BRIEFCASE

M J ANTONY

A selection of key court orders

SC: Follow norms before blacklisting

Government companies hold most of the contracts and they are also the ones that have a tendency to blacklist firms liberally. This is disastrous for the contractors. They also suffer a domino effect when other public sector units and even private employers keep them away. The Supreme Court (SC) recently criticised Food Corporation of India for blacklisting a firm without following set procedures. It was given a contract for recruiting employees for the corporation. The agency conducted a written test. The question papers reportedly leaked and the Bhopal police arrested some 50 persons. FCI issued show cause notice to which the firm replied that the "leaked" questions were not the ones set by it. However, FCI abruptly terminated the contract and blacklisted it for five years. It resulted in five other government units blacklisting the firm and withholding dues. The Madhya Pradesh high court dismissed it writ petition. The SC allowed its appeal (*UMC Technologies Ltd vs FCI*), stating that the show cause did not propose blacklisting, which was an essential condition before blacklisting. As a state entity, FCI has a greater duty to follow procedures.

Permanent ban is illegal

In another case of blacklisting, a veterinary drug manufacturer wrongly labelled a product by an inadvertent error, which was not serious. The UP Animal Husbandry Department blacklisted the firm indefinitely. The firm moved the high court and lost. In appeal, it argued before the SC that the Rajasthan government did not give it supply contract because of the permanent blacklisting. The SC allowed its appeal (*Vetindia Pharma vs UP*) stating that blacklisting should not last more than three years; otherwise it would be death knell for the company.

Row over challenge to foreign award

In the continuing controversy over enforcement of foreign awards in this country, the SC last week set aside the Bombay High Court judgment which had held that a challenge to a foreign award is maintainable here. In this case, disputes arose over the termination of a contract for a polymers plant between an Italian firm, NOY Vallesina and Jindal Drugs Ltd. The ICC arbitral tribunal in Paris held in favour of the foreign firm. When Jindal challenged it in the Bombay High Court, a single judge ruled the petition was not maintainable under the Arbitration Act. On appeal, the division bench held otherwise, leading to the appeal, which was allowed by the SC.

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Financial creditor gets suit shifted

The SC has ruled that a financial creditor can seek the transfer of winding up proceedings before a company court to the National Company Law Tribunal (NCLT). The object of the Insolvency and Bankruptcy Code (IBC) is to resolve issues speedily. By allowing parallel proceedings in the high court and the NCLT, "the entire object of IBC will be thrown to the winds". The SC stated so while allowing an appeal against the decision of the Allahabad High Court in the case, *Kaledonia Jute vs Axis Nirman Industries*. In this case, the high court had already passed a winding up order and the official liquidator was in charge of the failed company. Then another creditor approached NCLT seeking its dues and approached the high court for transfer of the case to the tribunal. The high court rejected its plea. The creditor appealed to the SC, which transferred the winding up proceedings to the NCLT. The judgment said: "The proceedings for winding up of a company are actually proceedings to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors."

Official absolved along with company

A food adulteration case against Hindustan Unilever over a tin of Dalda vanaspati ghee dragged on for three decades in various courts and ultimately the Nominated Officer of the company was acquitted by the SC last month. The criminal case shuttled between the trial court, the sessions court, the Madhya Pradesh High Court and the SC several times. Meanwhile, the Food Safety and Standards Act replaced the Food Adulteration Act in 2006, complicating matters further. The high court acquitted the company, but convicted the officer. On appeal, the SC held that "in the absence of the company, the Nominated Person cannot be convicted or vice versa". Since the company was not convicted, it will be unfair to the officer who has been facing trial for more than last 30 years, the judgment said.

Tata group extends its wingspan

The plan to take ownership of AirAsia would give it a presence in both the full-service and low-cost carrier markets

SURAJEET DAS GUPTA

New Delhi, 2 December

This week, news was out that the Tata group plans to raise its stake in AirAsia India from 51 to 76 per cent and prepare the ground for an exit route to its Malaysian partner, AirAsia Berhad. The group has also invested over ₹650 crore in the airline through optionally convertible debentures, which can be converted into equity. And it is looking for a name for the airline (expected to have the Tata tag) once the brand licensing agreement ends in March next year.

