



SINGH & ASSOCIATES
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ADVOCATES & SOLICITORS

September 2014. Vol. VII, Issue IX

INDIAN LEGAL IMPETUS



"IBA 2014 Special Edition".



FOREWORD



Manoj K. Singh
Founding Partner

Singh & Associates is thankful to all its readers for their overwhelming response.

Catching up with the most certain thing in life i.e. "Change" and reformulating our understanding and strategies with the ever changing dynamics of the legal world, there are many issues that need to be addressed. With our avid endeavour to keep our readers updated on all the important developments in the Indian legal scenario, it's my pleasure to bring to you the **September 2014** issue of our monthly News Letter "**Indian Legal Impetus**" which is also the **IBA Special Edition**.

In this edition, we have tried to provide the key highlights on Indian Pharmaceutical Industry which is at present, at its most progressive era in terms of "**Fixation of Prices of Drugs Under the DPCO, 2013: Application of Para 19 Only in Extra Ordinary Circumstances**". Further we have recent REITs Regulations introduced by SEBI in the article "**Framework of REITs in India**". In continuation from the corporate sector we have "**E-Commerce in India**".

Now moving ahead with our IPR Section, we have "**Hindi IDN'S: India's Move Toward Internet Literacy**" which elaborate on ICAAN management which is responsible for technical alignment of the domain names system which is working towards making internet available to every individual, the IPR Section also has contributed towards the "**Utility Model Patent: Road Ahead**". Further moving in this section we have "**Media Law: the Dire Needs of the Day. India's Overview on Standard Essential Patent**" which deals with the parallel policy of anti-trust laws and intellectual property rights intersect at a point which invoke public interest lastly from this section we have from "**Copyright to Right to Copy: 'World of Open Sources'**".

Now moving ahead with the Litigation Section, we have tried to summarise the latest judicial pronouncement of the honourable apex court wide its judgement in the article "**Aspect of Employer- Employee Relationship**"; the litigation section also includes article on topic, "**Cheque Bouncing- Jurisdiction of Courts Redefined**".

Further this edition briefly discusses on "**Overview of Sexual Harassment of Women at Workplace**" its implication, and related laws in India. The said article can be found in the Corporate Section of the newsletter.

Lastly this issue also includes the latest development in various fields of law which have been summarised in the Newsbytes Section of the newsletter.

I hope that our esteemed readers find this information useful and it also enables them to understand and interpret the recent legal Indian and International developments. I welcome all kinds of suggestions, opinions, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in.



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“Indian Legal Impetus”

Volume VII, Issue IX

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Published by
Singh & Associates
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FIXATION OF PRICES OF DRUGS UNDER THE DPCO, 2013: APPLICATION OF PARA 19 ONLY IN EXTRA-ORDINARY CIRCUMSTANCES

Rajdutt S Singh & Mrinali Mudoi

Indian Pharmaceutical Industry is at present, at its most progressive era where it has witnessed a robust growth over the past few years moving on from a turnover of approximately US \$ 1 billion in 1990 to over US \$ 20 billion in 2010 of which the export turnover is approximately US \$ 8 billion. The industry ranks 3rd in terms of volume and is 14th in terms of value globally.¹ It has shown tremendous progress in terms of infrastructure development, technology base creation and a wide range of products including pharmaceutical and surgical products.

THE DRUGS (PRICES CONTROL) ORDER 2013²

In May 2013, the Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers notified the Drugs (Prices Control) Order 2013 ("DPCO 2013") to regulate the prices of 348 essential drugs as mentioned in the National List of Essential Medicines (NLEM). The DPCO 2013 replaced the DPCO 1995 which included only 74 bulk drugs within its ambit to regulate their prices and the pricing of such drugs were fixed on the basis of manufacturing costs declared by the drug manufacturers.

FIXATION OF PRICE OF DRUGS UNDER CERTAIN CIRCUMSTANCES

Paragraph 19 of the DPCO 2013 empowers the National Pharmaceutical Pricing Authority (NPPA) to fix/ revise the ceiling price or retail price of any drug which it deems necessary for the interest of public incase of any extra ordinary circumstances. In the cases where the ceiling price or retail price of the drug is already fixed and notified, the Government is empowered to allow increase or decrease in the ceiling price or the retail, irrespective of annual wholesale price index for that year. Further, while executing such powers, in case the NPPA requires to cause enquiry or call for information,

DPCO 2013 confers the power to the NPPA to do so, if it is considered necessary in public interest.

NPPA INTERNAL GUIDELINES FOR FIXATION/ REVISION OF THE PRICE OF FORMULATIONS AND ITS EFFECTS THEREOF

In exercise of the powers conferred to the NPPA under Paragraph 19 of the DPCO, the NPPA formulated internal guidelines with an intention to have a uniform standard for fixation/ revision of prices of the drugs. As per these guidelines, the NPPA was required to monitor "inter-brand price differences" of non-scheduled formulations (formulations which are not under price control regime) on the basis of monthly Maximum Retail Price (MRP) based, data to be provided by the IMS-Health. On the basis of MRP based data, the NPPA used to identify the cases, wherein the MRP of the price brands exceeds 25 % of the simple average price of the medicines in that group to initiate the cases for price fixation under Paragraph 19 of the DPCO 2013. Initially, these guidelines applied in respect of single ingredient formulations/ medicines used for anti-cancer, HIV medicines, anti-tuberculosis, anti-malaria, etc.

Further, the NPPA was given responsibility to examine the cases of shortages of scheduled and non-scheduled formulations reported by the State Drugs Controllers or Government, on case to case basis for fixation or revision of price as conferred under Paragraph 19 of DPCO, 2013.

In July 2013, the NPPA had fixed prices of 50 anti-diabetic and cardiovascular medicines. This was the first time the government had brought drugs, outside the national list of essential medicines, under price control (Prices of 652 drugs under NLEM were fixed by the government last year under DPCO 2013)³. Various Pharmaceutical organizations have contended that the internal guidelines issued by the NPPA to regulate/fix

1. *Indian Pharmaceutical Industry –A Global Industry-* <http://www.pharmaceuticals.gov.in/aboutus.pdf>
 2. *An overview of the DPCO 2013 was covered under our October 2013 issue and the same can be accessed at* <http://singhassociates.in/UploadImg/NewsImages/Vol%20VI%20Issue%20X.pdf>

3. <http://timesofindia.indiatimes.com/business/india-business/Government-curbs-power-of-regulator-to-cap-HIV-cancer-drug-prices/articleshow/43276718.cms>



the prices of the drugs under paragraph 19 of the DPCO are erroneous.

RECENT ORDER OF GOVERNMENT FOR WITHDRAWAL OF THE INTERNAL GUIDELINES FORMULATED BY THE NPPA UNDER PARA 19 OF DPCO, 2013

Witnessing such outrageous response from the industry, the Government realized that the implementation of such internal guidelines formulated by the NPPA in pursuance of the powers conferred to it under Paragraph 19 of DPCO, 2013 is extremely harsh pressure on the Pharmaceutical Industry and its players as it adversely disturbed and get in the way of the smooth operation of the industry.

Recently on 22 September 2014, as per directions received from the Government in the Department of Pharmaceuticals under the Ministry of Chemicals and Fertilizers vide letter no. 31026/ 53/ 2014-PI-II dated 19.09.2014, the NPPA notified to withdraw the internal guidelines issued by it under Paragraph 19 of the DPCO, 2013 with immediate effect.⁴

CONCLUSION

Undoubtedly, it is one of the significant responsibilities of the Government to consider necessary steps in order to improvise the health sector of the country, however it is expected that in doing so, the Government should not overlook those considerable factors that could prove to be adverse consequences of the post era of the implementation of such steps in the longer run and should be diligent in the proper delegation of powers to the authorities. Although the Government empowered the NPPA to fix/ revise the ceiling price or retail price of any drug which it deems necessary for the interest of public and also if required, cause enquiry or call for information to the companies, however, it is required to consider that such powers can be exercised only in "extra-ordinary circumstances" and in "public interest".

4. <http://www.nppaindia.nic.in/order/ithdrawguideline-22-9-14.pdf>

FRAMEWORK OF REITS IN INDIA

Ms. Megha Kapoor and Mr. Harsimran Singh

The concept of Real Estate Investment Trusts Regulations (REITs) is not new to India. REITs invest primarily in completed, revenue generating real estate assets and distribute major part of the earning among their investors. Moreover, most of such investments are in completed properties which provide regular income to the investors from the rentals received from such properties.

The Securities & Exchange Board of India (SEBI) formally introduced the REITs in 2007 as draft REIT Regulations. Thereafter, SEBI released a revised set of draft REIT Regulations on October 10, 2013 through the consultative paper placed on SEBI website along with the draft REIT Regulations, 2013. The consultative paper and draft REIT Regulations were placed on SEBI website for public comments on October 10, 2013 till October 31, 2013; and comments were received from 65 entities.

Based on the comments received on the draft regulations and the Budget announcement of 2014-15, appropriate changes were made to the draft Regulations of 2013 and pursuant thereto SEBI issued a memorandum proposing the draft SEBI (Real Estate Investment Trusts) Regulations, 2014 (hereinafter referred as "Draft REIT Regulations"), and sought consideration and approval of the SEBI for the same.

The SEBI vide its meeting and decision dated 10.08.2014 bearing reference no. PR No. 89/2014 approved the SEBI (Real Estate Investment Trusts) Regulations, 2014.

Vide notification No. LAD-NRO/GN/2014-15/11/1576 dated September 26, 2014 and in exercise of the powers conferred by section 30 read with section 11 and 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the SEBI finally notified the SEBI (Real Estate Investment Trusts) Regulations, 2014 ("REIT Regulations")¹, laying down a framework for REITs in India and registration and regulation thereof.

