developing infrastructure facilities, deduction was introduced. The principal idea behind granting deduction was to achieve rapid growth in infrastructure development with private participation.

Specific period was also stipulated which must form part of the agreement between the undertaking and the Government within which the infrastructure facilities so developed would be transferred. It was explained that the tax

holiday was in respect of the income derived in use of of the infrastructure facilities developed by them.

From the inception, thus, the concept of development of infrastructure through private participation was clearly discernible. Principal purpose was to infuse private investment in such projects to speed up infrastructure development which required massive expansion. Even after bifurcation of section 80-IA into section 80-IA and section 80IB, with effect from 1.4.2000, this fundamental concept was not discarded. Sub-section (4) which formed part of the recast section 80-IA did not carry any material changes from the earlier provisions of sub-section (4A) of section 80-IA which existed prior to 1.4.2000.

It is true that with effect from 1.4.2002, some significant changes were made in the said provisions. Three of these changes which are material for the current purpose. Such changes were (i) that sub-section (4) of section 80-IA now required the enterprise to carry on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility. This was in contrast to the previous requirement of all three conditions being cumulatively satisfied; (ii) that the explanation of the term infrastructure facility was changed to besides others, a road including toll road instead of hitherto existing expression road and (iii) that the requirement of transferring the infrastructural facilities developed by the enterprise to the Central or the State Government or the local authority within the time stipulated in the agreement was done away with.

These changes, however, would not alter the situation *vis-a-vis* the impugned amendment. These legislative changes did enlarge the scope of the deduction and in a sense, made it available to certain assessees who would not have been, but for the changes eligible for such deduction. Nevertheless, the basic requirement of the enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining infrastructure facility was not done away with. In other words even the amended section 80-IA(4) with effect from 1.4.2002 could be construed as not including execution of works contract as one of the eligible activities for claiming deduction. The explanatory memorandum explaining such legislative amendments stated that investment in infrastructure has to compete with the investment in other sectors and must therefore be attractive. There is, therefore, in particular a need to encourage investment in the area of surface transport, water supply, water treatment system, irrigation project, sanitation and sewerage system or solid waste management systems. The bill therefore, proposed to relax the existing system to provide for a ten year tax holiday. Significantly, it was stated that keeping in view the capital intensive nature, the higher allowances of depreciation in the initial years in such enterprise and the need for improved cash flows, it is further proposed that for an infrastructure facility in the nature of a road including a toll road, bridge, rail system, highway project, water supply project, sanitation, sewerage and solid waste management system in place of two-tier tax holiday, a ten year tax holiday may be availed consecutively out of twenty years beginning from the year in which the undertaking begins operating the infrastructure facility. In the case of other infrastructure, namely, for airport, port, inland port and inland waterways, it is also proposed to relax the existing two tier fiscal incentive. The Bill proposed an identical ten year tax holiday that may be availed in a block of fifteen years. It is also proposed to do away with the mandatory requirement that such infrastructure facility shall be transferred to the Central Government, State Government, local authority or any other statutory authority.

Clearly, thus, post 1.4.2002 also, the involvement of the enterprise in developing infrastructure facility when the claim was covered under such expression was essential. One must understand the expression developing or operating and maintaining or developing, operating and maintaining. Keeping in mind the new areas where such private participation would be required and therefore had to be encouraged and keeping in mind that such areas, such as, surface transport, water supply, water treatment system, irrigation project, etc. would necessarily be highly investment intensive, the Legislature provided for a tax break of 10 consecutive years, out of a total of 20 years period and also proposed to do away with the requirement of such infrastructure facility being transferred to the Central or the State Government or the local authority.

In 2007, the *explanation* below sub-section (13) of section 80-IA came to be added which clarified that

nothing contained in the said section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be. In clear terms, this *explanation* targeted the second level works contractor who might have been employed by the enterprise developing the infrastructure facility. However, this was not found to be sufficient explanation clearing doubts with respect to the exclusion of the enterprise engaged in execution of a works contract. It was, therefore, that the impugned *explanation* came to be introduced substituting the existing *explanation* below sub-section (13) to section 80-IA. The explanatory memorandum recorded that profit linked deductions were prone to considerable misuse. With a view to preventing such misuse of the tax holiday under section 80-IA, it was proposed to amend the *explanation* to the said section to clarify that nothing contained in the section shall apply in relation to a business which is in the nature of a works contract executed by an undertaking.

