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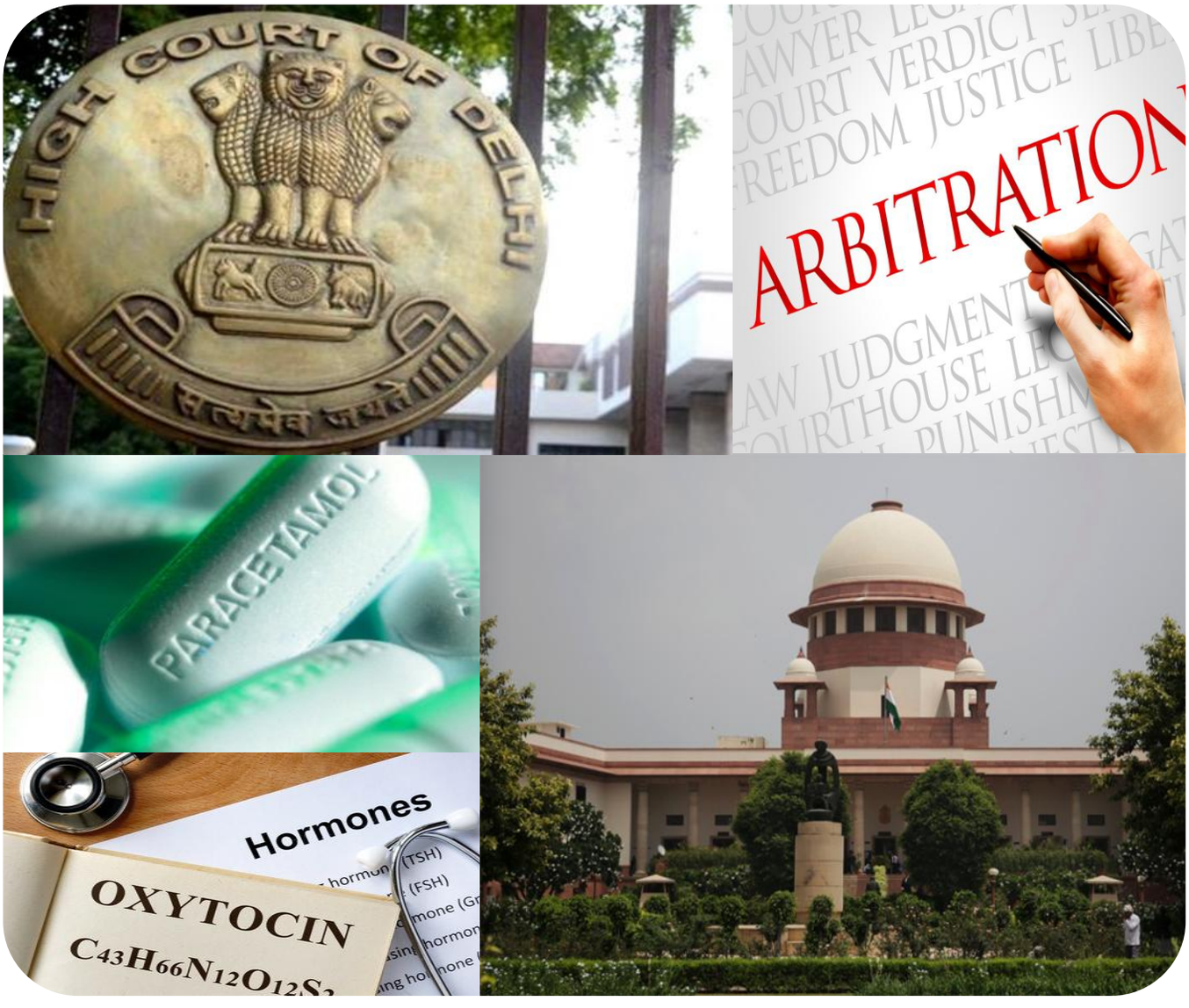

EDITORIAL

Manoj K. Singh
Founding Partner

Dear friends

We are pleased to present this October issue of *Indian Legal Impetus* which is packed with out of the ordinary articles and sincerely hope that you enjoy reading this edition.

Undoubtedly the Insolvency and Bankruptcy Code, 2016 has proved to have far reaching effects. So what is the effect of moratorium period commenced under section 14 of I&B Code on an ongoing arbitration? We find out this in a brief analysis of a recent judgment of the Hon'ble Supreme Court which has put this issue to rest (for the meanwhile!). Further, a note discusses the status of a scheme of compromise or arrangement initiated under section 230 of the Companies Act, 2013 if the Corporate Insolvency Resolution under I&B Code is triggered during the pendency of such a scheme of compromise or arrangement.

On the Arbitration front, we analyze a recent order of the Hon'ble Apex Court in the matter titled (Civil Appeal No. 15036 of 2017) wherein; it has been held that the arbitral tribunal has power to recall its order terminating the proceeding under Section 25(a) of the Arbitration and Conciliation Act, 1996. Moreover, in a separate article we discuss the importance of discovery in any arbitration proceeding; after all production of documentary evidence holds major importance towards the outcome of any commercial dispute.

For IPR, a detailed note discusses evolution of the Indian Trademark office from what it was and to what it is now – being manifestation of positive changes resulting in effective trademark prosecution and protection.

In the pharma section, we have two write-ups. First one relates to European medicine agency recommending modified-release paracetamol to be removed from the market; and the second one is regarding CDSCO's notice qua strict regulatory control over manufacture, sale and distribution of oxytocin and to curb its misuse.

Lastly, an article analyses a recent landmark judgment by a division bench of the Hon'ble High Court of Delhi holding that the compoundable offences can also be resolved through Mediation and thereafter laid the procedure to be adopted in such a case and the implications of legal breach.

Trust you enjoy reading this issue as well. Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in

Thank you.

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EFFECT OF MORATORIUM ON ARBITRATION UNDER SECTION 14 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Satwik Singh

The Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as the "**Code**") is a beneficial legislation which has been enacted with the aim of having a well structured and a time bound process for the initiation of the Corporate Insolvency Resolution Process, and in the event of the failure of the CIRP, for liquidation. Part II of the Code contains the detailed procedure for initiation of CIRP against the Corporate Debtor, and in the situation, the Adjudicating Authority (hereinafter referred to as NCLT) admits an insolvency resolution application under Section 7,9 or 10 of the Code, it declares a moratorium under Section 14 which continues until the approval/rejection of the resolution plan. During the moratorium period, "*the initiation of suits or the continuation or pending suits and proceedings including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or any authority is prohibited*."

