

CASES AND JUDGEMENTS.

Dresser Rand S. A.

Vs.

BINDAL Agro Chem Ltd. & K.G. Khosla Compressors Ltd.

Decided On: 12.01.2006

Hon'ble Judges: Arun Kumar and R.V. Raveendran, J.J.

The appellant in this case had received an invitation bid to supply certain equipment and material to the defendant for use in the defendant's "Fertilizer Project". After several correspondences and a meeting where the conditions were discussed, the appellants had received certain Letters of Intent on the letterhead of the second respondent, K. G. Khosla Compressors Ltd. The representatives of BINDAL assured DR that full and total responsibility of the performance would be on BINDAL. Believing these assurances DR signed the Letters of Intent. Afterwards first respondent informed that due to pressure from Government of India, they have to purchase the required equipment from an Indian manufacturer. The appellant alleged breach of contract and opted for arbitration to settle the dispute. But the respondents held forth that no arbitration agreement had been entered into nor any such clause was present in the Letters of Intent. The Apex Court said that the cardinal principle to remember is that it is the duty of the court to construe correspondence to decide whether there was any meeting of mind between the parties, which could create a binding contract between them. The intention

of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then there would be proof of an arbitration agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. Therefore there was no arbitration agreement.

You One Engineering And Construction Co. Ltd. And Anr.

Vs.

National Highways Authority Of India (NHAI)

Decided On: 10.03.2006

Hon'ble Judges: B.N. Srikrishna, J.

An application was made under Section 11(6) and Section 11(12) of the Arbitration and Conciliation Act, 1996 and Paragraph 2 of the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, for the appointment of a third/Presiding Arbitrator in accordance with an agreement between the parties. The petitioner in each of these applications is a joint venture of two constituents, who entered into a construction contract with the respondent - National Highways Authority of India (for short 'NHAI'). The first petitioner is a company incorporated/registered under the laws of the Republic of Korea, with its registered

office at Seoul. Thus, it is a body corporate incorporated in a country other than India within the meaning of Section 2(f)(ii) of the Act. Further, the contract entered into between the parties and the respondent pertains to execution of construction work, which is considered as commercial under the laws in force in India. Each of the three contracts contained an arbitration clause that any arbitration would amount to an international commercial arbitration within the meaning of Section 2(f)(ii) of the Act. A clause in the agreements provided that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President of Indian Road Congress. Here, the subsequently appointed arbitrator was appointed by the respondent as its arbitrator. The court held that the clause contemplates the appointment of Presiding Arbitrator by the President of the IRC. That there was no appointment of the Presiding Arbitrator within 30 days from the appointment of the Arbitrator appointed subsequently is incontrovertible. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. On this basis the court dismissed the petitions.



POLITIKING

1 Sonia Gandhi has been re-elected to the Lower House of the Parliament with a record victory margin of over 400,000 votes from her nearest rival.

2 The historic trade route of Nathu La between India and China has re-opened after a gap of nearly 44 years.

3 The election results in the assembly polls have brought in new governm ents in Kerela (CPI-M), and Tamilnadu (DMK+Congress). CPI(M) has won again in WestBengal and Congress in Assam and the Union Territory of Pondichery.

IN-HOUSE NEWS

FML New Delhi and FML Bhubaneshwar organized seminars in Bhubaneshwar and Pune on intellectual property and information technology, which were very well received by the legal fraternity, business entities, government representatives and the media.

FML capital markets team is presently involved in nearly 12 major capital markets and GDR issues.



HON. EDITORIAL CONSULTANT - KRISHAN MAHAJAN

EDITOR - KAMAL SULTANPURI SUB EDITORS - SURBHJI GUPTA & SIDDHARTH MISRA

PUBLISHER - FOX MANDAL & CO., FM HOUSE, A-9, SECTOR-9, NOIDA-201301, N.C.R. of Delhi, INDIA

TRAVEL SECTION

We feature in this issue the valley of Lahaul and Spiti. Spiti stems from two words *Sa Piti*, literally meaning, the country (*Sa*) of Piti river (*Spiti*). Not many people know the meaning and origin of the words- Similarly, the Spiti and upper Lahaulis call themselves *La-Yul-Mis*, the folks from the god's land. The word *Lahouli*, *Spiti*, *Laddhakhi* and *Tibetan* seemed to have come from *Lah*, which means mountain, peak or pass. Mountains command great reverence in the region.