Therefore, notice that from the inception, deduction was envisaged for development of infrastructure facilities with private participation. Of course, post 2002, certain relaxations were granted and in addition to extending tax holiday period, requirement for claiming such deduction was split into developing or operating and maintaining or developing, operating and maintaining infrastructure facility. The Revenue could therefore, legitimately contend that no such deduction was envisaged for mere execution of works contract. If this was the position what the explanation, did was to clarify a statutory provision which was at best possible of a confusion. If that be so, the *explanation* must be seen as one being in the nature of plain and simple explanation and not either adding or subtracting anything to the existing statutory provision. When it is held that the impugned *explanation* was purely explanatory in nature and did not mend the existing statutory provisions, the question of levying any tax with retrospective effect would not arise. If one agrees with the submission of the petitioners that such *explanation* restricted or aimed to restrict the provisions of deduction, certainly a question of reasonableness in the context of retrospective operation would arise. In the present case, however, it is to be concluded that the *explanation* only supplied clarity where, at best confusion was possible in the unamended provision. In that view of the matter, this cannot be seen as a retrospective levy even if one were to accept that withdrawal of a deduction would amount to a fresh levy.

In that view of the matter, challenge to the vires of the *explanation* must fail.

LD/61/86

Society of Franciscan (Hospitaller) Sisters
Vs.
Deputy Directors of Income-tax (Exemptions), 1(2)
January 23, 2013 (BOM)

Section 226 of the Income-tax Act, 1961 - Collection and recovery of tax - Other modes of recovery

Where applications for stay of demand itself were yet to be heard action under Section 226(3) attaching bank account for realisation of demand virtually keeping no funds to carry on trusts day to day welfare activities was arbitrary and high handed

The petitioner-public registered trust conducts educational institutions all over India as well as homes for the elderly, hostels for small children and health centres for the poor and needy. On 14th July 1975, the Petitioner was granted a registration under section 12A. An amendment was made to the objects of the Petitioner by which in the objects clause a reference is incorporated to the rendering of services primarily for Catholics and in consonance with Catholic principles.

For Assessment Year 2009-10, an order of assessment was passed under section 143(3) denying exemption under Section 11 on the ground that the objects clause had been amended. Orders were passed under Section 143(7), read with Section 147 for Assessment Years 2004-05 and 2006-07 withdrawing the exemption which had been granted earlier. The Petitioner filed appeals before the Commissioner (Appeals). Those appeals were pending.

The First Respondent issued a communication for recovery of demands for Assessment Years 2004-05 and 2006-07. The Petitioner requested that the demands be kept in abeyance pending the disposal of the appeal. The Petitioner filed written submissions for Assessment Years 2004-05, 2006-07 and 2009-10 before the CIT (A). However, the Petitioner received a notice for the recovery of outstanding demands of ₹11.72 crore for Assessment Years 2004- 05, 2006-07 and 2009-10.

A notice was issued by the Deputy Director of Income Tax (Exemption) to the petitioner's Bank under Section 226(3) calling upon the bank to pay over an amount of ₹11.72 crore towards the demands raised on the Petitioners. The Branch Manager was informed that he must not contact the assessee till the payment is made to the Income Tax Department.

The Bombay High Court held as follows:

Though the appeals are pending for nearly a year, no decision has been taken on those appeals. There is a request of the Petitioner for keeping the demands in abeyance. In this background, it is necessary for the Court to consider as to whether the recourse which was taken to the provisions of Section 226(3) was in accordance with the stipulations and safeguards provided therein.

Under clause (i) of Section 226(3), the assessing officer is empowered by a notice in writing to require any person from whom money is due or may become due to the assessee, or to any person who holds or may subsequently hold money for or on account of the assessee to pay to the assessing officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice so much of the money as is sufficient to pay the amount due by the assessee in respect of the arrears. Clause (iii) of Section 226(3) requires a copy of the notice to be forwarded to the assessee at his last address known to the assessing officer and in the case of a joint account to all the joint holders at their last addresses known to the assessing officer. The contention of the assessee before the Court is that the amounts which were invested in Fixed Deposit Receipts had not become due for payment. For the purposes of these proceedings, it is not necessary to delve further into this aspect since in any case, the manner in which recourse was taken to Section 226(3) shows that the provision was observed more in its breach than in compliance. The whole object of serving a notice on the assessee is to enable the assessee to have some recourse. In a given case, we are cognizant of the fact that it may be necessary for the Revenue to take recourse to Section 226(3) and it would not be feasible to serve a prior notice on the assessee if there is an apprehension that the monies would be spirited away to the detriment of the Revenue. This was not that kind of a case at all. The Petitioner was granted a registration under Section 12A on 14th July 1975 and the benefit of an exemption under Section 11 right since 1975, until it came to be denied in respect of the assessment years in question. A uniform formula cannot be applied to all cases. In a situation such as the present where the appeals filed by the assessee are pending before the CIT (A) and the assessee had sought an opportunity of being heard and filed applications for stay, there was no justification whatsoever to proceed hastily with the enforcement of the recovery of the demand without disposing of the application for stay.

