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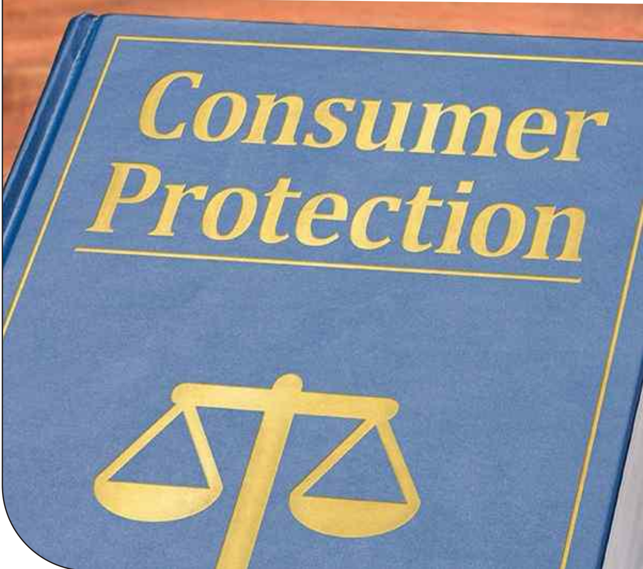

EDITORIAL

Manoj K. Singh
Founding Partner

Dear friends

We are pleased to present this December issue of *Indian Legal Impetus* newsletter providing insight to varied topics and sincerely hope that you enjoy reading this edition.

First up is a write-up on the being an extensive & exhaustive law on resolution of financial firms and provides for *deposit insurance* to the persons holding accounts in such institutions; apart from providing a specialized resolution to deal with bankruptcy situations in banks, insurance companies and financial institutions.

Next is a critical appraisal qua interpretation of the phrase "public policy" under section 34 of the Arbitration and Conciliation Act, 1996. This much talked about topic discussed herein on the basis of not only landmark judgments but also recent trends set by courts while handling this key issue.

Further, we discuss scope of *waiver* of mandatory 'cooling off' period in cases of divorce by mutual consent of the parties described under section 13B(2) of the Hindu Marriage Act, 1955 on the basis of key precedents on the issue which applied on case-to-case basis.

Under a concept note, we discuss the genesis and current regime of *International Worker*(s) as covered under the Employees' Provident Fund and Miscellaneous Provisions Act 1952. This is a topic of relevance not only for the employers deploying workforce in India but also vice versa.

As *Shayara Bano v. UOI* became locus classicus on the subject of talaq or triple talaq specifically, we delve upon the judgment to further explore, examine and understand the concept as it stood, its validity after the pronouncement of the judgment and its culmination into the Muslim Women (Protection of Rights on Marriage) Bill, 2017 (Triple Talaq Bill).

Going further, we study correlation between the amended Arbitration & Conciliation Act, 1996 and the Consumer Protection Act, 1986 and while doing so we interpret sections 8 & 37 of the arbitration law in light of section 23 of the later one.

From the pharma regime, we discuss scope, salient features and applicability of Essential Commodities (Control Of Unethical Practices In Marketing Of Drugs) Order, 2017 and examine need for governing the relationship between pharmaceutical companies and medical practitioners has been felt ever since the exponential growth of the pharmaceutical industry. In addition, we discuss the recent amendments made to the Drugs & Cosmetics Rules 1945 brought in by the Drugs and Cosmetics (Tenth Amendment) Rules, 2017 and the key issues arising therefrom.

In the IPR section, we deliberate upon various aspects of the Biological Diversity Act, 2002 vis-à-vis its need & relevance in order to meet the obligations under the Biodiversity Convention.

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

Thank you.