1. http://www.sebi.gov.in/cms/sebi_data/attachdocs/1411722678653.pdf

SALIENT FEATURES OF THE REIT REGULATIONS

The salient features of the REIT Regulations, as notified by the SEBI, include the following:

1. REITs shall be registered with SEBI upon fulfilling following criterions:
 - (i) A REIT has to be structured as a trust in accordance with the provisions of the Indian Trusts Act, 1882 and the trust deed shall be duly registered as per the provisions of Registration Act, 1908;
 - (ii) It shall have parties such as trustee, sponsor(s), re-designated sponsor(s) and manager, and all such persons should be separate entities;
 - (iii) The Trust Deed shall have its main objective as undertaking activity of REIT in accordance with the Regulations;
 - (iv) The trustee of a REIT shall be registered with SEBI under SEBI (Debenture Trustees) Regulations, 1993, and shall not be an associate of the sponsor / manager.
2. Regulation 4 of the REITs Regulations provides from the qualification criterions in relation to the above mentioned office bearers of a REIT. Regulation 4 (2) (d) with regard to a sponsor(s) of a REIT specifies that:
 - (i) there are not more than three sponsors each holding or proposing to hold not less than five per cent. of the number of units of the REIT on post-initial offer basis;
 - (ii) the sponsor(s), on a collective basis, have a net worth of not less than INR one hundred crore, provided that each sponsor has a net worth of not less than INR twenty crore; and
 - (iii) the sponsor or its associate(s) has not less than five years experience in development of real estate or fund management in the real estate industry, provided that where the sponsor is a developer, at least two projects of the sponsor have been completed;



3. Further Regulation 4 (2) (e) enumerates eligibility criteria with regard to the manager as:

- (i) the manager has a net worth of not less than INR ten crore if the manager is a body corporate or a company or net tangible assets of value not less than INR ten crore in case the manager is a LLP;
- (ii) the manager or its associate has not less than five years experience in fund management or advisory services or property management in the real estate industry or in development of real estate;
- (iii) the manager has not less than two key personnel who each have not less than five years experience in fund management or advisory services or property management in the real estate industry or in development of real estate;
- (iv) the manager has not less than half, of its directors in the case of a company or of members of the governing Board in case of an LLP, as independent and not directors or members of the governing Board of another REIT; and
- (v) the manager has entered into an investment management agreement with the trustee which provides for the responsibilities of the manager in accordance with regulation 10;

4. The eligibility criteria with regard to a trustee are provided under Regulation 4 (2) (f) as under:

- (i) the trustee is registered with the Board under SEBI(Debtenture Trustees) Regulations, 1993 and is not an associate of the sponsor(s) or manager; and
- (ii) the trustee has such wherewithal with respect to infrastructure, personnel, etc. to the satisfaction of the Board and in accordance with circulars or guidelines as may be specified by the Board;

5. As per the REITs Regulations:

- (i) a "real estate" or "property" means land and any permanently attached improvements to it, whether leasehold or freehold and includes buildings, sheds, garages, fences, fittings, fixtures, warehouses, car parks, etc. and any other assets incidental to the ownership of real

estate, except mortgage. However, this definition does not include any asset falling under the purview of 'infrastructure' as defined vide Notification of Ministry of Finance dated October 07, 2013 including any amendments or additions made thereof;³

(ii) "real estate assets" means properties owned by REIT whether directly or through a special purpose vehicle;⁴ and

(iii) "rent generating property" means property which has been leased or rented out in accordance with an agreement entered into for the purpose;⁵

6. As per regulation 18(1), a REIT can invest only in SPVs or properties or securities or TDR in India in accordance with the REIT Regulations and in accordance with the investment strategy as detailed in the offer document as may be amended subsequently. However, the REIT shall not invest in vacant land or agricultural land or mortgages other than mortgage backed securities, provided that this shall not apply to any land which is contiguous and extension of an existing project being implemented in stages⁶. In such SPVs a REIT shall hold or proposes to hold controlling interest and not less than 50% of the equity share capital or interest;

7. Further, such SPVs shall hold not less than 80% of its assets directly in properties and shall not invest in other SPVs;

8. Upon registration, the REIT shall raise funds through an initial offer. Subsequent raising of funds may be through follow-on offer, rights issue, qualified institutional placement, etc. The minimum subscription size for units of REIT shall be INR 2 Lakhs. The units offered to the public in initial offer shall not be less than 25% of the number of units of the REIT on post-issue basis;

9. Units of REITs shall be mandatorily listed on a recognized Stock Exchange and REIT shall make

3. [Regulation 2 \(zt\)](#)

4. [Regulation 2 \(zj\)](#)

5. [Regulation 2 \(zp\)](#)

6. [Regulation 18 \(2\)](#)

continuous disclosures in terms of the listing agreement. Further, the trading lot for such units shall be INR 1 Lakh;

10. For the purpose of making an initial offer, the value of the assets owned/proposed to be owned by REIT shall be of value not less than INR 500 Crore⁷. Moreover, the minimum issue size for initial offer shall be INR 250 Crore;
11. The Trustee shall generally have an overseeing role in the activity of the REIT. The manager shall assume operational responsibilities pertaining to the REIT. Responsibilities of the parties involved are enumerated in the Regulations;
12. A REIT may have multiple sponsors, however, subject to a maximum of 3. Further, each sponsor shall hold at least 5% of the units of the REIT. Such sponsors shall collectively hold not less than 25% of the units of the REIT for a period of not less than 3 years from the date of listing. After 3 years, the sponsors, collectively, shall hold minimum 15% of the units of REIT, throughout the life of the REIT;
13. Not less than 80% of value of the REIT assets shall be invested in completed and revenue generating properties;
14. Not more than 20% of the value of REIT assets shall be invested in following:
 - (i) properties in which not more than ten per cent of value of the REIT assets shall be invested, which are:
 - a) under-construction properties which shall be held by the REIT for not less than three years after completion;
 - b) under-construction properties which are a part of the existing income generating properties owned by the REIT which shall be held by the REIT for not less than three years after completion;
 - c) completed and not rent generating properties which shall be held by the REIT

for not less than three years from date of purchase;

- (ii) mortgage backed securities,
- (iii) listed / unlisted debt of companies / body corporates in real estate sector,
- (iv) equity shares of companies listed on a recognized stock exchange in India which derive not less than 75% of their operating income from Real Estate activity,
- (v) government securities,
- (vi) unutilized FSI of a project where it has already made investment,
- (vii) TDR acquired for the purpose of utilization with respect to a project where it has already made investment, and
- (viii) money market instruments or Cash equivalents.

However, investments in developmental properties shall be restricted to 10% of the value of the REIT assets;

15. A REIT shall invest in at least two projects with not more than 60% of value of assets invested in one project;
16. REIT shall distribute not less than 90% of the net distributable cash flows, subject to applicable laws, to its investors, at least on a half yearly basis;
17. REIT, through a valuer⁸, shall undertake full valuation on a yearly basis and updation of the same on a half yearly basis and declare Net Asset Value within 15 days from the date of such valuation/updation;
18. The borrowings and deferred payments of the REIT at a consolidated level shall not exceed 49% of the value of the REIT assets. In case such borrowings/

7. Explanation to Regulation 14 (2) (b) - Such value shall mean the value of the specific portion of the holding of REIT in the underlying assets or SPVs.

8. Regulation 2 (zz) - "valuer" means any person who is a "registered valuer" under section 247 of the Companies Act, 2013 and who has been appointed by the manager to undertake valuation of the REIT assets;

Provided that till such date on which section 247 of the Companies Act, 2013 comes into force, valuer shall mean an independent merchant banker registered with the Board or an independent chartered accountant in practice having a minimum experience of ten years;



deferred payments exceed 25%, approval from unit holders and credit rating shall be required.

KEY CHANGES

The notified REITs Regulations, 2014 differ from the draft REITs Regulations, 2013 on the below mentioned points:

1. Under the draft guidelines, apart from the three namely, viz. trustee, sponsor and Manager, appointment of a Principal Valuer was also provided. However, the approved guidelines has dispensed with the need for appointment of the principal valuer.
2. Restriction on making an investment in at least 2 projects has been introduced wherein it has been allowed to make a maximum investment of 60% for each project.
3. The requirement with respect to independent directors has been dispensed with.
4. The limit on value of assets has been reduced thereby allowing more sponsors to consider setting up REITs.
5. Making an investment in the body corporate engaged in real estate sector have been permitted.

CONCLUSION

The REITs Regulations, as notified, are definitely a welcome step which may attract foreign and domestic investments and will boost the progress of the real estate sector since the money collected would be majorly invested in commercial properties which are completed and generate income

Moreover, the new norms would enable the listing and trading of REITs on the stock exchange like any other security and would also lend a hand in creating a platform for raising of funds by real estate companies.

E-COMMERCE IN INDIA

Lakshay Dhamija

E-commerce in today's world has become one of the most essential part of everyday life. Particularly for urban areas, the accessibility to platforms of e-commerce is not just an opportunity but rather a necessity for most people. In 2014 nearly 75% (2.1 billion) of all internet users in the world (2.8 billion) live in top 20 countries. The remaining 25% (0.7 billion) is distributed among the other 178 countries, each representing less than 1% of total users.

China, the country with most users (642 million in 2014), represents nearly 22% of total, and has more users than the next three countries combined United States, India, and Japan¹.

It is not surprising to note that India is in a prime position for the growth and development of the e-commerce sector. The most prominent sector for which e-commerce presents an opportunity is **retail** since it provides for a vivid change from brick to mortar establishments to virtual shops which could operate for a fraction of the cost.

Social networking plays an important role in driving consumers online and getting them to engage with brands. While Indians primarily use the internet for communications, largely in the form of email, social media is also an important driver of internet user in India. The Internet and Mobile Association of India (IMAI) report estimates 243 million internet users in the country by June 2014, overtaking the US as the world's second largest internet base after China. The IMAI report can be corroborated with data from other sources such as Facebook, according to which India had 82 million monthly active users by June 30, 2013, the second largest geographical region for Facebook after the US and Canada.

The Indian Government for providing broadband connectivity to the local and village level government bodies has approved projects. The Government is expected to enable broadband internet connectivity at the rural levels for the purpose of providing services such as e-commerce, e-entertainment, e-education, e-health, e-governance to people and businesses.

E-Commerce and its business models:

E-commerce is a type of business model, or segments of a larger business model, that enables a firm or individual to conduct business over an electronic network, typically the internet. However, there exists no typical definition for the term e-commerce, it is generally used in the sense of denoting a method of conducting business through electronic means rather than through usual physical means. E-commerce challenged the traditional structure of businesses trading with consumers bringing to the fore various business models which has empowered consumers.

