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ADVOCATES & SOLICITORS

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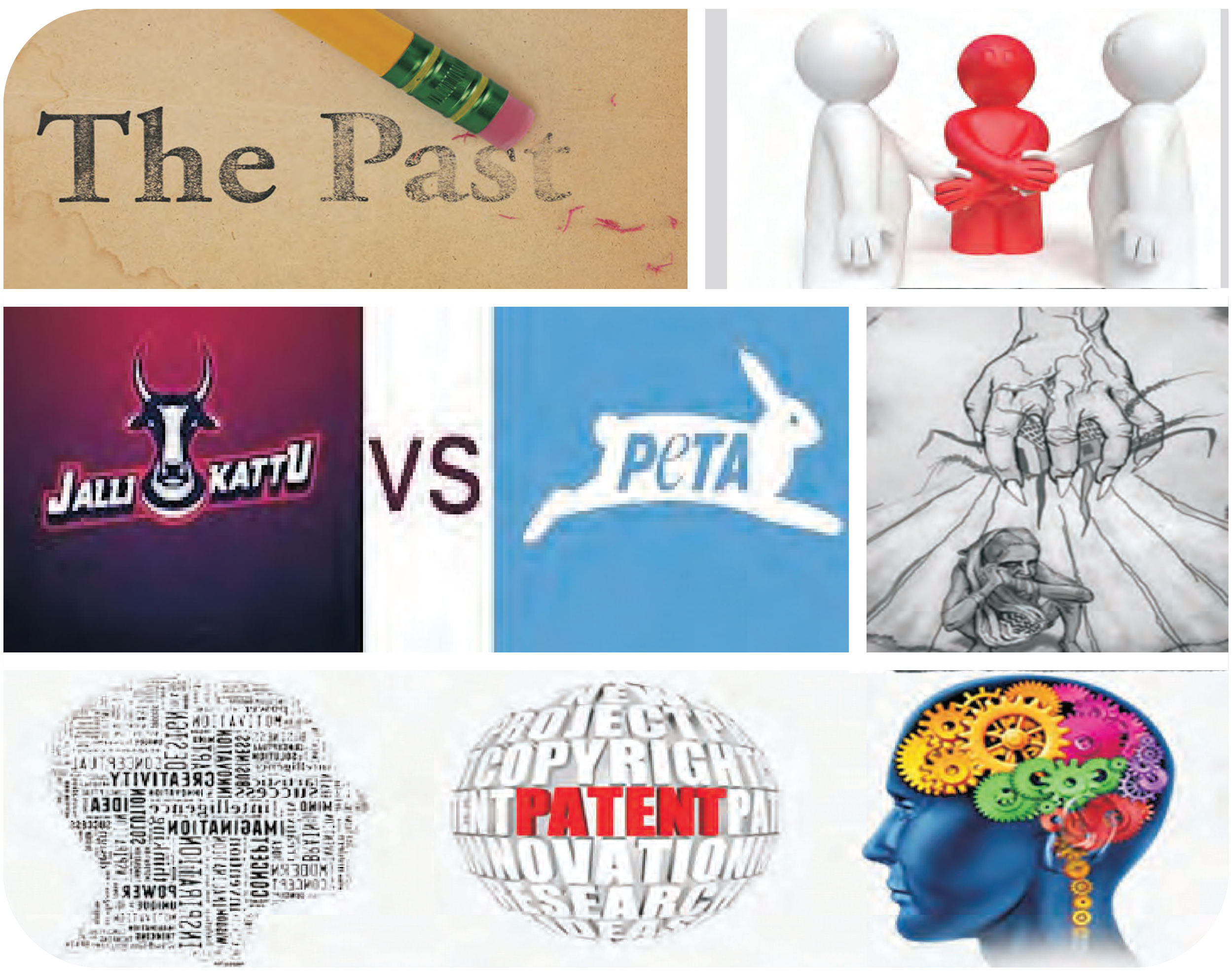

OFFICE MOVE ANNOUNCEMENT

Singh & Associates is pleased to announce that effective February 11, 2017 we have opened our doors of our new office!

Please contact our new office at:

E-337, EAST OF KAILASH, NEW DELHI-110065 INDIA
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We are looking forward to seeing you in our new and inspiring premises.

Thank you.

Note : To prevent any loss of correspondence, please send the same to us at our above stated new office contact details. However, we will continue to keep a check on correspondences sent to our old address.

With best regards,
The team

EDITORIAL

Manoj K. Singh
Founding Partner

Singh & Associates, Founder-Manoj K. Singh, Advocates and Solicitors is thankful to all readers of our Newsletter "**Indian Legal Impetus**" who have always bestowed overwhelming support to us as a result of which we have been successful enough to bring **January 2017 edition** covering the latest legal developments in India.

In current edition, we start with a recent Hon'ble Delhi High Court judgment highlighting the aspect of the automatic stay of the award pre and post the Amendment Act of 2015. The edition also discusses the effects of negligence of a counsel in appearing in the Courts.

Thereafter, the Corporate section includes an article discussing diverse aspects of the Fast Track Mergers & Amalgamation process notified under the recent Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 .

An analysis on retrospective applicability of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has also been included in the present issue. The new age concept of Right to be Forgotten is briefly discussed in light of recent two petitions filed before Hon'ble High Court of Delhi and Karnataka respectively. Further, recently much talked about Tamil Nadu Jallikattu Regulation Act of 2009 has been discussed under an article arguing animal welfare vis-a-vis culture & traditions.

A brief article on Department of Pharmaceutical's decision that NPPA erred in taking the company-wise percentage of moving annual turnover while entertaining review application under Para 31 of the Drugs (Prices Control) Order, 2013 will provide you an insight on complex price calculation methodology for drugs.

IP section covers articles discussing IPO's rejection of Patent application for Xtandi (Prostrate Cancer drug), entitlement of grant of Patents and opposition of Patents and an insight on opportunities & threats qua IP environment in India.

Then, an article on Predatory pricing as an Abuse of dominant position has been covered with respect to the scheme offered by Reliance Jio in Indian Telecom Sector.

We hope this issue as well helps us in further achieving our objective of making our readers understand and interpret the legal issues and developments in India and find the provided information useful. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Impetus" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to **newsletter@singhassociates.in**

Thank You.

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AUTOMATIC STAY OF ARBITRAL AWARD: PRE AND POST AMENDMENT ACT, 2015

Gunjan Chhabra

Before the coming into effect of the Arbitration and Conciliation (Amendment) Act, 2015 (***Amendment Act)***, the law as it stood was that filing of an objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (***"Act")*** would lead to an automatic stay of the impugned award. However, this scenario has changed after the coming into force of the Amendment Act, which has specified that mere filing of the petition under Section 34 would not lead to an automatic stay, but a separate application would be required to be filed in this respect.

However, a Division bench of the Delhi High Court in ***Ardee Infrastructure Pvt. Ltd v. Anuradha Bhatia***[1], has held in January, 2017, that if the Petition under Section 34 relates to an award which has been passed under the Act, un-amended by the Arbitration and Conciliation (Amendment) Act, 2015("***Amendment Act")***, then an automatic stay would operate on the impugned award, by mere filing of such a Petition, even when such a Petition has been filed post the amendment.

THE POSITION BEFORE THE AMENDMENT ACT

The pre-amendment scenario was that as soon as a Petition under Section 34 of the Act was filed, an automatic stay would operate on the award. This was the case owing to Section 36 of the Act, which read as under:-

"36. Enforcement.-Where the time for making an application to set aside the arbitration award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

A plain reading of this section made it evident that until the application under Section 34 had been disposed off as being refused, the award would not have become enforceable. This implied that there would be an automatic stay on the award on the mere filing of the Petition under Section 34.

1. *Decided by the Delhi High Court on 6 January, 2017, Division Bench*

THE POSITION AFTER THE AMENDMENT ACT

After the coming into effect of the Amendment Act, Section 36 of the Act was amended to read as follows:-

"36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.".

The change in the language of Section 36 makes the following things evident:-

i Section 36(2) clearly specifies that filing of Section 34 application shall not by itself render the award unenforceable unless the Court grants a stay on a separate application made.

ii Upon filing of the application, the stay is not to be granted as a matter of right, but the Court "may" in its discretion grant such a stay, subject to such conditions, and on recording of specific reasons.

iii While granting such a stay provisions of the Civil Procedure Code, 1908, regarding stay of money decree need to be followed.

Section 36 under the Amended Act, therefore clearly does not make the stay on the impugned award automatic upon filing of Petition under Section 34.

However, the question of whether the new Section 36 would be applicable to a Petition under Section 34 would depend upon the applicability of the Amendment Act to these proceedings.

The applicability of the Amendment Act is governed by Serial No. 26 o the Amendment Act, which reads as under:-

"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

The applicability of the Amendment Act, to a Petition under Section 34 filed after 23.10.2015, but where the award had been passed before 23.10.2015, was discussed in the judgment of ***Ardee Infrastructure (Supra)***

INTERPRETATION GIVEN BY ARDEE INFRASTRUCTURE (SUPRA)

The award in the present case had been passed on 13.10.2015 and the Petitions under Section 34 had been filed on 04.01.2016. The judgement analyzed the language of Serial no. 26 of the Amendment Act and decoded the words "arbitral proceedings" and "in relation to arbitration proceedings".

This was done in light of the judgment of ***Thyssen Stahlunion Gmbh v. Steel Authority of India Limited***[2], wherein the Court had held that the words, "in relation to arbitration proceedings" include not just the arbitration proceedings but also proceedings before the Court. The judgments of ***Tufan Chatterjee v. Rangan Dhar***[3] and ***New Tirupur Area Development Corporation Limited v. Hindustan Construction Company Limited***[4] were also analyzed wherein it had been held, that the use of the words "arbitral proceedings" specifically implied that the restriction provided under Serial no. 26 was limited, only to proceedings before the arbitral tribunal and not to the Court.

However, the division bench of the Delhi High Court did not agree with the view of the Calcutta High Court and Madras High Court in this respect. The Delhi High Court in the case of ***Ardee Infrastructure (Supra)*** was of the view that once an Arbitration has been conducted under the un-amended Act, it is a substantive right of a party to get it enforced under the un-amended Act. This reading was in view of specific applicability of Section 6 of the General Clauses Act, which reads as under:-

"6. Effect of repeal. - Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

Another reasoning which the Delhi High Court had used was that if it is assumed that the converse is true, and the Amendment Act is applicable to Court proceedings arising out of the old arbitrations but not

2. *1999 (9) SCC 334*
3. *AIR 2016 Cal 213*
4. *Application No.7674/2015 in O.P. 931/2015, Madras High Court*

to the old arbitration proceedings themselves, it would give rise to absurdity. The Amendment Act brought about amendments in Section 9 as well as Section 17of the Act. While Section 9 pertains to interim measures which may be directed by the Court prior, during arbitral proceedings or after the making of the award, Section 17 deals with the interim measures which may be ordered by an arbitral tribunal.

If it was to be accepted that the Amendment Act would apply to Court proceedings arising out of old arbitrations but not to proceedings before arbitral tribunals arising out of pending arbitration, then, in respect of arbitral proceedings commenced prior to 23.10.2015, the amended provisions would apply to proceedings under Section 9 of the said Act, but not to Section 17 thereof. This would result in a serious anomaly.

It is pertinent to note, that such a stand taken by the Division Bench of the Delhi High Court is also in stark contrast to the earlier single judge judgment of the Delhi High Court in ***Raffles Design International v. Educomp Professional Education***[5] as well as the single judge judgment of the Bombay High Court in ***Kochi Cricket Pt Limited . Board of Control for Cricket in India***[6], wherein the Courts have observed that there is a difference between the terms "arbitration proceedings" and "in relation to arbitration proceedings" and it is owing to this discussion that although the Amendment Act is applicable to Court proceedings arising out of old Arbitrations, it is not applicable to arbitration proceedings initiated under the old Act.

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5. *Delhi High Court on 7 October, 2016*
6. *Bombay High Court on 14th June 2016*

EFFECTS OF NON-APPEARANCE OF THE COUNSEL

Ramya Verma

Order IX of the Code of Civil Procedure deals with the Non-appearance of the Parties and such default may have the effect of the dismissal of the suit or ex-parte decision by the Courts. Now, the law does not require the personal presence of the Parties unless especially required by the Court. The appearance of the pleader is a deemed presence of the litigant. However, there are instances wherein the cases are dismissed for the default caused due to the negligence of the Counsel.

