



SINGH & ASSOCIATES

Founder - Manoj K. Singh

ADVOCATES & SOLICITORS

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INDIAN LEGAL IMPETUS





FOREWORD



Manoj K. Singh
Founding Partner

With immense pleasure, I introduce the latest May 2015 edition of our Newsletter "Indian Legal Impetus". The whole Singh and Associates team thanks its readers for their overwhelming responses towards our endeavors in making the legal information more accessible.

The advancement in technology and innovation has made man reach heights and success in fields never seen or imagined before. But the same has also raised an issue of concern on the protection of the innovative steps taken by a bonafide creator. One such issue is the protection of IP rights of the designing of food and food materials. Our first article "**Intellectual Property Protections and Food Plating**" deals with the protection of rights related to designs and mosaics created of food materials.

Moving forward, our second article "**Class Action Suit Vis-A-Vis Indian Laws**" deals with the recent development brought in the Indian legal scenario via Companies Act, 2013. A class action suit refers to a legal action that allows a large number of people with a common interest in a matter to sue or be sued as a group. It is a procedural tool enabling one or more plaintiffs to file and pursue litigation on behalf of a larger group or class, wherein such class has common rights and grievances against a company.

The deterrent effect that the criminal justice system aims at, will stand defeated in case the punishment has not been granted before the memory of the offence gets washed off from the heads of those affected by it thus the same has been dealt with in our article "**Crime Never Dies**".

An article in this edition also covers the principle of "**Doctrine of Frustration**" which says that any act which was to be performed after the contract is made becomes unlawful or impossible to perform, and which the promisor could not prevent, then such an act which becomes impossible or unlawful will become void.

The innovation and creation involved with an invention are a sine qua non for its getting patented. However, time and again there have been developments in the ideas and requirements related to an invention for getting patented. One such idea is dealt with in our article "**Determination of Non-obviousness: An Indian Approach**".

An article in our edition is "**Data Protection Laws in India: The Road Ahead**" which deals with the dire need of amendments and strict enforcement of the laws present for data protection in India.

Then we have our regular section of newsbytes for our reader, which provides a brief overview of some recent developments in legal world.

We, sincerely hope that our readers find the articles provided herein useful and informative. Any comments, suggestions, opinions or comments from our readers would be highly welcome. Please send us your valuable insights and reviews on newsletters@singhassociates.in.

Thank You!



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INTELLECTUAL PROPERTY PROTECTIONS AND FOOD PLATING

Vaibhavi Pandey & Surbhi Singh¹

"What is worth copying is prima facie worth protecting- Petersen J.²"

There was a time when the term cooking was considered to be generally restricted to the kitchen of a house. However in today's scenario, the growing restaurant industry, food blogs, mobile applications, food channels, programs, competitions (like Master Chef) etc, have given a new dimension to the cuisine/ food industry. Further there has been a long practice and culture of exchanging and sharing recipes and techniques prevalent in the cuisine industry. However in current times culinary skills are not just confined to mere preparation or cooking of a dish, it further includes the manner of presentation, arrangement, or appearance of their food, sometimes referred as **plating of dishes**. Especially in the arena of restaurant industry a lot of emphasis laid on the art of plating. Better presentation of the dish helps in influencing the taste of the dish, creating a unique and special dining experience, which increase the demand of the dish and consequently leads to more profits.

Such growth and transition in the sphere of food biz has lead to an urge for raising questions as to the protection of the original artistic work of a chef/ creator. Whether the artistic plating of a dish by a chef (who is the original creator) can be offered protection under intellectual property rights?

PROTECTION UNDER COPYRIGHT

Plating of dishes as artistic work:

Section 13 clause (a) of the Copyright Act, 1957 (further referred as the said act) provides that copyright subsists in original artistic works and further section 2 clause (c) provides that artistic work means-

1. a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
2. work of architecture; and
3. any other work of artistic craftsmanship;

1. *Intern; 5th Year Student, Amity Law School*
 2. *University of London Press Limited v University Tutorial Press Ltd (1916) 2 Ch. 601*

It is very common in restaurants and other dining places that fruits, vegetables and food products are used to make various patterns/sculptures/ mosaics etc. food is used as a medium to create works of art. At many high ended or top grade restaurants, food is intricately created and designed and placed with artistic precision and perfection on each plate before being delivered to the customers. Colour combination along with the contrasting textures, layering, and placement, are used artistically by the chefs to create/plate a dish.

TEST OF ORIGINALITY:

Clause (a) of section 13 protects **original work**. A work to be original, it is important that it should not have been copied from another work.³ Every literary or artistic work, to be afforded protection, should be "original" under the Act.⁴

The word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned only with the originality of ideas, but also with the expression of thought. Further Supreme Court in the recent celebrated case of **Eastern Book Company v. D.B. Modak 2008(001)SCC0001** has discussed in detail the "Originality Test" and adopted the Indian-Canadian test of "skill and judgment with flavour of creativity". Hence while considering whether a work is an original work or not following parameter have to be fulfilled :

1. the work must be independently created⁵
2. skill and judgment exercised by the creator
3. minimal amount of creativity

In case of plating, a chef has to exercise his culinary skills, judgment and labour in creation of textures, patterns, layering, placement etc, which are required for the purpose of plating a dish. As per my view plating also involve a flavor of creativity. Plating is medium where by a chef put forth his creative thoughts and

3. *University of London Press, Ltd. v. University Tutorial Press Ltd. [1916] 2 Ch. 601*
 4. *Mattel, Inc. and Ors. Vs. Mr. Jayant Agarwalla and Ors. 153(2008)DLT548*
 5. *Feist publication inc vs Rural Telephone Service Co.Inc. 499US 340*



expression with help of different colours, patterns, placements, shapes. In fact different plates/ cutleries are used by chefs to give a dish a unique and different look, which certainly involves minimal amount of creativity. A chef has a way of presenting a dish in which he puts his expressions.

Furthermore another essential requisite for an artistic work to get a copyright protection is that it must be in a tangible manifest. In **R.G. Anand Vs. Delux Films and Ors. AIR1978SC1613**, it was held by the apex court that only original expression of such thought or information in some concrete form is protected. Moreover in the case of **Prestige Housewares (india) Limited & Anothers Vs. Prestige Estates and properties& other, 2001(25) PCT108 (karn) at p.120**, it was held that:

If the idea, however brilliant and however clever it may be, is nothing more than an idea., and is not put into any form of words, or any form of expression such as a picture or a play, then there is no such thing as copyright at all. It is not, until it is reduced into writing, or into something tangible form, that you get any right to copyright at all, copyright exist in particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it.

A dish when presented or plated in a particular manner although it is meant to be eaten and it will cease to exist, however it will usually exist long enough to be considered that it has a concrete/ tangible form. It has a distinct shape, pattern, design which is easily visible. A dish is given a distinct look and appearance by the chefs using innovative ideas and techniques while plating a dish. Therefore a dish presented by a chef in a particular manner can be said to have satisfied the test of tangible form.

Further it is pertinent to point out that in case of **Barbour v. Head 178 F. Supp. 2d 758 (S.D.Tex.2001) United States District Court, S.D. Texas, Galveston Division**, it was held that- noting that although recipes that are "nothing more than mere recitations of facts" in the form of "mechanical listings of ingredients and cooking directions" are not eligible for copyright protection, "at least a few" of defendant's recipes" contain statements that may be sufficiently expressive to exceed the boundaries of mere fact," such as anecdotal language and suggestions for food presentation.

Also in case of **Publications INT'L., Ltd. vs. Meredith Corp., United States Court of Appeals, Seventh Circuit, 88 F.3d 473 (7th Cir. 1996)**, The court refused

to hold that recipes are unprotected as a matter of law and instead recognized that certain recipes may be copyrightable. The court elaborated that recipes may warrant copyright protection in a variety of circumstances, such as where the recipe includes "suggestions for presentation, advice on wines to go with the meal, or hints on place settings with appropriate music,"

At present we do not have any specific law or ruling in regards to the protection of artistic work involved in a plating of a dish. However with the food increasingly being embraced as a piece of art there may be a growing trend for chefs and restaurants to use intellectual property laws more aggressively to protect the artistic presentation of their food.

Further looking at the ongoing trend of celebritization of chefs, the success of reality TV cooking competitions and obsession of high ended food among the people, it can be said that the culinary industry is growing rapidly and consequently leading to existence of competition among chefs and restaurants. The reputation of the restaurant can be said to be dependent on these major factors which are- the look and feel of the establishment, the taste experience (driven by produce and recipes) and the look of the dishes themselves (the plating). Therefore the chefs put in huge amounts of creativity and time into their endeavours. We have a great example of designer cakes, available these days in market which are crafted beautifully by the chefs and have unique designs, shapes and patterns. It involves huge amount of creativity, effort and investment while designing such cakes and finally presenting it and it would be asking too much from them to take copying of their work as a compliment, particularly when it dilutes their profit.

CONCLUSION:

Therefore in view of the above submissions it is sated that the plating of dish is no less than an art. A chef uses the plate as a canvas and fills colour in it by using food products of different colour, textures, shapes patterns etc. He gives a concrete shape to his ideas, thoughts, and imagination, which does involve an element of creativity. There by making it a subject matter fit for protection under copyright.



CLASS ACTION SUIT VIS-A-VIS INDIAN LAWS

Vijay Sirohiwal' & Rahul Pandey

INTRODUCTION:

The conception of Class Action Suits is one of the many improvement introduced in the Companies Act, 2013 vide Section 245. The concept of *Class Action* is not new but in Indian context it has found recognition and enforceability now only by means of Companies Act, 2013. The class action suit first time came to the highlight in the context of securities market was when the Satyam scam broke out in year of 2009. Subsequently, the Indian investors in India couldn't take any legal remedy against the company while their counterparts in USA filed class action suit claiming compensations from the company. This mechanism evolved to overcome the well known 'Collective Action' problem, where suits by smaller stakeholders are not cost effective, and so may never get filed. As such, this is applicable not just in corporate law, but across the board.

CONCEPTUALIZATION IN INDIAN SCENARIO

It gained its momentum with "**India's Enron**" - **Satyam Fiasco case**: where lakhs of shareholders of Satyam Computer Services (now Mahindra Satyam) came together and sued the company. The shareholders claimed damages worth Rs.5000 Crore but India had no law enabling class action lawsuits (where a large group collectively brings a claim to court and/or in which a class of defendants is sued). The shareholders went from the National Consumer Disputes Redressal Commission to the Supreme Court, and had their claims rejected. But the US Investors who owned American Depositary Receipts (ADRs) demand a settlement to the tune of USD 125m (about 700 Crore) by mounting a class action suit. Shareholders of Satyam were able to claim \$125 million (about Rs 700 Crore) from the company.

WHO CAN FILE CLASS ACTION SUITS?

As per Section 245(1) r/w Section 245(3), the suit may be filed:-

- a) In case of a company having share capital, member or members:
 - not less than 100 members of the company or

- not less than 10% of the total number of its members, whichever is less or
 - Any member or members singly or jointly holding not less than 10% of the issued share capital of the company. Provided that the applicants have paid all calls and other sums due on their shares.
- b) In case of a company not having a share capital, member or members:
 - Not less than 1/5th of the total number of its members.

DEPOSITORS

- The number of depositors shall not be less than 100 or
- not less than 10% of the total number of its depositors, whichever is less or
- Any depositor or depositors singly or jointly holding not less than 10% of the total value of outstanding deposits of the company.

WHO MAY BE SUED THROUGH CLASS ACTION SUITS?

A class action suit may be filed against the following authorities

- A company or its directors for any fraudulent, unlawful or wrongful act or omission;
- An auditor including audit firm of a company for any improper or misleading statement of particulars made in the audit report or for any unlawful or fraudulent conduct.
- An expert or advisor or consultant for an incorrect or misleading statement made to the company.

WHICH RELIEFS MAY BE CLAIMED THROUGH CLASS ACTION SUITS?