Applications for stay cannot be treated by the assessing officers or for that matter by appellate authorities as meaningless formalities.

Quasi judicial authorities have to apply their mind in an objective and dispassionate manner to the merits of each application for stay. While the interest of the Revenue has to be protected, it is necessary for assessing officers to realize that fairness to the assessee is an intrinsic element of the quasi judicial function conferred upon them by law.

Applications for stay must be disposed of at an early date. Such applications cannot be kept pending to obviate compliance with the need to evaluate the contentions of the assessee until after monies are recovered using the coercive arm of the law. Appellate authorities must set down time schedules for disposal of stay applications with reasonable expedition. The manner in which recourse has been made to the coercive process of law, leaves much to be desired and we are of the view that the action which was pursued was completely high handed and arbitrary. There could have been absolutely no apprehension that the assessee in the present case was likely to split out the monies which were invested in Fixed Deposit Receipts. The assessee is an age old trust which carries on welfare activities. The assessee would be entitled to the grant of equitable relief in the exercise of the jurisdiction under Article 226 of the Constitution.

Therefore, sufficient funds are to be restored to the bank account of the Petitioner with a view to allow it to carry on its activities pending stay application before CIT(A). Considering that the total demand is of ₹11.72 crore, it would meet the ends of justice if the Revenue at this stage is permitted to retain an amount of ₹3.76 crore and to put back an amount of ₹1 Crore in the account of the assessee. Hence, the action under section 226(3) was arbitrary and high handed.

Companies Act

LD/61/87

The Official Liquidator, U.P. and Uttarakhand

Vs.

Allahabad Bank

March 12, 2013 (SC)

Sections 442, 446 and 537 of the Companies Act, 1956 read with Section 34 read with Sections 17, 18 & 30 of the Recovery Officer under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 - Power of Court to stay or restrain proceedings against company

DRT has exclusive jurisdiction to sell properties in a proceeding instituted by banks or financial institutions, but at time of auction and sale, it is required to associate Official Liquidator; when a sale has been confirmed by Recovery Officer under RDB Act, Official Liquidator can only take recourse to mode of appeal and further appeal under RDB Act and not approach Company Court to set aside auction or confirmation of sale

The question arose for consideration as to whether the Company Judge under the provisions of Companies Act, 1956 has jurisdiction, at the instance of the Official Liquidator, to set aside the auction or sale held by the Recovery Officer under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act) or whether the Official Liquidator is required to follow the route as engrafted under the RDB Act by filing an appeal assailing the auction and the resultant confirmation of sale.

The Supreme Court of India held as follows:

The DRT has exclusive jurisdiction to sell properties in a proceeding instituted by banks or financial institutions, but at time of auction and sale, it is required to associate Official Liquidator. Thus, the sale has to be conducted by the DRT with the association of the Official Liquidator.

The Official Liquidator would contend that he is liable to report to the Company Court and, therefore, the Company Court has jurisdiction to accept or reject the report and, hence it has jurisdiction to set aside the sale held by the Recovery Officer under the RDB Act. It was submitted with emphasis that the role of a Company Court cannot be marginalised as it has the control over the assets of the company.

Per contra, the Allahabad bank would submit that the jurisdiction of the Company Court cannot be equated with the jurisdiction exercised by the High Court under Articles 226 and 227 of the Constitution of India.

In *Jyoti Bhushan Gupta and others v. The Banaras Bank Ltd, AIR 1962 SC 403* the Judges, while stating about the jurisdiction of the Company Court, have opined that the jurisdiction is ordinary; it does not depend on any extraordinary action on the part of the High Court.

The jurisdiction is also original in character because the petition for exercise of the jurisdiction is entertainable by the High Court as a court of first instance and not in exercise of its appellate jurisdiction. As the High Court adjudicates upon the liability of the debtor to pay the debts due by him to the Company, the jurisdiction is, therefore, civil. It has been further observed that normally a creditor has to file a suit to enforce liability for payment of a debt due to him from his debtor. The Legislature has, by Section 187 of the 1956 Act, empowered the High Court in a summary proceeding to determine the liability and to pass an order for payment, but on that account, the real character of the jurisdiction exercised by the High Court is not altered. After further analysing, the four-Judge Bench proceeded to state that the jurisdiction to deal with the claims of companies ordered to be wound up is conferred by the Indian Companies Act and to that extent the letters Patent are modified. There is, however, no difference in the character of the original civil jurisdiction which is conferred upon the High Court by Letters Patent and the jurisdiction conferred by special Acts.