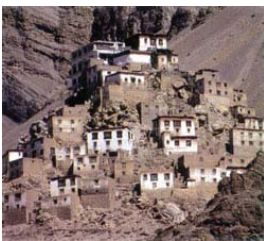
Reaching Spiti A day long Delhi-Manali bus or taxi journey; or a two-hour Delhi-Bhuntar flight, and one is at the sprawling riverside Manali town, enjoying the sylvan environs and the surrounding peaks and meadows. From Manali, one goes driving through 13,050 feet high Alpine Rohtang Pass.

The riverine Spiti is a minuscule civilisation whose spatial and spiritual existence in real and symbolic terms are so intermingled that not only the valley draws its name from the main river, but also most of its tributary valleys and villages are named after their rivers. This river, along its 130 km course, is joined by around 11 tributary streams on the right bank and 13 on the left bank.



Monastic and mystic Spiti is an important plank of the monastic travel circuit of India-Kulu-Lahaul-Spiti-Kinnaur and Leh. Spiti is a sanctum-sanctorum of ancient Lamaist Buddhist monasteries. Mane, Dhankar, Tabo, Gungri, Mud, Lidang, Rangrik, Key, Losar and Hikkim have the best of them. The most important of them is the Key Monastery, the abode of Lochen Tulku. A reincarnate spiritual institution, the Lochan Tulku is held high in Spiti's spiritual traditions.

Pin Valley National Park The Pin Valley National Park is an ideal wildlife tourism spot with a transit camp accommodation at Mud Farka, and bunkers. Chhumurli horses are available for a ride. Two to three days' travel in the Park under the guidance of the forest guides should be enough for sighting an ibex. Wildlife Census, 1999-2000, put the animal population of Pin Valley National Park and Kibber Sanctuary at 12,245, including 508 snow ibex in the Pin valley.



FOX MANDAL LITTLE

• BANGALORE

FM House
6/12, Primrose Road,
Bangalore-560025
Telephone : 91-80-2559 5911
Fascimile : 91-80-2559 5844
E-mail : bangalore@foxmandallittle.com

• BHUBANESWAR

Fox Mandal
'FM House', HIG-8, BDA Colony,
Gangadhar Meher Nagar
Bhubaneswar - 751013, Orissa
Telephone : 91-674-230327/2303328
Fascimile : 91-674-2303329.
E-mail : bhbaneshwar@foxmandallittle.com

• CHANDIGARH

S.C.O. 3, IInd Floor,
Sector - 17E, Chandigarh-160 017
Telephone : 91-172-5000090/5540680
Fascimile : 91-172-5000090
E-mail : chandigarh@foxmandallittle.com

• CHENNAI

FM House,
29, Kasturi Ranga Road,
Chennai-600 018
Telephone : 91-44-2498 6803, 2498 8040
Fascimile : 91-44-2498 6691
E-mail : chennai@foxmandallittle.com

• DHAKA

Room No.-: 410,
Dhaka Chamber of Commerce & Industries
65/66 Motijheel Areas, Dhaka-1000,
Bangladesh
Ph: 880-28311492
Fascimile : 880-29344356
E-mail : info@foxmadalhossain.com

• HYDERABAD

#22, Road No. 2, Banjara Hills, (Opp Trendset)
Hyderabad-500 034
Telephone : 91-40-2354 0218, 2355 1804,
91-40-2354 8977
Fascimile : 91-40-2354 0219
E-mail : hyderabad@foxmandallittle.com

• KOLKATA

12, Old Post Office Street
Kolkata - 700 001
Telephone : 91-33-2248 4843, 2248 8970
91-33-2248 8565
Fascimile : 91-33-2248 0832
E-mail : calcutta@foxmandal.com

• MUMBAI

Central Bank Building, 3rd Floor, M.G. Road,
Mumbai-400 021
Telephone : 91-22-2265 2739, 2270 3224
91-22-2270 3225
Fascimile : 91-22-2265 9918
E-mail : mumbai@foxmandallittle.com

• NEW DELHI

Litigation Office :
18, Kotta Lane, Rouse Avenue
New Delhi 110 002
Telephone : 91-11-4657 1530, 4657 1531
Fascimile : 91-11-4657 1531
E-mail : newdelhi@foxmandallittle.com

• Corporate Office :