THE MOST COMMONS BUSINESS MODELS FACILITATED BY E-COMMERCE ARE:

- (a) **B2B:** Business to Business (B2B) describes commerce transactions between various businesses thereby enabling various businesses to build new relationships with other businesses. Such as between manufacturer and a wholesaler, or between wholesaler and a retailer.
- (b) **B2C:** Business to Consumer (B2C) describes activities of businesses serving end consumers with products and/or services. The direct dealing has always existed between businesses and consumers however, with surfacing of e-commerce the momentum is been gained in such transactions.
- (c) **C2C:** Consumer to Consumer (C2C) involves the electronically facilitated transactions between consumers through some third party. Traditionally consumers have had dealings with other consumers, but only few of those activities were in a commercial sense.
- (d) **C2B:** Consumer to Business (C2B) involves consumers which provide goods/services to businesses and create value for the business.
- (e) **B2B2C:** This is an alternative to the B2C model and in this type of model there is an additional intermediary business to assist the first business transact with the end consumer. For instance, Flipkart which is one of the successful

1. Cited from www.intenetlivestats.com



e-commerce portals and which provides a stage for consumers to purchase a wide options of goods such as books, music CDs, etc.

Therefore, the panorama of conducting business through e-commerce may seem uncomplicated and economical, there are varieties of legal factors that an e-commerce business must seriously consider and keep in mind before commencing and while carrying out its activities.

LEGAL VALIDITY OF ELECTRONIC TRANSACTIONS IN INDIA

There are various legal issues relating to formation and validity of electronic transactions such as online contracts and enforcement issues which are dealt hereinafter.

(A) FORMATION OF AN E-CONTRACT:

The most common forms of e-contracts are click wrap, browse wrap and shrink-wrap contracts. The terms and conditions in such contracts are made available to the contracting party in a form that is considerably different from the standard paper contracts. In click wrap contract, the party's affirmative acceptance is taken by means of checking on an 'I accept' tab with the scroll box that allows accepting party to view the terms and conditions.

In case of browse wrap agreement the mere use (or browse) of the website makes the terms binding on the contracting party.

In case of Shrink wrap agreement the contracting party can read the terms and conditions only after opening the box within which the product (commonly a license) is packed. Such agreements are relevant in the context of e-commerce mostly because of the kind of goods associate with shrink-wrap agreements.

(B) ONLINE CONTRACTS VALIDITY:

The Indian Contract Act, 1872 governs all the e-contracts in India which inter alia mandate certain pre-requisites for a valid contract such as free consent and a lawful consideration. The question which needs to be examined is how the requirements of Indian Contract Act would be fulfilled in relation to e-contracts. Further, the Information Technology Act, 2000 ('IT Act') provides fortification of the validity of e-contracts.

As per Indian Contract Act, 1872 some of the important requirements of a valid contract are as follows:

- (i) The contract should be entered with the free consent of the parties;
- (ii) There should be lawful consideration for the contract;
- (iii) The parties should be competent to contract;
- (iv) The object of the contract should be lawful.

The terms and conditions associated with e-commerce platform are of utmost importance in ensuring and deciding that e-commerce transaction meet with requirements of a valid contract. Unless expressly prohibited click wrap agreements would be enforceable and valid if the requirements of valid contract as per Indian Contract Act, 1872 are fulfilled.

There is no requirement under the Indian Contract Act to have written contracts physically signed. However, specific statues do contain signature requirements. Further, the very nature of e-commerce is that it is practically impossible to check the age of anyone who is transacting online and which pose problems and liabilities for e-commerce platforms because the position under Indian Law is that the minor is not competent to enter into contract and such a contract entered is not enforceable against the minor.

In India, every instrument under which rights are created or transferred needs to be stamped and stamping of the instrument further depends on specific stamp duty legislations enacted by different states in India.

(C) STANDARD FORM OF ONLINE CONTRACTS ARE UNCONSCIONABLE

In India there is no well developed jurisprudence on the question of whether standard form of online agreements are unconscionable. Though, the courts of India as per Indian Laws previously dealt with instances where contract terms including standard form contracts were negotiated between parties in unequal bargaining positions. Certain provisions of Contract Act deal with unconscionable contracts such as when the consideration in the contract or object of the contract is opposed to public policy. In such cases the contract itself cannot be valid.

The courts can put the burden on the person in the leading position to prove that the contract was not induced by the undue influence.

In the case of **"LIC India Vs. Consumer Education & Research Center"**² the Hon'ble Apex Court of India interpreted an insurance policy issued by Life insurance corporation of India by bringing in certain elements of public purpose. The court noted that *"in dotted line contracts there would be no occasion for weaker party to bargain as to assume to have equal bargaining power. He has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever."*

It is highly important to have a well thought out terms which form online contracts in order to make sure that sufficient opportunity is provided to the customers to familiarize themselves with the terms thereof.

Besides the above there are also various other legal, tax and regulatory issues more specifically Security Issues, Consumer Protection Issues, Intellectual Property Issues, Content Regulation, Intermediary Liability, Jurisdictional Issues and issues relating to taxation which need to be taken in mind while dealing with e-commerce transactions.

CONCLUSION:

The growth of the e-commerce industry is not only indicative of the increasing openness of the public but has also brought to the front the issues that the legal system of the country has been faced within. The legal system has constantly tried to be updated especially with the enactment of IT Act to deal with lots of issues emerging from the use of internet.

Therefore, a comprehensive understanding of the legal regime and the possible issues that an e-commerce business would face together with effective risk management plans has been the need of the hour for e-commerce businesses to succeed in this industry.

2. 1995 AIR 1811



OVERVIEW OF THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

Rajdutt S Singh

INTRODUCTION:

In 1997, the Hon'ble Supreme Court of India, in *Vishaka and Others Vs. State of Rajasthan and Others*¹ ("Vishaka Judgment") acknowledged the gravity of sexual harassment of the working women at the workplaces and laid down guidelines making it mandatory for employers to prevent the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment. The guidelines issued by the Hon'ble Supreme Court were treated as law declared by the Hon'ble Supreme Court under Article 141² of the Constitution of India. It was held by the Hon'ble Supreme Court that the guidelines framed by the Supreme Court would be strictly observed in all work places for the prevention and enforcement of the right to gender equality of the working women.

It was observed by various Courts from time to time in the past that the guidelines and norms framed by the Hon'ble Supreme Court in Vishaka Judgment have not been followed in workplaces strictly.

The increasing work participation rate of women made it imperative for enacting a comprehensive legislation focusing on prevention of sexual harassment as well as providing a redressal mechanism.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 & Rules made therein

In 2013, after a span of 16 years, India finally enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the 'Act') for prevention of sexual harassment against women at the workplaces. The Central Government vide notification SO 3606 (E) appointed 9 December 2013 as the date on which the provisions of the Act came into force and on the same day, the Central Government made the Sexual

Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("Rules").

Objectives of the Act

The Act is enacted by the Indian Parliament to provide protection against sexual harassment of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. Sexual harassment is termed as a violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and right to life and to live with dignity under Article 21 of the Constitution of India. Sexual harassment is also considered a violation of a right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment.

Definitions

Sexual Harassment

The Act has adopted the definition of 'sexual harassment' from Vishaka Judgment and the term sexual harassment includes any unwelcome acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

In, *Apparel Export Promotion Council Vs. A.K. Chopra*³, the Hon'ble Supreme Court while deciding an issue whether the act of a superior officer (wherein such superior officer tried to molest his junior woman employee) would amount to sexual harassment, the Court relied on the definition of the term 'sexual harassment' laid down by the Supreme Court in the Vishaka Judgment (which is similar to the definition of the Sexual Harassment provided in the Act) held that "the act of the respondent was unbecoming of good

1. AIR1997SC3011

2. Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

3. AIR1999SC625

conduct and behavior expected from a superior officer and undoubtedly amounted to sexual harassment...."

Section 3 of the Act provides that no woman shall be subjected to sexual harassment at any workplace. This section further provides the circumstances which if present or connected with any act or behaviour of sexual harassment may amount to sexual harassment such as implied or expressed promise to preferential treatment or implied or explicit threat of detrimental treatment in her employment, implied or explicit threat about her present or future employment, interference with work or creating an intimidating or offensive or hostile work environment, humiliating treatment likely to affect health or safety of a woman.

Complaints Committee & Complaint Procedure

Internal Complaints Committee:

The Act makes it mandatory for every employer to constitute an internal complaints committee ("ICC") which entertains the complaints made by any aggrieved women. The members of the ICC are to be nominated by the employer and ICC should consist of i) a Presiding Officer⁴, ii) not less than two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge and iii) one member from amongst non-governmental organizations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. In order to ensure participation of women employees in the ICC proceedings, the Act requires that at least one-half of the members of ICC nominated by employer are women.

Local Complaints Committee:

Provisions are provided under the Act to form Local Complaints Committee (LCC) for every district for receiving complaints of sexual harassment from establishments where the ICC has not been formed

due to having less than 10 workers or if the complaint is against the employer himself.

Complaint procedure:

the Act stipulates that aggrieved woman can make written complaint of sexual harassment at workplace to the ICC or to the LCC (in case a complaint is against the employer), within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident. If the aggrieved woman is unable to make complaint in writing, reasonable assistance shall be rendered by the presiding officer or any member of the ICC (or in case the aggrieved woman is unable to make complaint in writing to the LCC, the reasonable assistance shall be rendered by the Chairperson or any member of the LCC) for making the complaint in writing.

As per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013⁵, in case the aggrieved woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed inter alia by her relative or friend or her co-worker or an officer of the National Commission for Woman or State Women's Commission or any person who has knowledge of the incident, with the written consent of the aggrieved woman.

CONCLUSION

Undoubtedly, the guidelines and norms framed by the Hon'ble Supreme Court in Vishaka Judgment are fountainhead of the Act. With the passage of time, it was felt that guidelines and norms are not sufficient to deal with the incidents of sexual harassment of women at workplaces and a strong piece of legislation is the need of the hour and accordingly the Act was enacted in 2013. The Act went one step ahead and included various issues which remained unaddressed in the past such as extension of the definition of workplace to include almost all types of establishments including private sector organization, dwelling places or houses, inclusion of the term domestic worker and unorganized sector in order to address the issue of sexual harassment of women.