When in exercise of its authority conferred by a special statute the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and if the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary.

The aforesaid enunciation makes it clear as crystal that while exercising jurisdiction under the 1956 Act, the High Court is exercising ordinary jurisdiction and not any extraordinary or inherent jurisdiction and that is why, the legislature has appropriately postulated that the jurisdiction of the High Court under Articles 226 and 227 of the Constitution would not be affected.

The aforesaid analysis makes it luculent that the DRT has exclusive jurisdiction to sell the properties in

a proceeding instituted by the banks or financial institutions, but at the time of auction and sale, it is required to associate the Official Liquidator. The said principle has also been reiterated in *Pravin Gada and another v. Central Bank of India and others (2013) 2 SCC 101*.

Once the Official Liquidator is associated, needless to say, he has a role to see that there is no irregularity in conducting the auction and appropriate price is obtained by holding an auction in a fair, transparent and non-arbitrary manner in consonance with the Rules framed under the RDB Act.

A three-Judge Bench, while dealing with the constitutional validity of the RDB Act, in *Union of India and another v. Delhi High Court Bar Association and others, (2002) 4 SCC 275*, observed that by virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, have become applicable for the realisation of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner.

Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner.

We have referred to the said passage for the purpose of highlighting that an appeal lies to the DRT challenging the action of the Recovery Officer. In the case at hand, the Official Liquidator was not satisfied with the manner in which the auction was conducted and he thought it apposite to report to the learned Company Judge who set aside the auction. Needless to emphasise, the Official Liquidator has a role under the 1956 Act. He protects the interests of the workmen and the creditors and, hence, his association at the time of auction and sale has been thought appropriate by this Court. To put it differently, he has been conferred locus to put forth his stand in the said matters. Therefore, anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal. Such a statutory mode is provided under the RDB Act, which is a special enactment. The DRT has the powers under the RDB Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise

of powers under Sections 25 to 28 (both inclusive) of the RDB Act. Thus, the auction, sale and challenge are completely codified under the RDB Act, regard being had to the special nature of the legislation.

It has been submitted by the Allahabad Bank that if the Company Court as well as the DRT can exercise jurisdiction in respect of the same auction or sale after adjudication by the DRT, there would be duality of exercise of jurisdiction which the RDB Act does not envisage. By way of an example, it was submitted that there are some categories of persons who can go before the DRT challenging the sale and if the Official Liquidator approaches the Company Court, then such a situation would only bring anarchy in the realm of adjudication.

The aforesaid submission of the Allahabad Bank commends acceptance as the intendment of the legislature is that the dues of the banks and financial institutions are realised in promptitude. It is to be noted that when there is inflation in the economy, the value of the mortgaged property/assets depreciates with the efflux of time. If more time is consumed, it would be really difficult on the part of the banks and financial institutions to realise their dues. Therefore, this Court in *Allahabad Bank v. Canara Bank, (2000) 4 SCC 406* has opined that it is the DRT which would have the exclusive jurisdiction when a matter is agitated before the DRT. The dictum in the said case has been approved by the three-Judge Bench in *Rajasthan State Financial Corporation v. Official Liquidator, (2005) 8 SCC 190*. It is not a situation where the Official Liquidator can have a choice either to approach the DRT or the Company Court. The language of the RDB Act, being clear, provides that any person aggrieved can prefer an appeal. The Official Liquidator whose association is mandatorily required can indubitably be regarded as a person aggrieved relating to the action taken by the Recovery Officer which would include the manner in which the auction is conducted or the sale is confirmed. Under these circumstances, the Official Liquidator cannot even take recourse to the doctrine of election. It is difficult to conceive that there are two remedies. It is well settled in law that if there is only one remedy, the doctrine of election does not apply and that the Official Liquidator has only one remedy, i.e., to challenge the order passed by the Recovery Officer before the DRT.

Be it noted, an order passed under Section 30 of the RDB Act by the DRT is appealable. Thus, it is to be concluded and held that the Official Liquidator can only take recourse to the mode of appeal and further appeal under the RDB Act and not approach the Company Court to set aside the auction or confirmation of sale when a sale has been confirmed by the Recovery Officer under the RDB Act.

In view of the aforesaid analysis, the view expressed by the Division Bench is to be upheld that the Official Liquidator can prefer an appeal before the DRT.

