Singh & Associates
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Advocates & Solicitors

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INDIAN LEGAL IMPETUS

FOREWORD

Manoj K. Singh
Founding Partner

It is my pleasure to present the June 2015 edition of our Newsletter "Indian Legal Impetus". I, on behalf of the entire team of "Singh and Associates" thank its readers for the overwhelming response and the support it has provided for making our endeavors come true. I take this opportunity to enlighten our readers about the latest happenings in India and around the world.

The present issue has delved with the recent controversy over the presence of "MSG" content beyond the permissible limit in household name "Maggie". The said controversy has startled the entire nation as the consumption of the "2 minutes noodle" sine-qua-non of every household. The issue further examines June 5^{th} 2015 order by the FSSAI whereby restrictions were imposed upon the sale of "maggie" and the other consequential implications thereof. Secondly, the present issue also throws light on the recent ordinance which seeks to amend the Negotiable Instrument Act and overturn a judgment by a three judge Bench of the Supreme Court which ruled 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."*

Moving forward, our issue also endeavors to enlighten our readers about the guidelines issued by SEBI on 16th June 2015 to supplement its SEBI (Share Based Employee Benefits) Regulations, 2014 notified on 28th October 2014. The overview of the article highlights the framework for all schemes formulated by the companies for the benefit of their employees involving dealing in shares, directly or indirectly, with a view to facilitate smooth operation of such schemes and this has been done in accordance with the powers conferred to the Regulator. Therefore by providing these requirements, SEBI has ensured that the companies do not take undue advantage in the secondary market, which can now be entered as per the new regulations. Additionally, a deep insight with respect to the key differences between the Companies Act 1956 and Companies Act 2013, from the point of view of mergers and amalgamations, has been covered in the present issue.

Then the importance of "novelty" and "inventive step" has been substantiated through an article in the present issue, whereby in a recent decision taken on 1st June 2015, Indian Patent Office rejected an application filed by US-based Abraxis BioScience relating to a new composition for Paclitaxel, an anti-cancer drug marketed under the trade name Abraxane, on the grounds of lack of novelty and inventive step.

We, sincerely hope that our readers find the articles covered in the present issue informative and useful in resolving their queries. We further welcome any suggestions, comments, opinions from our readers. Please send us your valuable insights and reviews on newsletters@singhassociates.in

Thank You!

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"Indian Legal Impetus"

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KEY COMPARISON BETWEEN COMPANIES ACT, 1956 & COMPANIES ACT, 2013 - MERGER & AMALGAMATION PERSPECTIVE

Karan Gandhi & Mukesh Arora[1]

For more then five and a half decades Companies law in India had been governed by Companies Act, 1956. Enactment and introduction of Companies Act, 2013 was a step to rejuvenate the existing corporate legal mechanism in the light of the needs and requirements of the Companies, better governance. In the present article we are dealing with the provisions with regard to the Arrangements, Mergers & Amalgamations; under Companies Act, 2013.

RELEVANT PROVISIONS FOR MERGER & AMALGAMATION

Under Companies Act, 1956 – Section 390-396A.

Under Companies Act, 2013- Section 230-240[1]

Merger is generally a scheme of arrangement or Compromise between a Company, Shareholders and Creditors , whereas, Amalgamation is defined under section 2(1b) of Income Tax Act, 1961 as a Merger of one or more Companies with another Company or Merger of two or more Companies to form a new Company.

DISCLOSURES IN CONNECTION WITH MERGER & AMALGAMATION

- Under Companies Act, 1956

  Tribunal had Power to sanction any compromise or arrangements with creditors and members if satisfied that company or any other person by whom an application has been made (by way of first motion Petition) has disclosed all material facts relating to company with an affidavit such as latest financial position of the Company, accounts of the company, latest auditor's report etc. For the compliance part, the notice of meeting was required to be sent along with statement setting forth the terms of the compromise or arrangement and explaining its affect in particular, the statement must state all material interest of directors of the company, whether in their capacity as such or as member or creditors of company or otherwise. The tribunal should also give notice to Central Government (Regional Director and Registrar of Companies) and shall take into consideration the representations, if any, made to it by that government before passing any order. Also, during the same period there was a requirement of newspaper publication and any objections by any of the shareholders, creditors if any, be raised before the Court during the hearing of the second motion Petition. All disclosure provision under 1956 Companies Act has been stated.[2]

- Under Companies Act, 2013

  The provisions of section 230 of the Companies Act, 2013 provide the additional disclosure if the proposed scheme involves; Reduction of Share Capital or the scheme is of Corporate Debt restructuring; consented not less then 75% in value of secured creditors, Every notice of meeting about scheme to disclose valuation report explaining affection various shareholders. Further, no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013.

  As per the provisions of Companies Act, 2013 dealing with the Arrangements; notice of meeting to consider Compromise or arrangement to be given to Central Government, Income Tax Authorities, Reserve Bank, Securities Exchange Board of India, Registrar of Companies, respective Stock

1. *yet to be notified*

2. *Section 391, 393 and 394 A of Companies Act, 1956*

Exchange, Official Liquidator, Competition Commission of India and other Authorities likely to be affected by the same.

These Authorities can voice their concern within 30 days of receipt of notice, failing which it will be presumed that they have no objection to the scheme[3].

CROSS BORDER MERGER & AMALGAMATION

- Under Companies Act, 1956

  As per section 394, Court can sanction arrangement between two or more Companies where whole or part of undertaking, property or liability of any company referred to as transferor Company is to be transferred to another company referred as transferee company. According to the provisions of Companies Act, 1956, Inbound merger (Foreign Company merges into an Indian Company) was permissible however, outbound merger (Indian company cannot merge with foreign Company) was not allowed. According to this section only inbound merger is allowed where transferor/target company means any body corporate whether or not registered under 1956 Act, that a foreign company could be transferor or target company. Transferee Company means an Indian Company. Cross Border merger allowed under 1956 Act as long as the Acquirer/transferee is Indian Company.

- Under Companies Act, 2013

  In bound and out bond foreign company merger are allowed, which means Foreign Company merging into Indian Company and Indian Company merging into foreign Company could be done with RBI approval. Therefore both these options are open under 2013 Act if foreign companies to be in notified countries, under Exchange Control Regulation, shares can be issued under Automatic route to non- resident, subject to certain consideration, consideration to shareholders of merging Company may include cash, depository receipts or combination of both. This section has widen the scope for Indian Companies as now they have both options of arrangement[4].

FAST TRACK MERGER

Fast Track merger or quick form merger is the new provision which is added in Companies Act, 2013. Fast track merger is merger between two or more small companies[5], holding company and its wholly own subsidiary and such other company as may be prescribed.

Fast Track merger does not involve Court or Tribunal, approval of National Company Law Tribunal is also not required. For fast track merger board of directors of both the Companies would approve the scheme. However, notice has to be issued to ROC and official liquidator and objections / suggestions has to be placed before the members. The scheme needs to be approved by members holding at least 90 percent of the total number of shares or by creditors representing nine-tenths in value of the creditors or class of creditors of respective companies.[6] Once the scheme is approved, notice would have to be given to the Central Government, ROC and Official Liquidator. NCLT may confirm the scheme or order that consider as normal merger under section 232 of Companies Act, 2013.

Therefore Fast track merger will be a speedy process as it does not require approval for NCLT available to certain kind of truncations. It opens the scope for small companies who wanted to merge and can propose the scheme of Merger or Amalgamation through their Board of directors. There is also no requirement for sending notices to RBI or income-tax or providing a valuation report or providing auditor certificate for complying with the accounting standard.

OBJECTION TO SCHEME OF AMALGAMATION

Scheme of Amalgamation can be objected as per

3. Section 230(5) of Companies Act, 2013

4. Section 234 of Companies Act, 2013

5. Small companies is defined in section 2(85) of Companies Act, 2013

6. Section 233 of Companies Act, 2013

section 230(4) of Companies Act, 2013, only by shareholders having not less than 10% holdings or creditors debt is not less than 5% of total outstanding debt as per the last audited financial statement. whereas earlier under Companies Act, 1956 there was no such limit which state that person holding even 1% in the company can object the scheme which was not fair at all therefore the new threshold limit for raising objections in regard to scheme or arrangement will protect the scheme from small shareholders' and creditors' unnecessary litigation and objection.

MEETING OF CREDITORS/SHAREHOLDERS TO APPROVE THE SCHEME

- Under Companies Act, 1956

  Scheme to approved by 3/4th value of creditors or members, agree to scheme, then it will be binding, if sanctioned by court as stated under section 391(2), voting in person or a proxy at meeting. E-Voting is not permitted under 1956 Act.

- Under Companies Act, 2013

  Scheme is to be approved by 3/4th of creditors or members, agree to scheme, then it will be binding, if sanctioned by National Company Law Tribunal as stated under section 230(6)(1). The 2013 Act additionally allows the approval of the scheme by postal ballot. Postal ballot gives an equal opportunity of vote to all stake holders. E-Voting is permitted under new 2013 Act. Therefore concept of E-Voting is introduced under new Act and section 108 of the Companies Act, 2013 read with rule 20 of Companies(Management and Administrative) rules, 2014 deal with exercise of right to vote by member by electronic means. Therefore postal ballot system and introduction E-Voting will protect the shareholders interest and will also increase the participation of shareholders of the company in voting.

MERGER OF A LISTED COMPANY INTO UNLISTED COMPANY[7]

The Companies Act, 2013 requires that in case of merger between a listed transferor company and an unlisted transferee company, transferee company would continue to be unlisted until it becomes listed. Shareholders of listed Company have the option to exit on payment of value of their shares, as otherwise they will continue as a shareholder of the unlisted company. the Payment to such shareholders willing to exit shall be made on pre-determined price formula or after valuation. Whereas; under Companies Act, 1956 there was no such provision. Therefore reverse merger of listed Company into an unlisted Company does not automatically result in a listing of surviving entity, which may be the unlisted Company.