Moratorium has been defined in the Black's Law dictionary as, *"Delay in performing an obligation or taking an action legally authorized or simply agreed to be temporary"*. The intent and the rationale behind having a moratorium is to protect the troubled corporate debtor and provide him with a breathing space so that the Corporate Debtor can focus all his attention towards the revival of his core business instead of worrying about the various proceedings and suits instituted against him. The Hon'ble Supreme Court in the case of *Innoventive Industries Ltd v. ICICI Bank Ltd* elucidated this by stating that the intent was, "*to provide the debtors a breathing spell in which he is to seek to reorganize his business*."

Recently the Hon'ble Supreme Court in its recent judgment passed by a division bench in the case *Alchemeist Asset Reconstruction Company Ltd v. M/s. Hotel Gaudavan Pvt. Ltd. & Ors.*[1] **[1]** held that a proceeding under Arbitration and Conciliation Act 1996 (hereinafter referred to as "Arbitration Act") instituted after declaring moratorium under "Code") is non-est in law i.e. does not exist at all.

It was reiterated that the mandate under Section 14 is very clear and that it expressly states that the moment, the moratorium comes into effect under section 14(1)(a) it expressly prohibits institution or continuation of pending suits or proceedings against corporate debtor. While setting aside the order of District Judge, Supreme Court expressed its dismay for entertaining the said appeal under section 37 of the Arbitration Act while the moratorium was in force. The Supreme Court held that the arbitration, which had been instituted after the commencement of moratorium under the Code, is non-est in law. This strict interpretation of the Hon'ble Supreme Court in upholding the provision of Section 14 of the Code holds the Code in good stead and provides a conducive environment for the fulfillment of the objectives that the Code aims to fulfill.

1 *Civil Appeal No.16929 of 2017*

ARBITRAL TRIBUNAL POWER TO RECALL ITS ORDER UNDER SECTION 25(A), ARBITRATION AND CONCILIATION ACT, 1996

Monalisa Kosaria

The Hon'ble Supreme Court recently in *Srei Infrastructure Finance Limited v. Tuff Drilling Private Limited,* Civil Appeal No. 15036 of 2017 held that the arbitral tribunal has power to recall its order terminating the proceeding under Section 25(a) of the Arbitration and Conciliation Act, 1996.

FACTUAL BACKGROUND

Tuff Drilling Private Limited (*Respondent/ Claimant*) filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (*Act*) for appointment of arbitrator based on the agreement entered between Srei Infrastructure Finance Limited (*Appellant)* and the Respondent. During the pendency of this application, an arbitrator was appointed with the consent of the parties. Subsequently, application under Section 11 was dismissed and the arbitral tribunal in its first sitting, held on 27.08.2011, directed the Respondent/ Claimant to file the statement of claim. The Respondent/ Claimant failed to file its statement of claim on two subsequent events, that is, on 19.11.2011 and 09.12.2011. On this ground, the tribunal vide its order dated 12.12.2011 terminated the arbitral proceeding under Section 25(a) of the Act. The Claimant filed an application on 20.01.2012 praying to recall the tribunal's order dated 12.12.2011 and condoning the delay in filing the statement of claim along with the reasons for the same. The Appellant questioned the maintainability of this application dated 20.01.2012 on the ground that arbitral tribunal has become *functus officio* in view of termination of proceedings under Section 25(a), hence arbitral tribunal cannot recall its order terminating the proceedings. The arbitral tribunal accepted the preliminary objection raised by the Appellant and rejected the application of Respondent/ Claimant vide order dated 26.04.2012. The Claimant challenged the said order of the tribunal before the Hon'ble Calcutta High Court under its revisionary jurisdiction in C.O. No. 3190 of 2012. The Hon'ble High Court after entertaining the application under Article 227 held that arbitral tribunal has the power to recall its own order passed under Section 25(a). The Hon'ble High Court accordingly set aside the order of the tribunal and remitted the matter back to the arbitral tribunal to decide the application dated 20.01.2012. The Appellant challenged the decision of the Hon'ble High Court before the Hon'ble Supreme Court.

CONTENTIONS OF THE APPELLANT

It was contended by the Appellant that the arbitral tribunal had become *functus officio* and had no jurisdiction to recall its order dated 12.12.2011 terminating the arbitration proceeding. The order dated 12.12.2011 passed by the arbitral tribunal under Section 25(a) of the Act cannot be challenged under Article 227 of the Constitution. Moreover, it was argued that the remedy, if any, available to the claimant against the order of the tribunal under Section 25(a) of the Act was to file an application under Section 34 of the Act for setting aside the order dated 12.12.2011.

SUBMISSIONS OF THE AMICUS CURIAE

The amicus curiae appointed to assist the Hon'ble Apex Court had submitted that the termination of proceedings under Section 25(a) of the Act and termination of proceedings under Section 32(2) of the Act are two eventualities. When the proceedings are terminated under Section 32(2), the mandate of the arbitral tribunal also terminates whereas no such consequence can be read in termination of proceedings under Section 25(a). Under Section 25(a), proceedings are terminated on default of the claimant to file the statement of claim. Section 32(3) would not apply to case falling under Section 25(a) of the Act. The Act does not provide for remedy against the order under Section 25(a) and the remedy under Section 34 is not available against such an order unless the order under Section 25(a) is also treated as an award. There seems to be a legislative gap with respect to Sections 25(a) and 32(2)(c). Regarding whether arbitral tribunal can exercise the power akin to principles underlying Order IX Rule 9 of the Civil Procedure Code, 1908 (CPC), the amicus curiae submitted that arbitral tribunal can recall an order passed under Section 25(a) on the principles of Order IX Rule 9 CPC.

ISSUES FRAMED

1. Whether arbitral tribunal which has terminated the proceeding under Section 25(a) of the Act due to non- filing of claim has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?

2. Whether the order passed by the arbitral tribunal under Section 25(a) terminating the proceeding is amenable to jurisdiction of High Court under Article 227 of the Constitution?

3. Whether the order passed under Section 25(a) terminating the proceeding is an award under the Act so as to amenable to the remedy under Section 34 of the Act?

