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International Journal of Law & Management Studies is a bi-monthly journal releasing six issues per year on areas which integrate and form the interactive part of the spheres of Law and Management. It may range from Corporate Law, Alternative Dispute Resolutions, Contracts and Transactional Law, Corporate Criminal Liability and many such areas where the corporate world interacts with the all-pervading Legal Sphere. However, we encourage well-written articles from across both the spheres independently too. IJLMS now releases its second issue of the journal.

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From the Editor-in-Chief...

International Journal of Law & Management Studies aims to establish the nexus between law and management through its issues. Businesses today intrinsically face legal hassles right from Incorporation to Winding Up and at every stage, are locking horns with the legal system. The need for law in management arises from the beginning. It has an indispensable link that makes lawyers role inevitable at every stage of a business. Further, it also propels the idea that lawyers, endowed with the knowledge of management, may make great entrepreneurs. Business, through varied concepts and methods including Corporate Social Responsibility, are under a duty, legally or morally, to return to the society and contribute for its growth and development.

- Sameer Avasarala

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THE EASE OF DOING BUSINESS: A NEW ERA OF CORPORATE LAW IN INDIA: FRONT RUNNING & INSIDER TRADING

PIYUSH VERMA¹, SHUBHYANKA RAO²

Abstract

The past decade has seen escalation of different trading systems in the capital market. This expansion has also generated a vigorous debate as to how markets should be organized and regulated. Amongst such proliferation, the important issues in market design and performance is the issue of Front Running and Insider Trading: the extent to which a trader is recognized as informed. But in recent decades, Insider trading has received a bad name, like an evil practice where those who engage in it are totally devoid of ethical principles. Yet all Insider Trading are not unethical per se, trader anonymity may affect market liquidity, volatility, and informational efficiency but at the same time, there are certain kinds of insider trading are actually beneficial to the greater investment community.

This paper explores the nature and analysis of the positive and negative aspects of 'Front Running and Insider Trading', and to which extent front running comes close to insider trading. Also current regulations and policy should be changed with respect of important regulatory issues regarding front running and insider trading are related to the degree of anonymity. Clearly worded legislation could be passed to prevent any fraud from being committed against these individuals and groups, while allowing non-fraudulent transactions to be completed without fear of prosecution. Until it can be clearly determined that someone is fraudulently harmed by insider trading, there should be no law or regulation restricting the practice, since such restrictions violate individual rights and will likely have a negative market reaction.

Keywords

Ease of doing business, Corporate Law, Insider Trading

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Introduction

“A stock broker is one who invests other people’s money until it’s all gone.” -Woody Allen

“Average investors who try to do a lot of trading will only make their brokers rich.” -Michael Jensen

Stock exchange in India have witnessed a phenomenal growth in the last decade in all sphere, volume, size and the number of listed companies, and brokers and with this, there have crept in a number of malpractices and unfair methods of which ‘Front Running and Insider Trading’ is widely used for private gains. Simply we can put these activities as an act of buying or selling of security by a person with access to privileged information to which no one else in the market has access to, usually done with the motive of making profits or avoiding losses. It can be done by an ‘Insider’ who has ‘Price Sensitive Information’ in his possession before that information is made public and by using such information, he makes private gain at the cost of ‘innocent’ investors. We must analyze the law relating to Front Running and Insider Trading in the context of the Indian regulatory regime. Also insider trading, as a securities offence in India, is defined as such and governed by the SEBI (Prohibition of Insider Trading) Regulations, 1992 now amended as SEBI (Prohibition of Insider Trading) Regulations, 2015. No Indian statute or SEBI has defined ‘Front Running’ in a uniform manner, still the term sounds like a proactive and diligent act; it is not at all complementary. However, the concept has been elaborated on vide various regulations, circulars and judgements laid down by SEBI for e.g., SEBI (Prohibition of Fraudulent and Unfair Trading Practices Relating to Securities Market) Regulation, 2003.

Front running constitutes an unethical practice of a broker trading an equity based on information from the analyst department before his or her clients have been given information or in common parlance we can say that whereby a person deals in securities in advance of the publication of the information by taking advantage of the “anticipated impact” of the order on the market price. For example, analyst and brokers who buy up shares in a company just before the brokerage is about to recommended the stock as a strong buy are practicing front running. The easiest way of

understanding the concept of front running may be by drawing parallel with insider trading. So, the question arises what are the similar factors in front running and insider trading, because in insider trading an insider has access to unpublished price sensitive information which could be misused to manipulate the market and accrue benefit/ profits.

Hence, this paper relating to ease of doing business with respect to Front Running and Insider Trading analyses the whole strengthened legal framework for curbing and prohibiting such practices/ activities. Delineation of “Insider”, “Front Running”, “Insider Trading”, “Connected Person”, “Deemed to be Connected Person”, “Unpublished price sensitive information”, “Compliance Officer”, “Trading” is very essential for effective enforcement of securities laws. New Regulations pertaining to such activities are very well set out, clearly interpreting the legislative intent of Regulators. Also how SEBI is empowered to issue directions for application of such regulations and their interpretation.³

I. FRONT RUNNING AND INSIDER TRADING:

A. FRONT RUNNING

Traditionally, “Front running means buying or selling of securities ahead of a large order so as to benefit from the subsequent price move. This denotes persons dealing in the market, knowing that a large transaction will take place in the near future and that parties are likely to move in their favor.” So, we have to see whether such front running is barred by the regulatory framework?

It has been defined under Major Law Lexicon: “Buying or selling securities ahead of a large order so as to benefit from the subsequent price move. This denotes persons dealing in the market, knowing that a large transaction will take place in the near future and that parties are likely to

³ Regulation 11, SEBI Regulations, 2015.

move in their favour. The illegal private trading by a broker or market-maker who has prior knowledge of a forthcoming large movement in prices”.

Black's Law Dictionary also defines the term ‘front running’ as: “A broker's or analyst's uses nonpublic information to acquire securities or enter into options or futures contracts for his or her own benefit, knowing that when the information becomes public, the price of the securities will change in a predictable manner.”

This practice is illegal. Front-running can occur in many ways. For example, a broker or analyst who works for a brokerage firm may buy shares in a company that the firm is about to recommend as a strong buy or in which the firm is planning to buy a large block of shares. It will thus be seen that if a person trades in stocks or other investments having knowledge of the upcoming transaction by a third party which is likely to affect the market price of the investment, the person can be said to be doing front running.

We will look into judicial interpretation of front running through different case laws. Securities Appellate Tribunal in the case of *Dipak Patel v. Adjudicating Officer, Securities and Exchange Board of India*⁴ held that held that:

“There was a specific provision in the PFUTP Regulations dealing with front running and that is Regulation 4(2)(q) of the PFUTP Regulations. However, this Regulation applied specifically to intermediaries only. And there are no other provisions in the Regulations/Rules/Act that prohibits front running by non-intermediaries and hence they cannot be held guilty of such charges.”

But then in another case *Vibha Sharma v. Securities and Exchange Board of India*⁵, Securities Appellate Tribunal has held that front running is indeed a fraudulent and manipulative act in violation of

⁴ Dipak Patel v. Adjudicating Officer, Securities and Exchange Board of India, Appeal No. 216 of 2011 (Securities Appellate Tribunal, 09/11/2012).

⁵ Vibha Sharma v. Securities and Exchange Board of India, Appeal No. 27 of 2013 (Securities Appellate Tribunal, 04/09/2013).

the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("PFUTP Regulations"). However, using the following reasoning, it departed from them and held that front running was a fraudulent market practice and violation of 3(a), (b), (c), (d) and 4(1) of the PFUTP Regulations and thus punishable. It observed:

"A minute perusal of the judgment of Dipak Patel makes it evident that act of front running is always considered injurious be it an intermediary or any other person for that reasons. We would like to give a liberal interpretation to the concept of front running and would hold that any person, who is connected with the capital market, and indulges in front running, is guilty of a fraudulent market practice as such liable to be punished as per law by the respondent. The definition of front running, therefore, cannot be put in a straight-jacket formula."

SEBI has taken a strong stand against front running in the case of whereby it has considered the evils of front running on the investor community and elaborated on the same as follows:

"Front running is one of the most heinous crimes in the securities markets. It has the potential of eroding the faith of the investors in the securities market. It amounts to defrauding an innocent and unsuspecting investor who blindly repose trust in the entity to transact on his behalf in the securities market. Once this trust is played truant with, one would run the risk of losing the investor, not only for the loss it would have suffered but also for the loss of confidence. It is of utmost importance that a sense of fair play be maintained in the market so that innocent investors do not find themselves at the receiving end of irregular conduct by entities in the market. Thus, I have considered it critical that the penalty in the matter should be seen not only disgorgement in nature but also deterrent in effect. Given this consideration I am imposing a penalty with a multiple of 3 of the profit made for deterrent effect. With regard to repetitive nature, I find that the default was repetitive in nature."

B. FRONT RUNNING BY A NON INTERMEDIARY:

The primary question is whether front running activities carried out by persons who are not intermediaries are prohibited under the PFUTP Regulations. Front running broadly refers to

“buying or selling of securities ahead of an anticipated larger order, which is not known to the market, with a view to benefit from the subsequent price rise”. It is also defined as “a broker’s or analyst’s use of non-public information to acquire securities or enter into options or futures contracts for his or her own benefit, knowing that when the information becomes public, the price of the securities will change in a predictable manner”.

Regulations 3 and 4 of the PFUTP Regulations were worded very broadly to prohibit dealings in securities in a fraudulent manner or by indulging in unfair trade practices. However, Regulation 4(2)(q) of the PFUTP Regulations (“Regulation 4(2)(q)”) specifically provides that an intermediary buying or selling securities in advance of a substantial client order or whereby a futures or option position is taken about an impending transaction in the same or related futures or option contract shall be deemed to be a fraudulent or an unfair trade practice. The question was whether SEBI intended to exhaustively cover and regulate all cases of front running (by intermediaries as well as non-intermediaries) under the aforementioned provision alone. SEBI was initially of the view that Regulation 4(2)(q) was only illustrative and therefore the broader provisions contained in Regulation 3 covered front running by non-intermediaries as well.

Securities Appellate Tribunal (SAT)⁶, in its recent decision had held that front running only by an intermediary is prohibited under the PFUTP Regulations, thereby brushing aside earlier decisions of SEBI whereby SEBI held that front running by non-intermediaries was also covered under the said regulation. The crux of the debate between the two authorities lies in the interpretation of the purpose and intent of the PFUTP Regulations and its wording. While SEBI has been upholding that the intent of law is to admonish “any person” involved in front running activities, SAT has ruled otherwise and restricted penalties only to “intermediaries”. It has now been made clear by SEBI by way of the press release that the PFUTP Regulations are intended to be broader in scope. SEBI has proposed to amend the Regulations to clarify that Regulation 4 is only illustrative and will not cut down the broader scope of Regulation 3 which seeks to prohibit

⁶ Supra 3.

all kinds of fraudulent activities. This would imply that even though Regulation 4(2) (q) prohibits front running only by intermediaries, it would not have the effect of permitting front running by other entities, as this would be covered by the broader Regulation 3.

C. INSIDER TRADING

A company is incorporated under the Companies Act and on being listed with a Stock Exchange after executing the listing agreement the SEBI (Prohibition of Insider Trading) Regulations, 2015. Now, with passing of two decades, SEBI notified SEBI (Prohibition of Insider Trading) Regulations, 2015 based on N. K. Sodhi Committee Report, replacing SEBI (Prohibition of Insider Trading) Regulations, 1992⁷, aiming at filling vacuum, lacuna of the 1992 regulations thereby amending the insider trading norms in order to achieve global standards. It is important to know that the expression 'Insider Trading' has not been defined under new SEBI Regulations of 2015 but is covered under Section 195(1)(a)(i)⁸ of the Companies Act, 2013 which refers to Insider trading is basically the buying or selling of the securities of a listed public company by a person who has unpublished price sensitive information relating to that company. The scheme of the Insider Trading Regulations contemplates that listed public companies and other specified entities should create an internal governance code and procedure which is intended to ensure a self-governing mechanism to prevent instances of insider trading. For this purpose, SEBI has prescribed a Model Code of Conduct for prevention of Insider Trading for other Entities (under Schedule I to the Insider Trading Regulations) ("Model Code") which is to be adopted by the listed companies/ entities.

Now coming upon as to what information to be called as confidential and is not known to public at large when he makes gain at cost of innocent investors. This can be unpublished news about 'bonus', 'right issues', 'dividend', 'good export orders', 'other corporate achievements', 'take overs',

⁷ Regulation 12, SEBI (Prohibition of Insider Trading) Regulations, 2015.

⁸ S. 195(1) of Companies Act, 2013.

'merger', 'acquisition', etc. Which every insider would like to seize the opportunity of making quick profits.

Now, the moment this "insider" places an order or trade in buying or selling of shares with his broker is suspected to be doing insider trading and while execution of such order does some work pertaining to him, passes on information to others too, they can be for example financial institutions and mutual funds, who are biggest investors as they have easy and first hand access to information and hence such activity is prohibited on the ground of unethical and immoral grounds as insider is taking advantage regarding timings of announcement of price sensitive information to public.

So insider trading is a worldwide phenomenon that is not only prohibited in India but other countries have adopted legislations, all aiming at curbing such unhealthy practices. Insider trading has been practised in India from last 50-60 years and hence there occurred a need to regulate it. Earlier government of India appointed Sachar Committee in 1978 and Patel Committee in 1985. Both recommended regulations regarding prohibition of insider trading. Hence certain regulations were incorporated thereby directly or indirectly controlling insider trading by:

1. SEBI (Insider Trading) Regulations, 1992.
2. SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994.
3. SEBI (Prohibition of Fraudulent and Unfair Trade Practice relating to Securities Market) Regulations, 1995.

But in particular 1992 regulations has been repealed and replaced by 2015 regulations. Whose main objective is to curb insider trading and so this draft legislation tries to identify insider trading and thereby suggesting penal measures against such traders and persons involved in such activities. This legislation is required to be effectively implemented in order to ensure greater transparency and fair play in the market.

So, under Regulation 10 of Regulations 2015⁹, it goes like "any contravention of the new regulations shall be dealt by SEBI in accordance with the Act.

Section 11(2)(g) grants power to SEBI to prohibit insider trading in securities.

Section 12-A(d) prohibits a person to engage directly or indirectly in insider tray.

Section 15-G imposes a punishment of imprisonment for a term which may extend to 10 years, or with fine, which may extend to 25crore rupees or with both to any person being offender of insider trading.

Also, Section 458 of Companies Act, 2013¹⁰ authorises SEBI to appoint such officer who shall have power to file complaint in court of competent jurisdiction for suspecting any "Trader" in offence of insider trading.

New regulations has also used words of wider connotations "trading" instead of "dealing" as used in 1992 regulations whereby trading means and includes subscribing, buying, selling, dealing, or agreeing to buy, sell, deal in any securities. Therefore, we can infer Trading is an umbrella term which includes dealing and is intended with a view to provide aid in curbing such unethical activities such as "pledging" while in possession of Unpublished Price Sensitive Information.

In developed market Insider Trading is considered as serious crime, most popular offence in Stock Market and offenders are meted with heavy penalties and punishments.

D. INSIDER

Under Regulation 2(1)(g) of regulations 2015¹¹, Insider is defined as any connected person who is connected with a company or deemed to have been connected with a company, having access to or is reasonably expected to have access to unpublished price sensitive information in respect of securities of that company or any other company and includes any other person who has received

⁹ Regulation 10, SEBI Regulation 2015.

¹⁰ Section 458 of the Companies Act, 2013.

¹¹ Regulation 2(1)(g), SEBI Regulations, 2015.

or has had an access to such information. New regulation do not rely on the source through which person is in possession of unpublished price sensitive information.

According to Justice PN Bhagwati, definition of "insider" lacks clarity and it ultimately depends on the interpretation of the law to determine whether or not a company, in its capacity as a principal party can be termed as an "insider".

For example, if Hindustan Lever could be said to be an insider within the meaning of the definition only if Hindustan Lever, being a person deemed to have been connected to with Brooke Bond Lipton India Ltd. (BBLIL), could be stated to have received by virtue to its with regard to BBLIL.

E. CONNECTED PERSON/ DEEMED TO BE CONNECTED PERSON

Definition of connected person have been expanded and strengthened under Regulation 2(1)(d)¹², Regulations 2015, covers in its ambit connected person/deemed to be connected person. Person in access to UPSI by being in any contractual, fiduciary, or employment relationship or by being a Director, Officer or an employee of the company or holds any position including a professional or business relationship between himself and the company is called connected person. Person associated with officers of the company by frequent Communication also treated as connected person. Like 1992 regulation treated connected person in context of person associated with company six months prior to the act concerned of Insider Trading.

For deemed to be connected, new regulations include "immediate relatives" under Regulation 2(1)(f) of 2015 Regulations¹³, this presumption of Immediate Relative is deemed to be legal fiction and rebuttable unlike 1992 regulation, which provided for "relative" as defined under S. 6 of companies act 1956. So, there is no straight jacket formula or water tight compartment for analysing immediate relative but it largely depends upon facts and circumstances of each case to

¹² Regulation 2(1)(d), SEBI Regulations, 2015.

¹³ Regulation 2(1)(f), SEBI Regulations, 2015.

call a person connected with or deemed to be connected with act of insider trading. The onus of proof of showing that person was in possession of trading upon person adducing such charges (particularly SEBI), thereby this onus shifts to such person who is called to be connected with or deemed to be connected with or in access of such UPSI in order to prove their innocence. As per Regulation 4 of 2015 regulations¹⁴, the *mens rea* behind such trading activity is not relevant. Trading while in possession of such UPSI will itself attract charges or sufficient grounds to prosecute an Insider of a connected person.

Also that out of such trading, there must accrue some personal gain or profit to the insider and it would not be an offence only if insider deals in such securities on basis of UPSI without personal gain or profit as held by Securities Appellate Tribunal in the case of *Rakesh Agarwal v. SEBI*¹⁵. So, if there is an absence of direct evidence of access to UPSI, it will be seen if person is reasonably expected to have access of such UPSI while Trading and also that he has made personal gain or profit out of such trading.

Regulation 4 of Regulations 2015, acts like a charging provision where term "trading" is aptly used, while imposing prohibition on trading by insiders when in possession of UPSI provides specific defenses for insiders and non-individual insiders to prove their innocence. These circumstances can be demonstrated as:

Defences by Insider- In case of off- market transaction, inter se transfer between promoters¹⁶ who were in possession of same UPSI without being breach of Regulation 3 of the Act and the both parties had made a conscious and informed decision between themselves.¹⁷ If the person who's taking trading decision is not in possession of UPSI, then that individual can't be said to be guilty of Insider Trading or Front Running. In Chinese wall defence, the "wall" is thrown up to prevent leaks of corporate inside information, which could influence the advice given to clients making

¹⁴Regulation 4, SEBI Regulations, 2015.

¹⁵ *Rakesh Agarwal v. SEBI*, Appeal No. 33 of 2001 (Securities Appellate Tribunal, 3/11/2003)

¹⁶ Regulation 2(1)(h), SEBI Regulations, 2015.

¹⁷ Regulation 4(1)(i), SEBI Regulations, 2015.

investments, and allow staff to take advantage of facts that are not yet known to the general public. So, if there was no leakage of information at the time of execution of trade then it would not be considered as insider trading or front running. Or if the trades were pursuant to a trading plan set up in accordance with Regulation 5 of 2015 Regulations¹⁸.

F. PERSON AND SECURITIES

The term “person” has been well defined and contains an exhaustive list of persons connected with the company. It includes all persons including a body corporate and partnership firm acting as broker, trustee, merchant banker, transfer agent, financial advisor, registrar, Investment Company, portfolio manager, or their employees or relatives of any of the above person. The definition is silent on legal advisors, solicitors, promoters, share brokers, and auditors. Securities include shares, scripts, stocks, bonds, debentures, units of mutual fund, and rights of interest in securities.

G. UNPUBLISHED PRICE SENSITIVE INFORMATION

As per regulation 2(1)(e), SEBI Regulations, 2015¹⁹, any information that is accessible to the public on a non-discriminatory basis is known as “generally available information”. Now, the most important aspect of insider trading, unpublished price sensitive information has been described as any information which relates to specific matters pertaining to or of concern, directly or indirectly to a company and not generally known, available or published by such company for general known to them, be likely to materially affect the price of securities²⁰. So, it is evident that “generally available” is the test/ main criteria to determine what will constitute UPSI. But such information is available on non-discriminatory basis would be subject to question of fact applying the standard of reasonable man unlike information published on stock exchange website would be considered as generally available information in the public domain and not UPSI, in possession

¹⁸ Regulation 5, SEBI Regulations, 2015.

¹⁹ Regulation 2(1)(e), SEBI Regulations, 2015.

²⁰ Regulation 2(1)(i), SEBI Regulations, 2015.

of an Insider. This new definition of UPSI is equally extended to both, company and securities unlike old definition in old 1992 regulations which limited it to information related to company only.

Examples of unpublished price sensitive Information can be:

- i. Any information which relates to the following matters and is not generally known or published by such company for general information but which if published or known, is likely to materially affect the price of securities of that company in the market;
- ii. Intended declaration of dividends;
- iii. Financial results;
- iv. Rights or bonus share offers;
- v. Amalgamation, Mergers, Takeovers;
- vi. Changes in capital structure;
- vii. Major expansion plans of business or execution of new projects;
- viii. Changes in key managerial personnel;
- ix. Disposals of the whole or substantially whole of the undertaking;
- x. Material events in accordance with the listing agreement;
- xi. Such other information as may affect the earning of the company;
- xii. Any change in policies, plan or operations of the company and securities.

II. COMPLIANCE OFFICER

New regulations precisely define what do we mean by Compliance Officer and for what purpose he is appointed and what purpose he serves. Regulation 2(1)(c)²¹ defines Compliance Officer as any senior officer so designated by the company for the purpose of reporting SEBI, Board of Directors or head of organisation if no board is there, who Is financially literate, capable of appreciating requirements for legal and regulatory compliance and are responsible for keeping a

²¹Regulation 2(1)(c), SEBI Regulations, 2015.

check upon the company or the body corporate that whether these companies are abiding by all the policies, procedures, rules, regulations, monitoring adherence to rules for preservation of UPSI, maintenance of records, monitor trade and implementation of codes, regulations specified therein under all supervision of the Board of Directors of listed company or the head of an organisation as the case may be. So, a greater amount of responsibilities are casted upon Compliance Officer to ensure that there is administration of regulations to see and keep a check or watch that all the rules, regulations, code of conduct with respect to trading plans are complied with.

- i. Overall compliance of the Regulations;
- ii. Code of fair disclosure and code of conduct;
- iii. Designated Persons' Trading Plans-review, approval, monitoring, submission to stock exchanges;
- iv. Periodic reporting to the Board of Directors and Audit Committee;
- v. Identifying and reviewing list of designated persons under internal code of conduct with guidance by the Board;
- vi. Notifying closure and re-open of Trading Window- generally/ for select employees;
- vii. Monitoring of trading by employees and connected persons;
- viii. Pre-clearance of trades;
- ix. Relaxation from mandatory 6 months holding period to the Insiders in exceptional circumstances;
- x. Maintenance of records for a period of five years;
- xi. Clarifications and guidance to the insiders;
- xii. Adoption of appropriate measures for prevention of leakage of UPSI;
- xiii. Stipulate various formats under the Code: Preclearance of Trades, Reporting of trades by Insiders or Decisions not to trade after securing pre clearance;
- xiv. Maintain following registers;
- xv. Register of Insiders; Register of Preclearance;



- xvi. Register of forms (A, B, C, D) submitted to stock exchanges;
- xvii. Board approval for due diligence on the Companies;
- xviii. Reporting of non-compliance to the Board / audit committee and SEBI.

III. COMMUNICATION / PROCUREMENT OF UPSI

New Regulations of 2015 Regulations, place a wide variety of restrictions on communication, procurement, or trading of UPSI, relating to a body corporate, company or securities listed or proposed to be listed, to any person including other insiders. New regulation imposes restrictions on the procurement of UPSI by other persons. It says, no Insider shall communicate, provide, or allow access to and no person shall procure from or cause the communication by Insider of any UPSI relating to a company or its securities listed or proposed to be listed to any other person except where such communication is in furtherance to legitimate purpose or performance of duty or discharge of legal obligation. There are two elements to deal with insider trading:

- i. To protect the integrity of securities markets.
- ii. To ensure that in any securities transaction there is no imbalance of information between the buyer and seller of that security.

However, both communication and procurement are allowed if done in furtherance of legitimate purposes, performance of duty or discharge of legal functions.²²

Also sub-regulation 3 of regulation 3 talks about exercise of due-diligence by board of Directors for certain transactions where an insider may communicate, provide, allow access or procure as follows:

- i. Entail an obligation to make an open offer under the takeover regulations.
- ii. With Board approval, if the information is disseminated two days prior to effecting the proposed transaction.

²² Regulation 3, SEBI Regulations, 2015.

- iii. For above purpose it's mandatory on the Board to require parties to execute agreements to contract confidentiality and non-disclosure obligation on the part of such parties, except for the purpose of this sub-regulation and parties shall not otherwise trade in securities of the company when in possession of UPSI.²³

IV. INSIDER TRADING IN OTHER COUNTRIES

In U.K. there is specific act called as Financial Services and Markets Act, 2000 (FSMA, 2000). Under the said Act, there are specific provisions dealing with Insider Dealing and Market Abuse. There is a model code within the listing rules and for the protection of confidential information, the statutory provisions on the criminalization of Insider dealing are contained in Part V of Criminal Justice Act, 1993 (CJA, 1993) comprising sections 52-64, schedule 1 and 2 of the Act.²⁴

The preamble of the legislation has set out "assurance" afforded to investors that they are placed on equal footing and they will be protected against the improper use of inside information. The concept "inside information" is also used in relation to market abuse and in relation to model code in the FSA Disclosure and Transparency Rules.

In U.S.A, Section 51 (2) of the Securities and Exchange Commission Act of no 36 of 1987 (as amended) states that a person who is found guilty shall be liable on conviction after summary trial by a Magistrate to of imprisonment of either description for a period not exceeding five years or to a fine not less than Rs 50,000 and not exceeding Rs 10 Million or to both such imprisonment and fine. In 2003, several hedge fund and mutual fund companies became embroiled in an illegal late trading scandal made public by a complaint against Bank of America brought by New York Attorney General Eliot Spitzer. A resulting U.S. Securities and Exchange Commission investigation into allegations of front-running activity implicated Edward D. Jones & Co., Inc.,

²³ Regulation 3(4), SEBI Regulations, 2015.

²⁴ Hudson Alastair, *Securities Law*, 744, (1st ed., 2008).



Goldman Sachs, Morgan Stanley, Strong Mutual Funds, Putnam Investments, Invesco, and Prudential Securities.

Rule 14 of the Securities and Exchange Commission of Sri Lanka Act no 36 of 1987 (as amended) states that no person shall directly or indirectly trade in securities of a company ahead of a significant purchase or sale of securities of that company, for his client, with the intent to profit by trading in such securities thereafter.

Front running is tempting for those with access to inside information. In most cases, the practice is highly unethical and may be illegal due to the obvious information advantage of industry insiders compared to equally capable investors outside the firm.

V. LEGAL DIFFERENCE AMONGST JURISDICTIONS

The US and UK vary in the way the law is interpreted and applied with regard to the insider trading. In UK, relevant laws are [[Criminal Justice Act 1993] Part V Schedule 1] and Financial Services and Markets Act 2000, which defines an offence of Market Abuse. It is also illegal to fail to trade based on inside the information (whereas without inside information trade would have taken place). The principle, it is illegal to trade on basis of market-sensitive information that is not generally known. No relationship to issuer of the security is required to all that is required is that party guilty traded (or caused trading) whilst having inside information.

Japan enacted its first law against the insider trading in 1988. Roderick Seeman says. "Even today Japanese do not understand why this is illegal. Indeed, they previously it was regarded as the common sense to make a profit from your knowledge."

In accordance with the EU Directives, Malta enacted Financial Markets Abuse Act in 2002, which effectively replaced Insider Dealing and Market Abuse Act of 1994.

The "Objectives and Principles of Securities Regulation" published by International Organization of Securities Commissions in 1998 and updated in 2003 states that three objectives of good securities market regulation-



- (1) Investor protection;
- (2) Ensuring markets are fair, efficient and transparent; and
- (3) Reducing the systemic risk.

In US, the insider trading prohibitions are designed to curb misuse of confidential information not available to the general public. The US Insider Trading Sanctions Act, signed into a law in August 10, 1984 allows imposing fines up to three times the profit gained or loss avoided by use of such material non-public information. Significantly, the SEC's Section 16 of the Exchange Act, requires all officers and directors of a company and beneficial owners of more than 10 per cent of its registered equity securities to mandatorily file an initial report with the commission, and with the exchanges on which the stock may be listed, showing their holdings of each of the company's equity securities. Thereafter, they must file reports for any month during which there was any change in those holdings. In addition, the US law provides that profits obtained from purchases and sales or sales of such securities within any six-month period may be recovered by the company or by any security holder on its behalf. Such 'insiders' are also prohibited from making short sales of their company's equity securities. A similar system would certainly help to inculcate more transparency among the Indian corporate sector and its leaders. As of now, there are no such clear-cut guidelines and it's a free-for-all situation.

Insider trading is not new to Indian markets. It is very common to see a big spurt in the share prices when companies plan bonus issues or major decisions like takeovers and sell-outs. The sudden jump in the share price of Merind one day before the Tatas announced the sell-out of their stake to Wockhardt is another case of blatant insider trading. Similarly, lack of transparency in the Lakme sellout to Levers is another example why Indian corporates need a crash course on corporate governance. Stock-brokers, on their part, consider it privilege to get exclusive information related to a company. Most of the companies have a network of brokers to support their share prices and other market operations. Almost 90 per cent of companies which came out

with premium issues in the last three years rigged up their share prices prior to the launch of issues. Investors were thus lured to such issues.

In fact, there is no law in Indian markets which keeps track of share transactions of top officials of Indian companies or companies themselves. India which boasts of a stock market tradition of over 100 years and listed companies of over 6,000, formulated insider trading regulations only three years ago. And there should be clarity in rules and definitions of terms like 'insider'. Also, in order to get more information on front running and insider trading, the SEBI can take help from the public or anyone who can provide leads and in quid pro quo give rewards for such leads as is the practice in the United States.

VI. CONCLUSION

The new regulations augur much needed changes in to the front running and insider trading scheme in India by tightening the rope with respect to people indulge in the offence of such malpractices, as capital market is considered a big fish so the chances of financial crimes arises inevitably. The gravest effect of such practices is that the investor's confidence in the transparency and fairness of the market is shattered. So, in order to prevent the victimisation of the innocent investor, the regulatory bodies should make the concerned persons accountable for such fraudulent activities. Overhauling the 1992 regulations, the new regulations promise a fair mechanism of justice delivery system. There have been several instances in the past where the regulations and laws failed to follow principles of natural justice, therefore the aggrieved innocent party suffered haphazardly due to the use of arbitrary power by the market regulator. The new regulations now provide a much needed wider scope but despite of these changes, new regulations lack clarity at certain places which need to be dealt or sorted in order to ensure smooth enforcement of regulations as legislature have supplemented them with legislative notes which is however not clear whether these have a binding force of law or not. Also such irregularity and unclear issues would be resolved with justified interpretation of statutes and regulations by the authorities and courts to pave way for progress and correct implementation of Prohibition of



Front Running and Insider Trading through regulations by Capital market regulators as trading on material non-public information and futures markets raises more sophisticated concerns. Presently, no uniform regulations have been enacted for having effective prohibitions against front-running activities in place. Therefore, statutory changes may be necessary, if this practice is to be prevented. In regard to the elusiveness of front-running, there should be improvements in surveillance methodology should allow proscribed practices to be detected more readily. In fact, SEBI can take some help from the US Securities and Exchange Commission (SEC) which has brought numerous civil actions in federal courts against persons whose use of material non-public information constituted fraud under the securities laws.

The whole discussion made in the paper is to state that investor protection means Investor should be protected from the misleading, manipulative or fraudulent practices, including the insider trading, front running or trading ahead of customers and misuse of client assets. In the new era of corporate law regime, the market players and the investors both should be at equal footings and both should be equally protected by law and regulatory authorities. In the modern era of fast opening Indian markets the regulations must have to keep pace with globalization, things like inadequate regulations on trading and disclosure norms, lack of transparency in operations and presence of ill-informed investors. There will always be malpractices such as front running and insider trading. What is required is that companies, stock brokers, investors, intermediaries and other market players must be self-disciplined and compliance of the regulations should be adhered to. Honesty and integrity are needed at all levels and self-discipline is an essential prerequisite for effectively preventing fraudulent practices.



BANKRUPTCY AND INSOLVENCY REGIME IN INDIA

ALI WARIS RAO²⁵

Abstract

With the globalization of the Indian economy, the issues, identifying with the corporate indebtedness framework have assumed more prominent significance and a need has been felt for long to bring about changes in this branch of law. In addition, with the Indian economy having been opened up for investments by foreign financial creditors and, globally, the Indian corporate additionally making investments in corporations outside, the domain of cross-border bankruptcy law has grown enormously.

Presently, no single umbrella enactment represents indebtedness and insolvency procedures in India. Rather, there are a large number of enactment administering the lawful system, including; the Companies Act 1956; the Sick Industrial Companies (Special Provisions) Act 1985; the Recovery of Debts Due to Banks and Financial Institutions Act 1993; the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 etc.

This paper analyses the corporate insolvency resolution procedures of India taking into account various statutes that exist currently, namely the Companies Act, 1956, The Sick Industrial Companies (Special Provisions) Act, 1985 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) that deal with various provisions pertaining to corporate insolvency with special emphasis on the Insolvency and Bankruptcy Code, 2015 which has recently been tabled in the Indian Parliament.

Keywords

Corporate Insolvency, Winding-Up, Corporate Restructuring, Debt Recovery Tribunal, Fresh Start Process, Insolvency Resolution Process

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INTRODUCTION

This paper begins with an analysis of the Bankruptcy and Insolvency Code, 2015 along with the Companies Act, 1956, The Sick Industrial Companies (Special Provisions) Act, 1985 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) that deal with various provisions pertaining to corporate insolvency. The first section of the paper focuses on the need to incorporate a structured, comprehensive insolvency statute since the existing framework is inadequate as I have explained further. Subsequently, I have undertaken a cross-country comparison through a schematic chart highlighting India's position in comparison to the United Kingdom and Singapore pertaining to the corporate insolvency resolution parameters.

The second section of the paper explains the historical development of the statute, i.e., how the law of insolvency in India evolved over a period of time. It examines the ancient rudimentary basics of insolvency enactments that can be traced back to the colonial period. In addition, the third section of the paper delves into the current framework and briefly glances the Bankruptcy and Insolvency Code, 2015 and analyses The Companies Act, 1956, The Sick Industrial Companies (Special Provisions) Act, 1985 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) that deal with various provisions pertaining to corporate insolvency. Further, I have also given a brief outline on the '*Priority of Claims*' at the time of winding up of the corporation as laid down under the Companies Act, 1956. Consequently, the last section of the paper concludes by focusing on the way forward for India.

Bankruptcy and Insolvency Code, 2015 which has recently been tabled in the Indian Parliament aims to improve all aspects of insolvency pertaining to a Corporation, L.L.P's (Limited Liability Partnership's) and other entities, including a household²⁶. India, at present lacks a comprehensive statute to address all aspects of insolvency. The Companies Act, 1956 essentially deals with many

²⁶ See the Report of the Bankruptcy Law Reforms Committee, Available at;
http://www.finmin.nic.in/reports/BLRCReportVol1_04112015.pdf

provisions pertaining to corporate insolvency²⁷. However, there are essentially three significant statutes, i.e., the Companies Act, 1956, the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“SARFAESI Act”) that address various elements of corporate insolvency. Moreover, the current system is inadequate and does not address the interests of unsecured creditors, i.e., bond holders, foreign creditors or institutions other than banks, such as NBFC’s (Non-Banking Finance Companies)²⁸. The Indian system at present provides neither an opportunity for a speedy and effective mechanism pertaining to winding up of a corporation nor for an efficient exit. The Sick Industrial Companies (Special Provisions) Act, 1985 through the institutional structure of ‘The Board for Industrial and Financial Reconstruction’ (BIFR) is susceptible to delays and does not provide for an effective framework for all stakeholders²⁹. More so, the above-mentioned provisions, which provide procedural guidance on the liquidation of a Corporation, L.L.P (Limited Liability Partnership’s) or other entities, having overlapping jurisdictions, further create inordinate delays and difficulties in the process. As a result, the liquidation and the winding up process pertaining to a Corporation, L.L.P (Limited Liability Partnerships) or other entities, are expensive, tremendously lengthy and results in complete abrasion of asset value. The Insolvency law ought to strike a balance between recovery and liquidation³⁰. It ought to give a chance for an honest effort to investigate rebuilding/restoration of possibly feasible business corporations with agreement of partners reasonably arrived at. Where recovery/restoration is shown as not being achieved, winding up ought to be resorted to³¹.

²⁷ See the Companies Act, 1956 (Act No.1 of 1956).

²⁸ See Ravi, Aparna, Indian Insolvency Regime in Practice: An analysis of Insolvency and Debt Recovery Proceedings, Economic and Political Weekly, Vol. 1 No. 51.

²⁹ See Sick Industrial Companies (Special Provisions) Act, 1985.

³⁰ See the Report of the Bankruptcy Law Reforms Committee, Available at; http://www.finmin.nic.in/reports/BLRCReportVol1_04112015.pdf

³¹ Id.

Bankruptcy regimes also elevate access to finance among Small Market Economies (SME's) by supporting predictability in credit markets³². A compelling indebtedness framework can help regulate effective ways out of the business sector, guarantee reasonable treatment through the orderly resolution of debts incurred by debtors in monetary misery and give opportunities for recovery by bankrupt entities and their creditors. In this way, a comprehensive Bankruptcy code is critical to improve the SME finance gap³³.

Furthermore, the poor results of India's corporate insolvency procedure are reflected in the nation's rankings in the World Bank (2016)³⁴. As for Insolvency Resolution, India's rank is as low as (136) contrasted with Australia's (14), Singapore's (27), The United Kingdom's (13), and United States of America's (5)³⁵. As per Wadia (2000)³⁶, a winding up process under the Companies Act, 1956 takes about 3-15 painstaking years. Consequently, the cost of liquidation increases and the realizable value of assets decrease³⁷. Additionally, banks have turned out to be progressively defenseless against poor recovery of loans made to corporate entities. The issue of 'Non-Performing Assets' (NPA's) in their books have turned into a reason for serious concern³⁸. Gross Non-Performing Asset's of the banking framework have ascended from 2.4% (on a base of Rs. 23.3 trillion of advances) in 2008 to 3.2% (on a base of Rs. 59.8 trillion of advances) in 2013³⁹.

Also, evidence about credit results highlights the shortcomings in the legal framework for credit in India (Table A)⁴⁰. In the event that Indian debt financing needs to move from the imperatives of a homogenous arrangement of formal Financial Institution's (FI's) and a huge informal

³² See RBI Report on the Committee on Medium-term Path on Financial Inclusion, December 2015.

³³ Id.

³⁴ See World Bank Doing Business Report, 2016.

³⁵ See Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015.

³⁶ See Wadia, N.N (2000), Unshackling the Indian industry, Technical report, Prime Minister's council on trade and industry.

³⁷ Id.

³⁸ See Ravi, Aparna, Indian Insolvency Regime in Practice: An analysis of Insolvency and Debt Recovery Proceedings, Economic and Political Weekly, Vol. 1 No. 51.

³⁹ See RBI Report on the Committee on Medium-term Path on Financial Inclusion, December 2015.

⁴⁰ Id.

business sector to the depth and assorted qualities of heterogeneous private and public debt markets, the corporate insolvency resolution structure of the nation should be changed to accomplish that objective.

INSOLVENCY RESOLUTION PARAMETERS AND CREDIT DATA TABLE⁴¹ (Fig. Below)

(The figure below has been taken from Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015).

(Figure A)

Indicator	United Kingdom	India	Singapore
Rank	13	136	27
Time (In Years)	1	4.3	0.8
Cost (% of Estate)	6	9	3
Outcome (0-Sale; 1- going concern)	1	0	1
Recovery Rate (Cents on Dollar)	88.6	25.7	89.7
Domestic Credit to GDP (In %) ⁴²	171.5	74.8	126.3
Bank Credit to GDP (In %) ⁴³	85.3	93.1	56.5

Source: World Bank Doing Business Report, 2016

BIS Debt Statistics, 2014

World Development Indicators, 2015.

⁴¹ See Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015.

⁴² Domestic credit by financial sector as a % of GDP.

⁴³ Domestic credit to private sector by banks (% of GDP).

HISTORICAL DEVELOPMENT

Historically, the law of insolvency in India is based on the *Roman principle of 'cession bonarum'*⁴⁴. The beginning of the law of bankruptcy backtracks to the colonial period in India and is observed to be enacted in two centrally administered pieces of enactments: 'The Presidency-Towns Insolvency Act of 1909' and 'The Provincial Insolvency Act of 1920'⁴⁵. These two statutes, primarily deal with consumer bankruptcy and the corporate insolvency is managed under the Companies Act of 1956⁴⁶. The passing of Statute 9 in 1828 (Geo. IV. c. 73), can be said to be the start of the extraordinary bankruptcy regime in India⁴⁷. Under this Act, the first bankruptcy Courts for the relief of insolvent account holders were set up in the Presidency-towns. In spite of the fact that the bankruptcy Court was directed by a judge of the Supreme Court, it had an unmistakable and separate presence⁴⁸.

The Insolvency Court was to sit and discard indebtedness matters regularly since it was vital. Be that as it may, the Court at Calcutta was to sit in any event once per month⁴⁹. The Act of 1828 was initially proposed to stay in power for a time period of four years, yet ensuing enactment extended its length of time up to 1843 and furthermore made certain changes therein⁵⁰.

The ancient rudimentary basics of insolvency enactment can be traced to Sections 23 and 24 of the Government of India Act, 1800, which presented bankruptcy locale (jurisdiction) on the Supreme Court at Fort William and Madras and the Recorder's Court at Bombay⁵¹. These Courts

⁴⁴ The term signifies 'surrender' of all his goods by the debtor for the advantage of his creditor, consequently for resistance from the process (Sathya, 2003) at pp. 93.

⁴⁵ See Patnaik, Vaneeta, Elements of Bankruptcy Law and Business Rescue in India, her paper is based on the analysis of the Companies Act as provided in (Ramaiya, 2010).

⁴⁶ See for historical background (Emerging Insolvency In India: Issues & Options), Available at: http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ See Patnaik, Vaneeta, Elements of Bankruptcy Law and Business Rescue in India, her paper is based on the analysis of the Companies Act as provided in (Ramaiya, 2010).

⁵⁰ Id.