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Contents

1. THE FINANCIAL RESOLUTION AND DEPOSIT INSURANCE BILL, 2017 — 04
2. INTERPRETATION OF "PUBLIC POLICY" U/S 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996 — 08
3. WAIVER OF COOLING PERIOD UNDER SEC 13B (2) OF HINDU MARRIAGE ACT, 1955 — 10
4. INTERNATIONAL WORKER – A CONCEPT NOTE — 12
5. TRIPLE TALAQ, JUDGMENT OF HON'BLE SUPREME COURT AND THE MOST ANTICIPATED TRIPLE TALAQ BILL — 18
6. INTERPRETATION OF SECTION 8 AND 37 OF THE AMENDED ARBITRATION AND CONCILIATION ACT, 1996 VIS-À-VIS CONSUMER PROTECTION ACT, 1986 — 21
7. ESSENTIAL COMMODITIES (CONTROL OF UNETHICAL PRACTICES IN MARKETING OF DRUGS) ORDER, 2017 – AN OVERVIEW — 23
8. SARFAESI & ARBITRATION — 25
9. NOTICE UNDER SECTION 21 IS MANDATORY BEFORE REFERRING THE DISPUTES TO ARBITRATION — 27
10. DRUGS AND COSMETICS (TENTH AMENDMENT) RULES, 2017 — 29
11. INDIA'S TAKE ON CONSERVATION OF BIOLOGICAL DIVERSITY — 31

THE FINANCIAL RESOLUTION AND DEPOSIT INSURANCE BILL, 2017

SIDDHANT MAKEN

SALIENT FEATURES

THE ACT:

- Comprehensive law on Resolution of Financial Firms and providing Deposit Insurance to the persons holding accounts in such institutions. It provides a specialized resolution to deal with bankruptcy situations in banks, insurance companies and financial institutions.
- The implementation of this Act shall repeal the Deposit Insurance and Credit Guarantee Corporation Act, 1961 ("DICGC Act, 1961"), the current law governing the bankruptcy in banks and financial institutions and providing for insurance on deposits.
- The Financial Resolution and Deposit Insurance Bill, 2017 ("Act") provides for:

SETTING UP OF THE RESOLUTION CORPORATION:

The Corporation shall include various members nominated by the Central Government and various banking and insurance companies. The corporation shall have variety of powers such as investigation, inspection, resolution, liquidation, search and seizure, etc. All such powers have certain restrictions and can come into play only on achievement of a particular classification by the covered service provider. The head office of the corporation shall be Mumbai.

REGISTRATION UNDER THE ACT:

All existing service providers, service providers licensed by the appropriate regulator[1], , specified service providers[2], banking institutions registered under the DICGC Act, 1961 and all new banking institution will be registered. The Act also empowers the Corporation, in consultation with the appropriate regulator, to withdraw the registration of certain service providers.

1 *List of the Appropriate Regulator as under the First Schedule of the Act.*

2 *List of Specified Service Provider as under the Second Schedule of the Act.*

FUNDS OF THE CORPORATION:

The Corporation shall maintain three types of funds, namely:

Corporate Insurance Fund – Providing deposit insurance to service providers;

Corporation Resolution Fund – Meeting expenses incurred during resolution;

Corporation General Fund – For functions apart from the ones above.

The funds shall be given by the Central Government to the Corporation and even the service providers under the Act shall provide the Corporation with the fees for resolution, administration expenses etc. as carried out by the Corporation.

LIABILITY OF CORPORATION TOWARDS INSURED DEPOSITORS:

The Corporation shall, in consultation with the appropriate regulator, specify the amount payable by the Corporation to one depositor. Such payments shall be made out of the Corporation Insurance Fund to the service provider for providing the depositors with the deposit insurance amount when under liquidation.

After the Corporation has liquidated the service provider, the payments made out of the Insurance Fund of the Corporation will be paid back in priority over all the other claims. Utilization of any funds from the Corporation's Insurance Fund shall be reported to the Central Government within ninety days of such utilization.

SYSTEMATICALLY IMPORTANT FINANCIAL INSTITUTIONS ("SIFI")

The Central Government, in consultation with the appropriate regulator, shall prescribe various criteria where a financial service provider shall be designated as a SIFI. The features that shall be taken into

consideration for such a designation shall include size, complexity, volume of transactions and other related matters as may be prescribed by the Central Government.

RESOLUTION PROCEDURE

- The Act has introduced various stages of risk to viability according to which the resolution procedure with the financial institution can be initiated. The different stages of risk as defined under the Act are:

    1. **Low** – Where the probability of failure of a service provider is below the acceptable probability of failure;
    2. **Moderate** – Where the probability of failure of a service provider is below or equal to the acceptable probability of failure;
    3. **Material** – Where the probability of failure of a service provider is marginally above the acceptable probability of failure;
    4. **Imminent** – Where the probability of failure of a service provider is substantially above the acceptable probability of failure;
    5. **Critical** – Where the probability of failure of a service provider is marginally above the acceptable probability of failure and is on the verge of failing to meet the obligations towards the customers.