For the Tatas, this will mean a wide wingspan across the aviation market — from full-service carrier Vistara, its joint venture (Tatas own 51 per cent share) with Singapore Airlines, to the low-cost carrier (LCC) AirAsia India. Both carriers are still loss-makers with modest market shares, so is the group spreading itself too thin in a challenging business?

At least one thing going for the Tata group's quest for a bigger stake in an LCC is that this market accounts for 84 per cent of the domestic passenger market, and it is growing. This is also an opportune time to push the joystick since some of the rivals have hit air pockets. Two of the three players in the LCC space have eroded their market shares — SpiceJet (with its fuel efficient 787 fleet still grounded for reasons beyond its control) and GoAir. Taken together, their market share has dropped from 26 per cent in the January-March quarter to 21 per cent in October. The overwhelming gainer has been IndiGo, which dominates the market with over 55 per cent.

But AirAsia's market share has been stagnant at over 7 per cent and that is because it has one of the smallest fleets (32 aircraft) among its LCCs competitors — GoAir has 57 aircraft and Spicejet 104. The airline was nowhere near its plan to hit 40 planes by May this year, leave alone flying abroad last September, which has been stalled by a government investigation into alleged irregularities in the permit process.

In the international market again, the LCC pie is getting larger, especially on short-haul flights. For instance, in the March quarter of this year, LCCs accounted for nearly half the customers who flew internationally in any of the top ten airlines (in terms of market share) to and from India. Last year, during the same period the LCC share was just over 36 per cent.

But despite the market potential, AirAsia has struggled. Frequent strategy flip-flops, changes in top management, alleged violations of Indian laws (it is being probed by the Central Bureau of Investigations) and lack of clarity on who really is piloting the airline (the Tatas started with only 30 per cent and AirAsia Berhad's promoter Tony Fernandes was to run the show) have all taken a toll. The company has never been even close to breakeven with its losses going up from ₹182 crore in FY16 to ₹670 crore in FY19. FY20 saw some improvement, with losses pared to ₹317 crore.

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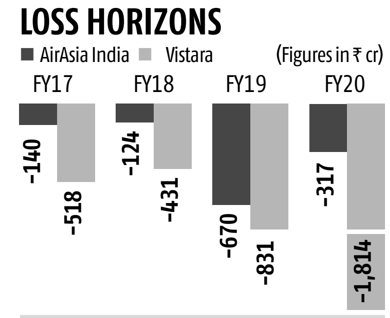
But it is now pretty clear that the Tatas have decided to occupy the pilot's seat at the airline. The process started in October-end 2018 when an old Tata hand, Sunil Bhaskaran, was appointed as MD and CEO after the top spot was vacant for months. This was followed by Fernandes quitting the board. In early 2019, the group took a more decisive step towards ownership and control by raising its stake to 51 per cent. And now discussions are on for AirAsia Berhad's formal exit.

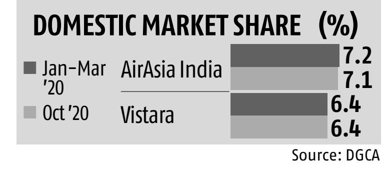
For the Tatas, building a budget brand in services or products is not new. As a top former executive of AirAsia India pointed out: "It's in the Tata DNA. They built Ginger Hotels to address the affordable hotel segment even though they had super luxury hotels. They did so too in the passenger car segment — with the Nano even though they also own JLR. So it was very clear that they were keen to run a budget airlines and straddle the entire aviation space even though they have a full-service carrier."