Any member or depositor on behalf of such members or depositors may file a class action suit before the **National Company Law Tribunal (NCLT)** to:

- (a) To restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company;

1. Intern [4th Year, NUJS Kolkata]



- (b) To restrain the company from committing breach of any provision of the company's memorandum or articles;
 - (c) To declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
 - (d) To restrain the company and its directors from acting on such resolution;
 - (e) To restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
 - (f) To restrain the company from taking action contrary to any resolution passed by the members;
 - (g) To claim damages or compensation or demand any other suitable action from or against—
 - (i) The company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
 - (ii) The auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct;
 - (iii) Any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;
- any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters on which an order can be passed;
 - whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;
 - any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;
 - where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would likely to be—
 - authorized by the company before it occurs; or
 - ratified by the company after it occurs;
 - Where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.
2. If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:—

WHAT ACTION WILL BE TAKEN BY NCLT ON A CLASS ACTION SUIT APPLICATION?

1. On receipt of a class action suit application, the Tribunal will look into the following before admitting it:
 - whether the member or depositor is acting in good faith in making the application for seeking an order;
- (a). Issue Public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;
 - (b) All similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors



should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

- (c) Consolidate all similar applications prevalent in any jurisdiction into a single application and the class members or depositors shall be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side
- Not allow two class action applications for the same cause of action.
 1. A copy of every application made under this section shall be served on the Regional Director and Registrar of Companies.
- 4. The Tribunal shall give notice of every application made to it under this section to the Central Government and shall take into consideration the representations, if any, made to it by that Government before passing a final order under those sections.
 1. Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding Rs. 1 Lakh, as may be specified in the order.

PENALTY FOR NON-COMPLIANCE OF ORDER PASSED BY TRIBUNAL

Any company which fails to comply with an order passed by the Tribunal under Section 245 shall be punishable with fine which shall not be less than Rs. 5 Lakhs but which may extend to Rs. 25 Lakhs and every officer of the company who is in default shall be

punishable with imprisonment for a term which may extend to 3 years and with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 1,00,000/-.

Under Section 425 of the Companies Act, 2013 the Tribunal has also been conferred the same jurisdiction, powers and authority in respect of contempt of its orders as conferred on High Court under the Contempt of Courts Act, 1971.

Other points relating to Class Action Suits

The cost or expenses connected with the publication of the public notice shall be borne by the applicant and shall be defrayed by the company or any other person responsible for any oppressive act.

Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

Provisions relating to class action suits do not apply to a banking company.

Difference between application for prevention of oppression and mismanagement u/s 241 to 244 and Class Action Suits under Section 245 of Companies Act, 2013.

	Prevention of oppression and mismanagement u/s 241 to 244	Class Action Suits Section 245
Who can file application?	Members of the Company	Members as well as deposit holders of the company
Against whom application can be filed?	Company and its statutory appointees	Company, Any of its directors Auditor, including audit firm Expert or advisor or consultant or any other person
Matters for which application can be filed	Any current or past activity or to prevent recurrence	Any current, past or future activity, including desisting from one or more particular action that has not been taken yet.



CONCLUSION

It may be concluded that class action suits will be a beneficial platform for members and depositors to raise their grievances against the management of a company including directors, advisors, consultants, auditors etc for acts or omission that is prejudicial, unlawful or wrongful to the interest of the company. Class action suits may be undertaken as a redressal tool by minority shareholders having common interest for promotion of transparent corporate governance.



CRIME NEVER DIES

Shweta Vashist' & Vishal Gera

"*Nullum tempus occurrit regi*", which originated in the 1250s, was first used by Bracton in his *De legibus et consuetudinibus Angliae*. The literal meaning of this maxim is that the crown may decide to proceed with action that may be barred by time and that the lapse of time does not bar the right of the crown. On the other hand, "*vigilantibus et non dormientibus jura subveniunt*", which is a maxim of Roman law, implies that the law shall only assist those who are vigilant and not those who are careless or lazy about their rights.

Chapter XXXVI of the Code of Criminal Procedure, comprising of Sections 467 to 473, prescribes distinct limitation periods for taking cognizance of various offences, depending upon the gravity of those offences interlinked with the punishments, respectively. The rationale behind the inclusion of a period of limitation was that the testimony of witnesses becomes weaker with the lapse of time and memory and consequently the chances of errors in judgments increase, since the evidence becomes weaker. In addition to this, the period of limitation would put pressure on the system of the criminal prosecution to ensure that the offender is convicted and punished quickly to ensure speedy justice. The deterrent effect that the criminal justice system aims at, will stand defeated in case the punishment has not been granted before the memory of the offence gets washed off from the heads of those affected by it. This Chapter is clearly in consonance with the concept of fairness of trial, as enshrined in Article 21 of the Constitution of India.

The object of the Legislature, while introducing a period of limitation can be ascertained from the statement of the Joint Committee of the Parliament, where it was stated that:

"These are new clauses prescribing periods of limitation on a graded scale for launching a criminal prosecution in certain cases. At present there is no period of limitation for criminal prosecution and a court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been

prescribed for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission"

Section 468 of the Code of Criminal Procedure lays down the period of limitation for taking cognizance of an offence. According to this Section, if an offence is punishable with fine only, the period of limitation shall be six months and if the offence is punishable with imprisonment for a term that does not exceed one year, the period of limitation is one year. Section 468, further makes it clear that if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, the period of limitation shall be three years. However, this Section does not lay down the period of limitation for offences punishable with imprisonment exceeding three years. Meaning thereby there is no outer limit qua the limitation in relation to the offences having punishment for three years or more. Thus, Section 473 of the Code of Criminal Procedure enables the Court to take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interests of justice.

In *Asst. Customs Collector, Bombay v. L.R. Melwani*, AIR (1970) SC 962, 965, the Supreme Court held that:

"The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint"

The five judges' bench of the Supreme Court of India, consisting of P.Sathasivam CJ, Dr.B.S.Chauhan, Ranjana P.Desai, Ranjan Gogoi and S.A.Bobde, JJ, in the case titled as "*Sarah Mathew Vs. Institute of Cardio Vascular Diseases & Ors.*"; 2014(2) SCC 62, sought to ensure justice to the citizens of the country, by striking a balance between the legal maxim "*nullum tempus aut locus occurrit regi*", and the legal maxim '*vigilantibus et non dormientibus, jura subveniunt*'.

This aforesaid decision of the Apex Court delivered and penned down by Justice Ranjana. P.Desai puts a rest to

1. Intern [5th Year, University School of Law and Legal Studies]



the conflicting views expressed by the court in the following authorities:-

- **Krishna Pillai Vs. T.A. Rajendran and Anr.; (1990) supp. SCC 121**, where the Court stated that no court shall take cognizance of any offence under the Child Marriage Restraint Act, 1929 after the expiry of one year from the date on which the offence is alleged to have been committed.
- **Bharat Damodar kale Vs. State of Andhra Pradesh; (2003) 8 SCC 559**, where it was held that for the purpose of computing the period of limitation, the relevant date is the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of a process by court. The aforesaid "Bharat Kale", was further referred and relied upon in the judgment titled as "Japani Sahoo Vs. Chandra Sekhar Mohanty; (2007) 7 SCC 394, where the Court upheld the decision given by it in the "Bharat Kale" case and stated that mere delay in approaching a Court of Law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict.

In the aforesaid "Sarah Mathew" case, reliance has been placed upon the Law Commission's Report and the report of the Joint Parliamentary Committee, which made it clear that Chapter XXXVI, dealing with the limitation for taking Cognizance of certain offences had been inserted into the Code of Criminal Procedure to make the prosecution of complaints a quick process and consequently make the criminal justice system more orderly, efficient and just. The Court states that the object of putting a bar of limitation, in light of Article 21 of the Constitution, was to prevent the parties from filing a case after a long time, which many times, results in the disappearance of material evidence and filing of vexatious and belated prosecutions long after the date of the offence. However, Chapter XXXVI of the Code of Criminal Procedure does not undermine the right of the accused. It aims to strike a balance between the interest of the complainant and the interest of the accused. While this limitation encourages diligence by providing for limitation, it does not intend to throw out all prosecutions on the ground of delay. It has further been stated that where the legislature wanted to treat certain offences differently, it provided for limitation in the section itself, for instance, Section 198(6) and 199(5) of the Code of Criminal Procedure.

The Supreme Court, in "Sarah Mathew" case, laid down the meaning and the scope of term 'taking cognizance'. **When on a petition or complaint being filed before a Magistrate, he applies his mind or takes judicial notice of an offence, with a view to initiate proceedings in respect of an offence which is said to have taken place, the Magistrate is said to have taken cognizance of the offence.** The Court states that Section 473, which provides for the extension of the period of limitation in certain cases, is a non-obstante clause, which has an overriding effect on Section 468 of the Criminal Procedure Code. Reliance has been placed on the decision of the Court in Vanka Radhamanohari vs. Vanka Vankata Reddy and Ors. (1993) 3 SCC 4, where the Court observed that the basic difference between section 5 of the Limitation Act and Section 473 of the Code of Criminal Procedure is that, in order to exercise the power under Section 5 of the Limitation act, the onus is on the applicant to satisfy the court that there was sufficient cause for condonation of delay, whereas, Section 473 enjoins a duty on the court to examine not only whether such delay has been explained, but as to whether it is the requirement of justice to ignore such delay.

The Court, while dealing with the two contradicting maxims, 'vigilantibus et non dormientibus, jura subveniunt' and 'nullum tempus aut locus occurrit regi', states that Chapter XXXVI of the Code of Criminal Procedure which provides the limitation period for certain types of offences for which lesser sentence is provided, draws support from the maxim 'vigilantibus et non dormientibus jura subveniunt' and that even certain offences such as section 384 or 465 of the Indian Penal Code, which have lesser punishment, may have serious social consequences and hence, the provision for the condonation of delay was made. The Court was thus, of the opinion that Chapter XXXVI is a part of the Code of Criminal procedure, which is a procedural law and it is a well settled principle that procedural laws must be liberally construed to serve as handmaid of justice and not as its mistresses.

Hence, the Court, in this matter, held that the decision given by the Court in the "Krishna Pillai", matter would not be the authority for deciding as to what is the relevant date for computing the period of limitation under Section 468 of the Code of Criminal procedure since in that case, the Court was dealing Section 9 of the Child Marriage Restraint Act, 1929, which is a special Act and there is no reference to Section 468 or 473 of



the Code of Criminal Procedure in that judgment. Also, the Hon'ble Supreme observed that the said judgment is restricted to its own facts and constitution bench does not endorse the view taken in "Krishna Pillai", which was by 3 Judges Bench. Finally, the Hon'ble Supreme Court in "Sarah Mathew" (supra), held that "Bharat Kale" (2003(8) SCC 559) which is followed in "Japani Sahoo" (2007(7) SCC 394) lays down the correct law.

In the light of the same, the Court held that **the relevant date, for the purpose of computing the period of limitation under Section 468 of the Criminal Procedure Code is the date of filing of the complaint or the date of institution of prosecution and not the date on which a Magistrate takes Cognizance.**

One of the most well-recognized principles of criminal jurisprudence is that "crime never dies". Even though this concept has been well-established, its implementation raised several questions with regard to the trigger point for computing the period of limitation. The Supreme Court, in this landmark judgment has provided a much-required clarification as to the ambiguity created by the contradicting views qua the running points with respect to limitation.



NATIONAL JUDICIAL ACCOUNTABILITY COMMISSION (NJAC)- TO BE OR NOT TO BE!!!

Abhishek Kumar

INTRODUCTION

National Judicial Accountability Commission (NJAC) and the National Judicial Accountability Commission Act (hereinafter referred to as "The Act") is at present the most debated political judicial topic. The challenge to the Act in the Hon'ble Supreme Court of India is gathering the attention of every aware person, intelligentsia, law student, legal professionals as the same will decide the ultimate authority with whom the appointment of Judges to the Higher Judiciary vests. Arguably, the matter which at present is being heard in the Hon'ble Supreme Court is also being compared to as the *Kesvanand Bharti vs. State of Kerala*¹ case as It will also seal oft debated issue over the supremacy of Judiciary or Executive in appointment of Judges in the Higher Judiciary.