BODY OF APPROVING MERGER

Approval of scheme requires an independent body of oversight and fairness. According to 1956 Companies Act , scheme of arrangement was to be approved by respective High Court which has jurisdiction over Acquirer and Target companies. Whereas; under Companies Act, 2013 National Company Law Tribunal will deal with matters related to Merger & Acquisition.

NCLT would be one specified body dealing with cases opposed to multiple High Court in case of the companies falling under the jurisdiction of different high courts.

VALUATION REPORT

The 2013 Act makes it mandatory that notice of meeting to discuss a scheme must be accompanied by valuation report prepared by an expert whereas, Companies Act,1956 Act is silent on disclosing the valuation report to the stakeholders, as a matter of transparency and good corporate governance. Courts also required annexing of the valuation report to the application submitted before them.

7. Section 232(3)(h) of Companies ct, 2013

CONCLUSION

It seems that Companies Act, 2013 makes merger process more efficient but it also has some obscurity which need to be modified in order to reduce or avoid any complexity in the process which can be identified once the corresponding sections are notified. The outbound mergers now being allowed (when notified) open an opportunity towards globalization.

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REFUND CANNOT BE CLAIMED ONCE THE AMOUNT OF SERVICE TAX IS PAID AND NO SHOW CAUSE IS ISSUED THEREAFTER

Shipra Makkar

SECTION 73(3) OF THE FINANCE ACT, 1994

"(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

Provided that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1 . - For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer but for this sub-section.

Explanation 2.- For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made there under shall be imposed in respect of payment of service tax under this sub-section and interest thereon."

The aforesaid provision very clearly lays down that the amount of tax, if any, which has not been paid or has been short-paid is ascertained by the Departmental officer and paid before the service of notice, no notice requires to be issued to the assessee. The provisions of sub-section further are very clear that if no notice is issued to the appellants under Section 73(1) of the Finance Act, 1994, it would mean that the tax liability discharged by the appellants would be the tax as accepted and paid by him.

On similar grounds, the Hon'ble CESTAT Mumbai recently in the case of **Nukay Nufit Nakshtra V Commissioner of Central Excise Pune reported in 2015-TIOL-607-CESTAT-MUM**, held that *"when the appellants themselves had discharged the tax liability, there cannot be any refund of the amount as the issue is considered as 'closed' by the revenue authorities."*

The facts of the case are that the the officers of the Directorate General of Central Excise Intelligence, Regional Unit, Pune gathered an intelligence that three companies NUKAY, NAFIT and NAKSHTRA were providing services of erection of modular kitchen and other services, which was brought under the tax ambit w.e.f 16th June, 2005. Post investigation, the company was directed to pay service tax as determined by the departmental representatives. All the companies paid the said amount so determined along with filing an application u/s 73(3) of the Finance Act, 1994.

Subsequently, all the three companies were of the view that the said amount of tax was not payable by them as the tax liability came into effect later, hence all of them filed refund claims. All such claims were rejected by the adjudicating authority. Even the first appellate authority after granting them an opportunity for personal hearing, rejected the said appeals.

The Hon'ble CESTAT, Mumbai after going through the provisions of S. 73(3) and hearing the contentions from both the sides observed that there was no dispute that companies themselves had paid the amount of tax not paid and filed a declaration u/s 73(3) that the case may be closed. In such scenario, there can be no chance that any refund can be claimed.

CONCLUSION:

Looking at the judgment above, it is crystal clear that once the Assesee pays the amount of tax determined by the Department and gives an intimation thereof u/s 73(3) of the Finance Act, the Officer shall not serve a notice and the Assessee cannot claim a refund of the said amount, as the issue stands closed.

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REQUIREMENT GUIDELINES FOR THE LISTED COMPANIES W.R.T SHARE BASED EMPLOYEE BENEFITS - BY SEBI

Arpita Karmakar

Securities and Exchange Board of India on June 16, 2015, issued guidelines to supplement its SEBI (Share Based Employee Benefits) Regulations, 2014, which was notified on October 28, 2014.

SEBI (SHARE BASED EMPLOYEE BENEFITS) REGULATIONS, 2014- AN OVERVIEW

The Regulator, on October 28, 2014, in accordance with the powers conferred to it, regulated the framework for all schemes formulated by the companies for the benefit of their employees involving dealing in shares, directly or indirectly, with a view to facilitate smooth operation of such schemes. The highlights of the Regulations were:

1. It repealed the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999 which were in force till then.
2. The companies could now use secondary shares for issuing ESOSs. This would result in no dilution of existing share capital. Companies using secondary shares in their scheme, has to mandatorily set up an irrevocable Trust(s).
3. The provisions of these regulations applies to any company whose shares are listed on recognized stock exchange and has a scheme:
    - i. For direct or indirect benefit of employees: and
    - ii. Involving dealing in or subscribing to or purchasing securities of the company, directly or indirectly: and
    - iii. Satisfying, directly or indirectly, any of the following conditions:
    - a. The scheme is set up the company or any other company in its group;
    - b. The scheme is funded or guaranteed by the company or any other company in its group;
    - c. The scheme is controlled or managed by the company or any other company in its group;
4. These regulations shall not apply to shares issued under preferential allotment.
5. The provisions applies to the following scheme:
    - i. Employee stock option schemes (ESOSs);
    - ii. Employee stock purchase scheme (ESPSs);
    - iii. Stock appreciation rights scheme (SARs); and
    - iv. Retirement benefit schemes (RBSs).
6. Accounting for all the Equity based benefit plans has to be in accordance with Standards issued by ICAI.

REQUIREMENTS UNDER REGULATIONS AS PER THE CIRCULAR OF SEBI

The mechanism has prescribed certain compliances to instill enough safeguard to prevent any sham in the secondary market. The circular CIR/CFD/POLICY CELL/2/2015 issued by SEBI on June 16, 2015, is a guideline for the companies to do such compliances properly in accordance with the provisions. Thus, the Requirements specified by the circular are as follows:

MINIMUM PROVISIONS IN A TRUST DEED

The schemes involving secondary acquisition or gift or both, has to be implemented mandatorily through a trust. Other schemes may also be implemented through a trust. The SEBI requires certain provisions to be incorporated in the Trust Deed:

- i. Details of the Trust- its name, object, source of funds, its usage and details of scheme, settler, trustees;
- ii. Powers and Duties of trustee(s);
- iii. Provisions on dissolution of the Trust;
- iv. Provisions specifying that the trustee shall not act in any manner that would be detrimental to the interests of the beneficiaries;
- v. Other clauses to safeguard the interests of the beneficiaries

COMPENSATION COMMITTEE

A company shall constitute a compensation committee, as per section 178 of Companies Act, 2013, for administration and superintendence of the schemes. As per the regulation, the committee is required to formulate detailed terms and conditions of the schemes. SEBI has provided an inclusive list of such provisions:

a. Quantum of the benefit;
b. Kind of benefits;
c. Conditions to avail the benefits;
d. Period within which the employee shall exercise the option;
e. Exercise period of the potion in the event of termination or resignation of an employee;
f. Right of an employee to exercise all options at one time or at various points of time;
g. The procedure for making a fair and reasonable adjustment to the entitlement of options/ SARs in case of corporate actions such as rights issues, bonus issues, merger, sale of division, etc.
h. Rules for employees who are on long leave;
i. Eligibility to avail benefits;
j. The procedure for cashless exercise of options/ SARs.

SHAREHOLDERS' APPROVAL

As per the provisions of regulations, no scheme shall be offered to the employees of a company unless the shareholders of the company approve it by passing a special resolution. The explanatory statement to the notice shall include the information as specified by SEBI in this regard.

LISTING REQUIREMENT

In case new issue of shares is made under the scheme, it has to be listed immediately on the stock exchange. A statement has to be filed by the company and obtain an in-principle approval from the stock exchange. Such statement shall include the description of the schemes in detail. The mandatory contents have been specified in the circular.

The company shall also notify the concerned stock exchange as and when an exercise of option/SAR is made. The format for such notification has been provided by the SEBI.

DISCLOSURES BY BOARD OF DIRECTORS

The Board of Directors in their report shall disclose any material change in the scheme(s) and whether the scheme(s) is/are in compliance with the regulations. SEBI has prescribed the following details that shall be disclosed on the company's website and a web-link thereto shall be provided in the report of board of directors:

a. Relevant disclosures relating to the accounting standards;
b. Diluted EPS on issue of shares pursuant to all the schemes;
c. Details related to ESOS;
d. Details related to ESPS;
e. Details related to SAR;
f. Details related to General Employee Benefit Scheme/Retirement Benefit Scheme (GEBS/ RBS);
g. Details related to Trust;

MANDATORY DISCLOSURES

No ESOS/SAR shall be offered unless the disclosures, as specified by the SEBI in this regard, are made by the company to the prospective option/SAR grantees. The disclosure documents specified by the SEBI in the circular are:

a. Statement of Risks;
b. Information about the company;
c. Salient features of the scheme;

CONCLUSION

The disclosures/certain processes, which had not been mentioned in the regulations, have now been provided by the SEBI in its circular. This will help the listed companies in its due compliances. By providing these requirements, SEBI has ensured that the companies do not take undue advantage in the secondary market, which can now be entered as per the new regulations.

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LAW, MORALITY, ETHICS AND RELIGION-BIOLOGICAL PATENTS

Monika Shailesh

INTRODUCTION:

From ages human beings have been trying to master the art of Biotechnology, but the 21st century has been seeing something different. The work in the field of Biotechnology has seen a rapid growth and this rapid growth and fierce competition have pushed the limits of intellectual rights and patent laws. With the advancement of technology and research more and more efforts are being put to patent life forms, organisms and Human parts in specific. This is an area which involves not only technology, Law, ethics and morality but also religion. Involvement of religious beliefs and practices around the world and the question of morality many a times lead to controversies and law suits.