SUBMISSION OF PLANS:

Where the service provider is at the stage of material or imminent risk, it shall submit a restoration plan to the appropriate regulator and a resolution plan to the Corporation stating its assets and liabilities, identification of functions, steps and procedure to be adopted to resolve the financial stability, etc., the time limit for the submission of such plans basis the classification is 90 days. The resolution plans so submitted shall be revised annually; and the appropriate regulator and the Corporation shall be duly notified about the same within 7 days of such revision.

DETERMINATION AND CONSEQUENCES OF THE STAGES:

Material Risk – The appropriate regulator, if so of the opinion, will declare a service provider to be of material risk. Upon such classification, the service provider will need to submit a resolution plan to the Corporation and restoration plan to the appropriate regulator, while the appropriate regulator will conduct additional investigations for monitoring the situation.

Imminent Risk – The appropriate regulator and the Corporation, after various investigations into the service provider, shall classify the service provider to be at Imminent risk. The reasons for such classification can be non-submission of plans or failed implementation of the same by the service provider. At this stage the Corporation shall impose various restrictions onto the service provider so as to resolve the current condition.

Critical Risk – The appropriate regulator and Corporation, after various investigations into the service provider, classify (if the situation qualifies) the service provider as Critical Risk (such classification to be in writing). After such classification, the Corporation will be appointed as a receiver and the commencement or continuance of all legal actions against the service provider shall be stayed for a period of time as specified by the Corporation, or until conclusion of the resolution or until the date of the order appointing the Corporation as the liquidator. The appropriate regulator may either withdraw or modify licenses granted to the service provider and publish the same, also the benefit under deposit insurance to the depositors shall stand abated.

CORPORATION'S POWER OF TERMINATION OF RIGHTS:

The Corporation has the power to put temporary stay on the exercise of termination rights of any party to a contract with the service provider, if such termination is exercisable solely on entry of the service provider under resolution. The stay may not exceed two business days and should not affect the termination rights of a counter party against a service provider under resolution.

METHODS OF RESOLUTIONS:

1. Transferring whole or part of the assets and liabilities to another person;

2. Bridge Service Provider – The provider which takes control of the service provider and handles its working until the latter is finally sold;

3. Bail-in – The Corporation may in consultation with the appropriate regulator, bail-in a service provider to absorb the losses incurred or reasonably expected to be incurred by the service provider and to provide capital so as to enable it to carry on business for a reasonable period and maintain market confidence.

4. Merger or amalgamation;

5. Acquisition;

6. Liquidation.

TIME LIMIT ON RESOLUTIONS:

The process of resolution under the Act has to be completed not later than one year from the date on which the service provider is classified to be at critical risk to viability. Though, such time can be extended by an order of the Corporation for up to an additional one year.

ADMINISTRATION

- The administrator shall be appointed once the specified service provider is at the stage of critical risk to viability. The Corporation on being appointed as a receiver shall be vested with all the powers of the management and shall carry out all necessary actions as specified by the Central Government, whereas during this period when the Corporation is the receiver of the specified service provider, no additional directors shall be appointed by the shareholders, no resolution passed at any meeting of the shareholder shall be given effect to, unless approved by the Corporation.

- The receiver shall perform all other necessary functions like taking over of assets, removing managerial persons from the office (persons aggrieved from the same can apply to the NCLT within 30 days), appointing additional directors to give effect to receivership, supersede the existing board of directors of the company (limit for such supersession is 2 years). The Corporation will also constitute a committee of persons with experiences in law, banking, finance and accountancy; all the salaries of such committee shall be made by the Corporation and paid by the specified service provider.

LIQUIDATION

- Where the Corporation is of the opinion that liquidation is well suited for the service provider, it has to make an application to the NCLT with relevant documents for obtaining orders to liquidate (time limit for NCLT to pass orders on application is 14 days). The order by the NCLT may also include stay on commencement or continuance on all legal actions till liquidation is completed.

