Analysis on Yograj Infrastructure Ltd v. Ssang Yong Engineering & Construction Co. Ltd.

The Supreme Court after the matter of Videocon International has further paved the way for minimal interference by Indian Courts to International Arbitration. The judgement being first of its kind to examine the rules of the International Arbitral Tribunal to reach to its final conclusion for rejecting an appeal under section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (the "Act"). The judgement ruled that the seat of arbitration was Singapore and rules governing the arbitration were of the Singapore International Arbitration Centre ("**SIAC**"), therefore Part I of the Act was impliedly excluded.

The Arbitration clause before the Supreme Court:

"*27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.*

27.2 The arbitration shall take place in Singapore and be conducted in English language.

27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration."

Clause 28 of the Agreement described the governing law and provided:

"*This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions.*"

The Appellant as well as the Respondent filed application for interim reliefs under Rule 24 of the SIAC Rules in June, 2010 before the Sole Arbitrator, Mr. G.R. Easton, who appointed by the SIAC on 20th May, 2010. The Arbitrator passed an interim order on 29th June, 2010 in favour of Respondent.

The Appellant filed an appeal under Section 37(2)(b) of the Act before the district Court at Narasinghpur against the interim order. The District court dismissed the Appeal on ground of maintainability and lack of jurisdiction, since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed

by the laws of Singapore. The Revision Application of the Appellant was dismiss by the Madhya Pradesh High Court on the ground that the parties have impliedly adopted Rule 32 of the said Rules, which categorically provides that the law of arbitration under the said Rules would be the International Arbitration Act, 2002, of Singapore.

Rule 32 (of the 2007 Rules) provides:

"*Where the <u>seat of arbitration is Singapore</u>, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.*

The Supreme Court held that the law governed the agreement and it is sufficient to permit the inference that Indian law of arbitration, however, the parties had agreed to be governed by SIAC Rules as the "crucial law" which includes Rule 32 providing that the law of arbitration for an arbitration under the SIAC Rules shall be the Singapore International Arbitration Act, 2002. and therefore Part I of the Act stood excluded.

The Supreme Court further held that Section 42 of the Act, was applicable at the pre-arbitral stage ie. when the Arbitrator had not also been appointed. In this case, the Arbitrator was already appointed and the arbitral proceedings had commenced, the SIAC Rules became applicable excluding the applicability of Section 42 as well as Part I of the Act, including the right of appeal under Section 37 thereof.

Thus, the appeal under Section 37(2) (b) of the Act was held not maintainable and was dismissed.

Intellectual Property Rights and the tale of "Arroz Gandhi"

"What is in a name' may not always be innocent. Logically, proper names are not connotative but have often gathered a content, a halo, around them sometimes or for all times to come. National or international significance gets attached to certain names or institutions over the years or ages and then they belong to the nation or to nations."

It gathered the recent attention, when Mr. Lalit Bhasin, the seasoned Indian lawyer took it upon himself to impede an attempt of commercially capitalizing on the name of Mahatma Gandhi, *the father of the nation (emphasis supplied)*.

It began when a request for trademark registration before the Trademark Office in Ecuador by a Valverde Munoz ("**Munoz**") as made, seeking registration of the name and label "*Arroz Gandhi*" as a trademark in Ecuador for rice that may or may

not come from India.

On receiving information about the application of Mahatma Gandhi's name and image for commercial use in a foreign state, the application was opposed in the Trademarks Office of Ecuador, wherein, Mr. Bhasin stated that the act by Munoz was practically and in spirit, the same as blasphemy in India, as it could be hurtful to the sentiments of the general public, who have nothing but veneration and respect for the man who they call the "father of the Nation". The impugned trademark literally translates to *"Gandhi Rice"*. It was reiterated in the opposition petition that no person can be permitted to carry any commerce and trade under the name and image of Mr. Gandhi, especially for petty monetary gains, for he was a world-famous leader.

Additionally it was contended that the extant laws of India protect "the name and symbol" of Mr. Gandhi as a national emblem under the Emblems and Names (Prevention of Improper Use) Act, 1950 ("**the Act**"), thereby imposing absolute restriction on use the name or representation of Mahatma Gandhi (or any other name or emblem specified in the Schedule 9-A of the Act) in a trademark or design, including the pictorial representation of Mahatma Gandhi for the "purpose of any trade, business, calling or profession, or in the title of any patent, or in any trademark or design" without authorization of the Government of India.

The Act, as stated in its preamble, is an Act to prevent the improper use of certain emblems and names for professional and commercial purposes. The applicability of this Act extends to the whole of India and to Indian citizens outside India. In this particular instance, the application for registration of a trademark is made in Ecuador by a person who is not an Indian citizen. This causes substantial ambiguity whether or not an opposition to the registration of the trademark can be upheld.

Interestingly, also under the Ecuador law, officially recognized flags and emblems of any state may not be registered as a trademark without the permission of that state. The provision only protects flags and emblems, Mahatma Gandhi, however is arguably neither. His name is protected under Indian law, but no equivalent provision exists under Ecuadorian law.