FM House,
A-9, Sector - 9, Noida-201301
Telephone : 91-120-2444567/4305555
Fascimile : 91-120-2542 2222
E-mail : newdelhi@foxmandallittle.com

Special Message : We shall appreciate any comments or suggestions that you may have

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NEWS TIME

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Editorial

The outstanding international performance of Indian corporates in the IT, BPO, energy and pharmaceuticals sectors has shown that developing countries have the wherewithal to lead the global economy. The sectoral footprint needs to be widened so that the same entrepreneurial synergy covers the socially disadvantaged to make them market viable. This applies especially to the global population of physically and mentally disabled children. They are the most visible symbols of economic and managerial neglect by international trade as well as lack of economic development. But all theorists and funders of economic development never build in a disability coefficient into their theories or their funding terms. The most visible are shut out. Accordingly international banking and investment laws do not correlate the children's disability coefficient with finance and investment policy. Hence there is no international regime de facto or de jure to ensure that development must show a decline in the number of children born into physical or mental disability.

The lack of such an international movement is explained by the national policies of the countries with the highest numbers of the disabled as also with the highest rate of growth of the disabled. The national policies do not integrate disability into public and private economic planning, budgeting or investment. The local development officer, the collector and the primary health centre in charge are not made legally responsible for any rise in the number of the disabled within their jurisdiction. Disability resulting from the malnutrition of the mother and then of the child is nobody's baby. Consequently, even countries professing a fundamental right to a life of human dignity, having affirmative state funded programmes for mother and child and state funded health programmes till the village level have no public accountability regimes to ensure delivery to the target populations of such State funded programmes usually bedeviled by corruption. The career progression of the district and national administrators does not depend in any way on the decline or progression of the disabled in a district. Development becomes an exercise in sustained disability.

The other indicator of the rule of law, legal aid for the disabled, also finds no place in market oriented policies, district planning and funding as also the promotion of officers. District development results in districts of the disabled. The district judiciary and the bar have no accountability for the failure of legal aid in the district. Legal aid delivery to the disabled is not a factor to be taken into account as part of the supervision by the superior courts of the district courts. Accordingly countries with specific laws for legal aid, with Constitutions that declare legal aid to be fundamental in the governance of the country and with enactments for the physically and mentally challenged, produce more and more disabled children. Development becomes an exercise in legal disability.

Given this state of the national eco-legal orders of developing countries, the international movement is for the right to development instead of the right to just development. There is no initiation of a United Nations debate on marrying justice to development, developing indices of eco legal failure with disabled children as one of the indices, defining physical and mental disability and methods of apportioning the liability for such growth of disabled numbers. The legal concept of preventable disability is not even born. Justice is knocked out of development. There is none to blame for the marred economic present and the mortgaged future that the failure of preventable disability represents. The absence of any international pressure on the economic and legal fronts ensures the continuance in the developing countries of colonial legal systems wherein justice is obtainable only by those who can afford to reach the courts. Preventable disability is not a part of the legal vocabulary of even those developing countries that have human rights enactments and infrastructure under such enactments. Legal systems are not seen as systems of administration of justice that economically empower people to reach justice against disability. WHO has predicted a grim life style future of increasingly large numbers of the mentally challenged. Hence the nature of eco-legal systems at the national level having the capacity and ability to meet this predicted future is a matter that affects human kind.

This issue of FM brings you the latest developments in India concerning FDI in the telecom sector, the national pharma policy, the publication of a compendium on India's FDI, RBI master circulars on foreign investments in India, external commercial borrowings and trade credits, the latest tax judgments concerning FIs and an informative article on the new French anti-takeover measures. The monsoon that gives the waters of life to India, is here with the last variety of luscious mangoes. For those wanting to escape the humidity FM suggests the Lahaul Spiti valley for comfort and peace. Enjoy the reading and the rains.

Clippings



(Indian PM with the American President at G-8 Summit in St. Petersburg)

The World Bank has approved two credit loans for a total of \$ 200 million for the National Agricultural Innovation Project in India, which would enable this significant sector to grow at 4 per cent per annum and usher in the second green revolution..

The development of infrastructure in the country, highways, ports and airports will see an investment of Rs 3,20,000 crore in the next six years.

According to a report released by Kelly Services, major trends in both the in-and outbound call centre industry in the region shows India having the highest recruitment pace at 15-20 per cent.