DECISION

The Hon'ble Supreme Court held that the scheme of Section 25 of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by Section 23(1) has expired. Thus, even after passing the order of terminating the proceedings, if sufficient cause is shown, the claims of statement can be accepted by the arbitral tribunal by accepting the show-cause and there is no lack of the jurisdiction in the arbitral tribunal to recall the earlier order on sufficient cause being shown.

Further, the Hon'ble Supreme Court dealt with the issue whether the termination of proceedings by an order under Section 25(a) can be treated to be covered by Section 32(2)(c). It was held that on termination of proceedings under Sections 32(2) and 33(1), Section 33(3) contemplates termination of the mandate of the arbitral tribunal, whereas no such similar provision is found for termination under Section 25. The Court observed that when the legislature has used the phrase "the mandate of the arbitral tribunal shall terminate" in Section 32(3), non- use of such phrase in Section 25(a) has to be treated as an intentional exclusion. The purpose and object of this exclusion can only be that if the claimant shows sufficient cause, the proceedings can be re-commenced.

The Hon'ble Court also upheld the view that every tribunal has inherent powers to review its order on the grounds of a procedural defect. It was held that arbitral tribunal, being a quasi- judicial authority, is vested with the power to invoke procedural review. The Court also stated that there is no distinction between the statutory tribunal constituted under the statutory provisions or Constitution in so far as the power of procedural review is concerned. It was further noted that Section 19 of the Act, which provides that arbitral tribunal shall not be bound by the rules of procedure as contained in CPC, cannot be read to mean that arbitral tribunal is incapacitated in drawing sustenance from any provisions of CPC. Thus, the principles underlying Order IX Rule 9 can be invoked by arbitrator.

It may be noted here that the Hon'ble Supreme Court did not deem it necessary to discuss issue nos. 2 and 3 after holding that arbitral tribunal has jurisdiction to consider an application for recall of order terminating the proceedings under Section 25(a) of Arbitration and Conciliation Act, 1996.

NOTE ON SCHEME OF COMPROMISE AND ARRANGEMENT W.R.T INSOLVENCY AND BANKRUPTCY CODE, 2016

Siddhant Maken

Question: What will be the status of a scheme of compromise or arrangement initiated under section 230 of the Companies Act, 2013 if the Corporate Insolvency Resolution ("**CIR**") under the Insolvency and Bankruptcy Code, 2016 ("**Code**") is triggered during the pendency of such a scheme of compromise or arrangement.

Answer: In order to answer the question above it is necessary to understand the following provisions of the Code in detail:

MORATORIUM –

Under the Code, the National Company Law Tribunal ("**NCLT**") is required to declare a moratorium at the time it accepts an application for the CIR process. The moratorium would prohibit:

- Institution or continuation of suits or proceedings against the company;
- Any actions for foreclosure, recovery or enforcement of any security interest;
- Transfer, alienation or disposal by the company of any of its assets or any legal or beneficial interests in the assets;
- Recovery of any property by an owner or lessee where such property is owned by or in possession of the company;
- Maintenance of supply of essential goods and services (as may be prescribed) to the company.

The moratorium is required to continue until the completion of the CIR process. The provisions of the Code specifically prohibit institution of any suits or proceedings against the company. In our view a scheme of compromise or arrangement is not a proceeding "against" the company and hence would not be barred. In *Commissioner of Income Tax* vs. *Hindustan Bulk Carriers [(2003) 3 SCC 57]* the Hon'ble Supreme Court observed '*If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an affective result*'. The intent of the Code is to facilitate rehabilitation of companies wherever feasible and to facilitate efficient liquidation in those cases where resolution of the financial distress of the company is not viable. Keeping in mind the intent of the Code, an interpretation of the provisions which goes against the object sought to be achieved by the Code would not be warranted.

OVERRIDING EFFECT OF THE CODE

Section 238 of the Code provides that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The provisions of the Code shall take precedence over any other law which may be inconsistent with the provisions of the Act. While interpreting similar notwithstanding provisions under the Sick Industrial Companies (Special Provisions) Act, 1985 the Hon'ble Bombay High Court in the case titled *Re: Pharmaceutical Products of India Ltd. [(2006) 131 CompCas 747 (Bom)]* considered the question whether pendency of proceedings before Appellate Authority for Industrial and Financial Reconstruction would exclude jurisdiction of the High Court to entertain petition for compromise or arrangement. The Court after relying on various cases observed that *"The legal position is that the provisions of 1985 Act shall prevail over the provisions of the Companies Act 1956 "in case of inconsistency" in a given subject. Besides as is noticed by our High Court the provisions of the two enactments operate in different spheres and the scheme in so far as the power of the High Court to grant sanction to the proposed scheme of arrangement is unaffected".*

Similarly the provisions of the Code would interfere and accordingly override the provisions of the Companies Act, 2013 only in the event that the provisions of the Code are inconsistent with the provisions of the Companies Act, 2013 and not otherwise. In the present question, the proceeding for

arrangement or compromise is a separate procedure which may not stricto sensu be construed to be inconsistent with the provisions of the Code.

JURISDICTION OF CIVIL COURTS EXCLUDED

Section 231 of the Code also bars jurisdiction of all other civil courts in respect of any matter in which the Adjudicating Authority is empowered by, or under, the Code to pass any order.

In view of the above, it is opined that although the Companies Act, 2013 and the Code are procedurally different, they are not repugnant to each other. The doctrine of harmonious construction which has been reiterated by the Hon'ble Supreme Court in many cases, clearly states that the statutes have to be construed so as to not reduce the statutes to futility. Giving such harmonious construction to the statutes, we understand that if the CIR process gets triggered during the consideration of a scheme of arrangement or compromise, the scheme shall not abate but shall continue and the Resolution Professional may represent the company in such a meeting for arrangement or compromise.

During the CIR, a scheme maybe passed by the Committee of Creditors mandating the pursuance of a scheme of arrangement or compromise. However, the scheme passed during the CIR process would also require to provide for certain additional matters such as:

i. Payments of liquidation value to dissenting financial creditors i.e. creditors who do not consent to the resolution plan;

ii. Payments of liquidation value to operational creditors;

iii. Payment of the insolvency resolution process costs.