When the appointment of judges across is taken into consideration what is perceived is that in some country like the United States, the President has the say in appointment. In United Kingdom, the system by far is very merit oriented because in order to become the judge there is an open competition that avoids kith and kin syndrome which is largely prevalent in India. The article *inter alia* throws light on the constitutional provision with respect to appointment of judges, the global perspective of appointment of judges, evolution of collegiums system and its notable flaws, evolution of NJAC, the Act, salient feature in the Act.

THE CONSTITUTIONAL PROVISIONS WITH REGARD TO APPOINTMENT OF JUDGES IN THE HON'BLE SUPREME COURT AND THE HIGH COURT.

This section in brief will throw light on important constitutional provision dealing with the appointment of judges in India. Article 124² deals with the

1. (1973) 4 SCC
 2. 124. Establishment and constitution of Supreme Court
 (1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges

appointment of Supreme Court judges. Article 124 (2) of the Constitution of India³ mentions about the appointment of Supreme Court Judges. Article 217 deals with appointment of High Court Judges.

PROCEDURE OF APPOINTMENT OF JUDGES IN OTHER COUNTRIES

This section of the Article will throw light on the manner of appointment of Judges in some other Countries.

(A) United States:-

Before deliberating as to the manner of appointment of Judges it is imperative to give some back ground regarding the mechanism of judiciary as prevalent in the States. The system of court in United States is referred to as dual court system meaning thereby that both state and federal systems have their own set of courts. There are 51 separate sets of courts in United States; i.e. one for each state and one for the Federal Government. Federal court is further categorized into three level; a) The Supreme Court; b) The Circuit Court of Appeals and the District Court. The Supreme Court is the highest court in the federal judiciary. Section II Article II of the United States Constitution reads as⁴ :-

The President..., nominate, and by and with the advice and consent of the Senate, shall,.....judges of the Supreme Court, and all other officers of the United States shall appoint judges of the Supreme Court, and all other officers of the United States,

3. Article 124 (2) :- Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:
 4. The Constitution of the United States ; <https://www.usconstitution.net/const.pdf> (Visited on 11th May,2015)



Interestingly, there is no statutory qualification with regard to person being judge in the Supreme Court. Generally, nominees need to have been admitted to the practice of law for at least 10 years. Pertinently, there is no rule where only a practising advocate can become judge. There are examples where a Academician (professor of law), have also been appointed as judge. At present out of one judge in U.S Supreme Court, there is one professor of law who is currently serving as judge in the U.S Supreme Court.⁵ Therefore, as far as appointment of judges in the United States is concerned, the authority vests with the U.S President and the Senate and there is no collegium system prevalent for appointing the judges.

(B) United Kingdom

The Judges in United Kingdom are appointed on the basis of the recommendation made by the independent Judicial Appointments Commission (JAC). Quite interestingly all appointments are made on the basis of open competition. Thus there is no kith and kin syndrome prevalent in the appointment of Judges in the United Kingdom. JAC is an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. Its an executive non –departmental public body, sponsored by Ministry Of Justice.⁶ JAC derives its source from Constitutional Reforms Act and it consists of 15 members. The judicial appointment and other details are contained in Schedule 14 to the CRA as amended by the Crimes and Courts Act, 2013.

(C) Canada:-

In Canada, the Supreme Court consists of the Chief Justice and 8 other associate judges. The Constitution of Canada empowers the Governor General to appoint the Supreme Court judges. In common practice, it is the advice of the Prime Minister upon which the judges are appointed. Furthermore, the Minister of Justice shortlist candidates with input from provincial law societies. Moreover, Canada does take into account regional representation while making appointment of Judges. In order to be appointed as judge the candidates must

have been a member of provincial or territorial law societies for at least 10 years⁷.

Thus, interestingly, what has evolved by having a glimpse of three countries of the world that in none of the three countries there exists a collegium system of appointment of judges.

THE COLLEGIUM SYSTEM IN INDIA : ITS EVOLUTION AND NOTABLE FLAWS

The evolution of NJAC dates back to the period when criticism started featuring regularly regarding the *collegium* system of appointment. Interestingly, the word “*collegium*” is nowhere mentioned in the Constitution of India. The evolution of Collegium system has its genesis in its three judgments which is also referred to as the “*Three Judges Case.*” In the First Judges Case⁸, the Hon’ble Supreme Court held that “*the primacy of the CJI recommendation to the President can be refused for cogent reasons.*” Thus, the first judges case gave the supremacy of executive over the judiciary in the appointment and transfer of the judges. Article 124 (2) was interpreted by the Hon’ble Supreme Court by its 9 judge bench in the case of *Supreme Court Advocates-on Record Association v. Union of India*, (1993)4 SCC441, also commonly referred to as *Second Judges case* to mean that the opinion and satisfaction of Hon’ble Chief Justice of India will have primacy in the matter of all judicial appointments. Additionally, the Hon’ble Court held that the Hon’ble Chief Justice views was not the sole view but the same had to be on the basis of views formed with at least two of the senior most judges of the Supreme Court. Therefore, in principle, the evolution of Collegium system of appointment started with the decision of Supreme Court in *Second Judge case.*⁹

The ambiguity with regard to judicial appointment was not settled clearly and the judgment as pronounced in the second judges case saw dissent in itself. Hon’ble Justice Verma wrote the majority judgment on behalf of four other Judges. Moreover, individual judgment was authored by Hon’ble Justice Pandian and Justice Kuldeep Singh though supporting the majority view.

5. <http://www.supremecourt.gov/about/biographies.aspx> (Visited on 11th May, 2015)

6. <https://jac.judiciary.gov.uk/about-us> (Visited on 11th May, 2015)

7. <http://www.parl.gc.ca/ParlInfo/compilations/SupremeCourt.aspx?Menu=SupremeCourt&Current=True> (Last visited on 11th May, 2015)

8. (1981) Supp (1) SCC 87

9. (1993) 4 SCC 441



Justice A.M. Ahmadi took the dissenting view¹⁰. The ambiguity resulted the then president K.R.Naryanan to refer the matter for Presidential reference. Subsequently, in 1998, in *Re Presidential Reference*¹¹ which is also referred to as the *third judges case* in response to third opinion¹² opined that *The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior-most puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior-most puisne Judges of the Supreme Court.*

Therefore, a march was made from two judges consultation and opinion as said by the Apex Court in second judges case to the consultation with four senior most judges of the Supreme Court. Thus, the evolution of collegium system of appointment dates back to second judges cases and has been further streamlined in third judges cases i.e. in *Re Presidential reference* case. Interestingly, the Apex Court has clearly outst the supremacy of executive in making any appointments in Higher Judiciary and has kept the ball in its own court.

As no system can be full proof, so was the case with the collegium system of judicial appointment. This system has been criticized as being biased, lacking transparency, marred in controversy, having kith and kin syndrome and at times resulting in quid pro quo.

One of the startling revelation which came against the collegium system that surprised the nook and corner of the educated intelligentsia and caused ruckus in the legal circle was when the alleged report with respect to then Chief Justice of Gujarat High Court, *Justice Bhaskar Bhattacharya*, surfaced. It is alleged that Justice Bhattacharya was not elevated to Hon'ble Supreme Court¹³ because he objected to the elevation of then Chief Justice Atmas Kabir sister to judgeship of Calcutta

High Court. The Learned Attorney General making his submission before the Hon'ble Supreme Court regarding the challenge to the NJAC Act gave this example and strongly submitted that the collegium system must be scrapped¹⁴.

EVOLUTION OF NATIONAL JUDICIAL ACCOUNTABILITY COMMISSION ACT: PROVISIONS, AND OTHER FEATURES

The National Judicial Accountability Commission Act (hereinafter referred to as the "Act") was passed by the Lok Sabha on 13th August, 2014 and the Rajya Sabha on 14th August, 2014. Since the Act involved constitutional Amendment, hence ratification was needed by the States. Pursuant to the ratification by the majority of the States, the president gave the assent to the Act on 31st December, 2014 and the Act has been notified to come into force from 13th April, 2015. The Constitution Ninety Ninth Amendment Act provides for the composition and the functions of the NJAC. The preamble of the Act reads as *An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.*

As a result of the Constitutional Amendment, Article 124 (A)¹⁵ has been inserted and it deals with the

10. *The collegium controversy*; <http://archive.indianexpress.com/news/the-collegium-controversy/836029/2> (Last visited on 09/05/2015)

11. (1998)7 SCC 739

12. 3. *Whether article 124 (2) as interpreted in the said judgment requires the Chief Justice of India to consult only the two senior-most judges or whether there should be wider consultation according to past practice*;

13. *Panel finds 3 top judges unfit for SC*; <http://www.hindustantimes.com/newdelhi/panel-finds-3-top-judges-unfit-for-sc/article1-1027632.aspx> (Last visited on 09 th May, 2015)

14. *Why was lawyer kin of then CJI made High Court judge, government asks Supreme Court*; <http://indianexpress.com/article/india/india-others/why-was-lawyer-kin-of-then-cji-made-high-court-judge-government-asks-supreme-court/> (Last visited on 9th May, 2015)

15. "124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:— (a) the Chief Justice of India, Chairperson, ex officio; (b) two other senior Judges of the Supreme Court next to the Chief Justice of India —Members, ex officio; (c) the Union Minister in charge of Law and Justice—Member, ex officio; (d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members: Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.



composition of NJAC. The members of NJAC will be consisting of a) CJI, b) two senior most judges of the Supreme Court, Union Minister of Law and Justice who will be ex-officio member and there will be two eminent members who will be nominated by the Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition. Strangely, the composition also states that out of the one eminent persons one persons will be nominated amongst the SCs, ST's and OBC community. Article 124 (B) gives the Commission the Constitutional Status.

Section 11 of the Act gives the rule making power to the Commission. The bone of contention and entire challenge to the Act rests mainly on the aspect that the amendment tampers the basic structure doctrine as propounded by the Hon'ble Supreme Court in landmark *Kesavananda Bharti* case and at the same time the interference of executive and political parties in the appointment of Judges. Section 5 of the deals with the procedure for selection of judge to the Supreme Court and it states that the senior most judge of the Supreme Court will be appointed as the Chief Justice of India. As per Section 5 (2) the commission shall recommend the name of appointment of Judges to the Supreme Court amongst persons who are eligible for appointment on the basis of the merit, ability and other criteria of suitability as per 124 (3) of the Constitution of India. Interestingly, the provision also states of veto power in case of disagreement of two members. The said Section under 5 (2) states as under :-

Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

(IV) Potential criticism of the Act and the Challenge made thereto.

As reiterated above, the main ground of challenge to the Act which has been made before the Hon'ble Supreme Court is that the amendment tampers with the basic structure doctrine and it will undermine the power of judiciary. Furthermore, the active involvement of Law Minister in the functioning of NJAC and sending details as to the vacancies in the Higher Judiciary there can be situation when the Law Minister will be involved in both the process i.e. the functioning of the NJAC and internal functioning. As it is said that power corrupts and absolute power corrupts absolutely.

As regards the composition of the Commission itself, a lot of debate has taken place that the same will also not be full proof as nothing specific is mentioned about *eminent person*. Moreover, the introduction of quota will once again result in balkanization of the commission itself as the concerned member will try to cherish the cause of particular community and strata to which he belongs. Till date the higher judiciary has been immune from any reservation but the Govt. In order to appease has tried to indirectly introduce reservation in the judiciary.

Furthermore, Section 13¹⁶ of the Act itself is prone to misuse. It is to be noted that Sub-ordinate legislation does not strictly follow the uniform standard of review by Parliament and the same may vary depending on the terms of the statute vesting such power. Generally however, statutes require that drafted rules be laid before both houses, and changes may be made by the parliament within 30 days of such laying (resembling Section 13 of the NJAC Act). Rarely, is the operationalization of such rules subject to prior parliamentary approval. Sub-ordinate legislation drafted by judicial bodies under the Indian constitution are qualitatively distinct, and are not subject to similar oversight.