Change in the basic nature of Humanity, conception of pseudo-human life forms and negativity associated with Humans "Playing God" are undoubtedly a cause of apprehension are real and a very problematic issue. This needs to be addressed with each and every improvement in the field of Biotechnology and assertion of patent rights on resulting innovation.

HISTORY OF LIFE FORM PATENT

Thomas Jefferson the man behind the first Patent Act did not have even slightest idea that the life forms can ever become a subject of Patent protection.The most famous case of Diamond v Anand Chakrabarty where a biochemist at GE developed a genetically modified organism that had the ability to decompose crude oil. At first his patent application was rejected which on further appeal was granted by the court with order stating "His claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter-a product of human ingenuity".

BIOTECHNOLOGY PATENT AND INDIA

Patent Act in India was enacted in 1856 from then it has been modified several times, one such major amendment was done in 1970 which satisfied the international norms of patentability such as Novelty, Inventive step and industrial application. The patent act 1970 had nothing specific concerning the Biotechnology invention and protection. At the same time patent offices and courts in US and EU were seeing increasing number of biotech inventions and patent application, as a result demand of amendment of Indian patent act to introduce biotech patentability gained significance in India. The amendment came in 2002 to explicitly include biochemical, biotechnological and microbiological processes within the definition of potentially patentable process.

OPPORTUNITY OF BIOTECHNOLOGY PATENT IN INDIA:

The practices prevalent in India in this regard, and are quite nascent and the Topic of Biotechnology Patent is not as clear and tidy as it is in other fields of intellectual property. There are several outstanding deficiencies within the substantive law that needs addressing. Apart from narrow standards of patentability, biotech products are faced with certain additional hurdles like mandatory disclosure of biological material, prior approval from the Biodiversity Board and access & benefit issues under the Indian Patent regime.

The Indian Patents Act does not define, in an comprehensive manner, what is patentable. Relatively, Section 3 includes a list of inventions considered not patentable. In respect of biotechnology inventions, the Indian Patents Act 1970 as amended till date postulates under Section 3(a) to 3(e), 3(h) to 3(j) and 3(p), inventions that will not be considered as a patentable subject matter in India. Though, Clauses 3(c) to 3(d), 3(i) to 3(j) and 3(p) are imperative in the context of patentability of biotechnological inventions. Clause 3(c) states that "The mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or nonliving substances occurring in nature" will not be considered as patentable invention.

This provision of non-patentability is common to patent laws of other countries. The Clause 3(j) states that "Plants and animals in whole or any part thereof other than microorganisms including seeds, varieties and species and essential biological processes for production or propagation of plants and animals as non-patentable invention".

WHAT IS NOT PATENTABLE IN INDIA

- Section 3 (b) - . As per the section an invention
- would not be patentable if it is immoral or against public order, harmful to human, animal or plant life or harmful to environment
- Discovery of living things or non living substances in nature - Section 3 (c)
- Plants and animals in whole or any parts thereof other than micro-organisms but including seeds, varieties and species - Section 3 (j)
- Essentially biological processes for the production or propagation of plants and animals– Section 3 (j)
- Any Process for the medicinal, surgical, curative, prophylactic, diagnostic or therapeutic or other treatment of human beings or animals to render them free of disease or to increase their economic value or that of their products – Section 3(i)
- Methods of agriculture or horticulture – Section 3(h)
- Traditional knowledge – Section 3(p)[1]

WHAT IS PATENTABLE IN INDIA

- The MPPP regards claims to 'genetically modified Gene Sequence/Amino Acid Sequence, a method of expressing the sequence, an antibody against the protein/ sequence, a kit containing such antibody/ sequence as having a single inventive concept and capable of being granted a patent
- Gene sequences, DNA sequences without having disclosed their functions are not patentable for lack of inventive step and industrial application
- Living entities of artificial origin such as micro-organism, vaccines are patentable
- Biological material such as rDNA, plasmids are patentable provided they are produced by substantive human intervention
- Processes for producing chemical and biological substances using microorganisms including lower plants and animals are patentable
- Modified Microorganism & process therefor
- Process for modification/ isolation of microbes.
- Isolated nucleic acids encoding gene, first time isolation of a molecule; novel peptides, novel peptide analogs, proteins, vaccines, antibodies, recombinant: DNA, RNA, Amino Acids, antibodies, primers, recombinant oligonucleotides and primers, genes and process therefor; DNA related inventions such as preparing plasmids, vectors etc.; composition/formulation thereof.
- Cell lines-A cell line is patentable if artificially produced.
- Hybridoma technology: patents are also allowed on hybridoma technology, but not on protoplast fusion.
- rDNA, cDNA, r-RNA, r-antibodies
  - Expressed sequence tag's, or ESTs, are small fragments of genetic material
  - obtained by reverse transcriptions of messenger RNA (mRNA) from expressed
  - Genes. The gene sequence, or expressed sequence tags (ESTs), can be Patented if it
  - has a use, such as if it works as a probe.[2]

CONCLUSION

It can be seen that the Biotechnology and life form patentability is a subject of exploration in India. With more and more research and innovation going around in this field and keeping in view the rich Bio-Diversity that India enjoy, there is a true need to protect the interest of inventors. India needs to enable its inventors and inventions to compete in the global scenario, although few claims are do considered but they are more case to case basis and there is a lack of tidy guidelines.

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1 *Indian Patent act ,1970*

2 *Biotechnology Patenting In India and Related Issues - Rajashree Sharma*

A STRONG OPPOSITION LEADS TO REJECTION OF PATENT APPLICATION

(Review of the recent Patent case between Eureka Forbes & Hindustan Unilever Ltd)

Aayush Sharma

In this article a recent case has been introduced where Chennai patent office rejected the Patent application. This rejection is solely based on the strong oppositions placed by the opponent against the Applicant. Going forward, this article also discusses the various preventive measures in keeping the novel invention in front of the Patent office.

An Indian giant company indulged in water purification system and sole manufacturer "Eureka Forbes" filed a patent application at the Chennai Patent office. The filed Patent application having the tile "'iron removal water purifier" was denied by the Patent office because of the pre grant opposition filed by the Indian MNC Hindustan Unilever Ltd[1]. The opponent stated that "the usage of ion exchange resin for the removal of iron as well as its usage in gravity water filters is well known in prior art." Moving forward, it is necessary to understand the Pre-grant opposition under the Indian Patents Act, 1970. In the section 25 (1) of the Indian Patent Act, 1970, pre grant opposition is well defined and clearly sub-detailed. Indian patent law allows two kinds of patent oppositions which include pre-grant patent opposition and post-grant patent opposition. Chapter V, section 25(1) of the Patent (Amendment) Act 2005 provides provisions for pre grant opposition of Patent. Under this provision any person or any third party or Government may challenge the application of grant of patent and inform to the controller of Patents for opposition, in writing against the grant of a patent after the application for a patent has been published but before the grant of a patent.

On the basis of the below mentioned grounds, Pre-grant opposition can be made on the grounds listed under section 25(1)(a) to (k) of the Patent Amendment Act, 2005[2]:

- Wrongfully obtaining the invention
- anticipation by prior publication
- anticipation by prior date, Prior claiming in India
- Prior public knowledge or public use in India
- Obviousness and lack of inventive step
- non patentable subject matter
- insufficiency of description of the invention
- non-disclosure of information as per the requirement or providing materially false information by an applicant

The pre-grant opposition procedure acts as a protective shield to check the validity of patent applications before a patent is granted on them. The primary difference between pre-grant and post-grant opposition is that though pre-grant proceedings may be initiated by "any person", but only a "person interested" can institute a post-grant opposition. The Indian Patents Act defines a "person interested" as including a person engaged in, or in promoting, research in the same field as that to which the invention relates.

Now coming back to the case where Eureka Forbes filed a Patent Application at the Chennai Patent office, where its Patent application has been rejected due to Pre grant opposition filed by the Hindustan Unilever [HUL]. According to HUL, the applicant fails to provide the strong comparative test with respect to the closest prior art and had also failed to provide information regarding the distinguishing features of the invention and the unexpected effects. Because of the breach of the novelty, obviousness and inventive step the claimed application has been rejected.

Further this was not the first time when both these rivals are battling for the Patent in India. Earlier in 2008, a much referred case of "double patenting" were both Eureka Forbes and HUL were allegedly granted a patent for identical technologies. HUL had filed an application for this technology in 2002 but was granted a patent only in 2006, by the Mumbai patent office. In the meantime, Eureka Forbes was granted its patent in 2005, by the Chennai patent office. Moreover, the

1 *http://www.financialexpress.com/article/economy/eureka-forbes-denied-patent-for-aquasure-after-hindustan-unilevers-opposition/84020*

2 *http://ipindia.nic.in/IPActs_Rules/updated_Version/sections/ps25.html*

Eureka's application was made after HUL's application and HUL had filed a pre grant opposition. However, the patent office rejected the plaint and the Chennai patent office went on to grant the patent without hearing the pre grant opposition. After that the HUL filed a post grant opposition under *section 25 (2) of the Patents Act, 1970*, to which Eureka Forbes proposed a reply within stipulated time frame. Instead of revocation of the patent, the India patent office went out of its way to condone the delayed reply. These steps of the Patent office forced the HUL to file a writ petition before the Madras High Court and also patent infringement lawsuit before the Delhi High Court alleging infringement by Eureka Forbes (CS (OS) 740/2006). This case was filed in 2006 and is still pending. Through order dated 20 January 2010, the patent office dismissed HUL's post grant opposition. Pertinently, Eureka Forbes had also filed a post grant opposition challenging HUL's patent. On 17 Aug, 2012 and then on 20 March, 2013, HUL informed the Delhi High Court that its patent had been revoked and an appeal had been filed. This appeal appears to be pending. The outcome before the IPAB, in both cases (HUL appealing the dismissal of post grant opposition and HUL's appeal challenging revocation by the patent office will help clarify whose patent will stand[3].