4. *Who shall be a woman employed at a senior level at workplace from amongst the employees. Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units or the workplace. Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organization. [Section 4(2)(a) of the Act].*

5. *Rule 6 (i) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013*



HINDI IDN'S: INDIA'S MOVE TOWARD INTERNET LITERACY

Himanshu Sharma

INTRODUCTION:

The transformation of technology from being a means of luxury to a day to day need has led to become dynamic in the present time. India being a country of masses rather than classes has various needs which might not been faced by some other countries. The world wide web is one of the basic needs in the present time as everything depends upon a click of a button on a computer, but then this also means is far from the reach of a person who is not well versed with the English language.

According to a report published by a website www.track.in¹, India has the lowest internet penetration in the Asia-Pacific region with only 17.4% of the total population has accesses to internet which is quite low in comparison to countries like South Korea, Japan & Australia. According to the report, in countries like South Korea, Japan & Australia, every 8 person out of 10 have internet access. One of the most important reasons for this difference is the language, as most of the websites are in English language. Indian population, apart from the metro cities, is not well versed with same. Therefore it was a long awaited demand to make internet a means for everybody.

ISSUE OF IDN'S IN LOCAL LANGUAGES:

The Internet Corporation for Assigned Names and Numbers (ICANN)², who is working towards making internet available to every individual, has provided Internationalized Domain Name (IDN) to India in 2011. IDN's are the domain names which are in non-latin script such as in Russian, Hindi, Urdu etc, which helps in making internet accessible to the citizens of a country in local language. After three years of research, the National Internet Exchange of India (NIXI)³ has now issued IDN's in seven Indian languages i.e. in hindi, Bangla, Telugu, Gujarati, Urdu, Tamil & Punjabi. Now,

website owner can not only register domain name with ".in" but also with ".bharat" in all these seven languages.

There are certain, terms and conditions which are required to be followed for the registration of IDN's available on the website of NIXI and the ".bharat" domain name registrar needs to include these terms and conditions into their registration agreements with the registrants.

PROBLEMS DUE TO REGISTRATION OF IDN'S:

Although the IDN's are released by NIXI but there are various difficulties arising from it which are also required to be taken care of such as cyber squatting and infringement of rights of the trademark holders in the registration of IDN's in these seven languages. There may be cases, where an anonymous person can register an IDN's in his own name which is a registered trademark or copyright of a person and later on try to sell it to the owner. To keep a check on this kind of problem, NIXI has come up with the 'Sunrise Period' in which the trademark owners are given preference to register their IDN's related to their trademarks till 18th of November, 2014. After this other person can apply for the registration of IDN's in these seven languages.

The main idea to have 'Sunrise Periods' is to provide a proper time line to the rights holder in a particular word to secure it before it goes into the hand of a profit monger. During these Sunrise Periods, which are divided in three different periods, application by the person having rights in a particular Intellectual Property will be entertained only and person seeking IDN's without any IP claim will have to wait till 18th November, 2014.

The Sunrise Periods are divided in three phases based upon the category of applicant and these are as below:

- Sunrise A: Indian Registrant holding Indian Trade marks

1. <http://trak.in/tags/business/2014/06/05/india-lowest-internet-penetration-at-17-4-highest-user-growth-asia-pacific/>

2. which is responsible for coordinating the management of the technical elements of the Domain Name System (DNS) to ensure universal resolvability so that all users of the Internet can find all valid addresses,

3 NIXI was set up for peering of ISPs among themselves for the purpose of routing the domestic traffic within the country, instead of taking it all the way to US/Abroad, thereby resulting in better quality of service (reduced latency) and reduced bandwidth charges for ISPs by saving on International Bandwidth

- Sunrise B: Overseas Registrant holding Indian Trade Marks
- Sunrise C: Existing Registrant holding ASCII domain name .in

Further the IDN's are divided in four categories based upon the use of the same. The four categories are:

String in English	Language	Script
.Bharat	Hindi, Bodo(Boro), Dogri, Konkani, Maithili, Marathi, Nepali, Sindhi	Devanagari
Company.bharat	Hindi, Bodo(Boro), Dogri, Konkani, Maithili, Marathi, Nepali, Sindhi	Devanagari
Vidya.bharat	Hindi, Bodo(Boro), Dogri, Konkani, Maithili, Marathi, Nepali, Sindhi	Devanagari
Sarkar.bharat	Hindi, Bodo(Boro), Dogri, Konkani, Maithili, Marathi, Nepali, Sindhi	Devanagari

First category is related to the IDN's which only have "bharat" as gTLD's further other three gTLD's are related to the use for companies (company.bharat), for education institutions (vidya.bharat) and for government organization (sarkar.bharat). The last two categories of the gTLD's can only be issue by Registrar ERNET and NIC respectively as they are related to the specific purposes.

ADVANTAGES OF IDN'S:

The decision taken by government in issuing the IDN's in the local language is a welcome step for non-English reading population which is a large chunk of the entire population of India. As per the report⁴ only India will be the country in Asia Pacific region which will see a double digit growth in its Internet population in the coming years. This step of issuing IDN's in local language will certainly be one of the reasons for achieving this growth. Apart from the growth, there would have been number of advantages of the IDN's in local language such as:

- Increase in use of internet by the population, for the basic amenities which is still not touched by the internet revolution.

4. <http://trak.in/tags/business/2014/06/05/india-lowest-internet-penetration-at-17-4-highest-user-growth-asia-pacific/>

- It will help in providing a time based delivery of public services to the citizens which is not possible right now due to too much human intervention in the country.
- The knowledge will certainly improve as people can have access to the information in their local language.
- As more and more services are switching to online mode, the access of services in the local language would be easy for the people and will certainly end the queue culture from the country.

CONCLUSION:

The internet is one of the most convenient ways to procure services and information in the present time. With the emergence of website in the local language of population will help in filling the gap between the people who really wants to procure the services but were unable to do because of language barrier. This welcome step will certainly takes India towards internet literacy at the grass root level. Internet being the most convenient means to avail services and information and when same is provided in the language a person knows then it will add to its effectiveness.



UTILITY MODEL PATENT: ROAD AHEAD !!!!

Priyanka Rastogi

INTRODUCTION

A utility model is an exclusive right granted for an invention, which allows the right to the holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time. There is no universal acceptance of the world "Utility Patent"; different country have different terminology, like in Australia, utility model protection is referred as "Innovation Patent", in Malaysia as "Utility Innovation", in France as "Utility Certificate", and in Belgium as "Short term Patent". Thus "Utility Model" is a generic term used for inventions which are not the subject matter of Patent.

"Imagine that frame of yours spectacles has solar cells embedded in them which get charged in day time and if you want to read comfortably, with no disturbance, then light may be switched on, thus you can enjoy reading a book in the dark".

There are many rural areas in India, where light cannot be reached. Isn't that this spectacle or any is useful in those areas. Can this invention be protected under Patent Act?

MAIN FEATURES OF THE UTILITY MODELS:

1. All Utility model law confers exclusive right on the Inventor;
2. Novelty is one of the criteria in all Utility Model Law, but requirement of inventive step varies from nation to nation;
3. Most of utility model laws protect the technical character of invention.

However beside this common trait, most of the countries have different provision on socio-economic condition of the Country.

DEVELOPMENT OF UTILITY MODEL PRINCIPLE

The concept of "utility model" principle is not a new phenomenon. The first important international treaties for promotion and protection of industrial property i.e. Paris convention for the protection of Industrial Property, 1883 recognizes the principle of Utility Model

system. Under the convention a period of priority can be secured for a utility model application by virtue of a right of priority based on a patent application and vice versa¹

Under the Convention, if patent application consist two inventions then, applicant can divide his patent application into patent application or utility model² either suo-motto or on the receipt of the examination report. Further provision of importation and compulsory licenses are also applicable mutatis mutandis, to utility models. Similarly Patent Corporation Treaty (PCT) also permits to file Utility Model application through National Phase utilizing the priority date and flexibilities provided therein as applicable for patent.

Though TRIPS lays down minimum standards for the protection of Intellectual Property rights but does not contain any provision regarding Utility Model Patent. The Utility Model framework was first established in **Germany** in 1891, this introduction encouraged innovators who file about 85% of these applications. Under German IP system, requirement of Utility Models are same as patents, but standard of inventive step is lowered down.³

In **Japan**, the Utility Model protection system established in 1905 was originally based on the utility model law of Germany. It has been amended several times but now restricted to the protection of device only. Japanese utility law encourages devices by promoting the protection and utilization of devices relating to shape or construction of articles or a combination of articles, so as to contribute to the development of industry.⁴

In **Australia**, petty patents were introduced in 1979 which has similar provision as German Utility Model. However under Australian model, process is not excluded as German but invention related to biological processes including product were excluded from protection. Petty Patent did not get popular among

1. Arts 4(E) (1) and 4(E)(2), Paris Convention
2. Art 5 of Paris Convention
3. Section 1(1) of German Utility Model Law
4. Section 1 of Japanese Utility Model Law

inventor because it could not differentiate substantially from standard patent.

In **China**, there is no separate Utility Model law, but patent law enacted in 1984 governs utility model. Utility Model patents have resulted into economic prospers in China and the application filed for Utility Models have always been more than of invention patents.

Apart from these countries, developing countries like Taiwan, Mongolia, Vietnam, Malaysia, Thailand, Indonesia and Philippines have adopted the Utility model system with aim to promote SMEs.

DIFFERENCES BETWEEN UTILITY MODELS AND PATENTS:

- The requirements for patents are stricter than the Utility Model. The invention which has novel, inventive step and industrial application can be protected by patents however for Utility Models the only requirement is the novelty.
- Only new substantial inventions are patentable whereas marginal improvements can be protected under Utility Patents.
- Term of protection of Utility Models is usually lesser than patents. In some countries utility models are granted for 10 or 7 years.
- Process for the grant of Utility Models is simpler and faster than the patents. Patent Office does not examine the utility applications substantially.
- Utility Models are very cheap to obtain and maintain than the patents and can be obtained in only 6 months to 1 year.
- Patents are available in most of the countries whereas Utility Models are available in specific countries.
- Patents can be converted into Utility Models but not vice versa.