CORPORATE

• Pharma policy formulated

The government today announced the much-awaited national pharmaceutical policy fixing the generic drug trade margin at 15 per cent for wholesalers and 35 per cent for retailers as against the earlier inflated prevailing margins.

The policy also seeks to strengthen the drug regulatory system and the patent office, while laying emphasis on developing human resources in pharmaceutical sciences by opening more institutions on the pattern of the National Institute of Pharmaceutical Education and Research (NIPER), Mohali. Maximum Retail Price (MRP) would be inclusive of all taxes as in the case of all other packaged commodities. Some exemptions have been provided for certain drugs from the price control. New drugs developed in India through product patent, process patent and new drug delivery systems would be exempted from price control for five years.

Price monitoring cells in the state drug controller offices with funding from the Government of India would be set up under the policy. The draft policy along with Cabinet Note has been circulated to all departments for their comments. On receipt of their comments it would be put up before the Cabinet.

• India Inc upbeat on foreign funds

Companies raised \$12.77 bn, up 63% in the first half. Funds raised by Indian companies from overseas markets during January-June 2006 were up 63 per cent over a year earlier. Companies across sectors raised a total of \$12.77 billion in the first half of 2006 against \$7.83 billion a year earlier. In the whole of 2005, Indian companies raised a total of \$17.18 billion from overseas markets.

The aggregate amount raised overseas was higher in the first six months of 2006, but there was a 56 per cent drop in funds raised through depository receipt issues during January-June 2006 compared with a year earlier.

The highest amount raised was in loans. Companies raised \$6.96 billion in the first half of 2006, 116 per cent more than \$3.21 billion a year earlier. Bharat Oman Refineries raised \$1.34 billion, Tata Steel and Reliance Infocomm \$ 500 million and ICICI Bank \$600 million.

The next most popular instrument for raising funds overseas was foreign currency convertible bonds (FCCBs). Companies raised 4.02 billion in 2006 against \$1.60 billion in the first half of 2005. The amount raised through FCCBs was 150 per cent more in 2006 from a year earlier.

Funds raised through overseas equity issues amounted to

\$1.10 billion, down from \$2.68 billion in the first half of 2005. The amount of debt raised from the domestic markets was Rs 32,247 crore, nearly 20 per cent more than Rs 26,900 crore a year ago.

• Regulator for Airline Industry postponed

The Union Cabinet today has deferred its decision on a Bill to set up an independent regulator for the airline industry, while approving extension for compliance of conditions with regard to enhancement of FDI ceiling in the telecom sector. The Cabinet headed by Prime Minister Manmohan Singh discussed the Airport Economic Regulatory Authority (AERA) Bill, but the Defence Ministry has sought some clarifications. The AERA is expected to deal with issues of pricing and competition in airports, particularly in view of private companies entering the airport arena. The new regulator will be independent of the existing Directorate-General of Civil Aviation (DGCA) that deals with technical aspects of aviation.

• Three-month extension for FDI in telecom

Meanwhile, the Cabinet granted three-month extension to the proposal of the Department of Telecom seeking extension for ensuring compliance of conditions with regard to enhancement of FDI ceiling

from 49 per cent to 74 per cent in the telecom sector.

The Department of Telecom had sought the Cabinet approval to extend the deadline for meeting the FDI guidelines by three months from July 3 to October 2. This will give more time for further consultation with different stakeholders and in the meantime maintain the continuity of operation in the telecom and IT sectors, Parliamentary Affairs Minister P R Dasmunsi said after the meeting.

The government received various representations for reconsideration of the conditions imposed by it in the Press Note issued on November 3, 2005, regarding the enhancement of the FDI ceiling from 49 per cent to 74 per cent in the telecom sector. Accordingly, the Cabinet gave its ex-post-facto approval to proposal of DoT to extend the correction time by four months with effect from March 3 to July 2. Now, this deadline has been extended by another three months.