Once a resolution plan mandating the pursuance of a scheme of arrangement and compromise is passed, the creditors are free to continue their action under section 230 of the Companies Act, 2013 and proceed in accordance therewith.

IMPORTANT ELEMENTS TO BE CONSIDERED:

1. **Appointment of Interim Resolution Professional by hostile party** – Although the Resolution Professional is under a professional obligation to continue with his operations impartially and is ultimately under the control of the Committee of Creditors, nonetheless in the event where the CIR process is initiated by a hostile party, such a party would be at liberty to appoint an Interim Resolution Professional of his/her choice. In such an event, the Resolution Professional may not be supportive of the proceedings under section 230 of the Companies Act, 2013 although he has no power to thwart the process under the Companies Act. Under such circumstances, the Financial Creditors (majority) would ideally approach the NCLT and request the NCLT to either replace the Interim Resolution Professional or either instruct him on early constitution of the Committee of Creditors. Once the Committee of Creditors is constituted, it is their prerogative to replace the Resolution Professional as they deem necessary.

2. **Misconduct or stripping away of assets** – If during the scenario mentioned in the point above, the creditors apprehend that the assets of the company are likely to be stripped or siphoned off, the remedy available with the creditors is again to approach the NCLT and request for orders for protection of the company's assets in addition to the orders for early constitution of the Committee of Creditors.

3. **Intention of the scheme of compromise and arrangement** – The scheme of compromise and arrangement between a company vis-a-vis its creditors or members is basically done for the reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes. The intention of the legislature is to reorganize and resolve the issues of the companies through such a scheme which may be brought up by either the company itself, the creditors, members of the company or in case of a company which is being wound up, of the liquidator.

MEDIATION FOR OFFENCE UNDER SECTION 138 OF NI ACT, 1881 – ANALYSIS OF THE DELHI HIGH COURT JUDGMENT

Akanksha Sisodia, Mahip Singh Sikarwar & Palash Jain

INTRODUCTION

A divisional bench of Hon'ble Delhi High Court headed by Chief Justice Gita Mittal and Justice Anu Mehrotra recently delivered a landmark judgment and held that Compoundable Offences[2] can also be resolved through Mediation and thereafter laid the procedure to be adopted in such a case and the implications of legal breach. It implies that offences under Section 138 of Negotiable Instrument's Act, 1881[3] can be tried under Section 89 of Code of Civil Procedure Code, 1908[4] which specifies the disputes that can be resolved under Alternate Dispute Resolution **("ADR").** The bench while giving its judgment relied on the three bench judgment of Hon'ble Supreme Court in ***Damodar S. Prabhu v Syed Babala***[5] which ruled that "*the punishment in cases under NI Act is not a means of seeking retribution, but is more a means to ensure payment of money.*" As a general principle of law, the Code of Criminal Procedure, 1973 **("CrPC")** and the Negotiable Instruments Act, 1881 **("NI Act")** do not contain any provision to refer matters to ADR unlike some of the other statutes i.e Hindu Marriage Act (Section 23), the Family Courts Act, 1984 (Section 9) and; the Industrial Disputes Act, 1947 (Section 10) which explicitly provide for settlement by the same.

The rationale on which the bench majorly rested its reasoning for the judgment was that there is no bar or restriction on using the Alternative Dispute Resolution mechanisms in either of the statutes, i.e the NI Act, 1881 or the CrPC, 1973, thereby providing the requisite leverage to refer the disputes under Section 138 to mediation. The bench answered five major questions pertaining to the issue which have been reproduced herein below:

QUESTIONS ANSWERED:

Question I: Is it legal to refer a criminal compoundable case as of Section 138 of NI Act, to mediation?[6]

To this question, the Honorable Division bench replied in affirmative and stated that it is legal to refer such disputes to mediation.

It is a settled principle that as far as a civil dispute is concerned, Courts shall adopt the principles as laid down in the case of ***Afcon Infrastructure Limited***.[7] Accordingly, Courts first ascertain if it's a fit case for adjudication by means of ADR process and then accordingly decide the kind of ADR (Arbitration, Conciliation, Mediation) as per consent of the parties. In the instant case, the bench opined that even though there is no express statutory provision under the Criminal Code to refer the parties to mediation, such matters can be referred to ADR if they fall under the ambit of Section 320, Cr.P.C[8] and such settlement shall be an order of the Court.

Question II: The next question answered by the Honorable Division Bench was that the whether the Mediation and Conciliation Rules, 2004 enacted under the Code of Civil Procedure be and imported and applied in criminal cases or not? Is the formulation of separate rules required in this regard?

The Delhi Court framed "*The Mediation and Conciliation Rules,2004*" in exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 **("CPC")** and Section 89(2)(d) of the CPC. The rules cover ***all*** the proceedings which are pending before the Delhi High Court or any other sub-coordinate court. As far as the nature of the proceeding under Section 138 are concerned, they are quasi-civil in nature and the

2 *Section 147- Offences to be compoundable*
3 *Section 138- Dishonor of cheque for insufficiency, etc., of funds in the account.*
4 *Section 89-* Settlement of disputes outside the Court
5 *2010 5 SCC 663*
6 *Dayawati v. Yogesh Kumar Gosain (MANU/DE/3173/2017); Para.1*
7 *Afcons Infrastructure Ltd. & Anr. v. Cherian Varkey Constructions Co. Pvt. Ltd, (2010) 8 SCC 24*
8 *Section 320 - Compounding of offences*

Criminal Courts follow the principle used by civil court's to adjudicate the same.

Question III: Thereafter the Court had to adjudicate on the question that once the dispute has been referred to mediation, then what procedure has to be followed in its furtherance?

In several cases, the Apex Court has held that after considering the legislative ambit of Section 147 of NI Act , the offences under Section 138 can be termed as Compoundable. Therefore, the procedure to be adopted for the settlement would be as per the principles of CPC i.e. Order XXIII Rule 3 which provide for Compromise of Suits. It is to be noted that generally the principles of Civil procedure shall not apply to Criminal matters, but as there is a lacuna in the legislative intent, Order XXIII Rule 3 of the CPC shall squarely apply to the subject matter of consideration by a Court under Section 320 of the Cr.P.C. or Section 147 of the NIA.