Herein, after reviewing the discussed case, it was believed that any patent application which is not novel and doesn't involve an inventive step has no rights to be registered under the Indian patents Act, 1970. The pre-grant opposition acts as a preventive tool for the Indian patent office, disregarding all the Patent application which is non-patentable in nature and accepts those applications which are novel and fulfils the patentability criteria as per the Patents Act, 1970.

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3 *http://spicyip.com/2015/06/eureka-forbes-and-hindustan-unilever-water-purification-patent-pitter-patter.html*

SECTION 3(D): INDIAN PATENT OFFICE REJECTS PATENT APPLICATION FOR ANTI-CANCER DRUG ABRAXENE

Saipriya Balasubramanian

In a recent landmark decision taken on 1st June 2015, the Indian Patent Office rejected an application filed by US-based Abraxis BioScience relating to a new composition for Paclitaxel, an anti-cancer drug marketed under the trade name Abraxane, citing lack of novelty and inventive step. A pre-grant opposition was filed by the Opponent NATCO Pharma Limited, under section 25(1) which argued that the claimed composition was merely a new form of a known substance and, hence, under Section 3 (d) of the Indian Patent Act was not patentable unless it exhibits enhanced efficacy.

BRIEF TIMELINE[1]

The Applicant Abraxis Bioscience, a US based company filed a national phase application number 4572/CHENP/2006 on 14/12/2006 for the grant of patent for their invention titled 'TREATMENT METHODS UTILIZING ALBUMIN-BINDING PROTEINS AS TARGETS'. The said application is based on the priority of US application No. 60/571,622 and US application No. 60/654,261. A pre grant opposition by the way of representation was filed by NATCO Pharma Ltd, Hyderabad on 08/09/2008. A revised set of claims were filed by the Applicant on 16/07/2013 based on the FER issued on 31/10/2012. The supplemental representation filed by the Opponents were refuted by the Applicant who requested the Controller not to take the supplemental representation on record. Subsequently, a hearing was held on 06/12/2013 and an opportunity was given to both the parties to be heard.

CONTROLLER'S DECISION ON ISSUE OF SUPPLEMENTAL REPRESENTATION FILED BY THE OPPONENT

During hearing the Applicant argued that "*there are no provisions in our current law to file supplementary representations…*" hence such representations should not be taken on record. After carefully considering the arguments of the Applicant and the opponent as well as the relevant sections and rules, the Controller agreed with the Opponent's argument that the proceedings of the Section 25(1) of the Patents Act 1970 are primarily to assist the Controller for taking the informed decision to grant good and valid patents only. The Controller further mentioned that the Opposition under Section 25(1) of the Patents Act 1970 can be filed by any person up to the grant of the patent, once the prior art documents along with matter pertaining to the grounds given under section 25(1) of the Patents Act 1970 has been brought to the controller's notice before the grant of the patent. Hence the controller considered the supplemental representation and took on his record.

The main grounds of opposition under section 25(1) of the Patents Act emphasized by the Opponent's agent are as follows;

1. Obviousness/ Lack of inventive step (Section 25(1)(e))

2. Not Patentable/Not an invention (Section 25(1)(f))

Section 25(1)(e)-Obviousness/ Lack of inventive step

The product claimed in independent claim 1 of the instant application is for the composition of paclitaxel coupled to an anti-SPARC antibody or fragment thereof which binds specifically to osteonectin with a pharmaceutically acceptable carrier. The Applicant clarified in a submission while replying to the other grounds of opposition that ' *the excipients on acting on its own will yield no effect, whereas the surprising effect conferred in the present invention is only by the virtue of the therapeutic agent paclitaxel conjugated to the anti-SPARC antibody and not the excipients per se'.* The Applicant has not quoted anywhere about the inventive features of the composition *per se*. Further the Applicant mentioned the section 59 of the Patents Act, 1970 as a basis for claiming the compound *per se* invention as composition of that compound.

The Controller considered the cited documents submitted by the Opponent in order to decide whether the conjugate of paclitaxel and anti-SPARC antibody of

1 *http://ipindiaservices.gov.in/decision/4572-CHENP-2006-10560/4572-chenp-2006%20order-Final.pdf*

the fragment is obvious to a person skilled in the art pertaining to the teachings of the cited documents.

Annexures	Prior Art	Teachings
III	US 5439686	To deliver pharmacologically active agent (taxol) in an "ummodified form" in a composition.
IV	US6096331 ('331 patent)	Pertains to in vivo delivery of biologics such as the anticancer drug paclitaxel. The preparations enabled in this patent are cremophor free and the compositions is delivered as nanoparticles and the paclitaxel is often stabilized by a polymer. It teaches the polymeric shells can be conjugated to monoclonal (*mAb*) or polyclonal antibodies or antibodies can be incorporated into the polymeric shell. Use of mAb antibodies against nuclear receptors to target the encapsulated product to the nucleus of certain cell types is also contemplated. ***Antibody targeting of paclitaxel nanoparticles were taught in '331 patent***
V	US67498686 ('868 patent)	Example 17 teaches *invivo* targeting of paclitaxel nanoparticles, where certain targeting moieties such as proteins, **antibodies**, enzymes, peptides, and the like are used to target specific sites in the body. ***The targeting ablility can be utilized for therapeutic or diagnostic purposes***.
IX	Taxene antibody conjugates Afford Potent Cytotoxicity, Enhanced solubility and Tumor Target Selectivity- Cancer Res 2001; 61: 694-699 Guillemard and Saragove. et .al	The problem of selectivity of paclitaxel can be addressed by using mAb that target 'tumor markers' which are proteins upregulated in tumor cells. The cytotoxicity, selectivity and specificity of the conjugate were better than that of free paclitaxel. The study conducted first-time reported the use of paclitaxel-antibody conjugates and proposed a general method to selectively target cancer cells by concentrating cytotoxic drugs near the tumor site and inside the tumor.
X	SPARC: A potential Diagnostic Marker of Invasive Meningiomas; 1999; 237-241. Clin Cancer Res.Sandra et.al	Teaches SPARC and gp60 share homology and anti-SPARC antibody is also known to bind to gp-60

From the cited prior art disclosures, it is obvious that the teachings of conjugates of paclitaxel with antibodies is already known in the art. The Controller mentioned that the cited prior art as discussed above are clearly stating that the SPARC is a tumor marker and hence it can be inferred that, the person skilled in the art will have to try with the binding molecule of the SPARC which he knows as its antibody. The controller further added that that the claimed composition i.e paclitaxel coupled to an anti-SPARC antibody or fragment thereof which bonds specifically to osteonectin is obvious to the person skilled in the art in view of the teachings in above cited documents.

Hence, the Controller concluded that since the Applicant has not quoted any of the specific inventive features for the dependent claims 2 to 14, they can also said to be obvious to a person skilled in the art and do not involve any inventive step u/s 2(1)(j) of the Patents Act, 1970.

Section 25(1)(f): Not Patentable/Not an invention

The Opponent contended that the claimed composition is a new form a known substance. Further, the opponent submitted that under section 3(d) a combination of a new form of known substance is patentable only if it exhibits enhanced efficacy. The present composition as claimed in the claims of the impugned patent application is a combination of known substances, namely paclitaxel and anti-SPARC antibody. The Opponent pointed that there is no demonstration of enhanced efficacy failing patentability under section 3(d). Also, such composition claimed in the impugned application is a mere admixture and not patentable under Section 3(e) of the Act thereby demanding refusal of claims 1-14 owing to not being patentable under Section 3(e) of the patents Act, 1970.

The Applicant refuted the Opponent's allegations that section 3(d) is not pertinent in respect of such an entity adding that "*A substance can be deemed a "combination" only when there two entities exist separately and unconnectedly and each of these entities confer their individual effect(s) on their own accord. Such is not the case in the present claims, where it is clear that the paclitaxel is "conjugated" to anti-SPARC antibody and hence the molecule is now a lone entity. Apropos to the allegation concerning the violation of Section 3(e), it was elucidated that and Section 3 (e) cannot be raised in a blindfolded manner on a mere reflection of the term "composition" in the preamble of a claim.*"

Also, the applicant mentioned that the surprising technical effect has indeed been demonstrated in the description at pages 19 in Example 4, para [0072], lines 4-6 of the present application, wherein it has been categorically established that the transport of paclitaxel from ABX (abraxane) was inhibited by the presence of anti-SPARC antibody, which is known to bind gp60, the receptor required for caveolar mediated transcytosis inhibits the binding of albumin itself to gp-60.

CONTROLLER'S DECISION WITH REGARDS TO SECTION 3(D) AND 3(E)

The Controller pointed that there is no submission by the Applicant of comparative efficacy data between the paclitaxel and paclitaxel coupled to an anti-SPARC antibody or fragment thereof which binds specifically to osteonection. Therefore, the Controller agreed with the Opponent that the invention paclitaxel coupled to an anti-SPARC antibody or fragment thereof which binds specifically to osteonectin in the absence of enhanced efficacy is not patentable under section 3(d) of the Patents Act 1970.

With regards to Section 3(e) of the Patents Act 1970, the Controller disagreed with the Opponent as the novelty and inventive step of the present invention lies mainly in the paclitaxel coupled to an anti SPARC antibody or fragment thereof which binds specifically to osteonectin and hence cannot be considered as an admixture.

CONCLUSION

Therefore the Controller refused to proceed with the application for the grant of patent under section 15 of the Patents Act 1970 citing claims 1-14 of the present invention lack inventive step under section 2(1)(ja) of the Patents Act , 1970 and the claimed composition is not patentable under section 3(d) of the Patents Act 1970.

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REGISTRATION OF SEMICONDUCTOR & LAYOUT DESIGN: AN INDIAN PERSPECTIVE

Priyanka Rastogi

INTRODUCTION

India is known for its software industry but sluggish in the development of hardware sector. The designing of integrated circuits and its viability involve intensive capital and it's mostly a volume game with distinct functionalities. It is well known fact that these tiny products known as semiconductor brought revolution in electronic industry but Indian semiconductor market is far away from such products at large scale mainly due to factor likes these industries needed interrupted power supply and skilled and efficient technology, inadequate funding and adequate infrastructure.