⁵¹ See for historical background (Emerging Insolvency In India: Issues & Options), Available at: http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf

were empowered to make rules and orders for giving reliefs to insolvent account holders on the lines expected by the Act of the British Parliament called the Lord's Act enacted in 1759⁵². Though the bankruptcy Court was presided over by a judge of the Supreme Court it had its particular presence and independent existence⁵³. While there was the extraordinary insolvency enactment for the Presidency-towns, there was no bankruptcy law in the rural territories. The primary explanation behind this distinction was the absence of any prospering exchange and business trade in those areas⁵⁴. The enactment of bankruptcy law in the rural zones was in 1877. Rules were consolidated in Chapter 20 of the Code of Civil Procedure, 1877, conferring locale (jurisdiction) on the district Courts to captivate insolvency petitions and concede requests of release⁵⁵. Moreover, guidelines were re-enacted with specific adjustments in Chapter 20 of the Code of Civil Procedure 1882⁵⁶. Also, various lenders (creditors) of a debtor were not entitled to file a suit for an insolvency petition⁵⁷. Subsequently, these ailments were removed by the enactment of the Provisional Insolvency Act of 1907 which was later repealed by the Provincial Insolvency Act, 1920. This statute is now in force in the areas other than the Presidency towns⁵⁸. It must also be borne in mind that the basic substantive provisions of both these statutes are similar⁵⁹.

The Corporate insolvency is managed under the Companies Act of 1956. This Act was enacted on the proposals of the Bhaba Committee set up in 1950 with the object to merge the current corporate laws and as a base for corporate operations in autonomous India. With the sanctioning

⁵² See for historical background (Emerging Insolvency In India: Issues & Options), Available at: http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf

⁵³ See Patnaik, Vaneeta, Elements of Bankruptcy Law and Business Rescue in India, her paper is based on the analysis of the Companies Act as provided in (Ramaiya, 2010).

⁵⁴ Id.

⁵⁵ See for historical background (Emerging Insolvency In India: Issues & Options), Available at: http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf

⁵⁶ Id.

⁵⁷ See Feibelman, Adam, Consumer Finance and Insolvency Law in India: A Case Study (December 16, 2010). Brooklyn Journal of International Law, Forthcoming; Tulane Public Law Research Paper No. 1726583. Available at SSRN: <http://ssrn.com/abstract=1726583> hereinafter (Feibelman, 2010).

⁵⁸ Id.

⁵⁹ Id at pp. 26.

of this enactment in 1956, the Companies Act of 1913 was repealed⁶⁰. The 1956 Act next saw significant revisions only in 1988 on the suggestions of the Sachar Committee. The next real revamp has been just in 2002 on the suggestions of the Eradi Committee Report⁶¹. Furthermore, in the year 2004 another committee was set-up to look into the proposed amendments made to the Companies Act of 1956.

The recommendations of this committee headed by Dr. Jamshed J. Irani were drafted into a Bill and tabled and had been passed as the Companies Bill 2009⁶². This Bill had been considered by the Central Government taking into account the Report of the Parliamentary Committee on Finance and had been entitled as the Companies Bill, 2011 and later renamed as Companies Bill, 2012 - this was set to supplant the Companies Act, 1956 which is right now in force⁶³.

CURRENT FRAMEWORK

Insolvency laws can be broadly classified into two distinct heads, namely; a) Personal Insolvency, which essentially deals with individuals and partnership, corporations regulated by the Provisional Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1908 and (b) Corporate Insolvency, whose consequence is winding up of the corporation under the Companies Act, 1956⁶⁴.

Robust insolvency laws empower a sound debtor-creditor relationship by securing the privileges of both debtors and creditors; advancing consistency; clarifying the dangers connected with

⁶⁰ See Irani, J.J, The report was a result of the Expert Committee on Company Law and published its report in May 2005 advising the government on the new company law, Available at; <http://www.primedirectors.com/pdf/IJ%20Irani%20Report-MCA.pdf>

⁶¹ Before the 2002 amendments the Companies Act additionally saw some form of amendments in the year 1998 and 2000 yet they were not as significant as the 2002 amending act.

⁶² See Irani, J.J, The report was a result of the Expert Committee on Company Law and published its report in May 2005 advising the government on the new company law, Available at; <http://www.primedirectors.com/pdf/IJ%20Irani%20Report-MCA.pdf>

⁶³ See Mulla, Law of Insolvency in India (1958), at pp.16.

⁶⁴ See the Companies Act, 1956 (Act No.1 of 1956).

lending; and ensuring effective accumulation of debt through insolvency proceedings⁶⁵. The Union Budget 2015-16 identified liquidation law reforms as a key priority and proposed a complete Bankruptcy and Insolvency Code, 2015 in accordance with worldwide norms to provide for essential judicial capacity⁶⁶. It is envisaged to achieve legalized assurance, speed and also enhance the simplicity of doing business in India. More so, the word 'insolvency' has not been defined in the Code⁶⁷.

Now, if we delve into the Companies Act, 1956, Section 433(e) of the statute includes a corporation, which is unable to pay its debts, and hence, constitutes a ground for winding up of a corporation⁶⁸. However, it must also be borne in mind that inability to pay debts must be distinguished from unable to pay debts⁶⁹.

Winding up of a corporation would be when a corporation's entire capital is lost in heavy losses and the life of a corporation is essentially brought to an end and its property is administered for the benefit of its creditors and members⁷⁰. The word '*debt*' cannot be deemed to be comprehensive to take into account un-liquidated damages or an un-identified sum inept of being ascertained immediately⁷¹. It should be precise and must be an ascertained sum. Under the Companies Act, 1956 a corporation is deemed unable to pay its debt if the corporation is unable to pay the debt exceeding rupees five hundred after the expiry of three weeks from the date of issuing of the notice claiming the payment by the lender⁷². Section 434 of the Companies Act, 1956 primarily deals with the position when the corporation shall be deemed to be unable to pay its debts.

⁶⁵ See RBI Report on Report of the Committee on Medium-term Path on Financial Inclusion, December 2015.

⁶⁶ Id.

⁶⁷ Sourced from: <http://www.mbcindia.com/Image/18%20.pdf>

⁶⁸ See the Companies Act, 1956 (Act No.1 of 1956).

⁶⁹ See Smt. Nagaveni Bhat v. Canara Leasing Ltd. ILR 2001 KAR 5569.

⁷⁰ See the Report of the Advisory Group on Bankruptcy Laws, Available at: <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁷¹ Id.

⁷² Id.

Moreover, under the Companies Act, 1956 the winding up proceedings are generally provided under section 425 of the statute and the grounds under which a corporation may be wound up is provided under section 433 of the Companies Act, 1956⁷³. Broadly speaking, a corporation may be wound up either by; a) The National Company Law Tribunal (NCLT - Compulsory winding up) or, b) Voluntarily⁷⁴. There used to be a third option available to the corporations prior to the 2002 amendment of the Companies Act. This option was '*voluntarily winding-up*' wherein which the Court orders the same to be carried on, but subject to the supervision of the Court⁷⁵. The 2002 amendment had replaced the word '*Court*' for the Tribunal in current usage. As enumerated above, till the approval of the Tribunal the presently existing forums would continue to play a crucial role. Additionally, The Sick Industrial Companies (SIC) Act, 1985 constituted the closest option to an inclusive bankruptcy framework which had established a quasi-judicial body, the Board for Industrial and Financial Reconstruction (BIFR), to fortify apt detection of '*sick*' industrial companies and provided a suitable type of intrusion⁷⁶. Furthermore, it must also be borne in mind that this procedure is only applicable to industrial corporations that have been registered for more than five years and have further accumulated losses at the end of any year which is more than their net worth⁷⁷. Once an application for intrusion has been filed, the Board for Industrial and Financial Reconstruction (BIFR) has three viable choices, namely⁷⁸; a) it can give its consent for a management/lender sponsored arrangement without concessional investment, b) establish un-viability of the business and advise insolvency to the Court (pursuant to the Companies Act, 1956 as discussed above) or, c) assert that the corporation must be revamped in

⁷³ See the Companies Act, 1956 (Act No.1 of 1956).

⁷⁴ Id.

⁷⁵ See Patnaik, Vaneeta, Elements of Bankruptcy Law and Business Rescue in India, her paper is based on the analysis of the Companies Act as provided in (Ramaiya, 2010).

⁷⁶ See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

⁷⁷ The Sick Industrial Companies (SIC) Act characterizes net worth as the sum total of paid up share capital and free reserves; free reserves incorporate all reserves from profits and share premium account yet not from the revaluation of assets, depreciation write-offs or mergers & acquisitions.

⁷⁸ Id.

public interest and endorse an arrangement involving chief concessions and forego itself from different groups as well as subsidies from the government. Moreover, The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) accredits the Financial Institutions (FI's) to redeem their non-performing assets (NPA's)⁷⁹. This statute provides viable choices for recovery of non-performing assets (NPA's), namely; a) Asset Reconstruction, b) Securitization and, c) Enforcement of Security without the intervention of the Court⁸⁰. More so, Recovery of Debts due to Banks and Financial Institutions Act, 1993 is an exceptionally contentious and commonly challenged legislation accepted as part of the fiscal reforms in the early nineties (1990's). This statute authorized the banks and other financial institutions to pursue recovery of debts more than Rs 10 lakhs by filing a petition before the Debt Recovery Tribunal (DRT)⁸¹. Subsequently, the Debt Recovery Tribunal issues a recovery decree (preliminary) (by way of the liquidation of assets) following a fairly quick procedure of appraising and legitimizing the claim which might countermand or override the other two rules in the jurisdiction, predilection and priority of claims⁸². Also, various banks and other financial institution's compared to various other litigants experience the procedure by following the cases for recovery through civil Courts for overly extensive periods of time (Justice Eradi Committee Report, 2000). The Fig. B below (next page) shows an outline of the diverse legal alternatives available to a corporation under fiscal tribulation⁸³.

⁷⁹ See Parasaran, Mohan, Additional Solicitor General of India, Note on the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act of India, 2002, Clean Energy Investment US-India Partnership, Centre for Climate Change Law, Columbia University, Columbia Law School.

⁸⁰ Id.

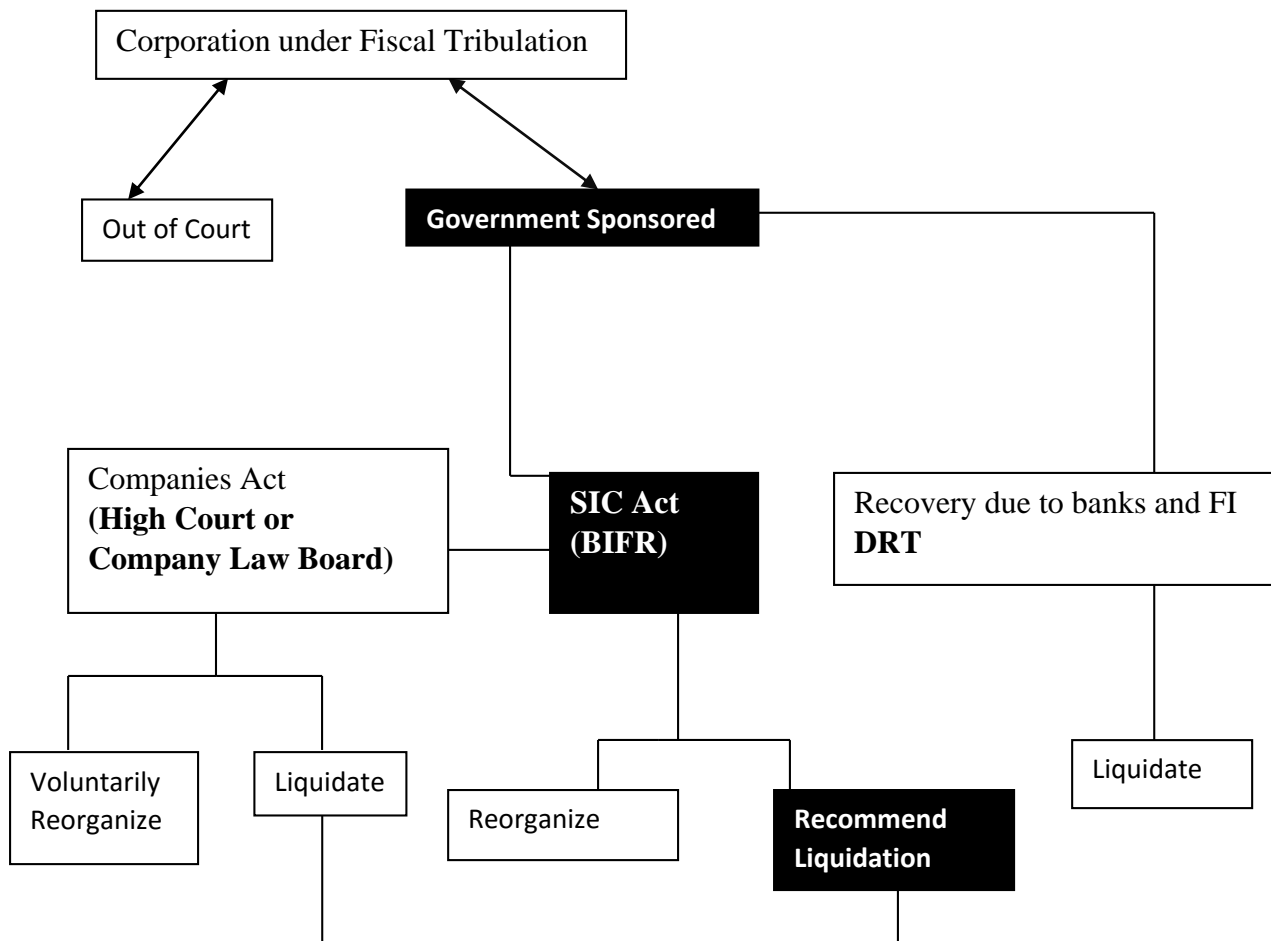
⁸¹ See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

⁸² Id.

⁸³ See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

(Note 1: Fig. B has been taken from Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Schematic Chart at pp. 5, Oct. 03-Mar. 04)

(FIGURE B)



(Note 2: The black coloured boxes represent the actual procedure undertaken by various corporations in widely held cases pertaining to fiscal tribulation).

Source: See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Schematic Chart at pp. 5, Oct. 03-Mar. 04.

PRIORITY OF CLAIMS IN LIQUIDATION

Section 530 of the Companies Act, 1956 determines certain payments in priority to every other debt subject to payment of workmen's dues and debts due to secured lenders on a '*pari passu*' (evenly) basis⁸⁴. This is an imperative provision as it draws out the pro-lender and pro-dispensation administration predisposition of the Indian law. The payments to be made first are called '*Preferential Payments*'. "*They must be paid in priority to all other debts*"⁸⁵.

Subsequent to retaining sums imperative for meeting the expenses and costs of winding up of the corporation, the above debts must be discharged forthwith to the extent assets are adequate to meet them⁸⁶. Where the Liquidator carries on business for gainful winding up, the taxes that get due on the profits are the costs of winding up⁸⁷. Also, the payment due to a Chartered Accountant in preparing the balance sheet is also an overhead cost or expense of winding up of the corporation. The '*Preferential Payments*' rank evenly among themselves and have to be discharged in full settlement. But, when the assets are inadequate to meet them, they shall abate on a '*pari passu*' (evenly) basis. Moreover, by virtue of Section 178 of the Income Tax Act, 1961, the Income Tax authorities have claimed priority over other preferential payments⁸⁸. Nonetheless, the Courts have held at various occasions that there is nothing in the statute that negates or hinders with the provisions for priority of claims as laid down under Section 530 (1) (a) of the Companies Act⁸⁹.

⁸⁴ See Singh, Avtar, Company Law, Lucknow: Eastern Book Company (IXth Edition), at pp. 506-508.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ See the Report of the Advisory Group on Bankruptcy Laws, Available at: <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁸⁸ See Section 178 of the Income Tax Act, 1961.

⁸⁹ Supra Note 61.

THE ROAD AHEAD

The life of a corporation has its highs and lows just like a living being⁹⁰. There are various reasons for the same. To put it in simple terms, purely an expert corporate practitioner can identify the ailment and regulate the treatment⁹¹. There might be certain situations where for some other reasons the speedy demise of a corporation is conceivably better for the financial system altogether⁹². Regrettably, in a country like ours there is no corporate practitioner to efficiently identify and regulate the proper treatment at an appropriate moment⁹³. Corporate law neither provides for any such methods that effectively ensures superior governance nor sufficiently protects the health of the corporation⁹⁴.

In India, the legal structure that essentially deals with corporations in tribulation is multifaceted, concerning a blend of collective insolvency and debt enforcement statutes⁹⁵. Moreover, the significance of a well-functioning insolvency resolution structure can barely be overstated. Prior to the introduction of the Insolvency and Bankruptcy Code, 2015 corporate insolvency regimes differed considerably across the nation and in varied respects. Likewise, insolvency statutes kept evolving over a period of time and did not remain static, thus, making it even more complicated to arrive at a steady system for designing a proper resolution mechanism⁹⁶.

⁹⁰ See the Report of the Advisory Group on Bankruptcy Laws, Available at; <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁹¹ Id.

⁹² See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

⁹³ Id.

⁹⁴ See the Report of the Advisory Group on Bankruptcy Laws, Available at; <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁹⁵ See Ravi, Aparna, Indian Insolvency Regime in Practice: An analysis of Insolvency and Debt Recovery Proceedings, Economic and Political Weekly, Vol. 1 No. 51.

⁹⁶ See Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015.

More so, the N.L Mitra Committee⁹⁷ had made certain recommendations about an all-inclusive rework of Bankruptcy laws. The Bankruptcy Law Reforms Committee had thereafter made certain recommendations in order to formulate a fresh Code⁹⁸. The effort of the Bankruptcy Law Reforms Committee in order to provide for a fresh code is a one of a kind initiative undertaken by the committee on the account of Indian codification since, at present there is no such structured, comprehensive insolvency statute in India⁹⁹.

Lastly, the Code ought to give prominence to the lowering of the overhead costs of transactions during the bankruptcy process and that must be its chief objective. The bankruptcy body must pave the way for decision-making and assume an empowering role rather than be a judge of what is an adequate reallocation of existing claims¹⁰⁰. Obviously, for this to have any significance, it must guarantee that the negotiating parties deliberately acknowledge all reallocations¹⁰¹. This is best accomplished when the parties have data, the ability to assess the significance of alternative propositions, are not pressured into accepting reallocations that are not ideal to them, and, in particular, know how the court will settle the dispute on the off chance that it can't be deliberately determined by the respective parties¹⁰².

⁹⁷ See the Report of the Advisory Group on Bankruptcy Laws, Available at; <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

⁹⁸ Id.

⁹⁹ See the Report of the Advisory Group on Bankruptcy Laws, Available at; <https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225>

¹⁰⁰ See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

¹⁰¹ Id.

¹⁰² Id.



RELATIONSHIP BETWEEN LAW & RURAL MANAGEMENT

AGAM MALOO¹⁰³

Abstract

From the advent of independence to the contemporary arena, a lot of changes to the rural areas have been done by Indian government. However, may be government was working on rural development (after independence) a bit lazily but due to circumstantial problems the government had no option but to work relentlessly, the problems was the separation of India and Pakistan and influx of people from Pakistan to India which caused burden on Indian government to accommodate the refugees and provide them land for cultivation because most of them were uneducated and did not know anything except doing agricultural activities, due to this reason government was originally able to demarcate between rural and urban, because the populated areas with agricultural land were rural and other than this the population which used to work, study and were employed was the urban.

The reason being the rural areas needed attention more than urban in India because the rural areas were lagging behind in development and the less educated were more in number and maximum were living in rural areas, they were lagging behind in Policy Implementation Methods, employment, Connectivity with Urban Areas, Gender Inequality, Low Wage Rate, Residential problems, having good Cultivation Methods. To cope up with the problem was not the options because such turmoil was causing a great economic loss in terms of marketable surplus in agricultural sector, capital formation. The government in response to such an economic loss has no option but to implement such policies namely – “Panchayati Raj System”, “Swarnjayanti Gram Swarozgar Yojna”, “MGNREGA”, “Pradhanmantri Gram Sadak Yojna”, “Indira Awas Yojna”, “Rajiv Gandhi Gramin Vidyut Yojna” and many more which could make the rural areas developed and make the rural population active in economic formation.

Keywords

Rural Management, Growth & Development, Law

¹⁰³ Raffles University, Neemrana



Introduction

The word law in general parlance is the set of rules and regulations used to govern the society. And the relation of it with the word “rural” is very archaic, and India sets a good example of the same. India! The country where out of the 1.252 billion unbridled population, 68 % of this lives in rural areas, the reason just because prior to the advent when the fight was between two Kingdoms namely, India and Pakistan, caused a serious disrupt which led to partition East Punjab and West Punjab, just because of this the Hindus and Sikhs were shifted from west to east which caused a sudden burden on the government, but due to circumstances the government of India had to accommodate all these refugees and the government of India without being restive in between great turmoil took out the solution of the same and settled refugee camp in the Kurukshetra, which was greatly evident of the battle of Mahabharata and history was still lying on the surface of Kurukshetra but this time it was not between the Kauravs and the Panadavas.

Vast numbers of tents were there which were having the capacity of 100,000 refugees and daily it welcomed 20,000 refugees but at a particular time the burden was so increased that the camps had to accommodate 3 times of it. The guests were used to consume about 100 tons flour daily including lentils, sugar etc. and the services were free due to the helping hand of “United Council for Relief and Welfare” (UCRW). The irony was that the most number of migrants were “Farmers”, they were not supposed to leave their land if were promised with honorable living but nothing such happened and they had to leave their land at the last moment. The same situation was also in Bombay and Calcutta, the peasants and other refugees don’t have any productive work to pursue thus, to avoid this the government started showing the movies featuring of Disney characters named Donald duck and Mickey mouse, the consequences of which made the helpless and impoverished refugees forget their misery for about 2 hours. But this setup was not solution of the problem because about 300,000 refugees were sitting mad and the government had to set rules and regulations which led permanent work and housing facilities because the economy of the country was facing a serious backdrop in terms of both economic



growth and economic development. As a result of this, peasant started shouting that they don't need so much of care instead of that they should be provided with land, which could be cultivated. Farming is the only one and productive occupation which doesn't need any educational qualification. And as a result of this, government started allotting 4 hectares of land from the 1.9-million-hectare land which the Muslims left behind, loans were also given at low ROI (Rate of Interest) to buy seeds and equipments. While cultivation commenced on these temporary plots, applications were invited in which the refugee family has to mention the land which they lose prior.

At this juncture it's very easy to demarcate between the rural areas and urban areas (reason is that before partition of India the "British Raj" used to prevail and maximum work was under their hand and population management was not also disrupted) because now the areas in which people who were involved in farming activity was called as rural areas and other than the place in which people used to reside and do other occupation was known as urban areas.

Now from that time (since 1947-48) rural areas are less developed as compared to the urban areas the reason being the people residing there are farmers which are not adequately educated, and on the other hand, urban population always used to develop techniques according to their needs. So the government of India has to make some guidelines or laws to develop the rural areas (process is known as rural development) i.e. to modernize farming methods, land use as well as rural property rights should be pushed up and other important things are also there like fire department, library, schools, street lights, garbage managing system etc., all these things are very necessary for a development of the rural areas the reason behind the same is because about three-fourth of the population of the India resides in rural areas and the development of the same also lead to a great difference between the urban and rural population can lead to a great political instability and nearly country's half of the national income is derived from agricultural sector, which is the main occupation of rural India. Also, the maximum number of raw material for industries come from agriculture sector and if we see on the other side then around 70 percent of the employment of nation comes through the agriculture sector. Thus, any drop in country's

rural development can lead to great economic loss in sense of economic development because if the rural population is not properly educated and properly facilitated then, the productivity level will start declining, then wage rate will start declining and efficiency of working will also start declining and will lead to fall in consumption and can result in fall quality of food, shelter and health and this cycle will continue to be go on as a cycle.

However it's not the facilities that lead to backwardness of rural areas but certain things which the rural population has itself developed in it like –

- Traditional way of thinking
- Lack of confidence
- Existence of unfelt needs
- Personal ego
- Poor understanding

Law has emerged time-to-time technological and resources advancement but despite of this efforts, India is lagging behind terms of rural development.

In India “Ministry of Rural Development” is the apex body to govern and regulate the conditions in the rural areas. The mission of the ministry is to bring out sustainable development in India by providing better education, food, good land reforms policy i.e. the acceleration of the working efficiency of agricultural system and ensuring a quality of life. The ministry has presently two departments naming the “Department of Rural Development” and “Department of Land Resources” which is led by civil servants Mrs. Anita Choudhry who is the Secretary, Land Resources and Mr. Jugal Kishore Mahapatra of rural development.

If we look behind the first initial step to improve the rural condition was the “Panchayati Raj System” and after this several other were also initiated which will be discussed later.

Panchayati Raj System

The Ministry of rural development through the Panchayati raj institution want to increase the facilities in the rural areas and want development and efficient rural India. The panchayati raj system was the dream of our father of nation, he wanted that every village in India should possess a Panchayat or Republic and thus, the dream was constructed in a true sense, which led to participation of each and every villager into the development of village, the first attempt to confer a constitutional status to the panchayati raj institution was constitutional bill (64th amendment) and the same was introduced in parliament in 1989 by then prime minster, Shri Rajiv Gandhi. The Constitution(73rd amendment) Act, 1992 brought a new part IX and the Eleventh Schedule to the Constitution of India, the said amendment screened the gram Sabah and the basis of panchayati raj to perform functions and powers given to it by the state legislature system. The said act described the three tier PRS at the village, intermediate, and at district level. Panchayati raj institution has the power to provide guide lines for the implementation of the policies for rural development or more clearly we can say that it is the administrative tool for rural development. The agenda of this institution is to strengthen the aim of panchayati raj in various states as according to the 73rd amendment act, so the panchayats could foresee the better development of rural administration and rapid rural development, objective is to setup democratic transfer of power from central to local self government and thus leading to rapid inexpensive justice and betterment of social and economic conditions of the rural life. The said charter has been divided into 7 subjects –

- Rural cleanliness program
- Decentralization program
- Control over gram panchayats
- Responsibility of panchayats
- Responsibility of public towards panchayats
- Arrangement of panchayati helpline
- Financial aid to gram panchayats.

Thus all these subjects under this institution are making a step towards a better rural India with complete coordination and transparency.

Swarnjayanti Gram Swarozgar Yojana (SGSY):

The following said initiative was introduced by government of India in the month of April 1999 to provide a sustainable income to the poor population of rural areas, by introducing the method of self employment by organizing self-help groups according to the skill and aptitude through the process of capacity building, provision of income generating asset and their training, with an objective to bring these people (poor rural population) above poverty line, these BPL families will be considered by Gram Sabah. Each cluster works on a particular activity through its skill, resources and market potentiality. Funds to this scheme are provided by the central government and state government by the ratio of 75:25, and of the subsidy by government. The SGSY is being implemented by District Rural Development Agencies with the active involvement of Panchayati Raj Institutions (PRI). The scheme will promote the marketing of the goods produced by the clusters. Usually this scheme was also initiated to expose skills of rural women who are not allowed to work outside, this scheme helps them to interact with other women, which will develop self confidence in them and group meetings also help them to identify and patronize their needs. The most elemental thing of cluster approach is that people either to fund diverse activities, each block should be selected for the same and attend to the entire variable aspect of this activity the swarojgaris can gain a reasonable income. Activities are being taken in clusters; the reason is because the forward and backward linkage could genuinely be established. This would establish the provision of different services needed by swarojgaris and monitoring also. More employment laws were also initiated which guarantee work to unskilled, to people of rural areas who are willing to work.

National Rural Employment Guarantee Act 2005:

National Rural Employment Guarantee Act 2005 the name which was later amended and kept as "Mahatma Gandhi National Rural Employment Guarantee Act 2005" (MGNREGA) is a labor law

introduced in 2005 and was spread across 200 district and by 2008 it was spread all over country. This scheme is for rural adults who are willing to work and registers to local gram panchayat (orally or in written) for rural employment and get casual manual labor for 100 days of employment (days every rural household not exceeding 100 days), because a maximum number of backward rural areas of country are mainly dependent on the wages they earn through the unskilled and manual labor. In this, if a person is not getting employment within 15 days of registration for this scheme then he shall get unemployment allowances and if a man doesn't get employment within 5 km radius then he will be compensated. The agenda of the this act is not to providing 100 days of employment to the rural households but to increase GDP of the country as well promoting equality without gender discrimination, i.e. women and men will get equal amount of wage. The beneficiaries in this scheme will get their wages, compensation or allowances in their respective bank accounts or post office accounts.

The other jubilant effect point of this scheme was, there are only 30 % of underweight children in 2014 vis-à-vis in 2005 47.7 % it was¹⁰⁴.

The MGNREGA physical progress report (2015-16 Survey) of some of the major states in India is rolled down in the below mentioned following table¹⁰⁵:

S.NO	STATES	Cumulative No. Of HH issued for Job Cards				Cumulative No. Of HH Provided Employment
		SCs	STs	OTHERS	TOTAL	
1.	ANDHRA PRADESH	2269015	766482	6315564	9351061	3427668
2.	GUJRAT	271723	1269724	1981929	3523376	465882
3.	RAJASTHAN	1795837	1739481	6339664	9874982	3955078

¹⁰⁴ International Food Policy Research Institutes Global Hunger Index.

¹⁰⁵ Ministry of Rural Development.

4.	BIHAR	3378505	224349	9416320	13019174	1282092
5.	PUNJAB	854846	327	297382	1152555	421290
6.	WEST BENGAL	3253417	934957	7998024	12186398	5527639
7.	TAMIL NADU	2325810	131863	5868364	8322037	5781162

And the total number of rural house hold provided Employment under this scheme including all states is “43578669¹⁰⁶” and maximum number of employment was provided in “Tamil Nadu” having “5781162” No. of HH employed.

However, employment alone cannot develop rural areas, it's the connectivity of the rural areas to the urban areas which cause a serious drawback in rural development, if a rural areas is not connected to urban areas or other areas nearby then it is very toiling to get development in that area. In effect of this, a central sponsored scheme is introduced naming.

Pradhanmantri Gram Sadak Yojna (PMGSY):

“Pradhanmantri Gram Sadak Yojna” (PGSY) is usually a central sponsored scheme, initiated on dated 25th of December of year 2000 with an aim to provide all weather road connectivity in rural areas having population of 500 or more in plain areas and 250 in respect of hilly areas (North-East, Sikkim, Himachal Pradesh, Jammu & Kashmir, Uttarakhand), desert areas (As mentioned in Desert Development Program) and tribal areas (As mentioned in Schedule-V¹⁰⁷) to maintain livelihood opportunities, connectivity with society at national level and market. The scheme was planned to start when it was found that around 1.70 lakh unconnected rural are to be connected¹⁰⁸.

¹⁰⁶ Ministry of Rural Development.

¹⁰⁷ BAKSHI P.M., *The Constitution of India*, (10th edn. Universal Law Publishing Co. 2015) Pg 408.

¹⁰⁸ Ministry of Rural Development.

The latest survey available by the state government found that around 1.67 lakh habitats are being covered under this scheme and to cover this it involves construction of 3.71 lakh kilometers of new road connectivity. This program also involved up gradation of existing routes and important connectivity to ensure good market. This scheme tend to ensure the all weather road connectivity i.e. the roads which can be operated in all seasons by making is strong and durable with culverts and cross drainage structures which will remain rigid throughout the year. This agenda of this scheme to improve conditions of habitation, which doesn't include village or panchayat unit, it includes Desam, Dhanis, Tolas, Majras, Hamlet¹⁰⁹ etc.

The scheme will provide core network only to the habitations that will fulfill basic access to socio and economic services and in adverse condition it will provide a single lane all weather road connectivity. Here are some recent (2015) data of work progress of Pradhan Mantri Gram Sadak Yojna¹¹⁰:

Number of works cleared	New Connectivity Works	Up gradation works	Completed road works	Completed length (Kms)	In Progress road works
139,815	101,097	38,718	118,525	455,581	21,290

Parallel to this maximum number of road expenditure is done in "Bihar" amounting 16, 14,963.830 lakh rupees.

Indira Awas Yojna:

With the escalation of population in rural areas, the paramount challenge which government face is to provide roof to people or more clearly we can say that to provide housing to the poor rural

¹⁰⁹ Terminology to define Habitations.

¹¹⁰ OMMAS.

population. To come over this challenge the government of India shrewdly introduced a social welfare flagship program known as “Indira Awas Yojna” in which Awas means residence. Initially the name was to be “*Rural Landless Employment Guarantee Program*” which came into existence since 1985- 86 and later named as “Indira Awas Yojna”.

The agenda of this scheme is to provide shelter to the impoverished rural people or to provide financial assistance to poor. Schedule Caste & Schedule Tribe, BPL, Ex-Serviceman of armed and paramilitary forces killed in battle, Mentally & Physically challenged, Bonded Labor that are freed, Non-Schedule Caste & Non-Schedule Tribes. Centre and state provide fund to the Indira Awas Yojna scheme by sharing by the ratio of 75:25. In case of union territories the center gives fund to DRDAs and the beneficiaries draw funds from DRDAs through gram panchayat. Financial assistance given under this scheme is 75,000 (w.e.f from 2013), earlier it was 45,000 to 48,000. And the listed beneficiaries can also get loan around 20,000 rupees at low Rate of Interest. Assistance to upgrade the Kutcha House to Pakka House / Semi-Pakka house is also available under this scheme.

However, under the scheme, assistance is given on the bases of allocation & target fixed, District Panchayat/ Zila Panchayat/ DRDAs decide the number of houses to be constructed and to be upgraded. The houses to be constructed under this scheme will be on 20 sq. area and under this scheme the electricity will also be provided by IAY through RGGVY (Rajiv Gandhi Gramin Vidyut Yojna) and apart from this the beneficiaries will get a Chulla (Smokeless) and a Sanitary Latrine.

The allotment of houses under this scheme will be on the female member of the benefitted household or in the name of Husband & Wife, in cases there is no female member then the name male member will be registered,. And the said houses will be constructed near the particular village to make people available to common needs and will be connected to the nearby population.

Here is the data of some states physical achievements under this scheme (2010-11)¹¹¹:

S.NO	NAME OF STATES / UT	ANNUAL TARGET FOR THE YEAR	TOTAL NO. OF HOUSE SANCTIONED (INCLUDING SC, ST, MINORITY AND OTHERS)
1.	BIHAR	758904	1003162
2.	RAJASTHAN	63362	80696
3.	KERELA	55084	52998
4.	MADHYA PRADESH	79073	7126
5.	MAHARASHTRA	155052	157567
6.	GUJRAT	126090	178136

Now the list of rural development programs will continue because there are so many of the programs started by the government such as - *DDU-GKY, National Social Assistance Program, PURA, DRDA administration, PMRDEs* etc. The reason is the private capitalist, are always in a hurry to re-invest there “Capital Surplus” in their respective industries and this tend to an escalation in the demand of labor and this lead to influx of labor from the rural sector, which usually tend to increase the wage rate in rural sector and by this the rural sector can never be able to make their capital surplus (or saving) and they will never able to invest in there sector. By this reason there is no option left to the government, but to invest and to make the rural sector developed.

Our government may be always try to make our economy increasing but in run increasing our economy commits a mistake that lead to a little bit of feud in between rural population and

¹¹¹ Ministry of Rural Development.

government. The example of the same is “The Land Acquisition Act”.

The reason being land acquisition is included in this category because the same Act is said to be Anti-Farmer Bill because acquiring farm land for the private industrial construction, without the consent of the owner of the property seems to be biased, along with that the compensation paid is not adequate with the same and if any land owner whose property is being acquired under this act wants to lodge a complaint then he has to seek permission of government. The said government which is uprising the bill is making a staggering effect on the farmers, its stating that the farmers who oppose this bill are opposing the development of the nation, because they are stopping the growth of the private industries. The government is presuming the private growth more important in pushing up the economy as compared to the agriculture sector or more precisely we can say that rural development. But the true fact is that both are equally involved in pushing up the economy and the fact is that the maximum number of population is involved in agriculture. Now, if the government will acquire the agricultural land for the private purpose then land for growing of the grain and other lentils will decrease which will lead to less production and on this less production even the Indian population (rural as well as urban) can't even subsist, and how with this less growth the grains will import to other countries, and without any appropriate productivity level the economy will not increase. But the anomaly is not that the government implements some laws off the way of rural development but the anomaly is that despite such prevailing conditions in India where *“only thing which is uniform is diversity”*, government and our law making bodies are making schemes and implementing them for suitable brethren.



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CRITICAL ANALYSIS OF ADVERTISING LAWS AND ITS IMPACT ON BUSINESSES IN THE CORPORATE WORLD

AKARSHITA DHAWAN¹¹²

Abstract

Advertising laws have a direct and significant bearing on business activities. Adherence to legal mandates is determinant of success in the long run, since it creates brand loyal consumers, trusting investors and motivated employees. This article is focused on television advertisements; however the interdisciplinary approach seeks to showcase the interface between advertising as a marketing practice, and the laws governing this activity. Although governed by multiple legislations, TV advertisements have found escape routes in deceptive, comparative and surrogate advertising among others. In response to prohibiting such acts which contravene public interest and foster unfair competition, enforcement of a series of regulations have been undertaken. Drawing from recent examples and landmark judgments, the article seeks to scrutinize the application of the numerous prevalent laws, while at the same time the necessity and desirability of a single uniform legislation is highlighted. Voluntary regulatory authorities, such as ASCI are the non-statutory watchdogs of. Violation of laws invites the consequence of punishment as well as the indirect but considerable damage to the defaulting firm's reputation as also the consumer base. Hence, the advertising decisions taken by a marketer are extremely crucial, since they have the potential to bear direct adverse impact on all the stakeholders concerned. The advertising laws governing this important business activity, as they obtain today, are very lax. However, if complying with legal and moral corporate practices becomes embedded in the culture of the firm, they are likely to pay rich dividends like increased revenue and generation of tremendous good will.

Keywords

Television Advertisements, Advertising Law, Interdisciplinary Approach

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Introduction

In this era of globalization, new products are being thrown into the market very frequently, each marketed in a unique manner. The challenge of tough competition stands as a barrier in all industries. In order to thrive in this neck-to-neck competition, and simultaneously increase sales in addition to building a strong brand, advertising strategies are at the core of every business activity.

Advertising, especially in India, has a close nexus with the thoughts and beliefs of the target population. In turn, advertising, profusely impacts the way people view their values, choices and behavior. Advertising is the key tool used by marketers to make their offering known to the people, and portraying the product or service with the aim of inducing the consumers to buy things they do not want or need.

Advertising industry in India has been expanding for the last few years and has developed as a full-fledged business in itself. However, the growth of this industry is affected by the prevalent malpractices carried out by advertisers in order to lure the consumers and to sustain an upper hand over the competitors. While trying to achieve the objective of creating awareness, the use of different media- print, audio –visual, internet etc. is prevalent. It is imperative for a marketer to keep in mind the legal and ethical issues while making choices because it has a bearing on all stakeholders involved with the business. Adhering to corporate values based on moral judgment is reflective of the approach and ideology of the organization.

Being a student of marketing as well as law, it is imperative to have a bird's eye view of the advertising practices, ethical issues faced by firms and the advertisement law prevalent in the Indian legal regime. This interface between law and marketing is a subject matter of great importance to business organizations as it is determinant of their success. It is a naked truth that advertising is a business strategy which is a powerful tool for enhancing, maintaining and developing brand equity. In addition, if the firm does its marketing activities while respecting the



legal framework, it emerges as trustworthy. Both these aspects help in building a strong brand and culminate in the success of the firm.

The present article focuses on advertising laws governing one of the most popular forms of media i.e. television. There are innumerable advertisements that one watches on TV in one day. But we are least bothered about the nuances that are to be taken care of to remain within the legal framework. Although, there is an absence of a uniform single legislation for regulating advertisement in any media in India, there exists a series of legislations and regulations relating to advertisements. The present study highlights the issues related to advertising, the legal scenario, regulatory authorities, various legislative mandates and the stringent penalties on contravention of the provisions. This complex regulatory mechanism, footed in a number of legislations, is the interface which forms the basis of this interdisciplinary approach.

Issues in Advertising

Advertising is a powerful instrument for enhancing, maintaining and developing brand equity. With its gradual development, advertising has transformed into a separate business industry. New tactics are used, in addition to creating awareness, both having the aim of selling the offering. But in doing so certain legal and ethical facets are to be borne in mind. There are many activities adopted by advertisers which are illegal, immoral or simply not acceptable. Some of those have been enumerated here.

Many a time, advertisements use false statements and make misrepresentations, while trying to persuade customers. This is illegal as it violates the customers' right to know exactly what they are purchasing. This can be understood from the 'Fair and Lovely' cream- which promises fairer skin, but its practicality remains a question. **Deceptive advertising** offers a one-time advantage, and can prove to be detrimental to the brand image in the long run. Here, there is difficulty in making brand loyal consumers. Also, non-compliance with regulations leads to reducing reputation in the market.

Culture and the external environment impact advertising. However, there were few cases of **obscenity, indecency and immorality** in advertisements. For example- the ad for “Axe” deodorants for men was obscene and denigrated women. With changes in the society, such issues are bound to emerge. In response to this, legislations, which aim at maintaining a standard of decency and morals, are in place.

Now, the advertising companies face huge challenges if the offering of the company is such that its advertisement is prohibited. **Surrogate advertisements** are an escape route to this explicit prohibition. The manufacturers of products like tobacco or liquor, which have adverse effect on health and are restricted or banned, tend to launch new products with similar brand names. This disguised advertising is done to make customers aware about market availability of these products as direct promotion of these products is prohibited by law.¹¹³ It works as it gives the subtle message to its audience. Be it “Mera No.1” or “*Khub Jamega Rang, Jab Mil Baithenge Teen Yaar, Aap, Main aur Bagpiper*”, a person who consumes alcohol will understand. Surrogate advertisement is not banned in India, but they have to be screened by Censor Board of India. Ministry of Information and Broadcasting in June 2002 served a show cause notice on some of the surrogate advertisements like *McDowell’s No. 1* and *Gilbey’s Green Label*. The advertisements were taken off- air the companies were asked to adhere to Cable Television Regulation Act 1995.

Another issue which has come up in the field of TV advertisements is **comparative advertising**. Generally, there is nothing wrong in comparing one’s product or service with that of a competitor’s. However, when such comparison is done with a mala fide intention to disparage the other’s product, it leads to infringement of trademarks of the competitors (as per the Trademarks Act, 1999) and promote unfair competition. This can be understood from the TV

¹¹³ Chetanya Rajput, “DISGUISED INTENTIONS – Surrogate Advertisements”, [MarkMity](http://markmity.wordpress.com/2012/08/02/disguised-intentions-surrogate-advertisements/), August 2, 2012
<http://markmity.wordpress.com/2012/08/02/disguised-intentions-surrogate-advertisements/> Accessed March 31, 2014

advertisement of 'Dettol' and 'Lifebuoy' (as discussed later under the heading *Legal Scenario in India- Trademarks Act, 1999*).

LEGAL SCENARIO IN INDIA

When we discuss legal issues in marketing, it is pertinent to note that every organization is not only required to follow the legal mandates, but also conform to ethical standards set by the firm itself, in order to build a trustworthy reputation in the market. Although advertising can be claimed as a matter of right under Article 19(1) (a) of the Constitution, there are many restrictions and prohibitions on it as well. The Supreme Court had held in a landmark judgment¹¹⁴:

"We, therefore, hold that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the constitution".

Advertisement is often described as commercial speech and it facilitates the dissemination of information about the sellers and their products. Hence, it is a facet of the Right to Information as well. However, the manner of facilitation is subject to a number of statutory provisions. Under the Indian legal regime, the prominent, prohibitory legal provisions that regulate advertising are:

1. *Telecom Regulatory Authority of India*

The number of advertisements in between programs, though is informative, proves to cause viewer irritation. In response, the TRAI issued a notification in May 2012 **limiting television advertisement duration to 12 minutes in an hour** and has come up with a proposal to regulate the duration, frequency and timings and audio level of advertisement. This was bound to have a negative impact of the revenues of broadcasters, who reacted by challenging this regulation.