In this regard it is to be noted that as per Article 145 and 229, the rule making power are bestowed to the Supreme Court and the High Court respectively.

Appositely, the Learned Senior Counsel appearing before the Constitution bench of the Apex Court has made submission before the bench that the impugned act violates the basic structure of the Constitution as the same undermines the independence of judiciary as the very act itself undermines the role of the Hon'ble Chief Justice in selection of the judges to the Higher

16. 13. Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.



Judiciary and therefore, the act must be declared as ultra vires.

CONCLUSIONS

There was some issues with the collegium system of appointment was one of the passing remark by Hon'ble Justice Khehar who is presiding the Constitution bench which is presently hearing the challenge to the Act. Whether the current replacement is an effective mechanism is too early to be judged at this stage but one thing is sure that there has been unhealthy practices which has been followed as a result of Collegium system of appointment. There has been published media reports where some of the judges were not appointed to Hon'ble Supreme Court because the Hon'ble Chief Justice did not approve his appointment because of the issues with the particular judge. The collegium system was noted for its very essential characteristic that there was no role of executive or there was no political interference in the composition of the Collegium as no one from the ruling party or the opposition was associated in any manner in the appointment of judges. Needless to say when the legislature is tainted, there are bottle necks and red tapism in the bureaucracy the common man looks at the judiciary as the last hope and most reliable organ. When there is any iota of political interference in the Judiciary and judicial appointments, the sufferer is none but the common litigants who seeks justice till the Hon'ble Apex Court. It is perceived that the Hon'ble Apex Court will pronounce the judgment keeping the essence of basic structure of the Constitution into consideration as well as taking into accounts the flaws which the Collegium had in its functioning.



CCI POWERS TO REVIEW OR RECALL ITS ORDERS

Rajdutt S Singh & Shivani¹

INTRODUCTION

Delhi High Court¹ has given yet another boost to the powers of the Competition Commission of India (CCI) when it held that the CCI has inherent powers to review or recall its order.

FACTS

A Complaint was filed before the CCI that Google Inc. has abused its dominant position in the internet advertising space by promoting its vertical search services like Youtube, Google News, Google Maps, etc. In other words, these services would appear predominantly during a search result on Google, irrespective of their popularity or relevance. On April 15th, 2014 the CCI ordered Director General (DG) under Section 26(1) of the Competition Act, 2002 (Act) to investigate into the affairs of Google Inc. As per Section 26(1), the CCI orders an investigation on the basis of prima-facie opinion and at this stage, the Act does not provide any right of being heard to the parties. Therefore, Google Inc had filed an application before the CCI for recall of its order dated April 15th, 2014. However, the application was rejected on the ground that CCI lacked jurisdiction to entertain any such application.

Further, the three appellants i.e. i) Google Inc., California, United States of America (USA), ii) Google Ireland Ltd. and, iii) Google India Pvt. Ltd., Bangalore, filed the writ petition impugning, the order dated 15th April, 2014 of the CCI. The CCI dismissed the application filed by the appellants for recall of the order dated 15th April, 2014 as not maintainable and restrained the CCI from carrying out any further proceedings against the appellants pursuant to the order dated 15th April, 2014.

ISSUE

The main issue was whether an administrative body like CCI had inherent powers to review or recall its order passed under section 26(1) in the absence of any specific provisions in the Competition Act, 2002?

¹ *In the case of Google Inc. and Others v. Competition Commission of India, W.P. (C) No. 7084/ 2014*

HELD

The CCI, before it passes an order under Section 26(1) of the Act directing the DG to cause an investigation to be made into the matter, is required to, on the basis of the reference received from the Central or the State Government or a statutory authority or on the basis of the information/complaint under Section 19 or on the basis of its own knowledge, form an opinion that there exists a prima facie case of contravention of Section 3(1) or Section 4(1) of the Act.

The statute does not provide any remedy to a person/enterprise, who/which without being afforded any opportunity, has by an order/direction under Section 26(1) been ordered/directed to be investigated against/into. Though Competition Appellate Tribunal [COMPAT] has been created as an appellate forum against the orders of CCI but its appellate jurisdiction is circumscribed by Section 53A of the Competition Act and no appeal is prescribed against the order of CCI under Section 26(1) of the Act. The said person/enterprise, in the absence of any remedy, has but to allow itself to be subjected to and participate in the investigation.

CCI can order/direct investigation only if forms a prima facie opinion of violation of provisions of the Act having been committed. Our Constitutional values and judicial principles by no stretch of imagination would permit an investigation where say CCI orders/directs investigation without forming and expressing a prima facie opinion or where the prima facie opinion though purportedly is formed and expressed is palpably unsustainable. The remedy of Article 226 would definitely be available in such case.

Even otherwise, the remedy under Article 226 of the Constitution of India has been held to be a part of the basic structure of our constitution. The rule of availability of alternative remedy being a ground for not entertaining a petition under Article 226 is not an absolute one and a petition under Article 226 can still be entertained where the order under challenge is wholly without jurisdiction or the like.



A Single Judge of this Court in *Asahi Glass India Vs. Director General of Investigation*² held a writ petition under Article 226 to be maintainable against an order/direction for investigation by the DG under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) (which the Competition Act repeals vide Section 66 thereof), of course in cases of inherent lack of jurisdiction or abuse of process of law or jurisdictional issues.

Supreme Court³ held that if a wrong and illegal administrative act can in the exercise of powers of judicial review be set aside by the Courts, the same mischief can be undone by the administrative authority by reviewing such an order if found to be ultra vires and that it is open to the administrative authority to take corrective measure by annulling the palpably illegal order.

The most relied judgment of Competition Commission of India Vs. Steel Authority of India Ltd.⁴ as relied by both the parties is only on the right of hearing of the person/enterprise complained/referred against at the stage of Section 26(1) of the Act. What it lays down is that CCI at that stage is not required to issue notice to such a person/enterprise. The question whether CCI is entitled to recall/review the order so made did not arise for consideration therein. The fact that said judgment holds that CCI is not required to hear the person complained/referred against before ordering investigation cannot lead to an inference that such a person even if approaches the CCI for recall/review of such an order is not to be heard.

It is in the discretion of the CCI to hear or not to hear the person/enterprise complained/referred against at the stage of Section 26(1) of the Act, CCI cannot be held to be without jurisdiction to recall/review the order.

Court held that mere filing of an application for review/recall would not stall the investigation by the DG, CCI already ordered. Ordinarily, the said application should be disposed of on the very first date when it is taken up for consideration, without calling even for a reply and without elaborate hearing inasmuch as the grounds on which the application for recall/review is permissible as aforesaid are limited and have to be apparent on the

2. MANU/DE/2568/2009

3. *Vinod Kumar Vs. State of Haryana* (2013) 16 SCC 293

4. MANU/SC/0690/2010 : (2010) 10 SCC 744

face of the material before the CCI. Even if CCI is of the opinion that the application for recall/review requires reply/further hearing, it is for the CCI to, depending upon the facts order whether the investigation by the DG, CCI, is to in the interregnum proceed or not.

Court further held that in every case in which CCI has ordered investigation without hearing the person/enterprise complained/referred against, such person/enterprise would have a right to apply for review/recall of that order. Such a power though found to exist has to be sparingly exercised and ensuring that the reasons which prevailed with the Supreme Court in *SAIL* (supra) for negating a right of hearing to a person are not subverted.

Such a power has to be exercised on the well recognized parameters of the power of review/recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. In fact, it is up to the CCI to also upon being so called upon to recall/review its order under Section 26(1) of the Act to decide whether to, pending the said decision, stall the investigation or not, as observed hereinabove also. The jurisdiction of review/recall would be exercised only if without entering into any factual controversy, CCI finds no merit in the complaint/reference on which investigation had been ordered. The application for review/recall of the order under Section 26(1) of the Act is not to become the Section 26(8) stage of the Act.

CONCLUSION

CCI has the power to recall/review the order under Section 26(1) of the Act but within the parameters and subject to the restrictions discussed above.

This decision of the Delhi High Court shows that the remedy of writ petition has made heavy inroads into the functioning of the CCI. This decision also stands as testimony to yet another successful lawyerly tactic to prolong investigations. While CCI can no longer reject an application for review or recall of its order, it would be interesting to see whether the CCI actually reviews or recalls any of its order while disposing of any such application.



HIJACKING OF IDENTITY: INITIAL INTEREST CONFUSION

Himanshu Sharma

INTRODUCTION:

Whenever a person wants to buy something, he starts with searching for the best option available in the market. There are various mediums of doing so in the contemporary time as compared from the time when the mediums were limited. Now a person has an option of window shopping, searching for the same through magazines, relying on the advertisement and promotion of the company related to the product and then he also have an option of searching on the internet and website of the particular brand. The choice of product depends upon various ingredients which are involved in a process of buying like the qualities of a product, budget of the person etc but one of the ingredient which is not involved earlier but with the emergence of time it has become one of the most important factor in the choice of the product i.e. initial interest involved.

A product sale apart from the other factors is also dependent upon the initial interest of the consumer involved in a product. Although a product has its sales because of its quality then also a share of the sale is because of reason of the initial interest of the consumer in the product. The initial interest confusion should not be baffled with the confusion related to the identity of the two trademarks. It is related to the confusion related to the time of searching for a product. The initial period when a person is looking for a product is very crucial and it is during this period that the initial interest confusion has its origin. The way by which a seller is able to draw attention of a consumer towards its product and how genuine his efforts are in drawing the consumer towards its product would help in deciding whether the same is infringement or not.

ORIGIN:

The initial interest theory has its origin from the judicial interpretation provided by the various courts around the world. The interest developed in a product because of its own qualities and the goodwill of the product itself is not a wrong in the legal sense but when the initial interest developed is because of unlawful use of the trademark, goodwill and name of a product then it would be treated as an infringement as held in the various cases around the world.

The initial interest confusion is related to the confusion before the time of purchase, it should not be mystified with the confusion at the time of purchase. It involve the time when a person has decided that he needs something and has not reached the place from where he has to buy that product hence the initial interest confusion does not come into picture when the person has reached the place from where he needs to buy that product and has got confused because he saw two marks similar to each other.

JUDICIAL UNDERSTANDING AND PRONOUNCEMENTS:

The use of others trademark as a metatags in drawing the consumers towards its own website is a common case these days.

In case of **Consim Info Pvt. Ltd Vs. Google India Pvt. Ltd. and Ors.**¹ while discussing various cases the court observed in regards to the initial interest theory that *"in the early stages, courts perceived the unauthorised use in metatags, by a person, of someone else's trademark, as creating confusion in the minds of the consumers. This doctrine, identified as a doctrine of initial interest confusion posits that trademark infringement results when a consumer has been confused prior to purchase. But in normal circumstances, the likelihood of confusion would occur at the time of purchase. All over the world, the Courts have struggled hard, as pointed out above, to grapple with this problem of "initial interest confusion" in the internet context, where internet users seeking a trademark owner's website are diverted (i) either by identical or confusingly similar domain names to websites in competition with the trademark owner or (i) by a competitor's unauthorised use of another's mark as the keyword to generate banner or pop-up advertisements for its products and services."*

In US, the use of another's trademark in meta-tags to capture initial consumer attention was also regarded as a potential infringement of a trademark.

1. MANU/TN/1816/2010



In **Brookfield Communications, Inc. v. West Coast Entertainment Corp.**² the defendant West Coast Entertainment used the plaintiff's "moviebuff" mark in the metatags of its website. The Court analogised it to the use of a Bill Board bearing the plaintiff's mark to attract consumers interested in the plaintiff's products or services. Although the consumers would ultimately realise that the defendant was not the provider they initially sought, they might decide instead to patronise the defendant's website. The Court held that using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Elaborating this illustration, the 9th Circuit Court said, "Using another's trademark in one's meta-tags is much like posting a sign with another's trademark in front of one's store..... Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by West Coast. Nevertheless, the fact that there is only initial consumer confusion does not alter the fact that Blockbuster would be misappropriating West Coast's acquired goodwill".