It forces the department of Electronics & IT to bring national policy on Electronics which can attract investment of US $ 100 billion & employment of 28 million & may possibly grow the chip design market to US $ 55 billion[1] as one of the three key electronic devices like mobile, TV & PC or laptop account for 70% of overall electronic consumption. The demand in Indian market was USD45 billion in 2008-09 & is expected to reach by USD 400 billion by 2020[2]. This advancement needs proper legal & procedural framework otherwise it lead to chip piracy.

India being signatory of TRIPS brings in that similar protection to investors & creator, India enforced Semiconductor Integrated Circuit layout Act, 2000 which provides for protection of creator or author of Semiconductor IC layout design. The act[3] is in conformity with the TRIPS agreement but different from U.S.[4]which does not provide protection to layout design without one or more active elements affixed to it but affords similar kinds of protection with sufficient opportunity to do reverse engineering for educational or research purpose, innovation unless it affects the creator rights. Similarly it provides for assignment, transfer, lease or sell or otherwise kinds of rights to creator who has put intellectual efforts in bringing new concept in semiconductor fields.[5]

The tiny particle with the distinctive properties between conductor & insulator namely semiconductor which is the foundation of modern electronics with unique properties application in transistor & other devices with the advancement of technology brings the revolution in almost all fields controlling mobiles, computers & even the fastest ballistic missile are based on these revolutionary material. The semiconductor & its design being distinct in itself having high quality engineering and involve huge investment demands legal protection too due to piracy. The legal provisions guarantee such protection based on originality & distinctiveness by simultaneously incorporating provisions for copying by reverse engineering limited to certain restriction. The paper tries to deal with the concept of distinctiveness & doctrine of equivalents whether such preposition can debar registration.

REGISTRATION PROCEDURE OF SEMICONDUCTOR IC & LAYOUT DESIGN

Any person who need to get certificate of registration for electronic design or its semiconductor IC need to file application u/s 8

1. Applicant must file application for registration to registrar within the territorial limits of principal place of business of applicant stating name, address & description of proprietor.
2. Application must states the
   a. Structure,
   b. Technique and
   c. Functionalities of the circuit

And must be different from other registered IC or layout design. However even if it accompanies the registered layout design or combination of elements which are commonly known among creators of layout

1 *http://deity.gov.in/esdm*
2 *http://deity.gov.in/sites/upload_files/dit/files/NPE_Notification.pdf*
3 *Semiconductor Integrated Circuits Layout-Design Act 2000*
4 *Semiconductor Chip Protection Act of 1984*
5 *Sec. 18 of The semiconductor integrated circuits layout-design act, 2000*

design, if taken as a whole it can be considered original if it's a result of creator's own intellectual efforts.

1. If the application is accepted by registrar but can be rejected on the following grounds namely:
   (i) Originality
   (ii) Commercially exploited
   (iii) Inherently distinctive
   (iv) Distinguishable from other registered layout design
2. When the application is accepted, registrar than within 14 days from the date of advertisement cause the same to be advertised.
3. On examination by registrar and with opposition if any within 3 month from the date of advertisement will grant certificate of registration u/s 13 subject to certain conditions like original, commercial exploitation and distinctiveness.
4. Certificate of registration is valid for 10 years from the date of filling of registration or from the date of first commercial exploration whichever is earlier.
5. Joint authorship in layout design is not permitted but can be claimed if and only if
   a. Both of the authors have put combined efforts in creation of design or
   b. Intellectual efforts are difficult to distinguish.
6. Registration provide the right to registered creator of layout design to sue for infringement or damages which otherwise is not permitted by law irrespective of the fact whether the layout design is embedded in article or not.
7. Proprietor right to assign or transfer- A registered layout-design shall be assignable and transmissible whether with or without the goodwill of the business concerned.

INFRINGEMENT OF LAYOUT DESIGN

Infringement of layout design takes place when not being the registered proprietor does any act like

a. Reproducing layout design in its entirety or its part except when it is not original or
b. Importing, selling or distributing for commercial purpose an article incorporating such registered layout design

Provided such above acts would not amount to infringement if used for scientific evaluation, analysis, research or teaching. Reverse decoding of these circuits if possible if such analysis is used to understand the scientific principle involved in these circuits or for any innovative purpose Or

Provided on the basis of research of registered layout design if someone produces another original article.

DISTINCTIVENESS IN CIRCUIT OR DESIGN

Now a day's number of new technique like VLSI or triple layer buffering or nano technology involved in manufacture or production of electronic components where thousands of elements are built on a layer installed in embedded design technology method bring drastic changes in designing being distinct in itself in use as well as function. For registration purpose each design or its layout or overall must satisfy the registration requirement i.e. distinctive. The real question involved is what are the parameters of distinctiveness i.e. distinct in what terms?

Are circuits different in terms of layout/component having same element but different connections performing different functions are distinct or there anything other than that is required? What about composition of elements, does it being a guiding factor in registration? How much distinctiveness is required & in terms of combination, elements, technology or any other factor.

However there is no list of such factors but there are certain parameters which are indeed helpful to find distinctiveness, list is not exhaustive. They are

1. components involved or component grouping in a circuit
2. key function performed (distinct application) like control mobile display or gaming function or certain motor of robots etc.,

3. distinguishable in terms of timing (clock rate), read, write or refresh command signals, frequency used or
4. method deploy in doing algebraic calculation,
5. interconnection [electrical interplay],
6. power sharing or power line[power topology],
7. interlayer or multiplayer,
8. energy consume & dissipation if innovative
9. passive elements, storage memory, operating temperature,
10. dual in line or molded package,
11. layout design pattern(single layer, double or tri layer) in its 3d pattern, device hole, inner lead pitch, base film thickness, material composition.

But design must be taken as a whole in making the determination of original or distinctiveness criteria.

Another grey area is whether additional or ancillary functions added in new IC liable to get protection which has to pass both the test of originality and distinctiveness.

However court able to distinguish the distinct element based on the claims mentioned in the application at the time of registration. As in *Power Integrations, Inc., V. Fairchild Semiconductor International, Inc*[6] where court distinguish distinctiveness based on various electronic parameters like "*frequency variation signal*" and "*soft start circuit*", "*frequency scaling*" etc. primarily based on claim construction with their effect that whether such frequency variation or other are to be tested in terms of essentiality of invention or such claims be read on the prior art, obviousness or ignored as fundamental aspect of the invention's improvement.

Similarly, in *Phillips v. AWH Corp*[7] court stated that ("[T] he claims are of primary importance, in the effort to ascertain precisely what it is that is patented."),

In *Tate Access Floors, Inc. v. Interface Architectural Res*[8] court interprets the claim's words "in light of the intrinsic evidence of record, including the written description, the drawings, and the prosecution history."

In *Teleflex, Inc. v. Ficosa N. Am. Corp*[9] court said that where the intrinsic record is ambiguous, and when necessary, we have authorized district courts to rely on extrinsic evidence, which "consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." This shows that to resolve the ambiguity court formulate the doctrine of equivalents based on equitable concept to restrain infringer for getting benefits by making minor changes in invention. To prove infringement under the doctrine of equivalents, the patent holder must show that the accused device contains each limitation of the claim or its equivalent; an element in an accused product is equivalent to a claim limitation if the differences between the two are insubstantial to one of ordinary skill in the art.[10]

CONCLUSION

The act provides the legal protection both to layout design as well as semiconductor integrated circuit. The act is in conformity with TRIPS but different from US act which provides protection only if the mask work has atleast one active element attached or in other words US law provides protection if the chip work produces some kind of thing instead of being in paper only. This multi-billion dollar industry needs protection but it has grey area too, where companies show reluctance in coming to courts if two circuits have similar formalities may be because act themselves provide reverse engineering for copying and remaking of circuit on the ground of innovation. Unlike other IP products like patent or trademark or even copyright, semiconductor layout or design do not sustain for longer time due to fast change in technology, where even if one company make innovative semiconductor product another company come up with even far better and replace such in few days.

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6 *MANU/USFD/0486/2013*

7 *Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed.Cir. 2005)*

8 *Tate Access Floors, Inc. v. Interface Architectural Res., Inc., 279 F.3d 1357, 1370 (Fed.Cir. 2002).*

9 *Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1324 (Fed. Cir. 2002).*

10 *Pactiv Corp. v. S.C. Johnson & Son, Inc., 2000 U.S. Dist. LEXIS 18877 (N.D. Ill. Nov. 27, 2000)*

MAGGIE:- 2 MINUTES NOODLE CONTROVERSY AND THE LEGAL ISSUES INVOLVED

Abhishek Kumar

BACKGROUND

The recent controversy with respect to MNC Giant Nestle's Maggie noodles across the country has once again opened the Pandora box with respect to dual safety standards being followed by the MNC food company in the Country and the yesterdays haunt of pesticides in Coke and Pepsi is once again looking to revisit. The article deals with the recent controversy with respect to Maggie noodles viz. the presence of higher Monosodium Glutmate than the prescribed limit and the Order dated 05th June, 2015 bearing No. 10/Q.A/Enforcement Issues/FSSAI-2015 issued by Food Safety and Standard Authority of India (hereinafter referred to as FSSAI) under the various provisions of Food Safety and Standard Act, 2006 (hereinafter referred to as "FSS Act"), 2006 inter alia directing the Nestle India Ltd to withdraw and recall various variants of its products has made it .