The disturbing feature of our present adversary legal system where the parties generally appearing through Advocates, the obligation of the Parties is to select the advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. The party may, on the other hand, be a litigant who engages an advocate with the belief that his case will be duly represented. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can, rest assured that he has neither to go to the Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It cannot be decided whether such non-appearance is the cause of the negligence of the Advocate or the negligence of a litigant himself. However, every time, it becomes a responsibility of the Court to allow such applications for restoration or appeals only for the possibility of justice being denied to an innocent litigant.

The Hon'ble Apex Court has discussed this aspect in the case of ***The Secretary, Department of Horticulture, Chandigarh and Anr. Vs. Raghu Raj***[1] and held that, "***Even if there is default on the part of advocate in not appearing at the time of hearing, Appellant shall not suffer injustice.***"

1 2009 (1) ALT 38 (SC)

It was pleaded by one of the counsels that the appellant had engaged a counsel and were under the impression that the lawyer will take care of the case and appear when the appeal will be called out for hearing. It was observed that the counsel is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without `sufficient cause' cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and disCourteous to the Court and can never be countenanced. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, *normally*, a party should not suffer on account of default or non-appearance of the advocate.

It is true that no Court is obliged to adjourn a case because of the difficulty of a Counsel. In fact, it is the solemn duty of every Court to proceed with judicial business fixed for the day yet in an appropriate case where no fault lies at the door of litigant, Court should not be in a hurry to dismiss the case in default or for non-prosecution on account of absence of his counsel. The Court must be considerate while dealing with an application for recall of dismissal or ex-parte order if a justifiable cause for non-appearance of counsel was made out, the simple reason being; ultimately, it would be the litigant who will have to suffer the consequences of the Order.[2]

Law always requires the test of reasonableness. Meaning thereby, the cause of non-appearance of the Advocate must be justifiable. It is the professional obligation of an Advocate to appear on behalf of his Client or make such alternate arrangements as necessary. But, if there is no sufficient reason and the Advocate by choice, omits to appear for a particular matter or before a particular bench, then is the innocent litigant to suffer injustice?

The Hon'ble Apex Court has discussed this aspect in the case of ***Rafiq and Anr. v. Munshilal and Anr.***[3] it was submitted by one of the counsels that a practice

2 *Lakhi Narayan Sonowal v. State of Assam & ors.*

3 *[1981] 3 SCR 509*

had grown up in the Hon'ble High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular bench. It was observed, If any counsel does not want to appear in a particular Court, that too for justifiable reasons, professional decorum and etiquette require him to give up his engagement in that Court so that the party can engage another counsel. But, retaining the brief of his client and at the same time abstaining from appearing in that Court, that too, not on any particular day on account of some personal inconvenience of the counsel but as a permanent feature, is unprofessional as also unbecoming of the status of an advocate.[4]

This practice can only be discouraged by rejecting such applications for restoration or appeals, as the case may be. However, the end result of every case should be justice. The Party who has shown faith in the judicial system must not be disappointed because of the default of his duly engaged Advocate. The Advocates Act and other rules of the Bar Council require an Advocate to argue the case of his Client in the best possible manner and keeping uphighest professional standards.

The Court observed, "What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If such appeals/ applications are rejected, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates before us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe, that the learned advocate absented himself deliberately or intentionally. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

CONCLUSION:

This scenario creates a very critical position in the justice delivery system. Where, on one hand, the Honble Court is duty bound to dismiss the proceedings if sufficient reasons are not established which has become the need of time owing to the large number of cases pending at all stages, on the other hand the Court cannot deviate from the very own objective of the judicial system, i.e. Justice for all. The Court by taking a strict or technical view of the procedures prescribed cannot cause prejudice to the innocent party who has faith not only on the Advocate he has engaged but the ultimate faith in Judiciary that the Court, in no circumstances would cause anything to affect the rights of the Parties. This kind of situation necessarily calls for a new practice duly prescribed by law so that neither the innocent Party suffers due to the default or negligence of an Advocate but the Courts can adopt the procedures meant for doing substantial justice keeping in mind the Right to speedy trial in every case, be it Civil or Criminal so that the faith in the Indian Judicial system remains alive.

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4 *Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd. [1999(1) KLJ530]*

THE LEGAL BATTLE: ANIMAL WELFARE VIS-À-VIS CULTURE AND TRADITION

Bornali Roy & Tanuka De

The current legal battle was triggered in Supreme Court when a notification[1] was issued by Ministry of Environment and Forest on July 11, 2011 banning use of various animals including bulls as performing animals. A Division Bench[2] of Supreme Court was called upon to examine the same along with a number of other legal questions including the validity of the Tamil Nadu Jallikattu Regulation Act of 2009 ("**TNJR Act**") in the judgment of ***Animal Welfare Board of India v. A Nagaraja***[3] (Civil Appeal No. 5387 of 2014). The matter involved writ petition filed before the Supreme Court[4] as well as appeals from Bombay High Court and Madras High Court[5]. The Bombay High Court had upheld the validity of the notification of July 11, 2011 while the Madras High Court had upheld the validity of the TNJR Act. The judgment upheld the validity of the notification. Further, it was found that the conduct of Jallikattu was violative of the provisions of the central act ***"Prevention to Cruelty to Animals Act (59 of 1960)"***, more particularly, sections 3, 11(1)(a), 11(1)(m)(ii) and 22 of the said Act.

Jallikattu comes from the words, 'calli' and 'kattu' which means 'coins' and 'package' respectively; is a traditional, cultural and ritualistic sport involving the daring stance of men trying to establish claim over a bundle of coin tied to the horn of a raging bull. That act is synonymous to valor and pride (and occasionally the hope of getting a bride), because, what brings more masculinity and pride, than being able to pull a stunt before a raging bull, jeopardizing one's own as well as the cattle's life, that too all in the name of culture!

As interpreted by the Supreme Court of India[6],

"**Para 16** *Jallikattu refers to silver or gold coins tied on the bulls' horns. People, in the earlier time, used to fight to get at the money placed around the bulls' horns which depicted as an act of bravery. Later, it became a sport conducted for entertainment and was called "Yeruthu Kattu", in which a fast moving bull was corralled with ropes around its neck. Started as a simple act of bravery, later, assumed different forms and shapes like Jallikattu (in the present form), Bull Race etc., which is based on the concept of flight or fight. Jallikattu includes Manjuvirattu, Oormaadu, Vadamadu, Erudhu, Vadam, Vadi and all such events involve taming of bulls."*

The Indian legislature, with the intent to prevent such sufferings and unnecessary infliction of pain on animal promulgated the Prevention of Cruelty to Animals Act, 1960. As has been already discussed, in the Supreme Court judgment in ***Animal Welfare Board of India Vs. A Nagaraj,*** the practice of jallikattu was held to be in violation of section 3, 11(1)(a), 11(1)(m)(ii) and 22 of the Prevention of Cruelty to Animals Act, 1960 on the following grounds:

i Violation of section 11(1)(a), 11(1)(c), 11(1)(l) of the Prevention of Cruelty to Animals Act, 1960

ii Mutilation of Ear: It is observed that almost 80% of the bulls have their external pinna cut off. The logic behind this is that this would enable the animal to hear sounds even from the back.

iii Fracture and Dislocation of Tail Bones: Many bulls suffered from dislocated or even amputated tails caused by deliberate pulling and twisting.

iv Twisting of Bull's tail: to induce fear and pain while they are in the waiting area.

As has been stated in the judgment, "Para 27 *Section 3 of the Act deals with duties of persons having charge of animals, which is mandatory in nature and hence confer corresponding rights on animals. Rights so conferred on animals are thus the antithesis of a duty and if those rights are violated, law will enforce those rights with legal sanction.*

Forcing and pulling bulls by nose ropes into the narrow closed enclosure of vadi vassal, subjecting it to all forms of

1. *Notification No. GSR528(E), "Specifies the list of animals not to be exhibited or trained as performing animals"*
2. *Hon'ble Justice K. S. Radhakrishnana and Hon'ble Justice P. C. Ghose*
3. *(2014) 7 SCC 547*
4. *SLP No. 13199 of 2012*
5. *Writ Petition No. 145 of 2011*
6. *(2014) 7 SCC 547 at Para. 16*

torture, fear, pain and suffering by forcing it to go the arena and also over-powering it at the arena by the Bull tamers, are not for the well- being of the animal.

Organizers of Jallikattu are depriving the rights guaranteed to the bulls under Section 3 of PCA Act."

i Poking Bulls with Knives and Sticks.

ii Irritant solutions were rubbed into the eyes and noses of bulls. Using nose ropes.

iii Forcing Bulls to drink fluid likely to be liquor.

Section 22 of the PCA Act places restriction on exhibition and training of performing animals. It had been observed in the judgment,

"**Para 34** *Bulls, therefore, in our view, cannot be a performing animal, anatomically not designed for that, but are forced to perform, inflicting pain and suffering, in total violation of Sections 3 and Section 11(1) of PCA Act. Chapter V of the PCA Act deals with the performing animals."*

PRESENT DAY SCENARIO

Ministry of Environment, Forests and Climate Change ("**MoEF**") had issued a new notification[7] dated January 7, 2016 in suppression of its 2011 notification. MoEF has justified that its January 7, 2016 notification issued to circumvent the Hon'ble apex Court ban by allowing the exhibition and use of bulls for jallikattu and bullock-cart races, saying that jallikattu "encourages breeding of indigenous bulls." The new notification has carved out an exception for Jallikkattu and bullock cart races stating the following:

"Provided that bulls may be continued to be exhibited or trained as a performing animal, at events such as Jallikattu in Tamil Nadu and bullock cart races in Maharashtra, Karnataka, Punjab, Haryana, Kerala and Gujarat in the manner by the customs of any community or practiced traditionally under the customs or as a part of culture, in any part of the country[8]…"

A batch[9] of petitions challenging the said notification came up for hearing before Hon'ble Supreme Court on January 12, 2016. The Court after hearing the parties issued notice and stayed the notification. Subsequently, protests in Tamil Nadu intensified and one of the raging contentions for protest now is the contention that Jallikattu is part of the culture and tradition of Tamil Nadu. However, in the 2014 judgment, the apex Court had dealt with the same issue and stated that the evolved practice is not a part of tradition or culture.

"**Para 42** *Jallikattu means, silver or gold coins tied to the bulls horns and in olden days those who get at the money to the bulls horns would marry the daughter of the owner. Jallikattu or the bullock cart race, as practised now, has never been the tradition or culture of Tamil Nadu."*

OPINION/CONCLUSION

It is very important to realize and appreciate that old might not always be gold to reach a reasonable and compassionate end to this discord currently between the Centre and the State. As has been rightly observed by the bench of Justices Dipak Misra and Rohinton F. Nariman while putting a stay on the notification that,

> *"You say that jallikattu is an age-old tradition, so was child marriage until it was declared a crime[10]."*

However, the battle also had a third angle to it. Another, fact that added on to trigger the battle was the upcoming Tamil Nadu Legislative Assembly elections in 2016. It should be borne in mind that the Jallikattu belt is dominated by the politically powerful Thevar community, which has politicians and considerable clout in several parties. All parties in Tamil Nadu welcomed the Centre's decision of removing ban from the cultural practice, thus, giving the dispute a fresh start.

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7. Notification No. GSR13(E), "Specified animals shall not be exhibited or trained as performing animal"

8. Point 6, Notification No. GSR13(E), "Specified animals shall not be exhibited or trained as performing animal.

9. WP (C) 24 of 2016 with WP (C) 23 of 2016, WP (C) 25 of 2016, WP (C) 26 of 2016, WP (C) 27 of 2016 and Contempt Petition (C) No. D 1296/2016.

10 The Hindu, http://www.thehindu.com/news/national/So-what-if-jallikattu-is-an-age-old-tradition-SC-asks-Centre/article14509747.ece#!, New Delhi, July 26, 2016, updated

FAST TRACK MERGERS & AMALGAMATION

Kumar Deep

PREFACE

The Ministry of Corporate Affairs ("**MCA**") vide Notification[1] dated December 7, 2016 had notified various provisions of the Companies Act, 2013 (hereinafter referred as "**CA 2013**") which have come into force with effect from December 15, 2016.

Vide this notification, the provisions pertaining to compromise, arrangements, reconstruction (comprising sections 230 to 240 of the CA 2013[2]) got enforced from December 15, 2016. The notified sections relating to compromises, arrangements and amalgamations correspond to sections 390 to 396A of the Companies Act, 1956.

Subsequently, MCA has also come out with a separate Notification[3] on December 14, 2016 to notify the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, (hereinafter referred as "**CAA Rules**") to be effective from December 15, 2016.