LD/61/88

Bank of Maharashtra
Vs.
Pandurang Keshav Gorwardkar
May 7, 2013 (SC)

Section 19 of the Recoveries of debts due to Bank and Financial Institutions Act, 1993 read with Section 529 of the Companies Act, 1956 – Deposit of amount of debt due, on filing of appeal

In case of winding up of Debtor Company, claims of the workmen who claim to be entitled to payment pari passu have to be considered and adjudicated by the liquidator of the debtor company and not by the DRT

The Supreme Court held as follows:

(i) If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

(ii) Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company.

(iii) The above position is equally applicable where the assets of the debtor company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realised from such sale could be fully and finally

disbursed, the company had gone into liquidation. In other words, pending final disbursement of the proceeds realised from the sale of security in execution of the recovery certificate issued by the debt recovery tribunal, if debtor company becomes company in winding up, Section 529A read with Section 529(1)(c) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

(iv) The relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the debtor company is the date of the winding up order and not the date of sale.

(v) The conclusions (ii) to (iv) shall be *mutatis mutandis* applicable where provisional liquidator has been appointed in respect of the debtor company.

(vi) Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realised and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT.

(vii) However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined

by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to restitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator.

(viii) The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT.

(ix) Where the sale of security has been effected in execution of recovery certificate issued by the DRT under the 1993 Act, the distribution of sale proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act and by no other forum or authority.

(x) The workmen of the company in winding up acquire the standing of the secured creditors on and from the date of winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to the distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act.

(xi) Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claim against the debtor company. The adjudication of workmen's dues against the debtor company in liquidation has to be made by the liquidator. In other words, once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator who obviously has to act under the supervision of the company court and by no other authority.

(xii) Section 19 (19) is attracted only where a debtor company is in winding up or a provisional liquidator has been appointed in respect of such company. If the debtor company is not in liquidation or if in respect of such company no order of appointment of provisional liquidator has been made and merely winding up proceedings are pending, the question of distribution of sale proceeds among secured creditors in the manner prescribed in Section19(19) of the 1993 Act does not arise.

For the above conclusions, we hold, as it must be held, that the claims of the workmen who claim to be entitled to payment *pari passu* have to be considered and adjudicated by the liquidator of the debtor company and not by the DRT.

LD/61/89

AdCept Technologies Pvt. Ltd.

Vs.

Bharat Coking Coal Limited (BCCL)

May 8, 2013 (CCI)

Section 3 read with Section 4 of the Competition Act, 2002 – Anti-competitive Agreements

Right of consumer's choice must be sacrosanct in a market economy; procurement of a technology by an enterprise cannot be equated with anti-competitive conduct

Informant is a company carrying on business of providing solution for opencast mining including slope stability monitoring. OP, a subsidiary of Coal India Ltd., is a company carrying on business, *inter alia*, of mining from its various mines all over its jurisdiction. For the purpose of monitoring the slope stability of the said mines, OP floated a global tender dated 28.11.2012 inviting bids from proven manufacturer(s) for supply of Mine Slope Stability Monitoring Radar (MSSM RADAR).

The informant submitted that there were two leading Radar Technologies available worldwide for monitoring the slope stability of open pit mines in real time namely—Real Aperture Radar (RAR) and Synthetic Aperture Radar (SAR). All the industrial users of such monitoring radars send their enquiries and invite tenders from the manufacturers of both the technologies so as to ascertain the comparative suitability, cost etc. However, the specification

given in the tender documents as floated by OP was biased and specifically intended to favour RAR dish antenna based system. It is alleged that by defining a large parameter value for "scan angle" required only by RAR system, OP eliminated the participation of SAR technology manufacturers in this global tender.

The Competition Commission of India held as follows:

The slope stability radar services are used by all open cast mines. OP is engaged in the business of only coal mining and allied activities. Therefore, it is only one of the procurers of the service in the relevant market offered by the informant. The OP does not seem to be a dominant player in the said market as there are ample numbers of players purchasing the Slope Stability Radar services in India to determine slope stability of the mines.

Since OP is not dominant in the relevant market, the question of abuse does not arise. However, assuming that OP was dominant in the relevant market, let us see whether the conduct of OP results in abuse of its dominant position. The instant case relates to the procurement of a technology by an enterprise which happens to be a public sector undertaking. Since, services were being procured for measuring slope stability of the mines, it is for the procurer of technology to decide which technology is wants to use. The Commission has no reason to interfere with its free choice.

The Commission, on the issue of consumer choice, has observed in case no. 03/2010 (*Padrol Rahee Vs. DMRC*) that *"..... Right of consumer's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer....."*

Therefore no *prima facie* case of abuse of dominant position against OP seems to be made out. There is no anti-competitive conduct apparent on part of the OP by insisting upon a particular type of technology for its use. There is no agreement existing at present which can be tested on the touchstone of section 3. ■