After repeated warnings from TRAI to obey the rules, the broadcasters agreed to a phased shift to the limit in May. Every TV news channel agreed to limit advertising to **20 minutes** per hour starting 1 July and all other channels to 16 minutes. This was to be in force **until 30**

¹¹⁴ Tata Press Limited vs Mahanagar Telephone-Nigam Ltd. AIR 1995 SC 2438

September, 2012, following which the 12-minute-per-hour rule was to be observed.¹¹⁵ In May 2013, TRAI has filed a cases against channels like Zoom, Aaj Tak, Zee News & Maa TV among 16 channels, for non- compliance with the 12 minute rule. Compliance with the advertising limits has risen to 97% after the first set of cases was filed in the court.¹¹⁶

The TRAI has also pointed out that news and current affair channels cannot run more than two **scrolls at the bottom** of the screen, occupying a **maximum of 10 per cent screen space**.¹¹⁷ It also says that advertisements should not in any manner interfere with the program use of lower part of screen to carry captions, static or moving alongside the program. This is a challenge for news and business channels as they broadcast weather conditions, BSE and NSE prices, commodity prices and exchange rates among others. There is a constraint because of the nature of content to be displayed as this information can't be shown by stopping the program and advertising. It is to be accommodated on the screen itself.

2. Ministry of Information and Broadcasting, Govt. of India

It was in May 2011 when the Ministry of Information and Broadcasting banned certain television commercial for men's deodorants while claiming that it wanted to curb advertisements targeted which were indecent and obscene. Brands affected include **Wild Stone, Addiction Deo and Axe**, wherein women were shown to be highly influenced by the deoderent applied by the men. As per the Ministry, these advertisements tend to denigrate women and should be broadcasted.

3. Indecent Representation of Women (Prohibition) Act, 1986

The same object as the above notification of the Ministry is enshrined in this Act as well. It is aimed at prohibiting indecent representation of women through advertisements or in

¹¹⁵ Shuchi Bansal, August 28 2013 , “Trai takes broadcasters to court over ad cap violation”, Live Mint and the Wall Street Journal, 2012, Accessed on 30th March 2014,
<http://www.livemint.com/Politics/bIYdFkbe6IC9Q5lZIakS5H/Trai-takes-broadcasters-to-court-over-ad-cap-violation.html>

¹¹⁶ Ibid, stated by TRAI official

¹¹⁷ http://www.trai.gov.in/Content/AllBroad/2_Broadcasting.aspx Accessed on 30 March 2014

publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto (Section 3 and 4 of the Act).

4. *Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003-*

Section 5 of this Act, inter alia, prohibits both direct & indirect advertisement of tobacco products in all forms of audio, visual and print media. Violation of this mandate is severely punishable with fine and imprisonment, and the advertisement material may also be forfeited by the government.¹¹⁸ Section 5 penalises the responsible persons in the company of the tobacco product with imprisonment for a period extending up to 2 years or with a fine up to Rs 1000/- or both, on the first conviction.¹¹⁹ On second and subsequent convictions with imprisonment for up to 5 years and with a fine up to Rs. 5000/-.¹²⁰

There has been a **prohibition of showing actors or actresses** smoking in films and on television shows. This had been introduced by the Ministry of Health and it came into effect on October 2, 2005. The aim behind such ban was to prevent audiences from smoking under the influence of movies. If producers wished to show a character smoking, the scene would have to be accompanied by a note saying that smoking is injurious to health, along with disclaimers at the beginning and end of films¹²¹

However, this **ban was subsequently removed** by the Delhi High Court in *Mahesh Bhatt vs Union Of India And Anr* ¹²², citing that the ban was a form of censorship that restricted the right to freedom of speech.

¹¹⁸ S 23, Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

¹¹⁹ S 22, Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

¹²⁰ *ibid*

¹²¹ "On Screen Smoking Banned?? No Thankyou!!", Smokefree- The Healthier Alternative, November 29, 2011. Accessed on March 31, 2014 <http://blog.smokefree.in/on-screen-smoking-banned-no-thankyou/>

¹²² WP (C) No.18761 of 2005 and WP (C) No.23716 of 2005 23.01.2009



Justice Sanjay Kishan Kaul ruled that the Govt's rule making powers can only curb the advertisements of smoking and not ban its depictions. He said: "All depictions cannot be termed as advertisements".

The learned judge explained that showing sports events sponsored by tobacco companies or of cigarette brands cannot be a violation of the Cinematograph Act. Further, he quoted an example of sponsorship by a cigarette company- an act done to build brand equity. There would be no harm if there is an advertisement of cigarettes in a car rally sponsored by the famous cigarette company 'Marlbro', the Judge said.

"There is nothing wrong to show the car rally having a brand of the cigarette on its body and similarly a photo shown in the print media with a Marlbro poster behind the prize winner or something similar cannot amount to violation of the laws."

This can be understood better, if we take the example of **litigating lawyers**. As a basic principle of code of conduct lawyers are not allowed to advertise their service of their firm's services. However, there is no harm if the litigating firm sponsors a Moot Court Competition in a famous Law School. This builds his brand image, just as was seen in the case of Marlbro.

5. Cable Television Networks (Regulation) Act, 1995 and Cable Television Networks (Amendment) Rules, 2006

The Cable television Networks (Regulation) Act, 1995 provides guidelines for programmes and advertisements on television. All programmes must adhere to the advertisement code as laid down in the Cable Television Networks (Amendment) Rules, 2006 before being transmitted or retransmitted.¹²³

¹²³ S 6, Cable Television Networks (Regulation) Act, 1995

Few guidelines are related to protecting the interest of children, like- programmes on TV must not denigrate children, no bad language or violence should be used in programmes for children and adult shows must be aired **after 11 p.m. and before 6 a.m.** among the many other regulations.

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Advertisement, not only reflects our values, beliefs and thinking, but also has a profound impact on them. Indian culture of adhering to morality, decency and religious beliefs is incorporated as a mandate under Rule 7 of the Act.

6. *Indian Penal Code, 1860-*

The IPC, vide an array of provisions, prohibits obscene, defamatory publication, publication of a lottery and/ or statements creating or promoting disharmony/ enmity in society. Few sections of the IPC, 1860 have been quoted here:

- Section 292 (1) (Sale, etc., of obscene books, etc),
- Section 292(2) (**Punishment** for advertising an obscene object- on first conviction imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees),
- Section 294 (**Obscene acts and songs**);
- Section 153 A (**Promoting enmity** between different groups on grounds of religion, race, place of birth, residence, language etc. for doing acts prejudicial to maintenance of harmony

¹²⁴ Sharad Vadehra, "Advertising to Children in India", *Youn Consumers*, Vol 11 No. 2, (2010), pp: 153-156. Accessed March 30, 2014 <http://www.gala-marketlaw.com/pdfs/IndiaAdvertising.pdf>

7. *Trademark Act, 1999*

The provisions of *Trademarks Act, 1999* clearly emphasize that a representation would be considered as trademark infringement if advertised in a way

- to take unfair advantage of trademark,
- in a manner contrary to honest practices in industrial or commercial matters, or
- being detrimental to its distinctive character; or
- Is against the reputation of the trade mark.

Thus, if used properly and without any mala fide intention, comparative advertisement can prove beneficial otherwise it may mislead consumers resulting into irreparable loss as well as legal battles. A series of important case laws will help better understand the legal position in respect of comparative advertising.

In the recent case of *Reckitt Benckiser v Hindustan Lever*¹²⁵, the dispute between the plaintiff, manufacturer of 'Dettol' soap, and the defendant, manufacturing 'Lifebuoy' soap, is with regard to an advertisement of the latter which disparages the formers product. The ad of 'Lifebuoy' displays and disparages a soap which is virtually identical to the 'Dettol' soap bar. The ad shows the same colour packaging, curved edges and orange coloured bar as 'Dettol' being conventionally used by a family, when the husband shows the disadvantages of using such soap and that only those who don't use their wisdom would use it. Further he says "*Dua ki zarurat padegi iss dawaa ke saath*" (prayers would be required with this medicine).

A **bare viewing** of the said advertisement was sufficient to **convince** the Court of the malicious intention of the defendant to increase the market share of its 'Lifebuoy' soap by tarnishing the goodwill and reputation of the plaintiff's soap i.e. 'Dettol' Original Soap. It was held that:

¹²⁵ 2008 (38) PTC 139,



"It is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior.

This position of law has been settled by a series of cases including *Hindustan Lever v. Colgate Palmolive (I) Ltd*¹²⁶, *Reckitt & Colman of India Ltd. v. M.P.Ramchandran & Anr.*,¹²⁷ and *Reckitt & Colman of India v. Kiwi TTK Ltd*¹²⁸.

In *Dabur India Limited v. Colgate Palmolive India Ltd*:¹²⁹, it was further explained that a generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. Clever advertising can indeed hit a rival product without specifically referring to it.

It would be unethical to disparage a product of the plaintiff and then take the defence that such plaintiff has not been specifically identified.

In *Pepsi Co Inc v Hindustan Coca Cola Ltd*¹³⁰, an important point of law was clarified. This strongly governs the way in which companies can make a comparative advertisement.

The brief facts of this case are as follows: In a TV Commercial the respondents in this case referred to 'Pepsi', the drink of the appellants (Pepsi Co Inc) as "*Yeh Bacchon Wali Hai. Bacchon Ko Yeh Pasand Aayegi*", "*Wrong Choice Baby*". Aggrieved by this, the appellants allege that the respondents depicted the commercial in a derogatory and mocking manner.

The question was whether such representation could be termed as disparagement or was it healthy competition.

To decide the question of **disparagement**, the **Court laid down** the following factors;

¹²⁶ 1998 (1) SCC 720

¹²⁷ 1999 PTC (1) 741.

¹²⁸ 1996 PTC (16) 393

¹²⁹ 2004 (29) PTC 401 (Del)

¹³⁰ 2003 (27) PTC 305 (Del)

- (1) *"Intent of commercial*
- (2) *Manner of the commercial*
- (3) *Story line of the commercial and the message sought to be conveyed by the commercial.*

*Out of the above, "manner of the commercial", is very important. If the manner is ridiculing or the condemning product of the competitor then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable."*¹³¹

It was held that this cannot be called puffing up. Repeatedly telecasting this commercial will leave an impression on the minds of the viewers that the product of the appellant i.e. "PEPSI" is simply a sweet thing not meant for grown up or growing children. If they choose PEPSI, it would be a wrong choice. The message is that kids who want to grow should not drink "PEPSI". They should grow up with "Thums Up". The manner in which this message is conveyed shows disparagement of the appellant's product.

Hence it can be concluded that if TV advertisements, or rather advertisements in any form of media, disparage or denigrate rival products it is an unhealthy practice which is punishable by law.

These were a few prominent laws specifically related to TV advertisements. However, there are other specific legislations which govern the different types of advertisements, like the prohibition of a class of advertisements may be an offence. These include:

1. Obscene publication or advertisement of a lottery under the Indian Penal Code.
2. Harmful publication under the Young Persons (Harmful Publications) Act, 1956.
3. Use of report of test or analysis for advertising any drug or cosmetic under the Drugs and Cosmetics Act, 1940.
4. Inviting transplantation of organs under the Transplantation of Human Organs Act, 1994.

¹³¹ *Ibid, Para 13*



5. Advertisement of magical remedies of diseases and disorders under Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954.
6. Advertisements relating to prenatal determination of sex under the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
7. Any political advertisement forty hours prior to polling time under the Representation of People Act, 1951.

REGULATORY AUTHORITIES

In India, general rules pertaining to advertisement are very lax. There are no regulatory bodies that monitor TV advertisements in specific. The Ministry of Information and Broadcasting intervenes for the purpose of regulation. However, apart from the Ministry, there are only voluntary groups like the “**Advertising Standards Council of India**” and the “**Advertising Agencies Association of India**”. Both these organisations are able to put external moral pressure on companies to comply with advertising standards because, in the end, they are only business organisations as opposed to government bodies.

Advertising Agencies Association of India

The Advertising Agencies Association of India (AAAI) is the official, national organisation of advertising agencies, formed to promote their interests so that they continue to make an essential and ever-increasing contribution to the nation.¹³² This can be achieved by working for all stakeholders including consumers, advertisers, the nation and media owners (e.g- advertising agencies).

Advertising Standards Council of India

The Advertising Standards Council of India (ASCI), established in 1985, is committed to the cause of **Self-Regulation in advertising**, ensuring the protection of the interests of consumers. ASCI is

¹³² Advertising Agencies Association of India, Official website,
<http://www.ibfindia.com/advertising-agencies-association-india-aaai-0> Accessed March 30, 2014

a non- statutory tribunal, which entertains and disposes off complaints based on its Code of Advertising Practice (ASCI Code).

Progressively, the ASCI Code has received huge recognition from the advertising industry. This is evident from the Cable Television Networks (Amendment) Rules, 2006 wherein all TV advertisements are bound to follow and adhere to the ASCI Code. The Code for Self-Regulation is now a **part of ad code under Cable TV Act's Rules**, and this means that violation of ASCI's Code is now violation of Government rules. Further, **section 6 of the Cable Television Networks (Regulation) Act, 1955**, as discussed above, prohibits the transmission or retransmission of any advertisement through a cable service unless they are in conformity with the ASCI Code.

ASCI is the **advertising industry watchdog** and its key objectives are to ensure that advertisements are truthful, decent & moral, not promote hazardous or harmful, and that they observe fairness in competition.

Under the ASCI Code, complaints against the advertisements can be made by any person who considers them to be offensive, false, misleading, or unfair. The complaints are evaluated by an independent Consumer Complaints Council (CCC). CCC decides on complaints made from the general public, consumer groups, complaints from one advertiser against another and even suo moto complaints from the members of the ASCI Board, CCC, or the Secretariat.¹³³

The CCC decides disputes after hearing both the parties and dismisses unsubstantiated complaints. It upheld 9 complaints against Brooke Bond Red Label Natural Care, Tatasky, Nikon Camera etc. ASCI further said its Consumer Complaints Council found that complaints against five TV advertisements were unsubstantiated. In case of Tata Sky, ASCI said it had received a complaint against the company stating that "Cable is just a Dabba" in a print advertisement.

¹³³ Advertising Standards Council of India, Official website, <http://www.ascionline.org/> Accessed March 31, 2014



Similarly, it had also upheld a complaint against Nikon camera's TV commercial for violation of The Performing Animals Registration Rules 2001.¹³⁴

Even in the absence of a government regulating authority, these voluntary organisations strive to protect consumer interest and have gained recognition from the Government as well.

The **Reserve Bank of India, SEBI and the IRDA** are some of the other regulatory authorities that regulate advertisements in their respective fields.

CONCLUSION

This study, ultimately, makes one thing crystal clear: **multiple laws** pertaining specifically to TV advertisements are present in the Indian legal regime. But these laws often tend to cause **confusion in the minds of advertisers, manufacturers or service providers as well as consumers**. It would not be naïve or premature to conclude that a single uniform legislation governing all media- TV, print etc. is essential. This would provide clarity and act as a one-stop window for all matters relating to advertising.

As much as there is a necessity to have a uniform legislation, it is also imperative to have a single statutory body. The same had been sought in a recent PIL¹³⁵ filed by Hindu Janjagruti Samiti. In addition to seeking formation of a statutory body overseeing advertising matters, the petition also raised the contention that guidelines to regulate the content of TV channels are needed. This shows the situation where a regulatory authority is not only desirable but also imperative.

Even if a single legislation does not exist, the multiple prevailing legislations should be well **implemented**. Not denying the desirability of such legislation, it is to be kept in mind that the existing laws must not be violated in the wake of a new legislation. In practice TV channels often

¹³⁴ Kalpesh Gupta, "Legal Issues in Ever changing Marketting Environment". International Conference on Managing Change in Business Economy, Udaipur, 2013. Accessed March 30, 2014 .

http://www.academia.edu/2558278/Legal_and_Ethical_Issues_in_Ever_changing_Marketing_Environment

¹³⁵ <http://www.livelaw.in/supreme-court-issues-notice-to-centre-asking-to-frame-guidelines-to-regulate-tv-content/> accessed March 30, 2014

flout even the existing laws with great impunity. There are many advertisements which are appropriate examples for patent non-compliance with regulations. It is not uncommon to see various advertisements which are false and misleading, promoting dubious products and making unsubstantiated claims. In reality, most of these advertisements are ignored by the consumers and go unnoticed by the statutory bodies. ASCI, an independent body having binding force on TV advertisers, takes action suo moto as well as based on complaints. Yet, a strict enforcement agency, having stringent penalty provisions would prove to be helpful.

However, **despite these negatives**, advertising law has come a long way in India. The awareness of the issues concerning advertising has increased and this is improving the situation. The organisations have become aware of the ethical mandates they need to comply with. Ethical and legal practices are being increasingly being adopted because this has a **two-fold advantage for the firm**. Firstly, the **internal environment** of the organization is transparent and pleasant. This increases **motivation of employees** to work and produce better outputs. In case non-compliance with laws is a practice in the organization, the employees get a wrong signal, encouraging them to indulge in corrupt practices. **Secondly**, adhering to legal regulations inculcates and **strengthens the trust of investors as well as customers**. This adds to the brand value of the company and creates '**brand loyal**' customers instead of 'switchers'. Thus the business entity will be able to derive benefits from a loyal consumer base in the long run, instead of not complying with the regulations and facing the consequences by way of penalty and smeared reputation in the market.

Ultimately, all the regulations aim at public interest and social benefit. The marketer is required to make choices in such a manner that the firm, as well as society at large is not harmed. While taking a decision, the **marketer** has to assess the **legal implications of the act**. Complying with these regulations may involve huge costs, straining the budget. However, these can be covered up in terms of increasing trust of the consumers, which will in turn increase revenue.



Apart from television, many **other mediums including**- print, audio, internet etc. are widely used by advertisers. Indian advertising is slowly recognising the potential of online marketing as it spread advertisements information across demographics at a low cost, covering a huge expanse of the target audience. Equally popular is the mobile advertising in India, which is growing like forest fire with increasing mobile connections in India. Looking at the laws governing advertisement in general, it can be seen that none of the existing laws particularly addresses the issues of advertisements in cyberspace. Technological changes are redefining the entire advertising industry and the legal regulatory mechanism will have to keep pace with this dynamic environment. As the ASCI has been made binding on TV advertisements, certain such steps will have to be taken with respect to these emerging areas.

*Advertising laws in India will see **resurgence in coming times** when- complying with legal regulations would be embedded in the corporate culture and would play a significant role in paying rich dividends like increased revenue and generation of tremendous good will. Just **like corporate social responsibility** has gained recognition in the market in recent times, advertising laws governing television as well as other mediums of advertising will be acknowledged in the times to come.*



INTELLECTUAL PROPERTY RIGHTS BROADCASTING & COPYRIGHT LAW IN RELATION TO SPORTS EVENTS

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Abstract

Intellectual property rights have been grown tremendously in the last decade. Now day's intangible assets have more value than tangible assets. Company's values are determined on the basis of IPR value. The growth in any sector always needs strict laws to control the related market. IPR laws are also growing throughout the world. One of the most recent recognized areas, which are getting affected by the IPR is sports sector and broadcasting sector. The problem in concerned is the ambiguity in broadcasting laws in relation to sports event. Recently in some cases Indian Courts have given view on this area, but as sports sector and broadcasting sector, both are growing tremendously we need stringent laws in relation to the same. This research paper is dealing with the ambiguity in copyright act about the broadcasting laws. Also the author's have discussed number of cases to discuss the same.

Keywords (if any)

Intellectual Property Rights, Sports Events, Copyright Law, Broadcasting

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INTRODUCTION

With the growth of technologies and higher rate of investments, broadcast sector has got affected in many ways. It has become the site of contention between many interests, like media, government, investors, companies, and audience, which we broadly call “public”. One of the fundamental tussles between these interests is legal regulation of already existing and emerging rights.

Different regulation governs broadcast laws in India for the different purpose. We can trace its existence from 130-year-old Indian Telegraph Act of 1885. The Act states that the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs within India¹³⁸. We can also take example of Prasar Bharti Act¹³⁹, which states that the primary objective of Broadcasting organization is to ‘organize and conduct public broadcasting services to inform, educate, and entertain the public’ and to ensure ‘a balanced development’ of broadcasting of radio and television¹⁴⁰. Apart from this Indian Copyright Act, gives Definition of broadcast, rights and duties of broadcasting organization, etc.¹⁴¹

With the increased use of technologies, the broadcasting organization interests have been affected. The present article will examine the ambiguity in broadcasting laws with relation to sports broadcasting and other companies overriding the interest of broadcasting organizations under copyright law.

Within the ambit of copyright, broadcasting organizations are given some rights for the protection of their investment, but to what extent it can be protected it is not given. According to the definition of broadcast in copyright act, it means communication to the public. The definition is very understandable from the point of reading but it is always disputable that whether they only have that right or it can be communicated by someone else also.

¹³⁸§4(1), Indian Copyright Act, 1957

¹³⁹ The Prasar Bharati(Broadcasting corporation of India) Act, 1990

¹⁴⁰§ 12, The Prasar Bharati Act, 1990.

¹⁴¹§ 2(dd)), Indian Copyright Act, 1957 .

BROADCAST IN RELATION TO INDIAN COPYRIGHT ACT

In Copyright Act procedure is given if somebody else wants to use other person's intellectual property, which is by way of licensing or assignment. So, if an entity has broadcasting rights and a second party want to use that right then they have to obtain a license or it can be done by way of assignment. To use the information for the purpose of fair dealing or research or for teaching purpose is not illegal, but nobody can make a profit out of someone else's efforts.

However, in some recent cases the third party who uses the information of broadcasting organization does not take the license or assignment by using the shield of the public domain. It is given in the copyright act that when the information is in public domain, then it cannot be protected as it is already in the knowledge of everybody. Here the central question is that the intellectual property gains recognition when it is known by people, so by using the term public domain can people override the efforts of others? In the era of technology, sports have become a very popular business, everybody invest in it, either in the form of money or in the form of time, etc. But with the advancement of technologies some more legal right has emerged, which needs to protect and analyzed. Broadcast reproduction rights has been recognized as neighboring right under the copyright act for protecting the interest of broadcasting organization

According to section 2(dd)¹⁴² of the Act Broadcast means communication to the public: (i) by any means of wireless diffusion whether in any one or more of the forms of signs, sounds, or visual images; or (ii) by wire, and includes a re-broadcast.

Whereas the Act in section 2(ff)¹⁴³ defines 'communication to the public' as:

"Communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies

¹⁴²Supra Note 4.

¹⁴³Ibid.



of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation: - For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

When an organization transfers media rights or bouquet of right to other organization, then it includes broadcasting rights as well as mobile rights. But it is always in question that whether bouquet of rights covers all the rights or there is still a place for other entity to use the broadcasting information. As the broadcasting business has grown so much, and with the vast development in technologies, these fields have become very competitive as well as very beneficial. So especially in sports law it has been a trend that everybody wants to take the bouquet of rights, media rights, mobile rights because if we see through the popularity of games let us say cricket then it is a very profitable business and they pay huge amount of money to take such rights. Problems arises when the rights that they have purchased is being used by someone else freely without taking any permission or license or assignment in the name of public domain.

If we look into the meaning of broadcast and communication to public then we can interpret that broadcasting rights mean, right to give any information regarding broadcast and out of broadcast or of the root event to the public. As they have paid for that right, so they should be the person to use the right, but that's not the case always.

Apart from the public domain, anyone who is free riding the efforts of others take the shield of Article 19¹⁴⁴ and the public right to know. No doubt that the constitution of India provides for freedom of speech and expression to each and every citizen but does it mean that people can override the efforts of others to use their right. Legally speaking they cannot do that. But that's what happening for a long time now, so is it the problem of people that they are doing wrong or

¹⁴⁴Article 19, Constitution of India, 1950.



there is some ambiguity or non-clarity in the act that is giving them a free path or excuse to do such thing.

In the case of **Pittsburgh Athletic Co. et.al vs. KQV Broadcasting Co. (Pittsburgh Case)**,¹⁴⁵ the District Court of Pennsylvania in the year 1938 dealt with a case where the plaintiff prayed for a preliminary injunction to restrain the defendants from broadcasting play-by-play reports and description of baseball games played by the plaintiff's baseball team.

The Madras High Court, relying on the decision of the New York District Court in the case of National Basketball Association and **NBA Properties Inc. v. Sports Team Analysis and Tracking Systems Inc.**¹⁴⁶(NBA-1 Case) held –

“The right of providing scores, alerts and updates is the result of expenditure of skill, labor and money of the organizers and so the same is saleable only by them. The sending of score updates and match alerts via SMS amounts to interference with the normal operation of the Organizers business. The defendant's act of appropriating facts and information from the match telecast and selling the same is nothing but endeavoring to reap where the defendants have not sown.”

But courts have shown different opinions in case like In **Eastern Book Company v. Modak**¹⁴⁷, the sporting event as a whole is incapable of ownership. The mere expending of money or effort would not render the underlying facts relating to sporting events property, capable of protection. What is conceivable, is that the organizer of an event can have certain rights that flow from (a) his ownership/control over the venue i.e. land; and (b) statute. In this context, the following excerpt has been taken from **Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor**¹⁴⁸:

“Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything that he sees anywhere...”

¹⁴⁵Pittsburgh Athletic Co. et.al vs. KQV Broadcasting Co. (Pittsburgh 24F.Supp. 490.

¹⁴⁶939 F.Supp. 1071

¹⁴⁷2008 (1) SCC 1.

¹⁴⁸58 CLR 479 (1937).

In **National Basketball Association v. Motorola Inc**¹⁴⁹, the court held that the protection was not extended to the underlying events. It held that a sports event is not a work of author and such should not be protected by copyright law.¹⁵⁰ And hence even if we considered match score as transformative or derivative work, we are not liable to get copyright protection as underlying event i.e. sporting event¹⁵¹ itself is unpredictable.

Indian courts has taken the above principal in different cases, because if one principal is saying that you cannot protect the information one says you can, and Indian judiciary itself lead everyone to chaos, no doubt that court's decision differ from case to case, it can be contrary to itself if the facts demand, but all these situation demands that there should be one basic principle laid down relating to sports broadcasting so that maximum rights can be protected.

In a very recent judgment of **Star India v. PiyushAgrawal**¹⁵²The Delhi High Court held that while the performance and visual/sound recordings of the said performance are protected by copyright, the facts from the broadcast were not. After the broadcast of the match, it is impossible for any party to claim that this information conveyed by the performance is not in the public domain. Once the "first broadcast" of the performance has been made, the information that underlies the performance is in the public domain. Therefore, the 72-hour media right monopoly as agreed upon between the plaintiff and the BCCI is meaningless since copyright law does not protect information in the public domain.

SHIELD TO USE COPYRIGHT WORK

- Public domain

The Merriam Webster's dictionary defines "Public Domain" as: *"The realm embracing property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to*

¹⁴⁹105 F.3d 841(7th Cir. 1997).

¹⁵⁰*Ibid.*

¹⁵¹*Supra* Note 12.

¹⁵² CS (OS) No. 2722/2012, Del HC.

*appropriation by anyone*¹⁵³ However, if we may use the term “public domain” to connote the information becoming freely available to the public (emphasis supplied), it can be said that the information emanating from a cricket match, enters the public domain at different moments of time i.e. it becomes freely available to the public at different moments of time. To elucidate through an example, the outcome of the first ball bowled in a cricket match, enters the public domain instantly qua the spectators in the stadium. The same information enters the public domain after a delay of a few seconds (or micro-seconds) subject to the time-lag in transmission of such information over a live telecast through television/radio. As a corollary, the information has still not entered the public domain qua the persons who do not have any access to a source of contemporaneous information therefore TV or radio.

Judge Henry in the 2007 **Tenth Circuit Golan v. Gonzales** stated that under the traditional contours of copyright, what comes into the public domain stays in the public domain.¹⁵⁴ Also Justice Stevens noted in **Sony Corp. v. Universal City Studios**, each year the public domain grows, as new works complete their copyright term¹⁵⁵, but the first question is that what is the meaning of work in public domain, it means that once in the public domain, individuals are free to use the work as they wish-reprint, create new versions, quote extensively, post on the Internet and do anything else-and all without permission of the copyright holder.¹⁵⁶ But when it comes to broadcasting, the third parties take advantage of the term public domain.

- The Fair dealing Concept

Section 39 of the Copyright Act 1957 reads as under:-

¹⁵³ Merriam Webster Dictionary, Page 342.

¹⁵⁴ *Golan v. Gonzales*, 501 F.3d at 1187-88.

¹⁵⁵ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 443 n.23 (1984) (“[S]ince copyright protection is not perpetual, the number of ... works in the public domain necessarily increases each year.”).

¹⁵⁶ This was the issue raised by *Eldred v. Ashcroft*, but with focus on the fact that the public domain for published works was suddenly delayed twenty years. *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Businesses that depended on public domain works-new ones coming into the public domain each year-suddenly found themselves with a terrible wait-twenty years for any additional published works to enter the public domain.

39. Acts not infringing broadcast reproduction right or performer's right - No broadcast reproduction right or performer's right shall be deemed to be infringed by -

(a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research; or

(b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; or

(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.

Section 52(1) (a)(iii)¹⁵⁷ reads as under:-

52(1) The following acts shall not constitute an infringement of copyright, namely:-

(a) A fair dealing with any work, not being a computer program, for the purposes of :

(iii) The reporting of current events and current affairs, including the reporting of a lecture delivered in public."

According to Section 39(b) of the Copyright Act 1957, *a use, consistent with fair dealing, of a broadcast in the reporting of current events is not an infringement of the broadcasters reproduction right and as per Section 52(1) (a) (iii) a fair dealing of a work while the reporting of current events and current affairs do not constitute an infringement of a copyright*¹⁵⁸.

In **ESPN Star Sports v Global Broadcast News Ltd.**¹⁵⁹ wherein it was held that both copyright and broadcasting reproduction rights could separately co-exist and that the same may vest with two different persons or even with a single person. It was observed that the broadcasting reproduction right of the broadcaster was an exclusive one and that excessive usage of the telecast in the form of news may amount to infringement as the exclusive monopoly to broadcast the live

¹⁵⁷ Copyright Act, 1964.

¹⁵⁸FAO (OS) 460/2012.

¹⁵⁹2008(38) PTC 477(Del).

feed or its reproduction lay with the broadcaster. The learned Single Judge has noted that prolonged and repeated footage of the broadcast, beyond what was permissible by fair dealing, would unfairly affect the goodwill, advertising and commercial prospects of the right holder.

The Delhi High Court vide its order dated 23.06.2014 in **Multi Screen Media Pvt Ltd versus Sunit Singh and Ors.**,¹⁶⁰ granted an *ex-parte* injunction to Multi-Screen Media Pvt. Ltd. (“MSM”) against 219 websites which were either infringing or were likely to infringe its exclusive broadcasting rights in the FIFA World Cup 2014. Pursuant to a Licensing Agreement dated 14.01.2014 with FIFA, MSM Satellite (Singapore) won the broadcasting rights in Television, Radio, Mobile Transmission and Broadband Internet Transmission. In India, this set of exclusive rights is protected under Section 37 of the Copyright Act, 1957; the infringement of which will entitle the broadcaster to bring a civil action against the pirates.

In **Taj Television Ltd. and Ors. v. RajanMandal and Ors**¹⁶¹ during the course of the 2002 FIFA World Cup held in Korea and Japan (“2002 Football WC”). Taj Television Ltd. owned the sports channel ‘Ten Sports’ and was the owner of the broadcasting rights. The Court granted Taj an *ex-parte* injunction against both named and unnamed cable operators for unauthorized transmissions as its broadcasting rights under section 37(3)¹⁶² were being infringed. Although a large number of cable operators had taken licenses, several prominent cable operators had not signed up with Taj or its authorized operators and broadcasted the tournament without any approvals, thereby costing the television industry in terms of millions of rupees.

In **Media Works NZ Limited & Anr v. Sky Television Network Ltd**¹⁶³, the case concerned the broadcasting rights of the Rugby World Cup 2007, held exclusively by MWNZ. The court held that three Sky program entitled *The Cup* a magazine program, *The Crowd Goes Wild* discussing the performance and prospects of teams and players, and *Reunion* (another magazine styled

¹⁶⁰CS (OS) 1860/2014.

¹⁶¹[2003] F.S.R 24.

¹⁶² Copyright Act, 1964.

¹⁶³ Media Works NZ Limited and another v Sky Television Network Limited [CIV 2007-404-5674]

program with rugby reviews did not use MWNZ Rugby footage for the purpose of 'reporting current events'. Furthermore, it was held that Sky's use of MWNZ footage did not amount to fair dealing given the number of programs and the number of times they were repeated. Sky's coverage had gone beyond public interest considerations by eroding the status of MWNZ as an exclusive broadcaster of the Rugby World Cup 2007 and negatively impacting upon MWNZ investment in the copyright.¹⁶⁴

BROADCASTING RIGHTS IN INTERNATIONAL SCENARIO

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations¹⁶⁵ done at Rome gives protection to three kinds of people, firstly to the performer for his/her performance, secondly to producer of phonograms and lastly to broadcaster for broadcasting. The convention also allows the limitations and exception to the protection with regard to private use, use of short clip for reporting current events, and use for solely for the purpose of teaching or research. These protections last till 20 years from the period of broadcast took place,¹⁶⁶ however in Indian Copyright Act; the protection is given for life and 60 years for literary work.¹⁶⁷

International rule and regulation to protect the broadcasting right from piracy was not developed till 1961. The Rome Treaty of 1961 have given an outline of the same problem, however till then no internet was there and broadcasting right were in the infancy stage. As we know now any

¹⁶⁴ Merry Moiseichik, 4 Copyright: An Issue in Sport and Recreation (1st ed. Journal of Legal Aspects of Sport 1994).

¹⁶⁵ Available at http://www.wipo.int/treaties/en/text.jsp?file_id=289757#P127_12121 (Last seen on 30/03/2016)

¹⁶⁶ Rome Convention, Article 14 Minimum Duration of Protection The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which: (a) the fixation was made—for phonograms and for performances incorporated therein; (b) the performance took place—for performances not incorporated in phonograms; (c) the broadcast took place—for broadcasts.



information is just a mouse click away, it needs to be protected and for that very same this convention has given some rules.

Signal piracy can take the physical form by the way of recording, broadcasting by videos and storing in DVDs or USBs, it can also be virtual, such as transmitting or distribution on internet without having authorization. Unauthorized live sport transmitting on internet has been a threat to the licensor who pays million of rupees to get this right of broadcasting.

In 1996 Members of WIPO have agreed to have a set of rule regarding this problem and they formulated WIPO internet treaties in 1996, which enables protection on copyright and on performers and producers of phonograms, and also included broadcasting right protection.

This treaty has given an outline but failed to reconcile on the issue that how right should be given to broadcasters and what measures will be taken against violators. In 2007 another attempt was made to draft a “signal based approach” which give broadcasters some additional right over the content of the program, but this also failed to fulfill the purpose.

Finely in 2011 WIPO's *Standing committee on Copyright and Related Rights*, formulated a new draft which will be binding on all the members, this draft has detailed provision regulating the rights of the broadcasters and their protection.

In the draft the protection of the broadcasting rights are widen for example it protect all kind of transmission and their signals, it also include IPTV (Internet Protocol TV or Internet TV) which transmit program also to computers and mobile phone apart from televisions. These protections would outlaw the breaking of anti-piracy “locks” on digital signals including encryption and tagging.

Further rights have been given to broadcasters under Roam convention to have exclusive right to rebroadcast, reproduce for public for 20 years. However some of the broadcasters wanted this period to be extended. Also, many European countries have their domestic law on the same issue



but in international law it is legal to transmit the broadcast over internet without protection without protection which leaves a loophole in the entire setup.¹⁶⁸

CONCLUSION

From the above discussion it can be concluded that definition of broadcasting Section 2(dd)¹⁶⁹ of Indian Copyright Act definitely lacks clarity since according to the section, Broadcast means communication of the work to public by any means of wireless diffusion or wire. The provision needs more conceptual clarity. Without the distinction, there is a finite overlap between section 14 of the Act and the provision in it relating to the broadcasting organization's broadcast reproduction rights.

¹⁶⁸ Available at <http://www.wipo.int/pressroom/en/briefs/broadcasting.html> (Last seen on 30/03/2016).

¹⁶⁹ Indian Copyright Act, 1957.



ANTI-DEFECTION LAW UNDER SCHEDULE X: ISSUES & CHALLENGES

YESHESHVINI OJHA¹⁷⁰

Introduction

Inserted in the Indian Constitution by the way of 52nd amendment in 1985 was the “Anti-Defection law”. The said law is enshrined in the tenth schedule (Xth Schedule) of the supreme Indian Constitution.

Defection can be defined as “To abandon a position or association, often to join an opposing group”. The concerned amendment aimed at bringing stability to the structure of political parties; strengthen party discipline and parliamentary practice by banning floor crossing. The Advanced Law Lexicon defines defection as floor crossing or rather crossing the floor by a member of legislature. The simple act by a member of a political party of pledging allegiance to another party and leaving the party in which he was originally presiding can be termed as defection. The reason and objective behind the concerned legislation (Schedule X) is said to be –

“The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the address by the President to Parliament that the government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance”¹⁷¹.

The law was added soon after Rajiv Gandhi government came to power with a thumping majority because of Indira Gandhi’s assassination. The main intent of the law was to curb the evil of political defections. The prior failure to deal with this issue had led to rampant horse-trading and corruption in daily parliamentary functioning. Schedule X was thus seen as a tool to cure this malaise.¹⁷² One of the first cases to analyze the scope of anti-defection law was Kihoto Hollohan v. Zachillhu¹⁷³, which further described the scope of this legislation from various other angles also.

¹⁷⁰ Year II, Symbiosis Law School, Pune

¹⁷¹ http://indialawjournal.com/volume3/issue_1/article_by_jenna.html

¹⁷² M.P. Jain, Indian Constitutional law 62 (2010)

¹⁷³ 1992 Supp (2) SCC 651

Overview of Schedule X

This thumbnail legislation contains 8 paragraphs, which weaves the legislation in to one. The first sets out the definitions, the second sets out the disqualification. The third, which was subsequently deleted by the 2003 amendment talked about splits within the party. The fourth and fifth state disqualification does not apply to mergers and certain exemptions respectively. The sixth and seventh paragraph, mention the process of deciding disputes and barring jurisdiction of courts in respect of questions relating to disqualification of a member. Ultimately, the last paragraph enabling a Speaker or a Chairman to make rules for a House in order to give effect to the provisions contained in the Schedule.

To sum up the main features of anti-defection under schedule X law will be as follows-

- *The disqualification of a member of the house belonging to a political party will take place if he voluntarily gives up the membership of his political party, or votes, or does not vote in the legislature, contrary to the directions of his political party. The paragraph expressly states “voluntarily giving up membership from a particular party. In *Ravi Naik v Union of India*, the Supreme Court says, “The words ‘voluntarily given up his membership’ are not synonymous with ‘resignation’ and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not rendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs”.¹⁷⁴*
- However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.
- Or if an independent candidate joins a political party after the election or a nominated member joins a party six months after he becomes a member of the legislature

¹⁷⁴ http://indialawjournal.com/volume3/issue_1/article_by_jenna.html

The power to disqualify such a member vests in the hands of the speaker or the chairman of the house. If any defection is reported against the speaker or chairman, the house elects a member, who presides over the matter and gives his decision. The exception to such disqualification is a merger i.e. a person should not be disqualified if his original political party merges with another, both the members and he himself of the old political party become members of the new political party. Or if he and other members do not accept the merger and opt to function out as a separate group, such type is only possible with two-third majority.

Issues and Challenges

The major disadvantages of this legislation are themselves the issues with regard to the validity of the legislation. The prevention of parliamentarians from changing parties reduces accountability towards the people and there also a huge interference with freedom of speech and expression by curbing dissent against party policies.

Every legislation is subject to criticism and certain challenges it faces for wide spread acceptability. Similarly 31 years down this road, despite of all the challenges faced and issues raised anti-defection stands strong. Though, clearly the legislation has some major flaws and loopholes, the idea of the judiciary is determined to keep settled this way. Some of the issues and challenges can be explained with the help of certain cases explained below

In *Kihoto Hollahan*¹⁷⁵ case the limitation of the schedule X on the freedom of speech and expression was expressly discussed and also how it affects the members of the house to take a stand, which for them is valid. The judgment, which the court declared was-“The provisions do not subvert the democratic rights of elected members in Parliament and state legislatures. It does not violate their conscience. The provisions do not violate any right or freedom under Articles 105 and 194 of the Constitution. The anti-defection law seeks to recognize the practical need to place the proprieties of political and personal conduct above certain theoretical assumptions.”¹⁷⁶

¹⁷⁵ *Kihoto Hollahan v. Zachilhu and Others* AIR 1993 SC 412

¹⁷⁶ http://www.prsindia.org/administrator/uploads/general/1370583077_Anti-Defection%20Law.pdf



It held that the law does not violate any rights or freedoms, or the basic structure of parliamentary democracy. The second issue which arose in the said case was whether Para 6 of the concerned schedule granting finality to the speaker or chairman's decision. The court stated that "To the extent that the provisions grant finality to the orders of the Speaker, the provision is valid. However, the High Courts and the Supreme Court can exercise judicial review under the Constitution. Judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. The third and the last issue was that it challenged Para 7 to be unconstitutional because it claims that courts cannot interfere with the decisions of the speaker and the chairman. The court stated that the paragraph seeks to change the operation and effect of Articles 136, 226 and 227 of the Constitution, which give the High Courts and Supreme Court jurisdiction in such cases. Any such provision is required to be ratified by state legislatures as per Article 368(2). It can be concluded that according to the courts the concerned schedule does not violate fundamental rights of the members and also the finality of the decision of a speaker or chairman is subject to judicial review. Section 2(b) of the Tenth Schedule puts the Member of Parliament into the straight jacket of obedience and compliance to the dictates of the party whips which undermines the democratic spirit. It also violates the principle of representative democracy by empowering the party, and undermining the relationship between elected representatives and their constituents. The anti-defection law makes a mockery of parliamentary democracy by marginalizing irrelevant debates, as the legislators are not allowed to dissent, without being disqualified by the House. Disruptions, rather than substantive and significant debate, become the only form of opposition possible. Parliamentary debate has thereby become largely redundant which turned out to be one of the first challenges faced by the anti-defection law.

There have been instances wherein after the declaration of election results, winning candidates have resigned from their membership of the House as well as the party from which they got elected. Immediately, they have joined the political party, which has formed the government and have again contested from that political party, which appears to be a fraud and goes against the spirit of the democracy and 52nd constitutional amendment. The intention was to have speedier

adjudicative processes under the Tenth Schedule. This provision was a subject matter of serious debate in both Houses of Parliament when the bill was being passed. The 91st Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. This amendment makes it mandatory for all those switching political sides — whether singly or in groups — to resign their legislative membership. They now have to seek re-election if they defect and cannot continue in office by engineering a “split” of one-third of members, or in the guise of a “continuing split of a party”. The amendment also bars legislators from holding, post-defection, any office of profit. This amendment has thus made defections virtually impossible and is an important step forward in cleansing politics.¹⁷⁷

In **Rajendra Singh Rana and Ors. v. Swami Prasad Maurya and Ors.**¹⁷⁸, the question that arose was that when can courts review the speaker’s decision-making process under the Xth schedule. The court concluded that if the Speaker fails to act on a complaint, or accepts claims of splits or mergers without making a finding, he fails to act as per the Tenth Schedule. Ignoring a petition for disqualification is not merely an irregularity but a violation of constitutional duties. The speaker and chairman of the house are responsible for the conduct of the members and the activities amidst the house. There is a great deal of responsibility on the speaker when it comes to schedule X. He/she cannot ignore the disqualification or any such behavior because they may then violate their own constitutional duties.