Foreign Direct Investment ("FDI")

• FDI Policy 2006

The Union Minister of Commerce and Industry, Mr. Kamal Nath, released a compendium on India's

FDI on April 19, 2006 which is a compilation of the current FDI policy of India and the relevant Press Notes of the Department of Industrial Policy and Promotion ("DIPP") on FDI. The policy contains 3 sections, which are as follows:

- Section A gives an overview of FDI policy. In the sectors listed in the statement, FDI is allowed only in the indicated activities subject to the equity limits and/or other conditions, as indicated. FDI in all sectors/activities is subject to sectoral guidelines and requirements. FDI is not permitted in Retail trade (except Single Brand product retailing); Lottery; Gambling and Atomic Energy. In the remaining sectors/activities, FDI up to 100% would be allowed on the automatic route.
- Section B contains relevant Press Notes on FDI policy and procedures in a chronological order.
- Section C deals with FDI inflow statistics since 1991, including the country-wise and sector wise details. It also gives FDI inflow statistics.

• Press Note 5 of 2006 series

The DIPP issued Press

Note 5 of 2006, which amends the enhancement of FDI ceiling from 49 % to 74 % in the telecom sector. This Press Note amends the earlier Press Note 5 of 2005 series, which was dated November 3, 2005 in so far as the time limit allowed for correction is concerned. Under Press Note 5 of 2005, an initial correction time of 4 months from the date of issue of Press Note 5 was allowed to existing licensee companies providing telecom services for ensuring adherence to the revised conditions. This time limit has now been extended till July 2, 2006 now.

• FDI inflows in India

The DIPP, on May 11, 2006 issued a Press Release giving details of FDI inflows in India. The said Press Release states that FDI in equity in 2005-2006, which was USD 5.135 billion is the highest FDI in equity in the country during any year. The Press Release further goes on to say that this represents a 60% increase over the corresponding figure of the last year. Further, FDI for March 2006 has been reported at USD 831 millions, which is 200 %

over the inflows of March 2005. The aggregate FDI flow for the year 2005-2006, as per the Press Release, is expected to be USD 8.3 billion, which would be 50% higher than the aggregate flows for the last year at USD 5.535 billion.

• Master Circular on Foreign Investments in India

The RBI issued a Master Circular (RBI/2006/07/20 Master Circular No.02/2006-07) on Foreign Investments in India dated 1st July 2006. The Master Circular also covers "Acquisition of Immovable property" by non-residents and foreign investment in the capital of partnership firms or proprietary concerns. The Master Circular consolidates the existing instructions in respect of above areas in one place and has been issued with a sunset clause of one year and would stand withdrawn on July 1, 2007.

• Master Circular on External Commercial Borrowing and Trade Credits

The RBI issued a Master Circular (RBI/2006-07/25 Master Circular No. /07/2006-07) on External Commercial Borrowings

and Trade Credits dated 1st July 2006. The Master Circular consolidates all existing instructions on the subject of "External Commercial Borrowings and Trade Credits" at one place. The Master Circular is being issued with a sunset clause of one year. This circular will stand withdrawn on July 1, 2007.

TAXATION

India, Japan exchange notes on amending income tax treaty

India and Japan have exchanged diplomatic notes indicating both countries' legal approval on the protocol amending the income tax treaty between the two nations. The protocol would reduce withholding tax from 20 per cent to ten per cent. The high rate of 20 per cent withholding tax on fees for technical services was a big deterrent to the Indian IT industry's progress in Japan. Japanese companies operating in India are also beneficiaries of this tax reduction.

In Japan, the amendment will be with effect from July 1 this year with respect to taxes withheld at source and India from April 1, 2007.

On the other hand, the amendments will come into force from January 1 next year with respect to taxes on income not withheld at source in Japan

and from April 1 next year in India.

FIs get relief on capital gains tax front

A special bench of the Income-tax Appellate Tribunal in Mumbai ruled that FIs could set off long-term capital losses against short-term capital gains. The ruling applies to all cases until financial year 2002, as the Income-tax Act was silent on whether the losses could be set off in such a manner. So, FIs set off long-term capital losses against short-term gains because short-term gains were taxable at a higher rate of 30% whereas long-term gains were taxed at 10%.

Aviation ministry for shifting ATF to declared goods list

With a view to reduce the sales tax incidence on the fuel, which is currently as high as 39% in some States, and thereby bring down the cost of airline operations, the civil aviation ministry has moved a Cabinet note on civil aviation policy in which it proposed shifting aviation turbine fuel (ATF) to the declared goods category. Under the Central Sales Tax (CST) Act, a declared good will not attract sales tax at more than 4%. Currently, ATF accounts for 35-40% of the cost of an air ticket in the domestic sector. Besides the varying and normally high sales tax (ATF is outside Vat), there is an 8% central excise duty on the aviation fuel