The Bill Board analogy used in Brookfield was again considered in **Playboy Enterprises, Inc. v. Netscape Communications Corporation**³. The District Court rejected the plaintiff's request for a preliminary injunction and the Court of Appeals, Ninth Circuit confirmed the same. Subsequently, the District Court granted summary judgment (akin to rejection of plaint) in favour of the defendants.

While reversing the order granting summary judgment in favour of the defendants and remanding the matter for further proceedings, the Court of Appeals, Ninth Circuit applied an eight-factor test, originally set forth in AMF Inc. v. Sleekcraft Boats⁴ viz., (1) strength of the mark (2) proximity of the goods (3) similarity of the marks (4) evidence of actual confusion (5) marketing channels used (6) type of goods and the degree of care likely to be exercised by the purchaser (7) defendant's intent in selecting the mark and (8) likelihood of expansion of the product lines.

Thereafter, the Court accepted the argument of "initial interest confusion" advanced by the plaintiff, on the ground that the choice of keywords, presented to the

advertisers by the search engine and the use of click-through rates as a way to gauge the success of advertisements, showed intent to confuse. Since intent to confuse constituted probative evidence of likelihood of confusion, the Court held that the summary judgment issued in favour of the defendants by the District Court was wrong.

After the 'Bill Board' analogy in Brookfield and 'highway sign post' analogy in Playboy, the Courts extended the "initial interest confusion doctrine" to correspond to a broader reading of Brookfield, under which real confusion is not required, but a probability of confusion was enough.

In **People for the Ethical Treatment of Animals v. Doughney**,⁵ the Court found initial interest confusion based on the use of the domain name peta.org to link to a site entitled "People Eating Tasty Animals", a parody of the "People for the Ethical Treatment of Animals" website that visitors were presumably trying to reach. Once visitors reached the page, there is no way they could have been confused given the very different title and the obviously parodic message of the page. Nonetheless, the Court found the instant of confusion created before visitors saw the content of the website to be actionable.

In case of **Warner Bros. Entertainment Inc. vs Harinder Kohli And Ors**⁶

It was observed by the Hon'ble High Court of Delhi on the basis of the explanation provided in McCarthy on Trademarks and Unfair Competition, Fourth Edition, Volume 3, pages 23-19:

"Infringement can be based upon confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion? The analogy to trademark initial interest confusion is a job-seeker who misrepresents educational background on a resume, obtains an interview and at the interview explains that the inflated resume claim is a mistake or a typing mistake. The misrepresentation has enabled the job-seeker to obtain a coveted interview, a clear advantage over others with the same background who honestly stated their educational achievements on their resumes. In such a situation, it is

2. 174 F.3d 1036-9th Cir. 1999,

3. 354 F.3d 1020

4. 599 F.2d 341 (9th Cir. 1979)

5. 263 F.3d 359 (4th Cir. 2001)

6. IA No.9600/2008 in CS(OS) No.1607/2008



not possible to say that the misrepresentation caused no competitive damage. Initial interest confusion can be viewed as a variation on the practice of bait and switch."

Initial interest confusion is been treated as infringement in various cases around the world.

Section 29(1) of the Trade Marks Act, 1999 requires the similarity of the trademark to result in likelihood of confusion for claiming infringement. In case of likelihood of confusion, the confusion is related to the time when a person is buying a product and the infringer has taken the advantage of the reputation of the well established trademark whereas in case of initial interest confusion it is related to the confusion before the time of purchase of product and the person has realised before purchase that he is not buying the same product what he had thought about but then also he has developed a liking for the product due to the initial interest developed due to one reason or other. The use of others trademark as a meta tag is the most common way of doing the same and the same has been taken as an infringement by the various courts in various judgments mentioned above.

CONCLUSION:

The initial interest confusion phenomenon is a recent development due to the development of modern mode of sales and purchase specially internet. The way of purchasing the product is changed with the passage of time and so is the way of selling a product. The latest development in the marketing has also led to the vigorous competition between the rival brands. The line between the fair use of others trademark or trade name and unauthorized use of the same is very thin. The development of provision of the trademark law has led to the establishment of the new theories related to the modern use of the trademark. Initial interest confusion doctrine is the development of the contemporary interpretation of the trademark law. Initial interest confusion has its origin from the use of other's rights for own benefits. It is related to the time period wherein the consumer has decided to buy a particular product. While he is searching for his choice of product he came across other products similar to the one he was searching for and instead of buying the product of his choice at the first instance he ends up buying another one due to the reason of his interest developed for the other product due to the method adopted by the others to promote his product. The use of the others trademark for the promotion of one's own product would decide whether the method used is infringement or not.



DOCTRINE OF FRUSTRATION

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – Lord Wright (Fibrosa Case)

Frustration is an act outside the contract due to which the completion of a contract becomes impossible. After the parties have concluded a contract, events beyond their control may occur which frustrate the purpose of their agreement, or render it very difficult or impossible, or as even illegal, to perform. An example of this is where a hall, which has been booked for the performance of a play, is destroyed by fire, after the contract has been concluded, but before the date of performance of the play.

The origin of the 'Doctrine of Frustration' as many other laws has been from the Roman laws. It was part of the Roman contract law which extinguished obligations of innocent parties where the 'thing is destroyed without the debtor's act or default', and the contract purpose has "ceased to be attainable". It was applied in Roman times, for instance, to save, from liability, a man who promised to deliver a slave by a certain day if the slave died before delivery.

Centuries later in England in 1863, in the case of **Taylor vs. Cardwell**¹ it was held that when an opera house, which was rented for holding concerts, was destroyed by fire, the contract was frustrated. This was because the very thing on which the contract depended on ceased to exist. Thus it was held that for the doctrine of frustration it must be so that the nature of contract is such that it would not operate if a thing ceased to exist. Again in **Paradine vs. Jane**² it was held that, 'In common rule of contract a man was bound to perform the obligation, which he had undertaken, and could not claim to be excused by the mere fact that performance had subsequently become impossible; because the party could expressly provide in their agreement, the upon fulfillment of a condition or occurrence of an event, either or both of them would be discharged of some or all of their obligations under the contract. This

¹ (1863) 3 B.& S. 826

² 91 LQR 247

By- Abhishek Arya¹ & Arvind Thapliyal

was the concept of 'absolute contract'. After various instances of people being excused for failure of performance of contract, the Doctrine was named in England in a rent case of **Krell vs. Henry**³ in 1903, when an Englishman named Krell leased his apartment in London to C.S Henry to be used for viewing a royal procession, which subsequently got cancelled and Henry refused to pay Krell the balance of the rent. Krell sued, but the English court held against him on the ground that the purpose of the contract between them was "frustrated". The court thought if Krell and Henry had foreseen the cancellation of the King's procession, they would not have entered into the agreement. It found that the procession was the foundation of the contract. The English law extended the principle beyond cases where the subject matter of the contract was destroyed rendering performance impossible, to cases where impossibility of performance follows the cessation of an "express condition or state of things" essential to the contract.

The doctrine of frustration is present in India u/s. 56 of the Indian Contract Act 1852. It says that any act which was to be performed after the contract is made becomes unlawful or impossible to perform, and which the promisor could not prevent, then such an act which becomes impossible or unlawful will become void. It lays down a rule of positive law and does not leave the matter to be determined according to the intension of the parties. This section clearly does not apply to a case, in which although consideration of contract is lost, performance of promise on other side is still possible.

In **Satyabrata v. Mugneeram**⁴ the Supreme Court has observed that various theories have been propounded regarding the juridical basis of the doctrine of frustration yet the essential idea upon which the doctrine is based is that of the impossibility of performance of the contract. In fact the impossibility of performance and frustration are often interchangeable expression. Also the meaning of the term 'impossible' was explained u/s 56. The Supreme Court made it clear that unlike English law the word impossible has not been used in the sense of physical or literal impossibility. The performance of an act may be impracticable and useless from the point

³ [1903] K.B. 740

⁴ AIR 1954 SC 44: 1954 SCR 310



of view of the object and whether it forms the basis of the contract rightfully has to be decided by the courts. Also in ***Sushila Devi vs. Hari Singh***⁵, it was observed that the impossibility contemplated by section 56 of the Contract Act is not confined to something which is not humanely possible. As it was a case of lease of property, which after the unfortunate partition, the property in dispute which was situated in Gujranwala, went onto the side of Pakistan, hence making the terms of the agreement impossible.

In another Supreme Court case, ***Nirmala Anand vs. Advent Corporation Pvt. Ltd.***⁶, the case was relating to suit for specific performance of agreement for purchase of a flat in a building construction on plot leased out by municipality. The court held that unless the competent authorities have been moved and application for consent or sanction have been rejected once and for all and such rejection made finally became irresolutely binding and rendered impossible the performance of the contract resulting in frustration u/s 56 the relief cannot be refused for the pointing out of some obstacles.

It is well settled that frustration automatically brings the contract to an end at the time of the frustrating event. This is in contrast to discharge by breach of contract where the innocent party can choose whether to treat the contract as repudiated. Moreover, a contract, which is discharged by frustration, is clearly different from one, which is void for mistake. A frustrated contract is valid until the time of the supervening event but is automatically ended thereafter, whereas a contract void on the grounds of mistake is a complete nullity from the beginning.

We have to see that unless the law provides for a fair distribution of the loss resulting from the supervening event, it may not be satisfactory simply to hold that the contract is frustrated.

⁵ AIR 1971 SC 1756: (1971) 2 SCC 288

⁶ AIR 2002 SC 2290



BOON OF NEW AMENDED INSURANCE LAWS

Shivanand Singh

The new Insurance Bill, 2015 passed on dated 12.03.2015 by the parliament is aimed to foster varieties of multilateral advantages for the Indian economy and basically the Insurance sector. This Bill is a manifestation of a logical step to re-energize the Insurance sector as well as the economy of India. It will lay its positive effects from the view of social, institutional and international impacts.

Out of its various impacts one of the very vital aspects is that the hike in the FDI limit in Indian Insurance Company up to 49% from present 26%, will bring major economic reforms and economy changes in country. It will cause its effect on other sectors as well and will lead to good impacts overall. Keeping aside its meager pros & cons, remarkable advantages of this new Bill can be summarized as below.

One of the vital aspects of the new Bill is the technology of facilitating the issuance of the electronic policies. It will help in improving the claims payout. This electronic issuance and dematerializing of policies will cause data sharing between companies very easier and reliable, and it will ultimately help in fast detection of any cases of fraud. According to the prevailing provision, the Insurance companies take a longer time for verifying the payable claims and the due diligence of the insurance companies for scrutinizing the payable claims, which ultimately leads to delay in processing and delay in paying the claims of the customers. So after this new technology of issuing the electronic policies, the companies will be able to share data, causing the instances of committing fraud in the motor insurance etc, and consequently the delays in the payments; be reduced drastically and it will ultimately boost up the growth of the business of the Insurance companies and also boost up the confidence of the people towards the insurance.

In order to prevent the miss-selling, the new bill prohibits paying any agent commission, in excess of what is prescribed in the regulation. Inducement by the insurance companies to the agents like giving rewards, gifts, foreign trips, etc are curtailed which is in the interest of the unconscious investors. By the effect of that the chances of giving unsuited policies to the customers by the agents will reduce.

Having been the second largest populated country with population more than 125 Crores, India has the requirement of Insurance, more than any other country in the world. It indicates towards the scope of more Insurance Inputs in the country. This sector will not only see the increase of FDI up to 49% from 26% but also help the domestic players sell stakes to foreign partners. The industry which was suffering from capital crunch for quite some time will now find some boon by this move.