Further, in **Ravi Naik v. Union of India**¹⁷⁹, it was adjourned that words “voluntarily giving up membership” does not just constitute resignation but also any such behavior by the member which implies which draws inference on the same. Secondly it was also adjourned that the speaker while passing his decision in regard of schedule X acts as a tribunal and therefore will be subject to judicial review. Speaking about how the Speaker’s authority could be a Tribunal, the Court explained that, “Where there is affirmation by one party and denial by another-and the dispute

¹⁷⁷ <http://www.legalservicesindia.com/article/article/anti-defection-law-the-challenges-1937-1.html>

¹⁷⁸ (2007) 4 SCC 270

¹⁷⁹ AIR 1994 SC 1558

necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court."¹⁸⁰ One of the most important issues raised in the case was that whether the judicial review by courts extends to rules framed under the Tenth Schedule, to which the courts concluded that rules under the schedule are procedural in nature and therefore any violation of these will lead to procedural irregularity, which is immune from judicial scrutiny.

Paragraph 7 of the Schedule bars the jurisdiction of courts in any matter connection with the disqualification of a member of House under this Schedule. Of course, this does not exclude Court's intervention under articles 32, 226, 227, 136 under the Constitution. If we go deep into the impact of this law, it curbs the legislators' freedom of opposing the wrong policies, bad leaders and anti-people bills proposed by the 'High Command' in arbitrary and undemocratic manner. This law has given additional dictatorial power to the political party to keep the flock together for an entire term. Several MPs had raised this issue of judgment to be made by presiding officers at the time of passage of the law. The Goswami Committee, the Election Commission and the Venkatachaliah Commission to Review the Constitution (2002) ¹⁸¹have recommended that the decision should be made by the president or the governor on the advice of the Election Commission. This would be similar to the process for disqualification on grounds of office of profit. This position was made very clear by the Supreme Court in *Kihoto Hollohan's* case. Citing various authorities, the court analyzed the meaning of the word 'final' in the context of such clauses and said, "*There is authority against the acceptability of the arguments that the word 'final' occurring in paragraph 6 (1) has the effect of excluding the jurisdiction of the courts in articles 136, 226, 227.*"

Another major issue is that should the law be valid for all votes or only for those that determine the stability of the government (such as the confidence and no-confidence motions)? The chief intention behind the making of the law was to deter "the evil of political defections" by legislators

¹⁸⁰http://indialawjournal.com/volume3/issue_1/article_by_jenna.html

¹⁸¹ <http://www.prsindia.org/media/articles-by-prs-team/in-parliament-961/>



motivated by lure of office or other similar considerations. However, loss of membership is hardly a penalty in cases ahead of the scheduled time of general elections. The Venkatachaliah Commission recommended that defectors should be barred from holding any ministerial or remunerative political office for the remaining term of the House. It also said that the vote of any defector should not be counted in a confidence or no-confidence motion. Also, if the house gets dissolved there is a huge insignificance attached to it. On the other hand, the voting conduct may be subject to issues not related to the stability of the government. A member may be unable to express his actual belief or the interests of his constituents. Therefore, a case may be made for restricting the law to confidence and no-confidence motions. The Dinesh Goswami Committee on electoral reforms (1990) recommended this change, while the Law Commission (170th report, 1999) suggested that political parties issue whips only when the government was in danger.¹⁸² The final provision in this legislation gives the Speakers of the House to make rules for giving effect to any provision contained in the Schedule. In pursuance of this power, the states of Goa, Maharashtra, Gujarat, Haryana, Bihar, Kerala, Karnataka and others and also the Houses of the Parliament, both the Rajya Sabha and Lok Sabha have made rules in this regard. These Houses would be bound by the rules contained in the Schedules as also the ones that have been enacted specially for them. The members of the house are bound to respect and follow the rules set for them

One of the most recent disqualification was -in **Shri Rajesh Verma v. Shri Mohammad Shahid Akhlaque, BSP**¹⁸³, it was alleged that the latter joined the Samajwadi party in a public meeting and speaker had to decide that whether or not print stories or media clippings amount to evidence for defection. The speaker reasoned that there is no ground on which such stories should not be considered as evidence for defection and therefore disqualified Shri Akhlaque. Other cases of famous disqualifications are **Avatar Singh Bhadhana v. Shri Kuldeep Singh**¹⁸⁴, INC (public

¹⁸² http://www.prsindia.org/administrator/uploads/general/1370583077_Anti-Defection%20Law.pdf

¹⁸³ January 27th, 2008

¹⁸⁴ September 10th, 2008



criticism of one's political party) and **Shri Prabhunath Singh v. Shri Ram Swaroop Prasad, JD(U)**¹⁸⁵ There is no ambiguity in the legality of current provisions related to these issues. Any change would require legislative action. There is, however, need for public debate on the working of the anti-defection law. Several committees and commissions have either advised changes and solutions like the law commission report (170th report), Halim Committee on anti-defection law (1998) or the Constitutional Review Commission(2002) granting solutions to various issues and challenges addressed above and trying find a nexus between all of them and Schedule X.

Conclusion

The introduction of Schedule X in the Constitution attempted to bring in a comprehensive legislation that would assail the menace of defection. It aimed at bringing down the political defection but due to ever increasing political dishonesty and corruption this law never evolved properly. While the law has succeeded in this aspect to a reasonable degree, there were certain ambiguities. The Courts of the land have done a fair job in expounding the stance by applying the law to particular facts and circumstances. Nevertheless, very few general propositions have been laid down which have a universal application and ambiguity. It has been subject a lot criticism in the house as well as outside it. Thus, there seems to be considerable scope for judicial interpretation, one that may give further clarity and lucidity on the law. This may bring in a wider range of cases within the umbrella of this legislation and stabilize it.

¹⁸⁵ October 3rd, 2008

ROLE OF A JUDGE IN A CONSTITUTIONAL DEMOCRACY

AYUSH JAISWAL* & MUGDHA TOMAR**

Keywords

Democracy, judiciary, justice

Introduction

A 'constitutional democracy' as defined by the dictionary is a system of government based on popular sovereignty in which structures, powers and limits of government are set forth in a constitution.¹⁸⁶ 'Judge' has been defined by the Oxford dictionary as an officer with authority to decide cases in law court.¹⁸⁷ Judges, all over the world function as impartial and independent 'umpires' bringing meaningful judicial order and justice in the society.¹⁸⁸ Though the main task of the judge is to decide cases and administer justice, but the role that he plays varies from system to system; since India is a constitutional democracy, the judge has a major role to play while deciding cases. The Indian democracy has been divided into three independent watertight organs viz. executive, legislature and judiciary. All these organs have distinct roles and derive their authority from the Constitution. The executive implements policies of the government, the legislature legislates laws according to dynamics of the society and creates livelihoods for the 'equals' and the judiciary has been bestowed with the power to protect their (people's) rights. Since the power of the other two organs i.e. Legislature and Executive are wider,

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¹⁸⁶ <http://dictionary.reference.com/browse/constitutional+democracy> (accessed on 03-11-2014)

¹⁸⁷ "Judge" Def. 1 Oxford Advanced Learners Dictionary, 1997, Print

¹⁸⁸ Rao G.M., Reddy G.B., Rao V. Geeta, Judiciary in India Constitutional Perspective, Asia Law House, 1st Edition, 2009, "Role of Judge in the Judicial System of India-An analysis of recent trends", Dr. C. Nirmala, P. 400



there are chances of people being harmed. Whenever issues relating to crime committed or in case of disagreement among people, one can approach the court and seek interference of judges not only to protect their rights and privileges but also to punish the offenders. It is worth mentioning here that though the judge has the power to award punishment to the criminals, such power is neither unrestricted nor can it be used arbitrarily; there is a defined ambit within which a judge has to act and use of his authority. He can also be questioned in higher courts. This is a unique feature of our constitutional democracy while in other systems like the autocratic system, the king himself is the judge and his authority cannot be questioned. Apart from this, the doctrine of judicial review also confers on the courts the power to rule on legislative as well as administrative actions.¹⁸⁹ In this paper these functions and powers of a judge are discussed.

Delivery of Justice

Law, Liberty, Equality oriented legal processes are means to achieve an end i.e. Justice. As pointed out by Maitland, a judge is not expected to behave like a machine but as a thoughtful and skilled artist, who processes law in his anxiety to do justice.¹⁹⁰ However, justice is not something that can be achieved by applying one formula to all cases. As morals and ethics play a vital role in administering justice, each case is to be decided in a way that equality is ensured in diversity. This is done by a judge by settling a disagreement through ensuring just allocations of advantages and disadvantages, preventing the abuse of power and preventing the abuse of liberty. Legislations, precedents and customs 'guide' the judiciary in this process. It is worth noticing that the laws enacted by the parliament and state legislatures are finally and authoritatively interpreted by the court. Our Constitution envisages the judiciary as the final arbiter on the Constitution, as the guardian of freedom and liberty, and as a citadel against administrative

¹⁸⁹http://www.supremecourtindia.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf (accessed- 01-11-2014)

¹⁹⁰ C.K. Allen "Law in the making", Oxford University Press, 7th Edition, 1967, P. 397.

excesses.¹⁹¹ There is virtually no area of constitutional, legislative or executive activity which is beyond the court's scrutiny.¹⁹²

Formation, Interpretation and Review of Laws

Article 141 of the Constitution empowers the Supreme Court to declare a law, which shall be binding on all courts within the territory of India. This can be in the form of a judgment or by the way of wider or narrower interpretation given by the judges to a law. Complete prohibition by the Supreme Court on use of tinted glass in windows of vehicles, though permitted by the Central Motor Vehicles Rules subject to a maximum limit of 30%¹⁹³ is an example of how the judiciary 'interprets' law to mould it into a new shape. The guidelines for arrest laid down in *DK Basu v. State of West Bengal*,¹⁹⁴ the Vishakha Guidelines,¹⁹⁵ and the provision for not amending the basic structure of the Constitution are other examples. Apart from this, the lower courts are also bound to follow the judgment laid down by a higher court, which is referred to as 'precedent'. The application of precedent by judges is the main mechanism whereby judges make law. Occasionally, judges are called upon to give a ruling or make a decision when confronted with a condition for which there appears to be no precedent or any directorial rule. In these circumstances, judges can be said to be articulating original precedent. Thus, it is the judge's role to use his own discretion concerning what rules he thinks need to be applied, changed, improved, or abolished whenever an issue is brought before the court and the law is silent or is inadequate to ensure justice.¹⁹⁶

¹⁹¹ *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

¹⁹² Godbole Madhav, *The Judiciary and Governance in India*, Rupa Co., 2nd Edition, 2009, P. 24.

¹⁹³ <http://indiatoday.intoday.in/story/delhi-sc-ban-on-tinted-black-film-car-glass-may-4/1/186536.html> (accessed- 01-11-2014).

¹⁹⁴ AIR 1997 SC 610.

¹⁹⁵ *Vishakha and others v. State of Rajasthan* (AIR 1997 SC 3011).

¹⁹⁶ <http://www.legalserviceindia.com/articles/juju.htm> (accessed on 01-11-2014)

Another distinguishing feature is the doctrine of judicial review, which was propounded in the case of *William Marbury v James Madison*.¹⁹⁷ This doctrine confers on the courts the power to rule on legislative as well as administrative actions.¹⁹⁸ In this context, the then Chief Justice Patanjali Shastri rightly said “ *Judicial review is undertaken by the courts not out of any desire to tilt at legislative authority in a crusaders spirit but in discharge of a duty plainly laid upon them by constitution.*”¹⁹⁹ The courts are empowered to review and either strike down a law on the ground of unconstitutionality or uphold legislation or a part thereof as constitutional. The latter lends legitimacy to the law. Thus, both legitimating function and checking function are implicit in the power of judicial review.²⁰⁰ It is worth mentioning that this power cannot be taken away from the courts by Parliament even by amending the constitution.²⁰¹

Rendering Advisory Opinion

Article 143 of the Indian Constitution pertains to power of the President to consult the Supreme Court in case a question of law or of fact has arisen or is likely to arise, which is of such nature and public importance that it is expedient to obtain the opinion of the Supreme Court upon it. As of 2009, the President had made 11 references under this Article to the Supreme Court.²⁰² The President however is not bound to act in accordance with the opinion of the Court. It is pertinent to mention here that the Supreme Court is also entitled to decline answering a question posed under this Article but it must give reasons for the same.²⁰³

National Judicial Appointments Commission²⁰⁴

¹⁹⁷<http://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review> (accessed on 2-11-14).

¹⁹⁸ Supra note 4.

¹⁹⁹ *State of Madras v. V.G. Rao*, 1952 SCR 597.

²⁰⁰ Supra Note 3, “Judiciary in Indian: Constitutional Perspectives” Key Note Address by Justice M.N. Rao, P. 35.

²⁰¹ *L. Chandra Kumar v. Union of India* 1997 (3) SCC 261.

²⁰² Supra Note 7, P. 37.

²⁰³ Ibid.

²⁰⁴ International Journal of Legal Research (ISSN- 2349-8463) Volume 1, Issue 2, P. 206.



Our Constitution has given separate powers to each organ of the government and judiciary is one among them. It is the guardian of the Constitution as it protects the rights of the citizens from the government or private encroachment and protects the society from injustice. Beside this, the role of judges in delivering the judgement is very significant because they bring change to the society for the betterment of the citizens. Thus, selection of judges by a proper system is of great importance. The quality and experience of a person is very integral and of utmost importance in selection of judges for a particular position and independence of the Judiciary is a very important part of democracy in India. However, the new system of the National Judicial Appointment Commission introduced by the government was an anathema to judicial independence.

The National Judicial Appointments Commission Bill, 2014, and the accompanying Constitution Amendment Bill, passed by a majority vote in Parliament proposed to replace the 20 year old collegium system (consisting of the Chief Justice of India and four senior-most judges of the Supreme Court) that had come under severe criticism, to prevent the corruption in the prevailing Judicial system. The New Commission consisted of six members which including the Chief Justice of India (CJI) (chairman, ex officio), two senior most judges of the Supreme Court (member, ex officio members), the law minister (member, ex officio), two eminent persons whose task was to appoint and transfer judges of the Supreme Court and 24 high courts.²⁰⁵ The eminent persons were to be chosen by the committee comprised of CJI, Prime Minister and Leader of Opposition or leader of largest opposition in the Lower House and if Leader of Opposition, is not present then, the Leader of single largest Opposition Party in the House of the People.

The provision also says that one of the eminent persons shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women. It was also stated that the eminent person will be nominated for a period of three years. The Constitutional Bench of the Supreme Court on 16th October, 2015 declared the

²⁰⁵ <http://www.deccanherald.com/content/425553/parliament-nod-scrap-collegium.html> (accessed on []).



99th constitutional amendment Act, 2014 and the National Judicial Appointment Commission (NJAC) Act, 2014 as unconstitutional and void.

Conclusion

As noticed in the above, it can be said that a judge plays a major role in safeguarding the democracy. He, in a way is guardian of the constitution and is empowered to settle disputes among people. Apart from this, he also renders opinion to the President and reviews, interprets and forms laws to ensure justice is delivered. Though the main task of the judge is to deliver justice, there have been instances where the judiciary stepped out of the ambit and sadly subjected people to injustice; one such instance being the case of the Bhopal gas tragedy. Also, in the MC Mehta Case,²⁰⁶ the Supreme Court played the role of executive by asking the concerned authorities to submit day-to-day accounts of progress of work of cleaning the river Ganga. Apart from this, there have been instances where the judiciary has refrained from intervening and protecting democracy. In the ADM Jabalpur case,²⁰⁷ the Court, during emergency didn't play the role to safeguard democracy.

In addition, the process of appointment of judges has also been in the cross hairs; the reason being that the heads of legislature and executive are appointed by the people while they hardly have any role to play in appointment of judges.

If the above mentioned suggestions/ findings are looked into, it can be concluded that the day is not far, when our judiciary can actually be called the 'best judicial system of the world'.

²⁰⁶ *M.C. Mehta v. Union of India* 1988 SCC (1) 471.

²⁰⁷ *ADM Jabalpur v S.S. Shukla* 1976 SCC (2) 521.



FINANCIAL STATEMENTS AND TRANSACTIONS BETWEEN HOLDING & SUBSIDIARY COMPANIES

DEEYA RAY²⁰⁸

Abstract

A special relationship exists between holding and subsidiary companies as compared to other companies. The Companies Act 2013 describes them as 'related parties'. This special relationship that exists between them necessitates the application of some special laws and rules that have to be in existence in order to govern all matters that they are involved in, especially as regards their financial statements and transactions with each other.

A number of changes have been made to these laws and rules over the years. This paper seeks to first look into the concepts of Holding and Subsidiary Companies as provided for under the Companies Act 2013. Thereafter, it delves into the evolution of the law with respect to transactions between Holding and Subsidiary Companies and their Financial Statements. The latest changes that have been made to the law shall also be discussed.

Keywords

Financial Statements, Holding Companies, Subsidiary Companies, Transactions between companies

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INTRODUCTION

Holding and Subsidiary Companies have a special relationship with each other as compared to other companies. They have been described as 'related parties'. Due to this special relationship, certain special laws and rules have been put in place to govern matters connected with transactions and financial statements between Holding Companies and their Subsidiaries.

These laws and rules have undergone certain changes over the years. This paper shall first discuss the concepts of Holding and Subsidiary Companies as provided under the Companies Act, 2013. Thereafter, it shall look into the evolution of the law relating to transactions between Holding and Subsidiary Companies and the Financial Statements of the same by looking into the latest amendments and changes that have been brought in.

HOLDING AND SUBSIDIARY COMPANIES

A 'Holding Company' has been defined under s.2(46) of the Companies Act, 2013 (the Act) as a company that has a number of subsidiaries in one or more other companies.²⁰⁹

A 'Subsidiary Company' or simply, a subsidiary has been defined under s.2(87) of the Act as a Company in which the holding company has control over two aspects:

- (i) the composition of the Board of Directors (i.e. appointment or removal of all or majority of the directors)
- (ii) more than half of the total share capital, either on its own or with one or more of its subsidiary companies.²¹⁰

S.2(76)(viii)(A) of the Act says that a 'Related Party' in relation to a company, is any company that is a holding, subsidiary or an associate company of such a company.²¹¹

²⁰⁹ The Companies Act 2013, s 2(46).

²¹⁰ The Companies Act 2013, s 2(87).

²¹¹ The Companies Act 2013, s 2(76)(viii)(A).

Therefore, from a perusal of the above, it is clear that holding and subsidiary companies are related parties and are governed by special rules when they interact with each other.

TRANSACTIONS BETWEEN HOLDING AND SUBSIDIARY COMPANIES

The law relating to transactions between holding and subsidiary companies has evolved over the years. Since they are related parties, the provision relating to 'Related Party Transactions' as provided under s.188 of the Companies Act, 2013 would apply to them. However, this section was only brought in to replace s.297 and s.314 of the Companies Act, 1956. Therefore, it is pertinent to look at the changes that have been made in the new section.

Relevant Provisions of the Companies Act 1956

The Companies Act, 1956 (the 1956 Act) did not define a 'related party' and followed the definition provided under Accounting Standard 18. The standard provides that a related party relationship includes enterprises that directly or indirectly (i.e. through one or more intermediaries) control or are controlled by, or are under common control with, the reporting enterprise. The standard expressly states that this would include holding companies, their subsidiaries and fellow subsidiaries.²¹² Therefore, under the 1956 Act as well, holding and subsidiary companies were held to be related parties.

S.297 of the 1956 Act provided that in case of sale, purchase or supply of any goods and services and in case of underwriting the subscription of any shares or debentures of a company in which particular directors are interested, the consent of the Board of Directors of the company would have to be obtained.²¹³ Obviously, the director of a holding company would be interested in a contract entered into between that company and its subsidiary, therefore s.297 would govern such transactions.

²¹² Accounting Standard 18, paragraph 3.

²¹³ The Companies Act 1956, s 297.

Further, the section provided that if a company had a paid-up share capital of more than one crore rupees, then prior approval of the Central Government would be required before entering into such a transaction.²¹⁴

Relevant Provisions and Changes brought by the Companies Act 2013

Significant changes were brought by the 2013 Act with respect to related party transactions. The act sought to emphasise on investor protection. Onerous responsibilities with strict consequences were brought in by the Act. Basically, s.188, dealing solely with Related Party Transactions, was introduced.

This section provided that the transactions of a company with its related party that are neither in the ordinary course of business, nor at arms length would require the prior consent of the Board of Directors provided by a resolution.²¹⁵

S.188(1) of the Act provides a list of 'transactions' that would fall under the scope of related party transactions and would require a Board Resolution to be carried out. These include:

- (i) Sale, purchase or supply of goods
- (ii) Sale, disposal of or purchase any kind of property
- (iii) Lease of property
- (iv) Rendering or availing a service
- (v) Appointing agents for buying and selling goods, materials, services or property
- (vi) Appointment to any office or place of profit in the company, its subsidiary company or associate company and
- (vii) Underwriting the subscription of any securities or derivatives thereof, of the company.²¹⁶

²¹⁴ *ibid.*

²¹⁵ The Companies Act 2013, s 188(1).

²¹⁶ The Companies Act 2013, s 188(1).

The section further provides that prior approval of shareholders by special resolution would be required in case of a related party transaction that exceeds the prescribed thresholds provided under the Act: In case of sale/purchase/lease of goods/services/properties and appointments of agents for the same, a special resolution would be required if the aggregate/individual transactions are greater than 5% of annual turnover or 20% of the networth, whichever is higher. In case of appointment to an office or place of profit in a company or subsidiary, if the monthly remuneration exceeds Rs.1 lakh.²¹⁷ Further, a member cannot vote on such special resolution if the member is a related party.²¹⁸

However, here, an exception has been made with regard to a wholly owned subsidiary. It is stated under Explanation (2) of Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014²¹⁹ that in case any of these transactions are between a holding company and its wholly owned subsidiary, then a special resolution passed by the holding company would be sufficient to enter into transactions between the wholly owned subsidiary and the holding company.²²⁰ They are exempt from requiring the approval of non-related shareholders.²²¹ However, nothing about transactions between two wholly owned subsidiaries has been provided for and therefore, this still remains a grey area.

²¹⁷P Udhas and S Venkateshwaran, 'Companies Act 2013: New Rules of the Game' 20 (KPMG, October 2013) <https://www.kpmg.com/IN/en/Documents/KPMG_Companies_Act_2013.pdf> accessed 22 August 2015.

²¹⁸ The Companies Act 2013, s 188(1).

²¹⁹ The Companies (Meetings of Board and its Powers) Rules 2014, Rule 15.

²²⁰ Udhas and Venkateshwaran (n 9); M Kapoor and S Shukla, 'India: Related Party Transactions: Companies Act 2013' (Mondaque, 14 October 2014) <<http://www.mondaq.com/india/x/346678/Contract+Law/Related+Party+Transactions+Companies+Act+2013>> accessed 22 August 2015.

²²¹ 'Companies Act Amendments to make Related Party Deal Norms Easier' (*The Economic Times*, 3 December 2014) <http://articles.economictimes.indiatimes.com/2014-12-03/news/56684764_1_related-party-transactions-sai-venkateshwaran-companies-law> accessed 22 August 2015

Thus we see that the government approval requirement for transactions between related parties has been done away with and it has been replaced by a regime of shareholder approval and disclosures.

A Board Report or Director's Report also has to be maintained that provides for the details of related party transactions that need a special resolution or the consent of the board and it must contain the reasons and justifications for entering into such transactions.²²²

The section also provides for penalties in case of non-compliance with the provisions of the section. In case of a listed company, non-compliance would lead to imprisonment for up to a year, or a fine that is not less than Rs25, 000 and not more than Rs.5 Lakh or both. In case of any other company, there can be no imprisonment, but the rest is the same.²²³

Therefore, the most significant changes brought by the 2013 Act with respect to transactions between holding and subsidiary companies are:

- (i) Requirement of central government approval has been done away with
- (ii) The ambit of transactions has been widened so as to include transactions such as leasing of property, appointment of agents selling and buying goods, materials, services and properties
- (iii) The 1956 Act had provided that s.297 would not be applicable in case of transactions carried out for 'cash at prevailing market price.' This has been replaced and now reads as s.188 would not be applicable to 'arms length transactions.'
- (iv) All transactions have to be entered into in the Board's Report, wherein, the reasons for entering into such transactions must be mentioned.

²²² The Companies Act 2013, s 188(2).

²²³ CS Vanaja and CSJ Smitha, 'Related Party Transactions' (*R&A Associates*, 4 August 2014) <<http://rna-cs.com/related-party-transactions>> accessed 22 August 2015; The Companies Act 2013, s 188(5).

- (v) Under the 1956 Act, general provisions of the Act governed penalties for non-compliance with the provisions of s.297. However, now, specific penalties, extending to imprisonment, have been provided under s.188.
- (vi) Additional conditions may be prescribed by the Central Government.²²⁴

Here, the exemptions to s.188, namely, transactions in ordinary course of business and arms length transactions should be briefly understood. 'Ordinary Course of Business' has not been defined under the Act, however, it would in all probability mean, the usual transactions and practices of the business of a company. The Institute of Chartered Accountants of India has provided an illustrative list of transactions that would not fall within the ordinary course of business. These include, complex equity transactions involving corporate restructuring and acquisitions, transactions with offshore entities in countries having weak corporate laws, transactions with large discounts or circular arrangements etc. In order to determine whether a transaction is in ordinary course of business, importance has to be given to the nature and objects of the business and the company. It will differ on a case-to-case basis.²²⁵ An 'Arms Length Transaction' on the other hand is defined under explanation (b) to s.188(1) of the Act and is a transaction wherein the related parties transact as if they were unrelated. This is done to avoid any conflict of interest.²²⁶ A number of qualitative and quantitative aspects may be considered in order to determine arms length. The Income Tax Act may even have a persuasive value in order to understand the working of the concept better.²²⁷ However, it must be remembered that the

²²⁴ Pricewaterhouse Coopers, 'Companies Act 2013: Key Highlights and Analysis' 22 (PricewaterhouseCoopers, 2013) <https://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/companies-act-2013-Key-highlights-and-analysis.pdf> accessed 22 August 2015.

²²⁵ Gaurav Mittal, 'Section 188-Related Party Transactions under Companies Act 2013' (*TaxGuru*, 13 June 2014) <<http://taxguru.in/company-law/section-188-related-party-transaction-companies-act-2013.html>> accessed 22 August 2015.

²²⁶ The Companies Act 2013, s 188(1).

²²⁷ Mittal (n 17)

objects of the two acts are different, the Income Tax Act is a fiscal statute while it is the objective of the Companies Act to protect the interests of shareholders.²²⁸

Sometimes, the question of applicability of s.185 of the Act to holding and subsidiary companies arises. S.185 provides that a company cannot advance a loan to any of the directors or any person in whom the director is interested or provide any security or guarantee for the same unless it is otherwise provided for under the Act.²²⁹ Now, the explanation under this section provides for a list to explain whom the person that the director may be interested in for the purposes of this section. Nowhere is a holding or subsidiary company mentioned. Therefore, there is no reason to say that this section would apply to holding and subsidiary companies. Explanation (e) comes closest to including holding-subsidiary transactions under this section. The clause basically means that if the Board of the borrowing company is simply a shadow of that of the lending company, then the directors of the lending company are technically controlling the borrower and hence the borrower is under the economic control of the directors of the lending company.²³⁰ This view creates problems for many companies because a subsidiary may not be in a position to raise capital without the support of the holding company. The Companies (Meetings of Board and its Powers) Rules, 2014 have provided certain exemptions to address this issue subject to the fact that the loans are used by the subsidiaries for their main business activities: (i) a loan or a security or guarantee of a loan made by a holding company to a wholly owned subsidiary and (ii) a guarantee or security given by holding company to its subsidiary (even not wholly owned subsidiary).²³¹

²²⁸ Sarvesh Karnani and Shruti Sethi, 'Related Party Transaction Regime: A Perplexity for Private Companies' (2014) 7 (2) India Law Journal 7.

²²⁹ The Companies Act 2013, s 185(1).

²³⁰ Vinod Kothari, 'Does section 185 apply to Holding Subsidiary Transactions?' (*IndiaCorpLaw*, 14 March 2014) <<http://indiacorplaw.blogspot.in/2014/03/does-section-185-apply-to-holding.html>> accessed 22 August 2015.

²³¹ The Companies (Meetings of Board and its Powers) Rules 2014, Rule 10.

Most companies follow these provisions. However, whether these rules could be used to override the Companies Act 2013 was not clear.²³²

Another important addition to the 2013 Act would be of s.177(4)(iv) which mandates that the Audit Committee has to approve or modify transactions between related parties.²³³

Uncertainty for Transactions between Private Companies and their Subsidiaries

Previously, under 1956 Act, s.300, while stating that a director who has an interest in the contract or arrangement cannot vote for or against it, expressly stated that this would not apply to private companies. However, the new s.188 does not make any distinction between private and public companies in this regard. So, this implies that even private companies have to undergo the lengthy and cumbersome process to enter into transactions with its related party. Since transactions between holding and subsidiary companies are treated as Related Party Transactions, if such a transaction exceeds the thresholds prescribed, then approval of members is required. This creates a problem for the subsidiary because the holding company (that may even hold 99% of the shares) will not be permitted to vote for or against the transaction. Thus, the objective for creating the subsidiary will not be met. It must be kept in mind that this is only for those subsidiaries that are not wholly owned.²³⁴

Clause 49

Clause 49 of the SEBI Listing Agreement provides for some additional requirements for listed companies.²³⁵ The Revised Clause 49 has a broader definition of related party transactions and

²³² Ernst & Young, 'Companies Act 2013: Related Party Transactions: Loans to Directors and Subsidiaries' (E&Y) <<http://www.ey.com/IN/en/Issues/Governance-and-reporting/EY-Compass-on-Companies-Act-2013/EY-cfo-companies-act-2013-related-party-transactions>> accessed 22 August 2015.

²³³ Vanaja and Smitha (n 15).

²³⁴ Karnani and Sethi (n 20)

²³⁵ SEBI Listing Agreement, Clause 49.

covers all transactions. The transfer of 'research work' to a subsidiary would not be an 'asset' as required under Accounting Standard 26, but under the revised clause 49, it would be considered a transfer of a resource and hence an RPT.²³⁶ As per Clause 49(VII)(D) and 49(VII)(E), approval of the audit committee and shareholders is required before entering into RPT. However, there is an express exemption given to holding companies and their subsidiaries from requiring such approval as long as their accounts are consolidated and placed before the shareholders for approval in the general meeting.²³⁷

Companies (Amendment) Act 2015

The Ministry of Corporate Affairs brought in the Companies (Amendment) Act 2015. This was mainly to reinstate to private companies the exemptions that it had enjoyed prior to the 2013 Act replacing the 1956 Act. According to the new law, in relation to private companies, holding and subsidiary companies are not held to be 'related parties' for the purposes of s.188 of the Act. Therefore, such private companies are not required to obtain approval of the Board or shareholders in order to enter into transactions with a related party. It should be mentioned here that private holding and subsidiary companies are still related parties under s.2(76), it only under s.188 that there is an exemption.²³⁸ Therefore the problem posed earlier with regard to uncertainty in case of private companies has been dealt with.

²³⁶ Ernst & Young (n 24)

²³⁷ S Mukherjee, K Dalal and S Tolia, 'Related Party Transactions: Navigating through challenges: Companies Act 2013 and SEBI's Revised Clause 49' (*PricewaterhouseCoopers*, 15 September 2014) <https://www.pwc.in/en_IN/in/assets/pdfs/india-services/transfer-pricing/related-party-transactions-navigating-through-challenges.pdf> accessed 22 August 2015; KPMG in India "SEBI's recent amendments of Clause 49" (*KPMG*, 17 September 2014) <<https://www.kpmg.com/IN/en/IssuesAndInsights/first-notes/Documents/FirstNotes-17Sept14.pdf>> accessed 22 August 2015.

²³⁸ N Joseph, R Sinha and S Rana, 'Companies Act 2013 Amended: Private Company Exemptions Reinstated' (*Nishith Desai and Associates*, 29 June 2015) <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/companies-act-2013-amended-private-company-exemptions-reinstated.html?no_cache=1&cHash=689be6318f964317396b94d7c23199db> accessed 22 August 2015.

The Amendment Act further provides that in case of related party transactions between a holding company and its wholly owned subsidiary, there is no need for a resolution as long as consolidated accounts of the holding and subsidiary company are provided to the shareholders for approval in a general meeting.²³⁹ Thus it is in alignment with Clause 49.

Another important change brought by the amendment act is that it has incorporated the Companies (Meetings of Board and its Powers) Rules, 2014 that were provided to help explain s.185 of the Act. Therefore, now, loans can be given by holding companies to their wholly owned subsidiaries and the holding company can give a security or guarantee for a loan to all subsidiaries.²⁴⁰

Another relevant change has been the addition of s.177(4) which allows the audit committee to provide an omnibus approval for related party transactions proposed to be entered into subject to prescribed conditions. Although this was introduced to improve the ease of doing business, it has not been enforced yet. It is aligned with Clause 49 of the Listing Agreement.²⁴¹

CONSOLIDATED FINANCIAL STATEMENTS

Financial Statement has been defined under s.2(40) of the Act for the first time and it includes:

- (i) Balance sheet
- (ii) Profit and loss account
- (iii) Cash flow statement

²³⁹ 'Highlights on Companies Amendment Act 2015' (KPMG, 2 June 2015) <[http://www.kpmg.com/IN/EN/SERVICES/TAX/FLASHNEWS/KPMG-FLASH-NEWS-HIGHLIGHTS-ON-COMPANIES-\(AMENDMENT\)-ACT-2015.PDF](http://www.kpmg.com/IN/EN/SERVICES/TAX/FLASHNEWS/KPMG-FLASH-NEWS-HIGHLIGHTS-ON-COMPANIES-(AMENDMENT)-ACT-2015.PDF)> accessed 22 August 2015.

²⁴⁰B Narsana, S Dwivedi and A Govil (Khaitan & Co), 'India: Companies Amendment Act 2015: Key Highlights' (Mondaq, 6 July 2015) <<http://www.mondaq.com/india/x/410320/Corporate+Commercial+Law/Companies+Amendment+Act+2015+Key+Highlights>> accessed 22 August 2015.

²⁴¹ 'The Companies (Amendment) Act 2015' (DSK Legal) <<http://dsklegal.com/PDF/2015/DSK%20LEGAL%20-%20COMPANIES%20AMENDMENT%20ACT.PDF>> accessed 22 August 2015.

- (iv) Statement of changes in equity and
- (v) Any other document that is attached to or forms a part of the abovementioned documents.²⁴²

The Act also provides for some special requirements that have to be fulfilled by holding and subsidiary companies with regard to their financial statements.

S.136(1) of the Act provides that every holding company has to place a separate audited account of each of its subsidiaries on its website.²⁴³

S.129(3) of the Act provides for Consolidation of Financial Statements (CFS) of holding and subsidiary companies. These are to be provided by the holding company in addition to its standalone financial statement. This requirement is a positive step in moving towards the International Financial Reporting Standard, which states that the CFS is a primary financial statement.²⁴⁴ A CFS is intended to show the financial position of the group as a whole.²⁴⁵

s.129(5) states that a separate statement containing the salient features of the financial statements of subsidiaries has to be attached with the CFS.²⁴⁶

In case of non-compliance with the provisions of this section, penalties are applicable as per s.129(7). The managing officer, whole time director in charge of finance, the Chief Financial Officer, or any other person charged by the Board of Directors and in the absence of any officer, all the directors shall be punishable with imprisonment for up to a year or a fine not exceeding Rs.5 Lakh or both.²⁴⁷

²⁴² The Companies Act 2013, s 2(40).

²⁴³ The Companies Act 2013, s 136(1).

²⁴⁴ A Ramaiya, *Guide to Companies Act*, vol 2 (18th edn, LexisNexis 2015) 1955.

²⁴⁵ Institute of Chartered Accountants of India, 'Consolidated Financial Statements of Group Companies' (ICAI) <<http://www.icaiknowledgegateway.org/littledms/folder1/chapter-5-consolidated-financial-statements-of-group-companies.pdf>> accessed 22 August 2015.

²⁴⁶ Ramaiya (n 36) 1957.

²⁴⁷ *ibid.* 1958.



As per Rule 6 of the Companies (Accounts) Rules 2014 a company has to make its consolidated financial statement in accordance with Schedule III and the applicable Accounting Standards.²⁴⁸

Accounting Standard 21 provides the principles and procedures that are to be followed while preparing and presenting a CFS. The CFS is to be in the same format as that used for the separate financial statement of the holding company.²⁴⁹

The basic framework for preparation and presentation for consolidated statements as well as investments in subsidiaries in a holding company's separate financial statement is provided for in International Accounting Standard 27.²⁵⁰

Now, issues arise due to the fact that under the Companies Act, 'shareholding' is a major factor used in determining whether a company is a subsidiary or not, while under AS 21 it is 'voting power'. Previously, CFS was only provided for under AS 21, but now, since CFS requirement has been included in the Companies Act, a conflict arises as to which definition should be used.²⁵¹

s.137 of the Act requires financial accounts of a subsidiaries outside India to be provided with the financial statements including CFS.²⁵²

²⁴⁸ The Companies (Accounts) Rules 2014, Rule 6; Ramaiya (n 36) 1958.

²⁴⁹ Institute of Chartered Accountants of India (n 37).

²⁵⁰ International Accounting Standard 27: "Consolidated Financial Statements and Accounting for Investments in Subsidiaries".

²⁵¹ Pricewaterhouse Coopers (n 16) 26.

²⁵² The Companies Act 2013, s 137(1).



CONCLUSION

Holding and Subsidiary Companies are thus Related Parties under the Companies Act 2013 and therefore special rules have been put in place in order to govern transactions entered into between them and special requirements have to be fulfilled by them as well. The Companies (Amendment) Act 2015 has answered a number of questions that had been left hanging by the 2013 Act and has made the law relating to holding subsidiary companies clearer. However, problems still remain, especially when it comes to the massive compliance requirements that have been imposed on the holding and subsidiary companies in case of both, transactions amongst themselves and financial statements. The requirement of a CFS has substantially increased compliance costs for unlisted companies and does not really work as well as it does for listed companies. Preparation of the same information in different forms such as standalone financial statements, CFS, salient features of subsidiaries financial accounts and the like is just leading to duplication making the process more cumbersome.



LEASE: A CRITICAL ANALYSIS

AUSHI SARANGI²⁵³

Abstract

In the paper, the researcher embarks on the importance of lease in a tenant landlord transactions and the legal validity of lease agreement. The first part of the paper deals with the historical background of the concept of lease and its essential elements. It also discusses about the rights and liabilities of the lessor and lessee.

The second part of the paper deals with the meaning of agreement under the Indian Contract Act, 1872. It also describes about the implementation of various clauses in different types of lease agreements.

The third part of the paper deals with the interpretation of certain important doctrines like doctrine of equity, frustration of lease and perpetual liability in the context of British Judgment and Indian Judgment.

The fourth part of the paper takes a peak upon the difference between lease and license along with brief judicial interpretation of such difference discussed in various cases.

Last but not the least, in the final part of the paper the researchers wish to embark that along with statutory measures, enforceability of an agreement plays a major role while leasing a property.

Keywords

Agreement, Contract, Lease, Lease Types, License

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Introduction

According to Bacon Abridgement ²⁵⁴, a lease is defined as a contract between the lessor and the lessee for the possession and enjoyment of the profits of the land on one side and recompense by rent or other consideration on the other.

The basic concept of leasing dates back to at least 1800 B.C., when the Babylonian king Hammurabi described the transaction in his Code of laws, stating that use of an equipment rather than the ownership produces wealth. Leasing has been employed for centuries in different forms and for different applications but by early 1990s it was confirmed primarily to real estate rentals, although leasing was also used to finance other expensive assets such as cars and farm equipment. As a result of several factors, including tax code changes and improved efficiency in the financial markets, leasing became a common financing tool after 1950. By the mid of 1990s people and companies started leasing everything from land, office furniture, airplanes etc. In the United States leasing was the most common way to finance plant and equipment for manufacturing companies and it was being used in a growing number of consumer purchases. In India, leases used for agricultural purposes until the late 18th century and early 19th century when the growth of industrialized countries made leases an important form of landholding in urban areas. The modern law of landlord and tenant in common law jurisdictions retains the influence of the common law and particularly, the philosophy of laissez faire that dominated the law of contract and property law in the 19th century. With the growth of consumer protection laws which assumes equal bargaining power between the contracting parties. Consequently, reformers have emphasised the need to assess residential tenancy laws in terms of protection they provide to tenants. Thus Legislation to protect tenants is now common.

²⁵⁴Mulla's Transfer of Property Act, 8th Ed, p.767.

1.1 LEASE - A lease is a transfer of an estate of inheritance and does not ipso facto terminate on the death of any one of the parties but passes on to their respective heirs and legal representatives. Lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms²⁵⁵. Thus it is a conveyance of lands tenements to a person for life for a term of years or at will, in consideration of rent or some other recompense as per Black's Law Dictionary.

1.2 ESSENTIAL ELEMENTS OF LEASE -

1. Parties - The parties to the lease are the transferor, who is called the lessor or landlord and the transferee who is called the lessee or tenant. Both the parties must be competent to contract. The lessor and lessee cannot be the same person. A lessor can be an absolute owner of the land or a joint tenant or a lessee himself, thus a minor or unregistered associations cannot be lessee.

2. Subject matter of Lease - It is a specific immovable property such as land, houses, factories, shops etc. Usually a lease of a house and a shop includes not only the superstructure but also the site, unless the same is specifically excluded from the definition of the land in the lease deed. However, terrace and air space above a tenanted multi-storeyed building are not included in lease.

3. Demise or Transfer of Interest - A lease transaction with respect to immovable property and creates a right to enjoy such property for a certain term and for consideration on the conditions mentioned in it. The right to possess and enjoy the property is transferred in favour of the lessee and he acquires this interest through the conveyance of the lease. After the creation of such an interest, a tenant or a sub-tenant is entitled to remain in possession thereof until the lease is duly terminated and eviction takes place in accordance to law. The relationship of landlord and tenant can come into existence only after the transfer of an interest in immovable property pursuant to

²⁵⁵ Sec 105 of Transfer of Property Act, 1882.

a contract and creates a right in rem. Where there is no transfer of interest there is no lease, further, if an option is given to the lessor by the lessee himself to resume the leasehold, it is a personal covenant and does not create an interest in the land.

4. Terms and Conditions

5. Consideration - Consideration may be termed as rent plus premium as well as rent alone or premium alone. A lease without consideration is invalid. There must be a consideration fixed for lease in the form of -

- a. money,
- b. money's worth such as a share in crops,
- c. service or any other thing value, to be rendered periodically or on specified occasions to the transferor by the transferee.

A lease agreement is drafted like a ordinary agreement but the property to be leased , period of lease, the date of commencement of the lease, rent and other terms and condition agreed upon must be mentioned in the agreement. In the case of *Giribala v Kalidas*²⁵⁶, it was held by the Privy Council that a suit for a specific performance cannot be decreed in the absence of a definite date as to commencement of the lease.