INTRODUCTION

The recent controversy erupted from Barabanki District of Uttar Pradesh where samples of Maggie noodles were collected by Uttar Pradesh Food Safety and Drug Administration and the same was found to contain lead, MSG. Pertinently, the order dated 5th June issued by FSSAI has classified the issues with respect to Maggie. The First is the presence of lead in excess of maximum permissible levels of 2.5 ppm, misleading labelling information on the package reading "no added MSG" Monosodium glutamate (MSG) and lead and release of non-standardized food product in the market viz. Maggie Oats Masala Noodles with tastemaker1.Shockingly, after the lab tests in Uttar Pradesh it was revealed that 2 minute noodle contained 17 parts per million lead, while the prescribed and permissible limit is only 0.01 ppm2. Even the content of monosodium glutamate (MSG) in it was found at levels above the dangerous mark. The various articles dealing with the harmful effects of MSG has clearly outlined that impressible and high intake MSG can have very dangerous impact on health and it can lead to Obesity, Eye damage, Headaches, Fatigue and disorientation, Depression3 amongst others. Therefore as a result of high presence of Lead and MSG particles in Maggie, the various State Government conducted a lab test in to find the content of the same and almost quite a few States including Delhi, Gujarat, Tamil Nadu, Jammu Kashmir and Uttarakhand4 have imposed ban on sale of Maggie after the 2 minutes noodles failed the lab test in these respective states. The ban imposed by State Government on sale of Maggie and its products from the market eventually resulting in the recall of Maggie products from the market.

LEGAL DIMENSIONS TO MAGGIE CONTROVERSY

A) Legal Issues dealing with June 5 FSSAI Order and the Provisions under FSS Act, 2006

In brief the order dated 5th June, 2015 issued by Food Safety and Standard Authority of India, Delhi has held M/s. Nestle India Ltd liable inter alia under Section 20, 22, 23 and 24 r/w Section 53, Section 26, 27,48, 50, 52 and 58 and 59 5 amongst others of the FSS Act, 20066. The FSSI order published and available on the public domain inter alia also directed M/s. Nestle India Ltd to withdraw and recall the 9 approved variants of Maggie instant Noodles from the market since these products having been found unsafe and hazardous for human

1 *http://www.fssai.gov.in/Portals/0/Pdf/Order_Nestle.pdf (Visited on 20th June, 2015)*

2 *Maggi noodles controversy: Case to be filed against Nestle in UP today; http://zeenews.india.com/news/health/health-news/maggi-noodles-controversy-case-to-be-filed-against-nestle-in-up-today_1604198.html (Last Visited on 20th June, 2015)*

3 *MSG: Is This Silent Killer Lurking in Your Kitchen Cabinets; http://articles.mercola.com/sites/articles/archive/2009/04/21/msg-is-this-silent-killer-lurking-in-your-kitchen-cabinets.aspx (Last Visited on 21st June, 2015)*

4 *Trouble escalates for Maggi as four more states impose ban - http://indianexpress.com/article/india/india-others/maggi-fails-uttarakhand-test-banned/ (Last visited on 21st June, 2015)*

5 *Food Safety And Standards Act, 2006, http://www.fssai.gov.in/portals/0/pdf/food-act.pdf (Last visited* on 21st June, *2015)*

6 *http://www.fssai.gov.in/portals/0/pdf/food-act.pdf (Last visited on 21st June, 2015)*

consumption. The Authority also directed the company to further stop the production, processing, import, distribution and sale of the instant products from immediate effect, and also to immediately withdraw and recall "*Maggie Oats Masala Noodles with Tastemaker*" since the product has still not been approved by the Competent Authority.

Section 20 deals with Contaminants, naturally occurring toxic substances, heaving metals etc which states that food products will only contain the quantities as specified by the regulations. Section 22 deals with genetically modified foods, organic foods, functional foods, proprietary foods7. It is this "proprietary food" provision that has been used against Maggie Oats Masala Noodles with Tastemaker whereby M/s. Nestle India Ltd was asked to recall and withdraw the product with immediate effect. Section 23 of the FSSI Act deals with packaging and labelling of foods, M/s. Nestle India Ltd has been prima facie being liable under this section since the label of Maggie specifies that the product does not contain any MSG whereas lab testing of the product confirmed that the MSG presence was much higher than the prescribed limit.

Section 27[8] deals with liability of the manufacturers, packers and wholesalers, distributors and sellers and amongst various other liability Section 27 (3) (c) deals with liability of wholesalers and distributors for unsafe and misbranded. Section 489 in detail covers provisions relating to offences.

The company has challenged the order dated 5th June, 2015 issued by FSSAI and order dated June 6th issued by Maharashtra FDA whereby direction was issued to recall Maggie products from the market before the Hon'ble Bombay High Court.

B) Legal Issues with respect to Celebrities liability for Brand Endorsement under FSS Act, 2006

Pertinently, this section is important since the Ld. Muzzfarpur Court in Bihar has asked Police to register FIR against Amitabh Bachhan, Madhuri Dixit and Priety

7 "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe: See Section 22 (4) of the FSSI Act, 2006

8 (1) The manufacturer or packer of an article of food shall be liable for such article of food if it does not meet the requirements of this Act and the rules and regulations made thereunder.
(2) The wholesaler or distributor shall be liable under this Act for any article of food which is–
(a) Supplied after the date of its expiry; or
(b) Stored or supplied in violation of the safety instructions of the manufacturer; or
(c) Unsafe or misbranded; or 28
(d) Unidentifiable of manufacturer from whom the article of food have been received; or
(e) Stored or handled or kept in violation of the provisions of this Act, the rules and regulations made thereunder; or
(f) received by him with knowledge of being unsafe.
(2) The seller shall be liable under this Act for any article of food which is –
(a) sold after the date of its expiry; or
(b) handled or kept in unhygienic conditions; or
(c) misbranded; or
(d) unidentifiable of the manufacturer or the distributors from whom such articles of food were received; or
(e) received by him with knowledge of being unsafe.

9 48. General provisions relating to offences. (1) A person may render any article of food injurious to health by means of one or more of the following operations, namely:- (a) adding any article or substance to the food;
(b) using any article or substance as an ingredient in the preparation of the food;
(c) abstracting any constituents from the food; or
(d) subjecting the food to any other process or treatment, with the knowledge that it may be sold or offered for sale or distributed for human consumption.
(2) In determining whether any food is unsafe or injurious to health, regard shall be had to –
(a) (i) the normal conditions of use of the food by the consumer and its handling at each stage of production, processing and distribution;
(ii) the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable, immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
(iii) to the probable cumulative toxic effects;
(iv) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers; and
(v) also to the probable cumulative effect of food of substantially the same composition on the health of a person consuming it in ordinary quantities;
(b) the fact where the quality or purity of the article, being primary food, has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then such article shall not be deemed to be unsafe or sub-standard or food containing extraneous matter. Explanation – For the purposes of this section, "injury", includes any impairment, whether permanent or temporary, and "Injurious to health" shall be construed accordingly.

Zinta10 who were said to be endorsing Maggie products through advertisements. Quite interestingly, the FSS Act appears to be vague when it comes to impose liability on celebrities for endorsing the products which is otherwise found to be unsafe and hazardous. It is pertinent to appreciate some of the relevant provisions dealing with advertisement under the FSS Act. Section 3 (1) (b) of the Act defines "advertisement11" and section 24 (1)12 of the Act deals with Restrictions of Advertisements and prohibitions as to unfair trade practises. Section 53 of the Act deals with penalty for misleading advertisement13 and it imposes a penalty of Rs. 10,00,000/- for misleading advertisement. The definition of advertisement is very wide when it comes to the liability of brand endorsers more so because there are various stake holders involved in branding starting from the company, advertisement agency and then the celebrities who endorse the product. Further, besides imposing a fine of Rs. 10 lakh, it is difficult to prosecute the celebrity because for the act done in good faith one cannot held to be liable.

Maggie in its defence has categorically and out rightly denied the presence of excess MSG and lead in its composition and rather has contended that the presence of MSG and lead is natural phenomenon. The statement issued by Maggie read as under:-

"We do not add Monosodium Glutamate (MSG) to Maggi Noodles. We use raw materials that may contain naturally occurring Glutamate and which could be confused with commercially produced MSG. Glutamate is safe and is found in everyday and high protein foods including tomatoes, peas, paneer, onions, milk.[14]"

Thus it can be inferred that Nestle has shielded itself from any culpability and has sought to justify MSG as natural phenomenon.

CONCLUSION

The Fault dear Brutus, is not in our Stars, But in Ourselves[15]. This is the very famous quote from the masterpiece Julius Ceaser, a play written by William Shakespeare. Thus the point which is being emphasised is that our system itself is not full proof to deal with such kind of action and issues with Iron hand. The Coke controversy is not very old wherein it was brought to the knowledge that the standard and the ingredients followed by the MNC giants while preparing the soft drink is different in European Countries as compared to the Asian countries to be more precise Afro-Asian Countries. As of now we don't have the prevalence of product liability in India whereby the company can be sued for the deficiency of their products and compensation can be claimed in considerable amount as the same is prevalent in United States and Other European Countries. Even though Nestle has recalled its products, Maggie controversy has given our lawmakers to revisit the entire Consumer Protection Act and ensure that the concept of Product Liability is incorporated in the Act.

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10 Court orders FIR against Amitabh, Madhuri, Preity over Maggi row; http://www.thehindu.com/news/national/court-orders-fir-against-amitabh-madhuri-preity-over-maggi-row/article7274587.ece (Last visited on 21st June, 2015)

11 (b) "advertisement" means any audio or visual publicity, representation or pronouncement made by means of any light, sound, smoke, gas, print, electronic media, internet or website and includes through any notice, circular, label, wrapper, invoice or other documents;

12 (1) No advertisement shall be made of any food which is misleading or deceiving or contravenes the provisions of this Act, the rules and regulations made thereunder.

13 53. Penalty for misleading advertisement. (1) Any person who publishes, or is a party to the publication of an advertisement, which– (a) falsely describes any food; or

(b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees.