Question IV: The other question for the consideration for the Honorable Bench was that in case the settlement reached in the process of mediation is not honored by the parties then, what would be subsequent course of action? Will the court proceed with the case by conducting trial on merits or hold such settlement to be executable as decree?[9]

In case of breach of the terms of the settlement Agreement, Section 421 of the CrPC [10]comes into play which provides the mechanism to recover fines. Also, under Section 431 of CrPC[11]., in case money is to be collected other than fine under CrPC and the method is not expressly provided, it shall be recoverable in terms of Section 421 CrPC. Also, if a Court accepts an undertaking in the form of an Agreement and there is non-compliance of the same, the parties shall be punished under Section 2(b) Contempt of Courts Act, 1971.[12]

Question V: If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court? And if yes, what should be the appropriate orders with respect to the criminal complaint case at hand. What would be the effect of such a mediated settlement vis-à- vis the complaint case?[13]

As in the case of a civil dispute, the settlement between the parties is in terms of the decree of the Court and is to be executed under the procedure of Order XXIII of the CPC unlike in criminal cases which cannot be executed similarly. Also , a settlement in mediation arising out of referral in a civil court can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C which cannot be done in case of a criminal matter.

CONCLUSION

By means of in The Arbitration & Conciliation Act (Amendment) Act, 2015, the main objective of the legislature was to expedite the process of ADR mechanism and reduce the burden of Courts by making it more effective and time bound process. Thus, through this order, the Judiciary has given a signal of permitting resorting to mediation and other alternative disputes redressal mechanism in criminal cases by enunciating the procedure to be followed and consequences of the legal breach.

9 Ibid.

10 Section 421- Warrant for levy of fine

11 Section 431- Money ordered to be paid recoverable as fine

12 Section 2(b) Contempt of Courts Act- (b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

13 Supra 3 Pg.2

DISCOVERY IN ARBITRATION

Kunal Kumar

'Witness may lie but the documents do not.'[14]

The production of documentary evidence holds major importance towards the outcome of any commercial dispute. Production of documents is necessary as it helps the tribunal to deliver a reasoned award. Parties submit the documents to the arbitral tribunal to support their claim, counter claim or defense. The problem usually arises when parties rely on the documents which are in the possession of the opposite party.

Domestic arbitrations in India are governed by Arbitration and Conciliation Act, 1996. In the case of *Thyssen Krupp Werkstoffe GMBH v. Steel Authority of India,* MANU/DE/0386/2010, it was held that though there is no specific provision under the Arbitration and Conciliation, 1996 specifically conferring power on the arbitrator to direct discovery, the arbitrator has absolute power and flexibility to conduct the proceeding as he may consider appropriate and is not bound by the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908.[15] Further, it was held that Section 27 of the Arbitration and Conciliation Act, 1996 only deals with third-party discovery and not with the discovery of parties. However, in the case of the *Delta Distilleries Limited v. United Sprits Limited,* AIR 2014 SCC 13, the Hon'ble Supreme Court interpreted that the term 'any person' under Section 27 (2) (C) of the Act, 1996 is not just limited to the witnesses but also covers the parties.

Likewise, in another case *Silor Associates v. Bharat Heavy Electrical Limited*, 213 (2014) DLT 312, it was submitted by the Supreme Court that the tribunal is empowered by its own to direct the parties to produce the documents without taking assistance from the court under Section 27 of the Arbitration and Conciliation Act, 1996 and upon failure to comply with the directions of the tribunal to produce the documents, the aggrieved party may draw adverse inference against the defaulting party or may require the tribunal to enforce the same direction with the assistance of the court under Section 27 of the said Act.

The parties cannot just directly approach the court under Section 27 to seek assistance from the court. It is necessary for the parties to seek permission from the arbitral tribunal before filing an application under Section 27 before the court.[16] The tribunal is not under any obligation to grant such a permission. The pleadings are before the tribunal and the arbitrator(s) are the master of the case. The tribunal has to conclude whether or not the evidence requested to be produced is relevant or not.[17] It is appurtenant to note that the exercise of power under Section 27 is to just assist in taking evidence and not to determine the admissibility, relevancy, materiality, and weight of any evidence.[18]

The reason why parties prefer arbitration over litigation is due to the flexibility arbitration has to offer. The parties are free to choose their own arbitrator, the number of arbitrators (odd number), the governing law, the seat of arbitration, whether or not to have any witnesses, whether or not to have any documentary evidence or just have it completely oral based (like in the cases of fast-track procedures). However, in most cases parties prefer having documentary evidence. Production of documents helps the parties to support their claims by which the arbitrator can deliver a well reasoned award. Therefore, the arbitral tribunal has the power to get the evidence as it may become necessary.[19]

EMERGING TRENDS FOR DISCOVERY IN THE FIELD OF ARBITRATION:

1. **Redfern Schedule:** is a collaborative document which both parties and the tribunal use for the production of documents. It is usually used for international arbitrations to create re-

14 *Vishnu @ Undrya v. State of Maharashtra, [2005] Insc 671 (24 November 2005), Para 12. Line 13*

15 *Section 19*

16 *Satinder Narayan Singh v. Indian Labour Co-operative Society ltd., (2008) 1 Arb LR 355*

17 *Hindustan Petroleum Corporation v. Ashok Kumar Garg (2007) 1 Arb LR368*

18 *Thiess Iviinecs India vs Ntpc Limited & Anr, MANU/De/0748/2016*

19 *Delta Distellaries limted united spirit 2014 case*

cords for the requests for production of documents and responses between both parties.

Sample of Redfern Schedule:

S. No.	Claimant's Request	Claimant's Reason for Request	Respondents Objection	Claimant's Comments/ Reply	Tribunal's decision

The only reported case to have used Redfern Schedule is *Thiess Iviinecs India v. NTPC Limited*, MANU/DE/0748/2016.