DOES INDIA NEED UTILITY MODEL PATENT?

The Utility Models are considered generally good for developing countries, namely

- a) It secures protection for innovations, which does not require the strict novelty and inventive step as required by patent law.
- b) They increase the role of individual & small scale innovators in economic development and promote competitive environment.

c) They act as a spur to enhanced levels of innovation.

d) They are cheaper to acquire than patent and finally they become a source of data on innovative activity and experience in technological management.

In recent years India IP regime has developed with several initiatives taken by government to promote Intellectual Property. And one of the heated debates is whether India should opt Utility Model patent or not?

Voices are yes and it is expected soon. Indian patent regime is stricter than many other countries. Under the Indian Patent Act, 1970, several exceptions are provided which excludes small and useful inventions. India is growing as a hub for small and medium size enterprises which focuses on the development of new technology with minor improvements or modifications of existing products to meet the changing demands of the market. In India SMEs plays an important role in economic growth of country and it provides employment to about 27.14 millions people, which is second only to Agriculture⁵. However, this sector is not much aware of patent regime and if so then also they are reluctant, because the slogan of patent system is "you have to invest in it before you can really benefit from it". Thus, Patenting is expensive and time consuming.

In recent years, industrialization process has reached its highest pick and it is expected to have more Foreign Direct Investment. Thus strong IP regime ensure nondisclosure of technology brought by firms and further encourage investment. On this scenario Utility Model Patent will be boon to India.

UTILITY MODEL FOR INDIA:

There are various types of models followed by different countries for the protection of small inventions according to the need of the industry. What kind of model should India follow for the protection of Utility Models is highly debated issue? Do we need to follow country specific Utility Model or a blend of various countries? However before adopting any model we should identify the best practices followed by various countries and considering socio-economic condition of our country. Utility Models protection shall not be

5. *Handbook of Industrial Policy and statistics, 2003-04, Ministry of Commerce and Industry, PP 155, available on the Ministry website at http://eaindustry.nic.in/new_handout.htm*



restricted only to mechanical devices as followed in various countries, but should be allowed for inventions in the field of information technology, biotechnology, pharmaceuticals and agriculture in order to promote SMEs in every sector.

Another major aspect is what parameters India should adopt with respect to novelty, inventive step, utility, and examination procedure. Should we exempt inventive step criteria for Utility Models or not and to what extent novelty is to be judged? However for sure utility models requirements shall be less stringent than patents. Utility Models will fill the gap between the patentable inventions and non patentable inventions.

According to the various studies conducted on the viability of Utility Models for India it can be derived that the novelty criteria should be followed same as for Patents. Because in case prior art only in India is considered then the patentee cannot commercialize the invention in other jurisdictions as he always have fear of infringing others patents. Inventive step criteria should be lowered down. Minimum cost and time shall be required for the grant of the utility patents and the duration for the same shall not exceed 10 year.

CONCLUSION

Innovation culture is growing rapidly but in terms of filling, we are far below the standard. This reflects that we have innovation in mind not in paper because of lack of legal framework. Experience of most Utility Model Patent looks very promising and beneficial to the SMEs and India opting this model will give its international legal obligation.

We can learn from our neighboring country China whose goods in terms of technology are more in Indian market than ours because they promote small invention through Utility Model Patent. Utility Model patent is a useful tool for enhancing the competitiveness of SMEs, but they must be used in a very careful way so that it can't be misused.

MEDIA LAW: THE DIRE NEEDS OF THE DAY

Vaibhavi Pandey & Komal Chauhan¹

Right to Freedom of Speech and Expression has emerged as a sine qua non in a democracy. The Indian Constitution guarantees this right under Article 19(1) (a) to its citizens. Free exchange of ideas and debate are essentially required for the good governance of a country. This is where media steps in. Media has a special role to play as the guardian of democracy, as it functions as an extra parliamentary opposition to strengthen the roots of the democracy. Connecting us with the scenarios in the world and creating a vocal public opinion for realizing the goal of social and economic justice, it has become an important part of our lives.

However, with all these developments media and its powers have also been reasons of concern on various platforms. There are issues relating to media bias, personal propaganda, sensational and objective reporting of events and increased capitalist tendency of media. Such issues concerning quality of media are of great consequences to a country like India where media has a greater role to play rather than just providing information and entertainment. Consequently, the Law Commission of India has variably discussed the issues related to the media laws and also have given recommendations on the same in its consultation paper. (May, 2014).

THE EVOLVING TREND OF PAID NEWS

The democratic India has witnessed the emergence of media as the fourth important body after legislature, executive and judiciary. However, it has been constantly criticized for its tendency towards commercialism and inclination merely towards entertainment i.e. making money out of news. A recent trend that has been observed in media is the buying of news and for being in highlights by political parties which is referred to as 'paid news' by the Press Council of India. Today, as a reason of ongoing criticisms and constant competition, the political parties are more interested in manufacturing and creating news for their own good. Many suggestions have been put forth in the paper to save it from the clutches of paid news like self regulation, implementing voluntary code of conduct, promoting

ethical norms and above all placing objectivity, transparency and truthfulness as the vision, mission and value of the media will put a strong resistance to the enticement for paid news culture.

OPINION POLLS

The right to free speech can and should be curtailed if it has any malafide intention. This principle applies to the pre election opinion polls too. The media's job is to report on, and give its opinion on the communication. But when the media starts telling the voter who's going to win by how many seats, it starts interfering in the communication between candidates and voters. An opinion poll implies that media has already taken the opinion of the people as to which party is going to win and which is to lose and the same is reported back to the people even before they actually vote for the parties. In recent years, parties and candidates are willing to pay for advertisements suggesting that they are likely to win. This is why we have "paid news" at election time, declared as a malpractice by the Election Commission. Many questions remain about the objectiveness of the opinion polls and the methods of conducting them. Even if election forecasting through opinion polls is not to be banned, it definitely needs to be regulated.

SOCIAL MEDIA AND INFORMATION TECHNOLOGY ACT, 2000

Section 66A, Information Technology Act, 2000 refers to the sending of offensive or false messages through a computer device. This provision even though has been inspired by the noble objectives of protecting reputations and preventing misuse of networks, has not been able to achieve its goals and goes far beyond the reasonable restrictions on free speech as mandated under Article 19(2) of the Constitution of India. Section 66A needs to be amended to make the cyber law in sync with the Constitution and also with the existing realities of social media.

TRIAL BY MEDIA

The media acts both as a watchdog and a platform to bring people voice to the notice of society and legislatures. Freedom of press is the freedom of people.

1. Intern, 2nd year Law Student, Faculty of Law, DU.



Some famous criminal cases would have gone unpunished but for the intervention of media the cases like Priyadarshini Mattoo case, Jessica Lal case, Nitish Katara murder case the culprits are behind the bars. However this righteousness does not embrace the freedom to commit contempt of court. There have been numerous instances in which media has been accused of conducting the trial of the accused and passing the 'verdict' even before the court passes its judgment. Media, at times completely overlooks the vital gap between an accused and a convict keeping at stake the golden principles of "presumption of innocence until proven guilty" and "guilt beyond reasonable doubts". The most suitable way to regulate the media will be to exercise the contempt jurisdiction of the court to punish those who violate the basic code of conduct. While civil contempt refers to the willful disobedience to any judgment, or order of a court, criminal contempt is an offence under Section 2(c) of the Contempt of Courts Act, 1971, and is punishable by imprisonment of up to six months. It is defined as the publication of any matter which lowers the authority of any court, or scandalises or tends to scandalise, prejudices or tends to prejudice, or obstructs or tends to obstruct any judicial proceedings, or the administration of justice. It is evident that this definition is extremely wide, particularly as it is unclear what the words "tends to" encompasses.

MEDIA, PRIVACY AND STING OPERATIONS

Freedom of press has been held to be a part of the fundamental right of "freedom of speech and expression" guaranteed by Article 19(1) (a) of the Constitution. It has been held that "freedom of press" is necessary for exercise of fundamental freedom of citizens of speech and expression. Though it empowers the press to disclose the information vital to public interest, it often results in the intrusion of privacy. Privacy means being aloof on some issues of personal life. But the question is, can sting operations take away this privacy and make it public? The News Broadcasters Association (NBA) justified sting operations as "illegitimate journalistic tool" and it has been found out that these sting operations are done to interest the public rather than public interest. Recommendations have been made to enact laws to prevent media from interfering with the individual privacy.

CONCLUSION

The fundamental objective of media is to serve the people with news, events, incidents and opinions in the exact manner in which they are actually happening. The freedom of press is a blessing for the people. However this blessing can go terribly wrong when manipulation and mishandling of news comes into picture. The fact that media has played a vital role in keeping a cheque on the government functionaries cannot be overlooked, but still there are a lot of loopholes and lacunas that need to be filled. Towards this end, the media's conduct is expected to be governed with certain amount of professionalism and ethics in the mind. Media should restrain itself from publication of fake, manipulated or tampered news. Further, it shall not interfere with the privacy of any individual unless there is dire need of the same in public interest. It is not only ethical but also the duty of media of any country to preserve and protect its cultural heritage and values. Media organizations should be more accountable and inclined towards the interests of the general public.

INDIA'S OVERVIEW ON STANDARD ESSENTIAL PATENT (SEPS)

Suchi Rai Singh and Gyanendra Kumar¹

INTRODUCTION

One of the boons of liberalized economy was closure of monopolistic market and development of a competitive regime globally which gave birth to antitrust jurisprudence. Consumer is made the king and any enterprise hampering the free competitive market environment is staunchly dealt at the hand of strong anti-trust laws which never permitted any monopolistic arrangement in any form. However, when Intellectual Property laws have been tested on antitrust jurisprudence, a huge lacuna's and paradoxes appeared globally.²

Intellectual Property rights are exclusionary in nature and any holder of any Intellectual Property acquires a monopolistic right over his Intellectual properties which can extent to absolute restrain on use of his Intellectual Property from any other person. Any violation to such can cost huge amount of compensations. However the parallel policy of antitrust laws and Intellectual Property right intersect at a point which invoke public interest and is called "Standard Essential Patents" known as SEPs. Generally when Intellectual Property Rights are concern Competition Laws keep themselves aloof them indulging in the counter law however both authorizes intersect on this point and absolute rights over the Intellectual Property is restrained. Licensing of Standards Essential Patents (SEPs) on reasonable and non-discriminatory (RAND) terms is a foundation of the standards development process.