SYNOPSIS OF PROVISIONS NOTIFIED WITH RESPECT TO COMPROMISES AND AMALGAMATIONS

Before briefing on the diverse aspects of the Fast Track Mergers & Amalgamation process, a short synopsis of the various provisions relating to compromise and amalgamation is presented herein below in concise manner for better understanding of the subject matter. The provisions mentioned under these sections shall be read with the CAA Rules.

POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS

The provisions of section 230 of the CA 2013 deals with the powers of the National Company Law Tribunal ("**NCLT**"/ "**Tribunal**") to make order on the application of the company or any creditor or member or in case of company being wound up, of the liquidator, for the proposed compromise or arrangements. The section provides that if a compromise or arrangement is proposed between a company and its creditors or any class of them, or between a company and its members or any class of them, then an application can be made to NCLT for sanctioning the same.

POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT

Section 231 of the CA 2013 provides that the powers of the Tribunal can be exercised either at the time of making the order or at anytime thereafter as specified therein. The Tribunal may also order for winding up of the company, which shall be deemed to be an order under section 273 of CA 2013, in case the sanctioned compromise or arrangement is not satisfactorily implemented and the company is unable to pay its debts as per the scheme.

MERGER AND AMALGAMATION OF COMPANIES

Section 232 deals with the powers of the Tribunal to order for holding meetings of the creditors or the members and also to make such orders on the proposed reconstruction, merger or amalgamation of companies. Additionally, the section also provides the manner and procedure for merger, amalgamation, compromise, arrangement, demerger of companies.

MERGER OR AMALGAMATION OF CERTAIN COMPANIES

Section 233 of the CA 2013 is a new section which deals with merger or amalgamation of the following companies without approval of any Court or Tribunal subject to fulfilment of prescribed conditions and following the procedure prescribed under the CAA Rules:

1. *http://www.mca.gov.in/Ministry/pdf/commencementnotif_08122016.pdf*
2. *Sections 230(11), 230(12) and 234 have not been notified.*
3. *http://www.mca.gov.in/Ministry/pdf/compromisesrules2016_15122016.pdf*

i Two or more small companies[4]

ii Between a holding company & its wholly owned subsidiary company

iii Other class of prescribed companies[5].

POWER TO ACQUIRE SHARES OF DISSENTING SHAREHOLDERS

Section 235 deals with the manner in which the transferee company may acquire shares of such shareholders who are dissenting from the scheme or contract as approved by the holders of not less than nine-tenths in value of the shares.

PURCHASE OF MINORITY SHAREHOLDING

This section 236 provides the procedure and manner for acquiring shares held by minority shareholders.

AMALGAMATION OF COMPANIES IN PUBLIC INTEREST

In pursuance to this section 237 the Central Government is empowered to amalgamate two or more companies in public interest by passing an order to be notified in the Official Gazette.

REGISTRATION OF OFFER OF SCHEMES INVOLVING TRANSFER OF SHARES

This section 238 provides the manner of registration of offer of schemes or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company in case of acquisition of shares of dissenting shareholders.

PRESERVATION OF BOOKS AND PAPERS OF AMALGAMATED COMPANIES

The section 239 provides that books of account and papers of a company which has been amalgamated or whose shares have been acquired by another company, shall not be to disposed of without prior permission of the Central Government.

LIABILITY OF OFFICERS TO BE CONTINUED POST MERGER, AMALGAMATION ETC.

This section 240 provides the liability in respect of offences committed by the officers in default of transferor company prior to its merger or amalgamation or acquisition shall continue after such merger or amalgamation or acquisition.

FAST TRACK MERGERS AND AMALGAMATION

Section 233 of the Companies Act, 2013 (CA 2013) dealing with "Merger or Amalgamation of Certain Companies" has also come into force with effect from 15th December, 2016. In contrast to the Companies Act, 1956, this is a new provision under CA 2013 which deals with out of court/tribunal, fast tracked merger or amalgamation of certain companies subject to conditions prescribed.

The detailed framework and the procedure of the Fast Track mergers and amalgamation has been provided under Section 233 of CA 2013 read with Rule 25 of the CAA Rules.

SALIENT FEATURES OF FAST TRACK MERGERS/AMALGAMATIONS

APPLICABILITY

In terms of Section 233(1) of CA 2013, a scheme of merger or amalgamation under the said provisions may be entered into between:

i two or more small companies

ii a holding company & its wholly owned subsidiary company.

iii other class of prescribed companies[6]

The approval of the above scheme will not require mandatory approval of NCLT unless the companies concerned opts for.

ELIGIBILITY FOR COMPROMISE OR ARRANGEMENT

The above mentioned class of companies would also be eligible for out of Court/Tribunal process of compromise or arrangement in terms of Section

4. As per section 2(85) "small company" means a company, other than a public company,—
(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; AND
(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:
Provided that nothing in this clause shall apply to—
(A) a holding company or a subsidiary company;
(B) a company registered under section 8; or
(C) a company or body corporate governed by any special Act;

5. The other class of companies have not been yet prescribed till date of this article

6. The other class of companies have not been yet prescribed till date of this article

233(12) of CA 2013. Such compromise or arrangement could be:

i between a company and its creditors or any class of them; or

ii between a company and its members or any class of them.

CONDITIONS

The eligible class of company or companies as mentioned herein above are required to fulfil the following conditions for Fast Track Mergers & Amalgamations under Section 233:

i To invite objections and suggestions from the ROC and Official Liquidator on the proposed scheme;

ii To consider the objections and suggestions, if any;

iii To file declaration of solvency before the ROC; and

iv To get the scheme approved by the shareholders and creditors

NECESSARY APPROVALS FOR FAST TRACK MERGERS & AMALGAMATIONS

Approvals of the following concerns are required for fast Track Mergers & Amalgamations:

i Shareholders;

ii Creditors;

iii The Central Government (powers delegated to Regional Director vide MCA notification[7] dated 19/12/2016);

iv ROC; and

v The Official Liquidator

It is pertinent to note that if the ROC and the Official Liquidator concerned does not have any objections or suggestions to the scheme, the Central Government (Regional Director) shall register the scheme and issue a confirmation thereof to the companies.

PROCEDURE

The procedure under the Fast Track Mergers & Amalgamation may be summarized as below:

i There must be power to amalgamate with other companies in the Memorandum of Association (MOA) of the companies seeking to merge. If not such power provided in the MOA then as a first step get the MOA to be amended to insert the provision empowering the company to get itself merged with one or more other companies.

ii Convene the Board of Directors meeting to get the scheme approved in both the Transferor Company and the Transferee Company.

Send Notices (in Form CAA.9) by both the Transferor Company and the Transferee Company inviting objections or suggestions on the scheme of amalgamation to the ROC, Official Liquidator and such other persons who are all affected by the scheme of merger/amalgamation. The Notice given to the shareholders or creditors or any class of them, shall be contain the followings:

- Scheme of Amalgamation;
- Statement disclosing the scheme of amalgamation and the effect of the scheme on its stake holders such as the shareholders, key managerial personnel, directors, employees, promoters, creditors, debenture holders etc.;
- Copy of the valuation report;
- Such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme.

iii File Declaration of Solvency by both the Transferor and the Transferee Company in Form CAA.10 with the ROC.

iv Convening the meeting of Shareholders for their Approval with 90% of the shareholders approving the resolution.

v Convening the meeting of Creditors for the approval of the scheme by the majority representing 9/10th in value of creditors or class of creditors of the respective companies.

vi The transferee company to file a copy of the scheme so approved in the Form CAA-11 with the

7. *http://mca.gov.in/Ministry/pdf/Notification_PowerRD_20122016.pdf*

ROC in Form GNL-1 and with the Office of Official Liquidator through hand delivery or by registered post or speed post.

vii If there is no objection or suggestion received from the ROC and Official Liquidator and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12 shall be issued by the Central Government.

viii Where objections or suggestions are received from the ROC or Official Liquidator and the Central Government is of the opinion that the scheme is not in the public interest or in the interest of creditors, it may file an application before the Tribunal in Form No. CAA.13 within sixty days of the receipt of the scheme requesting that Tribunal may consider the scheme under section 232 of the CA 2013.

ix On receipt of an application from Central Government as aforesaid or from any other person, if NCLT for reasons recorded in writing is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the NCLT may direct accordingly or it may confirm the scheme by passing such order as it deems fit.

x The confirmation order to be filed by the transferor and transferee companies in Form INC 28 with the ROC concerned within 30 days of the order of confirmation from the Central Government or NCLT as the case may be.

Effect of Registration of the Scheme

The registration of scheme shall have the following effect:

i Transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;

ii The charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;

iii Legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and

iv Where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

CONCLUSION:

In a nutshell the provisions of Section 233 provide a simplified procedure for the merger & amalgamation including any scheme of compromise & arrangement for certain specified companies. The modus operandi of this section is no mandatory approval from NCLT and dissolution of transferor companies without process of winding up on registration of the scheme for the specified companies. It is a new provision which was introduced in the Companies Act, 2013 as no such provision was there in the previous Companies Act, 1956. This route of Fast Track Merger & Amalgamation provides extensive relief to such companies from following the meticulous and complex procedure of merger & amalgamation involving approval of NCLT. As there are significant interest of third parties and general public in mergers between holding and its wholly owned subsidiary company, the fast track mergers & Amalgamation scheme is relevant and a boon for the corporate sector. The small companies are also get benefitted by saving time and cost as well. The NCLT will also become less burdened. This is a much needed step taken by the Government in order to promote ease of doing business in India and for the overall benefit of the industries.

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RETROSPECTIVE APPLICABILITY OF LARR ACT, 2013

Siddharth Sharma & Aayushmaan Vatsyayana

INTRODUCTION

The Authors have addressed this issue in four parts. Part I gives a historical background of the situation that has culminated presently- the entrance of the new law governing land acquisition. Part II deals with the new law and its retrospective application provision. Part III throws light on the interpretation of the ambiguity with respect to the term period of the retrospective application. Part IV finally analyzes the various decisions and draws a conclusion.

HISTORICAL BACKGROUND

The Supreme Court of India in the case *Ramji Veerji Patel & Ors*[1]. v. *Revenue Divisional Officer& Ors.*, in relation to Land Acquisition Act, 1894 ("**old Act**") observed:

> *"The provisions contained in the Act, of late, have been felt by all concerned; do not adequately protect the interest of the land owners/persons interested in the land. The Act does not provide for rehabilitation of persons displaced from their land although by such compulsory acquisition, their livelihood gets affected. For years, the acquired land remains unused and unutilized. To say the least, the Act has become outdated and needs to be replaced at the earliest by fair, reasonable and rational enactment in tune with the constitutional provisions, particularly, Article 300A of the Constitution".*

Hence, the old Act was replaced and substituted by the new law, i.e. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("**the 2013 Act**") which governs Land Acquisition throughout the country. Clause 18 of the objects of the 2013 Act provides that

> *"The benefits under the new law would be available in all the cases of land acquisition under the Land Acquisition Act, 1894 where award has not been made or possession of land has not been taken".*

Thus, the object of the Act seems to be clear that it will benefit the land owners who are suffering because of the delay on part of the government in providing compensation to the land owners.

RETROSPECTIVE APPLICATION: PROVISIONS UNDER THE 2013 ACT

Section 24(1) of the 2013 Act provides that the Act will not be applicable in cases where an award has been made under section 11 of the old Act. Further, section 24(2) of the 2013 Act starts with a non-obstante clause and provides-

> *"Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:*
>
> *Provided that where an award has been made and compensation in respect of a majority of land holding has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."*

1. *MANU/SC/1288/2011*

Hence, the benefit under the provisions of the 2013 Act as per the above-stated statutory provision is being given in the cases wherein the award has been made under the provisions of the old Act *five years* (5) *or more* prior to the commencement of the 2013 Act (i.e. on or before 01.01.2009) but the compensation has not been paid or the physical possession of the property has not been taken.

In the recent case ***Delhi Development Authority* v. *Sukhbir Singh & Ors*[2],** the Hon'ble Supreme Court has granted the benefit of sec. 24(2) of the 2013 Act to the land owners, as the award under section 11 of the Land Acquisition Act, 1894 was passed in the year **1997,** i.e., prior to 01.01.2009.