E-Discovery: In legal proceedings, it is not uncommon to have discovery. E-discovery is the electronic discovery. It is the process of storing, compiling and securing data such as files, E-mails, documents, database, bills, etc. for evidence in legal proceedings. E-discovery is very helpful as it is reliable and saves time. More than 3 Zettabytes (1ZB= 1 Billion of Terabytes (TB)) of the digital data is stored around the world. A large amount of time is being used in litigation and also in arbitration. Although parties may agree to limit discovery or have no discovery at all (in arbitration) but there is still a large amount of data being used in proceedings these days.[20] With the advancement in technology, promising software such as TAR (Technology Assisted Review) has now come into existence. This software runs on an algorithm which helps in prioritizing the documents in terms of their relevance. It provides accurate discovery and also delivers more consistent review. This kind of technology should be used more often as it saves time and cost, significantly. TAR was first used by US courts[21], followed by the Irish courts[22]. Recently, even the UK Courts have joined the US and Irish courts accepting E-discovery[23]. "E-discovery is a game changer," proclaimed Jayesh H, founder, Juris Corp. "Any data, which could be denied in discovery, can be retrieved using recovery software," "But E-discovery is not a search and seizure process. If handled well, it can expedite dispute resolution."[24]

CONCLUSION:

After the amendment of Arbitration & Conciliation, 1996 the Indian courts have become more arbitration friendly. Indian arbitration proceedings should not hesitate from using Technology software programs such as TAR which are likely to change the future of discovery in arbitration.

20 *How Technology Assisted Review Can Decrease the Cost of E-Discovery in Arbitrations By Ignatius Grande and Joseph Lee*

21 *Da Silva Moore v. Publicis Groupe, Judge Peck. 11 Civ. 1279 (ALC) (AJP)*

22 *Irish Bank Resolution Corp. v. Quinn, [2015] IECH 175*

23 *Pyrrho Investments Ltd. v. MWB Property Ltd., 2016 EWHC 256 (Ch), Judge Master Paul Matthews*

24 *http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/Quotes/India_Can_Become_Global_Arbitration_Hub.pdf*

EUROPEAN MEDICINE AGENCY RECOMMENDS MODIFIED-RELEASE PARACETAMOL TO BE REMOVED FROM THE MARKET

Shahnawaz Ibrahim

On September 1, 2017, The European Medicines Agency's (EMA) Pharmacovigilance Risk Assessment Committee (PRAC) has recommended that modified or prolonged-release paracetamol products that are designed to release paracetamol slowly over a longer period should be removed from the market. The decision was taken in view of the difficulties in managing overdose in patients, due to the complex way these medicines release paracetamol into the body[25].

The Committee, after evaluating published studies and consulting experts, confirmed that when used in the approved way, modified-release paracetamol tablets have acceptable benefits and risks. However, experience has shown that in event of overdose, because of the way paracetamol in modified-release products is released in the body, the usual treatment procedures developed for immediate-release products are not appropriate. The PRAC therefore recommended the suspension of the marketing authorizations of these medicines.

The review of modified-release paracetamol was initiated on June 30, 2016, following a request from the Swedish Medicines Authority, the Medical Products Agency under Article 31 of Directive 2001/83/EC. The Swedish Medicines Authority had noted problems in managing overdose with such a product since marketing approval. The PRAC evaluated published studies and reports of overdose with these medicines, consulted experts in the management of poisoning and assessed how overdose with paracetamol is managed in the EU and other parts of the world.

Experience has shown that in overdose (particularly at high doses), because of the way the paracetamol in modified-release products is released in the body, the usual treatment procedures developed for immediate-release products are not appropriate and effective. If doctors are not aware that modified-release paracetamol has been taken, it affects decisions regarding the dosage, timing and duration of the antidote; overdose may result in severe liver damage or death. In modified-release products which also contain the painkiller tramadol, case may be further complicated because of the additional effects of overdose with tramadol.

In many cases, it may not be known whether an overdose of paracetamol involves immediate-release or modified-release products, making it difficult to decide what type of management is needed. The Committee could not identify means to minimize the risk to patients, or a feasible and standardized way to adapt the management of paracetamol overdose across the EU to allow for treatment of cases that involve modified-release preparations. It concluded on balance that the risk following overdose with these medicines outweighs the advantage of having a longer-acting preparation. The Committee, therefore, recommended that marketing of modified-release paracetamol medicines should be suspended. Immediate-release paracetamol products, which are not affected by this review, will continue to be available as before.

The agency also said that it remains important that patients seek medical advice quickly if they have taken, or think they may have taken, more than the recommended amount of any paracetamol-containing product. Patients should also consult a healthcare professional if they have any other concerns about their medication.

Paracetamol is a medicine that has been widely used for many years to relieve pain and fever in adults and children.

25 *http://www.ema.europa.eu/ema/index.jsp?curl=pages/news_and_events/news/2017/09/news_detail_002806.jsp&mid=WC0b01ac058004d5c1*

ABOUT PHARMACOVIGILANCE RISK ASSESSMENT COMMITTEE (PRAC)[26]

The Pharmacovigilance Risk Assessment Committee (PRAC) is the European Medicines Agency's (EMA) committee responsible for assessing and monitoring the safety of human medicines. The PRAC was formally established in line with the pharmacovigilance legislation which came into effect in 2012 to help strengthen the safety monitoring of medicines across Europe.

26 *http://www.ema.europa.eu/ema/index.jsp?curl=pages/about_us/general/general_content_000537.jsp&mid=WC0b01ac058058cb18*

INDIAN TRADEMARK OFFICE: A JOURNEY TOWARDS A BETTER FUTURE

Himanshu Sharma

INTRODUCTION:

For decades, the Indian Trademark Office was termed as the slowest office in terms of getting a trademark registration. The scarcity of staff combined with the lackluster attitude of the Officials working had given Indian Trademark Office a tag of being the least efficient office till early 2000's. Then came the transformation period wherein the government changed the rules of appointment of the Controller General (CG) in the year 2009 and an 'Indian Administrative Services (IAS)' Officer took over the reins for the first time. When Mr. P. H. Kurien was appointed as CG of the Indian Patent and Trademark Office, there was a lot of pendency and lack of transparency in the working style of the Office. The very first step taken by him was digitization of all the files related to Patent and Trademarks. From that point onwards, the Indian Trademark Office has not looked back and is now going at a steady pace wherein there is less pendency and adequate transparency.

TRANSFORMATION IN INDIAN TRADEMARK OFFICE

Availability of free search of trademark database: Before adopting or filing a trademark, a proprietor needs to ensure that the mark is available. Earlier a trademark search, after payment of an official fee of INR 500, used to take more than 2 months . It was a big headache for an owner as he was required to wait for a long time for the search report to reach him and that too after a lot of hassle. In the year 2011, Indian Trademark office made database available for the general public and trademark search become free. This has helped tremendously as people file trademark after getting it thoroughly searched and making sure that the applied trademark is available.