- a) One benefit from this increased FDI up to 49% will be that the Insurance companies will get the level playing field. It is pertinent to note that 70% of the life insurance market in India is controlled by the State owned Life Corporation of India.
- b) The extra capital inflow of 49% FDI can be used to fund the infrastructure need of the country which is very necessary and one of the vital parts of the development. This capital inflow is expected to go from 10,000 crore to 40,000 crores in the near coming future. This considerable hike in the FDI limit will bring remarkable relief to these firms and industries, as the Private sector Insurance companies have been suffering from reasonable losses.
- c) Among the other advantages of this new amendment Bill are the new Job opportunities. This new Bill is definitely going to create new Joint ventures and new entrants are also expected to join the sector. It will promote customer centric product and service innovations with an enhancement to technology, deepening market penetration besides improving distribution efficiencies. The new Bill will help in expanding the scope of insurance intermediaries to include insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrators, surveyors and loss assessors and such other entities, as may be notified by the authority from time to time.
- d) This Bill will support the development and enhancement of the Health Insurance industry with an infusion of Capital and the ability to



operate as a separate line of business. This Bill is also favorable to the Pension sector. The pension fund regulatory development bill (PFRDA) links the FDI limit in the pension sector to the Insurance sector. If the pension Bill is passed in the Parliament then the foreign direct investment in the pension funds can also rise to 49%. So this measure is going to help beyond life Insurance to cover other aspects like health and Crop besides providing more funds for development of infrastructure.

- e) The common men will become the good beneficiary from this new Insurance amendment Bill. By the effect of this there is more probability of increasing more employees/agents in the Insurance sector and it can lead to the good competitive environment as well as the good competitive quotes, improved services and ultimately it will also lead to somewhat better Claim settlement ratio. So all these will go to benefit the common men. Further, more and more interests and involvement of the people in the Insurance sector will make an attractive market in the insurance sector due to which a continuous increase in the FDI in the coming times can be definitely anticipated. IRDA will also get more power in order to impose penalty over the wrong doers. Further, properties in India can now be insured with a foreign insurer with prior permission of IRDAI, whereas the same could be earlier done after the permission of the Central Government.

Grievance Redressal authority: The bill also introduces the provision for establishing an independent grievance redressal authority which will have the powers of civil court and the authorities will be consisted of judicial and technical members. So this provision of 'grievance redressal authority' will be a much better alternative solution than the existing scheme for the purpose i.e. of 'Ombudsman', because the ombudsman was an insufficient solution to tackle the large number of complaints against the companies.

and every aspects, this new Insurance Bill amendment is also said to witness its repercussions. For example, it is a hot money and may put Inversion as well as economy at risk, mainly to Institutional Investors which is permitted in this new Insurance Bill. It is also pertinent to note that the employees of the LIC (life insurance Corporation) have shown their protest against the new Bill and they are unsecure about their future. While commenting on this issue, Minister of State for Finance, Mr. Jayant Sinha, rightly stated that Premium will not flow out of the country but will remain within the country and the interests of Policy holders will be protected by the IRDA.

CONCLUSION

As we know that every coin has its two sides and pros and cons are there with everything



DETERMINATION OF NONOBVIOUSNESS: AN INDIAN APPROACH

Ms. Priyanka Rastogi

“... and in every age there come forth things that are new and have no foretelling, for they do not proceed from the past.”¹

Non-obviousness of the invention is one of the three desiderata for the grant of Patent, others being novelty and industrial application. Simply put nonobvious as a patent term means that the invention shall not be obvious or apparent to a person ordinary skilled in the field relating to the invention. Basically the invention shall contain an inventive step over the prior art. It should not be mere a workshop improvement or general re-arrangement of components / features of the invention.

This test of non-obviousness is to be made with the perspective of a person having ordinary skill in the art i.e. having average skills, and not an expert in that technology. The test is very essential and subjective too, while deciding the inventive step the adjudicator needs to assess the “inventive step” on the scale and parameters of a person ordinarily skilled in that art.

The Delhi High Court in the matter titled **Asian Electronics Ltd. Vs. Havells India Limited**² looked into the basic criteria of patentability, particularly “non-obviousness” or “Inventive-step” in a Patent. In this article the focus will be on the concept of non-obviousness in the patent laws and the above mentioned case.

The US Supreme Court has discussed the aspects involved in the non-obviousness analysis in the landmark case **Graham et al. v. John Deere Co. of 2 Kansas City et al**³. Three factors were laid down as tests for which should be looked into while determining obviousness, these are commonly known as Graham factors:

- 1) the scope and content of the prior art;
- 2) the differences between the prior art and the claims at issue; and

- 3) the level of ordinary skill in the pertinent art.

Apart from the above factors the US Apex Court also laid down secondary considerations as:

1. commercial success of the invention,
2. long felt but unsolved need, and,
3. failures of others could serve as evidence of nonobviousness.

The Supreme Court of India in **M/s. Bishwanath Prasad Radhey Shyam Appellant v. M/s. Hindustan Metal Industries**⁴, laid down the importance of assessing inventive step, as below-

“It is important that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an ‘inventive step’. To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working interrelation they produce a new process or improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent.”

Facts of the case Asian Electronics Ltd. Vs. Havells India Limited:

Asian Electronics (hereinafter plaintiff) being owner of patent no. 193488 for “Conversion Kit to change the fluorescent lighting units inductive operation to electronic operation” filed a suit for permanent injunction and damages for infringement against Havells Limited (hereinafter defendant). The plaintiff alleges that the defendant is using all the novel and important features of their invention. The comparison between defendant’s product and plaintiff’s patented invention was done as below:

¹ J.R.R. Tolkien, “The Simarillion”, Ainulindale.

² I.A. No. 8205/2009 in CS(OS) 1168/2009

³ 383 U.S. 1 (1966)

⁴ AIR 1982 SC 1444



S.No.	Claim 1 of patent no. 193488	Product of Defendant
1	Conversion Kit	YES
2	Adaptors on either side of fluorescent lamp	Yes
3	Wiring assembly	YES
4	Ballast	Present, mounted in wiring assembly

The plaintiff submitted that the novel features of the invention are the two adaptors based on 2 sides which assist in the process of conversion to electronic current from induction and thus minimize flickering which is normally associated with fluorescent lights. The defendant alleged that the plaintiff's invention is not entitled to a patent on as it is based on a prior art. It was alleged that the patent is based on the US Patent 4246629 which discloses all the essential or important elements of the plaintiff's patent. Defendant further submitted that the plaintiff's patent is just workshop improvement or trade variant of the US Patent; it lacks the inventive step essential for the grant of Patent under the Act. Sections of the Patent Act are reproduced as cited by the defendant.

SECTION 3. WHAT ARE NOT INVENTIONS:-

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

(f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;

The Court upon analysis of plaintiff's patent stated that plaintiff is not claiming that any of the components are inventions, or involve a new or inventive step; the patent is claimed for the kit, which incorporates the two sleeve-like ends, one or both of which contain the ballast. In other words the claim is only in respect of the design or this particular assembly.

The Court was of view that the plaintiff's patent does not disclose any new product or any significant improvement. It was held that the plaintiff's patent is mere a workshop improvement over the US Patent; the comparison of the US Patent with the plaintiff's is as below:

Embodiment	US Patent	Plaintiffs Patent
1. Fluorescent Tube	Present	Present
2. A pair of sleeve like adaptors on each side of lamp	Present	Present
3. Wiring Assembly	Present	Present
4. Conversion kit	Present	Present

Based on above the Court was of prima facie view that the patent cannot sustain as being obvious, and is also hit by the section 3(d) and 3(f) of the Patents Act, 1970.

The High Court took reliance on the decision reported as **British Celanese Ltd v. Courtaulds Ltd⁵**, it was held, of patents involving combinations, that:

It is accepted as sound law that a mere placing side by side of old integers so that each performs its own proper function independently of any of the others is not a patentable combination, but that where the old integers when placed together have some working interrelation producing a new or improved result then there is patentable subject matter in the idea of the working inter relation brought about by the collocation of the integers.

The High Court observed that the US patent clearly mentions about two ends and electronic ballast as claimed by the plaintiff in its patent. Further the function of the end product is the same, i.e. a fluorescent lamp. The plaintiff' also failed to explain any significant improvement in function or efficiency, or any objective material in the new product, it has to be concluded that the patent is hit, prima facie, by anticipation. In view of the above findings and precedents the Court dismissed the application for grant of injunction stating that patent is anticipated by prior art and the plaintiff has failed to establish balance of convenience in his favour.

5 1935 (52) RPC 171



CONCLUSION

India has been witnessing an increase in patent enforcement activities. Going forward, one can anticipate much more refined tests for determining the presence of inventive step in inventions. It is recommended that patent practitioner keep themselves educated about this fascinating topic of “inventive step/obviousness” and provide informed opinions.⁶ This test of non-obviousness is to be made with the perspective of a person having ordinary skill in the art i.e. having average skills, and not an expert in that technology. The test is very essential and subjective too, while deciding the inventive step the adjudicator needs to assess the “inventive step” on the scale and parameters of a person ordinarily skilled in that art.

⁶ <http://www.invtree.com/blogs/determination-obviousnessinventive-step-indian-approach>



DETERMINABLE CONTRACTS

Priya Dhankhar¹ and Harsimran Singh

The word “determinable” used in clause (c) to Sub-section (1) of Section 14 of the Specific Relief Act, 1963 (the “Act”) means that which can be put an end to. Determination is putting of a thing to an end... Meaning thereby, all revocable deeds and voidable contracts may fall within “determinable” contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant.¹

Determinable Contracts derive their existence from the termination clause envisaged therein. There are essentially three types of termination clauses, viz. (i) termination for cause (breach or upon a contingent event), (ii) termination for convenience and (iii) termination upon expiry of the term. While a termination clause may be drafted in several ways, broadly speaking, termination could occur “without cause” (that is, without assigning any reason) at the option of either party and/or the contract may also provide for the right of a non-defaulting party to terminate the contract on the occurrence of certain specified events.

The law being all about equity and fair play provides certain remedies in case a party to the contract fails to discharge its contractual obligations. These remedies include- specific performance of the contract, damages for breach of contract, injunction to a party to not commit a breach of the contract and Quantum Meruit (what one has earned). Under Indian law, the principles governing the grant of specific performance and injunctions are found under the Act.

Specific performance is an age old remedy for breach of contract. A contract is an agreement between parties consisting of a bundle of mutual rights and obligations that the law will enforce. The commonest reliefs for breach of contract are specific performance, where the contract is specifically enforceable at law or in equity or damages as compensation.

Though the Act defines and amends the law relating to certain kinds of specific reliefs, it appears to be exhaustive in dealing with specific performance of contracts. At any rate, specific performance of a contract cannot be had if the Act prohibits it. It is against such legal backdrop that it must be assessed whether the natural right of a contracting party to obtain what has been promised to him under the contract is interdicted by the provisions of the statute. As to whether or not specific performance is to be granted and as to whether or not any interlocutory order in aid of the ultimate relief of specific performance may be issued will depend, inter alia, on the nature of the agreement, the conduct of the parties, the surrounding circumstances and other relevant considerations.

Further, Section 10 of the Act enumerates the kinds of cases in which the specific performance of any contract, in the discretion of the court, can be enforced. Thus, even though Section 10 enumerates the cases in which court may specifically enforce the contract, yet it makes it clear that the relief of specific performance of a contract is a discretionary relief. Thus, before granting the relief, the court has to make out the facts and circumstances of the case, conduct of the parties, etc. Therefore, in certain cases, even though the contract in question falls in the category of contracts specifically enforceable, the court may refuse the relief on the basis of facts and circumstances of the case, conduct of parties, etc. Where there is a case that falls within the category i.e. clause (c) of subsection (1) of Section 14, the court cannot by exercising its discretion, order specific performance of court. A combined reading of Sections 10 and 14 (1) (c), shows there is more scope of discretion with the court in refusing specific enforcement rather than allowing it.

Moreover, Section 42 of the Act provides that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises of the affirmative agreement to do a certain act, coupled with a negative agreement express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

1. *Law Intern (4th Year, New Law College, Bharati Vidyapeeth Deemed University)*

2. *Rajasthan Breweries Ltd. vs. Stroh Brewery Company (AIR 2000 Delhi 452)*



Perusal of the above referred sections reflect that a contract cannot be specifically enforced which in its nature is determinable and injunctions are not to be granted on breach of contract, non-performance of which could not be specifically enforced and/or when a party has an equally efficacious remedy available to him. The general scheme of law in relation to determinable contracts is that in a contract which could be compensated for damages in terms of money cannot be enforced. Further, in a contract where no specific performance can be granted the grant of declaration and injunction as prayed for is also not sustainable.