The Hon'ble Supreme Court, while deciding above mentioned case, has found that it is squarely covered by the ratio of another Supreme Court judgement, i.e ***Pune Municipal Corporation v. H.M. Solanki*[3]**. In Pune Municipal Corporation case, the date of award passed under section 11 of the Land Acquisiton Act, 1894 was 31.01.2008, i.e. prior to 01.01.2009

Conditions for availing the benefit of section 24(2) of the 2013 was noted in the case of ***Delhi Development Authority***:

1. *Land Acquisition should have been initiated under Land Acquisition Act, 1894;*

2. *Award under Section 11 should have been made 5 years or more prior to the commencement of the 2013 Act, i.e. award should have been made on or before 01.01.2009;*

3. *Physical possession has not been taken or the compensation has not been paid.*

However, the issue which remains contentious is the interpretation of 5 year period, i.e. whether the above-stated provision will benefit the land losers, whose lands have been acquired after 01.01.2009. Till date there is no precedent of any court which provides clarity over this issue.

2. *MANU/SC/0986/2016*
3. *AIR 2014 SC 982*

INTERPRETATION OF THE TERM PERIOD

LIBERAL INTERPRETATION OF 5-YEAR TERM

The Government of India on the basis of the Solicitor General's opinion came out with a circular which clarified the position with respect to interpretation of section 24(2) of the Act. The said circular states that a landowner becomes eligible to the benefit available under sec. 24 (2) of the Act

in cases where the award under section 11 of the 1894 Act is passed after 01.01.2009 *and* the period of 5 years has not lapsed from the date of passing of this award *and* the date of commencement of this Act *and* if the said period of 5 years gets lapsed on any date after the commencement of the Act and the compensation is not paid till such date.

Further the Hon'ble Supreme Court in numerous instances including cases, ***Union of India* v. *Shiv Raj & Ors*[4]**. and ***Ram Kishan & Ors .v. State of Haryana & Ors*[5].** has considered the above said circular of Government of India while deciding the cases. In ***Delhi Development Authority*** case, court while explaining the object of s. 24(2) observed:

> *"The picture that therefore emerges on a reading of Section 24(2) is that the State has no business to expropriate from a citizen his property if an award has been made and the necessary steps to complete acquisition have not been taken for a period of five years or more. These steps include the taking of physical possession of land and payment of compensation. What the legislature is in effect telling the executive is that they ought to have put their house in order and completed the acquisition proceedings within a reasonable time after pronouncement of award. Not having done so even after a leeway of five years is given, would cross the limits of legislative tolerance, after which the whole proceeding would be deemed to have lapsed."*

As per the liberal interpretation and keeping in mind clause 18 of the objects of the 2013 Act, it seems clear

4. *(2014) 6 SCC 564*
5. *(2015) 4 SCC 347*

that the benefit of section 24 (2) must be given to the land loser whose land have been acquired by an award passed under the old Act after 01.01.2009, i.e. within 5 years of the commencement of the 2013 Act.

STRICT INTERPRETATION OF 5 YEAR TERM

In ***M/s Competent Automobiles Limited v. UOI & Ors.***[6] (Civil Appeal No. 5054 of 2008), the apex court observed,

> *"The said award must predate the commencement of the Act i.e. 1-1-2014; by at least five years (or more) i.e. the award must have been passed on or before 1-1-2009…Each and every deeming operation under Section 24(2) requires unambiguously and unvaryingly that a factual conclusion be drawn about the passing of the award under Section 11 of the 1894 Act, on or before 1-1-2009."*

Further, the Hon'ble Supreme Court in case of ***Ratan Singh v. UOI & Ors***[7], reiterated the same.

In case of ***Athena Demwe Power Limited***[8] of the Hon'ble Gauhati High Court while considering the fact that the award in question was passed on 11-5-2012, while possession was taken on 22-6-2012. Thus it does not satisfy the test of sec. 24(2), as the award was made after 01.01.2009. Thus, Court while allowing the appeal on behalf of the appellant-company, on whose behalf, the lands were acquired held that "*this section cannot obviously deal with a situation if the award is passed within five years of the commencement of the Act of 2013*."

However, the question which remains unanswered is the incidence of the said Provision in cases where the award is passed within 5 years of the commencement of the 2013 Act and the possession has not been taken or the compensation for such acquisition has not been paid even after the expiry of 5 year period from passing of such award.

6. AIR 2015 SC 3186
7. Civil Appeal No. 2852 OF 2009
8. W.A. No. 175 of 2015

CONCLUSION

The decisions of the Hon'ble Apex Court cited above have created confusion with regard to applicability of section 24(2) in cases where the award under Sec. 11 of 1894 Act has been passed after 01.01.2009 and the compensation has not been paid even after 5 years.

As per the strict interpretation of the 5 year period, as envisaged under Section 24(2) of the 2013 Act, the land losers whose lands have been acquired by an award passed under the old Act *after* 01.01.2009 and the compensation has not been paid till date shall be kept devoid of the benefits of the 2013 Act, while the same benefit shall be given to the land losers whose lands have been acquired by an award passed under the old Act *on or before* 01.01.2009. It is well settled principle under the law that a beneficial piece of legislation has to be given a liberal interpretation. Hence, there exists a need that the apex court must step in and give a liberal interpretation with regard to interpretation of `5 year period' under section 24(2). Hence, the land losers whose lands have been acquired after 01.01.2009 should be accorded with the benefits under the 2013 Act.

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RIGHT TO BE FORGOTTEN – PREVIEW TO THIS NEW AGE CONCEPT

Harsimran Singh

"THE RIGHT TO SILENCE ON PAST EVENTS IN LIFE THAT ARE NO LONGER OCCURRING"

In simple words, as a concept, the right to be forgotten means allowing individuals to have their information, videos or photographs deleted from certain internet records so that they cannot be found by search engines. This concept has been in existence in the European Union (EU) and Argentina since 2006 and finds its genesis in the principle of determining the development of one's life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past. Under the right to be forgotten, an individual can make a request to search engines like Google, Yahoo and Bing to take down his/her personal details in certain circumstances to prevent access of confidential information by third parties.

There have been reports that owing to practical difficulties in implementation of such a right apart from vagueness in rulings by various courts, this concept has remained in controversy. It was in 2014, when the Court of Justice of the European Union recognized the right to be forgotten as a part of the fundamental right to privacy in the *Google Spain v AEPD and Mario Costeja González* case. In this case the plaintiff sought delinking of search results appearing on Google and the deletion of newspaper articles appearing online with respect to bankruptcy proceedings against him. The Court held that individuals have a right to request search engines to delink information which causes prejudice to them. However, the Court was careful to state *that this right is not absolute and can be applied only when the data becomes 'inadequate, irrelevant, excessive, not kept up to date, or kept for longer than necessary' with respect to the purpose for which it was collected or processed*. Accordingly, the Court directed Google to delink the search results in the instant case. It was further held that the publication of accurate data may be lawful at a given point in time, but in due course, it might become inconsistent with the law.

There are concerns about its impact on the right to freedom of expression, its interaction with the right to privacy, and whether creating a right to be forgotten would decrease the quality of the Internet through censorship and a rewriting of history, and opposing concerns about problems such as revenge porn sites appearing in search engine listings for a person's name, or references to petty crimes committed many years ago indefinitely remaining an unduly prominent part of a person's Internet footprint. The right to be forgotten is distinct from the right to privacy, due to the distinction that the right to privacy constitutes information that is not publicly known, whereas the right to be forgotten involves removing information that was publicly known at a certain time and not allowing third parties to access the information. Limitations of application in a jurisdiction include the inability to require removal of information held by companies outside the jurisdiction. There is no global framework to allow individuals control over their online image[1].

Pursuant to *Google case* (supra), Google created a platform through which an individual can make a request for taking down of or delinking of a specific search result bearing an individual's name. Google evaluates such requests on predetermined criterions to decide (though arguable) whether such information should be taken down or not. As per Google's Transparency Report, Google[2] had received 688,868 requests for the removal of URLs. The Report further states that it has already evaluated 1,905,513 URLs since ruling in *Google case* (supra).

This so called right does not have any legal recognition under various legislations; e.g. the nearest possible statute Information Technology (IT) Act, 2002 or the Rules made thereunder do not envisage this right / concept anywhere.

1. *https://en.wikipedia.org/wiki/Right_to_be_forgotten*
2. *As on 13.02.17-https://www.google.com/transparencyreport/removals/europeprivacy/*

The right / concept came up before consideration in April 2016, where the Hon'ble Delhi High Court began to examine the issue after the petitioner prayed to have his personal details deleted from search engine results following a marital dispute. In this case, due to the dispute being settled, the petitioner's request was found to be valid and the Hon'ble High Court was pleased to direct Google and other search engine companies to file respective replies to the petition, upon which the court could continue to investigate the issue[3].

Recently, Hon'ble High Court of Karnataka in Writ Petition No. 62038 of 2016 (GM-RES) titled ***Vasunathan Vs. The Registrar General, High Court of Karnataka and Ors.*** on 23.01.2017 decided petition involving this concept.

In this case, a father/petitioner filed the petition inter alia seeking directions of the Court to safeguard identity of his daughter who was a party to court cases including quashing of FIR, criminal complaints etc. arising out of matrimonial dispute. The Petitioner contended that the name of his daughter and identity details are indicated in the cause-title to the concerned petition and that it is the apprehension of the petitioner's daughter that if a name-wise search is carried on by any person through any of the internet service providers such as Google and Yahoo, this order may reflect in the results of such a search and therefore, it is the grave apprehension of the petitioner's daughter that if her name should be reflected in such a search by chance on the public domain, it would have repercussions even affecting the relationship with her husband and her reputation that she has in the society and therefore is before this court with a special request that the Registry be directed to mask her name in the cause-title of the order passed in the petition filed by her husband (accused in a disposed-off criminal petition). Further, if her name is reflected anywhere in the body of the order apart from the cause title, the Registry shall take steps to mask her name before releasing the order for the benefit of any such other service provider who may seek a copy of the orders of this court. However, it is made clear that insofar as the High Court website is concerned, there need not be any such steps taken. Therefore, if a certified copy of the order is applied for, the name of the petitioner's daughter would certainly be reflected in the copy of the order. It should be the endeavor of the Registry to ensure that any internet search made in the public domain, ought not to reflect the petitioner's daughter's name in the cause title of the order or in the body of the order of this court in the said concerned disposed-off criminal petition. The Court observed that this plea would be in line with the trend in the western countries where they follow this as a matter of rule "Right to be forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned. Accordingly the Court was pleased to dispose of the petition in favor of the petitioner/father.

It will not be incorrect to state that the concept / right is surely gaining popularity and acceptability through courts of law. Further road ahead … time will only tell

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3. *(Laksh Vir Singh Yadav vs. Union of India, WP(C) 1021/2016) - No further details could be found in public domain.*

PRICE FIXATION OF DRUGS – COMPANY-WISE MAT VIS-À-VIS INDIVIDUAL DRUG-WISE MAT

Rajdutt S Singh

The calculation methodology of the fixation of price for drugs is a complicated one and recently we have come across yet another case of using incorrect methodology for price fixation of scheduled formulation by National Pharmaceutical Pricing Authority ("***NPPA***"). In this case, while entertaining review application under Para 31[1] of the Drugs (Prices Control) Order, 2013 ("***DPCO***"), the Department of Pharmaceutical ("***DoP***") held that NPPA has erred in taking the company-wise percentage of moving annual turnover ("***MAT***").

M/s Sun Pharmaceuticals Industries Ltd. ("***Petitioner***") filed a petition under Para 31 of the DPCO against notification S.O. No.1686(E) dated 09.05.2016 ("***NPPA Order***") issued by NPPA for fixing the ceiling price of "Ciprofloxacin 500 mg tablet" and "Ciprofloxacin 250 mg tablet".

1. *Para 31: Power to review.– Any person aggrieved by any notification issued or order made under paragraphs 4, 5 and 6 of this Order, may apply to the Government for a review of the notification or order within a period of thirty days of the date of publication of the notification in the Official Gazette or the receipt of the order by him, as the case may be, and the Government may make such order on the application as it may deem proper…"*

Para 4: Calculation of ceiling price of a scheduled formulation.– (1) The ceiling price of a scheduled formulation of specified strengths and dosages as specified under the first schedule shall be calculated as under:
Step1. First the Average Price to Retailer of the scheduled formulation i.e. P(s) shall be calculated as below:
Average Price to Retailer, P(s) = (Sum of prices to retailer of all the brands and generic versions of the medicine having market share more than or equal to one percent of the total market turnover on the basis of moving annual turnover of that medicine) / (Total number of such brands and generic versions of the medicine having market share more than or equal to one percent of total market turnover on the basis of moving annual turnover for that medicine.)