1.3 PARTIES- A lease agreement is a contract between two parties- Lessor and Lessee

LESSOR - Any transferor who is competent to contract and also having title or authority to create the grant²⁵⁷.

RIGHTS AND LIABILITIES OF LESSOR²⁵⁸.

²⁵⁶ *Giribala v Kalidas*, AIR 1921 PC 71.

²⁵⁷ Sec 105, The Transfer of Property Act, 1882.

²⁵⁸ Sec 108(A), The Transfer of Property Act, 1882.

i) Bound to disclose any material defect in the property limited to patent defect and not latent defect.

ii) Bound on lessee's request to put him in possession of the property otherwise he is not entitled to any rent as held in the case of *Uday Chand v. Narain*²⁵⁹. In England, in order to complete the title of the lessee, the delivery of seisin is necessary. Such doctrine of suspension of rent is not applicable in India since the lessee can take an action against the Lessor for the mesne profits even though he has not received possession²⁶⁰.

iii) The lessor cannot create any kind of interruption in case the lessee has made the payment and performed the contract properly. In the case of *Nilkanta Pati v. Khitish Chandra*²⁶¹, it was held that eviction of the lessee from part of the demised premises justifies suspension of the entire rent and thus if the lessee loses possession of any portion of the property owing to any act or default on the part of the lessor, the lessee can suspend payment of rent till restoration of possession.

LESSEE- Any transferee who is competent to accept contract on the date of the lease and shall further accept the demise of the estate²⁶².

RIGHTS AND LIABILITIES OF LESSEE²⁶³-

i) Accession made during the lease period is comprised of lease.

ii) In case lessor is bound to make any repairment cost and simultaneously neglects to do so, in such circumstances the lessee can deduct his repair expenses from the rent with interest.

iii) Bound to disclose to the lessor any fact as to the nature or extent of the premises.

²⁵⁹ *Uday Chand v. Narain*, (1920)58 IC 186.

²⁶⁰ *Regia Begum v. Mahomed Daud*, AIR 1926 Pat 508.

²⁶¹ *Nilkanta Pati v. Khitish Chandra*, AIR 1951 Cal 338.

²⁶² *Supra* 3.

²⁶³ Sec 108(B), The Transfer of Property Act, 1882.

iv) Bound to make the payment along with the premium to the lessor etc.

2. AGREEMENT - It is defined as every promise and every set of promises, forming the consideration for each other²⁶⁴. The essential elements of agreement are -

- a. There must be at least two parties.
- b. There must be a proposal or offer from one party.
- c. There must be an acceptance from the other party.

Therefore it is an act whereby two persons being "ad idem" declare their common intention to do or not to do any act, deed or thing. Thus the agreement between both the parties is the combined product of offer and acceptance for some consideration passed between them²⁶⁵.

2.1 LEASE AGREEMENT - It is a contractual agreement where the lessee makes a payment to the lessor for using its owned property and thus such agreement allows the lessee rights to the use of a property owned or managed by the lessor for a period of time. Such agreement does not provide ownership rights to the lessee, however the lessor may grant certain allowances or facilities to make certain modification or changes or as to adapt the property to suit the needs of the lessee and thus lessee has the prime responsibility to take due care of the property during the lease period.

2.2 RESPONSIBILITIES UNDER A LEASE AGREEMENT- Under State Laws, the landlord and the tenant will have some set of responsibilities with regard to lease agreement, simultaneously every individual owner can come up with their own set of requirement like-

- **General Property Information**- In every lease agreement form must contain the address of the property along with the names of tenants and landlord.

²⁶⁴ Sec 2(e), Indian Contract Act, 1872.

²⁶⁵ Halsbury's Laws of England, 4th Ed, Vol.9, para 206.



- Maintenance Information - It is mentioned in the agreement as to who will maintain the property. In most of the states , its requires the attention of the landlord to pay repairment cost even though not caused by tenant itself.
- Security Deposit
- Payment Schedule
- Furnishing

2.3 STANDARD CLAUSES USED IN A LEASE AGREEMENT -

1. Preamble which includes the name of the parties along with their address, description of the property etc.
2. Lease Commencement Date
3. Possession
4. Purpose
5. Rent along with security deposits
6. Covenants, Representatives and Warranties of the lessor and lessee
7. Repairment Cost and Property Taxes.
8. Termination of agreement along with its consequences.
9. Stamp Duty and Registration fee .
10. Dispute Resolution.

3. TYPES OF LEASE AGREEMENT

1. Commercial Lease Agreement
2. Amendment to Lease Agreement
3. Operating Lease Agreement



4. Capital Lease Agreement
5. Sale and Lease Back Agreement
6. Synthetic Lease Agreement.

3.1. COMMERCIAL LEASE AGREEMENT- It is a contract between a landlord and tenant for the rental of a business property. It is also known as Commercial Real Estate Lease Agreement or Commercial Lease Contract. Therefore the use of commercial property come into existence where -

1. a person who owns a commercial property that will be leased to a new tenant
2. a person who owns a commercial property that will be converted to a rental property
3. a person who wants to lease commercial rental property from a landlord who does not have any lease form.

IMPORTANT CLAUSES IN THE FORM-

1. **PERMITTED USES** - Unlike Residential Lease , commercial properties have a distinct commercial purpose and thus all permitted uses must be mentioned in the agreement.
2. **EXCLUSIVE RIGHTS-** While renting a unit, an exclusive rights must be guaranteed to the tenant for their particular kind of business.
3. **INSURANCE RESPONSIBILITIES** - The agreement must mention the liability and casualty insurance on the property shall be vested on the lessee or lessor.
4. **MAINTENANCE RESPONSIBILITIES**
5. **PAYMENT AND LEASE RENEWAL OPTIONS**

3.2. LEASE AMENDMENT - It is a way of making certain modifications with respect to the terms and condition framed in the original lease while leaving the rest of the lease in full effect with the prior consent of both the lessor and lessee. Such kind of lease agreement is also known as Lease

Addendum, Lease Amendment Form, Addendum to Lease. Thus creation of Amendment Lease requires many information like the name of the landlord and the tenant , the effective date of original lease, the date of the lease amendment, the address and nature of leased property, which part of the original lease was amended and recorded.

3.3. OPERATING LEASE AGREEMENT- It is also known as service leases. It is a agreement between two parties in which one provides rent to the other for using an asset In an operating lease, the borrower uses an asset for only a fixed portion of the assets life. The owner is responsible for all the maintenance costs and other operating cost associated with the leased asset. The lessee records rent expense for each of the lease payments.

3.4. CAPITAL LEASE AGREEMENT - It is also known as finance lease. It is an agreement in which the lessee has full control over the use of the assets during the lease period and thus are responsible for all maintenance and other associated cost and is directly affected by its associated advantages and disadvantages. With capital leases, the lessee records all the assets and liabilities rather than rental expense and depreciation on the asset. If a lessee agreement meets any one of the following criteria, it is considered to be capital lease-

- a. The lease term is equal to 75% or more of the life of the asset.
- b. The present value of the minimum lease payments is equal to atleast 90% of the cost of the asset.
- c. The lease transfers ownership of the asset to the lessee at the end.
- d. The lease contains a bargain purchase option, which is very low and automatically influences lessee to purchase the asset²⁶⁶.

3.5. SALE AND LEASEBACK AGREEMENT- It is a type of lease in which one party purchases property, equipment or land from another party and immediately leases it to the selling party

²⁶⁶ Available at ccba.jsu.edu/accounting/LEASES.HTML.

under specific terms. The seller could be an individual investor , a limited partnership, an industrial firm, a leasing or insurance company, a commercial bank. It is a type of Capital Lease with the only difference being that a buyer purchases a used asset instead of a brand new one. It is also called tripartite lease as there are three different parties i.e equipment supplier, lessor. lessee

3.6. SYNTHETIC LEASE AGREEMENT- It is a type of operating lease that is recorded in the balance sheet without showing the liability on a company. It is instead recorded on the income statement as an expense which allows the borrower to use the asset without being burdened by tax . It provides various kinds of advantages like- availability of various financial sources including bank debt, private institution and commercial paper on a fixed or floating rate bases. Synthetic leases are used by the borrower to finance equipment for hospitals, corporates, data centres etc. According to Eugen F. Brigham and Phillip R. Daves, synthetic lease became popular in 1990 as used by some well known like Tyco and Enron for the first time.

4. DIFFERENCE BETWEEN BRITISH JUDGEMENT AND INDIAN JUDGEMENT

4.1 SUB-LEASE- In the case of *Bryant v Wilson*²⁶⁷, it was held that in England, Sub-lease for the whole residue of the lessee's term operates as an absolute assignment of the lease but in India a Sub-lease is not an absolute assignment as held by the Privy Council in the case of *Hunsrati v Bejoylal Seal*²⁶⁸.

4.2 DOCTRINE OF EQUITY - In England the transfer of property by lease is termed a demise. A lease for more than three years can be created by a deed for the tenant to acquire legal estate in

²⁶⁷ *Bryant v Wilson*, (1868) 1 QB 716.

²⁶⁸ *Hunsrati v Bejoylal Seal*, (1930)Cal 1176.

the property²⁶⁹. According to the doctrine of *Walsh v Lonsdale*²⁷⁰, the lease creates an equitable estate, when the lease is in writing and not by a deed. This is based on two equitable doctrine-

- a. Equity looks at the intension of the parties and not the form.
- b. Equity considers as done what ought to have been done.

Whereas in India , the doctrine of equity of *Walsh v Lonsdale*²⁷¹ is not applicable, as according to the Indian statutory law like The Transfer of Property Act, The Indian Registration Act etc makes no distinction between the legal estate and equitable estate. In the case of *Ariff v Jadunath*²⁷², it was held that the right of a person under an agreement for lease is a personal right and not an equitable estate .

4.3 PERPETUAL LEASE-In England, in the case of *Seven Oaks Maid Stone Tunbridge Railway Co. v London Chatham & Dover Ry Co.*²⁷³ it is treated as a grant of the fee simple subject to a rent charge. The common law now recognises two types of estate-

- a. Freehold Estate
- b. Leasehold Estate for a term of years.

Whereas in India, such a lease is recognised into three types²⁷⁴-

- a. Term Lease.
- b. Periodic Lease.

²⁶⁹ Sec 149 & 205, Law of Property Act.

²⁷⁰ *Walsh v Lonsdale*, (1882)21 Ch D 9.

²⁷¹ Ibid.

²⁷² *Ariff v Jadunath*, 58 Cal 1235.

²⁷³ *Seven Oaks Maid Stone Tunbridge Railway Co. v London Chatham & Dover Ry Co*, (1879) 11 Ch 625.

²⁷⁴ Sec 105, Transfer of Property Act, 1882.

c. Permanent Lease.

4.4 DOCTRINE OF FRUSTRATION OF A LEASE- In English law the doctrine is based upon the old theory of impossibility of performance, discharges a contract where the subject matter is destroyed and thus the lessee takes the premises subject to all events which may depreciate the value. In the case of *Stocker v Planet Building Society*²⁷⁵, it was held that in absence of any express covenant, the tenant is not exonerated from payment of rent even if the premises is destroyed by fire or taken by enemy. The object of the doctrine was to fulfill the demand of justice and to bring a just and reasonable enforceability in the contract.

Whereas in India, the application of the doctrine is very limited and the provision of Sec 56²⁷⁶ codify the law on the subject, which become impossible of performance because of change of circumstances when the obligations of the respective parties stand discharged²⁷⁷. The Supreme Court of India in the case of *Raja Dhruv Deb v Raja Harmohinder Singh*²⁷⁸ held that the doctrine applies to all executory contract and not executed contract²⁷⁹, but not to a completed conveyance the lessee cannot avoid the lease on the ground of the property having been rendered unfit for use. The doctrine, however applies in cases where property is rendered substantially and permanently unfit and not merely damaged which can be repaired.

5. DIFFERENCE BETWEEN LEASE AND LICENSE-

1. The term "**lease**" is defined under sec 105 of Transfer of Property Act, 1882 as a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to

²⁷⁵ *Stocker v Planet Building Society*, (1879) 27 WR 877 (CA).

²⁷⁶ Sec 56, Indian Contract Act 1872.

²⁷⁷ *Ganga Saran v Ram Charan Ram Gopal*, AIR 1952 SC 9.

²⁷⁸ *Raja Dhruv Deb v Raja Harmohinder Singh*, AIR 1968 SC 1024.

²⁷⁹ *Sushila Devi v. Hari Singh*, AIR 1971 SC 1756.

the transferor by the transferee, who accepts the transfer on such terms. Whereas the term "license" is defined under Sec 52 of the Easement Act, 1882, where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.

2. The lease is heritable while license is personal to the grantee²⁸⁰. A lease is both transferable and heritable, a sub tenancy can be created by the tenant and on the death of the tenant, the tenancy can be inherited by his/her legal heir whereas in case of license, it is neither transferable nor heritable.

3. The legal possession of the property is inevitably transferred to a tenant under lease while in a transaction of license the legal possession continues with the licensor and the licensee has a mere right of user of the premises in a particular fashion mentioned under the document²⁸¹.

4. A lease is a transfer of interest in specific immovable property, while license is a bare permission without any transfer of interest.

5. A lease does not come to an end on either the death of the grantor or grantee whereas a license comes to an end with the death of either the grantor or grantee, since it is a personal contract.

6. A lease can come to an end only in accordance with the terms and condition stipulated in the contract of tenancy agreement whereas in license can be withdrawn at any time at the pleasure of the grantor.

7. A lease is unaffected by the transfer of the property by sale in favour of a third party. It continues and the purchaser has to wait till the time period for which the tenancy was created is

²⁸⁰ *Madhu Behal and Anr. vs. Rishi Kumar and Anr.*, (2009) 3 PLR 628.

²⁸¹ *Ibid.*

over before he can get the possession whereas in case of license, if the property is sold to a third party, it comes to an end immediately.

8. A lessee has a right to protect the possession in his own right whereas a licensee cannot defend his possession in his own name as he does not have any proprietary right in the property.

9. A lessee in possession of the property is entitled to any improvements or accessions made to the property whereas a licensee cannot do so.

6. JUDICIAL INTERPRETATION ON THE DIFFERENCE BETWEEN LEASE AND LICENSE

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1. In the case of *Associated Hotels of India Ltd. vs. R.N.Kapoor*²⁸², it was held by the Supreme Court held that - A lease is a transfer of an interest in land. The interest transferred is called the leasehold interest. The Lesser parts with his right to enjoy the property during the term of the lease and the lessee gets that right to the exclusion of the Lesser, whereas in case of license, the legal possession continues to be with the owner of the property, but the license is permitted to make use of the premises for a particular purpose. But for the permission his occupation would be unlawful. It does not create in his favour any estate or interest in the property.

2. In the case of *Mrs. M.N. Clubwala v. Fida Hussain Saheb*²⁸³, it was held by the Supreme Court that whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement.

3. In the case of *Chandu Lal vs. Municipal Corporation of Delhi*²⁸⁴, it was held by the Delhi High Court that the intention of the parties is the real test for ascertaining the character of a document²⁸⁵. If a

²⁸² *Associated Hotels of India Ltd. vs. R.N.Kapoor*, (1960) 1 SCR 368.

²⁸³ *Mrs. M.N. Clubwala v. Fida Hussain Saheb*, (1964) 6 SCR 642.

²⁸⁴ *Chandu Lal vs. Municipal Corporation of Delhi*, AIR 1978 Delhi 174.

²⁸⁵ *Delta International Limited vs. Shyam Sundar Ganeriwalla & Another*, AIR 1999 SC 2607.

document gives only a right to use the property in a particular way but its possession and controls remains with the owner thereof it will be license. In such a case the legal possession remains with the owner of the property, the licensee being permitted to make use of the property for a particular purpose. Exclusive possession does not militate against the concept of license, if the circumstances negative any intension to create a tenancy. A license only makes an action lawful which without it would be unlawful but does not transfer any interest in favor of the licensee in respect of the property. In case of license there is something less than a right to enjoy the property in the licensee while on the other hand, in the case of a lease , there is transfer of a right to enjoy the property. A bare license having no interest in the property cannot maintain an action for its possession.

4. In the case of *Rajbir Kaur and Anr. vs. S. Chokesiri and Co.*²⁸⁶, it was held by the Supreme Court that the question whether a transaction is a lease or license "turns on the operative intention of the parties and there is no single, simple litmus test to distinguish one from the other". The grant only for the right to use the premises without being entitled to the exclusive possession thereof operates merely as a license. Exclusive possession itself is not decisive in favour of a lease and against a mere license for even the grant of exclusive possession might turn out to be only a license and not a lease where the grantor himself has no power to grant the lease.

5. In the case of *Municipal Corporation of Delhi vs. Pradip Oil Corporation and Anr*²⁸⁷, it was held by the Delhi High Court that a mere license does not create interest in the property to which it relates. Lease on the other hand, would amount to transfer of property. License may be personal or contractual. A licensee without the grant creates a right in the licensor to enter into a land and enjoy it. By reason of a license, no estate or interest in the property is created. A lease is inter alia-

a) is not assignable,

²⁸⁶ *Rajbir Kaur and Anr. vs. S. Chokesiri and Co*, AIR 1988 SC 1845.

²⁸⁷ *Municipal Corporation of Delhi vs. Pradip Oil Corporation and Anr*, 100 (2002) DLT 442.



- b) does not entitle the licensee to sue the stranger in his own name,
- c) it is revocable ,
- d) it is determined when the grantor makes subsequent assignment.

7. CRITICAL ANALYSIS

Therefore the enforceability of an agreement is very important while leasing a property because-

1. A lease agreement is simply a binding contract between a landlord (lessor) and tenant (lessee) which lays down the rules, responsibilities, fees and privileges of both parties in the document. The basic purpose of the lease agreement document is to safeguard the interest of the landlord to make sure that his property will be taken care of and for the tenant to prevent him from being charged with more than what they should pay.

2. A lease agreement once signed it becomes a legal contract and thus acts as a conclusive proof and helps in proving once accountability if a problem arises. Tenant must ensure that they have already read, understood and signed the legal contract before issuing their first rental payment and thus a lease document is the best protection against the law and thus it should be legal all the time.

3. A lease agreement should be drafted in accordance to the state laws, thus it is important for both the parties to have basic knowledge of the rental laws in their area. It allows the tenant more time to investigate the reason and prepare financially and mentally for the pending review. The negotiating party should always be equipped with the prevailing market prices before consenting to the agreement.



IS ORBIT OF INTELLECTUAL PROPERTY RIGHTS : JEOPARDIZED BY NASCENT OF COMPETITION LAW

DR. MANPREET KAUR RAJPAL²⁸⁸

Abstract

Intellectual Property Rights (IPR) are founded with the purpose of achieving economic development, technological advancement and consumer welfare. IPR are legal rights governing the use of such creations. This term covers a bundle of rights, such as patents, trademarks or copyrights, each different in scope and duration with a different purpose and effect. IP laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators and to bring into the public domain innovative information that might otherwise remain trade secrets.

During the late 19th century, the demand for Intellectual property rights increased due to high-tech development and expansion of international trade. Meanwhile Intellectual Property transactions in the international market increased which gave rise to contradictions regarding IPRs and regional restrictions. In order to resolve these contradictions, various international conventions were enacted. With march of time and progress of society remarkable developments took place in the field of Intellectual Property Rights but at the same time few challenges in the form of Competition Law were even surfaced. The intersection of intellectual property rights and competition law is one of the most complex areas of law and economics today. These two areas are interdependent and affect each other adversely. This paper throws light on the ways how we can strike a balance between the two laws so that they may work in their independent sphere without any interventions.

Keywords (if any)

Intellectual Property Rights, Interface, Competition law, Conflict

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INTRODUCTION

Intellectual property rights create monopolies, while competition law battles monopolies. How do the two polices interact? Is there a balance or conflict? In this light, the present paper examined the survey of economic literature analyzing the interaction between intellectual property rights laws and competition policy and how the boundary between these two polices is drawn in practice. Competition law and intellectual property rights (IPRs) have evolved historically as two separate systems of law. There is a considerable overlap in the goals of the two systems of law because both are aimed at promoting innovation and economic growth. Yet there are also potential conflicts owing to the means used by each system to promote those goals. IP laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators and to bring into the public domain innovative information that might otherwise remain trade secrets. Competition authorities regulate near monopolies, mergers and commercial agreements with the aim of maintaining effective competition in markets. This article introduces the concept of IPRs and Competition law. It highlights important areas of conflict between the two laws and concludes by trying to harmonize the conflicts.

Intellectual Property Rights (IPR) and Competition Law are both founded with the purpose of achieving economic development, technological advancement and consumer welfare. IPR are legal rights governing the use of such creations. This term covers a bundle of rights, such as patents, trademarks or copyrights, each different in scope and duration with a different purpose and effect.¹ Competition law seeks to prevent certain behaviour that may restrict competition to detriment consumer welfare. In short run, IPR encourages innovation and new products in the market, whereas in long run- Competition Law promotes consumer welfare by introducing new products to the market and maintaining the qualities of the goods in the market. Thus both are complementary means of promoting innovation, technical progress and economic growth to the benefit of consumers and the whole economy.



IPRs and competition are normally regarded as areas with conflicting objectives. The reason is that IPRs, by designating boundaries within which competitors may exercise monopolies over their innovation, appear to be against the principles of competitive market and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions. IP Laws are monopolistic in nature. They guarantee an exclusive right to the creators and owners of work which are a result of human intellectual creativity. Also they prevent commercial exploitation of the innovation by others. This legal monopoly may, depending on the unavailability of substitutes in the relevant market, lead to market power and even monopoly as defined under competition law. It is an advantage granted to the owner over the rest of the industry or sector. When this advantage or dominant position is abused, it creates a conflict between IPR and competition law.²

History and Evolution of IPR

Historically, the interest of exporters of products or technologies incorporating IP conflicted with those of importers or imitators of such products or technologies. The increasing pace of globalization engendered by faster and cheaper methods of transportation and communication, combined with the growing ease of imitation, produced a strong and continuing demand for improving the international legal framework for the protection and enforcement of IPRs. IPRs have thus moved rapidly from being an esoteric subject confined to specialist's circles to become a major policy issue in international economic relations and a term recognized by the general public the world over.³

During the late 19th century, the demand for Intellectual property rights increased due to high-tech development and expansion of international trade. Meanwhile Intellectual Property transactions in the international market increased which gave rise to contradictions regarding IPRs and regional restrictions. In order to resolve these contradictions, various international conventions were enacted. The convention of "Paris convention for protection of Industrial Property" was the first convention came up in 1883 established by Germany, France, Belgium

and 10 other countries for the protection of Industrial Property, followed by “Berne Convention for the protection of Literary and arts” first of its kind for the protection of Copyright. It was in 1993 when WTO adapted these international conventions.

WIPO (World Intellectual Property Rights Organization) was established in 1970 and it was in charge of 20 international conventions relating to protection of intellectual property rights. TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement in 1994 achieved the goal to link international trade with people’s intellectual property rights. It succeeded in providing a more unified higher platform.⁴

History and evolution of Competition law

History of competition law can be traced back to Roman Empire: the modern day competition law has its genesis in the American antitrust statutes like Sherman Act of 1890 and Clayton Act of 1914. But it was only after the Second World War that the American concept of Competition law became widely accepted. European Community incorporated the provisions of Competition law in Articles 81 and 82 of Treaty of Rome, signed in 1957. Subsequently most of the major countries, like China, Brazil, Russia, Singapore, South Korea and Japan established their own competition regimes. Today, over hundred jurisdictions have their competition regimes in place and any enterprise having aspirations to go multinational cannot afford to ignore this law.

The Indian Parliament passed the Competition Act in 2002 and it received the President’s assent in January, 2003. To fulfill the objectives of the Act, government established CCI with effect from October 14, 2003. Certain provisions of the Act were challenged in the Hon’ble Supreme Court and Hon’ble Chennai High Court. In response, the Government promised to carry out certain amendments to the Act. This amendment bill was introduced in Parliament in 2006 and was adopted in 2007.⁵

In pursuit of globalization, India has responded positively by opening up its economy, removing controls and resorting to liberalization. In quest of increasing the efficiency of the nation’s

economy, the Government of India acknowledged the Liberalization Privatization Globalization era. As a result, the Indian market faces competition from within and outside the country. This led to the need of a strong legislation to dispense justice in commercial matters and the Competition Act, 2002 was passed. Healthy and fair competition has proven to be an effective mechanism which enhances economic efficiency. Therefore, the purpose of implementing the competition law was to curb monopolies and encourage competition in Indian market. Competition laws involves in formulating a set of policies which promote competition in the market. These are aimed at preventing unfair trade practices. It is also framed with the intention of curbing abuse of monopoly in the market by the dominant company. Consumer welfare and a healthy competition in the market are the main objectives of the Competition Law.⁶

Are IPRs and Competition Policy objectives conflicting in nature?

Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. An Intellectual Property Right (IPR) is, an intangible right "protecting commercially valuable products of the human intellect"; it may comprise patents, copyrights, trademarks and other similar rights. An IPR includes the right to exclude others from exploiting the non-corporeal asset.⁷ IP is divided into two categories: Industrial property, which includes inventions patents, trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.⁸

Competition law involves formulating a set of policies which promote competition in the market. These are aimed at preventing unfair trade practices. It is also framed with the intention of curbing abuse of monopoly in the market by the dominant company. Consumer welfare and a healthy competition in the market are the main objectives of the Competition Law. The provisions of the Competition Act, 2002 prohibits the exercise of anti-competitive agreements by the IPR



holders since they are in conflict with the competition policies. Further, the Act authorizes the Competition Commission of India to penalize the IPR holders who misuse their dominant position. Furthermore, Section 45 of the Act the Commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.⁹

The major concerns of competition law in regard to intellectual property rights are the market power that may result from granting such rights, and the detrimental effects caused by the anti-competitive exercise of IP rights. At its simplest, market power can harm consumers by setting prices higher than those needed to secure cost effective production. Moreover, the harm caused by market power may extend beyond this, when the protection granted to firms allow them to slow or distort innovation. Under these circumstances, market power will limit the growth of productivity over time, and reduce the scope for sustainable increases in living standards.¹⁰

Intellectual Property Rights and Competition Law have been described as an unhappy marriage. The former may be seen to promote monopolies whilst the latter is designed to oppose them. In other words, on one hand, IP laws work towards creating monopolistic rights whereas competition law battles it. In view of this there seems to be a conflict between the objectives of both laws.¹¹ In order to combat, IPR monopolies anti-competition laws often include two major measures like parallel imports and compulsory licensing. A compulsory license is where an IPR holder is authorized by the state to surrender his exclusive right over the intellectual property, under the provisions of TRIPS.

A parallel import includes goods which are brought into the country without the authorization of the appropriate IP holder and are placed legitimately into a market. Innovation has always been a cause in a growing economy resulting in more innovation. The advent of fresh innovations gives rise to healthy competition at macro as well as micro economic levels. IP laws help protect these innovations from being exploited unlawfully. In view of this, IP and Competition laws have to be applied in tandem to ensure that the rights of all stake holders including the innovator and the consumer or public in general are protected.¹¹

The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. For this the competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare. From the above discussion, it is clear that intellectual property rights which provide an incentive for enterprises and individuals to create and innovate; a fertile setting for the development of, and trade in, intellectual assets; and a stable environment for domestic and foreign investment is important for the promotion of **ideas, invention and innovation (i3)** which results in consumer welfare, social welfare and above all economic growth. But at the same time, these rights are creating monopolistic power¹² in the market resulting consumer exploitation, and inefficient allocation of resources (Robert and Justus, 2004; Boldrin and Levine, 2008; Bainbridge, 2009).

The exercise of IPRs which give monopolistic power leading to allocative inefficiencies, in the absence of competing technologies and products, may appear in contrast with what is generally perceived in most jurisdictions as the main objective of competing policy¹³ is: the protection of competitive process to ensure an efficient allocation of resources, lower prices and higher choices for consumer welfare. Moreover, the harm caused by market power may extend beyond this, when the protection granted to firms allow them to slow or distort innovation (Granstrand, 2003; Andewelt, 1986). Under these circumstances, market power limit the growth of productivity over time, and reduce the scope for sustainable increases in living standards. For its part, competition regulation ¹⁴ aims at curbing attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition laws and IPRs, particularly if competition laws emphasize static market access and IPRs emphasize incentive for dynamic competition.¹⁵

In *Xerox* ¹⁶, the court stated that

“The conflict between the antitrust¹⁷ and IPR laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws prescribe unreasonably restraints of competition, the

IPR laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his protected art”.

Similarly in the case of *Atari*¹⁸, the court stated that

“The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The IP laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes and original works of expression. The antitrust laws provide innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing ways or new ways of serving consumers.

INTERFACE BETWEEN IPR AND COMPETITION LAW IN INDIA

Structured properly, however, the two regulatory systems complement each other in striking an appropriate balance between the needs for innovation, technology transfer and information dissemination. In its report on patents and competition, the US Federal Trade Commission (2003) noted that from a policy point of view there is no inherent conflict between competition policy and protecting IPRs. This view has also been articulated in US case law. For instance, in *Atarti*¹⁹, the court wrote that-

“...the aim and objectives of patent and antitrust law may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition”.

Striking this balance involves walking the tightrope between over-and under-protection of innovators' efforts not compromising on a sufficient incentive for the innovator but also ensuring that follow-on invention is not delayed and consumers are not victimized for unnecessarily long periods by high prices. There are areas where IPRs and competition law complement each other. First, at the highest level of analysis IPRs and competition policies²⁰ share a concern to promote technical progress to the ultimate benefit of consumers and society. Firms are more likely to

innovate if they are at least somewhat protected against free-riding. They are more likely to innovate if they face strong competition. In fact, both IP policy and competition policy aim to encourage innovation, but both will discourage it if pursued too strongly or too weakly.

On the IP side, if it is easy to obtain patents, for example, potential innovators might be discouraged from innovating because there are so many parties with so many patents that it is too difficult and expensive to determine which licenses are needed and to pay for them (Dumont and Holmes, 2002; Kitch, 1977; Maskus and Penubarti, 1995). On the competition side, if law enforcement is pursued so strongly that rivals are allowed to make unencumbered use of a company's innovation, then there will be little incentive to innovate in the first place. Second, it has long been believed that competition and innovation are not compatible; that truly competitive markets (at least in the textbook sense of "perfect competition") are incapable of sustaining innovative activities by firms. Usually associated with the work of Joseph Schumpeter, the argument is, in essence, that in the absence of some monopoly power, firms will be unwilling to invest in innovation. The argument continues that the presence of some monopoly will ensure that prices are above variable costs, and, hence, that fixed costs can be paid off.

Further, it is argued that the existence of some excess profits gives firms the option of funding innovation out of retained profits, something that might be easier to do than borrowing from uninformed, risk averse, investors. Such firms may also have the capabilities to innovate, having been able to finance the development of skills and capabilities that they would otherwise lack. Finally, it is argued that some degree of monopoly power may make it somewhat easier to market the new idea, or the good or service which embodies it; that is, a monopolist is likely to be able to appropriate more of the returns of his/her innovation than would a firm in a very competitive market. The big problem with this argument is that they do not address incentives (Geroski, 2005). Third, consider the case of innovation with incentive; by creating and protecting the right to innovators to exclude others from using their ideas or forms of expression, IPRs provides economic agents with the incentives for technological innovation and/or new forms of artistic



expression. This will create more inputs for competition on the future market, as well as promote dynamic efficiency, which is characterized by increasing quality and diversity of goods, which is also the objective of competition policy.

Fourth, IPR laws recognize that the protection cannot be for an indefinite period, as after sometime it should be available to the wider public and enterprise world in the general interest. Even within the IPR period, the intellectual asset may be used without restriction for certain purposes, such as for research and training. Article 31 of TRIPs provides for the grant of compulsory licenses, under a variety of situations, such as: the interest of public health; national emergencies; nil or inadequate exploitation of the patent in the country; anti-competitive practices by the patentees or their assignees; and overall national interest.

Further, Article 40 of TRIPs provides considerable discretion to WTO member States in specifying license practices or conditions that may constitute an abuse of IPRs. Therefore, both IPRs and competition policy are necessary to promote innovation and ensure a competitive exploitation thereof. It is necessary therefore to ensure their co-existence.

Through Domestic Legislation

The roots of Indian law on competition can be traced back to Articles 38 and 39 of the Constitution which lay down the duty of the State to promote the welfare of the people by securing and protecting a social order in which social, political and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way so as to best sub-serve the common good, in addition to ensuring that the economic system does not result in the concentration of wealth. It is from these duties that the MRTP Act, 1969, also influenced by US, UK and Canadian legislations, came about.²¹ The process of initiating a new competition law in India was started by an Expert Group set up to study trade and competition policy, following the Singapore Ministerial Declaration of the WTO in 1996. Noting that competition policy is a prerequisite to economic liberalization, the Expert Group, in its report

submitted to the Ministry of Commerce in January 1999 recommended that a fresh competition law be drawn up. In October 1999, the government appointed a High Level Committee on Competition Policy and Competition Law to draft the new competition law, which was submitted in November 2000.²² The resultant Competition Act, 2002, coming into force mere months before the expiry of the TRIPS compliance period for India can therefore be seen as India's fulfilment of its TRIPS obligations.²³ Under Section 3, the Competition Commission is required to look into agreements which are anticompetitive in nature and those found to be anticompetitive are declared void.

The Competition Act incorporates a blanket exception for IPRs under Section 3(5) based on the rationale that IPRs deserve to be cocooned since a failure to do so would disturb the all-important incentive for innovation, which, itself, would have knock-on effects in terms of a lack of technological innovation and reflect a lack of quality in goods and services produced. However, equally, it does draw the line inasmuch as it does not permit unreasonable conditions to be passed off under the guise of protecting IPRs.²⁴ Thus, in principle, IPR licensing arrangements which interfere with competitive pricing, quantities or qualities of products would fall foul of competition law in India.

However, this manifestation of Section 3(5) is far removed from the original recognition given by the High Level Committee to the fact that all forms of IPRs have the potential to raise competition policy problems, in effect recognizing the existence/exercise distinction.²⁵ That apart, it has no mention of exhaustion, parallel importation or compulsory licensing. Owing to the blanket exemption under Section 3(5), the square peg of any anticompetitive practice tethered to the use of IPRs must now be brought through the round hole of "abuse of dominant position"²⁶ under Section 4.

Section 3 also remains puzzling, in as much as it goes against MRTP Commission precedent under the old Act which held that the Commission (and, by extension, the Competition Commission of today) had complete and unfettered jurisdiction to entertain a complaint regarding IPRs. Indeed, *Manju Bhardwaj v. Zee Telefilms Ltd*²⁷ and *Dr Vallal Peruman v. Godfrey Phillips (India) Ltd*²⁸ stand as authority for the view that unfair trade practices [as understood under Section 36-A(1) of the old

Act] could be triggered by the misuse, manipulation, distortion, contrivance or embellishment of ideas generated by the complainant. Other grounds for critique of Section 3 in particular include the almost exclusive focus on protecting the IPR holder, no adequate consideration of public interest and the absence of any power to restrict an IPR holder from imposing reasonable conditions on licensees for protecting such IPRs.²⁹

While the Act does create categories of per se illegality such as price fixing, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, re-sale price maintenance and exclusivity agreements suggests that the standard of if “they cause an appreciable adverse effect on competition”³⁰ would have to be very sound indeed.

At International FORA

Relevant to IPR and competition law, India made three proposals at the WTO Ministerial Conference in 1999.³¹ The first was with regard to transfer of technology and called on developed countries to provide incentives to enterprises to promote technology transfer to developing countries as they were enjoined to do under Article 66(2). India used the example of environmentally friendly technology that could serve as a useful starting point for facilitating such fair and favourable transfer and also supported a further study of the TRIPS provisions including Article 40 to better evaluate where implementation of technology transfer could be improved.³²

The second proposal was a call for harmonizing the approaches to utilizing living resources as under the TRIPS Agreement and the UN Convention on Biological Diversity—primarily a clash between the hand-medown provision under Article 27(3) of the former and the affirmation of Members’ sovereignty in such issues under the Preamble of the latter. India suggested the via media of including further conditions on patent applications under Article 29 of TRIPS and subsequent harmonization of national laws in line with this. Lastly, the Indian delegation put on record its view that a higher level of protection for GIs was necessary, noting the anomaly under Article 23 of TRIPS which extended the “kind”, “type” and “imitation” protections only to wines

and spirits. India called on Members to respond to the need to expedite and spread the benefits of work already initiated by the TRIPS Council in this regard under Article 24.

While the first two initiatives are of an international character and require India to remain persistent at the international level, the third suggestion, *i.e.* better protection for GIs, is something that Indian competition law also currently lacks. Thus, it may be recommended that India, which has adopted the relevant, TRIPS standards under Section 22 of its GI Act, 1999, should look to bring unfair competition in dealing with GIs under its competition law since, currently; there is no agency to ensure enforcement of Section 22.³³ If competition law improvements are sought to be made to the TRIPS itself, India would do well to buy more implementation time, restrict progress only to measures actually stymieing free trade and lobby for more exemptions.³⁴

India also needs to be extremely careful about how to exercise discretion under Article 31 in granting compulsory licenses since the potential negative effects on R&D and new innovation are immense. Following due administrative/judicial process is an absolute must, as provided by the Article 31 procedure.³⁵ The need for harmonizing the current Act (which, in status quo, merely provides that an evaluation of whether an enterprise enjoys a dominant position take into account technical advantages including IPRs held by it) with the standards for granting compulsory licenses in Article 31 is thus apparent, since the due regard to technical advantages dilutes the stronghold created on the abuse of dominant position under Section 4.³⁶ It would be most advisable, therefore, to specify concrete circumstances in which compulsory licenses should be granted or, at the very least, which of the conditions in Article 31 of TRIPS are supported by India.

Enforcement Laws in India

The general laws in relation to Intellectual Property Enforced in India are Civil Procedure Code provides for the civil remedies and enforcement through civil courts, the Indian Penal Code provides for penal remedies. The rules of practice of the trial courts, High Courts and the Supreme Court of India set the finalities of the enforcement procedure. India follows common law tradition and judicial precedents do have binding force. Hence the decision of the Supreme Court binds the Lower judiciary of the country.³⁷

The IP laws do provide for statutory enforcement mechanisms. The most important Indian Intellectual Property Laws. These legislations are supported by the relevant Rules there under and these rules, along with the main post WTO Intellectual Property Legislations.³⁸ The geographical indications rules provide for the administrative mechanism for registration and enforcement of geographical Indications. The Semi Conductor Integrated Circuits Lay out Design Act, 2000 the under the Act were notified in the official gazette on 11th of December 2001, to support the administrative mechanism there under. The Information Technology Act, 2000 also plays an important role in relations to areas of inter phase between information Technology and IPR.

Conclusion

IP and Competition laws share the same economic rationale. They are both crucial for the establishment of competitive and innovative market conditions. The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. The competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare. Competition laws are always directed towards diluting monopolies, unfair trade practices and dominance of abuse of market power in the hands of few individual e.g.-cartels and charters. Though IPRs promotes monopoly and abuse of dominance of market power in the hands of the innovator, it helps in promoting innovation and economic growth as it encourages more and more investors to invest money in the R&D and also to utilize its application in efficient manner. It should be kept in mind that the only conflict arising between IPRs and competition laws as stated in the above discussions arises due to the monopolistic effect of the IPRs. We should not forget that IPRs provide short term monopolies (Patent-20years, Copyrights- life+60years), which implies that it provides incentives for the innovator and also allows them to apply its industrial application. After the allotted time span, the monopoly on the hand of innovator expires and it comes to public domain. The intellectual property laws provide motivation for innovation and its dissemination



and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation.

In nutshell, we can say that the intersection of intellectual property rights and competition law is one of the most complex areas of law and economics. These two areas are interdependent and affect each other in three important ways. First, they pursue the same aims-consumer welfare, together with the increase of useful investment. The law of intellectual property grants an exclusive right in the hope that this will induce people to make investments in things that customers or people want to use. The investor will be able to use the fruits of the investment itself, rent out or sell it to others. Second, enforcement of competition laws against the intellectual property owners can damage the incentives to innovate that the intellectual property systems are designed to foster.

Third, as Kalpow stated: despite the conflict, both competition law and IPR laws take into account allocative efficiency and dynamic efficiency consideration, albeit with different emphasis. Competition laws is primarily focused on allocative efficiency, i.e., ensuring that consumers obtain the goods they desire the most at the lowest possible prices that producers produce the goods that consumers desire in the most cost effective manner. However, competition law recognizes the importance of dynamic efficiency and the fact that the most significant improvement in consumer welfare often results from technological innovations that give rise to new and better products and not from keener competition in the provision of existing products. Therefore, competition authorities and courts do consider gains in dynamic efficiency when assessing the competitive effects of a business practice.

IPRs laws grants exclusivity in exploitation in order to induce potential investors to innovate. This exclusivity results in losses in allocative efficiency, because for example patented products

are likely to be produced below the competitive level. However, these losses are deemed to be necessary price that must be paid to induce innovations. The balance to be struck in IPR policy is how to offer potential investors sufficient incentives without incurring excessive losses in allocative efficiency. Therefore, both bodies of law balance allocative efficiency against dynamic efficiency, which forms a useful starting point for the resolution of the conflict between them.

Thus, while competition authorities need to ensure the co-existence of competition policy and intellectual property laws, they need not overlook the fact that the objectives of the two policies, though complementary, can also be conflicting, in which case there could be harm to society in terms of reduced welfare. Although putting exemption clauses in competition laws to cater for IPRs is a noble idea, the exemption should ensure that it leaves room for competition authorities to carefully implement a rule of reason approach, on a case by case basis, to ensure that the innovation objective, which is the basis for IPRs, does not result in practices that are in violation to the competition laws. Thus, in the case of unreasonable restrictive practices or abuse by the IPR holder, relief is available to the affected parties under the Competition Act. In fact, it is widely accepted that competition policy is a potent tool to neutralize the negative effects of anticompetitive activities.

Therefore, in an environment where it is too easy to acquire a patent, competition authorities and courts have tendency to regain a balance by using competition law to limit the undesirable effects of over patenting. But, that leads to the question whether competition agencies should be involved in the intellectual property granting process itself. For several reasons, including a lack of relevant technical and legal expertise, as well as limited resources, it would be imprudent for competitive authorities to assume responsibilities related to review intellectual property applications. Furthermore, requiring approval from the competition agency would impose significant delays on the patent process. That in turn may dilute the incentive to innovate and retard the benefit that would flow from the patent, such as disseminating technological information and facilitating precompetitive licensing agreements.



Nevertheless, competition agencies can undertake a variety of measures to promote greater awareness of competition issues so that intellectual property agencies can begin to take necessary steps to improve the intellectual property process themselves. Among the ideas that have been successfully implemented in some jurisdictions are opening interdisciplinary dialogue with intellectual property agencies to foster greater mutual understanding of each other's fields, commissioning expert reports that study a nation's IPRs system to determine whether and how it is causing any undue competition problems, and holding seminar or hearings in which academics, public and private sector practitioners, and industry participants come together to discuss the overlap between IPRs laws and competition policies. Whatever intellectual property related initiatives competition agencies may take, they should strive to limit the anticompetitive aspects of IPRs while respecting its necessary.