The rationale behind RAND is that it benefits are the inclusion of patented technology in technical standards, while also ensuring that the holder of a Standard Essential Patent cannot abuse the dominant market position it gains from widespread adoption of a voluntary technical standard.³

STANDARDS AND STANDARD ESSENTIAL PATENTS

A standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'. In other words, standards are norms that apply to a category of technology. Standards can be adopted at a worldwide scale, or only at a regional scale. It is usually the interest of industrial players on the market to create products that comply with standards. Products that use non-standardized technologies are generally commercial failures, because consumers want their devices to interact with those of other people.⁴

Thus those technologies which are required to establish the standards are more important. Such technologies are core technologies without any alternatives hence every product which is based on a standard requires a mandatory access over these technologies. Patent rights granted over such standard establishing technologies are called Standard Essential Patent.

This patent right is not absolute like rest of the patent rights, Owner is restricted on its use on the ground of RAND (reasonable and nondiscriminatory) hence the owner of SEP is under an obligation to grant license to use the technology which sets a standard for the industry. He may be allowed to charge a nominal fee but that should be reasonable and justified otherwise Competition law shall intervene to avoid the monopoly. In the case of Microsoft v. Motorola, the Court defined SEP in this case as "A given patent is "essential" to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into the standard."⁵

1. Legal Intern, 5th year Symbiosis Law School, Noida.

2. <http://www.fosspatents.com/2013/03/standard-essential-patent-litigation.html>

3. Dore Antoine, "LIMITING THE ABUSE OF MARKET DOMINANCE BY STANDARDS-ESSENTIAL PATENTS" Retrieved from - <http://itu4u.wordpress.com/2013/02/06/limiting-the-abuse-of-market-dominance-conferred-by-standards-essential-patents/>

4. DUFFEY GUILLAUME, "Patents and Standardisation: Competition Concerns in New Technology Markets" Retrieved from - http://www.icc.qmul.ac.uk/GAR/GAR2013/GAR%202013_1_Guillaume%20Duffey.pdf

5. Bartleson Karen, "Standard-Essential Patents: Innovation's Boon or Bane?" retrieved from <http://electronicdesign.com/digital-ics/standard-essential-patents-innovation-s-boon-or-bane>



Thus the base requirement for SEPs to be constructive is licensing under FRAND conditions. Without FRAND, SEPs can cause costly conflicts. FRAND is the acronym for fair, reasonable, and non-discriminatory. It's also known as RAND—reasonable and non-discriminatory. According to the principles of FRAND licensing, the patent owner must allow to take a license, the license terms must not be illegal or anti-competitive, and the cost of the license must not be too high.⁶

SEP VIS A VIS COMPETITION LAWS

In general, it is well established that Anti-trust regime does not intervene with the exclusionary Intellectual Property rights. The rationale behind such abstention is that Competition laws realize that, this interplay between innovation and exclusive rights of exploitation on IPR protected products. Beside innovation is important for amplified competition, once an enterprise secures IPR protection over certain products/technology, competition laws do not generally cast a 'duty to deal'.

However, when it comes to essential patents, the distant respect for IPR protected technology usually in compliances with competition authorities, leads to active intervention. Patents that are considered essential to implement a chosen industry standard cannot be exploited like any other patent, and certainly not to the exclusion of other market participants.

In order to ensure that standard-setting remains beneficial, it is necessary to ensure that in cases where adopting a standard necessarily involves the incorporation of a patent into the industry standard, the relevant patent holder is not in a position to unjustly exploit its market power newly accrued to it (for example, by extracting exorbitant royalty rates) to the detriment of the entire industry.

One of the ways in which this may be achieved is by extracting FRAND commitments, where owners of essential patents commit to make their essential patent available to third parties on FRAND terms. While this appears to be a mutually beneficial solution, with the patent owner benefitting from its patent being widely used by the industry, and the remaining stakeholders being protected from paying exorbitant royalty rates,

ultimately, the efficacy of FRAND is determined by its enforceability.⁷

INDIA'S EMERGING APPROACH TO CONDUCT INVOLVING SEPS

Since becoming fully functional in October of 2009, the CCI has brought two investigations involving SEPs, one in November 2013, and the other in January 2014, both against Ericsson based on allegations that it violated its FRAND commitments by imposing discriminatory and "excessive" royalty rates and using Non-Disclosure Agreements (NDAs). According to the CCI, "forcing a party to execute an NDA" and "imposing excessive and unfair royalty rates" constitutes "prima facie" abuse of dominance and violation of section 4 of the Indian Competition Act, as does "imposing a jurisdiction clause debarring complainants from getting disputes adjudicated in the country where both parties were in business."

In both matters, the CCI stated that "prima facie the relevant product market" is "the provision of SEP(s) for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices," in India, in which "prima facie it is apparent that Ericsson was dominant." The investigations allege that Ericsson "seems to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents." Thus, "for the use of GSM chip in a phone costing Rs 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5." According to the CCI, "charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-à-vis high cost phones." Furthermore, contends the CCI, "transparency is the hallmark of fairness, and" alleging that, Ericsson's use of NDAs "is contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed players."

The second investigation further alleges that, although Ericsson publicly claims that it offers a broadly uniform rate to all similarly placed potential licensees, its refusal to share commercial terms and royalty payments on the grounds of NDAs is "strongly suggestive of the fact that different royalty rates/commercial terms were

6. "Patent and Antitrust Law" Retrieved from "http://www.freshfields.com/en/global/Global_Antitrust_TKT/8_Patent_and_antitrust_law/"

7. "India - Competition Law and FRAND Commitments." Retrieved from - <http://www.conventuslaw.com/india-competition-law-and-frand-commitments/>

being offered to the potential licensees belong to the same category."

The CCI has also expressed concern about hold-up and royalty stacking, stating that "FRAND licenses are primarily intended to prevent patent hold-up and royalty stacking. . . . from the perspective of the firm making the product, all the different claims for royalties must be added or 'stacked' together to determine the total burden of royalty to be borne by the manufacturer." ⁸

8. Koren W. Wong-Ervin, "Standard-Essential Patents: The International Landscape" Retrieved from http://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf



FROM COPYRIGHT TO RIGHT TO COPY: "WORLD OF OPEN SOURCES"

Monika Shailesh

With the advent of internet, open- source software initiatives, General public licenses, and conception of copyleft the present copyright is under fire. This has initiated debates questioning the fundamentals of copyright. Debates about copyright are thus full of subtexts; they are partly about law, partly about profit, partly about access, and partly about who produces what.

Many stake holders believe that copyright laws are not only providing benefit to individual but also are detrimental to the general public domain. It is being used a weapon to protect the commercial culture all the cost of non commercial and being considered as an inhibitor to the growth of artistic and intellectual development by cutting away the necessary inputs. It is believed that laws have considerably failed to provide a simple means to allow use of an individual's work by making the permission process cumbersome and to a certain extent prohibitive.¹

Consequently a large no. of groups and individuals have emerged with new ideas to ascertain free flow of knowledge and have created modular contracts and licenses that allows right holders to pre authorize use of their work.

Open source initiative or "OSI" has been doing pioneering work in this region. It is a California public benefit corporation, with 501©3tax exempt status and was founded in 1998. OSI is a non- profit corporation with a mission to educate about and advocate for the benefits of open source and to mend the gap among different constituencies in the open source community. Open source is believed to be a development method for software that harnesses the power of distributed peer review and transparency of process. The promise of open source is better quality, higher reliability more flexibility, lower cost and an end to predatory vendor lock in.

"OSI "is continuously working as a standard body maintaining the open source definition for the good of community. The open source initiative approved. Licenses trademark and program creates a nexus of trust around with developers, uses, corporations and governments can organize open source co- operation.²

Classical examples of open source initiatives is the birth of "open source," "copyleft" licensing in the software development industry .For this GNU General Public License "GPL" is a prominent model. A GPL builds upon existing copyright law, using the existing rights of an owner to attempt to allow public use of software at the same time preventing its privatization or commercialization. Any free software released under a GPL would require that anyone who wants to use and modify the underlying source code must release any modification under a GPL thereby keeping the software or the code within the non – commercial realm.

Copyrights and licenses for most of the software and other artistic work are designed to take away one's freedom to share and change the works. By contrast, the GPL is intended to guarantee freedom to share and change any work in part or full to make sure it remains free to all its users. While referring to "Free" it is intended for the freedom and not for price. This means the author can distribute the work to anyone for free or charge for the work but the author cannot inhibit in part or full the further distribution of that work. This means that any uses are free to use that work and hence GPL pre authorized the General Public Domain to use any work under GPL.

Another important aspect of these initiatives and efforts is to protect user's legal rights from Anti-circumvention Law. By saying this it means that no covered work shall be deemed part of all effective technological measure under any applicable law fulfilling obligations under article of **WIPO COPYRIGHT TREATY** adopted on 20 DEC 96 or similar laws prohibiting or restricting circumvention of such measures.³

1. *Codifying a commons; copyright, copyleft and the creative commons project.* by ADRIENNE K. GOSS.

2. www.opensource.org

3. Source: WWW.GNU.ORG LAST VISITED 14/09/2014

There are many more models of open source licenses but a few popular ones are required to be known.

- **BSD license**
- **MIT license**
- **APACHE license**
- **Creative commons**

Many open source, or copyleft licenses has following mission statement.