But how does AirAsia India fit in with the Tata's overall aviation ambition — which, apart from the two carriers, may include bidding for state-owned Air India? Mumbai-based aviation consultancy firm Martin Consulting said based on order books and plans of the three airlines for the next few years (assuming there is no change), the Tata group will end up commanding an aviation group with a fleet of 800-900 aircraft (roughly the same as Delta Airlines) with conservative revenues of $7-8 billion-plus annually.

"The Tatas could easily become a global aviation force to reckon with, they only have to offer clearly differentiated products and cater to different segments of the market. This will also help expand the overall Indian market — both domestic and international," said Mark Martin, founder of Martin Consulting.

But ambition in the aviation business tends to be overtaken by hard realities. The Tata group's aviation plans will be put to its sternest test yet.





Source: DGCA

'Mineral mining in need of FDI, modern technology'

Lack of foreign investment and application of modern exploration technologies in the mining sector have made the country a big net importer of minerals, **R K SHARMA**, director general of Federation of Indian Mineral Industries, tells **Kunal Bose**. Edited excerpts:

Why is the performance of India's mining industry not in sync with the resources lying underground?

We are aware that geologically India has almost an identical prospectivity as the world's mineral rich countries such as Australia, Brazil and South Africa. But the contribution of the mineral industry to our GDP in 2018-19 was a disappointing 1.75 per cent compared with 7.5 per cent for South Africa and 6.99 per cent for Australia.

This is because we have so far exercised the soft option of extracting superficially available bulk minerals such as coal, iron ore, bauxite and limestone. No wonder during 2018-19, against our production of ₹244,216 crore worth of major and minor minerals, minerals and metals imports cost us ₹910,840 crore. The big trade deficit on this account is due to our importing high-value gold, diamond, platinum, nickel, cobalt, rare earths, etcetera. These are the difficult-to-find minerals and call for high-end exploration and prospecting technologies.

R K SHARMA

Director General, Federation of Indian Mineral Industries

So, despite the potential, India has remained highly underexplored?

Our failure to attract investment in the same order as our geological siblings has kept us as a big net importer of minerals. In spite of the government allowing 100 per cent foreign direct investment (FDI) in the mining sector in February 2000 and the subsequent revision of national mineral policy according the private sector a significant role in exploration, the situation on the ground has remained unchanged. The only way to reduce our dependence on minerals imports is to secure FDI on a large scale and adopt modern exploration technologies by making necessary changes in Mines & Minerals (Development & Regulation) Act, 1957. Once the requisite changes are made, there has to be policy stability.

What is the size of geological under-exploration in India?

The obvious geological potential (OGP) area of 0.571 million sq km is 17.4 per cent of the country's total landmass. Lack of investment and appropriate technology have restricted exploration and actual mining to around 10 per cent and 1.5 per cent of OGP area, respectively. The base paper on national mineral exploration policy, 2015 has identified OGP areas mineral-wise. According to it, we have 300,000 sq km under diamond and other precious stones, 181,150 sq km under base metals and 102,890 sq km under gold. However, due to lack of exploration leading to poor extraction, all three continue to figure prominently in our import bill.

But why, in spite of our excellent resources, has FDI remained shy?

Mining, a long gestation business, takes time to generate returns. Foreign groups will come in only in an environment of policy stability underpinning a rate of return commensurate with the risk involved in exploration. While we have political stability, the MMDR Act, 1957 has proved to be unstable. Not only has the Act been subject to amendments from time to time, many of its provisions have not been honoured.

Moreover, the unconscionably long time that the authorities concerned take in processing reconnaissance permits, prospecting licences and mining leases has compromised India's appeal as a mining investment destination for foreign groups. No wonder then over the last three years, India ceased to find a place among attractive destinations for investment opportunities in Fraser Institute's annual survey of mining companies.

Are tax rates in India a disincentive for investment in mining?

The mining industry in India remains the highest taxed in the world. Let's take the typical case of iron ore. The new iron ore mines here have an effective tax rate (ETR) of 54 per cent and the existing ones 58 per cent. Compare that with ETR of 34 per cent in Canada and 39.7 per cent in both Australia and South Africa.