Another provision of Ecuador's trademark law states that signs may not be registered as trademarks as they violate third party rights such as those "that consist of the full name, pseudonym, signature, title, nickname and caricature, likeness or portrait except where proof is given of the consent of that person or his heirs." This provision supports the opposition to some extent. However, as this provision applies to all persons and not just national symbols, it is probable that the person whose name is being used, his/her heirs would have the right to challenge the registration and the general public would probably not have the *locus standi*.

Regard may be had to Article 66 of the Ecuadorian Constitution which protects the right to good honor and a good name. It protects the image and voice of every person. Essentially this provision is a right to publicity provision, and these rights can usually be invoked by the persons themselves or their heirs, and not the public at large.

It appears that neither Indian nor Ecuadorian law supports the case of the opposition in entirety. The bone of contention in the instant case therefore remains that the Act does not extend beyond India and Indian citizens, and while flags and emblems of other countries are protected by Ecuador's trademark legislation, it does not protect our national icons.

For this reason, it is only appropriate that the Indian symbols and emblems be protected by other countries, and the Trademarks Office at Ecuador extends a common courtesy to India. There is no denying the fact that the name of Mahatma Gandhi and any representation of him is held in the highest regard by the Indian public in general, and it is hurtful to the sentiments of the people that the Father of their Nation be used by someone to market a product.

A dispute along similar lines had arisen with Montblanc International GmbH ("**Montblanc**"), when the German pen-makers released a limited edition pen with Gandhi's likeness on the nib, stating that "the design pays tribute to his life and achievements". This faced considerable opposition, and consequently a notice by the Kerala High Court was served on Montblanc. It ultimately undertook not to sell these pens, as people took it as an insult to Gandhi that his image was being used on an article of opulence and luxury.

Conclusion

Section 3 of the Act provides for "Prohibition of improper use of certain emblems and names". Names such as Gandhi, Nehru and Shivaji have been included in the Schedule, as a mark of respect to the great people who contributed enormously to our country's mindset and sense of independence. But what does 'improper use' mean? This phrase surely calls for an adequate clarification.

The law as it stands today is unclear whether trans boundary protection be given to the national icon of India.

As much as the jurisdiction is imprecise, substantially ambiguous is the scope of protection whether it extends to the flags and emblems or further covers names and pictorial representation.

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Applicable from October 22, 2011)

With increased complexities and challenges facing Corporates world-over, the regulatory environment across jurisdictions has been facing “catch up” especially over the past few decades. Regulators all across are concerned about transparency and corporate governance while at the same time ensuring competition and encourage investment.

The Takeover Code 2011 is one such move by the Securities and Exchange Board of India (“**SEBI**”). Takeover Code 2011 comes out as a result of discussions and debates for more than 2 years by the Achuthan Committee which was set up by the SEBI in the year 2009 and replaces the SEBI (Substantial acquisitions of shares and takeovers) guidelines 1997. Notified on 23rd September, 2011, the new Code took effect from 23rd October, 2011.

The other reasons which made the passing of a new Takeover Code were put forth by SEBI in its report in which the Achuthan Committee stated the necessity of a Takeover Code on the following grounds:

- The confidence of retail investors in the capital market is a crucial factor for its development. Therefore, their interest needs to be protected.
- An exit opportunity shall be given to the investors if they do not want to continue with the new management.
- Full and truthful disclosure shall be made of all material information relating to the open offer so as to take an informed decision.
- The acquirer shall ensure the sufficiency of financial resources for the payment of acquisition price to the investors.
- The process of acquisition and mergers shall be completed in a time bound manner.
- Disclosures shall be made of all material transactions at earliest opportunity.

The main objectives of enacting this new Code and replacing the old one were to provide transparency, protection of interests of investors, balancing of conflicting interests and objectives of stakeholders and investors, ensure fair and accurate disclosure of all material information in transactions, promotion of competition and ensuring that only those acquirers who are capable of actually fulfilling their obligations under the takeover regulations make open offers.

Below are the main highlights of the Takeover Code 2011:-

- Any acquirer would require making an open offer for Acquisitions of an aggregate of 25 percent or more voting rights in a target company.
- An acquirer who already holds 25 percent or more voting rights in a target

company is allowed to acquire additional voting rights in the target company up 5 percent within a financial year, without making an open offer.

- The Acquirer would be required to make an open offer regardless of the level of shareholding and acquisition of shares, acquisition of control over a target company.
- Shareholders holding shares entitling them to exercise 25 percent or more of the voting rights in the target company may, without breaching minimum public shareholding requirements under the listing agreement, voluntarily make an open offer to consolidate their shareholding.
- In case of an acquisition leading to a change in control, the acquirer can exercise control over the acquired company, such an acquisition would be indirect in nature and will make it mandatory for the Acquirer to make an open offer.
- If the indirectly acquired target company is a predominant part of the business or entity being acquired, the takeover code would treat such indirect acquisition as a direct acquisition for all purposes.
- Timelines of various activities in the open offer process have been revised. A normal open offer process would be completed within 57 business days from the date of public announcement.
- Also the FII holding limit remains to 10% in-spite of the apprehensions that it could have easily gone up to 23%.