"THE INVENTION IS TO MAKE WORK ACCESSIBLE AND TO AUTHORISE THE USE OF ITS RESOURCES BY GREATEST NUMBER OF PEOPLE: TO USE IT IN ORDER TO INCREASE ITS USE TO CREATE NEW CONDITIONS FOR CREATION IN ORDER TO MULTIPLY THE POSSIBILITIES OF CREATION, WHILE RESPECTING THE ORIGINATORS IN ACCORDING THEM RECOGNITION AND DEFENDING THEIR MORAL RIGHTS [----] KNOWLEDGE AND CREATIVITY ARE RESOURCES WHICH, TO BE TRUE TO THEMSELVES MUST REMAIN FREE[---] THIS IS THE BASIC AIM OF THIS FREE ART LICENCE: TO PROMOTE AND PROTECT ARTISTIC PRACTICE FREED FROM THE RULES OF THE MARKET ECONOMY⁴

In order to support copy left, GNU GPL and other open source initiatives, critics of copy right laws often quote examples of ANDROID, LINUX, MYSQL, APACHE etc. open source projects are giving hard times to the counterpart copyright protected ones. and in some cases even surpassing their popularity. The strong foothold of open source license system can be realized by a federal court ruling in U.S stating violating copyleft = copyright infringement⁵

In India even the Supreme Court has also adopted open source operating system ubuntu and has directed over 17,000 courts across the country to switch to open source operating system.

CONCLUSION:

As a result, numerous open source licenses have emerged as viable alternatives to costly proprietary and commercial products. Open source licenses are gaining popularity. Open source is fast gaining acceptability and is the future of e-learning. Many

world class institutes have adopted Open source. In a sense, we are at a turning point in the evolution of free knowledge.

4. Artlibre.org/licence/lal/en/(last visited 14/09/2014)

5. *Robert Jacapsen v/s Kamid Associates*. 13 March, 2006(California)



ASPECT OF EMPLOYER-EMPLOYEE RELATIONSHIP

Rohit K. Gupta

Bench of Hon'ble Supreme Court comprising H.L. Dattu, R.K. Agrawal and Arun Mishra, JJ. vide its Judgment dated 25.08.2014 in the matter **Balwant Rai Saluja & ANR. Vs. Air India Ltd. & Ors.**¹ held that it is not the test of sufficient control, but the test of effective and absolute control which would be relevant to decide the employer-employee relationship. The question before this bench was whether, the workmen engaged in statutory canteens, through a contractor, could be treated as employees of the principal establishment.

The present industrial dispute arose between the Appellants-workmen herein of the statutory canteen and Respondent No. 1 herein. The said industrial dispute was referred by the Central Government to the Central Government Industrial Tribunal cum Labour Court (for short "the CGIT"). **The question referred was whether the workmen as employed by Respondent No. 3 herein, to provide canteen services at the establishment of Respondent No. 1, herein, could be treated as deemed employees of the said Respondent No. 1.**

Vide order dated 05.05.2004, the CGIT held that the workmen were employees of the Respondent No.1-Air India and therefore their claim was justified. Furthermore, the termination of services of the workmen during the pendency of the dispute was held to be illegal. However, vide judgment and order dated 08.04.2010, the learned Single Judge of the High Court of Delhi set aside and quashed the CGIT's award and held that the said workmen would not be entitled to be treated as or deemed to be the employees of the Air India. The Division Bench of the High Court of Delhi vide impugned order dated 02.04.2011 found no error in the order passed by the learned Single Judge of the High Court. The appeal was dismissed by the Division Bench confirming the order of the learned Single Judge who observed that the responsibility to run the canteen was absolutely with the HCI (respondent no.2) and that the Air India and the HCI shared an entirely contractual relationship. Therefore, the claim of the appellants to be treated as employees of the Air India and to be regularized was rejected by the learned Single Judge.

Here the appellants are workers who claim to be the deemed employees of the management of Air India on the grounds, inter alia, that they work in a canteen established on the premises of the respondent No. 1-Air India and that too, for the benefit of the employees of the said respondent. It is urged that since the canteen is maintained as a consequence of a statutory obligation under Section 46 of the Act, 1948, and that since by virtue of notification dated 21.01.1991, Rules 65-70 of the Delhi Factory Rules, 1950 (for short, "the Rules, 1950") have become applicable to the respondent No. 1, the said workers should be held to be the employees of the management of the corporation, on which such statutory obligation is placed, that is Air India.

Senior Counsel for the appellants- workmen contentions was; firstly, that in the event of a statutory requirement to provide for a canteen or any other facility, the employees of the said facility would automatically become employees of the principal employer, irrespective of the existence of any intermediary that may have been employed to run that facility. Secondly, the test of sufficient control by the principal employer over the operation of the canteen and consequently over the appellants-workmen, should prevail.

Therefore, the Court should pierce the veil and take note of the fact that the contractor was a mere camouflage, and the principal employer was in real control of the canteen and its workmen. The appellant relied on the following cases in support of its submissions- *Saraspur Mills Co. Ltd. v. Ramanlal Chimanlal*²; *Hussainbhai v. Alath Factory Thezhilali Union*³; *M.M.R. Khan v. Union of India*⁴; and *Parimal Chandra Raha v. LIC*⁵. As per Appellant, the issue raised in these appeals is squarely covered by the observations made by the Constitution Bench in the case of *Steel Authority of India Ltd. v. National Union Waterfront Workers*⁶.

1. Civil Appeal Nos. 10264-10266 of 2013

2. (1974) 3 SCC 66

3. (1978) 4 SCC 257

4. 1990 Supp SCC 191

5. 1995 Supp (2) SCC 611

6. (2001) 7 SCC 1

However, the above contentions of appellant-workmen were objected by the counsel for respondent and it was stated that the above case laws cited by the learned counsel for the appellants are not only distinguishable on facts, but are inapplicable to the facts of the present case. He would also refer to the three-Judge Bench decision of this Court in the case of *Indian Petrochemicals Corpn. Ltd. v. Shramik Sena*⁷, and then would submit that the proposition of law enunciated in the *Indian Petrochemicals* case (supra) is followed by this Court in *Hari Shankar Sharma v. Artificial Limbs Mfg. Corpn.*⁸; *Workmen v. Coates of India Ltd.*⁹; *Haldia Refinery Canteen Employees Union v. Indian Oil Corpn. Ltd.*¹⁰; and *Karnataka v. KGSD Canteen Employees' Welfare Assn.*¹¹. It was also contended and emphasized by the counsel for the respondent that it is not the test of sufficient control, but the test of effective and absolute control which would be relevant, and that if the said test, in the given facts is applied, the appellants would fail to establish the employer and employee relationship. In aid of his submissions, he refers to *Bengal Nagpur Cotton Mills v. Bharat Lal*¹²; *International Airport Authority of India v. International Air Cargo Workers' Union*¹³; and *National Aluminium Co. Ltd. v. Ananta Kishore Rout & Ors.*¹⁴.

The main issue for consideration before this Court in the present reference is *"whether workers, engaged on a casual or temporary basis by a contractor (HCI) to operate and run a statutory canteen, under the provisions of the Act, 1948, on the premises of a factory - Air India, can be said to be the workmen of the said factory or corporation"*.

During arguments, Hon'ble Apex Court observed that Respondent No. 1 is a company incorporated under the Companies Act, 1956 and is owned by the Government of India. The primary object of the said respondent is to provide international air transport/travel services. Respondent No. 2-HCI is also a company incorporated under the Companies Act, 1956 and is a separate legal entity from the Air India. As per the Memorandum of Association of Respondent No. 2, the same is a wholly-owned subsidiary of the Air India. The main objects of

the said respondent, inter alia, are to establish refreshment rooms, canteens, etc. for the sale of food, beverages, etc. Respondent No. 2 has various units and Respondent No. 3, being Chef air Flight Catering (for short, "the Chefair"), provides flight catering services to various airlines, including Air India. It is this Chefair unit of HCI that operates and runs the canteen. It requires to be noticed that the appellants-workmen are engaged on a casual or temporary basis by the respondent Nos. 2 and 3 to render canteen services on the premises of Respondent No.1 - Air India.

It was observed that there is requirement to ascertain whether workmen, engaged on a casual or temporary basis by a contractor to operate and run a statutory canteen on the premises of a factory or corporation, can be said to be the workmen of the said factory or corporation. It was noticed that workmen hired by a contractor to work in a statutory canteen established under the provisions of the Act, 1948 would be the said workmen of the given factory or corporation, but for the purpose of the Act, 1948 only and not for all other purposes. Therefore, the appellants-workmen, in the present case, in light of the settled principle of law, would be workmen of the Air India, but only for the purposes of the Act, 1948. Solely by virtue of this deemed status under the Act, 1948, the said workers would not be able to claim regularization in their employment from the Air India. As has been observed in the *Indian Petrochemicals* case (supra), the Act, 1948 does not govern the rights of employees with reference to recruitment, seniority, promotion, retirement benefits, etc. These are governed by other statutes, rules, contracts or policies.

To ascertain whether the appellants-herein would be entitled to other benefits and rights such as regularization, the test of employer-employee relationship as noticed hereinabove was applied. For the said purpose Memorandum of Association and the Articles of Association of the HCI was referred to look into the nature of the activities it undertakes. The objects of the HCI, as provided under its Memorandum of Association, inter alia, include the following:

- (i) To carry on the business of hotel, motel, restaurant, café, tavern, flight kitchen, refreshment room and boarding and lodging, house-keepers, licensed victuallers, etc.;
- (ii) To provide lodging and boarding and other facilities to the public;

7. (1999) 6 SCC 439

8. (2002) 1 SCC 337

9. (2004) 3 SCC 547

10. (2005) 5 SCC 51

11. (2006) 1 SCC 567

12. (2011) 1 SCC 635

13. (2009) 13 SCC 374

14. (2014) 6 SCC 756



- (iii) To purchase, erect, take on lease or otherwise acquire, equip and manage hotels;
- (iv) To establish shops, kitchens, refreshment rooms, canteens and depots for the sale of various food and beverages.

The objects incidental or ancillary to the main objects include, inter alia: "... (5) To carry on any business by means of operating hotels etc. or other activity which would tend to promote or assist Air-India's business as an international air carrier...."

It was observed by the Hon'ble Court that the primary objects of the HCI have no direct relation with the Air India. It is only one of the many incidental or ancillary objects of the HCI that make a direct reference to assisting Air India. The argument that the HCI runs the canteen solely for Air India's purpose and benefit could not succeed in this light. The HCI has several primary objects, which include the running of hotels, motels, etc., in addition to establishing shops, kitchens, canteens and refreshment rooms. The Air India only finds mention under HCI's ancillary objects. It cannot be said that the Memorandum of Association of the HCI provides that HCI functions only for Air India. Nor can it be said that the fundamental activity of the HCI is to run and operate the said statutory canteen for the Air India.