Step2. Thereafter, the ceiling price of the scheduled formulation i.e. P(c) shall be calculated as below:
P(c) = P(s).(1+M/100), where
P(s) = Average Price to Retailer for the same strength and dosage of the medicine as calculated in step1 above.
M = % Margin to retailer and its value =16

Succinctly, NPPA is empowered to fix/regulate the prices of drugs under the DPCO. Drugs are mainly divided under 2 categories (i.e. Scheduled Formulations and Non Scheduled Formulations). Scheduled Formulation means any formulation, included in the First Schedule (Schedule appended to the DPCO) whether referred to by generic versions or brand name. On the other hand, Non Scheduled formulation is defined as a formulation, the dosage and strengths of which are not specified in the First Schedule. The DPCO mandates that NPPA has to follow the methodology provided under Para 4 (1) of the DPCO.

NPPA vide its Order dated 9.05.2016 fixed the prices of the aforesaid Formulations of the Petitioner and being aggrieved by the NPPA Order, the Petitioner challenged the NPPA Order. The Petitioner *inter alia* contended that

(i) the working sheet showing calculation of ceiling price displayed on the website of NPPA was not correct;

(ii) certain packs, having 1% Market Share or above (which were considered in calculating ceiling price of the Petitioner's aforesaid Formulations) should not have been included, as either they were Innovative tablets like Once a Day Extended Release Tablets or they were discontinued/seem to be discontinued; and

(iii) Petitioner's other formulations' prices were wrongly clubbed by NTPA with plain ciprofloxacin 500 mg tablets.

On the other hand, NPPA contended *inter alia* that DPCO does not distinguish common and innovative category for the aforesaid Petitioner's formulations. Further, while fixing the ceiling price of ciprofloxacin tablet 500 mg, all variants of the tablet have been taken into account.

The DoP observed that:

- NPPA has erred in taking the company-wise percentage of MAT instead of individual brand

and generic versions-wise MAT (having market share of more than 1%).

- This is in gross violation of Para 4(i) of the DPCO, 2013, which gives the methodology of calculating the ceiling prices of Scheduled formulations.
- Para 4 (i) of the DPCO does not provide for calculating the ceiling prices of company-wise MAT percentages, but on individual brand and generic versions having market share of more than 1%.

Thus, the DoP directed NPPA to adopt the correct methodology in all such cases of calculating the ceiling price of scheduled formulations as per Para 4(i) of DPCO and provisions of the First Schedule by including market shares of only generic/brands and not company-wise MAT percentage and to re-fix the ceiling prices of Petitioner's aforesaid drugs.

The DoP also directed NPPA to comply with the provisions of First Schedule as per which the formulations developed through incremental innovation or novel drug delivery systems like lipid/ liposomal formulations, sustained release/controlled release etc. should be considered as included only if specified in the list against any medicine.

CONCLUSION

NPPA has to follow the methodology provided under Para 4 (1) of the DPCO for fixation of prices of Scheduled Formulations. Further, in case NPPA does not follow the said methodology, the same may be challenged by an aggrieved party by filing an application under Para 31 of the DPCO. Further, NPPA has to keep in view the First Schedule while taking into account the innovative drugs for calculation of ceiling price of a scheduled formulation having same strengths and dosages.

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CONTESTING GRANT OF A PATENT AT THE PATENT OFFICE BY WAY OF OPPOSITIONS

Shrimant Singh

A patent being an exclusive monopolistic right over a technology given to an individual, care of a high degree is warranted towards the examination and grant of such monopolistic right. The Patents Act, 1970 ("the Act") clearly prescribes what is an "invention" under Section 2(1)(j) and what are not inventions hence not patentable as per Sections 3 and 4. While the Examiners and Controllers examine an application for patent as per the qualifications or tests provided under the Act, the other parties are also enabled under the law to represent and oppose to grant of an application for patent.

Under the Patents Act, there are two stages at which the grant of a patent can be opposed, namely, pre-grant opposition and post-grant opposition.

Pre-Grant Opposition: Section 25(1) of the Act stipulates that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground—

(a) that the applicant has wrongfully obtained the invention;

(b) that the invention as claimed has been published before the priority date of the claim;

(c) that the invention as claimed is already claimed in an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

(d) that the invention as claimed was publicly known or publicly used in India before the priority date of the claim;

(e) that the invention as claimed is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

(f) that the claim cannot be regarded as an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose the information required by Section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a convention application, the application was not made within twelve months from the date of the first application in a convention country;

(j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the claimed invention is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Rule 55 of the Patents Rules, 2003, **("the Rules")** prescribes the process involved in the pre-grant opposition proceedings. The main provisions relating to initiating or defending the pre-grant opposition are:

i A "representation" for opposition shall be filed on Form 7(A) provided in Schedule II of the Rules, at the appropriate office with a copy to the applicant. The same shall include a statement and evidence in support of the representation and a request for hearing, if so desired by the opponent.

ii Such representation shall be considered by the Controller only when a request for examination of the application has been filed.

iii On consideration of the representation, if the Controller is of the opinion that application for patent shall be refused or the complete specification requires amendment(s), he shall give a notice to the applicant to that effect.

iv On receiving the notice under sub-rule (3), the applicant shall, if he so desires, file his statement and evidence, if any, in support of his application within three months from the date of the notice and shall also serve a copy of the same to the opponent.

v On consideration of the statement and evidence filed by the applicant, the Controller may either refuse to grant a patent on the application or require the complete specification to be amended to his satisfaction before the patent is granted.

<u>Post Grant Opposition</u>: Section 25(2) provides that after grant of a patent but before the expiry of a period of one year from the date of publication of the grant, any person interested may give notice of opposition to the Controller in the prescribed manner on the grounds as mentioned under the said provision. The grounds prescribed under Section 25(2) for post-grant opposition are the same as that in a pre-grant opposition.

Further, the Act under Section 25(2) and 25(3) provides for "*constitution of Opposition Board*" and "*upon receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, the Controller shall order either to maintain or to amend or to revoke the patent*" respectively. Rule 55A of the Patents Rules, 2003, prescribes that notice of opposition under Section 25(2) shall be filed at the Patent Office on Form 7 given in Schedule II of the Rules.

The procedure regarding constitution of the Opposition Board and its proceedings along with the steps involved in the post-grant opposition proceedings are given under Rules 56 to 62. To put the procedural steps briefly:

<u>Rule 56</u> empowers the Controller to constitute the Opposition Board comprising of three members as prescribed under the sub-rules and the notice of opposition along with documents filed therewith are examined by the Board and a joint recommendation is to be given within three months from the date on which notice of opposition and documents were forwarded to them.

<u>Rule 57</u> stipulates that the Opponent, along with his notice, needs to send a written statement comprising nature of his interest, the facts of the case, evidence, and relief which he seeks, further, a copy shall be served to the Patentee.

<u>Rule 58</u> provides that a reply statement and evidence, if any, by the Patentee shall be filed at the IPO along with serving a copy to the Opponent, within two months from the date of receipt of written submission. In case the Patentee chooses not to reply to the opposition or fails to reply within said two months, the patent is deemed to be revoked.

Further, under **<u>Rule 59</u>,** the Opponent may within one month from the receipt of Patentee's reply file at the IPO along with serving a copy to Patentee, further evidence strictly confined to the matters in the Patentee's evidence.

Subsequent to completion of evidence and upon receiving recommendation of the Opposition Board, **<u>Rule 62</u>** enables that the Controller, subject to the formal request(s) along with prescribed official fee, to appoint a hearing of the opposition and may require the members of the Board to be present in such a hearing. Finally, after duly hearing the parties desirous of being heard and considering the recommendation by the Opposition Board, the Controller shall decide the opposition and notify his reasoned order/decision to the parties.

Accordingly, the enabling Section 25 of Act and corresponding Rules, specifically prescribe as to how to file opposition against grant of a patent and steps which shall be followed during the opposition proceedings. Apart from the literal difference in time to oppose [i.e., before or after grant], there are other salient differences which shall be kept in mind by both the parties - Opponent and the Applicant/Patentee:

1. **Who can file the opposition:** While pre-grant opposition can be filed by any person, the post-grant opposition can be filed by a <u>person interested</u>. It is pertinent to note that the Act, under Section 2(1)(t) also defines *"person interested"* as a person engaged in, or in promoting, research in the same field as that to which the invention relates. Therefore, an additional qualification is placed under the post-grant opposition, that the Opponent needs to satisfy/establish before the Controller or Opposition Board that it is a person interested within the meaning of the Act.

2. **When to file and procedural timelines**: While a pre-grant opposition can be filed at any time after publication of the application till the grant of patent, a post-grant opposition shall be filed within one year from the date of publication of the grant of patent. Further, a pre-grant opposition along with evidences, etc. is to be considered by the Controller only after request for examination has been filed in an application for patent, whereas the post-grant opposition is carried out as per the procedure and timeline prescribed under Rules 56 – 62 as detailed above.

3. **Filing of reply evidence by Opponent:** In a post-grant opposition, the Opponent is given an additional opportunity to submit evidence in reply to evidence of the Patentee, whereas, in pre-grant the opponent needs to furnish all evidence and also request for hearing if desired at the first instance itself, i.e., along with its notice of opposition.

4. **Opposition Board:** There is a specific provision of constitution of the Opposition Board under post-grant opposition proceedings and the recommendation of the Board is to be taken under consideration by the Controller. The same is not the case with respect to the pre-grant opposition.

5. **Hearings:** How the hearing is to be conducted during a post-grant opposition is specifically prescribed under Rule 62, however, with respect to pre-grant opposition no such provisions are laid out.

While one cannot take sides as to the most effective way to contest the grant of a patent, nevertheless, it is advisable not to leave out an opportunity to oppose by way of pre-grant opposition and to represent the case strongly at the first instance itself, that too when the application is pending consideration before the Examiner and the Controller.

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ENTITLEMENT TO APPLY FOR AND BE GRANTED A PATENT

Suchi Rai

WHO IN INDIAN LAW IS ENTITLED TO APPLY FOR A PATENT?

In India the person eligible to file for a Patent is the "true and first" inventor of the invention. An assignee of the "true and first" inventor or legal representative of the deceased person who before his death was entitled to make such an application are also eligible to apply for patent based on the supportive documentation respectively.

ENTITLEMENT TO FILE

[1]Section 6 of Patents Act, 1970 provides the eligibility criteria for person filing Patent Application in India.

Any person claiming to be the true and first inventor of the invention has the right to file a patent application in India. Also an assignee with rights in invention has the eligibility to file for patent in India provided, the requirement under [2]Section 7 of Patents Act, 1970 to submit the Proof of Right is duly met. Further where an application for patent is made by an assignee, there needs to be submitted a declaration mentioning the name of inventor(s) claiming to be the true and first inventor(s).

Both Section 6 and 7 of Patents Act, 1970 mention that the person entitled to apply for a patent shall be the "true and first" inventor of the invention.

As per the law, the rights to file for patent are with the genuine inventors of the invention. Inventor(s) themselves or by assigning their rights in an invention can file a Patent Application.

In a scenario, where two inventors work on the same inventive concept separately and either of them first files a patent application, provisional or complete gets the priority under Indian Patent Law. In this situation both the inventors are genuine, working independently on the concept, however one of them gets the priority by filing the patent application first.

In this situation, both the inventors are genuine and as per their awareness both of them are the first filers considering the fact that the patent application already filed may not have been published till the time the other inventor files for patent.

FIRST FILING

[3]As per Section 13 of Patents Act, 1970, the patent application filed first on an inventive concept gets the priority and the application filed thereafter are

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1 Section 6 in The Patents Act, 1970:
Persons entitled to apply for patents. -
(1) Subject to the provisions contained in section 134, an application for a patent for an invention may be made by any of the following persons, that is to say,-
(a) by any person claiming to be the true and first inventor of the invention;
(b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application;
(c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.
(2) An application under sub-section (1) may be made by any of the persons referred to therein either alone or jointly with any other person.

2 Section 7 in The Patents Act, 1970
Form of application. -
(2) Where the application is made by virtue of an assignment of the right to apply for a patent for the invention, there shall be furnished with the application, or within such period as may be prescribed after the filing of the application, proof of the right to make the application.
(3) Every application under this section shall state that the applicant is in possession of the invention and shall name the person claiming to be the true and first inventor; and where the person so claiming is not the applicant or one of the applicants, the application shall contain a declaration that the applicant believes the person so named to be the true and first inventor.