The main differences between the Takeover Code, 2011 and the Takeover Code 1997 can be enlisted as follows:-

- Multiple Trigger points amounting to the obligation of Disclosure under Regulations 7& 8 of 5%, 10%, 14%, 54% & 74% have been replaced with one trigger point of 5% in the new Code Regulations 29 & 30(1).
- The threshold limit for annual disclosure has been increased from 15%-25% by the new code.
- Threshold limit for Open Offer Obligations which earlier was 15%under Regulations 10 & 11 has been revised to 25% under Regulation 3 of the new Code.
- Also the amended provisions have done away with the multiple trigger points of open offer for the creeping acquisition route and fixed it to 25%.
- The new Code also scrapped the non-compete fee.

News 10 @ a glance

Government set to provide Rs. 8000 crore to SBI:

The government has finally, although partially, relented and is likely to infuse Rs.8000 crore in State Bank of India. This will enable

SBI to push for rapid expansion of its loan book. In 2008, the government had subscribed to a Rs. 20,000 crore rights issued by SBI to help augment its capital base. But following the rapid expansion, the bank had demanded more funding to help grow its loan book and retain at least 25% of the market share.

Kingfisher defaulting TDS payment:

The Airport Authority of India(AAI) has found that the airline had deducted almost Rs.21 crore in the payments made to it for the financial year 2010-11 but the same was not being reflected as tax deposited on its behalf. The authority has now asked kingfisher to pay this sum to it, along with other dues of Rs. 200 crore.

BBC to cut 2,000 jobs, move offices out of London to save $ 1 bn in costs:

The British Broadcasting Corporation, plans to cut 2,000 jobs and move offices and production outside London as part of an effort to reduce costs after its funding was frozen. This may save the broadcaster about 670 million pounds ($1.04 billion) annually by the 2016-17 fiscal year.

New mining law to give tribals Rs.10k crore:

The Union Cabinet is set to approve a law that will provide more rights to

tribals for the beginning and end of mining activity besides providing Rs. 10,000 crore annually to 60 tribal-dominated districts. The bill proposes that coal companies set aside 25% of their post-tax profits for a fund. An amount equal to the royalty for iron ore, bauxite and limestone will also flow into the fund. Each district will get Rs.170 crore on average every year.

Promoters can no longer hide behind the ‘Pledge’:

Indian promoters, several of whom have managed to dodge rules which make it mandatory for them to disclose details of shares pledged by them, will now find it tough to sidestep such norms, with market regulator SEBI insisting in greater disclosure. New SEBI takeover code makes it mandatory for shares ‘encumbered’ to be disclosed. Under regulation 28(3) of the new takeover code, it has been explicitly clarified that an encumbrance shall include a pledge, a lien or any such transaction by whatever name called.

Tweak puts foreign investors in a spot:

A clause tucked away in the foreign investment policy update is threatening to stall foreign direct investment into the country, at least for a while. The new rules for FDI states that equity instruments with in-built options will not be considered foreign direct

investment. Such inflows into Indian companies even if they are issued in lieu of shares will be considered external commercial borrowing. The rule will affect private equity investments as they usually have buyback provisions.

Obama asks Supreme Court to back healthcare law:

The Obama administration asked the US Supreme Court to back the centerepiece of Barack Obama's sweeping healthcare overhaul-the requirement that all Americans have health insurance. The appeal was largely expected as a high court ruling against the law could be a fatal blow to the president's signature domestic policy achievement and could have major implications for his re-election bid.

Emerging markets offer banks profits, headaches:

As profits wane on the home front, Wall Street firms are increasingly dependent on the emerging markets to bolster their bottom lines. But the perils can be plentiful, with economic, political and regulatory challenges. Foreign regulators have scolded banks, fined them and even banned their activities in various countries. The emerging market quest has been marred by regulatory challenges.

US regulator grapples with Cos' overseas corruption:

Wall Street's headlong rush into emerging markets could collide with the government's push to fight corruption overseas. The Justice Department of Securities and Exchange Commission (SEC) have been ramping up their enforcement of the Foreign Corrupt Practices Act in an effort to police bribery by US companies in other countries. Since 2008, the government has brought more than 150 cases under the law.

Dunlop India transfer rights to Ruia Sons

The Kolkata-based tyre manufacturer Dunlop India has announced that it is transferring its rights to an estimated 100 trademarks including Dunlop Tyre, Falcon Tyre and Monotona to Ruia Sons Private Limited, the flagship holding firm of Pawan Kumar Ruia, said a Livemint report.
'An agreement has been concluded to transfer Dunlop's trademarks to Ruia Sons,' said an official at the tyre maker, who did not want to be named. 'We are soon going to file an application with the trademark office for the transfer of the trademarks to Ruia Sons', he said. Dunlop's right to these trademarks are restricted to India alone.