Under a plethora of judgments pronounced by various courts while deliberating definition of determinable, it also included contracts that allowed the defendant to terminate the contract without notice and/or without assigning any reason.

The law with regards to specific performance of determinable contracts was first laid down by the Supreme Court of India in the case of *Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.*² wherein the Court held that a distributorship agreement which contained a clause that entitled either party to terminate the agreement with 30 days prior notice and without assigning any reason was "determinable" in nature and hence, could not be specifically enforced. This view has further been reaffirmed by the Supreme Court in 2001, when it observed an agreement for construction unilaterally terminable before delivery of possession to be "determinable" in nature, in the case of *Her Highness Maharani Shantidevi P. Gaikwad v. Savijbhai Haribhai Patel*³.

The Delhi High Court in its various judgments broadened the definition of "determinable" so much so that an observation of the judgments suggest that the mere existence of a termination clause might lead to the contract being held "determinable" and hence, not specifically enforceable. The Delhi High Court in a case titled

3. (1991)1SCC533
4. AIR2001SC1462

*Rajasthan Breweries v. Stroh Brewery Co.*⁴ while deciding the dispute arising out of a technical know-how agreement between the parties, held that even in the absence of a specific clause enabling either party to terminate the agreement, in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, it could be terminated even without assigning any reason and by serving a reasonable notice and was hence, determinable and not eligible for an injunction/specific performance under the Act.

Further, the High Court of Orissa in its judgment in *Orissa Manganese and Minerals Pvt. Ltd. v. Adhunik Steel Limited*⁵ observed that the agreement in question in which the only clause in regard to termination stated that either party had to before termination of contract serve notice of 90 days to the other party to remedy the breach as not determinable and hence, specifically enforceable. The Court said, occasion of such nature never arose and hence the contract was not determinable unless the condition therein was fulfilled and thence section 14 (1) (c) was not attracted. Although, the case was appealed in the Supreme Court of India, the Court did not particularly deal with the determinability of the agreement in question and refrained from granting any injunction.

In a matter titled *Atlas Interactive (India) Pvt. Ltd. v. Bharat Sanchar Nigam Limited*⁶, the court observed that the contract may be determinable in nature but the instrumentality of the State has to act in a fair and just manner and not arbitrarily.

In a matter titled *Rattan Lal (since deceased) v. S.N. Bhalla and Anr.*⁷ the hon'ble High Court of Delhi observed an agreement to sale with a clause that the same shall be terminated if the requisite approvals are not received within six months, to be determinable and hence, not specifically

5. AIR2000Delhi450
6. AIR2005Ori113
7. 2005 (40) RAJ 585
8. AIR2012SC3094



enforceable under the Act. However, the Supreme Court in its decision of the appeal against Delhi High Court's decision observed that the relevant clause of the agreement in question was never meant to provide the obligated party with an escape route if they themselves failed to discharge their responsibility and that in the absence of any material on record to show that they had made positive efforts for procuring the necessary sale permission and clearance certificates, they were not entitled to determine the Agreement and hence the agreement was held to be wrongly terminated. But due to the step hike in the real estate prices the Court instead of decreeing the suit for specific performance decreed the suit for costs to the Appellant.

Further the High Court of Orissa in *Indian Oil Corporation Ltd. v. Freedom Filing Station*⁸ opined that a dealership agreement entered into between the parties, stating that the agreement shall remain in force for five years and continue thereafter for successive periods of one year each until determined by either party by giving 3 months' notice in writing to the other of its intention to terminate the agreement and further, as per Clause 56(1) the Petitioner shall be at liberty to terminate the agreement if the dealer deliberately contaminates or tamper with the quality of any of the Corporation's product as such is determinable in nature. Therefore, the Court set aside the orders of the trial court as well as the appellate court that granted injunctions with respect to the agreement.

In another case (*Ministry of Road Transport and Highway, Government of India v. DSC Ventures Pvt. Ltd.*⁹), the High Court of Delhi, whilst placing reliance upon the decision of the Supreme Court in *Indian Oil* case (supra.), observed that an agreement that provides for termination by serving 60 days of notice to rectify the default in any event of default falls within the ambit of "determinable contracts". Notably, this view of the

Delhi High Court is contrary to that of the High Court of Orissa in *Orissa Manganese* case (supra.).

Based on the above discussion, it is to be noted that if any contract entitles either party to terminate a contract for convenience subject to notice period then as per the provisions of the Act and precedents, such a contract may qualify as "determinable"; hence, not capable of being specifically enforced. Meaning thereby, in such cases specific performance may not be 'the' remedy, but a claim for compensation could be resorted to. Further, it should be borne in mind that even when contract is determined prior to its stipulated term, the performing (non-terminating) party should get paid in proportion to the obligations fulfilled by such party

Giving due regard to the viewpoint of various courts it is pertinent that due consideration and deliberation is given while drafting the termination provisions of any contract. In other words, the parties to a contract must not demote or give less importance to the termination provisions of the contract, rather deliberate on all and any possible outcomes upon termination of the contract. Lastly, it is critical and duly hoped, given the large amount of joint venture and IPR related agreements executed in a globalized and growing economy that is India that due attention is paid to this by the judiciary so that the net outcome for the contracting parties is fair.

9. 2011(1)ILR-CUT93

10. 2015(2)ARBLR142(Delhi)



POWERS VESTED IN THE CONTROLLER UNDER THE PATENTS SYSTEM

Aayush Sharma

The Controller of Patents is the principal officer responsible for administering the patent system in India. The Controller is the overall supervisor of the four Indian Patent Offices in Chennai, Delhi, Mumbai and Kolkata.

The powers of the Controller includes the power: to receive, acknowledge, accept, publish and examine a patent application, claim, description and specification, to make search and investigate for anticipation by previous publication and by prior claim to consider the report of the examiners; to refuse application or require amended application, in certain cases to make orders respecting division of application; to make orders respecting dating of applications; to make orders regarding substitution of applicants; to issue written permit to a person resident in India to make an application outside India for the grant of a patent for an invention; to grant patent to name a few.

1.1 THE GENERAL POWERS OF CONTROLLER

The powers of the controller are generally enumerated in *Section 77 of the Patents Act, 1970*. He shall have certain exercising powers of a Civil Court under the CPC, 1908 while trying a civil suit. These include summoning of witnesses and enforcing the attendance of witnesses; Receiving evidence on affidavits; Issuing commissions for the examination of witnesses of documents; Awarding costs; etc.

This also includes power to Review his own decisions on application made within the prescribed time and in the prescribed manner and setting aside an order passed ex-parte on application made within the prescribed time and in the prescribed manner; sub section 2 also makes it clear that orders passed by the Controller shall be executable as a decree of a Civil Court.

Section 78 provides for correction of any clerical error in any patent or in any specification or other document filed in pursuance of such application or in any application for a patent or any clerical error in any matter which is entered in the register.

In the case of *Press Metal Corporation Limited v. Noshin Sorabji Pochkanwalla*¹, it was held that the power to correct clerical errors under *Section 78(1)* does not extend to make amendments suo moto. Thus, amendments have to be strictly made only under *Section 57* of the Act.

In the case of *AIA Engineering Ltd. v. Controller of Patents*², it was held that, while purporting to exercise powers under *Section 78* of said Act, there could not be any amendment of application as in that eventuality procedure of *Section 57* read with *Section 59* of said Act must be followed - There appears to be also absence of any power of Controller to make any amendment suo motu - Therefore, impugned order could not be sustained as it suffers from a patent error and improper exercise of jurisdiction by Assistant Controller **and was liable to be set aside.** "While exercising powers under *Section 78* of the *Patents Act*, which permits correction of clerical errors, amendment is not permissible for allowing amendment the procedure of *Section 57* read with *Section 59* of the Act must be followed.»

1.2 DISCRETIONARY POWERS OF THE CONTROLLER

1.2.1 Discretionary power of the controller under *Section 3(d)*

In the case of *Novartis Ag v. Union of India*³, the court held that *Section 3(d)* did not violate *Article 14* of the Constitution of India and was not vague or arbitrary, and did not confer uncontrolled discretion to the Patent Controller. The court rejected Novartis's arguments that *Section 3(d)*, which denies patents to new uses of known substances unless the patentee can show "enhancement of the known efficacy" or "differing significantly in properties with regard to efficacy,"

1. AIR 1983 Bom 144
2. 2007(34)PTC457(Del)
3. MIPR2009(2)345



was ambiguous and unclear. The court emphasized that discretionary power did not necessarily mean that it would be discriminatory. The Patent Controller's discretionary power under Section 3(d) in deciding whether a known substance has enhanced efficacy did not automatically lead to an arbitrary exercise of discretionary power or discrimination against Novartis.

1.2.2 Discretionary power of the controller under Rules 137 & 138

Section 80 deals with how discretionary powers should be exercised by the Controller. It specifically refers to applications of Patents and amendments of Patents. The controller has to give the parties an opportunity of hearing.

Section 81 gives power to the controller to extend time. And no appeal shall lie from the order of the Controller granting extension.

In the case of *Nokia Corporation vs Deputy Controller Of Patents and Designs*⁴, it was held that Courts and statutory authorities were to do substantial justice - Object of Rule 138 was that prescribed time under Rule 20 could be extended by period of one month on showing of sufficient cause - Therefore, it was discretion of Controller **to extend period on facts and circumstances of case - However, it was not correct on part of Deputy Controller to have rejected Application, by treating it to be not maintainable, as having been filed after expiry of prescribed time under Rule 20 of the Patents Rules - Thus, impugned order was quashed and case was remanded back to Deputy Controller to decide Application moved under Rules 137 & 138 in accordance with law. "Authority shall not reject application for condonation of delay if application is filed after prescribed delay."**

In the case of *Nippon Steel Authority v. UOI*⁵, it was held that there is no time limit prescribed for filing application for amendment of priority date, it does not mean that such application can be filed even after patent application ceases to exist in law - Once

application is deemed to have been withdrawn by applicant in terms of Section 11-B (4) of Act, Controller of Patents cannot entertain application for amending any portion of such application - It is not possible to accept submission of petitioner that Controller of Patents is bound to allow amendment at any time, even after deemed withdrawal of such application, and that once such amendment is allowed it would relate back to date of filing of application and thereby revive the application -

It is beyond doubt that Controller of Patents could not have, after deemed withdrawal of Petitioner's patent application, permitted it to amend priority date of such application, Petitioners could not be held to have abandoned their claims for purposes of Section 21 of the Act. As far as the present case is concerned, Petitioner missed deadline for filing RFE, Court finds no error whatsoever in the impugned decisions of Controller of Patents to decline Petitioner's request for amendment of priority date - Writ petition is without merit and it is dismissed.

1.3 Power of the Controller under Section 8(2)

Section 8 (2) gives power to the Controller to ask for any information regarding the 'processing' of the application in a country other than India at any time before the grant of patent. Section 8 (2) of the Act and rule (12) of the Rules provides discretionary power conferred upon the controller and hence an applicant has to make sure that the information is submitted to the satisfaction of the controller. The controller has conferred with the powers to sustain the objection or reject the grant if he is not satisfied with the extent of the information disclosed.

In the case of *Chemtura Corporation vs. Union of India*⁶, the Delhi High Court on the question of submission under section 8 (2) held that the applicant was required to periodically update the controller on the current status of the corresponding foreign application. Mere simply filing of information on the status of the application will not fulfill the obligation under section 8 (2) of the Act. Applicant is required to submit all foreign search reports.

4. 2011(46)PTC70(Mad)

5. 2011(46)PTC122(Del)

6. 2009(41) PTC 260(Del)



In *Tata Chemicals vs. Hindustan Lever*⁷, the petitioner argued that the respondent had not filed the International Preliminary Examination Report (IPER) and hence not full filled the section 8 obligations. The Intellectual Property Appellate Board (IPAB) held that the IPER is related to the processing of an application in country outside India and the word processing is an all encompassing word, it would take within it a series of actions to be taken in order to achieve a particular result. Therefore the respondent is required to file the IPER in order to comply with the requirements of section 8(2).