3 Section 13 in The Patents Act, 1970
Search for anticipation by previous publication and by prior claim.-
(1) The examiner to whom an application for a patent is referred under section 12 shall make investigation for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification-
(a) has been anticipated by publication before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in India and dated on or after the 1st day of January, 1912;

considered anticipated in the law. When two inventors file patent application on the same inventive concept, then as per Section 13 of Patents Act, 1970 the application filed first will get the priority and the other application will be considered as anticipated even if the first filed patent application was not published by Indian Patent Office before the filing date of second filed patent application.

[4]Further, Section 25 of Patents Act, 1970 has the provision of opposing the Patent/application on the ground that the invention was already claimed in a specification which was filed earlier then the patent application which claims the same subject matter and filed later on.

Both Section 13 and Section 25 support the provision of first filing.

"WRONGFUL OBTAINING" OF INVENTION

In a situation where the genuine inventor is robbed of his right to file the patent application in India, he has the remedy in Indian Patents Law to prevent others from having a patent grant and protecting his rights in the invention. In this scenario, complete data of research for invention and other relevant evidences can be submitted to protect the rights in the invention for genuine inventor.

[5]Section 25 of the Patents Act has the provision to oppose a patent/application on the ground that the invention was wrongfully obtained from the genuine inventor.

Further a revocation application[6] can be filed by any interested person on the ground of wrongful obtaining of the patent.

Concluding the above, the true and first inventor is entitled to apply for and be granted a patent. The inventor has to be both true and first for obtaining the rights under the Patent Law. Also, there are provisions to protect the rights of genuine inventors in the cases where there has been wrongful obtaining of the invention.

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(b) is claimed in any claim of any other complete specification published on or after the date of filing of the applicant's complete specification, being a specification filed in pursuance of an application for a patent made in India and dated before or claiming the priority date earlier than that date.

4 Section 25 in The Patents Act, 1970
Opposition to the patent. -
(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

5 Section 25(1)(a) in The Patents Act, 1970
Opposition to the patent. -
(1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground-
(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

6 Section 64(1)(c) in The Patents Act, 1970
Revocation of patents. -
(1) Subject to the provisions contained in this Act, a patent, whether granted before or after the commencement of this Act, may, [be revoked on a petition of any person interested or of the Central Government by the Appellate Board or on a counter-claim in a suit for infringement of the patent by the High Court] on any of the following grounds that is to say-
(c) that the patent was obtained wrongfully in contravention of the rights of the petitioner or any person under or through whom he claims;

Singh & Associates
Founder - Manoj K. Singh
Advocates & Solicitors

IPO REJECTS PATENT APPLICATION FOR XTANDI (PROSTRATE CANCER DRUG)

Saipriya Balasubramanian

INTRODUCTION

The Indian Patent Office in its order issued on 18th November 2016[1], has denied a patent for the prostate cancer drug sold under the brand name Xtandi (generic name Enzalutamide). Xtandi was developed at the University of California, Los Angeles (UCLA) (***Applicant***) for fighting prostate cancer which is commercially sold in India by ASTELLAS PHARMA. The drug is currently sold at Rs 3.35 lakh[2] for a pack of 112 capsules normally to be taken by a patient in a month's time, accordingly, which amounts to Rs.11,000 approximately per day.

The provision of pre-grant opposition under Indian Patents Act enables any person to file notice of opposition on Form 7A at the Indian Patent Office (IPO) after the publication of an application for patent. Therefore, by way of pre-grant oppositions any person can assist the Controller of Patents in evaluating the application for patent. IPO has seen a surge of pre-grant opposition, especially in pharmaceutical applications and the said application as scrutinized in detail because of the same. IPO is often regarded as being stringent on allowing grant of patent on drug compositions. The TRIPS agreement[3] contains flexibilities that were enhanced and clarified during the 2001 Doha Declaration on TRIPS and Public Health. The said agreement states, for instance, that for pharmaceutical patents, there is a flexibility to interpret and implement TRIPS provisions in a manner supportive of the government's right to protect public health.

1. *http://ipindiaservices.gov.in/decision/9668-DELNP-2007-24746/9668delnp2007.pdf*
2. *http://keionline.org/node/2662*
3. *http://www.firstpost.com/world/india-at-wto-takes-strong-stand-to-save-generic-drugs-industry-calls-for-transparent-health-assessment-of-trade-deals-3102716.*

Coming back to the instant case of Xtandi, the pre-grant oppositions was filed by a bunch of companies, including, Fresenius Kabi Oncology (***Opponent 1***), BDR Pharma (***Opponent 2***) and Indian Pharmaceutical Alliance (***Opponent 4***) as well as individuals: Mr.Umesh Shah (***Opponent 3***) and Ms. Sheela Pawar(***Opponent 5***). The main grounds of opposition were lack of novelty, lack of inventive step, and that the claimed compound did not constitute an invention under Section 3(d) *relating discovery of new form of known compound and with efficacy test* and Section 3(e) *relating to mere admixture resulting in aggregation of properties of compounds* of the Patents Act, 1970.

THE APPLICATION

The present application relates to diarylhydantoin compounds including diarylthiohydantoins and methods for synthesizing them. The claimed compounds of the said application are used for the treatment of hormone refractory prostrate cancer. The application was initially filed as PCT national phase with 46 claims. In the reply to FER the claims were reduced to 15 and further the Applicant retained only 3 claims pursuant to an official hearing with the Controller of Patents.

GROUNDS OF OPPOSITION AND PRIOR ART RELIED ON

Following are the grounds and the documents relied on by the opponents:

S. No.	Sections	Documents Cited	Comments
1	Section 25(1)(b)- Lack of Novelty	US5411981 (US'981) US6087509(US'509) 2440/DEL/1996 US 5434176(US'176) US 5750553(US'553)	=> US'981 already disclosed Enzalutamide; US'509 disclosed a family of compounds phenyl, phenylimidazolidines represented by a Markush structure including the compound claimed in the present invention. US'509 also disclosed the use of compounds for anti-androgenic activity useful against tumors.
2	Section 25(1)(e)- Lack of Inventive step	US5411981(US'981) US6518257(US'257) US46366505(US'505) US4097578(US'578) US5705654(US'654) US6087509(US'509)	=> Obvious selection of cyano group, CF3(Trifluoromethyl), fluoro-N-Methylbenzamide (or aryl substituted with fluoro and methylcarbamoyl) groups from the generic disclosure of US'981, US'257 and US'505 => Formation of imidazolidine ring already a known process in view of US'578 =>US'509 disclosed compounds which are similar to enzalutamide maintain the same hydantonin moiety attached to a phenyl ring further substituted by a cyano and a trifluoromethyl group.
3	Section 25(1)(f) Not an invention u/s 3(d) Not an invention u/s 3(e)	US4511981(US'981)	=> US'981 disclosed compounds which are structurally similar to Enzalutamide. Therefore, enzalutamide is a derivative of the known compounds of US'981. => The compounds claimed in claims 3-12 of the present application is a mere admixture of the compounds Enzalutamide as claimed in claim 1 and there is no demonstrated synergy in the present application.
4	Section 25(1)(g)- Lack of clarity and Sufficiency		=> Best mode of performing the invention is not mentioned. => Markush structure mentioned in the specification of present application encompasses several diaryl hydantonin compounds => Superiority of compound RD162' is not demonstrated in the specification.
5	Section 25(1)(h)- Section 8 requirement not completed		The details with respect to all the foreign applications in respect of the same/substantially same invention were not disclosed completely in accordance with the requirement of Section 8(1) and (2) of the Act.

APPLICANT'S ARGUMENTS:

- With regards to lack of novelty, the applicant submitted that the cited prior art documents do not disclose any diaryl compound or any other compound that is even closer to the structure of Enzalutamide.
- With regards to lack of inventive step, the applicant submitted that citation US'981 does not talk about methylcarbamyl group and that US'981 suggests acetamido group which is different than the methylcarbamoyl group. The Applicant further submitted that the compounds disclosed or taught under the cited documents are structurally dissimilar and have dissimilar modes of action and therefore the said documents fail to guide the person skilled in the art to perform the present invention as envisaged in the present patent application.
- With regard to Section 3(d), the Applicant submitted that Enzalutamide the claimed compound is a new Chemical Entity (NCE) and the same is not a salt, ester, ether, polymorph, derivative, etc. of a known substance. Therefore, Enzalutamide cannot be regarded as the known substance under Section 3(d).
- With regard to Section 3(e), the Applicant submitted that the revised claims disclose a novel diaryl thiohydathoin compound, Enzalutamide, a new chemical entity and therefore the combinations of Enzalutamide would be new and inventive which cannot be considered as an aggregation of the known properties of the components.

In response to ground of lack of clarity and sufficiency as per Section 25(1)(g), the Applicant submitted that the present invention is sufficiently disclosed to the fullest extent with sufficient working examples, synthetic schemes and test procedures to determine the biological activity of the disclosed compounds. RD162 is specifically disclosed as Example 56 in the complete specification. In response to ground of non-compliance with Section 8, the Applicant submitted that, the information related to the corresponding foreign patent applications has been submitted to the Learned Controller at regular intervals, therefore the Applicant pleaded to dismiss the aforesaid ground of opposition.

SECTION 25(1)(B)

The Controller observed that none of the documents cited by the Opponents specifically disclosed the structure of the compound as claimed in the present application either by the way of claim or as an example. The claimed compound can only be arrived by suitable substitutions of different R group and X,Y,A,B etc. The Controller further pointed that to arrive at the structure of Enzalutamide, a person has to pick some suitable substituents from the definition given in markush structure as given in prior art and hence picking and putting is not allowable in ascertaining the novelty of the claimed invention. Therefore, the Controller dismissed the ground, reasoning that the claimed compound is novel and not anticipated in view of the cited prior art documents.

SECTION 25(1)(E)

The Controller observed that US'981 clearly mentioned that even moderately sized groups are not favored at ortho and meta position of the aryl ring. That leads to the only option is halogens out of the disclosure given in US'981 at this position. The Controller further mentioned that the applicant has failed to show in their application that fluoro substitution has any effect on the activity and there is no difference in activity of RD153 and compound that doesn't have fluoro substitution at this position and Enzalutamide. Also, the fluoro-N-Methylbenzamide moiety is clearly in the prior art US'257. Further, the formation of imidazolidine ring was already known in the art in view of US'578. Hence, the Controller stated that the claimed invention lacked inventive step in vide of US'981 in combination with US'257 and US'578.

SECTION 25(1)(F)

As the claimed compound Enzalutamide lacks novelty and inventive step due to the aforementioned reasons, the applicant's claim that the compound is a new chemical entity was denied by the Controller. Further the applicant failed to demonstrate an improvement in efficacy thereby making the claim unpatentable under section 3(d) of the Act.

The Controller further stated that the applicant in the present invention failed to show any synergistic effect when the compound Enzalutamide is used as a composition. Hence, the Controller accepted the opponent's objection to the application under to Section 3(e) of the Act.

SECTION 25(1)(G)

The Controller refused the ground of opposition for lack of sufficiency as the specification fully and sufficiently describes the claimed invention. Enzalutamide (RD 162') is specifically disclosed as Example 56 in the complete specification and its process for preparation is also disclosed.

SECTION 25(1)(H)

The Controller stated that the requirement of Section 8(1) and 8(2) was complied on different dates by filing the information regarding corresponding applications in other jurisdictions. Therefore, in view of the aforestated, the Controller dismissed the ground stated under section 8.

CONCLUSION

The Controller in his decision, refused to grant patent over Xtandi, as the claimed invention lacked inventive step under section 2(1)(ja) and is not patentable as the claims falls under Section 3(d) and 3(e) of the Patents Act, 1970.

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PREDATORY PRICING: A BRIEF SYNOPSIS ON THE INDIAN TELECOM SECTOR

Himanshu Sharma & Martand Nemana

INTRODUCTION

Predatory pricing poses a dilemma that has perplexed and intrigued the antitrust community for many years. On the one hand, history and economic theory teach that predatory pricing can be an instrument of abuse, but on the other side, price reductions are the hallmark of competition, and the tangible benefit that consumers perhaps most desire from the economic system[1].

As the name suggests, Predatory pricing is the practice of pricing of goods or services at such a low level that other firms cannot compete and are forced to leave the market. Thought this practice was mostly used by the Government agencies to put a check on the unlawful activities and control monopolies of the agencies, it acted as a redressal mechanism rather than a threat to the equality and freedom as promised under the law.