Transparency: With the digitization of the Indian Trademark Office, all the documents related to the trademark applications are available online without any hassle. Even the orders passed by the hearing officers are available online, obtaining a copy of which was earlier a hard task and an Applicant was required to either visit the office numerous times or had to pay under the table to get a copy. The availability of all the documents and orders online helps the Applicant's in checking the progress of the trademark registration without expending much effort. This has also helped in uplifting the image of the office in the eyes of the Foreign Applicants, as they can also keep a track of the progress of their trademark application without relying on the local agents, who in past took them for a ride due to lack of transparency.

Introduction of Online filing: With the introduction of Madrid protocol and online filing, Indian trademark office had taken a long leap of faith amongst the Applicants. Not only this helps businesses and applicants in saving time and effort but it has also helped trademark office saving valuable resources by utilizing the staff in other processes where they are required rather than spending time in time-consuming processes of filing of application such as making data entries in the database, maintaining physical files etc which were eating into a lot of resources.

Appointment of new staff: In the recent years, the government has undertaken the task of appointment of the new staff at the Indian Trademark Office as same was required due to the increasing workload of the officials and manifold increase in new filings due to increased awareness and knowledge of IP rights among the business class. People now are more diligent about their IP rights and try to secure them first hand before moving forward with establishing business. Government is also giving push to manufacturing in India and promoting the entrepreneurs to establish their businesses through various schemes like Make in India, Start-up India and Digital India. This has led to a sudden surge in seeking protection of IP rights be it a Patent, Trademark or Copyright etc., as people want to protect the rights first and then move forward. With this, the workload at the IPO of India has increased tremendously and requires a larger work force. During the last five years the situation regarding the work force at the IPO has improved and

new staff at all level has been hired. Due to this, the situation at Trademark Office has improved up to a level that now a trademark gets registered within six months from the filing.

1. **Least pendency:** As explained above, with the improvement in the number of people working in the IPO, the pendency at the Indian Trademark Office is at its lowest. Each department of the Registry consciously works towards the reduction of pendency. A number of drives across all departments of the registry are undertaken where the applicants are called upon to provide the necessary documents so that a pending action can move forward. There are numerous drives taken up by Indian Trademark Office such as taking up post registration, show cause matters and pending replies to the examined applications in order to reduce pendency.

2. **Introduction of new Trademark Rules:** The new Indian Trademark Rules of 2017 have been adopted by Indian Trademark Office in the month of March and subsequently more procedures have been undertaken or streamlined to make Indian Trademark Office an efficient office. The outline of the new Rules of 2017 is to make Indian Trademark Office a paperless office and to have proper procedures in every department. The effort is being made in the new Rules to encourage people to go for online filing which is helping in improving the services at the Indian Trademark Office. A 10% Discount is provided to an Applicant if the application is filed online and same is also easy to access.

3. **Timeline for the process:** With the introduction of new Rules of 2017, effort is made by the legislature to introduce a timeline for each procedure. Earlier an Opposition proceedings would go on forever but the new Rules of 2017, lays a special focus on the speedy redressal of disputes amongst the parties embroiled in a dispute for the trademark. Hence, under the new Rule 50 of 2017, it is mentioned that no party shall be given more than two adjournments and each adjournment will not be more than thirty days. Further, effort has been made to reduce the timeline for procedure of registration to a minimum and there are lots of cases where this procedure has been completed within 6 months. The Opposition proceeding under the Rules 50 to 52 of 2002, had provisions related to the extension of time but the same are now done away with, under the new Rules of 2017. There are no provisions related to the extension of time for filing evidences in the Opposition proceedings. Hence if a party to the proceeding does not file evidences or fails to intimate the Registrar that he wishes to rely on the documents already filed, within stipulated time period provided under the Rules 45 to 47 of new Rules of 2017, then it will be deemed that he has abandoned his application/opposition.

4. **Proper procedure to declare trademarks as well-known:** Under the new Rule 124 of 2017, an owner of a trademark can apply to Indian Trademark Office, to recognize his trademark as a well-known trademark by paying an official fee. Until now, a trademark could be recognized as a well-known trademark by a court in a proceeding related to trademark infringement. Now, an owner of a trademark can file an application to this effect, along with all the evidences and documents on which the Applicant wants to rely in support of his claim. The Registrar will go through the application and may ask for the additional documents and evidences in this regards from the Applicant and if satisfied with the claim, can determine the trademark as a well-known Trademark. The Registrar can ask public for objection against the said application and within 30 days any person can object the application. The Registrar on acceptance of a trademark as a well-known trademark will publish it in Trademark Journal.

5. **Least interference of Officials:** With technology taking over most aspects, the India ITO is also moving in the same direction and all the procedures in the Indian Trademark Office are now being monitored and processed with the help of special software. All the procedures are maintained with the help of this software and the human intervention relating to the appointment of hearing, allotment of files etc, is now at a minimum. As everything is published online, there are less chances of getting an arbitrary or an out of turn order. With the fear of somebody constantly monitoring, the official are more diligent about work and chances of fiddling with the procedure is now minimum.

6. **Email now a way of Official communication:** Under the new Rules, the Indian Trademark Office has also recognized email communication as the official mode of communication. For the same, an Applicant/Agent has to provide an email address at

the time of filing of an application and all the official communication will be sent to the Applicant/ Agent on this email. The deadline to respond to the official communication will be counted from the date of communication of email to the Applicant/ Agent. This is also a step forward in the direction of making Indian Trademark Office a paperless office as an Applicant can also file replies to the examination report and other communication from Indian Trademark Office through online portal of Indian Trademark Office.

The changes mentioned above have not taken place overnight and it took a lot of effort from the stakeholders and government to bring Indian Trademark Office to a position where it can compete with any international office. Although work is still far from over and there is a scope of improvement in each department of Indian Trademark Office and all the parties related to the office. All should work in consonance with each other so that registration of trademark in India should become a smoother procedure rather than a hassle which people faced in past.