Further, competition agencies should consider publishing a set of guidelines describing how they will analyze licensing agreements and other IP related conduct. It is advisable for competition authorities to incorporate in their guidelines a practice of distinguishing vertical relationship among licensing parties from horizontal ones. In other words, it is useful to identify whether agreements are between the competitors or between the non-competitors because that will inform the policy decision that needs to be made. Agreements between competitors are more likely to cause competitive problems and should therefore be subjected to greater scrutiny. Added to these, most developed countries have established rather sound national regimes governing the interface between the IPRs and competition policy.

In most developing countries, however, such an interface has not gained enough attention and prescriptive frameworks governing it are still in infancy. Competition authorities of jurisdictions having already developed experience in this area will play, therefore, an extremely important role in providing the assistance to those countries with less or no experience in dealing with competition cases in the intellectual property areas. These countries should also fully use the



flexibilities allowed by the TRIPs Agreement to determine the grounds for granting compulsory licenses to remedy anti-competitive practices relating to IPRs. Finally, possible friction between IPRs and competition laws can be reduced if competition agencies are constrained, either by statutes or administrative policy from seeking to fine tune IPR protection. It can be concluded that both IPRs and Competition law goes hand in hand. As certain privileges are being given under the IPRs it is restricted by the enforcement of Competition laws. As rightly said in Indian laws, nothing (right) is absolute, every right comes with restriction, limitations and liabilities.

End-Notes

1 Jayashree Watal, Intellectual Property Rights in WTO and Developing Countries, 2001 (Oxford University Press) , at 1-5

2 Adv. Vishnu S, Conflict Between Competition Law And Intellectual Property Rights (August 13, 2010) <http://www.articlesbase.com/intellectual-property-articles/conflict-between-competition-law-and-intellectual-property-rights-3106578.html#ixzz0yxtT0wdR>

3 The Review and Forecast on development History of IPR in the World, Xeumei an, School of Law, Gaundong University of Financial, Gangdoug, China, (August 11, 2010) www.ccsenet.org/journal/html.

4 Supra note 1, at 12-13

5 Supra note 2

6 See. <http://www.competitionlawindia.com/scope-of-competition-law/> (August 20, 2010).

7 Supra note 2

8 Max Planck Institute for Intellectual Property, Competition and Tax Law (August 18, 2010) http://www.ip.mpg.de/ww/en/pub/research/researchprofile/int_prop.cfm

9 See. A Public Lecture on "Interface between the Indian Competition Act 2002 and the IPR Laws in India" by Allan Asher, Board Member of the United Kingdom Office of Fair Trading Friday, 29 May 2009, 3PM to 5PM, Federation House, FICCI, New Delhi (August 18, 2010) http://www.circ.in/pdf/Backgroundunder-Public_Lecture_By_Allan_Asher_29May2009.pdf

10 Sachin Kumar Bhimrajka, Study on relationship of competition policy and law and Intellectual property rights, (August 18, 2010) http://www.cci.gov.in/images/media/ResearchReports/sachin_report_20080730103728.pdf

11 The term Third World was originally coined in times of the Cold War to distinguish those nations that are neither aligned with the West (NATO) nor with the East, the Communist bloc. Today the term is often used to describe the developing countries of Africa, Asia, Latin America and Oceania. Many poorer nations adopted the term to describe themselves.



12 The obligation under TRIPS to implement high standards of intellectual property protection, including the minimum 20-year protection for patent rights and the obligation to recognize product and process patents, effectively eliminate competition from generic pharmaceutical producers and allow for increased prices of medicines beyond the reach of even more patients in the developing countries.

13 However, there is no international consensus as to whether, IPRs constitute “monopolies”.

14 The ability of the IPR holders to maintain monopolistic dominance depends on their ability to segment markets to maximize markets for their utility and prevent reproduction or market entry of competing products, real, fake or substitutes by meeting market demand in delivering: (1) the right product (including choice, right format. language etc); (2) the right price; (3) increasingly, the right time and (4) enforcing their legal rights.

15 This also gives them the subsequent right to license others to exploit the innovation when they themselves are unable to engage in largescale commercial exploitation or for other reasons.

16 SCM Corp. v. Xerox Corp. , 645 F. 2d 1159.1203 (2d Cir. 1981)

17 Competition law, known in the United States as Antitrust Law, are laws that promote or maintain market competition by regulating anticompetitive conduct (Taylor, 2006).

18 Atari Games Corp. v. Nintendo of America, 897 F.2d 1572, 1576 (Fed. Cir.1990).

19 *Id*

20 Aghion *et al* (2001), through an endogenous growth model, show that competition has a positive effect on growth. Dutz and Hayri (1999) also indicate that the pro-competitive policy environment is positively associated with long-run growth. Cross-country experiences in the retailing sector show the employment in Netherland and Germany increased and prices in Sweden and Japan declined [Pilat (1997), OECD (1997)] on account of competition. Koedijk and Kremers (1996) find a clear negative relationship between government regulation and economic performance in 11 European countries.

21 The Institute of Chartered Accountants of India, Competition Laws and Policies (2004), at 117-118

22 *Id*, at 128-129.

23 R. Dutta, Critical Analysis: Reflection of IP in Competition Law of India (August 11, 2010), <http://www.indlawnews.com/display.aspx?4674>

24 S. Jain and S. Tripathy, Intellectual Property and Competition Laws: Jural Correlatives, 12 Journal of Intellectual Property Rights (2007), at 236-243.

25 The Committee noted that IPRs provide exclusive rights to their holders to undertake commercial activities but this does not include the right to exert restrictive or monopoly power in a market/society. See S.M. Dugar, Commentary on the MRTPLAW, Competition Law & Consumer Protection Law- Law, Practices and Procedures: Volume 1 (2006), at 757.

26 M. Kochiapalli, Competition Bill in India: The Nexus with IP September 22, 2007 (August 17, 2010), <http://spicyipindia.blogspot.com/search/label/competition%20law>

27 (1996) 20 CLA 229.



28 (1995) 16 CLA 201.

29 P.S. Mehta & U. Kumar, Tackling IPR Excuses through the New Competition Law: Financial Express, June 12, 2001 (August 17, 2010), <http://www.cuts-international.org/article%20comp.htm>

30 S. Ghosh, Presentation on IP and Competition in India (August 18, 2010), <http://www.business.uiuc.edu/stip/documents/ShubhaGhosh.pdf>.

31 Ministry of Commerce, Government of India, India's Proposals on IPR Issues: Preparations for the 1999 Ministerial Conference 1(3) INDIA & THE WTO (March 1999), (August 15, 2010), <http://commerce.nic.in/wtomar.htm>

32 *Id*, at para 3.

33 Dr. S. Chakravarthy, Competition Policy and Intellectual Property Rights (August 14, 2010), http://www.cci.gov.in/images/media/forum/34f_IPRs_chakravarthy_22July2005.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00

34 A. Bhattacharjea, India's Competition Policy: An Assessment POLICY: AN ASSESSMENT (August 12, 2010), http://www.competitionlaw.cn/upload/temp_08033019381892.pdf, at 36

35 *Id*

36 P.S. Mehta and U. Kumar, Need for Clearer Norms on IPR in New Completion Bill: The Financial Express , June 13, 2001 (August 18, 2010), <http://www.cuts-international.org/article%20comp.htm>

37 Mainly -Code of Civil Procedure; Indian Penal Code; The Civil and Criminal Rules of Practice.

38 The Patent Act, 1970, The Trade Mark Act, 1999, The Copyright Act, 1957, The Design Act, 2000.



NJAC V. COLLEGIUM: THE CLASH BETWEEN TWO TITANS

DHRUV CHAWLA, RITWICK SHRIVASTAV²⁸⁹

Abstract

The Parliament of India recently passed the much awaited judicial reformation bill, paving the way for constitution of the National Judicial Appointment Commission, an apex body to advise the Executive on the appointment of Judges in the Supreme Court and the various High Courts of the country. The Constitution under Article 124 states that it is the Executive, which conducts the appointments of judges in higher judiciary after consulting such judges as it, may require. But the last decade of the 20th century witnessed a new phenomenon unheard in the global legal arena, when the Apex Court of the country through its infamous Three Judge Cases, overran the basic spirit of check and balance of power amongst the three organs of the state, and created the collegiums system for judicial appointments, unique in the world, in which judges appointed themselves.

This paper deals with the dire need for judicial reforms and its implementation in the form of establishment of the commission in India. It also comparatively analyses the system of judicial appointment amongst various democracies and lays down key loopholes in the collegiums system. This paper also focuses on the effects of the NJAC on the Judicial Independence, elaborately shows how the enactment refrains from interfering with the independence of judiciary, an idea which forms the basic feature of Indian Constitution.

To this end, this paper will be divided into four parts. Part I shall provide that the constitution (99th amendment) Act, 2014 & the National Judicial Appointments Comm. Act, 2014 do not transgress the basic structure of the constitution. Part II shall deal into The basic structure doctrine unreasonably restricts the legislature from exercising its constitutional & democratic powers. Part III provides that the collegium system of judicial appointments & transfer is not in accordance with the constitution. Finally, Part IV deals with the constitution (99th amendment) act 2014 is not subject to limitations enshrined under art. 13 of the constitution.

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Introduction

No democracy can flourish without an independent judicial system, a system free from fear or favor, a system isolated from the other branches of government. It enhances the prosperity and stability of the social order.²⁹⁰ Too often, civil society undermines the importance of an independent judiciary while legal professionals overlook it. Today, the activist Indian Judiciary adjudicates disputes as diverse as river water distribution between states, the legality of a Governor's proclamation of President's rule in a states, and even matters involving allegations of corruption by high ranking public officials including the Prime Minister and the members of parliament. In fact in India citizens disillusioned with the political system often resort to Supreme Court as their last hope. In such circumstances, it is imperative to safeguard the independence of the judiciary so that it continues to play a proactive role in our democracy. There is no institutionalized system of making recommendations for the appointment of judges. The lack of this transparency in the process has impacted the Supreme Court's legitimacy.

The Constitution was drafted with the hope that the executive and the judiciary would work in unison to ensure the judicial appointments are based on merits. Under the Constitution judicial appointment should be "integrated, participatory and consultative". In an ideal scenario, there should be no scope for 'primacy' of judiciary or the executive; both branches should make the appointment collectively as originally contemplated by the Constitution.

Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how the judges are selected and appointed or transferred and whether any, and if so, what principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests. The mystique of this process, is kept secret and confidential between just a few individuals not more than two or four as the case may be, and the possibility cannot therefore be

²⁹⁰ M.P Singh, 'Securing the Independence of Judiciary: The Indian Experience', *Indiana International and Comparative Law Review*, vol. 10 (2000): p.245.

rules out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal even trade off.²⁹¹

Though most people would choose judge controlled appointments as against politically controlled ones, it is time to attain a balance of power in selecting members of arguably the most powerful institution in India. At this juncture, National Judicial Appointment commission seems to be the only solution to restore the system of checks and balances in judicial appointments and infuse transparency and accountability into the process.

Part I

The constitution (99th amendment) Act, 2014 & the National Judicial Appointments Comm. Act, 2014 do not transgress the basic structure of the constitution

1. The acts do not impinge on the independence of the judiciary.

The Constitution (99th Amendment) Act, 2014 & the NJAC Acts were passed with a view to confer the Executive branch of the Govt. with more say in the appointments and transfers of judges. It is therefore most respectfully submitted that **a)** the acts do not impinge upon the IOJ. Notwithstanding the above, **b)** There exists a need for establishing a comm. for appointments.

a. The role of the judiciary is limited to the interpretation of the Constitution.

Sufficient focus is to be laid on judicial accountability so that confidence of the people in this institution as the citadel for legal redress of grievances of the people is not eroded. Sir Alladi Krishnaswamy Iyer declared, "*The doctrine of independence is not to be raised to the level of a dogma so as to enable the Judiciary to function as a kind of super-legislative or super-*

²⁹¹ S.P Gupta v. President of India, AIR 1982 SC 149, at Para 84

executive." It is most humbly submitted that, these impugned acts do not impinge upon the IOJ as the courts and judges have a restrictive immunity, and a limited power of judicial review.

Courts are not a supervisory body over the legislature. Their approval or disapproval is not needed for an Act passed by the legislature to have the force of law.²⁹² The province of the Court is normally to administer the law as enacted by the Legislature within the limits of its power.²⁹³

"The word "collegium" is nowhere present in the Constitution. It was first used by J. Bhagwati in the majority judgement of S.P. Gutpa vs. UOI (4:3) ... "There must be a collegium to make recommendations etc." Again in the Presidential reference the expression "collegium" and "collegium of judges" has been freely used (Paras 15 and 22 to cite a few instances) It is submitted that any addition of words in the Constitution would not be permissible under the interpretive jurisdiction of the SC. The SC has to interpret the Constitution as it is"²⁹⁴

b. There exists a need for establishing a comm. for appointments.

The Appellants submit that there is a strong need to introduce the Constitution (99th Amendment) and NJAC Acts, 2014 which would in turn broad base the appointment process with equal participation of the judiciary and the executive and make it participatory so as to ensure greater transparency and objectivity in the appointments to higher judiciary. If the Constitution is to endure, it must necessarily respond to the will of the people by incorporating changes sought by the people.²⁹⁵ The term 'amendment'

²⁹²Hem Chandra Sen Gupta & Ors. v. The Speaker Of Legislative Assembly of West Bengal, AIR 1956 Cal 378

²⁹³ His Holiness Kesavananda Bharati Sripadgalvaru and Ors v. State of Kerala and Anr, (1973) 4 SCC 225.

²⁹⁴ Law Commission, Proposal for Reconsideration of Judges cases I, II and III (Report no. 214, 2008).

²⁹⁵ P.K. Agrawal, Land Reforms in India: Constitutional and Legal Approach, Para 1238, Page 46, First published in 1993

implies "such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was formed."²⁹⁶

2. The Acts are in furtherance of checks & balances which allows an equilibrium between the Executive & the Judiciary.

a. Checks and balances are essential.

The Law Comm.²⁹⁷ has observed that the Indian Constitution provides a beautiful picture of checks and balances under Art.s 124(2) and 217(1) for the appointment of Judges of the SC and HCs where both the Executive and Judiciary have been given an equal and balanced role. This balance has been upset by the *Second Judges' Case* and the original balance of power needs to be restored. Separation of powers between the Legislature, the Executive and the Judiciary is a part of the basic structure of the Constitution.²⁹⁸ This structure is of supreme importance and cannot by any form of amendment be destroyed.²⁹⁹ It recognizes and gives effect to equality between the three wings of the State and the concept of '*checks and balances*' inherent in such scheme.³⁰⁰ Therefore, our Constitution envisages a broad division of power, and though this is not precisely demarcated, there is general acknowledgment of its limits with certain measure of overlapping.³⁰¹ The independent judicial power is implicit in the 'basic concept of separation of powers among a plurality of agencies and the tripartite scheme of checks and balances. It is the very 'heart of the Constitutional scheme'.³⁰²

b. Comparative study of judicial appointment in other countries

²⁹⁶ *Livermore v E.G Waite*, 102 Cal 113 (1804)

²⁹⁷ *Supra* N.3

²⁹⁸ *Supra* N.1

²⁹⁹ *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640

³⁰⁰ *State of Bihar v. Bihar Distillery Ltd* AIR (1997) SC 1511

³⁰¹ *State of HP v. Umed Ram Sharma* AIR (1986) SC 847; *Ram Jawaya Kasur v State of Punjab* AIR (1955) SC 549.

³⁰² *State of Bihar v. B M Shah*, AIR (2000) SC 1296.

"The position as it exists in different countries may be noticed at this stage. On a scrutiny of several Constitutions of other countries it may be seen that in all other Constitutions either the executive is the sole authority to appoint judges or the executive appoints in consultation with the Chief Justice of the country. The Indian Constitution has followed the latter method. However, the 2nd Judges Case Advocates on Record Association vs. U.O.I.³⁰³, as we have seen in the discussion above, has completely eliminated and excluded the executive and the opinion of the Hon'ble SC in the Presidential reference (Special Reference 1 of 1998) has reaffirmed this view with slight modifications."³⁰⁴

"In America the State judges are elected. When they are not elected their appointment is subject to legislative concurrence. In the SC it is the President who nominates the Judges but the nomination has to be confirmed by the Senate. In Australia it is the executive that appoints judges. In Canada the Governor General makes the appointment of judges. In New Zealand the Chief Justice is appointed on the recommendations of the PM by the President. The PM in turn consults the AG; the A.G. informally consults the President of Court of Appeal and other judges. As for HC Judges, Chief Justice recommends after consulting other Judges and gives the list to the AG for scrutiny. AG scrutinizes the list, consults New Zealand Law Society and then candidate's consent is sought. Thereafter the Cabinet finally recommends the names to the Governor General who issues the appointment letter. Recently, the judges from the Apex Court and the HC of Kenya came to the SC and they addressed the SC Bar. They confirmed that they have a National Judicial Comm. which undertakes the selection process. In this National JudicialComm. there is the AG and the Chief Justice, two senior most judges of the Apex Court and an expert. Thus it may be seen that in all the Constitutions, the executive has a role to play and in some countries a major and exclusive role."³⁰⁵

Part II

The basic structure doctrine unreasonably restricts the legislature from exercising its constitutional & democratic powers.

1. Vagueness connoted to the doctrine.

³⁰³ 4 SCC 441 (1993).

³⁰⁴ Supra N.3

³⁰⁵ Ibid

Neither the doctrine of basic structure, nor the basic features of the Constitution have been explicitly mentioned in the Constitution. The very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its nebulous and ill-defined nature.³⁰⁶ This was developed as a rare residuary power to be used by the Court to control the excesses of a transitory majority. However, the formulation of the doctrine has not been precise and it is tempting for a *judge with the best of intentions to invoke it and try to mould the Constitution in his own image*.³⁰⁷ The court has itself compounded the confusion by refusing to be clear about the scope of the doctrine.³⁰⁸ The basic structure has been very loosely defined by the Judiciary, which in turn strengthens the view of its vagueness; *"Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution. is a precious heritage, therefore, you cannot destroy its identity."*³⁰⁹ In light of this, the Respondent humbly submit that except for the features enumerated in the Fundamental rights case by the judges, the 'basic structure' test was nowhere near concrete.

2. Scholarly public opinions & critiques.

Eminent jurist in the likes of *H.M Seervai* have lamented that, "a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of Art 368". Moreover, with respect to the ratio in the *Kesavananda's Case* he states that "there is an unbridgeable gap between the concepts and lines of reasoning of Justice Khanna and the six judges. For though in the summary, signed by nine out of thirteen judges, the six judges adopt Justice Khanna's phrase "basic structure" of framework of the Constitution, their judgements use very different concepts and they do not use the phrase in the same sense in which

³⁰⁶ Pathik Gandhi, BASIC STRUCTURE AND ORDINARY LAWS (ANALYSIS OF THE ELECTION CASE & THE COELHO CASE) PAGE 65

³⁰⁷ Ashok Desai, 'Constitutional Amendments and the "Basic Structure" Doctrine', in *Democracy, Human Rights and the Rule of Law* (Butterworths India, 2000) 90.

³⁰⁸ Pratap B. Mehta, 'The Inner Conflict of Constitutionalism', in *Zoya Hasan India's Living Constitution*, (Permanent Black, 2002) 180.

³⁰⁹ *Minerva Mills v. Union Of India* (1980)3 SCC 625

Justice Khanna uses it"³¹⁰ and that there was no clear ratio decidendi³¹¹. If each judge is able to define the basic structure concept according to his own view, a Constitutional amendment would be valid or invalid according to the personal preferences of the judges.³¹² S. P. Sathe concluded that "the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature"³¹³ Likewise, T. R. Andhyarujina said that the "exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with Constitutional democracy"³¹⁴ There is no provision in the Indian Constitution stipulating that this Constitution has a basic structure and that this structure is beyond the competence of amending power. Therefore the limitation of the amending power by the basic structure of the Constitution is deprived of positive legal validity,³¹⁵ as it cannot be derived from an interpretation of the text with the normal scope of interpretation.³¹⁶ This has also been criticised for expanding the basic feature catalogue, and observes that the 'open-ended' nature of the doctrine is beginning to lead an irrational and confusing situation.'³¹⁷

3. Absence of a yardstick for lucid determination.

The sweep and impact of the doctrine is so wide and far reaching that it is impossible for those amending the Constitution to guess what surprise lies in the store for them before the SC. A multitude of features have been acknowledged as basic, in judicial pronouncements by different judges individually though it can be said consensus as regards each of them is yet to be achieved.³¹⁸ The infamous judgment in *ADM Jabalpur* also came from the very same court that unhesitatingly approved the suspension of the Right to Life and Liberty under Emergency laws.

³¹⁰ H.M.Seervai, *Fundamental Rights At The Cross roads* (1973).

³¹¹ P.K Tripathi, "Kesavanada Bharti v State of Kerela: who wins?", (1974) 1 SCC Journal 3.

³¹² Kemal Gözler, *Judicial Review Of Constitutiona lAmendments; A Comparative Study* (Ekin Press Bursa 2008).

³¹³ S. P. Sathe, *Judicial Activism: The Indian Experience*, (2001) 6 Wash. U. J. L. & Policy 29-108, Vol. 6:29, Page 88

³¹⁴ T. R. Andhyarujina, *Judicial Activism And Constitutional Democracy In India* (1992) 10.

³¹⁵ *Supra* N.20

³¹⁶ P. Chopra, *The SC V. The Constitution* (Sage Publications, 2006) 29.

³¹⁷ R.K.P Shankardass, 'The anomalies of the doctrine' in Pran Chopra (Sage Publications 2006) 137.

³¹⁸ Justice R.C.Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India*, Eastern Book Company, First Edition, 2004; at p. 111-112



The difficulty arises because of the uncertainty of so-called basic features and the inclination of the court to change its interpretation by narrow majorities from time to time. Therefore, this is contrary to the spirit of parliamentary democracy and concentrates unfettered power in one institution, which, incidentally, is not an elected body.³¹⁹ Hence, it is apparent that the Doctrine is a subjective one and largely relies upon the values of *the* judges, who influenced by inherited instincts, traditional beliefs, acquired convictions, and conceptions of social need formulate, their own peculiar yardsticks and values and the same vary from person to person and time to time. There is an absence of a definite test to conclude whether a Constitutional right or a part thereof forms a part of the basic structure. In other words, there was no hypothesis against which the theory could be tested. The result was that instead of the Constitution drawing authority from within itself, it became dependent upon judicial interpretation i.e. the Judge made the Law. It has even been stated that the doctrine is anti-democratic and counter majoritarian in character and that unelected judges have assumed vast political power not given to them by the Constitution.³²⁰ Thus it has been shown to be a “vulgar display of usurpation of Constitutional power by the SC.”³²¹

³¹⁹ N.R. Madhava Menon; Basic Structure: After 30 years, in Pran Chopra, *The SC v. the Constitution* (2006).

³²⁰ R. Ramachandran, ‘The SC and the Basic Structure Doctrine’, *Supreme but not Infallible*, (Oxford University Press, 2000) 122-6.

³²¹ Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections* (2005) 26-27.

Part III

The collegium system of judicial appointments & transfer is not in accordance with the constitution.

1. Constitutional provisions & history purports the view of participative decision making rather than conferring primacy upon any one organ.

a. Texts of Art. 124(2) & Art. 217(1) never intended to confer any primacy upon the judiciary.

Owing to the several consultees under Art. 124(2) and 217(1) and the possibilities of different combinations of agreement/disagreement between them, the question of according primacy to the views of the CJI must be viewed.³²² Each of the Constitutional functionaries holds a high Constitutional position and it is difficult to see how, in the absence of express words, it can be said that there is a hierarchy envisaged by the said provision.⁴⁰³²³ If primacy is to be accorded to the views of the CJI, the views of the consultees would become redundant and will best serve the purpose of persuading the CJI to change his views, but if he does not, the views of the other consultees will become nugatory. Bhagwati CJ. In the *First Judges' Case* opined that, even if there is a difference of opinion between the Constitutional functionaries, the opinion of the CJI will not have primacy since all the functionaries are on the same pedestal.³²⁴“The plain language of Art. 124(2) says that the President shall consult the Chief Justice of India and such of the judges of the SC or the HC as he deems necessary. The Art. does not place any ceiling or limitation on the no. of judges other than the Chief Justice of India to be consulted.”The relation between the President and the Council of Ministers³²⁵is that tough we have an elected President, the present art. introduces the same system of parliamentary executive as in England and reduces the President to a formal or constitutional head of the executive, the

³²²Supreme Court Advocates-on Record Association vs Union of India,(1993) 4 SCC 441 (530) : AIR 1994 SC 268

³²³ Ibid

³²⁴ S.P Gupta v Union of India, AIR (1982) SC 149

³²⁵S.R. v. Union Of India (1994) 3 SCC 1 : AIR 1994 SC 1918 -9 Judges

real power being exercised by the Council of Ministers³²⁶. All the powers that are vested by the Constitution in the President, must be exercised on the advice of the Ministers responsible to the Legislature as in England, because of the mandatory requirement of Cl. (1) of Art. 74.³²⁷³²⁸

The President should always act on the aid and advice of the Council of Ministers (art. 74). However, contrary to what was said in the Constitution both the Judges II and Judges III cases have laid down that consultation with the Chief Justice of India means a collegium consisting of the Chief Justice of India and two or four judges as the case may be. Further, in both the cases it was stated that it is the Chief Justice of India who should consult with collegium of judges, whereas Constitution says that the President should consult the Chief Justice of India and such judges as he deems necessary"³²⁹

b. The idea of a Judicial Comm. has been prevalent from the past.

It has been suggested by the Law Comm., for setting up a National Judicial comm. and tentatively it suggested that its members should be the Chief Justice of India as Chairman, 3 senior most judges of the SC, retiring Chief justice of India, 3 Chief justices of HC, according to their seniority, minister of law and justice, Govt. of India, AG and an outstanding law academic.³⁶ The Constituent Assembly's Ad Hoc Committee in its report also favoured the system of a Judicial Comm.³³⁰ Evidence of the mechanism of Comm. having presence of Executive therein is found in the United Kingdom, South Africa, Russia, Canada, Sri Lanka, Japan amongst others.³³¹

³²⁶Ram Jawaya Kapur, *Rai Sahib v. State of Punjab* (1955) 2 SCR 225 (238) : AIR 1955 SC 549; *Sanjeevi Naidu, A. v. State of Madras*, AIR 1970 SC 1102 (1106) : (1970) 1 SCC 443

³²⁷*Rao, U.N.R. v. Indira Gandhi*, AIR 1971 SC 1002 (1005) : (1971) 2 SCC 63; *Samsheer Singh v. State of Punjab*, AIR 1974 SC 292 (7 Judges) (paras 27, 30, 32) : (1974) 2 SCC 831

³²⁸DD BASU 'SHORTER CONSTITUTION OF INDIA', 13th EDITION 2001, PAGE 489

³²⁹Supra N.13

³³⁰Ad Hoc Committee Report ¶ 14-16, P 65-66

³³¹64th Rajya Sabha bill report (The Judicial Appointments Commission Bill, 2013)

c. *Consultation does not mean concurrence & has been fallaciously interpreted.*

There is a consensus of opinion that, 'consultation' does not mean 'concurrence'.³³² The word 'consult' as understood in ordinary parlance means to ask or seek advice of a person on any given subject i.e. to take counsel from another, but it does not convey that the consultant is bound by the advice. The opinion of the CJI has to be formed collectively after taking into account the views of the senior colleagues who are required to be consulted by him for the formation of an opinion.³³³

The Parliamentary standing Committee has also opined that, the *Second Judges' Case* had altered the Basic structure of Constitution by interpreting the word 'consultation' to mean the 'concurrence' within the meaning of Art. 124(2) and 217(1) of Constitution.³³⁴ Under Art. 124(2), while the proviso obligates consultation with the CJI, the text of Clause 2 stretches out the zone of consultees and leaves it to the president to consult one or more amongst that broad band of consultees. But he must consult before he makes the appointment. Here the expression '*such of the judges*' must include the CJI in the case of the former and the Chief justices of the HC's in the case of latter even though consultation with the former is mandated by the proviso.

As per the practice hitherto followed it is not incumbent on the govt. to consult any judge of the SC or the HC including any Chief justice of the HC if consultation with the CJI is considered sufficient and no further consultation is deemed necessary. So the plain language of Art.s 124(2) and 217(1) do not convey that the process of consultation means concurrence with the views of the CJI.³³⁵ It has further been held that the expression

³³² Gauhati HC v. Khuladhar Phukhan, (2002) 4 SCC 524; HC of Judicature of Rajasthan v. P.P Singh (2003) 4 SCC 239.

³³³ Supra N.30

³³⁴ Parliament of India, Rajya Sabha (Department-related parliamentary standing committee on personnel, public grievances, law and justice (64th Report) ;The Judicial Appointments Commission Bill, 2013

³³⁵ Supra N.30

“consultation with the CJI” in Art. 217(1) and 222 (1) of the Constitution requires consultation with a ‘*plurality*’ of judges.⁴⁷

Legislative history further tells us that prior to the Constitution and during the British rule, no law warranted the executive to consult the Chief Justice of the federal Court and/or that of the HC for appointment of judges in the aforesaid Courts. While framing the Constitution of India, suspicion in the Constituent Assembly was cast on both the exclusive roles of the President and the CJI and hence the concept of plurality was introduced in the exercise at that level and at that level alone. Neither was to have a veto in Art. 124 and 217, the word ‘consultation’ was preferred to ‘concurrence’.³³⁶

2. Role of the executive is essential for the selection of judges and must not be undermined.

a. The executive provides for the essential pre requisite information required in the assessment of candidates for appointment

Matters, such as the antecedents of the individual, his political affiliations, if any, his other interests in life, his associations etc. the executive alone may provide the information. Similarly, the executive would be able to collect information regarding the honesty and integrity of the individual and certain other related matters, which may have a bearing on his appointment. Thus, the opinion of the executive in this area would be equally important.

The above recommendation for the need for an urgent and immediate review of the present procedure for appointment of judges is further fortified by the views expressed by Justice J.S. Verma, who wrote the lead judgment in *Advocates on Record vs. Union of India* 1993(4) SCC 441, by his forthright views expressed in an interview in the *Front Line Magazine* dated 10.10.1998. The relevant portion is reproduced below: When asked “you said in one of your

³³⁶*In re* Special Reference 1 of 1998, 1998 (7) SC 739

speeches that judicial appointments have become judicial disappointments. Do you now regret your 1993 judgement? Justice Verma stated “My 1993 judgement, which holds the field, was very much misunderstood and misused. It was in that context I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore, some kind of rethink is required. My judgement says the appointment process of HC and SC Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it. Broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents. It is the judiciary, i.e., the Chief Justice of India and his colleagues or, in the case of the HCs, the Chief Justice of the HC and his colleagues (who) are the best persons to adjudge the legal acumen. Their voice should be predominant. So far as the antecedents are concerned, the executive is better placed than the judiciary to know the antecedents of candidates. Therefore, my judgement said that in the area of legal acumen the judiciary’s opinion should be dominant and in the area of antecedents the executive’s opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment.”³³⁷

b. The Constitution inherently provides for consultation with the governor and the CoM by the president.

The power to appoint judges to superior courts is an executive function. The President as well as the governor exercise the power conferred by the Constitution on the aid and advice of the respective CoM, except where the governor is required by or under Constitution to exercise his functions in his discretion. Since Art. 217(1) does not say that the said function the governor must perform in his discretion, it is obvious that in the matter of appointments to the superior judiciary the governor must act according to the aid and advice received from the CoM. Similarly by the virtue of Art. 74(1) the President is obliged to act on the

³³⁷ Supra N.3

advice of the CoM. It must also be realized that under Art. 75(3) and 164(2), the CoM are collectively responsible to the house of the people in case of the union and the legislative assembly in the case of the State. In the view of Art. 248, it cannot be said that appointments to the superior judiciary do not attract Art. 74(1).³³⁸

c. The executive must be involved in the decision making process, as they are accountable to the people in a democracy

The emphasize is that there arises a distinction between appointment and functioning of the Judiciary. Owing to this distinction, in the matter of functioning, the executive does not have any role. However, the executive must necessarily be involved in the process of appointment. It is submitted that the Judiciary is not accountable to the people, and thus, the concentration of power of appointment in them is undemocratic. However, the executive is accountable to the Legislature, which represents the will of the people and that involvement of Executive is the only way of incorporating the element of democracy and accountability in the process of appointment of the judges of the Higher Judiciary.

d. There subsists a likelihood of mala fides in appointment made by the judiciary

Criticism has occasionally been leveled that the selection has not been proper and has been induced by ulterior considerations. It has been further lamented that, a person appointed not on merit but because of favoritism or other ulterior considerations can hardly command real and spontaneous respect from the bar.³³⁹ It is submitted that, the judges may be appointed on the whims and fancies of the CJI. His personal affiliates may with whom his personal interest lies, may also be slated to elevation. Justice Ruma Pal had recently

³³⁸ Supra N. 30¶ 304; Shamsher Singh v. State of Punjab, (1974) 2 SCC 831.

³³⁹ Law Commission, The Method of Appointment of Judges (Law Com No 80, 1979).

remarked that the collegium system of appointment is *"one of the best kept secrets in the country"*.³⁴⁰

Part IV

The constitution (99th amendment) act 2014 is not subject to limitations enshrined under art. 13 of the constitution.

- 1. The two acts have been duly passed by the process of law and the procedure set forth under art. 368 is not under challenge.**

The provisions of Art 368 show that subject to some conditions and procedural requirements, the Parliament is competent to amend the Constitution.³⁴¹ The Art. contains both the power and procedure to amend the Constitution and the power of amendment implied in that Art. can reach each and every Art. as well as every part of the Constitution.³⁴²

- 2. The constituent law making power prescribed under art. 368 enjoys immunity from the bar of Art. 13.**

- a. There exists a distinctive element in ordinary and constituent power of amendment under Art. 13.*

The settled position of law as determined in the cases of Shankri Prasad and Sajjan Singh from as early as the 50's was that there is a clear demarcation between ordinary law which is made in exercise of the legislative power and Constitutional law which is made in exercise of constituent power. The court sought harmoniously to reconcile the amending

³⁴⁰5th V.M. Tarkunde Memorial Lecture: An Independent Judiciary by Justice Ruma Pal. (New Delhi, 10th November 2011)

³⁴¹ Kuldip Nayar v. Union of India, AIR (2006) SC 3127

³⁴² Supra N. 2

power of Parliament and the judicial review power of the courts by reading down the scope and application of the judicial review to not include Constitutional amendments.³⁴³

b. Over ruling of the Golak Nath case testifies the aforesaid portion of law.

Consequently, this position of law was sought to be altered by an 11 judge bench in the case of *Golak Nath v State of Punjab*³⁴⁴. It was held that the amending power, which was the called the constituent power of Parliament arose from provisions other than Art. 368 which merely prescribes the procedure of amendment. It held that the power to make laws was contained in Art.s 245, 246 & 248 of the Constitution which gave it plenary power to make laws. Thus, the apex court laid down that the constituent power and ordinary legislative powers of Parliament were one and the same and any amendment of the Constitution must be deemed to be law under Art. 13 (2).³⁴⁵ However, the Apex Court overruled its earlier decision in *Golak Nath* in the seminal case of *Kesavananda Bharti*³⁴⁶, holding that Parliament could amend the fundamental rights, but also held that under Art. 368, Parliament could not enact Constitutional amendments that altered the "basic structure" of the Indian Constitution.³⁴⁷ It re-affirmed the pre-*Golak Nath* position that ordinary law and constituent law are different and 'law' in Art. 13(2) cannot include a constituent amendment.³⁴⁸ This was based on the premise that while an ordinary law depended on a higher law for establishing its own validity, a provision of the Constitution did not depend on another law and, instead, generated its own validity.³⁴⁹ Moreover, Art. 368 is not merely procedural but confers substantive powers, for, on the procedure being followed, the product is a substantive amendment of the Constitution.

³⁴³ Sankari Prasad v. Union of India, AIR (1951) SC 458.

³⁴⁴ *Golak Nath v.State of Punjab*, (1967) 2 SCR 762.

³⁴⁵ Ibid

³⁴⁶ Supra N.2

³⁴⁷ Supra N.28

³⁴⁸ Supra N.2

³⁴⁹ P.K Tripathi: Some insights into Fundamental Rights (1972).

It would be correct to say that law making power is the genus of which legislative power and constituent power are the species.³⁵⁰

c. Presumption of constitutionality

We submit that there exists a presumption which is in favour of constitutionality of the enactment.³⁵¹ It must be presumed that the legislature understands and correctly appreciates the need of its own people, that the laws are directed to problems made manifest to experience.³⁵² A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily.³⁵³ It was held that as long as the Legislature acts within the sphere allotted to it, does not infringe the provisions of Part III of the Constitution, or the Constitutional limitations, it can create a 'conclusive presumption' of law in appropriate cases.³⁵⁴

3. Art. 13(4) as inserted by the 24th amendment replicates the immunity derived from Art. 368(3)

a. The parliament constituent power is not subject to judicial review under Art. 13

By virtue of Art. 13(4), the amendments made to the Constitution under Art. 368 are left untouched. The enactment of the Twenty-Fourth Amendment, sought to overrule the *Golak Nath* judgement by affirming and reasserting Parliament's unlimited power to amend the Constitution under Art. 368, and declared that such amendments were not ordinary "laws" under Art. 13 and thus could not be subject to judicial review by the Court.³⁵⁵ The 24th Amendment was challenged in the case of *Kesavananda Bharti* and

³⁵⁰ Supra N.2

³⁵¹ *Chiranjit Lal v. Union of India*, (1950) SCR 869.

³⁵² *Ashuthosh Gupta v. State of Rajasthan*, AIR (2002) SC 1533.

³⁵³ *People's Union for Civil Liberties v. Union of India*, AIR (2004) SC 1442.

³⁵⁴ *Kerala Swatantra Malayala Thozhilali Federation v Kerala Trawl Net Boat Operators's Association* (1994) 5 SCC 28.

³⁵⁵ *S.P. Sathe, SC, Parliament, and the Constitution*, 6 Econ & Pol Weekly (1971) 1821, 1824.

was unanimously upheld by the 13 judge bench as valid.³⁵⁶ Thus, the position of law is extremely lucid as the amendment and the upholding of it by the Apex Court clearly show that the legislative intent was to preclude amendments made in the exercise of constituent powers from judicial review under Art. 13. The law laid down in the *Fundamental Rights case* with respect to the 24th Amendment Act is as follows: It is submitted that the 24th Amendment was to remove some of the doubts on the scope of limits on the amending power. In *Golak Nath*, the minority rejected the theory of implied or inherent limitations on the amending power but the majority did not decide the issue. Therefore, it was only done to restore to the Parliament the power it already possessed. . In *Kesavananda's*³⁵⁷ case it was held that the *Sankari Prasad*³⁵⁸, *Sajjan Singh's*³⁵⁹ case and the dissenting minority judgment in *Golak Nath*³⁶⁰ took the view that every provision of the Constitution could be amended in exercise of constituent power. As a necessary corollary, the 24th Amendment excludes the operation of Art. 13 by a new sub-Art. (4) that nothing in Art. 13 shall apply to any amendment of this Constitution under Art. 368. The amendment of Art. 13 by an insertion of sub-Art. (4) is also reinforced by the opening words introduced in Art. 368 by the 24th Amendment, 'notwithstanding anything contained in this Constitution which would certainly exclude Art. 13. Further, Art. 13(4) and Art. 368(3) make explicit what was implicit.³⁶¹

³⁵⁶ Supra N.2

³⁵⁷ Ibid

³⁵⁸ Supra N. 51

³⁵⁹ *Sajjan Singh v. Rajasthan* AIR (1965) SC 845.

³⁶⁰ Supra N. 52

³⁶¹ Supra N. 2



INTERNET OF THINGS AND PATENT ISSUES

RASHI SHAHRAWAT³⁶², SAMRAT ANAND³⁶³

Introduction

The phrase “Internet of Things” was first used by Kevin Ashton in the title of a presentation made by him at Procter & Gamble (P&G) in 1999. At that time he used the phrase to refer to Radiofrequency identification (RFID) gadgets used for tracking consignments. However, in today’s e-world this phrase has evolved and is not just limited to discovering objects and receiving information from them.

Consider the following scenario:

- Your alarm-clock tells the coffee-maker when you wake up, and the coffee-maker is ready with your morning cup of coffee
- The coffee-maker in turn gives a signal to your car to set the temperature inside it to comfortable levels by the time you are ready to drive down to work
- Your car in turn signals your offices’ electrical switches to be switched on and signals your computer to prepare your daily schedule

The result being: “Seamless integration of devices which can communicate with each other and undertake activities useful to human beings - Internet of Things”. ³⁶⁴

³⁶² Year III, B.B.A LL.B (Hons), NorthCap University, Gurgaon

³⁶³ Year III, B.B.A LL.B (Hons), NorthCap University, Gurgaon

³⁶⁴ Wood, Alex. "The internet of things is revolutionizing our lives, but standards are a must". theguardian.com. The Guardian. Retrieved 31 March 2015.



In other words, where everything can be connected via a sensor and connectivity to enable that 'Thing' to participate in the larger 'network ecosystem'³ where machines can virtually talk to each other can be called as IoT.

A quick look at the news surrounding the IoT today will show that every major player in the IT and technology industry is gunning to claim its stake in IoT. Frontrunners in this field are not only working on developing business models and marketable applications of the IoT, but also on developing standards and guidelines for those following in their footsteps. The Government of India also released a draft 'Internet of Things Policy' in early 2015, with the aim of promoting the creation of an IoT ecosystem, and the development of IoT products specific to Indian needs in the domains of agriculture, health, water quality, and natural disasters among other things.

In order for IoT and its convergence to exist and function properly, devices need to communicate with each other for which devices need to use standardized technology. This is needed because different devices from different commercial sources have to connect and also the existing architecture should allow addition of devices. However, if standardized technologies are patented then it will create obstacles for the development of IoT as any party adopting standardized technology will end up infringing patents of third party patent owners.

From an Indian context, software programmes per se are not patentable in India. However, certain computer related inventions, which involve software could be patentable in India but would need to be examined in light of the "Guidelines for Examination of Computer Related Inventions" issued by the Indian Patent Office.

Further, it would be interesting to observe how this space evolves when Indian patents would be determined as SEP along with the FRAND terms which would be sought by Indian patent owners in relation to such SEP.

Theoretical Analysis

The essential technology elements involved in IoT are:

- Wireless Internet Connection (Communication Means)
- Embedded Sensors
- Communication Software (Modules to perform one or more AI instructions)
- Admin Interface
- Encryption Algorithms for Security
- Other Electronic Devices (Appliances)
- Operating Platforms
- Data Management Protocol

A broad parallel can be drawn between this theoretical IoT architecture and today's smartphone systems: operating systems, protocols and remote connectivity. However, the smartphone example also points to the potential difficulties that may be faced with intellectual property ownership in the IoT, particularly patenting, because it is with these technological aspects that patents become relevant.

Indian Patent Law

The history of Patent law in India starts from 1911 when the Indian Patents and Designs Act, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals and micro-organisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition have been also introduced.

An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section 3 and 4 of the (Indian) Patents Act,

1970. In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee.

For an invention to be patentable under the Indian Patent Act, 1970; the invention must be new, involve inventive step that is non-obvious and must have industrial application. Section 3 and 4 of the Act enlist the inventions which are not patentable.

IoT in INDIA

With the advent of the Internet of Things (IoT), fed by sensors soon to number in the trillions, working with intelligent systems in the billions, and involving millions of applications, the Internet of Things will drive new consumer and business behavior that will demand increasingly intelligent industry solutions, which, in turn, will drive trillions of dollars in opportunity for IT industry and even more for the companies that take advantage of the IoT.