The Competition Act, 2002 outlaws predatory pricing, treating it as an abuse of dominant position, prohibited under Section 4. Predatory pricing under the Act means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors. Predatory pricing is pricing one's goods below the production cost, so that the other players in the market, who aren't dominant, cannot compete with the price of the dominant player and will have to leave the market. The CCI in In ***Re: Johnson And Johnson Ltd***[2]. said that "*the essence of predatory pricing is pricing below one's cost with a view to eliminating a rival.*"

ROLE OF COMPETITORS IN PREDATORY PRICING

When a single entity in the market rises almost instantaneously, it is mostly because of the abuse of dominant position and predatory pricing which follows. These two principles are seen to intertwine to form a bridge between legal and economic boundaries, and overlap over the existing players in the market. Such activities are basically found to be illegal, however it is just one of the many most frequently used ways in which that enterprise or group may abuse its position of dominance.

Predatory Pricing is mostly dependent upon the use/misuse of dominant position. As per the Section 4(2) of the Competition Act, 2002 dominant position has been described as:

"*DOMINANT POSITION*" means a position of strength, enjoyed by an enterprise, in the relevant market, in Bohemia, which enables it to-

i Operate independently of competitive forces prevailing in the relevant market; or

ii Affect its consumers or competitors or the relevant market in its favour;

For an entity to attain a dominant, position it is important that the entity has control and has the influence to affect the relevant sector of market to the tune of 50 per cent or more, provided that the other rival players hold a much less share in the active market. Though the economic strength of the entity does play a vital role, however, conditions like the presence of other players in the relevant section of the industry/market plays an important role in ascertaining whether the entity is capable of exercising a dominant position.

Michael E. Porter of the Harvard Business School[3] developed an analysis of the name Porter's 5 forces, which shows that the five conditions mentioned below are prerequisite to show abuse of dominance:

The bargaining power of customers (buyers)

The threat of the entry of new competitors

1. *PREDATORY PRICING:STRATEGIC THEORY AND LEGAL POLICY - Patrick Bolton, Joseph F. Brodley and Michael H. Riordan*
2. *In Re: Johnson And Johnson Ltd., (1988) 64 Comp Cas 394 NULL*
3. *Michael E. Porter, The Five Competitive Forces that Shape Strategy, Harvard Business Review 86 (1979)*

The bargaining power of suppliers

The threat of substitute products or services

The intensity of competitive rivalry

In Hoffmann-La Roche & Co. AG v Commission of the European Communities the concept of 'abuse of dominant position' has been defined as:

> *"The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."*

Though it has been repeately iterated, but being in a dominant is not illegal per-se. Further, "Abuse" is an objective term and it comprises every conduct which might adversely affect the structure of a market in which competition is weakened. Hence, the being on a entity in a business in a dominant position is not illegal but the misuse of such dominant position is illegal. The position of the company has also been laid down in Section 2 of the Sherman Act, 1860 and under Art 82 of the EC Competition Law. Predatory pricing by such an enterprise which spans enough business to be classified as a dominant player, can be one such abuse.

LEGAL REMEDIES AGAINST PREDATORY PRICING

To ensure a healthy competition in the market amongst the players the Competition Act, 2002, has been introduced in replacement of the Monopolies and Restrictive Trade Practices Act, 1969, seeks to ensure the welfare of the consumers. Upon realizing the risk and challenges posed by predatory pricing, which mostly a clear abuse of the 'dominant position' in the market, which per-se is illegal; the dealings of predatory pricing in India, as expressed under the Competition Act, 2002, have been borrowed from the English Competition Act, 1998 and the Clayton Anti-Trust Act, 1914. The provision reads as below:

Section 4(2) (a) of the *Competition Act, 2002* states that: There shall be an abuse of dominant position under Sub-section (1), if an enterprise,-

(a) directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service. Explanation.- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in Sub-clause

For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition

As per explanation (b) at the end of Section 4 predatory pricing refers to a practice of driving rivals out of business by selling at a price below the cost of production[4]. Denial of market access briefly referred to in this section, if read conjunctively, is expressly prohibited under Section 4 (2) (c) of the Competition Act, 2002.

The Section 4 of the Competition Act, 2002 corresponds to Clause 4 of the Notes in clauses of the Competition Bill, 2001 which reads as follows:

> *This clause prohibits abuse of dominant position by any enterprise. Such abuse of dominant position, inter alia, includes imposition, either directly or indirectly, or unfair or discriminatory purchase or selling prices or conditions, including predatory prices of goods or services, indulging in practices resulting in denial of market access, making the conclusion of contracts subject to acceptance by other parties or supplementary*

4. *Hovenkamp, H., Federal Antitrust Policy-The Law of Competition and its Practice 339 (3rd ed., 2005)*

obligations and using dominant position in one market to enter into or protect other market[5].

However, in 2007, Section 4 of the Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007. The objects and reasons of such amendment were given in the Notes on clauses of the Competition (Amendment) Bill, 2007 which says that: This clause seeks to amend Section 4 of the Competition Act, 2002 relating to abuse of dominant position. The existing provisions of Section 4 apply only to an enterprise and not to the group of enterprises. Clause (c) of Sub-section (2) of Section 4 states that there shall be an abuse of dominant position if an enterprise indulges in practice or practices resulting in denial of market access.

CASE STUDY

The Indian Telecom in the past 6 months has witnessed a turmoil, which was caused by a new entrant in the telecom market by the name of "Jio", a product of the conglomerate of Reliance Group of Industries. The services under the offer which was first launched as an "employee-only" offer (i.e. Unlimited Calling for life and Unlimited Data Benefit) were made open to the general public which resulted in the torrent and surge of the masses to avail the proposed benefits. From what was already prognosticated not only did the move trigger profusion of clientele, but also instilled the rivals with a sense of fierce competition.

This further resulted in multifold reduction in the prices of the services of all other leading service providers which then painted this insurgence of competition as an act of intentional sabotage. Though the allegations can't be discarded as foul cry, but the consumer centric market has welcomed the new entrant and the competition with open hands which further makes it difficult for others to form a basis of competition.

Predatory pricing, as the name suggests, is the pricing of goods or services at such a low level that other firms cannot compete and are forced to leave the market. Thought this practice was mostly used by the government agencies to put a check on the unlawful activities and control monopolies of the agencies, it acted as a redressal mechanism rather than a threat to the equality and freedom as promised under the law.

5. *H.K. Saharay, Textbook on Competition Law, (1st ed., 2012)*

WHETHER CASE STUDY FITS INTO THE DEFINITION OF PREDATORY PRICING

Concentration of the power has time and again been proven to be the least effective remedy to prevent it from falling into the hands of the undeserving. In a scenario where development and business economy form two different sides of the coin, money always changes the equation and the outcome goes for a toss. Despite repeated denials by the Reliance Group of Industries about the "Predatory Pricing" & being a dominant player in the market, the conglomerate has surely affected the Indian telecom sector and the major players, left right and centre; it would be worth waiting to understand the course of events which follow. However, at present, given the illustrious reputation and the sky rocketing user base, coupled with throw away prices breaking the market stereotype of telecom sector

LEGAL PRECEDENTS

The most valuable observation relating to predatory pricing and abuse of dominance was made by Lord Denning, M.R. in Registrar of ***Restrictive Trading Agreements v. W.H Smith & Son Ltd***[6]., while construing the English Law in Restrictive Trade Practices Act, 1965 that there was a time when traders used to join hands, and combine, so as to keep the trade all for themselves, so that prices can be decided according to them, because of the monopoly. This also lead to the shutting down of all new entrants who might cut prices or even produce and sell better quality goods. Therefore, the Parliament had to step in, both for the benefit of the new entrants and the consumers, and had to hold these trade practices void unless they were done in the interest of public. Therefore, the law made any such agreement void and also asked the traders to get all their trade practices registered. However, Lord Denning observes that the traders who combined did not tell the law about it, and it was done in dark; without the law or the consumers knowing about it. Neither putting such agreement in writing, nor words were required, "a wink or a nod was enough" for them to combine and turn the whole market into a monopoly and control everything in it. Therefore, the Parliament came up with another law to get rid of these practices, and so, it included not only agreements but also arrangements to keep the predatory pricing in control. This

6. *Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd., (1969) 3 All ER 1065*

observation by Lord Denning was aptly discussed when Parliament of India amended Section 4 of the Competition Act, 2002 by the Competition (Amendment) Act, 2007 and is also reflected in the amendment.

In ***MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd***[7], the CCI while laying down the test for predatory pricing said that

> *"before a predatory pricing violation is found, it must be demonstrated that there has been a specific incidence of under-pricing and that the scheme of predatory pricing makes economic sense. The size of Defendant's market share and the trend may be relevant in determining the ease with which he may drive out a competitor through alleged predatory pricing scheme-but it does not, standing alone, allow a presumption that this can occur. To achieve the recoupment requirement of a predatory pricing claim, a claimant must meet a two-prong test: first, a claimant must demonstrate that the scheme could actually drive the competitor out of the market; second, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market."*

CONCLUSION

Market has always been a consumer centric business model which harnesses the potential of the players in a fair and healthy competitive environment. Amongst many other challenges present, the most important is to abolish the system of concentration of power. As essential it is for the consumer to derive the value for money for the goods they want, it is equally important that the companies have a fair playing ground to establish themselves as a reliable and trustworthy entity.

Whilst all the competitors in the market have diverse backgrounds and economic portfolios, it should be understood that principles of fairness apply to each of them individually. Predatory Pricing may, in some cases, be implemented and considered as a check by the Govt agencies to rule out unlawful market entities or business practices. Interestingly, given the developing affairs of the Indian Economy, the market is often vulnerable to new entrants who struggle to establish themselves, however, the same doesn't seem to be the case with "Jio" , a part of the conglomerate of the Reliance Group of Industries. Though what may have been appearing as an act of predatory pricing, as has been accused by the other major players in the relevant market sector, it shall be interesting to watch what the course of action which further go on in the sectors of telecommunications in India.

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7. *MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd , 2011 Comp LR 0129 (CCI)*

IP ENVIRONMENT IN INDIA - AN INSIGHT OF OPPORTUNITIES AND THREATS

Monika Shailesh

India is believed to have an incredible potential to become one of the world's leading markets and hub for the innovation, research and development. Intellectual property industry is assessed to have a huge growth potential in the current Indian and Global context. Intellectual Property Rights (IPRs) unarguably are emerging as a strategic business tool for any business organization to enhance its competitiveness. India has proven its endurance by not only withstanding the global economic slowdown but also emerged as one of the fastest growing economy across the globe. Over the last few years, with slogans like "Creative India: Innovative India"–"Make in India" the Government of India has been trying to position itself to be a pro-IP, knowledge-driven economy capable of competing with developed and developing countries in protecting and promoting innovation and other IPR in an array of industries. Lately, we have seen a paradigm shift towards high quality and value added ideas and innovations. Intellectual Property provides exclusive rights to the inventors or the manufacturer of the respective IP Property which in turns enables them to reap out the commercial benefits from the innovative idea or design. IPR provides some kind of granted monopoly and this is the main cause that inspires innovators to come up with innovations and new ideas. IPR also provides an added advantage of safety from the competitors.

Comprehending that invention is the engine for the growth of affluence and national competitiveness in the 21st century; The President of India has declared 2010 as the 'Decade of Innovation'. Declaration of 2010-2020 as the innovation decade can be seen as a desperate attempt towards making the Indian IP environment more healthy and supportive towards the indigenous as well as the international innovators. National Innovation Council (NInC) has been setup under the Chairmanship of Mr. Sam Pitroda, He will act as an adviser to the PM to discuss, to analyze and to help implement strategies for inclusive innovation in India and prepare a Roadmap for Innovation 2010-2020[1]. Government of India has recently approved the new IPR policy 2016 on May 13, 2016, which targets to encourage escalate awareness about and administer Intellectual Property in India. IP offices across the country are being transformed to increase the efficiency in processing the applications. Patent offices have been directed to ensure uniformity and consistency in the examination of applications. A Roadmap to increase the bilateral cooperation at global level and raising the public awareness level has been set up. Mass recruitment of Patent and trademark examiners are planned to take care of the ever increasing backlogs. Startups have a very inadequate possessions and manpower and can sustain in the cut throat competition only through continuous growth and development oriented innovations. For them the union Government of India has started a facility of faster allocation of patents under the "Tatkal" scheme. Startups are also facilitated with the reduced patent examination fee. These facilities are also available to the innovators who file their patents first in India. The new provisions introduced in the Patents Rules by way of 2016 amendments seek to grant patent within two and a half years and within one and a half year by March 2018 which otherwise used to take about five to seven years. To clear the backlogs the government of India has recruited large number of Examiners in each of the technological department at the Patent Office.. Further, by 2016 amendment, the official fee for withdrawing an application for patent has been waived off and now the applicant can also claim a refund of 90% of examination fee in case the withdrawn application is not examined at the Patent Office. Accordingly, applicants are encouraged to withdraw application for which the applicant is "not interested" in acquiring a patent, thereby, automatically reducing the Examiner's load to some extent.