(2) In any proceeding the fact that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

14 No MSG in Maggi Noodles, Says Nestle, as States Reportedly Ask for Tests; http://food.ndtv.com/food-drinks/maggi-noodles-too-much-msg-764089

15 Julius Ceasar (Act I, Scene II) Play written by Shakespeare

SANCTION FOR PROSECUTION OF PUBLIC SERVANTS: LAW REVISITED IN THE LIGHT OF THE JUDGMENT "INSPECTOR OF POLICE AND ORS VS BATTENAPATKA VENKATA RATNAM AND ORS"

AMIT PRATAP SHAUNAK

The Hon'ble Supreme court of India in the case titled as **Inspector of Police and ors vs Battenapatka venkata Ratnam and ors** [2015(5)SCALE253] have dealt with the question that whether sanction under section 197 of Cr.pc is required to initiate criminal proceedings against the public servant and can a public servant take shield to protect themselves when the criminal proceeding is initiated against the public servant for fraud, criminal conspiracy. The brief facts of the case are as under:-

1. Whether sanction Under Section 197 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code of Criminal Procedure') is required to initiate criminal proceedings in respect of offences Under Sections 420, 468, 477A, 120B read with 109 of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'Indian Penal Code'), is the question arising for consideration in these cases.

2. The District Registrar, Vijayawada lodged a complaint with the Inspector of Police, CBCID Vijayawada on 07.07.1999. The main allegation against the Respondents was that while they were working as Sub-Registrars in various offices in the State of Andhra Pradesh, they conspired with stamp vendors and document writers and other staff to gain monetary benefit and resorted to manipulation of registers and got the registration of the documents with old value of the properties, resulting in wrongful gain to themselves and loss to the Government, and thereby cheated the public and the Government.

3. On the basis of the complaint, F.I.R. No. 35/1999 was registered by the Appellant, and after investigation, report Under Section 173(2) Code of Criminal Procedure against 41 persons including the Respondents herein, was submitted before the III Additional Chief Metropolitan Magistrate, Vijayawada. The Respondents raised the objection that there was no sanction Under Section 197 Code of Criminal Procedure and hence the proceedings could not be initiated.

4. Learned Magistrate on 03.07.2007 passed an order holding that:

   Whether the sanction is required Under Section 197 Code of Criminal Procedure or not to be considered during the trial and it is the burden on the complainant to prove that the accused acted beyond in discharge of their official duties and there is no nexus between the acts committed and their official duties and at this stage the question that the accused acted within their duties cannot be decided. Aggrieved, Respondents moved the High Court Under Section 482 Code of Criminal Procedure leading to the impugned order whereby the criminal proceedings were quashed on the sole ground that there was no sanction Under Section 197 Code of Criminal Procedure, and hence the appeals. After perusal of the arguments of both the sides; *the Hon'ble Supreme Court was of the view that:*

5. No doubt, while the Respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty" and that question is no more res integra. In **Shambhoo Nath Misra v. State of U.P. and Ors.** (1997) 5 SCC 326, at paragraph-5, this Court held that:

   > *The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official*

duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained.

6. In **Parkash Singh Badal v. State of Punjab and Ors.** (2007) 1 SCC 1, at paragraph-20, this Court held that:

   20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity.

   38. The question relating to the need of sanction Under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.

7. In a recent decision in **Rajib Ranjan and Ors. v. R. Vijaykumar** (2015) 1 SCC 513, at paragraph-18, this Court has taken the view that...

   "even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted".

8. Public servants have, in fact, been treated as special category Under Section 197 Code of Criminal Procedure, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as shield to protect corrupt officials. In **Subramanian Swamy v. Manmohan Singh and Anr**.(2012) 3 SCC 64, at paragraph-74, it has been held that the provisions dealing with Section 197 Code of Criminal Procedure must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote:

   ***74**. ...Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption.*

9. The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only.

CONCLUSION

The Hon'ble Supreme Court of India has rightly decided the question relating to the need of sanction Under Section 197 of the Code of Criminal Procedure, 1973 is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.

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SENTENCE VIS-À-VIS COMPENSATION IN MOTOR ACCIDENT CASES

Criminal Appeal No.520 of 2015 [*Arising out of S.L.P. (Crl.) No. 5825 of 2014*]
-Decided on 30.03.2015.

Bench of Hon'ble S.C. comprising Dipak Misra And Prafulla C. Pant, JJ.

Rohit K. Gupta

Hon'ble Apex Court has in matter State of Punjab Vs. Saurabh Bakshi[1] considered the principle of sentencing and recognition of the corrective measures in death cases in motor accidents due to rash and negligent motor driving.

Hon'ble Supreme Court vide its Judgment has further refused to accept the proposition of law that whenever an accused offers acceptable compensation for rehabilitation of a victim, regardless of the gravity of the crime under Section 304A, there can be reduction of sentence.

The ***brief facts***, which lead the filing of subject Special Leave Petitions, are as under:

On 14.6.2007 Jagdish Ram and his nephew Shavinder Kumar @ Tinku, had proceeded from Sangrur to Patiala in their Maruti car bearing registration PB-11-M-8050. The said vehicle was also followed by Ramesh Chand in another Maruti car bearing registration no. PB-09-C-6292. All of them had gone to house of one Des Raj at Sangrur in connection with matrimonial alliance of Shavinder Kumar alias Tinku. The vehicle that was driven by Tinku was ahead of Ramesh's at a distance of 25/30 kadams. After they reached some distance ahead of the bus stand village Mehmadpur about 2.00 p.m. an Indica car bearing registration no. HR-02-6800 came from the opposite side at a very high speed and the driver of the said car hit straightaway the car of Jagdish and dragged it to a considerable distance as a result of which it fell in the ditches. Ramesh Chand, who was following in his car, witnessed that his brother-in-law and nephew had sustained number of injuries and their condition was critical. A police ambulance came to the spot and the injured persons were taken to Rajindra Hospital, Patiala where Jagdish and Shavinder Kumar succumbed to injuries. In view of the said incident as FIR was lodged by Ramesh Chand, brother-in-law of Jagdish and accordingly a crime under Section 279/304A was registered against the respondent for rash and negligent driving.

The learned trial Magistrate, Patiala framed charges for the offences punishable under Section 279/304A IPC to which the respondent pleaded not guilty and claimed to be tried. The prosecution in order to prove its case examined six witnesses. The learned Addl. Chief Judicial Magistrate, Patiala vide judgment and order dated 23.4.2012 convicted the respondent for the offences punishable under Section 304A IPC and sentenced him to undergo rigorous imprisonment for a period of one year and pay a fine of Rs.2000/-with a default clause.

On an appeal being preferred, the learned Addl. Sessions Judge, Patiala dismissed the appeal by judgment and order dated 6.9.2013.

The respondent being grieved by the aforesaid conviction and the sentence preferred Criminal Revision No. 2955 of 2013 and the High Court while disposing off the Criminal Revision addressed to the quantum of sentence and in that context observed that:

> *"...the legal heirs of Jagdish Ram have been awarded a sum of Rs.7,30,000/-as compensation by the MACT and Rs.12,07,206/-to the legal heirs of Shavinder Kumar @ Tinku by the MACT. The FAO Nos. 5329 and 5330 are pending in this Court. In compliance of order dated 19.9.2013, the petitioner has deposited Rs.85,000/-before the trial court as compensation to be paid to the LRs of deceased Jagdish Ram and Swinder Kumar @ Tinku. The compensation shall be divided as Rs.50,000/-to the LRs of Swinder Kumar @ Tinku and Rs.35,000/-to the LRs of Jagdish Ram. The receipt is taken on record. As per custody certificate petitioner Saurabh Bakshi has undergone 24 days as on 30.9.2013 out of one year."*

1 2015 STPL(Web) 261 SC

Being of this view the High Court upheld the conviction and reduced the sentence, as has been stated before, to the period already undergone. Hence, the State filed an appeal.

The contentions on behalf of State were that when the prosecution had been able to establish the charges leveled against the respondent and both the trial court and the appellate court had maintained the sentence, there was no justification on the part of the High Court to reduce the sentence to the period already undergone solely on the basis that the respondent had paid some compensation. Reliance was placed on decision passed in **State of Punjab v. Balwinder Singh and Others**[2] and **Guru Basavaraj Alias Benne Settappa v. State of Karnataka**[3] and was further contended that keeping in view the gravity of the offence that two deaths had occurred, the High Court should have kept itself alive to the nature of the crime and should have been well advised not to interfere with the quantum of sentence.

Whereas the contentions on behalf of respondent were that the respondent was quite young at the time the accident took place and it may be an act of negligence, but the contributory facet by the Maruti car driver cannot be ruled out. Further, there are mitigating circumstances for reduction of the sentence and in the obtaining factual matrix the High Court has appositely adopted corrective machinery which also reflects the concept of proportionality. It was contended that when the High Court has exercised the discretion which is permissible under Section 304A this court should be slow to interfere. The respondent relied on judgments namely **Gopal Singh v. State of Uttarakhand**[4] and a recent judgment in Criminal Appeal No. 290 of 2015 titled **State of M.P. v. Mehtaab**[5] and argued that when the compensation had been paid, the High Court has kept in view the aspect of rehabilitation of the victim and when that purpose have been sub-served the reduction of sentence should not be interfered with.

Hon'ble Apex Court during the hearing observed that the High Court was persuaded by the factum of payment of compensation by the respondent herein, amounting to Rs.85,000/-to the LRs of deceased Jagdish Ram and his nephew and the said compensation had been directed to be paid by virtue of the order dated 19.9.2013 passed by the High Court.

In Mehtaab's case a two-Judge Bench was dealing with the case under Section 304A IPC wherein the respondent was convicted under Section 304A IPC and 337 IPC and sentenced to undergo one year and three months rigorous imprisonment respectively. The High Court had reduced the sentence to 10 days. It is apt to note here that in that case the deceased had received injuries due to shock of electric current. The court took note of the submission of the learned counsel for the State and opined that the deceased Sushila Bai died on account of the said naked wire which had high voltage and was not visible in the dark. The offence having been fully proved by the evidence on record, the High Court was not justified in reducing the sentence to 10 days which was not just and fair. Even if liberal view on sentence of imprisonment was to be taken, the High Court ought to have enhanced the sentence of fine and awarded a reasonable compensation as a condition for reduction of sentence. It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim. Unfortunately, these factors are missing in the impugned order. No cogent reason has been assigned for imposing only 10 days sentence when an innocent life has been lost."