The number of Internet-connected devices (12.5 billion) surpassed the number of human beings (7 billion) on the planet in 2011, and by 2020, Internet-connected devices are expected to number between 26 billion and 50 billion globally. Therefore to leverage India's strength as a leader in the global service industry, through suitable promotion and supportive mechanisms the draft IoT policy has been formulated to create IoT ecosystem in the country.

The Indian Government's plan of developing 100 smart cities in the country, for which Rs. 7,060 crores has been allocated in the current budget could lead to a massive and quick expansion of IoT in the country. Also, the launch of the Digital India Program of the Government, which aims at 'transforming India into digital empowered society and knowledge economy' will provide the required impetus for development of the IoT industry in the country. The various initiatives proposed to be taken under the Smart City concept and the Digital India Program to setup Digital Infrastructure in the country would help boost the IoT industry. IoT will be critical in making these cities smarter. Some of the key aspects of a smart city will be:

Smart parking, Intelligent Transport System, Smart urban lighting, Waste management, Smart city maintenance, Tele-care, Citizen safety, Smart Grid, Smart Energy and Water Management.

Among other things, IoT can help automate solutions to problems faced by various industries like agriculture, health services, energy, security, disaster management etc. through remotely connected devices.

IoT offers avenues for telecom operators & system integrators to significantly boost their revenues and has resulted in their taking lead in adoption of IoT applications and services being offered by the technology. Apart from direct IoT applications, the IT industry also has an opportunity to provide solutions, services and analytics related to IoT.

IT services giant Tech Mahindra announced in the first week of February, 2016 that it was launching an Internet of Things platform called Jumpstart IoT, in partnership with US-based firm Aeris Communications, a pioneer in machine to machine (M2M) communications³⁶⁵. Jumpstart IoT is a platform that carriers can use to provide value added services to enterprise customers, who can use the system for greater efficiencies in areas such as inventory management with the use of automated sensors that can send updates using the cellular network.

Quoting Jagdish Mitra, Head Mobility Business and Large Deals, Tech Mahindra; "This isn't for the future. This is all happening now".

Challenges to Patentability of IoT

1. IOT includes multiple technological aspects, these filing patents to cover all elements may get complicated. In many cases one has to take license for an essential invention without which IoT based invention cannot function.
2. IoT components pertaining to pure software & business methods may not be patentable. Writing patent claims can be tricky.
3. Hardware components may be eligible for patent protection eg: wearable devices (digital watches) gadgets, accessories, electronic appliances & the like.

³⁶⁵ <http://gadgets.ndtv.com/internet/features/building-the-internet-of-things-in-india-658716>

One issue will be the extent to which many parts of the technology required for the IoT are patentable at all. Indian Patent Act, 1970 (Section 3(k))³⁶⁶ is clear that software and methods of doing business are not patentable. However, computer implemented inventions that have a technical effect are potentially patentable (providing that they fulfil other requirements such as novelty and invention). Smartphones have yielded many examples of subject matter about which there is much discussion as to whether the invention is software, and/or a business method as such or whether there is technical application.

Another key difficulty will be that for the IoT to work in a truly seamless and interoperable way, it needs to use standardised technology. This is because it will need to connect objects from different commercial sources and allow the addition of new objects without disrupting the existing architecture or requiring an alternative structure. If, however, standardised elements of technology in the architecture are patented, this presents a problem because without a licence from the patent owners, third party users of the technology may be forced to infringe those patents. The attempted solution to this problem in the smartphone business, where the equivalent patents are referred to as standard essential patents ("SEPs"), has been for the various bodies who set standards to impose a condition that patent licences should be available to third parties on fair, reasonable and non-discriminatory ("FRAND") terms.

Experience has shown that agreeing FRAND terms is not always straightforward. Parties cannot always agree what terms are fair and reasonable, particularly as regards royalty rates. It is also a question under discussion in the courts of many jurisdictions as to what role the FRAND obligation plays when an SEP owner seeks to enforce an SEP against an alleged infringer.

Indian Scenario on SEP and FRAND

Indian jurisprudence on fair, reasonable, and non-discriminatory (FRAND) licensing practices for standard-essential patents (SEPs) is at a relatively nascent stage. Unlike US and EU courts,

³⁶⁶ The following are not inventions within the meaning of this Act,—

(k) a mathematical or business method or a computer programme per se or algorithms;

which have dealt with cases concerning calculating a FRAND royalty for a considerable time, Indian courts and the Indian antitrust authority—the Competition Commission of India (CCI)—have only just begun to decide such cases.

In its initial orders in the first two antitrust complaints concerning SEPs, the CCI seemed to favour using the smallest salable patent-practising component (SSPPC) as the royalty base to determine a FRAND royalty. However, in the short time since the CCI's orders, the Delhi High Court has rendered contrary decisions in two SEP infringement suits i.e. *Telefonaktiebolaget LM Ericsson v Mercury Elecs. & Another*³⁶⁷ and *Telefonaktiebolaget LM Ericsson v Intex Techs. (India) Ltd*³⁶⁸. The Delhi High Court's decisions use the value of the downstream product as a royalty base and rely on comparable licences to determine a FRAND royalty. The Delhi High Court's decisions are not only consistent with sound economic principles, but also indicate that the court is responding to the judicial and industry trends in the rest of the world.

Because the CCI is still investigating the antitrust complaints with respect to the same SEPs, the CCI could benefit from considering the legal and economic arguments in the Delhi High Court's decisions. It would be counterproductive for the emerging FRAND jurisprudence in India if the judiciary and the competition authority take opposing views toward the rights of SEP holders and SEP implementers.

Taking a lesson from Germany, the landmark decision *Orange-Book Standard* of the German Federal Court of Justice³⁶⁹, confirms that a defendant sued for the infringement of an SEP can rely on FRAND as a defence against claims for injunctive relief, providing he has, in effect, acted as a licensee in any event, and the plaintiff patent owner refuses to grant a licence on FRAND terms. However, the circumstances in which this defence can be employed by a defendant have been

³⁶⁷CS (OS) No. 442 of 2013

³⁶⁸I.A. No. 6735/2014 in CS(OS) No.1045/ 2014

³⁶⁹ Joseph Straus, "Patent Application: Obstacle for Innovation and Abuse of Dominant Position under Article 102 TFEU?", *Journal of European Competition Law & Practice* (2010) 1 (3): 189-201, footnote 71.

criticised as far too strict on the defendant. By contrast, in the Netherlands the onus is on the patentee to take steps towards a FRAND licence to avoid this defence. Hence, questions have now been referred to the Court of Justice of the European Union (CJEU), from the Dusseldorf court, in the case of *Huawei v ZTE*³⁷⁰, seeking clarification of the conditions in which the FRAND defence is applicable.

With the development of the IoT, networks of standardised technology will become even more widespread and issues such as those already experienced in the telecommunications sector can be expected. However, with the telecoms market providing a model, it is hoped that a suitable way forward on some of these issues, particularly FRAND terms and their application, will soon be found.

Conclusion

IoT presents immense value to consumers and entrepreneurs. Additionally, the emerging technologies will help businesses to redefine the patent system in order to promote innovation and growth in IOT applications. On the flip side, IoT technology involves sharing information from one smart object to another that involve multiple parties infringing a patent. Inventors or businesses have adopted specific claim drafting techniques to avoid joint infringement issues. Patentability and joint infringement will be the major challenge for IoT technology. To overcome these challenges, businesses need to understand the best practices for drafting specific claims for IoT. As IoT is interactive in nature, IoT technologies will be at the center of any further changes in the patent law in terms of patentability and enforcement of patent claims.

Issues

1. For IoT to function effectively devices will need to use standardised technology.
2. Patented standardised technology will either force 3rd Party users to infringe or pay exorbitant licensing fees.

³⁷⁰ *Huawei v ZTE* – No More Need To Look At The Orange Book In SEP Disputes by James Killick & Stratigoula Sakellariou



Solution

1. Such patents need to be declared SEPs (Standard Essential Patents).
2. Standard setting bodies would impose a condition on the SEP owner to license their patents to 3rd parties on FRAND (Fair, Reasonable and Non-Discriminatory) Terms.

What we found was that given the diversity of technologies in IoT's Things, the innovations in low power and analytics, and the wealth of established technology that is being repurposed for this market, there will be strong licensing positions held by a wide assortment of well established companies. Those companies entering the market will have to prepare for licensing by driving their rate of patent applications, purchasing patents, taking licenses, or being acquired as part of a round of market consolidation.

Overall, the IoT will continue to evolve as we move beyond humans talking to machines, to machines talking to machines. Many markets are poised to jump on the IoT bandwagon as the IoT permeates every facet of daily life. While new technology developed for the IoT will drive the growth of newly patented technology, it will also drive explosive growth in the patent licensing landscape as many of the patented technology being used in new ways for IoT is nearly 20 years old.



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THE RECENT TRENDS AND DEVELOPMENTS IN THE INDIAN LEGAL SYSTEM

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Abstract

The prominence of development has been dealt in this article to prong the trend of the Indian legal system. At first, the system of change prevailing in India has been acknowledged with. Then, profuse relevant acts have been broached to mark the changes brought by them in brief considering the societal needs. The acts and its impact with reference to society have been precisely conferred here to conger their importance. Finally, the trend has been alluded on the basis of the research done on all the acts.

Keywords

Developments in law, Legal System in India

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Introduction

This article is apropos the recent developments which took place in the Indian legal system. It also alludes the trend towards which this legal system is advancing. The laws prevailing in India has been much affected by the customs and traditions prevailing in Indian society. Customs and traditions are also source of law. Even laws are made after proper scrutiny of but it is a well-known fact that change is the law of nature and so the society evolves or changes desiderating the new kind of law or certain amendment in the existing law. So in order to retain the purpose of law that is to serve justice intact, the legal system also need changes. Now, the change can be encompassed basically by two ways which are –

- A) Legislation
- B) Judicial Pronouncement

Laws are made through the process of legislation by the parliament. Not only laws are made but even amendment is done in the prevailing laws by including some new provisions by the parliament of India. However, the changes made through judicial pronouncement are of different nature. Those are made by giving judgments given by the judges of higher court which is binding upon the lower court which means they have to apply the same principle which have been used by the judges of the higher court, in case, similar type of cases arrived as per provision under article 141 of the constitution of India which says that the judgment becomes precedent and can be regarded as law for all other cases of akin nature. The judgment of higher court is binding upon the lower court. This is also supported by the doctrine of prospective overruling which articulate that if the judgment has been given by the judge still it can be over ruled by the judge of higher court or even higher bench. Thus developments are made in the Indian legal system.

Law, when inadequately understood, undermines the effort of all those who may be correctly investing in the objectives and implementation of law. Let's briefly understand some important recent developments in the Indian legal system.



Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013

In year 2013 two significant legislations were introduced relating sexual harassment. Firstly, sexual harassment act at workplace and secondly criminal law amendment act 2013. These are very prominent legislation relating to the security of women in country. And this was immediate result of incidents of gang rape that shook country in 2013. There were wide protest and hue and cry from various NGO's working for women right. On 26 February 2013, the government complied with the Court's order, and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Upper House of the Indian Parliament, the Rajya Sabha (enacted in April 2013)³⁷³. It was the landmark judgment of the supreme court Vishakha Vs. State Of Rajasthan³⁷⁴ in which court first acknowledged the need to define the term sexual harassment at workplace and laid the guidelines. It was after the incident of gang rape of social worker took place in Rajasthan the writ petition was filed in court. It was said in this judgment "The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfill this felt and urgent social need"³⁷⁵. In the same judgment it was recognized that incidents like this not only violates rights of 'Gender Equality' and Right to Life and Liberty but also Right to practice any profession and to carry out any occupation, trade or business. And these guidelines were to be followed by both private and public sector organizations. Even after making such stringent law still many cases of sexual harassment have been registered. Over 520 cases of sexual harassment of women at workplace were reported during 2014, of which, 57 cases were reported in office

³⁷³ www.ilo.org

³⁷⁴ (1997) 6 S.C.C 241

³⁷⁵ www.indiankanoon.org

premises and 469 registered at other places related to work, the Women and Child Development Ministry had informed Parliament during the recently-concluded monsoon session³⁷⁶.

After 16 years of passing judgment on sexual harassment at work finally legislature passed the law. This is very much revised version of the guidelines laid down in the *Visakha vs. state of Rajasthan* but this time with strict and much rigorous punishment. Also the ambit of the offence has been increased and employer duties defined. Objective of the act is to provide protection to the women employees from sexual harassment and to setup a redressal mechanism to curb the menace.

Looking at the scope and applicability of this act it extends to the whole of India and applies to both organized and unorganized sector. Section 3 of the act says 'No women shall be subjected to sexual harassment at any workplace'³⁷⁷. Act defines Aggrieved woman in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment.³⁷⁸ Act seeks protection only for women from sexual harassment and no other sex. Sexual harassment of male has been overlooked by the parliament also which is one of the drawbacks of this act because sexual harassment of the male is also frequent at workplace. The absence of a law definitely doesn't stem from the absence of the crime. A large number of males do face sexual harassment in work places, both at the hands of men and women³⁷⁹. Further 'Workplace' has been defined as any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially trained by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society.³⁸⁰ Also includes any private sector, any sports institutes, or any place visited by the employee in course of employment, a dwelling place or house etc. workplace defined in the act not only increases the

³⁷⁶ www.articles.economictimes.indiatimes.com

³⁷⁷ Section 3 of the Sexual Harassment Act 2013

³⁷⁸ Section 2(a) of Sexual Harassment Act 2013

³⁷⁹ www.indianexpress.com

³⁸⁰ Section 2(o) of Sexual Harassment Act 2013

responsibility on the employer but this kind of strict law may cause deterrence in the mind of the employer. Increasing number of the complaints may lead to avoid hiring women employees by employers so that they do not have to bear much responsibility.

Meaning of Sexual Harassment- The statute defines "Sexual Harassment" includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely (i) physical contact and advances or (ii) a demand or request for sexual favours; or (iii) making sexually colored remarks or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.³⁸¹ Later under section 3(2) of the act few circumstance has been added which may amount to sexual harassment are as follows³⁸²;

- (i) Implied or explicit promise of preferential treatment in her employment; or
- (ii) Implied or explicit threat of detrimental treatment in her employment; or
- (iii) Implied or explicit threat about her present or future employment status; or
- (iv) Interference with her work or creating an intimidating or offensive or hostile work environment for her; or
- (v) Humiliating treatment likely to affect her health or safety.

There has to be two complaints committees have to be established according to this act. One is Internal Complaint Committee (ICC) and other is Local complaint committee (LCC). ICC is to be created in the organization itself having more than 10 employees. And LCC has to form at the district level or at block by the district officer.

Internal complaints committee- Act directs to setup ICC at every office and administrative unit of organization at each level of such organization. Whereas in the constitution of the ICC members to be included are³⁸³

³⁸¹ Section 2(n) of Sexual Harassment Act 2013

³⁸² Section 3(2) of the Sexual Harassment Act 2013

³⁸³ Section 4 of the Sexual Harassment Act 2013



- i. a presiding officer who shall be a man & woman employed at a senior level at workplace from amongst the employees
- ii. not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge
- iii. one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment.

The person so appointed as member from the non-governmental organizations or associations must be given prescribed amount for holding proceedings by the employer. And specifically mentions that half of the total members must be the women. Most contentious part of these committees is that the members do not have any legal knowledge which can lead to disastrous results. Also the power of civil court has been given to the committee to gather evidence which may lead to biased and poor results.

Local complaints committee- Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Complaints Committee" to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been instituted due to having less than ten workers or if the complaint is against the employer himself³⁸⁴. Talking about constitution of the LCC members nominated by the district officer are

- i. A Chairperson to be nominated from amongst the eminent women in the field of social work and committed to the cause of women
- ii. One Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district
- iii. Two Members, of whom at least one shall be a woman, to be nominated from amongst such non-governmental organisations or associations committed to the cause of women

³⁸⁴ Section 6 of the Sexual Harassment Act 2013

or a person familiar with the issues relating to sexual harassment, which may be prescribed.³⁸⁵

Redressal Mechanism- Regarding making of the complaint of sexual harassment act says that aggrieved woman may make complaint in writing to the internal complaint committee if setup by the employer or to the local complaint committee within the period of the 3 months from the incident. Further it says that committee may increase the time for any reasonable assistance. Act also says that in case woman is unable to make the complaint then on her behalf her legal heir or any other person can make complaint. Under section 10 of the act before initiating the inquiry if requested by the aggrieved woman may settle the matter between the parties by conciliation. But this conciliation should not be made on the basis of the money.³⁸⁶ In this regard act gives the committee is vested with the powers of the civil court for summoning, production of the documents, or any other matter prescribed. During the pendency of the matter if requested by the woman committee may grant some interim reliefs to the woman like³⁸⁷

- i. transfer the aggrieved woman or the respondent to any other workplace
- ii. grant leave to the aggrieved woman up to a period of three months
- iii. grant such other relief to the aggrieved woman as may be prescribed.

Punishments- After the completion of the inquiry must provide report of its findings and must be given to both parties within 10 days. As per its findings in the case if no action is to be taken against the accused then it shall recommend it to the employer or to the district officer of it.

And in case the allegations are proved committee shall recommend to the employer or district officer³⁸⁸

³⁸⁵ Section 7 of the Sexual Harassment Act 2013

³⁸⁶ Section 10 of the Sexual Harassment Act 2013

³⁸⁷ Section 12(1) of the Sexual Harassment Act 2013

³⁸⁸ Section 13 of the Sexual Harassment Act 2013

- i. to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed
- ii. to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or the wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or her legal heirs as it may be determined, in the accordance with the provisions of section 15.

If the allegations are disproved and found to be malicious or aggrieved woman or any other person has made false allegation knowingly or produced forged documents then action to be taken against such person or women as prescribed by the service rules. Provided that a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section³⁸⁹

And under section 15 of the statute conditions which are to be taken in account in determining the compensation to the aggrieved woman are³⁹⁰

- i. the mental trauma, pain, suffering and emotional distress caused to the aggrieved woman
- ii. the loss in the career opportunity due to the incident of sexual harassment
- iii. medical expenses incurred by the victim for physical or psychiatric treatment
- iv. the income and financial status of the respondent
- v. feasibility of such payment in lump sum or in instalments

Duties of the Employer- Duty of the employer not only to setup ICC and LCC but various other duties have been imposed on the employer to maintain the speedy redressal of the cases. These are defined under chapter 6 of the act as follows³⁹¹

³⁸⁹ Section 14 of the Sexual Harassment Act 2013

³⁹⁰ Section 15 of the Sexual Harassment Act 2013

³⁹¹ Section 19 of the Sexual Harassment Act 2013



- i. provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace;
- ii. display at any conspicuous place in the workplace, the penal consequences of sexual harassments; and the order constituting. the Internal Committee under subsection (1) of section 4
- iii. organise workshops and awareness programmes at regular intervals for sensitising the employees with the provisions of the Act and orientation programmes for the members of the internal Committee in the manner as may be prescribed
- iv. provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry
- v. assist in securing the attendance of respondent and witnesses before the Internal Committee or the Local Committee, as the case may be
- vi. make available such information to the Internal Committee or the Local Committee, as the case may be, as it may require having regard to the complaint made under sub-section (1) of section 9
- vii. provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law for the time being in force
- viii. cause to initiate action, under the Indian Penal Code or any other law for the time being in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place
- ix. treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct
- x. monitor the timely submission of report: by the Internal Committee.

Besides so many provisions law still leaves with many questions and many provisions of the law are not appropriate with least impact. Definitions have very wide scope which leads to



excess of responsibility on employer. The very purpose of the law is not met due to the strict provisions of actions against victim. Constituting of committees which hardly any organizations follow and even if they constitute it members in it do not possess legal knowledge which can result in obstructed justice.

Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice (care and Protection of Children) Act, 2015 became applicable from 15th January, 2016 while it was passed by Lok Sabha on 7th May, 2015 amid intense protest and by Rajya Sabha on 22nd December, 2015. The objective of the amended Juvenile Justice (Care and Protection of Children) Bill, 2015, passed by Parliament is a collective reform and restoration even if it takes the route of stiff punishment for certain adult crimes committed by juveniles or children below 18³⁹². Juveniles between 16 to 18 years of age committing heinous crimes such as rape and murder can now be tried as adults if the Juvenile Justice Board after due deliberations comes to this assessment. The Board will now comprise of a metropolitan magistrate and two eminent social workers actively involved in health, education or welfare activities for at least seven years or practicing profession with a degree in child psychology, psychiatry, sociology or law. They will collectively decide on a case-to-case basis, unlike the situation earlier, where there was no option. Juvenile Justice Boards (JJB) and Child Welfare Committees (CWC) will be constituted in each district³⁹³. The other improvement in the new law is the considerable involvement of volunteering community. Trained and qualified community workers can be co-opted at all stages of work at the discretion of the public officials in the Juvenile Justice Management system. Also, nomenclature has also been changed from 'juvenile' to 'child' or 'child in conflict with law', across the Act to remove the negative connotation associated with the word "juvenile"³⁹⁴. Section 15 provides special provisions to tackle child offenders who commit heinous offences in the age

³⁹² www.hindustantimes.com

³⁹³ www.prsindia.org

³⁹⁴ www.pib.nic.in



group of 16-18 year by providing Juvenile Justice Board the option to transfer cases of heinous offences by such children to a Court of Session after conducting preliminary assessment. The provisions provide for placing children in a 'place of safety' both during and after the trial till they attain the age of 21 years after which an evaluation of the child shall be conducted by the sessions court, depending on which the child shall either be released on probation or will be sent to a jail for remaining term if the child is not reformed. At present, most states do not have the 'place of safety', also known as 'borstals'. The law will act as a deterrent for child offenders committing heinous offences such as rape and murder and will protect the rights of victim. Central Adoption Resource Authority (CARA) has been given the status of a statutory body to streamline adoption procedures for orphan, abandoned and surrendered children. A separate chapter on Adoption also has been added for detailed provisions relating to adoption and punishments for not complying with the laid down procedure. Processes have been streamlined with timelines for both in-country and inter-country adoption which includes declaring a child legally free for adoption. Several new offences committed against children, who were earlier not adequately covered under any other law, are included in the Act. These includes sale and procurement of children for any purpose including illegal adoption, corporal punishment in child care institutions, use of child by militant groups, offences against disabled children and, kidnapping and abduction of children. Also all child care institutions, whether run by State Government or by voluntary or non-governmental organizations, which are meant, either wholly or partially for housing children, regardless of whether they receive grants from the Government, are to be mandatorily registered under the Act within 6 months from the date of commencement of the Act. Stringent penalty is provided in case of non-compliance. So these are the changes which latest amendment in juvenile law brought. The amended Juvenile Justice Act is a message for several sections of society. If each one of them appreciates this, society will be a safer place.

**THE RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION,
RESETTLEMENT AND REHABILITATION AMENDMENT BILL 2015**

The right to fair compensation and transparency in the land acquisition, resettlement and rehabilitation act 2013 got presidents assent on 26 September 2013. It took years to government more than 100 years to replace the replaces the Land Acquisition Act, 1894. Again amendments were made to this new law of 2013 in 2014 to strengthen the rights of the farmers and owners of the land. The Land Acquisition, Resettlement and Rehabilitation Act, ensured the displaced a compensation up to four times the market value of land in rural areas and two times in urban areas³⁹⁵. While again the government felt the need to amend the act as it was becoming it was difficult to implement it and caused stalling of important projects. Also to strengthen the rights and interest given to the affected families. In view of the urgency, these were brought about by an Ordinance on 31.12.2014. Subsequently, on 10.03.2015 the Lok Sabha passed the Amendment Bill to replace the Ordinance³⁹⁶. Important changes proposed in this act are as follows;

ADDITION OF CERTAIN ACTS ACCORDING TO THE LAAR ACT 2013: Some of the acts included in the (1) The Ancient Monuments and Archaeological Sites and Remains Act, 1958, (2) The Atomic Energy Act, 1962, (3) The Damodar Valley Corporation Act, 1948, (3) The Indian Tramways Act, 1886, (4) The Land Acquisition (Mines) Act, 1885, (6) The Metro Railways (Construction of Works) Act, 1978, (7) The National Highways Act, 1956; (8) The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962; (9). The Requisitioning and Acquisition of Immovable Property Act, 1952; (10) The Resettlement of Displaced Persons (Land Acquisition) Act, 1948; (11) The Coal Bearing Areas Acquisition and Development Act, 1957 (12) The Electricity Act, 2003; (13) The Railways Act, 1989³⁹⁷.

Exemption to the five categories of land from certain restrictions; The Bill creates five special categories of land use: (i) defence, (ii) rural infrastructure, (iii) affordable housing, (iv) industrial corridors, and (v) infrastructure projects including Public Private Partnership (PPP) projects

³⁹⁵ www.modelgovernance.com

³⁹⁶ www.pmindia.gov.in

³⁹⁷ Ibid.

where the government owns the land³⁹⁸. Where there is public private partnership and ownership is with the government appropriate government can exempt that acquisition from the social impact assessment. It means that in certain cases government need not to do any assessment and straight away can acquire the property. It is questionable here that as to why SIA is not to be conducted rather it should be done within specific time limit. But bill states that land so acquired must be minimum need of the project.

Another change that new bill seeks to make is to include the acquisition of land for private hospitals and educational institutions which was earlier excluded. Also if the land acquired under this act remained unutilized for more than five years or for any period specified for the project then it has to be returned to the owner of the land. A limit has been set by this act and some restrictions on acquisition of irrigated cropped land which is not to be acquired beyond the limit set by the government. Earlier act of 2013 was limited to 'private company' but new bill seeks to amend it and include other forms of companies too like proprietorships, partnerships, corporations, etc.

The LARR Act, 2013 requires that the consent of 80% of land owners is obtained for private projects and that the consent of 70% of land owners be obtained for PPP projects³⁹⁹. But as of now the deadline of the ordinance passed in 2014 is coming to end soon again law of land acquisition will be dealt by the Act of 2013. As the NDA Ordinance is lapsing, land acquisition would be governed now by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which came into force on January 1, 2014⁴⁰⁰.

³⁹⁸ www.prsindia.org

³⁹⁹ Ibid.

⁴⁰⁰ www.financialexpress.com/article/fe-columnist/opinion-has-pm-narendra-modi-killed-the-land-bill/128300/



BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015.

Black money (undisclosed foreign income and assets) and imposition of tax act, 2015 is to stricture black money or undisclosed foreign assets and income and imposes tax and penalty on such income. This act applies to Indian residents. It replaced the Income Tax (IT) Act, 1961 for the taxation of foreign income. It also empowers the Union government to enter into agreements with other countries for the exchange of information, recovery of tax and avoidance of double taxation⁴⁰¹. It penalizes the concealment of foreign income, and provides for criminal liability for attempting to evade tax in relation to foreign income. The relevant tax authorities and their jurisdiction are same as specified under the IT Act. They have powers of inspection of documents, and evidence. The proceedings are to be judicial. A flat rate of 30% tax would apply to undisclosed foreign income or assets of the previous assessment year⁴⁰². No exemption, deduction or set off of any carried forward losses which was provided under the IT Act would apply. It also has punishment for those who willfully evades tax which is 3-10 years of imprisonment along with penalty equal to three times of tax evaded or 90% of the undisclosed income or value of the asset⁴⁰³. There is a limited compliance window offer. Offenders would have to pay tax at the rate of 30% but concessional penalty would be equal to the tax amount. Failure to file returns of foreign income or assets will attract a penalty of Rs.10 lakhs. If a person who has filed tax returns does not disclose his foreign income, or submits inaccurate details of the same, he has to pay a fine of Rs10 lakh. This would not apply to an asset, with a value of five lakh rupees or less. Any person, who continues to default in paying tax that is due, would be liable to pay amount equal to the amount of tax arrears. If a person fails to abide by the tax authority in (i) answering questions, (ii) signing off on a statement, (iii) attending or producing relevant documents, he is to pay a fine between Rs. 50,000 to two lakh rupees. If a person makes a false statement in

⁴⁰¹ www.rediff.com

⁴⁰² www.business-standard.com

⁴⁰³ www.thehindu.com

verification or delivers false accounts or statement then there is no provision for penalty but there is for prosecution which is 6 months to 7 years and fine. In case of non-disclosure of foreign asset or income in return or failure to furnish return under Act Rs10 lakhs in addition of penalty of 3 times the tax payable on undisclosed income and for the same prosecution will be 6 months to 7 years and fine if default is willful. No penalty shall be levied if any foreign asset, being in one or more bank accounts has an aggregate balance which does not exceed Rs5 Lakh at any time during the previous year. In case of abetment to make and deliver false return, account, statement or declaration relating to tax payable the prosecution is for 6 months and 7 years. If a person, who has been convicted for an offence, is again convicted for an offence under this act, then penalty for those is Rs.5 lakhs to Rs.1 Crore along with prosecution of 3 years to 10 years. For any offence under this Act, every person responsible to the company is to be liable for punishment unless he proves that the offence was committed without his knowledge⁴⁰⁴. The valuation of the assets is done and the fair market value of assets is determined through various standards fixed under this act. Thus this act helps curb the menace of black money which if succeed would definitely contribute in the economy of the country.

STREET VENDORS (PROTECTION OF LIVELIHOOD AND REGULATION OF STREET VENDING) ACT, 2014

The street Vendors (Protection of Livelihood and regulation of Street Vending) Act, 2014 came into force from 1May, 2014. The act provides for protection of livelihoods rights, social security of street vendors, regulation of urban street vending in the country and for matters connected therewith or incidental thereto.⁴⁰⁵ The Street Vendors Act is a culmination of a decade long activism by civil society organizations and over a 30 year legal battle (beginning in the late 1950s) for the rights of street vendors.⁴⁰⁶ Street vendors are an integral part of the urban economy and not only a source of self-employment to the poor but also are means to provide affordable as well

⁴⁰⁴ www.prsindia.org.

⁴⁰⁵ www.pic.nic.in

⁴⁰⁶ www.easeofdoingbusiness.org

as convenient services to the urban population. The Provisions of this act are aimed at creating a conducive atmosphere where street vendors, are able to carry out their business in a fair and transparent environment, without the fear of harassment and eviction. It provides for constitution of a Town Vending Authority (TVC) in each Local Authority, which is the fulcrum of the bill. In order to ensure participatory decision making for aspects relating to street vending activities like determination of natural market, identification of vending zones, preparation of street vending plan, survey of street vendors etc. the TVC is required to have representation of officials and non-officials and street vendors, including women vendors with due representation from SC, ST, OBC, Minorities and persons with disabilities. It has been provided that 40% members of the TVC will be from amongst street vendors to be selected through election, of which one-third shall be women.⁴⁰⁷ To avoid arbitrariness of authorities, the act provides for a survey of all existing street vendors at-least once in every five years, and issue of certificate of vending to all the street vendors identified in the survey, with preference to SC, ST, OBC, women, persons with disabilities, minorities etc. All existing street vendors, identified in the survey, will be accommodated in the vending zones subject to norm confirming 2.5% of the population of the ward or zone or town or city and if the number of street vendors identified is more than the holding capacity of the vending zone, then TVC is required to carry out a draw of lots for issuing the certificate of vending for that vending zone and the remaining persons will be accommodated in any adjoining vending zone to avoid relocation. Those street vendors who have been issued a certificate of vending before the commencement of this Act, they will be deemed to be a street vendor for that category and for the period for which he/she has been issued such certificate of vending. It has been provided that no street vendor will be evicted until the survey has been completed and certificate of vending issued to the street vendors. It has also been provided that in case a street vendor, to whom a certificate of vending is issued, dies or suffers from any permanent disability or is ill, one of his family member i.e. spouse or dependent child can vend in his place, till the certificate is valid. Procedure for relocation, eviction and confiscation of goods

⁴⁰⁷ www.pib.nic.in

has made street vendor friendly. Relocation of street vendors should be exercised as a last resort. Accordingly, a set of principles to be followed for 'relocation', which are:-

- (i) Relocation should be avoided as far as possible, unless there is clear and urgent need for the land in question;
- (ii) Affected vendors or their representatives shall be involved in planning and implementation of the rehabilitation project;
- (iii) Affected vendors shall be relocated so as to improve their livelihoods and standards of living or at least to restore them, in real terms to pre-evicted levels
- (iv) Natural markets where street vendors have conducted business for over fifty years shall be declared as heritage markets, and the street vendors in such markets shall not be relocated.

The Local authority is required to make out a plan once in every 5 years, on the recommendation of TVC, to promote a supportive environment and adequate space for urban street vendors to carry out their vocation. It precisely provides that declaration of no-vending zone shall be carried subject to the specified principles namely, any existing natural market, or an existing market as identified under the survey shall not be declared as a no-vending zone, declaration of no-vending zone shall be done in a manner which displaces the minimum percentage of street vendors, no zone will be declared as a no-vending zone till the survey has not been carried out and the plan for street vending has not been formulated. There is also provision for establishment of an independent dispute redressal mechanism under the chairmanship of retired judicial officers to maintain impartiality towards grievance redressal system of street vendors. It provides for time period for release of seized goods, for both perishable and non-perishable goods. In case of non-perishable goods, the local authority is required to release the goods within two working days and incase of perishable goods, the goods shall be released the same day of on which the claim would be made. The act also provides for promotional measures to be undertaken by the Government, towards availability of credit, insurance and other welfare schemes of social security, capacity building programmes, research, education and training programme etc. for



street vendors. Section 29 of the Bill provides for protection of street vendors from harassment by police and other authorities and provides for an overriding clause to ensure they carry on their business without the fear of harassment by the authorities under any other law.⁴⁰⁸ The act specifically provides that the Rules under the Bill have to be notified within one year of its commencement, and Scheme has to be notified within six months of its commencement to prevent delay in implementation. Thus, this act landmarks the employment of those unemployed people who are specially uneducated, hence unable to find job and so are compelled by the circumstances to work on streets as vendors.

These above are some of the cardinal changes in the Indian Legal System that the country came across in recent years. As all of us are acquainted with the well-known verse that “change is the law of nature”, so law itself needs change. Changes are being made to cope up with the pace at which society changes and so this change is leading towards progression stepping up to a more advanced state of law each time. The mode of change which Indian legal system follows as seen earlier itself is propitious as it assures that changes made will be according to society. What society needs to resolve is its dispute and that need craves for law. In this, judicial pronouncement plays a very important role as it give new laws to society on case-to-case basis which sets up precedents. Although the process of creating new laws through legislation is a time taking process but the judicial pronouncement is other way round. Many new laws are being legislated day by day, many bills are being passed and many landmark precedents are being setup through judicial pronouncement and so catering the exigencies of society creating a society a better place.

⁴⁰⁸ Section 29 of the act



DISSECTING THE LACUNA IN INSIDER TRADING LAWS: FOCUSING ON SCOPE OF MENS REA AND UPSI

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Abstract

The Paper deals with the topic of insider trading which has become one of the most controversial aspects of securities regulation, even among the law and economics community. It has become rampant in almost all the nations in the world however the approach has been different in different countries. The paper majorly focuses on aspects of insider trading: first is the mens rea part of it and the second part is about the discrepancies in the character of Unpublished Price Sensitive Information. In the first part the authors have tries to assert and justify on as to why mens rea should be considered while a comparison to the developed nations following such a regime has been made. An overview of the landmark cases which changed the face of insider trading with regard to mens rea has been dealt with as well which strongly proposes for a change in the system especially focussing on the Justice N.K Sodhi's Law commission Report which imputed the same, however was ignored by the legislation. In the second part the variations in the definitions of Unpublished Price sensitive information has been dealt with considering the the Patel Committee report, the Abid Hussain committee report and more recently, the N.K. Sodhi report. The focus here lays on filling the gap and loopholes in the insider trading laws and thus encloses the changes that are requisite to enhance the insider trading regulations.

Keywords

Insider trading, Mens Rea, Price Sensitive Information

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Introduction

Insider Trading has been among the most vicious crimes affecting the faith of dealing fairly in a capital market in recent times. The rigour and latitude for the offence differs wildly from nation to nation. Trading by an insider of his shares in a company per se is not a breach of law. However, when an insider trades on the basis of information, obtained by him by virtue of his proximity to the company and, not disclosed to the shareholders, he could be liable for the offence of Insider Trading. Insider trading is being regulated dynamically in many countries. In India, the Insider Trading regulation has been recently amended in 2015, they are still not on par with other jurisdictions due to the fact that many loopholes still persist. One of the imperative questions to be determined is what would constitute valid publication of information as that would determine the legal responsibility of the insiders. Many attempts have been made to define what information would be 'generally available' and what role do media publications play in the same. Another issue with is to what extent the element of *mens reas* is an essential to constitute an offence of Insider trading. In capitalist countries, it is necessary that the person ought to have a motive to gain unfair advantage or make secret profits to be liable under Insider trading laws. However, India imposes absolute liability and intention is not taken into consideration. This has been sought to be modified by courts, however the issue remains unsettled due to lack of a concrete legislation.

MENS REA: A CRITICAL FACET

If A, a promoter of a company knows about the extremely weak financial position of his company and to solely save the same, he enters into a merger agreement with a large corporation, under Indian law, he will be prosecuted for the offence of insider trading even though his actions were bona fide and in pursuance of fiduciary duties. This is because India has an exceedingly inequitable principle of discarding *mens rea* as an essential in insider trading charges. This is in dire need of amendment.



UNITED STATES

The United States was the first nation to take cognizance of the issue of insider trading and thereby impose restriction on the same. Even today the country leads in the matter of international regulation and enforcement regarding the prevention of insider trading. Various administrative and enforcement powers has been granted to the Securities and Exchange Commission ("SEC") against the matters of insider trading which included the administrative sanctions, civil proceedings, and even criminal prosecutions. Thus whenever an issue regarding insider trading arises in the U.S, the SEC can bring the case on complaint before a civil court or issue an administrative sanction or it can even prepare a formal referral to the U.S. Department of Justice ("USDOJ") which can initiate criminal discourse. Till the 1934 Act was enacted, courts recognised merely civil liability. It was Section 32(a) which imposed criminal liability for wilful violation of Section 10(b) and Rule 10(b)(5). The proviso to Section 32(a) provides for the 'no knowledge' clause whereby if the defendant can prove that he had no knowledge, he can be precluded from being sentenced. Later the *Insider Trading and Securities Fraud Enforcement Act* and *Sarbanes-Oxley Act* in 2002 were passed which elevated criminal penalties.

The U.S. Supreme Court has in the case of *U.S. v. Murdock*⁴¹¹ interpreted the meaning of wilfulness. In fact the term 'wilfully' used in the legislation is derived from Murdock judgment only. The SC in Murdock decision held that the word "wilful" often "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental" and "when used in a criminal statute it generally means an act done with a bad purpose" and "without justifiable excuse."

The SEC after considering the *In Re.Cady Roberts & Co.*⁴¹² case laid down the fundamental principle governing insider trading norms that "Inherent unfairness involved where the party takes advantages of information knowing it is not available to others with whom he is dealing." Hence

⁴¹¹ 290 U.S 389 (1933)

⁴¹² 40 SEC 907 1961

here taking advantage means taking cognizance of *mens rea* in commission of the offence. This results in contravention of fiduciary obligation cast upon the corporate insider, in possession of material information. However this doesn't lay down that the information cannot be used with bonafide intention for the enhancement of the firm. The obligation of the company is paramount in case of conflicting fiduciary obligations. Page 11 of the decision states that "*even if we assume the existence of conflicting fiduciary obligations, there can be no doubt which is primary here.*"

It was in the case of *U.S. v. O'Hagan*⁴¹³ that the U.S SC extended the scope of fiduciary duty that was owed to one's own company in the traditional theory to a fiduciary duty owed to "the source of information" in a "misappropriation" theory. It declared the safeguards to criminal liability and demanded for presence of the element of *mens rea* evincing the actor's wilfulness to sustain a criminal conviction. The U.S SC expounded on 10(b) in *Tellabs, Inc. v. Makor Issues & Rights, LTD*⁴¹⁴ determining the requisite specificity when alleging fraud. It said that a strong inference showing the cogent and compelling evidence was sufficient to give criminal touch to the case. The *United States v. Chiarella*⁴¹⁵ case recognised *mens rea* by way of the misappropriation theory, explained by Professor Bainbridge as a theory that requires a breach of fiduciary duty before the trading on insider information becomes unlawful.

THE UNITED KINGDOM

In U.K, the *Criminal Justices Act, 1993* deals with the issue of insider trading, placing exclusive reliance upon criminal sanctions for its enforcement. The Act under Section 57(1) makes it mandatory for the prosecution to establish beyond reasonable doubt that the individual charged with the offence of insider trading, dealt with the securities intentionally. The British Law doesn't make the alleged offender guilty of insider trading if he neither had knowledge nor any cause to

⁴¹³ 521 U.S. 642 (1997)

⁴¹⁴ 551 U.S. 308 (2007)

⁴¹⁵ 445 U.S. 222 (1980)

believe that the dealing occurred based on the information. However due to certain uncertainties in the act, the *Financial Services and Market Act, 2000* under Section 118(2) was enacted empowering to prosecute criminal offences of market manipulation and insider trading.

INDIA

In India, under Section 11 of the *SEBI Act*, the *SEBI (Insider Trading) Regulations 1992* has been framed with intend to prevent the menace of insider trading in securities. In India under section 24 of the Act, the Securities Appellate Board has been empowered to issue directions as it may deem fit for the protection of investors and in the interest of the securities market. The provision gives the mandate to initiate due compliance with the provisions of the Act. The object behind providing for a criminal liability is to create deterrent effect in the society so as to restrain such corrupt practices. The Patel Committee, constituted by SEBI, in 1986 also recommended making insider trading an offence. As the SEBI was established due to the commendation from this committee, its advice of making insider trading holds immense significance.

Keeping in view how the Indian laws were framed and the laws of the capitalist countries, it is necessary to analyze the changes made in the regulations according to the western laws. The commonwealth countries consider Insider trading as a criminal offence, for which intention to accrue personal profits determines the liability of the offender. Multiple cases have been adjudicated in India, pertaining to importance of the component of *mens rea*, but they haven't provided a well-established precedent due to paradoxical judgments. While the 1992 regulations were completely silent on the element of a guilty mind, the note to regulation 4 in 2015 regulations has expressly disregarded *mens rea*⁴¹⁶. It is also a general rule of law that unless a statute has specifically mentioned a need to establish the element of *mens rea*, it is generally sufficient to prove

⁴¹⁶The reasons for which he trades or the purposes to which he applies the proceeds of the transactions are not intended to be relevant for determining whether a person has violated the regulation. He traded when in possession of unpublished price sensitive information is what would need to be demonstrated at the outset to bring a charge.

that a default in complying with the statute has occurred⁴¹⁷. In *SEBI v Cabot International Capital Corporation*⁴¹⁸, the Bombay HC said that levying of penalty under Chapter 15 of the SEBI act and all other regulations creates a civil obligation for which no intention has to be proved. The court also determined that the penalties prescribed under the SEBI Act are the liabilities for breach of civil obligation in complying with civil obligations imposed by the SEBI Act and Regulations and, therefore, penalty imposed cannot be equated to a fine imposed in criminal proceedings. However, the important decision in this regard came from the SAT in the case of *Rakesh Agrawal v SEBI*⁴¹⁹, wherein the tribunal addressed the absence of the *mens rea* in the regulations saying the mental element could not be ignored keeping in mind the objective of insider trading. Therefore, the motive of the insider has to be taken cognizance of to ascertain whether he sought to make secret profits from the undisclosed information, which would be punishable. Ignoring the motive would be contradictory to the purpose of enacting the regulations. *To address these conflicting statements, SEBI constituted the High Power Committee under the chairmanship of N.K. Sodhi in 2013 to clarify the provisions. It is important that the policy-makers legislate according to the directives of the committee as they are expounded by the former Presiding officer of SAT, who would be trying to mould the law according to legal environment suitable to corporate evolution. The preface of the report has clearly stated that Insider trading is a crime in India while Part 2 of the report articulates that the very purpose of the regulations is to prevent the insiders from gaining an unfair advantage. Thus, where there is no intention to secure an unfair advantage by using the UPSI, the person needs to be given the defence of the absence of mens rea. India needs to move towards a more open ended law to prosecute insider trading to comply with the essence of the legislation. The legislators seem to be in a limbo to hold on the traditional notion while being influenced by the modern view. While the note to regulation 4 in the 2015 norms has clearly disregarded intention to use the UPSI as an essential, Regulation 3 has allowed communication of UPSI if the purpose is legitimate or in case of performance of duties. When seen in the light of In re Cady,*

⁴¹⁷Gujarat Travancore Agency v CIT, 1989 177 ITR 455 (SC)

⁴¹⁸2004 (4)Bomc 700

⁴¹⁹ 2004 49 SCL 351 SAT



Roberts & Co.,⁴²⁰, where the promoters/directors owe a high level of fiduciary duty to the company, trading on the basis of UPSI for purely the benefit of the company is officially permitted.