The Indian Government acknowledges that even after taking some major steps towards improving the overall IPR environment in the country, we still need to strike a balance in the IPR regime, its protection and effective promotion.. For instance, it will be obligatory for the administration to provide effect to the full essence and scope of the National IPR Policy, which endorses a host

1. *http://innovationcouncilarchive.nic.in*

of methods including the periodic review and changes to the existing IPR legal and regulatory framework and creating a credible IPR enforcement system. Indian IP laws have many provisions for administrative, civil and criminal remedies for infringement of the IPR; however ineffective enforcement is one of the biggest problems that inhibit the growth of IP industry in the country

The Index which is created by the US Chamber of Commerce: Global Intellectual Property Center (GIPC) has around 30 principles critical to innovation including patent, copyright and trademark protections, enforcement, and engagement in international treaties. According to the report, the reason India scoring low rank was nonalignment with the international best practices in IPR. It also mentioned that India needs to provide ample protection from online piracy and shall strive to have proper law enforcement. The use of compulsory licensing, which is governments permission to allowing entities to manufacture, use, sell or import a patented invention without the permission of patentee, for the commercial and non-emergency situations has been a topic of discussion at various platforms.

Key Areas of Strength as per GIPC[3]

- The government of India continued to make positive statements during 2015 on the need to introduce a strong IP environment.
- Ex officio powers introduced in 2007 for the Deputy and Assistant Commissioners of Customs.

Key Areas of Improvement suggested as per GIPC[3]

- Patentability requirements shall be made in line with that of the international standards.
- Regulatory data protection and patent term restoration should be made available.
- History of use of compulsory licensing for commercial and non-emergency situations shall be discouraged.
- Steps should be taken towards effective application and enforcement of civil remedies and criminal penalties against patent infringements.

Taking positive cues out of the various reports, the Union Government has implemented major steps in the direction of enabling the law enforcement agencies with recourses against infringement of Patents, Trademarks and Copyrights. Government of India has launched a new mission where the Indian Police personals will be equipped with special knowledge toolkit to identify and prosecute the IPR violations. The toolkit is jointly developed by Cell for IPR Promotion and Management (CIPAM) and the Federation of Indian Chambers of Commerce and Industry (FICCI). The CIPAM has taken all the essential actions to build up a healthy IP environment in the country by creating various awareness programmes and seminars. To further strengthen the law enforcement and awareness of the state police CIPAM has already organized seven batches of training for the police officials in Andhra Pradesh. Also a three day training programme was arranged for the Police Officials in the state of Uttar Pradesh. CIPAM has also directed all the state police and judicial academies to introduce and take up training on enforcement of intellectual property rights. CIPAM is actively facilitating international engagements in the field of intellectual property rights protection. Two MoUs on IPR were recently signed with UK and Singapore. India-USA Workshop on Protection of Trade Secrets was successfully organized by CIPAM to discuss various aspects related to Trade Secrets and its impact on Industry[2].

CONCLUSION

We now have to understand that creating innovation is of no use if we cannot assure the patent owner if the patent rights are protected by the State through adequate law enforcement. Today, India is on its way of adopting a balanced approach towards creating a stimulus for the betterment of the IPR industry as a whole. Recent developments in India, be it the New IPR policy or the initiatives taken by the National Innovation Council (NInC) or providing an effective toolkit in the form of checklist that will act as a reckoner for the police to deal with IP crimes or encouragement to innovators in terms of speedy patent examination in case they file first in India, all are a part of much needed attempt to improve the overall security of IPR and encouragement to create more IP in the country. While

2. *http://pib.nic.in/newsite/PrintRelease.aspx?relid=156135*

the latest Intellectual Property index results ranking India as one of the lagging end countries is a setback for us, however, the efforts undertaken by the Indian Government in recent past would definitely improve the IPR protection in the country. Further, the Courts and the Government are indeed acting cautiously over the recommendations and identifying areas that need improvements while also continuing with policies like compulsory licensing where it really matters for example in the cases of life saving drugs. India being a developing country with second largest population needs to carefully identify exact areas to act upon and strike an ever-evasive balance between commercial rights/recommendations on IPR protection while not succumbing to international pressure and give away the socialist approach towards the public at large.

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NEWSBYTES

1. COMPANIES (TRANSFER OF PENDING PROCEEDINGS) RULES, 2016

The Ministry of Corporate Affairs vide notification No. G.S.R. 1119(E) dated December 07, 2016 has notified, Companies (Transfer of Pending Proceedings) Rules, 2016 (hereinafter referred to as 'Rules') to provide for transfer of matters pending before Company Law Board to National Company Law Tribunal (hereinafter referred to as 'NCLT'). The Rules bifurcate the pending proceedings as follows:

a. **Proceedings relating to cases other than winding up, such as arbitration, compromise, arrangement and reconstruction, etc.;**

b. **Cases relating to winding up;**

A brief summary of these Rules are provided below:

<table>
<tr><th>Sl.No.</th><th>Particulars</th><th colspan="2">Explanation</th><th>Effective Date</th></tr>
<tr><td rowspan="4">1.</td><td rowspan="4">Transfer of pending proceedings relating to cases other than Winding Up</td><td colspan="2">All proceedings under the Companies Act, 1956 including proceedings relating to arbitration, compromise, arrangements and reconstruction, shall stand transferred to the Benches of the National Company Law Tribunal (NCLT) exercising respective territorial jurisdiction.</td><td rowspan="3">15th December, 2016</td></tr>
<tr><td>Proceedings which are reserved for order</td><td>Shall not be transferred to NCLT.</td></tr>
<tr><td>Proceedings which are not reserved for order</td><td>Shall be transferred to NCLT.</td></tr>
<tr><td colspan="3">Provide that all those proceeding which are reserved for orders for allowing or otherwise of such proceedings shall not be transferred.</td></tr>
<tr><td>2.</td><td>Pending proceeding</td><td colspan="2">All applications and petitions relating to voluntary winding up of companies under Companies Act, 1956 pending</td><td>1st April, 2017</td></tr>
</table>

<table>
<tr><td></td><td>relating to Voluntary Winding up:</td><td colspan="2">before a High Court on the date of commencement of this rule, shall continue with and dealt with by:</td><td></td></tr>
<tr><td></td><td></td><td>High Court</td><td>Till 1^{st} April, 2017</td><td></td></tr>
<tr><td></td><td></td><td>NCLT</td><td>On or after 2^{nd} April, 2017</td><td></td></tr>
<tr><td>3.</td><td>Transfer of pending proceedings of Winding up on the ground of inability to pay debts</td><td colspan="2">Where the petition has not been served on to the Respondent under Rule 26 of the Companies (Court) Rules, 1959

Petitions relating to winding up under clause (e) of section 433 of the Companies Act, 1956 pending before a High Court shall stand transferred to the Benches of the National Company Law Tribunal (NCLT) exercising respective territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Insolvency and Bankruptcy Code, 2016.

Further petitioner shall also submit information forming part of the records transferred, required for admission of the petition under sections 7, 8 or 9 of the Insolvency and Bankruptcy Code, 2016, including details of the proposed insolvency professional to the NCLT within sixty days from date of this notification (7^{TH} December, 2016), failing which the petition shall abate.

Further, petition shall also abate if details regarding proposed Insolvency Professional are not filed within 60 days from 15^{th} December, 2016.</td><td>15^{th} December, 2016</td></tr>
</table>

		Where Board for Industrial and Financial Reconstruction (BIFR)has forwarded an opinion for Winding Up of company , under Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 to High Court **and** ***where no appeal is pending,*** Then such cases shall be dealt by High Court and will not be transferred to NCLT.	
4.	**Transfer of pending proceedings of Winding up matters on the grounds other than inability to pay debts**	***Where the petition has not been served on to the Respondent under Rule 26 of the Companies (Court) Rules, 1959*** All petitions filed under clauses (a) and (f) of section 433 of the Companies Act, 1956 pending before a High Court, shall be transferred to the Bench of the Tribunal exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the Companies Act, 2013.	15th December, 2016
5.	**Transfer of Records**	Relevant records pursuant to the transfer of cases shall also be transferred by the respective High Courts to the NCLT Benches having jurisdiction forthwith over the cases so transferred.	15th December, 2016
6.	**Fees not to be paid**	Notwithstanding anything contained in the NCLT Rules, 2016, no fee shall be payable in respect of any proceedings transferred to the Tribunal in accordance with these rules.	15th December, 2016

2. ENHANCEMENT OF MATERNITY BENEFITS UNDER THE ESI ACT, 1948

The Ministry of Labour and Employment vide its Notification dated 20 January, 2017 being G.S.R. 62(E) notified further amendment to the Employees' State Insurance (Central) Rules, 1950 in exercise of the powers conferred by section 95 of the Employees' State Insurance Act, 1948, and made the following rules further to amend the Employees' State Insurance (Central) Rules, 1950, namely the Employees' State Insurance (Central) Amendment Rules, 2017.

Under these Rules, new provision being section 6A has been inserted to include definition of the term "insured woman". The term means a woman who is or was an employee in respect of whom contribution is or were payable under the Act and who is, by reason thereof, entitled to any of the benefits provided under the Act and shall include—

a commissioning mother who as biological mother wishes to have a child and prefers to get embryo implanted in any other woman;

a woman who legally adopts a child of upto three months of age;

Further in existing rule 56, in sub-rule (2), for the words "twelve weeks of which not more than six weeks", the words "twenty-six weeks of which not more than eight weeks" have been substituted; and that after the first proviso, the following provisos are inserted, namely:--

"*Provided further that the insured woman shall be entitled to twelve weeks of maternity benefit from the date the child is handed over to the commissioning mother after birth or adopting mother, as the case may be:*

Provided also that the insured woman having two or more than two surviving children shall be entitled to receive maternity benefits during a period of twelve weeks of which not more than six weeks shall precede the expected date of confinement."

Notably these Rules were published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i) *vide* number G.S.R. 958(E), dated the 6th October, 2016, as required under sub-section (1) of section 95 of the Employees' State Insurance Act, 1948(34 of 1948), inviting objections and suggestions from all persons likely to be affected thereby before the expiry of a period of thirty days from the date on which the copies of the Gazette containing the said notification was published were made available to the public. Copies of the said Gazette were made available to the public on the 6th October, 2016. However, no objections and suggestions were received from persons in respect of the said rules (as reported).

3. RESPONSE TO OFFICE ACTION(S) IN RESPECT OF INDIAN PATENT APPLICATIONS

We hereby bring to notice of all the applicant(s) in respect of Indian Patent Applications, that in accordance with The Patent Rules, 2003 as amended by Patent (Amendment) Rules, 2016 the time to put the application in order for grant under Section 21 has been reduced from 12 months to 6 months with effect from 16 May 2016.

"The time for putting an application in order for grant under Section 21 of Patents Act, 1970 in cases where the first statement of objections has been issued by the Office on or after 16 May 2016, shall be 6 months from the date on which the said first statement of objections is issued to the applicant to comply with all the requirements imposed under the Act and Rules made there under in accordance with Rule 24B(5) of the Patents (Amendment) Rules, 2016".

In view of the above all the objections/requirements as mentioned in Office Action(s) shall be complied within **6 months** from the date of issue of First Examination Report (FER).

Further **an extension of time for three months** beyond the said six months duration can be requested from Controller of Patents to comply with objections by filing Form-4 with prescribed official fee before the expiration of six months timeline.

Relevant rule in this regard is mentioned below for ready reference as amended with Patent (Amendment) Rules, 2016.

Rule 24B(5) of Patents Rules, 2003: Examination of application

(5) The time for putting an application in order for grant under Section 21 shall be ***<u>six months</u>*** *from the date on which the first statement of objections is issued to the applicant to comply with the requirements.*

(6) The time for putting an application in order for grant under section 21 as prescribed under sub-rule (5) may be further extended for a period of three months on a request in Form-4 for extension of time along with prescribed fee, made to the Controller before the expiry of the period specified under sub-rule (5).

It is pertinent to mention that the time for putting the applications in order for grant under Section 21 of the Act in cases where the first statement of objections has been issued by the Office before 16 May 2016, shall remain 12 months from the date on which the said first statement of objections is issued to comply with all the requirements imposed under the Act and Rules made there under in accordance with the earlier provisions.

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