Hon'ble Court referred the decision in Balwinder Singh (supra) wherein two paragraphs of the decision in **Dalbir Singh v. State of Haryana**[6] has been referred as under:

"1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental

2 [(2012) 2 SCC 182]
3 [(2012) 8 SCC 734]
4 [(2013) 7 SCC 545]
5 [2015 (2) SCALE 386]
6 [(2000) 5 SCC 82]

vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.
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13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. …….. A driver must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. …….''

Hon'ble Court also cited **B. Nagabhushanam v. State of Karnataka**[7], wherein the appellant was directed to undergo simple imprisonment for six months for the offences punishable under Section 304A IPC. The two-Judge Bench referred to Dalbir Singh (supra) and declined to interfere with the quantum of sentence.

Hon'ble Court also referred **Alister Anthony Pareira v. State of Maharashtra**[8] while emphasizing on the inherent danger the Court observed thus:

"39. Like Section 304-A, Sections 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act. The scheme of Sections 279, 304-A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life."

Hon'ble Apex Court relied as held in **Shyam Narain v. State (NCT of Delhi)**[9] though in a different context while dealing with the issue of sentencing it has been stated that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. ….. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

It has been held that in the instant case the factum of rash and negligent driving has been established. Hon'ble Supreme Court observed that the increase in number of road accidents and has also noticed how the vehicle drivers have been totally rash and negligent. It seems to us driving in a drunken state, in a rash and negligent manner or driving with youthful adventurous enthusiasm as if there are no traffic rules or no discipline of law has come to the centre stage. It has also observed that India has a disreputable record of road accidents. There is a non-challant attitude among the drivers. They feel that they are the Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life".

On these observations and with immense anguish, Hon'ble Apex Court suggested that the lawmakers should scrutinize, re-look and re-visit the sentencing policy in Section 304A, IPC. Further, as per the holding, the appeal was allowed to the extent that sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months.

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7 [(2008) 5 SCC 730]
8 [(2012) 2 SCC 648]
9 [(2013) 7 SCC 77]

FAIR TRIAL OF CHEQUE BOUNCE CASES IN THE LIGHT OF THE AMENDMENT

Shivanand

INTRODUCTION:

The section 138 of the Negotiable Instruments Act, 1881, deals with the offence pertaining to dishonor of Cheque for insufficiency, etc, of funds in the drawers account on which the cheque is drawn for the purpose of discharge of any legally enforceable debt or other liability. This section prescribes for penalties in case of dishonor of Cheques. The object of the Act is to encourage the usage of cheque and enhance the credibility of the instrument so that the flow of normal business transactions and settlement of liabilities remain unobstructed.[1]

The parliament of India had given its approval on 13.6.2015 for the proposal to promulgate the Negotiable Instruments (amendment) Ordinance, 2015; and the President of India has promulgated the same. The said amendments are sought to be brought in the Act vide this amendment Bill, because of Court Order stating that – "cases against those having defaulted on their Cheque payments could only be filed in Courts under which jurisdiction the bank Account of the accused fell." Therefore the Finance Minister Mr. Arun Jaitley said while introducing the Bill that "to address the difficulties faced by the payee or the lender of the money in filing the case under section 138 of NI Act, because of which a large number of cases are stuck, the jurisdiction for offence has been clearly defined keeping in view the interest of complainants".

There are five separate actions that lead to Cheque Bouncing Case. These are: (1) Drawing of the Cheque, (2) Presentation of the Cheque to the bank, (3) Returning of the Cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the Cheque demanding payment of the amount within 30 days of the dishonoring of the Cheque, and (5) Failure of the drawer to make payment within 15 days of the receipt of the notice.[2]

After the Bill is passed the Cheque Bouncing Cases can only be filed in a court under whose jurisdiction the Bank Branch of the payee where the Cheque is presented, falls. While approving the amendment, the government had said it is aimed at fast tracking the resolution of Cheque bounce cases while removing ambiguities' on jurisdictional issues.

DESCRIPTION OF THE AMENDMENT BILL:

The ordinance seeks to amend the NI Act and overturn a judgment issued by a three judge Bench of the Supreme Court in last August in 2014 in the case of ***Dasrath Rup Singh Rathod Vs State of Maharashtra***[3] and ruled 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.*" Supreme Court further said "*We clarify that the place of the issuance or the delivery of the statutory notice or where the complainant chooses to present the Cheque for encashment by his Bank are not relevant for purposes of territorial jurisdiction of the complaints". This three member Bench of the Supreme court had actually overturned an earlier apex court ruling – the so called* ***Bhaskaran Ruling*** *delivered in 1999, which allowed the victims of 138 NI Act to file cases in a magistrate's court in any court having jurisdiction over the local areas where the five different actions took place*". While doing so the Supreme Court said "*the conclusion in Bhaskaran was influenced in large measure by curial compassion towards the unpaid payee/holder, whereas with the passage of two decades the manipulative abuse of territorial jurisdiction has become a recurring and piquant factor*".

Therefore the proposed amendment is definitely going to bring in some relief to the victims. The present Ordinance proposes to inserts a new Sub Clause to the existing section 142 (sub-clause (2)), which reads as follows:

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local

1. *http://pib.nic.in/newsite/PrintRelease.aspx?relid=118533*
2 *http://www.telegraphindia.com/1150611/jsp/frontpage/story_25118.jsp#.VY5dhBuqqko*
3 *2014(3)ACR2914,*
4 *http://www.prsindia.org/uploads/media/Negotiable%20instrument/Negotiable%20instruments%20bill-.pdf*

jurisdiction the Bank Branch of the payee, where the payee presents the Cheque for payment, is situated"[4].

The Bill also introduces a new section (142A) in the NI Act, which reads as follows:

" (1) Notwithstanding anything contained in the code of Criminal Procedure, 1973 or any other judgment, decree, order or directions of any court, all cases arising out of section 138 which were pending in any court, whether filed before it, before the commencement of the Negotiable Instruments (amendment) Act, 2015, shall be transferred to the court having jurisdiction under sub section (2) of section 142 of sub section(1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under subsection (2) of section 142or the case has been transferred to that court under sub section (1), all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those Cheques were presented for payment within the territorial jurisdiction of that Court.

(3) If, on the date of the commencement of the Negotiable instruments (amendment) Act, 2015, more than one prosecution filed by the same person against the same drawer of the Cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub section 142(2) before which the first case was filed as if that sub-section had been in force at all material times."[5]

In order to create a suitable legal frame work for determination of the place of jurisdiction for trying cases of dishonor of Cheques under section 138 of NI Act, this new amendment Bill has been brought. The objective of the new amendments is to ensure that a fair trial is conducted keeping in view the interest of the complainant by clarifying the territorial jurisdiction for trying the cases for dishonor of Cheques.

5 *http://www.prsindia.org/uploads/media/Negotiable%20instrument/Negotiable%20instruments%20bill-.pdf*

6 *http://pib.nic.in/newsite/PrintRelease.aspx?relid=118533*

The clarity on the jurisdictional issue for trying the cases of Cheque Bouncing would increase the credibility of the Cheque as a financial instrument. This would help the trade and commerce in general and allow the lending Institution, including banks, to continue to extend financing to the economy, without the apprehension of the loan default on account of bouncing of a cheque.[6]

This decision of the Union Cabinet has been widely welcomed throughout the country, and especially by the stake holders including industry associations and financial institutions.

In the absence of these new proposed provisions, the litigants were harassed for no cause, as they had to travel several times to a court in a different city to pursue the case adding to the cost of litigation. Sometimes there arose ridiculous situation where the litigants had to spend half of the Cheque amount or more than that on travel and hotel bills etc, in order to face the litigation and to get their own due amount.

CONCLUSION

Keeping the fact in view that about 21 Lac Cheque Bounce cases are pending in Indian Courts, the new law should help to consolidate the cases and quicken the judicial process. It will also be proved helpful for banking institutions which are battling the menace of bad loans. On the other hand, there arose some protest also against the new bill, giving their arguments that the new proposed laws in the NI Act could be used by the Corporate to harass the common man.

Answering the protest and questions arose to the new amendment bill, the Minister of State for finance - Mr. Jayant Sinha, insisted that it would boost the integrity of financial system and not lead to the harassment of the common man. The Hon'ble minister has further stated that "we need this law to strengthen the financial system. It will beef up the integrity of the system. We are moving towards a cashless society and we need this".[7]

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7 *placement.freshersworld.com/power.../Current-Affairs-May-2015*

NEWSBYTES

DOMESTIC PRIVATE PLAYERS GET LEVEL PLAYING FIELD WITH DEFENCE PSUS

The Government of India, to bring about the parity between Private Sector Manufacturers with Ordinance Factory Board (OFB) and Defence PSUs, has withdrawn excise and customs duty exemptions available to the goods manufactured by such OFB and PSUs vide Notifications No.23/2015- Central Excise and No.29/2015- Customs dated 30.04.2015. Many private companies, including multinational companies, has long-awaited for this change. These Notifications came into force from June 1, 2015.

India is the highest importer of Defence items in the world. Accordingly, Defence manufacturing has been identified as one of the key sector among 25 sectors under Make in India campaign launched by the Government of India. Systematically the sector has been opened up for private investment by increasing FDI cap in defence to 49% and rationalizing conditions. Now the foreign Original Equipment Manufacturers (OEMs) would have the scope of investing in India by choosing partners on the basis of efficiency and effectiveness. It is quite evident that the new Government has taken number of initiatives to incentivize private sector and foreign OEMs to engage in the Defence and Civil Aerospace sector. The simplifications of rules and procedures to promote defence manufacturing and exports in India would stimulate high investments in this sector.

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