CDSCO NOTICE REGARDING STRICT REGULATORY CONTROL OVER MANUFACTURE, SALE AND DISTRIBUTION OF OXYTOCIN AND TO CURB ITS MISUSE

Vijaylaxmi Rathore

On September 22, 2017, The Central Drug Standard Control Organization (CDSCO) has notified to all the state drug controllers regarding strict regulatory control over manufacture, sale and distribution of Oxytocin and to curb its misuse. The CDSCO has received the letter from Ministry of Health and Family Welfare vide F.No. BD/VET/CELL/13.2014 (Pt-1) dated 09-05-2017 that the following measures are to be taken in order to comply the direction of the Hon'ble High court, Himachal Pradesh on the subject cited above-

I. Constitution of special task force in each District, of each State, to ensure that no prohibited/regulated drug including Oxytocin is freely available in each district in open market, save and except in manner prescribed.

II. Concerned Drug Controllers of the States where licenses of manufacturing of Oxytocin have been issued shall examine the license of all existing manufacturers of Oxytocin to ensure that the same have been issued strictly in accordance to the Drugs and Cosmetics Act, 1940 and Rules 1945 and that the manufacturers mandatorily comply with all the conditions of the Act and rules framed there under. Immediate appropriate actions as per the statutory provisions may be taken wherever violations of the rules are found.

III. The State Drug Controllers shall place on their respective websites, by 10th of each month, details of licenses issued to various manufacturers along with the monthly statement of production and sales of Oxytocin with complete particulars and details furnished by manufacturers. The manufacturer of Oxytocin shall in turn submit these details beforehand, so as to reach the office of drug Controller by 7th of every month.

IV. The wholesaler and retailers of all prohibited scheduled drugs including Oxytocin shall maintain records, as required under law and the same shall be produced for inspection after every quarter before the officer specifically deployed for this purpose by the drug controller.

V. You may take appropriate steps of undertaking IEC activities for sensitizing public about ill effects of Oxytocin both on humans and the animals specially mulching cattle, and about penal provisions for abuse/misuse of Oxytocin[27].

ABOUT OXYTOCIN

Oxytocin, a neuro-hormone that also acts as neurotransmitter in brain, is naturally released in large amounts by the posterior pituitary gland in mammals. Oxytocin is known to induce contractions of the uterus during labour and stimulate ejection of milk during breastfeeding. It also promotes the maternal nurturing behavior along with general psychological stability in women as per various researches.

Synthetic Oxytocin is being widely administered in obstetric practice for induction of labour, control of bleeding following delivery, and for the stimulation of milk letdown reflex in human and cattle as well. However, along the way people started using Oxytocin injections unsystematically on milch animals not only during delivery of a calf, but more frequently to get benefit/profit out of that for example – a milch cattle injected 5 ml of Oxytocin twice a day just five minutes before of milking, so that milk flows fast out of the udder[28].

There have been many complaints regarding misuse of Oxytocin injection in milch cattle to increase milk production by dairy owner and also to increase the size of vegetables and fruits by farmers in the country. However, there no scientific data in support of such

27 *http://www.cdsco.nic.in/writereaddata/notice22_9_2017.pdf*

28 *http://www.bwcindia.org/Web/Awareness/LearnAbout/Oxytocin.html*

practices is available. The National Dairy Research Institute (NDRI) and Indian Council of Agricultural Research (ICAR) has informed that there is no scientific evidence that artificial use of Oxytocin has adversely affected progeny of cattle and buffaloes resulting in dwindling of livestock. However, continuous Oxytocin use could lead to a progressive addiction and lack of response to normal let down of milk[29].

REGULATION OF MANUFACTURE, SALE AND DISTRIBUTION OF OXYTOCIN IN RECENT YEARS

The Government of India, Ministry of Health and Family Welfare, issued a notification under Section 26A of the Drugs and Cosmetics Act, 1940 vide G.S.R. 29(E) dated January 17, 2014 restricting the manufacture and sale of Oxytocin as under:

- The manufacturers of bulk Oxytocin drug shall supply the active pharmaceutical drug only to the manufacturers licensed under the Drugs and Cosmetics Rules, 1945 for manufacture of formulations of the said drug.
- The formulations meant for veterinary use shall be sold to the veterinary hospitals only[30].

Further, the Department of Animal Husbandry, Dairying and Fisheries have also issued an Advisory to all the State Governments to comply with the provisions of the above-mentioned notification. Despite this, the continued misuse of Oxytocin injection in the country has been considered by the Drug Consultative Meeting (DCC) as well as Drug Technical Advisory Board (DTAB) in its various meetings.

In the 69th meeting of DTAB, the board opposed against Oxytocin prohibition, as it has definite use for therapeutic purposes. The problem of misuse of Oxytocin is more related to stricter control over the manufacture and sale of the drug especially through clandestine channels.[31]

Similarly, the 49th DCC meeting also raised the following recommendations to fight against the misuse of Oxytocin in the country:

- State Drug Regulatory officials must conduct raids with the assistance of Police Authorities at the suspected outlets of such drugs near the dairy farms after due surveillance to apprehend culprits red-handed.
- The manufacture and sale of Oxytocin formulations by the licensed manufacturers in the State should be monitored regularly.
- States should share information about the raids conducted and results of investigations with other concerned State Drug Control Authorities and Zonal offices for interstate coordination.
- Samples of milk may be drawn to assess the presence of Oxytocin in milk.
- Rapid test for detection of Oxytocin may be developed.
- The Port offices of CDSCO shall inform custom authorities that import of all peptide formulations be monitored for their use.
- The Central Government may request Police authorities of States to take cognizance of offences related to misuse of Oxytocin.
- FSSAI may be asked to explore the possibility of declaring the use of Oxytocin on animals for production of milk as an offence under the FSSAI Act.
- Each State and Central regulatory system must develop an intelligence wing for keeping close watch, sharing of information and prompt action for checking/eradicating the misuse of Oxytocin in the country[32].

CONCLUSION:

The manufacture, sale and distribution of Oxytocin is well described under the provisions of the Drugs and Cosmetics Act, 1940 and Drugs and Cosmetics Rules, 1945. However, a strict vigilance and regular monitoring/ inspection of Oxytocin misuse by Central and State drug authorities are recommended.

29 *http://dahd.nic.in/sites/default/files/LS%20328.pdf*
30 *http://cdsco.nic.in/writereaddata/G.S.R.%2029%20(E).pdf*
31 *http://www.cdsco.nic.in/writereaddata/70th%20DTAB%20minutes.pdf*
32 *http://www.cdsco.nic.in/writereaddata/Minutes%20of%20%20DCC%20dated%2016_10_2015%20.pdf*

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