UPSI: DISCREPANCIES IN CHARACTERIZATION

While *mens rea*, as an essential ingredient of Insider Trading is a judicial import, the body of legislation has an inherent ambiguous provision which has led to certain controversial precedents and interpretations. Defining “Unpublished Price sensitive information”, hereinafter referred to as UPSI, is no longer a one-dimensional task due to the intense growth in telecommunication. The Insider Trading Regulations, 2015 have distinguished UPSI from generally available information. This stands in contradistinction to the 1992 regulations where all information, not published in the form prescribed in the regulations, was regarded as UPSI. The various high committee reports viz., the Patel Committee report, the Abid Hussain committee report and more recently, the N.K. Sodhi report of 2013 have relied on such jurisprudence to close the loopholes present in the Insider Trading laws. It is necessary to scrutinize the provisions in these countries to be able to correctly interpret the law in India

AUSTRALIA

Section 128 of the Securities Industries Act, 1980 had prohibited Insider Trading on the basis of information which was not *generally available*. However the legislation had failed to define the term. As a result, only that information, which was disseminated specifically to the public and where reasonable time period has elapsed, would be considered as ‘Generally Available’⁴²¹. The

⁴²⁰40 SEC 907 1961

⁴²¹Anisman, *Insider Trading Legislation for Australia: An outline of Issues and Alternatives* (1986) 44 (‘Anisman Report’)

Griffiths Committee report also endorsed the same view as it remained convinced that “readily observable” matters were not always exclusive of inside information.

Section 1042c of the *Corporations Act, 2001*⁴²² of Australia provides the explanation for what would constitute ‘generally available information.’ The term, though not defined, would include all kinds of information which can be observable by a reasonable person available in public arena. By having no qualifications, information published in newspapers, research reports, and even public conduct of directors would be outside the ambit of UPSI. The accepted channels of dissemination for S. 1042c(1)(b) were discussed in various judicial pronouncements. In *Kinwat Holding Pty. Ltd. v Platform Pty Ltd.*⁴²³, a newspaper article was sufficient enough to make information generally available. Similarly, pronouncements made in open court in Australia were included under the ambit of generally available information in *ICAL Ltd. v. County Natwest Securities Aust. Ltd.*⁴²⁴ On the other hand information present in broker’s reports not inferred through public information⁴²⁵, report presented by directors in the annual general meeting, without more⁴²⁶, is not ‘public’ information for word at large. The laws regarding the securities

⁴²²Information is said to be generally available if

- a) It is of a readily observable matter.
- b) Without limiting the operation of Para (a)
 - I. It has been made known in a manner that would, or would be likely to bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information.
 - II. A reasonable period of time has elapsed after it has been made known for it to be disseminated among such persons or;
- c) It consists of deductions, conclusions or inferences drawn from paras (a) or (b)(I)

⁴²³1982 Queensl. R. 370

⁴²⁴(1988) 13 ACLR 129

⁴²⁵R v Hannes (2000) 158 FLR 359 [254]-[258]

⁴²⁶Killen v Brierly (1980) ACLC 34



market in Australia were pliable to change with the revolution in communications. In the landmark case of *R v Firms*⁴²⁷, the court observed that “*profound influence of telephone, telex, facsimile, television and internet provides an immediate yet indirect means of observing information not just locally, but globally. As a consequence, the lines between ‘published information’ and what is ‘readily observable’ have already begin to blur. Failure to acknowledge the domination influence of modern, near instantaneous means of communication ‘skews the scope’ of what is readily observable.*”

THE UNITED KINGDOM

The Insider Trading laws in the U.K are now embodied in the *Criminal Justice Act, 1993*. Section 58(2) of the act provides that information will be deemed to be public if it can be readily acquired by potential investors or if the records are open to inspection by the public. The English Act purports to give a wide scope to information made ‘public’ so as to tighten the range of UPSI which has been provided for in Section 58(3)⁴²⁸. Unlike the Australian laws, U.K. Legislation requires only literal interpretation to conclude that matters reported in media and otherwise observable by public would constitute ‘generally available information’. As long as it is available to any section of the public, it would not constitute UPSI.

THE UNITED STATES OF AMERICA

The U.S. does not have any statute or legislations dealing with Insider Trading. Section 10b of the *Securities Exchange Act* along with Rule 10b-5 allows prosecution of Insider trading under the broad umbrella of anti-fraud provisions. The insiders are prohibited from dealing in material-

⁴²⁷40 SEC 907 1961

⁴²⁸Information may be treated as made public even though—

- (a) it can be acquired only by persons exercising diligence or expertise;
- (b) it is communicated to a section of the public and not to the public at large;
- (c) it can be acquired only by observation;
- (d) it is communicated only on payment of a fee; or
- (e) it is published only outside the United Kingdom

non-public information. While, the legislations do provide for a form of disclosures of such material information, judicial verdicts have recognized other form of dissemination as valid to make any information public.

The decree that the directors/other insiders need not disclose information when it was already available in public domain was propounded in the case of *Johnson v L. Wiggs*⁴²⁹. The acquisition of a shell company by Western Reserve had been reported by newspapers and the financial news of a local media channel. The current quotes and listing of brokers making a market in Western Reserve were readily available to Tyler and Johnson through any brokerage house. Therefore, the information was available in “public domain” and Wiggs, founder-president of the company, had no obligation to disclose this information to Johnson who was the second-largest shareholder of Western Reserve. Courts have held that there is no violation of the duty to disclose when the information is available to a reasonably diligent searcher⁴³⁰.

INDIA

In India, the 1992 *Insider Trading Regulation* provided for definition of UPSI in Regulation 2(k)⁴³¹. This provision and its implications were drawn out in the case of *Hindustan Lever v SEBI*⁴³²,

⁴²⁹ 443 F.2d 803

⁴³⁰ *Gilbert v. Nixon*, 429 F. 2d 348, 355

⁴³¹ Unpublished price sensitive information means any information which related to the following matters or is of concern, directly or indirectly, to a company, and is not generally known or published by such company” for general information , but which if published or known, is likely to materially affect the price of securities of that company in the market –

- (i) financial results (both half-yearly and annual) of the company;
- (ii) intended declaration of dividend (both interim/final);
- (iii) issue of shares by way of public rights, bonus etc.;
- (iv) any major expansion plans or execution of new projects;
- (v) amalgamations, mergers and takeovers;
- (vi) disposal of the whole or substantially the whole of the undertaking;
- (vii) such other information as may affect the earnings of the company.

⁴³² 1998 SCL 311

which received massive attention from the analysts of securities market. This was also one of the first cases whereby SEBI dealt with the charges on Insider Trading.

- Hindustan Lever Ltd. (HLL) and Brooke Bond Lipton India Ltd. (BBLIL) had common parentage, i.e. both were subsidiaries of Unilever and were under common management.
- The controversy involved HLL's purchase of 8 lakh shares of BBLIL two weeks prior to the public announcement of the merger of the two companies (HLL and BBLIL).
- HLL claimed that the market was generally aware of the merger talks and that UTI would have discounted for this in the price at which the share was traded. However, SEBI said that there was a fundamental difference between the general information that was available to UTI and the specific information available to HLL about the swap ratio decided for the merger.
- SEBI, therefore, held executive directors of HLL liable for Insider trading on the account of them being Insiders and having access to UPSI about the merger and the swap ratio.
- The Appellate Authority did confirm SEBI's ruling that HLL and its directors were Insiders. It also accepted that the information on the basis of which trade was being made was price-sensitive in nature. However, its ruling was based on the fact that this price-sensitive information was generally available. There were 21 media reports which had disseminated information about the merger. The Authority says that SEBI should have given "due weightage" to "market reports". The Authority came down heavily on UTI, suggesting that it was not market-savvy, that it did not know what was generally known in the market.

The Appellate Authority's order was viewed as a setback to the investors of the market. The analysts' viewed the ruling as an exploitation of the loophole by HLL. Firstly, if UTI accepts that it knew about the proposed merger, it would be accused of having participated in a collusive deal using privileged knowledge; however, if it admits that it differentiated between market gossip and rumour, and information derived from the Company's sources, it would be ridiculed for not being market-savvy.

The weightage given to media reports of mergers and other such information cannot be equated to hard market information or concrete information available especially within companies. This ruling has raised market and media gossip and speculation to the status of hard and accurate information, thereby providing an opening to the insiders to deal upon precise and accurate information congregated by them through their position, while publishing only general information in the market through media. This allows such insiders to bypass the necessity of disclosure of all price-sensitive information. In fact, the burden of the Authority's ruling rests on the premise that the information was freely available and that trading in that information would not have offered either party any advantage or special privilege. This is highly impossible when media reports are considered sufficient to make information 'generally available'. Considering dissemination of information by different newspapers, news channels and other such reports to be analogous is *prima facie* a wrong postulation as they are equally based on conjecture as on facts.

To address the matter and prevent the corporatist misuse of law, the entire scale of 1992 regulations was amended in 2002. Subsequent to this, the regulations read *as SEBI(Prohibition of Insider Trading) Regulation, 1992*, an important change from *SEBI(Insider Trading) Regulations, 1992*. Major alterations were made in the definition section 2, whereby Regulation 2(k) defining the scope of 'Unpublished Price Sensitive information' was overhauled. After 2002, Regulation 2(k) reads as *"unpublished" means information which is not published by the company or its agents and is not specific in nature.*

Explanation.—Speculative reports in print or electronic media shall not be considered as published information.'

To interpret the provision *prima facie*, the maxim *"Expressio unius est exclusion alterius"* comes into play which means *expression of one is the exclusion of another*. If legislation mentions a certain class of things explicitly, it implies exclusion of all other classes. Therefore, as a plain reading of the regulation would suffice to show that a publication of information will be considered as valid

only when it is published by the company, either by itself or through its agents, publication by a third party would not be considered as legitimate publication. Such information would be excluded from the ambit of public information and will be eligible being deemed as UPSI if all other conditions are satisfied. This tightened the scope of what would constitute published information, in contradistinction to the Commonwealth and the U.S. law.

The legislators, in order avert any digressing interpretation, have provided an explanation clause to the regulation which expressly debars speculative reports in print or electronic media from being considered as published information. The underlying principle is that if newspaper reports could be used as publication evidence, then blatant misuse of the law is permitted whereby the insiders could publish in local newspapers, not widely disseminated, to circumvent the provision. The *Hindustan Lever* case laid down the principle of *Caveat Emptor* while dealing in the securities market which defeats the purpose for Insider Trading laws. Taking advantage of this provision, it would have been easy for the corporatist to publish UPSI in a local newspaper or likewise and shift the burden of responsiveness to the investors. This ambiguity has even been recognized in other jurisdiction specially the U.S. In *Reynolds v Texas Gulf Sulphur*⁴³³, mere public announcement of the information did not amount to public availability thereby mitigating the premise that publication or dissemination through media would be sufficient to make the information generally available.

However, while relying on direct interpretation, one should not forget the qualifying word “speculative” preceding newspaper reports. The explanation to this Regulation disregards newspapers as a legitimate form of publication only when the reports made by it are speculative. Speculative is defined as *given to, characterized by, or based upon conjecture*.⁴³⁴ The web source, freedictionary.com has been relied on for definitions in the Supreme Court of *Association on*

⁴³³ 309 F. Supp. 548

⁴³⁴ Available at- [Http://Legal-Dictionary.Thefreedictionary.Com/Speculative](http://Legal-Dictionary.Thefreedictionary.Com/Speculative), Last Accessed On 19th September 2015.

*Natural Gas & Ors. v. Union of India*⁴³⁵, which was decided by a 5 judge bench to define 'gas works' as well as by the Income Tax Appellate tribunal in the case of *Kodak India Pvt. Ltd v Deputy CIT*⁴³⁶ for the definition of 'acting and modelling.' Inferring from this definition of 'speculative', certain media and newspaper reports corresponding in nature may be considered to make information publicly available. Supporting this view, the High Powered Committee constituted by SEBI in 2013 to review the regulations (N.K. Sodhi Committee) concluded that if large newspapers and television channels were to have published a piece of news and market participants were already factoring in the news in price discovery, an insider who trades when in possession of such news would be regarded as violating the law merely because the stock exchange website does not carry the news. The Committee believes that it would be inappropriate to regard information that is widely available in the public domain as UPSI.

The N.K. Sodhi committee believed it was essential to exclude 'generally available information' from the ambit of UPSI regardless of the fact that it was not published by the company or its agents. While the original 1992 regulations placed the investors in an unfavourable position through *caveat emptor*, the 2002 amendment placed the corporate side in a disadvantageous position by imposing strict, draconian regulations. Pursuant to the findings of this committee, the SEBI(*Prohibition of Insider Trading*) regulation, 2015 defined generally available information in Regulation 2(e) as "*generally available information*" means information that is accessible to the public on a non-discriminatory basis. Consequently regulation 2(n) which has defined UPSI excludes from its compass information which is generally available; additionally, as information available generally would be deemed to be information available to public, any person in possession of UPSI would be deemed to be an insider as per Regulation 2(g) (ii). Such a definition allows inclusion of every person possessing UPSI regardless of the means of possession encompassing employees of the company, persons connected with them, addressing tipper-tippee liability and other unforeseen circumstances thereby providing protection to investors who would otherwise

⁴³⁵(2004) 4 SCC 489

⁴³⁶ 253 ITR 445

remain at a disadvantageous position. The 2015 regulations simplify the job of SEBI by creating only two classes of people; Insiders, who possess UPSI which is not generally available to the world at large, and the public.

The 2015 regulations, also though, come up with certain gradations for consideration of information which is “generally available”. Regulation 2(e) considers only that information as generally available which is available to public in a non-discriminatory manner. The term ‘non-discriminatory’ has not been defined in any legislation concerning Insider trading. However, it was adopted according to the recommendation of the N.K. Sodhi committee and its interpretation can be derived from the committee report. The committee did not want to define “non-discriminatory” within four walls or in a strict sense in order to avoid narrowing the scope of the definition. The report gives a few examples of what would constitute generally available information as per 2(e):

1. Research reports priced for purchase and available to all clients of the stock broker. Putting a price on the report would not make it discriminatory insofar as it is reasonable. However, if a report has an irrational pricing structure so that only select clients can purchase it, it becomes discriminatory.
2. The CEO of a company collapsing at the reception of a hospital (or any public space) due to a heart attack (or any ailment) and his subsequent decision to sell shares. However, if such a scenario plays out in a small meeting, the colleagues present at the scene would be holding UPSI.
3. Information on company’s performance, by counting movement of goods by standing outside the factories would be generally available information as any member of the public can do that without violating the law. However, such information obtained by bribing the workers of the factories, would render the information as UPSI and the person would become an insider.
4. Research reports available in a discriminatory manner but based entirely on generally available information would not constitute UPSI. Conclusions, deductions and analyses

of generally available information too would be regarded as generally available information.

5. Regulation 2(n), while defining UPSI, also mentions certain kinds of information which would be considered as UPSI if not generally available like information relating to dividends, capital structure, mergers etc. However, it is mentioned explicitly that this list is not exhaustive.

It is possible to conclude that, any information which would be published by newspapers and media reports which would lead to a change in the stock prices, as reflected in the stock market, would become 'generally available information'. However, it is possible that by considering only media publishing as a source for making information public, the insiders might gain an upper-hand; Publication of UPSI in a local, vernacular newspaper and then trading on the basis of it, would put investors at a disadvantage if it the company does not merely have local operations. To conclude, whether or not a piece of information is generally available or is unpublished would necessarily be a mixed question of fact and law. It is settled law that such regulations ought to be purposively construed and if two views were possible, the view that furthers the legislative objective would need to be adopted over a view that makes a mockery of the legal provisions⁴³⁷. Hence, while distinguishing UPSI from 'generally available information' has abridged SEBI's responsibility in deciding the scope of "Insider", it has to be extremely conscientious in determining what information would be considered in public domain, according to its means of dissemination, and maintain balance between the welfare of both investor and the corporate community.

⁴³⁷N. K. SODHI, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 1992 (2003)



CONCLUSION

Thus it can be concluded that the laws penalising and prohibiting insider trading have been enacted to increase market efficiency by hunting over the informational disparity, erosion of confidence of investors, non-transparency in dealings, etc. With time, SEBI has done a laudable job to strengthen its control over the insider trading practices in India by time to time formulation of stringent regulations. SEBI should hand over the task of determining what would constitute 'generally available information' to judiciary so that it can be determined on a case to case basis by considering the outreach of the information. The only lacuna that prevails is that it creates offences that explicitly dispense with mens rea. This has widened the scope of Indian regulatory framework addressing the practice of insider trading resulting in the citizens being unsure of when they violate the law. Hence it is in the interest of justice that mens rea as a requirement should be preserved and reinvigorated. The precedent set by the SEC and the U.S in criminalisation of insider trading on the basis of mens rea should continue to act as a guiding factor for developing economies like ours. It is therefore quintessential to establish a coherent standard that is based on mens rea, by the way of statutory provisions or judicial precedents. This will give the market a clear idea about what conduct will attract criminal liability and will also ensure that deterrence is created so that no wrong doer escapes from the liability on the ground of ambiguity.



CHANGING PARADIGM OF INTELLECTUAL PROPERTY ISSUES

ANU CHAUDHARY⁴³⁸

Abstract

Intellectual property is an outcome of human intellect. The main motivation for its protection is to encourage the creative activities and inventions. Beginning from Paris convention on Industrial Property, 1883 and with the conclusion of Trade Related Intellectual Property Rights (TRIPS) Agreement of World Trade Organisation, the legal regime of Intellectual Property has come to a full circle. IPR system has many different forms of protection, which are independent of each other and governed by separate laws. These are Patents, Copyrights, Industrial designs, Trademarks, and geographical indication etc. Copyright is an incorporeal property in nature. The property in the work is justified by the fact that the right owner has created or made it. As he is the owner of property, he can dispose of it by outright sale or by licensing. The term "Patent" acquired statutory meaning in India when the Patent Act, 1970 was enacted. It refers to a grant of some privilege, property or authority made by the Government of the country to one or more individuals. The instrument by which such grant is made is known as "Patent". An invention is the creation of intellect applied to capital and labour, to produce something new and useful. Such creation becomes the exclusive property of the inventor on grant of patent. The patentee's exclusive proprietary right over the invention is an intellectual property right. This is to encourage the inventors to invest their creative faculties, knowing that their inventions would be protected by law and no one else would be able to copy their inventions for certain period during which the respective inventor would have exclusive rights. A trade mark may, in particular, consist of words, designs, letters, numerals or the shape of goods or their packaging. It protects the public from confusion and deception by identifying the source or origin of particular products as distinguished from other similar products. Earlier when IPR was in its preliminary stage, lot of problems arose relating to its implementation, policies, Act/ Rules, financial and governmental support. With the amendment of the Copyright Act in 1994, which came into force on 10 May 1995, the situation with regard to copyright enforcement in India has improved.

Keywords: Intellectual Property Rights, Patents, Copyrights, Trademarks

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INTRODUCTION

Intellectual property is an outcome of human intellect. The main motivation for its protection is to encourage the creative activities and inventions. Intellectual property (IP) pertains to any original creation of the human intellect such as artistic, literary, technical, or scientific creation. Beginning from Paris convention on Industrial Property, 1883 and with the conclusion of Trade Related Intellectual Property Rights (TRIPS) Agreement of World Trade Organisation, the legal regime of Intellectual Property has come to a full circle. IPR system has many different forms of protection, which are independent of each other and governed by separate laws. These are Patents, Copyrights, Industrial designs, Trademarks, and geographical indication etc. It is very well settled that IP play a vital role in the modern economy.

BRIEF HISTORY

The laws and administrative procedures relating to IPR have their roots in Europe. The trend of granting patents started in the fourteenth century. In comparison to other European countries, in some matters England was technologically advanced and used to attract artisans from elsewhere, on special terms. The first known copyrights appeared in Italy. Venice can be considered the cradle of IP system as most legal thinking in this area was done here; laws and systems were made here for the first time in the world, and other countries followed in due course. Patent act in India is more than 150 years old. The inaugural one is the 1856 Act, which is based on the British patent system and it has provided the patent term of 14 years followed by numerous acts and amendments.

Types of Intellectual Properties and their Description

Originally, only patent, trademarks, and industrial designs were protected as 'Industrial Property', but now the term 'Intellectual Property' has a much wider meaning. IP protection can be sought for variety of intellectual efforts including

(i) Patents



- (ii) Copyright relates to expression of ideas in material form and includes literary, musical, dramatic, artistic, cinematography work, audio tapes, and computer software
- (iii) Trademarks relate to any mark, name or logo under which trade is conducted for any product or service and by which the manufacturer or the service provider is identified
- (ii) Industrial designs relates to features of any shape, configuration, surface pattern, composition of lines and colors applied to an article whether 2-D, e.g., textile, or 3-D, e.g., toothbrush
- (v) Geographical indications are indications, which identify as good as originating in the territory of a country or a region or locality in that territory where a given quality, reputation, or other characteristic of the goods is essentially attributable to its geographical origin.

What is Copyright?

Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings. Copyright law protects expressions of ideas rather than the ideas themselves. Under section 13 of the Copyright Act 1957, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. For example, books, computer programs are protected under the Act as literary works.

Registration of Copyright

In India, the registration of copyright is not mandatory as the registration is treated as mere recordal of a fact. The registration does not create or confer any new right and is not a prerequisite for initiating action against infringement. The view has been upheld by the Indian courts in a catena of judgments. It is important to note here that there is no prescribed time limit within



which registration of a copyright can be obtained. However, presently the registration of a copyright may take a period of 1 to 1 ½ years.

Need for Registration of Copyright

The awareness of Intellectual Property (IP) Laws is considerably low among the enforcement authorities in India, and most of the IP litigation is confined to metropolitan cities. It is to be noted that awareness of Intellectual Property (IP) Laws is considerably low even among the enforcement authorities in India, and most of the IP litigation is confined to metropolitan cities. It is always advisable to register the copyright as the copyright registration certificate is accepted as a *proof* of ownership in a Court of law and Police authorities, and acted upon smoothly by them.

Enforcement of Copyright in India

The law of copyright in India not only provides for civil remedies in the form of permanent injunction, damages or accounts of profits, delivery of the infringing material for destruction and cost of the legal proceedings. etc. but also makes instances of infringement of copyright, a cognizable offence punishable with for a term which shall not be less than six months but which may extend to three years with a fine which shall not be less than INR 50,000 but may extend to INR 2,00,000. For the second and subsequent offences, there are provisions for enhanced fine and punishment under the Copyright Act. The (Indian) Copyright Act, 1957 gives power to the police authorities to register the Complaint (First Information Report, i.e., FIR) and act on its own to arrest the accused, search the premises of the accused and seize the infringing material without any intervention of the court.



Duration/Term of Copyright

In the case of original literary, dramatic, musical and artistic works, the duration of copyright is the lifetime of the author or artist, and 60 years counted from the year following the death of the author.

In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organizations are protected for a period of 60 years which is counted from the year following the date of publication.

What is a Patent?

The term "Patent" acquired statutory meaning in India when the Patent Act, 1970 was enacted. It refers to a grant of some privilege, property or authority made by the Government of the country to one or more individuals. The instrument by which such grant is made is known as "Patent". An invention is the creation of intellect applied to capital and labour, to produce something new and useful. Such creation becomes the exclusive property of the inventor on grant of patent. The patentee's exclusive proprietary right over the invention is an intellectual property right. This is to encourage the inventors to invest their creative faculties, knowing that their inventions would be protected by law and no one else would be able to copy their inventions for certain period during which the respective inventor would have exclusive rights.

Membership of International Treaties

- India is member of the following treaties governing patents:
- Convention establishing World Intellectual Property Organization (WIPO)
- Trips Agreement under the World Trade Organization.
- Paris Convention for the protection of Industrial Property with effect from Dec. 7, 1998.
- Patent Cooperation Treaty (PCT) with effective from Dec. 7, 1998.



Types of Patents

- Ordinary Patent
- Patents of addition
- Convention

Who can apply

Application may be made, either alone or jointly with another, by the inventor, assignee, legal representative of deceased inventor or assignee. The inventor is entitled to be mentioned in the patent if he applies to do so.

Application may be made jointly by two or more corporations as assignees.

Patentable Inventions

An invention means any new and useful art, process, method or manner of manufacture; machine, apparatus or other article; or substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention.

What is not patentable

- (1) An invention that is frivolous or that claims anything obviously contrary to well-established natural laws;
- (2) An invention the primary or intended use of which would be contrary to law or morality or injurious to public health;
- (3) The mere discovery of a scientific principle or the formulation of an abstract theory;



- (4) The mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;
- (5) A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- (6) The mere arrangement or rearrangement or duplication of known devices, each functioning independently of one another in a known way;
- (7) A method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient, or for the improvement or restoration of the existing machine, apparatus or other equipment, or for the improvement or control of manufacture;
- (8) A method of agriculture or horticulture;
- (9) Inventions relating to atomic energy.

In the case of inventions relating to substances prepared or produced by chemical processes (including alloys, optical glass, semiconductors and inter-metallic compounds) & substances intended for use or capable of being used as food. No patent will be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture will be patented.

What is a Trademark?

A trade mark may, in particular, consist of words (including personal names) designs, letters, numerals or the shape of goods or their packaging. It protects the public from confusion and deception by identifying the source or origin of particular products as distinguished from other similar products. For example, the trademarks "Nike," along with the Nike "swoosh," identify the

shoes made by Nike and distinguish them from shoes made by other companies (e.g. Reebok or Adidas). Trademarks make it easier for consumers to quickly identify the source of a given good. A trademark provides **protection** to the owner of the mark by ensuring the **exclusive right** to use it to identify goods or services, or to authorize another to use it in return for payment.

Requirements for filing a trademark application

1. The name, address and nationality of the applicant. If the applicant is a partnership firm, the names of all the partners. Also mention whether any minor is a partner.
2. If the applicant is a company, the country or state of incorporation.
3. A list of goods and/or services for which registration is required.
4. Soft copy of the trademark to be registered.
5. If the mark contains or consists of non-English words, a translation of those words into English is required.
6. If the application is to claim priority from an earlier filed convention application, details of that application is also required (application number, filing date, country and goods/services). A certified priority document or its duly notarized copy is to be submitted. If the certificate is not in English, a certified/notarized English translation is also required. If it is not readily available, the application can be filed based on the basic application number, date of the application and country of the application. A copy of the priority document can be submitted within 1 month from the filing date of the application.
7. Date of first use of the trademark in India, if at all used
8. Power of attorney simply signed by the applicant (no legalization or notarization is required). For Indian clients, power of attorney to be executed in 100 Rs. stamp paper and signed by the applicant. The power of attorney is not required at the time of lodging the application and can be submitted later with no additional cost.

Trademark Registration Process



Upon filing of the application, the registry will issue with an official receipt with the filing date and number allotted to the application. The application is then formally examined by the Indian Trade Marks Office, as to its inherent registrability and/or any similarity with existing marks. If an objection to registration is raised, an official examination report will issue. To overcome the objection, it is necessary to file a written response or presenting evidence of acquired distinctiveness and in most cases, an interview/hearing with the examiner is posted. The Registrar may require the applicant to file an affidavit testifying to such user with exhibits showing the mark as used.

If, following examination, the trade mark application is considered allowable, a Letter of Acceptance (TLA order) will issue, after which the trademark will be published in the Trade Marks Journal. If there are no oppositions within 4 months from the date of advertisement in the Trade Marks Journal, then the trademark registration certificate will issue.

Trademark Registration is a tedious process and it takes around 18-24 months to obtain registration in a straight-forward case, without any objections or oppositions. However, once the trademark application is filed, an application number is allotted immediately and the priority starts from the date of application.

Once the trademark is registered, it is valid for a period of 10 years from the date of application. The registration can then be renewed indefinitely as long as the renewal fees are paid every 10 years.

Legal Remedies against Infringement and/or Passing off

Under the Trade Marks Act, both civil and criminal remedies are simultaneously available against infringement and passing off.

Infringement of trade mark

Infringement of trade mark is violation of the exclusive rights granted to the registered proprietor of the trademark to use the same. A trademark is said to be infringed by a person, who, not being a permitted user, uses an identical/ similar/ deceptively similar mark to the registered trademark without the authorization of the registered proprietor of the trademark. However, it is pertinent to note that the Indian trademark law protects the vested rights of a prior user against a registered proprietor which is based on common law principles.

Passing off

Passing off is a common law tort used to enforce unregistered trademark rights. Passing off essentially occurs where the reputation in the trademark of party A is misappropriated by party B, such that party B misrepresents as being the owner of the trademark or having some affiliation/nexus with party A, thereby damaging the goodwill of party A. For an action of passing off, registration of a trademark is irrelevant.

Registration of a trademark is not a prerequisite in order to sustain a civil or criminal action against violation of trademarks in India. In India, a combined civil action for infringement of trademark and passing off can be initiated. Significantly, infringement of a trademark is a cognizable offence and criminal proceedings can be initiated against the infringers. Such enforcement mechanisms are expected to boost the protection of marks in India and reduce infringement and contravention of trademarks.

Relief granted by Courts in Suits for Infringement and Passing off

The relief which a court may usually grant in a suit for infringement or passing off includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings. The order of interim injunction may be passed ex parte or after notice. The Interim reliefs in the suit may also include order for:

(a) Appointment of a local commissioner, which is akin to an “Anton Pillar Order”, for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.

(b) Restraining the infringer from disposing of or dealing with the assets in a manner which may adversely affect plaintiff’s ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.

Offences and Penalties

In case of a criminal action for infringement or passing off, the offenses punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and fine which shall not be less than INR 50,000 but may extend to INR 200,000

What is an Industrial Design?

An industrial design renders an object attractive or appealing, thus increasing its marketability and adding to its commercial value. The design may be three-dimensional based on the shape or surface of the object, or two-dimensional based on the object’s patterns, lines or colours. Novelty, originality and visual appeal are essential if an industrial design is to be patented, although these criteria can differ from one country to another. Its aesthetic features should not be imposed by the technical functions of the product.

Legally, “industrial design” is the title granted by an official authority, generally the Patent Office, to protect the aesthetic or ornamental aspect of an object. This protects solely the non-functional features of an industrial product and does not protect any technical features of the object to which it is applied.

Industrial design rights are granted to the creator of designs to reward them for their effort and investment in manufacturing the product. These rights enable the owner to make articles to which the design is applied or in which the design is embodied.

The holder of this legal title has the exclusive right to make, import or sell any objects to which the design is applied. They can authorise others to exploit the design and bring a legal action against anyone using the design without authorisation.

In general the period of protection granted is from 10 to 25 years. This is often divided into terms and an extension of the term requires renewal of the registration.

Why protect an industrial design?

Consumers often take the visual appeal of a product into consideration when choosing between different products. This is especially true when the market offers a large variety of products with the exact same function. As the aesthetic appeal of a product can determine the consumer's choice an industrial design adds commercial value to a product.

Protecting an industrial design is also a reward for creativity and encourages economic development. Above all, it ensures protection against unauthorised copying or imitation of the design and can be relatively simple and inexpensive to develop. An industrial design is not protected unless it has been published in an official bulletin.

Registration of Designs

The registration of industrial designs under the Designs Act, 2000 is done by the Designs Wing of the Patent Office located at Kolkata. However, applications can be filed at other offices of the Patent Office, namely, at Delhi, Mumbai and Chennai.

The thrust of the modernization programme of the Designs Wing includes a transition from the essentially paper-based examination procedures to an IT-based system supported by the computerization of existing records, on line search facilities, setting up of a user-friendly website and creation of a digital library.

Ten Steps for Registration of industrial design given by the Designs Wing are as follows:

Step 1. Finding out whether any registration already exists

The Designs office can assist you to search whether the design has been previously registered. If the registration number is known, Form No.-6 should be filed along with the prescribed fees of Rs. 500. If the representation of the article or the specimen of the article is filed Form No.-7 along with the prescribed fees of Rs. 1,000 is required.

Step 2. Preparing a representation of the design

A representation is the exact representation of the article on which the design has been applied. It should be prepared on white A4 size paper of durable quality. Do not prepare it on cardboard or mount it on other paper. Indicate details of the design and applicant clearly.

Step 3. Identifying the class of design

Designs are required to be categorized in separate classes in order to provide for systematic registration. An internationally accepted classification of Industrial Designs based upon the function of the article is required. The class and sub-class should be mentioned in the application. There are 32 classes and most of the classes are further divided into sub-classes.

Step 4. Providing a statement of novelty

A statement of novelty should be included on the representation of a design as per the Act in order to specify the claim. This will enable speedier examination and provide a more specific protection. The claim will protect the overall visual appearance of the design as described in the representation of drawing.

Step 5. Including a disclaimer

If the ornamental pattern on an article is likely to be confused with a trade mark, suggests any mechanical action or contains words, letters, numerals, etc., a disclaimer should be included in the representation.

Step 6. Claiming a priority date

If you have applied for protection of the design in convention countries or countries which are members of inter-governmental organizations, you can claim registration of the design citing a priority date in India. This is the date of filing of the application in any of such countries provided the application is made in India within six months.

Step 7. Determining the fee to be paid

Applications are to be accompanied by the required fee through cheque or draft payable at Kolkata or in cash (if filed in Design Office, Kolkata). Application for the registration of design is Rs 1,000 and for renewal it is Rs. 2,000.

Step 8. Ensuring all enclosures are attached

File an application only after ensuring that all enclosures and fee in the required numbers are attached. Applications can be filed in either the Design Office in Kolkata or the branch offices of the Patent office in Delhi, Mumbai or Chennai.

Step 9. Complying with objections (if any)

If the Design Office seeks additional information or clarifications after preliminary examination, please ensure that these are provided promptly. This will help the office to take up your application for early examination.

Step 10. Providing full details

While filing an application make sure that all contact details and addresses are clearly and legibly filled in. This will enable the office to keep in touch with you and convey decisions. The duration of the registration of a design is initially ten years from the date of registration, but in cases where claim to priority has been allowed the duration is ten years from the priority date. This initial period of registration may be extended by further period of 5 years on an application made in Form-3 accompanied by a fee of Rs. 2,000/- to the Controller before the expiry of the said initial period of Copyright. All designs are not registerable. Designs registered come into force from the date of registration. Designs registered should be renewed in time for them to be valid.

Piracy of a Registration Design:

Infringement of a copyright in design is termed as "Piracy of a registered Design". It is not lawful for any person during the existence of copyright to do the following acts without the consent or license of the registered proprietor of the design. Section 22 of the Designs Act, 2000, lays down that the following acts amount to piracy:

- (1) To publish or to have it published or expose for sale any article of the class in question on which either the design or any fraudulent or obvious imitation has been applied.
- (2) To either apply or cause to apply the design that is registered to any class of goods covered by the registration, the design or any imitation of it.
- (3) To import for the purpose of sale any article belonging to the class in which the design has been registered and to which the design or a fraudulent or obvious imitation thereof has been applied.

In fact any unauthorized application of the registered design or a fraudulent or obvious imitation thereof to any article covered by the registration for trade purpose or the import of such articles for sale is a piracy or infringement of the copyright in the design.

Meaning of fraudulent or obvious imitation:

A distinction is made between fraudulent and obvious imitation. The crux of both is that there is imitation. Thus even in the case of fraudulent imitation the design applied must be an imitation of the registered design. In a fraud the imitation has been made with the intention to deceive another person with the knowledge that what is being done is a violation of the other person's right. There must be an exact imitation of the registered design. In *Western Engineering Company v. Paul Engineering Co*, it was held that features of shape, configuration, pattern etc, of the two designs must be same for determining whether there was infringement or not. The sameness in feature shall be determined by the eye. The design need not be identical on all points and differ on no points.

Infringement of copyright in a design

The following persons may be infringers of copyright in a design:-

- a person who has applied the design of fraudulent or obvious imitation thereof to the article for the purpose of sale without the license or consent of the proprietor.
- a person who has caused to be applied the design or its imitation as aforesaid.
- a person who has imported for the purpose of sale a pirated article without the consent of the registered proprietor; and
- a person who has published or exposed for sale a pirated article knowing that it is pirated article.

Where to file the suit?

No suit or any other proceeding for relief under the Designs Act shall be instituted in any court below the court of District Judge. In other words, the suit for infringement, recovery of damage etc should not be filed in any court below the court of District Judge.

The Remedy:

Judicial Remedy

The judicial remedy for infringement of a registered design recommended in the Act is damages along with an injunction. Section 22(2) stipulates remedy in the form of payment of a certain sum of money by the person who pirates a registered design. A suit for relief should be filed in a court not below the court of District Judge. When a court makes a decree in a suit involving piracy it shall send a copy to the Controller who shall make an entry in the register of designs.

Geographical Indications

Geographical Indications of Goods are defined as that aspect of industrial property which refer to the geographical indication referring to a country or to a place situated therein as being the country or place of origin of that product. Typically, such a name conveys an assurance of quality and distinctiveness which is essentially attributable to the fact of its origin in that defined geographical locality, region or country. Under Articles 1 (2) and 10 of the Paris Convention for the Protection of Industrial Property, geographical indications are covered as an element of IPRs.

The Legal framework in India

As a party to the TRIPS Agreement, India is required to protect GI and hence in order to fulfill that obligation, the Geographical Indications of Goods (Registration and Protection) Act, 1999 was enacted. It may also be noted that India felt that some of its products have high potential to benefit from GI registration and it was necessary to put in place a comprehensive legislation for registration and for providing adequate protection for GI. For unless a geographical indication is protected in the country of its origin, there is no requirement under the TRIPS Agreement for other countries to extend reciprocal protection. The main benefits which accrue from registration under the Act are as follows:

- Confers legal protection to GI in India;
- Prevents unauthorized use of a registered geographical indication by others;
- Enables seeking legal protection in other WTO member countries

Infringement of Registered Geographical Indications and Appeals

A registered geographical indication is infringed by a person who, not being an authorised user thereof uses such geographical indication by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods. Hence the infringement of registered G.I. occurs if a person:



- Uses the Geographical Indications on the goods or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the public; or
- Uses the Geographical Indications in a manner that constitutes an act of unfair competition; or
- Uses another Geographical Indications to the goods in a manner, which falsely represents to the public that the goods originate in the territory, region or locality in respect of which such registered Geographical Indications relates.

IPR Scenario: From Indian Perspective

Earlier when IPR was in its preliminary stage, lot of problems arose relating to its implementation, policies, Act/ Rules, financial and governmental support. Earlier, companies and inventors were also not aware of IPR, therefore risk of infringement was at an alarming level without a healthy system, and companies were not interested to go for R&D process in India. This resulted in the death of inventions, high risk of infringement, economic loss and decline of an intellectual era in the country. Keeping in view all the above problems, India has taken strong steps in strengthening IPR in the country. For example, the first Indian Patent Law came in 1856. Further, the same was modified from time to time by Indian patent system. The copyright laws in India are set to be amended with the introduction of the provisions for anti-circumvention and Rights Management Information in the Indian copyright regime. With the amendment of the Copyright Act in 1994, which came into force on 10 May 1995, the situation with regard to copyright enforcement in India has improved.

Challenges in IPR: From Indian Perspective

Today, IPR plays an important role in every sector and has become an important aspect of research for Pharma and research oriented industries. The continuous efforts of the government in policy establishment, IT protection, infrastructure, IPR search portals and manpower made this



Industry a step ahead. In consideration of all the achievements, our industry is still facing troublesome challenges not only at domestic level but also at international level. Firstly, in India IPR lacks its roots in remote areas, such areas are considered to be the hot bed of inventions. Many people are still unaware about IPR and their advantages in taking rights for their intellectual property. In such cases, the government should promote the awareness of IPR in such remote areas. Large number of awareness camps and educational hubs has to be organized for the skilled impart of knowledge among the inventors. Secondly, a legal issue plays an important role in IPR situation in the country. Today various trademark and patent infringement matters are gaining their significance in the legal story of the country. In such increase of IPR matter, a skilled team of law persons (Judges, advocates) and IPR professionals are required.

The future of IPR in India: Results and Benefits

India has begun to see some positive results as awareness of the need for greater IP protection has increased. But these results are only the first steps on the path to full development of India's knowledge based economy. India must continue to improve its IPR protection, or risk being left behind as other countries in the developing world implement protections and build their own knowledge based economies. When examining potential investment sites, investors in the knowledge industries will look at the IPR regimes of various countries and choose those countries that offer the greatest protection for their investments."

Early implementation of a strong pharmaceutical patent regime would strengthen India's research and development sector, attract more foreign investment, and provide a basis for Indian firms to begin tackling diseases that have a serious effect on the country. Local companies have the advantage of being close to disease patterns for indigenous communicable diseases and can develop drugs through local R&D. Diseases such as tuberculosis, malaria, leprosy, plague and dengue fever continue to pose serious problems in India and take millions of lives each year. Talented Indian scientists, attracted by adequate patent laws, are desperately needed in India to conquer these endemic diseases.



As India's knowledge based economy grows, it will benefit not only India, but the rest of the world as well, especially the developing world it leads. This is India's challenge, and one in which the U.S. would like to cooperate.

CONCLUSION

The actual managing involving IP and also IPR is really a multidimensional activity and also demands a number of action and also tactics which usually have to be aligned along with country wide laws and regulations and also international treaties and also procedures. It is no longer driven purely by a national perspective. IP and it is connected legal rights tend to be severely influenced from the market needs, market response, charge involved with converting IP into professional opportunity and so forth. In other words, trade and commerce considerations are important in the management of IPR. Diverse sorts of IPR desire unique treatment, dealing with, organizing, and also tactics and also involving individuals along with unique sector understanding like science, engineering, medicines, law, marketing, and also economics. Each industry should evolve its own IP policies, management style, strategies, etc. depending on its area of specialty. Pharmaceutical industry currently has an evolving IP strategy. Since there exists the increased possibility that some IPR are invalid, antitrust law, therefore, needs to step in to ensure that invalid rights are not being unlawfully asserted to establish and maintain illegitimate, albeit limited, monopolies within the pharmaceutical industry. Still many things remain to be resolved in this context.



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