The Hon'ble Apex Court was not agreed with the contention that the HCI shall be a wholly-owned subsidiary of the Air India and that its share capital shall be held by the Air India and/or its nominees. Furthermore, the said Articles included provisions whereby Air India controls the composition of the Board of Directors of the HCI, including the power to remove any such director or even the Chairman of the Board. Further, Air India has the right to issue directions to the HCI, which the latter is bound to comply with. In this regard, it may be contended that the Air India has effective and absolute control over the HCI and that therefore latter is merely a veil between the appellants-workmen and Air India. The Apex Court held that the doctrine of piercing the veil cannot be applied in the given factual scenario. Despite being a wholly owned subsidiary of the Air India, Respondent No. 1 and Respondent No. 2 are distinct legal entities. The management of business of the HCI is under its own Board of Directors. The issue relating to the appointment of the Board of Directors of the HCI by the Air India would be a consequence of statutory obligations of a wholly owned subsidiary under the Act, 1956.

It has been held that the present facts would not be a fit case to pierce the veil, which as enumerated above, must be exercised sparingly by the Courts. Further, for piercing the veil of incorporation, mere ownership and control is not a sufficient ground. It should be established that the control and impropriety by the Air India resulted in depriving the Appellants-workmen herein of their legal rights.

Therefore, the only consideration which Hon'ble Court noticed is the nature of control that the Air India may have over the HCI, and whether such control may be called effective and absolute control. Such control over the HCI would be required to be established to show that the appellants-workmen were in fact the employees of the Air India.

The Hon'ble Apex Court opined that such control would have nothing to do with the appointment, dismissal or removal from service, or the taking of disciplinary action against the workmen working in the canteen. The mere fact that the Air India has a certain degree of control over the HCI does not mean that the employees working in the canteen are the Air India's employees. The Air India exercises control that is in the nature of supervision. Being the primary shareholder in the HCI and shouldering certain financial burdens such as providing with the subsidies as required by law, the Air India would be entitled to have an opinion or a say in ensuring effective utilization of resources, monetary or otherwise. The said supervision or control would appear to be merely to ensure due maintenance of standards and quality in the said canteen.

It was observed that there is no parity in the nature of work, mode of appointment experience, qualifications, etc., between the regular employees of the Air India and the workers of the given canteen. Therefore, the appellants-workmen cannot be placed at the same footing as the Air India's regular employees, and thereby claim the same benefits as bestowed upon the latter. It would also be gainsaid to note the fact that the appellants-herein made no claim or prayer against either of the other respondents, that is, the HCI or the Chefair. Accordingly, It has been held that, the appellants-workmen could not be said to be under the effective and absolute control of Air India. The Air India merely has control of supervision over the working of the given statutory canteen. Issues regarding appointment of the said workmen, their dismissal,



payment of their salaries, etc. are within the control of the HCI. It cannot be then said that the appellants are the workmen of Air India and therefore are entitled to regularization of their services.

In terms of the above, it was held that the workers engaged by a contractor to work in the statutory canteen of a factory would be the workers of the said factory, but only for the purposes of the Act, 1948, and not for other purposes, and further for the said workers, to be called the employees of the factory for all purposes, they would need to satisfy the test of employer-employee relationship and it must be shown that the employer exercises absolute and effective control over the said workers. Accordingly, appeals dismissed.



CHEQUE BOUNCING- JURISDICTION OF COURTS REDEFINED

Bijoylashmi Das

The legal nodus of determining the Jurisdiction of Courts in cheque bouncing cases has finally been resolved by the Supreme Court of India. A three Judges bench of the Hon'ble Supreme Court in *Dashrath Rupsingh Rathod vs State of Maharashtra*¹ has finally decided the issue of territorial jurisdiction concerning criminal complaints filed under section 138 of the Negotiable Instruments Act, 1881. The Court held that return of the cheque by the drawee bank alone constitutes the commission of the offence under section 138 of the Negotiable Instruments Act, 1881 and indicates the place where the offence is committed. Hence the place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located.

The aforementioned judgment took a contrary view from what was laid down by a two Judges bench of the same court in *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr*². K. Bhaskaran observed that the offence under Section 138 of the NI Act, 1881 can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It is not necessary that all the five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Sec. 138 of the NI Act. Referring Section 178(d) of the Code of Criminal Procedure, 1973 it is clear that if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the NI Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas

within the territorial limits of which any one of those five acts was done.

But the Hon'ble Supreme Court in *Dashrath Rupsingh Rathod* disagreed with the *Bhaskaran* judgment and observed that *Bhaskaran* allows multiple venues to the Complainant which runs counter to this Court's preference for simplifying the law. Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulosity, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law. Law's endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings. Therefore, precision and exactitude are necessary especially where the location of litigation is concerned. The Court further observed that a reading of Section 138 of the NI Act in conjunction with Section 177 of Code of Criminal Procedure leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed. In this analysis the Hon'ble Supreme Court held that the place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located.

Keeping in mind the fact that the present decision will have a massive impact on the cases already pending in various Courts if the same is applied prospectively, the Supreme Court thought it to be expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceed to continue at that place. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints, including the ones where the accused/ Respondent has not been properly served shall be returned to the Complainant for filing in the proper Court. If such Complaints are filed /refiled within thirty days of their return, they shall be deemed to have been

1. *Dashrath Rupsingh Rathod vs State of Maharashtra* 2014(9) SCALE97
2. *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr* (1999)7SCC510

filed within the time prescribed by law, unless the initial or prior filing was itself time barred.

It was also observed by the Hon'ble Supreme Court that the relief introduced by Section 138 of the NI Act is in addition to the contemplations in the Indian Penal Code. It is still open to such a payee recipient of a dishonoured cheque to lodge a First Information Report with the Police or file a Complaint directly before the concerned Magistrate. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under the Indian Penal Code and Code of Criminal Procedure are available to such a payee if he chooses to pursue this course of action, rather than a Complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises dependent on his choosing.

CONCLUSION

The Hon'ble Supreme Court by way of this latest judgment has finally put an end to the perplexity of territorial jurisdiction in cases under 138 of NI Act by clearly laying down that only return of the Cheque by the drawee bank constitutes the commission of the offence under section 138 of the Negotiable Instruments Act, 1881 and also indicates the place where the offence has actually been committed. Hence it is that place, situs or venue where the drawee bank is located, is the place where judicial inquiry and trial of the offence must logically be restricted.



NEWSBYTES

A STEP AHEAD BY IPO: ESTABLISHMENT OF NEW OFFICE AS ISA AND IPEA

On 8th September, 2014, IPO inaugurated a new building to deal with the operations of the Patent Office as an International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA) under the Patent Cooperation Treaty (PCT). This introduction will not only accelerate the ISA and IPEA proceedings but it also helps in gaining IPO a step ahead among other IP countries viz. USPTO, EPO, JP etc. Further to this the IP Office also introduced a system called the 'Stack and Flow' which tracks the progress of the work happening in the Patent office and can be viewed on the website. The IPO has the distinction of being the first office in the world with such a system. This appears to be a huge boost for transparency in the working of the Patent Office as the process is now freely traceable. These are some extremely good initiatives that the IPO has put up.

DIRECTIONS FOR CLINICAL TRIAL APPLICATION BY CDSCO

Drug Controller General of India (DCGI) with the approval of the Ministry of Health and Family Welfare, vide Order no. F. No. DCGI/Misc./2014(132) dated 05 September, 2014 directed all the Sponsors/CROs/Medical Institution and other Stakeholders involved in the conduct of Clinical Trial in the country to include following information in their Clinical Trial Application with immediate effect i.e. (i) Assessment of risk versus benefit to the patients, (ii) Innovations vis-à-vis existing therapeutic options, (iii) Unmet medical need in the country. The above said direction of inclusion of these three parameters in the Clinical Trial Application by DCGI is in furtherance of the Hon'ble Supreme Court Order dated 21.10.2013 in the matter of W.P (C) No. 33/2012 of Swasthya Adhikar Manch, Indore & Anr. V. Ministry of Health and Family Welfare & Ors. with W.P (C) No. 779/2012 regarding Clinical Trials, wherein it was directed that all the Global Clinical Trials (GCTs)/New Clinical Trials (NCEs) should be evaluated having regard to the three parameters (as mentioned above) in the Clinical Trial Application.

DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION NOTIFIES RAISE IN FDI LIMIT FOR DEFENCE FROM 26% TO 49%

Changes have been notified by the Department of Industrial Policy and Promotion (DIPP) with regard to the foreign direct investment policy for defence in India which was approved by the Government earlier. The limit for foreign direct investment has been raised from 26% to 49%. At the same time government approval over and above this increased percentage shall be mandatory. Further, it is a composite limit and shall include FDI, FII, Qualified foreign investors, NRI's, Foreign venture capitalist. Any proposals for over and above Rs. 1200 crore and beyond the limit of 49% would require the approval of Cabinet Committee of Economic Affairs (CCEA).

The objective of the Indian Government behind this development is to help and encourage the domestic manufacturing of the defence goods which are imported by the Country as of now. This will be a boon for the domestic manufacturing and will further reduce the imports which in turn will prove very beneficial for the Country's economy and would also lead to its growth.

IP EXPRESSIONS: TECHNICAL MAGAZINE OF CONTROLLERS GENERAL OF PATENTS, DESIGNS AND TRADE MARKS

The Indian Patent Office on 8th September, 2014 introduced a technical magazine of Controllers General of Patents, Designs and Trade Marks called 'IP EXPRESSIONS' in a noteworthy step towards achieving the larger goal of creating a platform for interaction on IPR matters. Starting initially as a biannual publication, the IP Expressions is expected to benefit the IP researchers, academicians and public at large as a source of IP information. Also, this technical magazine provides a platform for the officials of IPO to share knowledge and experience gained in the field of intellectual property. It is commendable to note that this technical magazine will not only provide information of the development on Intellectual Property Rights related matters but will also enable various stakeholders to present their points of view in an effort to nurture the culture of innovation.

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NOTES



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