1.4 The powers of the Controller under Section 17

Under this the Controller has the power for postdating an application which are fettered by the provision of *Section 9(1)* that a complete specification must be filed within 12 months from the date of filing of the application. This issue was considered in the case of *Standipack Pvt. Ltd. Vs. Oswal Trading Co. Ltd*⁸, wherein the judge while considering the provisions of postdating clearly stated in paragraph 8 that "The aforesaid provisions make it crystal clear that postdating of the patent can be done only to the date of filing of the complete specifications". This makes it clear that the date of the provisional specification cannot be postdated.

2. Other Powers

Power of the Controller of Patents includes

- Power to remedy a clerical error committed during prosecution.
- Power to issue compulsory licenses, power to adjourn applications for compulsory licenses, power to strike out any stay proceedings.
- Power to call information from patentees.
- Power to revoke surrendered patents.
- Power of controller to give directions to co-owners of patents.
- Power of controller to refuse or ask for amended applications etc.

CONCLUSION

7. *ORA/18/2010/PT/MUM*

8. *(AIR 2000 Delhi 23, 80 (1999)).*

An amendment was brought in the Patents Act, in the year 2005, the new law states that the Controller of Patents has a series of wide-ranging discretionary powers to determine all kind of criteria like reasonable affordability, reasonable pricing, and reasonable royalty. These powers are not arbitrary and the general powers of the controller are that of a Civil Court under the CPC 1908.



DATA PROTECTION LAWS IN INDIA: THE ROAD AHEAD

Vaibhavi Pandey

With the advent of technology and e-commerce, the problems related to the same are also increasing day by day. India itself has faced a tremendous increase in cyber crimes, data stealing etc. The cyber protection cells have witnessed various instances of data theft recently. India, being the host and the biggest platform of data outsourcing needs an effective and well formulated mechanism for dealing with these crimes. Data Protection laws may be defined as the laws which are enacted for safeguarding and protecting the data present on the internet.

India has witnessed various high profile data theft cases off lately. One of the biggest incidents of data theft was the HSBC case, wherein a former employee of HSBC, the biggest bank of Europe, committed a fraud that affected millions of its customers. This theft not only caused harm to numerous of the Bank's customers but also left a permanent question mark on the year long reputation and Reliability of the Bank.

Unlike the EU, India does not have any separate law which is designed exclusively for the data protection. However, the courts on numeral instances have interpreted "data protection" within the ambits of "Right to Privacy" as implicit in Article 19 and 21 of the Constitution of India. Apart from this, the laws which are presently dealing with the subject of data protection are "The Indian Contracts Act" and "The Information Technology Act". Section 43 A of the Information technology Act explicitly provides that "*Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected*"

Further Section 72 A provides that "*Punishment for disclosure of information in breach of lawful contract. -Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another*

person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both"

It is apparent that both the sections mentioned above are not dealing with data security directly. Prior to 2011 the situation of the laws related to data protection was very vague and ambiguous, as there was no law which dealt directly and explicitly with this issue.

Later in 2011, after the enactment of the European Union's strict and stringent Data Protection Laws, the Government of India also felt the need for the same in our country. Consequently, a new set of rules named the "**Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**" came into picture. These rules have provisions for three groups- Body Incorporates, Information Providers (Data Subjects) and the Government. The key features of the Rules are as follows-

- *Rule 3* mentions the list of things which will be treated as "sensitive personal data "under the Act. It includes passwords, credit or debits card information, medical and biometric records etc.
- *Rule 4* casts a duty upon the Body Corporate to provide a privacy policy for dealing with personal information and sensitive data and it also requires that the policy should be available on the website of the body corporate. The policy shall include all the necessary details for e.g. type of personal data collected, statements of practices, purpose of collection, provisions related to disclosure and security practices etc.
- *Rule 5* states various provisions which govern the collection of information by the Body Corporate. The main clauses are as follows-
 - i. Body Corporate shall not collect sensitive personal data without obtaining consent in writing or by fax or e-mail form the



provider regarding the purpose for which the data is being collected.

- ii. Any personal information or sensitive data shall not be collected unless and until it is for a lawful purpose and the collection is necessary for the fulfillment of that particular purpose.
 - iii. The provider shall be made aware of the facts as to the information collected, its purpose, its recipients and the agencies that are collecting and retaining the information.
 - iv. The information collected shall be used only for the purpose for which it is collected and shall not be retained for a period longer than which is required.
 - v. However, the Body Incorporate shall not be responsible for the authenticity and reliability of any personal data or sensitive information.
 - vi. The provider shall be given an option to opt out of providing such information along with an option to withdraw his consent to the collection at any later stage as well.
 - vii. The Body Corporate shall keep the data secured and it shall designate a grievance redressing body for any discrepancies arising in future.
- Rule 6 requires that the Body Corporate shall seek the consent of the concerned provider before disclosing the sensitive data to a third party, unless such disclosure was agreed by the parties through any contract. However, such information can be shared without any prior consent with government agencies mandated under law or any other third party by an order under the law, who shall be under a duty not to disclose it further.
 - Rule 8 clarifies that a body corporate shall be considered to have complied with reasonable security practices if they have implemented and documented the standards of these

security practices. Rule 8 (2) mentions the name of one such ISO security standard for data protection. However, any person or agency that are following any code of best practice other than that mentioned in rule 8(2) shall get their code duly approved by the Central Government. Body Corporate and agencies who have implemented either ISO standards or any other standard duly approved by the central government shall be considered to have implemented security measures provided that such codes have been audited on a yearly basis by independent auditors approved by the government.

Therefore, we can say that the new laws are stricter and the legislature has made an attempt to tighten its grip over the un-estimated and negligent use of the personal data by the Body Incorporates. It's time for them to review and recheck their privacy policies and make them in accordance with the new standards created by the Rules.

CONCLUSION-

As mentioned above, India is still struggling for enduring an effective and concrete legislation for data protection. A new legislation dealing specifically with the protection of data and information present on the web is the dire need of the day. However, while drafting the laws, the legislature has to be cautious of maintaining a balance between the interests of the common public and tightening its grip on the increasing rate of cyber crimes.



NEWSBYTES

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) BILL, 2014

The Bill was introduced in the Lok Sabha on August 12, 2014 by the Ministry of Women and Child Development. The Bill was referred to the Standing Committee of Human Resource Development on September 22, 2014. The Committee submitted its report on February 25, 2015.

Amended Provisions:-

- The Bill replaces the Juvenile Justice (Care and Protection of Children) Act, 2000. It addresses children in conflict with law and children in need of care and protection.
- The Bill laid down the sanction for juveniles between the ages of 16-18 years to be tried as adults for heinous offences/crimes. Also, any 16-18 year old, who commits a lesser, i.e., serious offence may be tried as an adult only if he is apprehended after the age of 21 years.
- Juvenile Justice Boards (JJB) and Child Welfare Committees (CWC) will be constituted in each district. The JJB will conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. The CWC will determine institutional care for children in need of care and protection.
- Eligibility of adoptive parents and the procedure for adoption have been included in the Bill.
- Penalties for cruelty against a child, offering a narcotic substance to a child, and abduction or selling a child have been prescribed.

THE TRADE OF BIRDS COMES UNDER THE SCANNER OF THE DELHI HIGH COURT.

Time immemorial, fundamental rights have come to the rescue of all living things including animals and birds. The Indian constitution has taken under its wings every harmed soul whose basic humane right has been infringed. The Apex Court in Animal Welfare Board v. A. Nagaraja & Ors as reported in MANU/ SC/ 0426/ 2014

have recognized the fundamental right of every animal to live with dignity and have had also imposed stringent conditions upon the Government and its authorities to stop any form of cruelty upon Animals. In the said case, the apex court held that bulls cannot be used as performing animals either for Jallikattu events or for any Bullock-cart Races in State of Tamil Nadu, Maharashtra or elsewhere in country. It is this backdrop, the principles of fundamental rights are again being reinforced and this time, it is Delhi High Court which has unclipped the wings of caged birds.

Justice Manmohan Singh of the Delhi High court in People for Animals v. Md. Mohazzim as reported in 2015 SCC OnLine Del 9508 have observed that running the trade of birds was in violation to the fundamental rights of the Birds. The court while issuing notice to the alleged respondent owner observed that birds have a fundamental right to live with dignity and they cannot be subjected to any form cruelty by anyone including the alleged owner of the birds. The courts observed that the birds will have to be set free in sky and cannot be caged. This petition was being heard against the trial court order which had allowed the return of birds to the alleged respondent owner despite upon arriving at categorical findings that the respondent was not the owner of the birds since they were not exotic. The birds were released to alleged respondent owner on superdari basis on the ground that respondent had not committed any cruelty on the birds and respondent cannot be denied to the property that he is otherwise entitled to. In response to the said trial court's order, the court observed that birds cannot be caged and they have a fundamental right to fly. The court also observed that these birds were being caged and exported illegally to foreign countries without any care and without being provided with any food and medication. The court took into account the pictures of birds taken from the shop of the respondent wherein the birds were kept in cages. The question as to whether the wings or tails of the birds were clipped or cut could not be answered. The matter has been put for hearing on May, 28, 2015.

GOOGLE LAUNCHES A PATENT MARKET PLACE

Google has announced the launch of an experimental Marketplace that will allow it to purchase patents from businesses and patent holders who are willing to sell



patents. Google believes that its new program of Patent Purchase Promotion will help the company to eradicate the friction in patent market caused by Patent trolls, Lawsuits and other wasted efforts.

Google said that the program so launched will be on an experimental basis and will remain for a short window of time from May 8, 2015 to May 22, 2015. This short duration will lead to a quick buying from Google. The company said that while buying a patent from marketplace a due diligence will be done and the transaction will be closed "in short order" and all the stake holders will be paid by late August this year through ACH bank Transfer.

TATA'S BIG PATENT PLAN

TATA Group headed by Cyrus Mistri, has some big plans to increase its patent base to more than 4000 in the span of coming three years, says the group's first chief technology officer Gopichand Katragadda.

Chairman Cyrus Mistri hired Katragadda from General Electric last year eyeing to boost research and development operations and to craft technology approaches for its diversified business. Katragadda quoted that the group has plans to spend about \$100 billion in doing patent analytics, charting innovations and providing aid to employees with patent filing. He added that there is a need of awareness regarding the patent publication and filing, in order to achieve the same the group has recently concluded a training program on technology road mapping for company CTOs.

The group in the last decade had a 15 fold increase in innovation across its 70 companies since it started the annual competition of ideas called Tata Innovista.

NOVARTIS PATENT APPLICATION DENIED.

The Patent office (PO) Delhi in a recent event refused to grant a patent for an application of Novartis. The Swiss Pharmaceutical company applied patent for a modified formulae of its diabetes drug called Vidagliptin which is being marketed under the brand name of Galvus.

Novartis filed an application with the PO in November 2007, The First Examination Report (FER) was issued in end-May 2012, with objections against some of the claims made by the company, for which the company responded in May 2013. The examiner was not satisfied

with the response filed by the company and raised some more objection after re-examination. On request of company an official hearing was held in May 2014, Rajesh Dixit assistant controller of Patents and design, Delhi said in his order that the claims failed to meet the requirements under section 2(1)(j) of patent law, which says an invention means a new product or process involving an inventive step and capable of industrial application. The company also failed to meet the requirements of Section 3(d) and 3(e) of the Act, he said. So, a grant of patent was refused.

THE ENACTMENT OF THE FINANCE BILL 2015 AS FINANCE ACT 2015

The Finance Bill 2015 has finally received the assent of the President on May 14th 2015 and has been enacted as the Finance Act 2015. However Section 2 to 81 of the Act shall be deemed to have come into force from 1st April 2015. The Parliament has made certain amendments to the original version of the Finance Bill, 2015 laid in Parliament on February 28, 2015 like widening the scope of exemptions from MAT to all the foreign companies from the earlier proposal to FPIs only; modifying the disclosure requirement in case of assets held outside India etc.

“Our Representatives at INTA”.





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