- Corporation shall be appointed as the liquidator.

- No legal proceeding shall be instituted by or against the service provider before any court or tribunal except the NCLT, after the order for liquidation has been passed.

- The Liquidator shall form an estate out of the assets of the service provider, though the third-party assets shall be excluded.

- **Secured Creditors in liquidation** – The Act provides for two options to the secured creditors -either to relinquish its security interest to the liquidation estate and to be paid from the proceeds or to realize its security interest on its own.

- It allows the secured creditor to realize and enforce its security interest in accordance with any law prevalent and applicable to the secured creditors apart from the Act as well. For realizing the same outside the purview of the Act, the secured creditor shall have to make an application to the NCLT for facilitating the same.

- The Act also provides for the order for distribution of proceeds from the sale of assets, that is:

1. Sums paid by the Corporation for Deposit

Insurance

2. Costs incurred by Corporation for resolution and liquidation

3. Workman dues and debts owed to a secured creditor to rank equally

4. Wages to employees other than workmen

5. Uninsured depositors

6. Unsecured creditors

7. Central and State Government

8. Other remaining debts

The Act also provides for a safeguard to such order of payments to be made, wherein it specifically mentions that if under any contract between such persons to whom the payment is to be made, disrupts the order of priority in payments, as mentioned above, shall be disregarded by the liquidator and the payments to be made in the order as mentioned in the Act.

- There are certain provisions of the Insolvency and Bankruptcy Code, 2016 which are mentioned in this Act as well, such as:

  1. Undervalued Transactions – Where it comes to the knowledge of the liquidator that the specified service provider has been involved with an undervalued transaction within the period of one year preceding the liquidation commencement date or such transaction was made with a related party within the period of two years preceding the liquidation commencement date, the liquidator shall make such application to the NCLT to declare such transactions as void and reverse the effect of such transactions.

  2. Preferential Transactions – Where it comes to the knowledge of the liquidator that the specified service provider has been involved in a preferential transaction such as transfer of property or interest for the benefit of the creditor or guarantor, etc. and was made with a related party within the period of two years preceding the liquidation commencement date or with a person other than the related party during the period of one year preceding the liquidation commencement date, the liquidator shall make such application to the NCLT for avoidance of preferential transactions.

  3. Extortionate Credit Transactions - Where it comes to the knowledge of the liquidator that the specified service provider has been a party to an extortionate credit transaction involving a financial or operational debt during the period within two years preceding the liquidation commencement date, the liquidator shall make such application to the NCLT for avoidance of such transactions if the terms of such transaction required exorbitant payments to be made by the specified service provider.

FOREIGN RESOLUTION ACTION

- Facilitates reciprocal arrangements with foreign jurisdiction for implementation of provisions of the Act in cases where the estate of the service provider is situated abroad.

- In such cases, the Corporation may make an application to the NCLT for seeking assistance of foreign courts in taking evidence or any action in relation to such assets that may be situated in foreign court's jurisdiction.

- The Corporation also has the power to enter into MOUs with such international organizations which have functions similar to those of the Corporation, though prior approval of the Central Government shall be necessary.

INTERPRETATION OF "PUBLIC POLICY" U/S 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

ADHIP KUMAR RAY

Arbitration is an alternative system of dispute resolution. The system follows the mandate of "minimal court intervention" and Courts can interfere in the arbitral process only under the limited grounds provided under the Arbitration and Conciliation Act, 1996. One such provision, section 34 provides grounds on which an arbitral award can be set aside by the Court. Section 34 (2)(b)(ii) states that a Court may set aside an arbitral award if it finds that the award is in conflict with the public policy of India. Explanation 1 of S. 34(b) states three criteria on which an award could be overturned on the ground of public policy – when the award was induced by fraud, corruption or in violation S. 75 or S. 81; or it is against the fundamental policy of Indian Law; or it is in contrast with the most basic notions of morality and justice. The second and third grounds are vague and are susceptible to being interpreted too widely. Accordingly, a number of Supreme Court judgments had widened the scope of interpretation of public policy. In 2015, section 34 for amended in order to restrict the scope of "Public Policy."

WIDE INTERPRETATION IN ONGC V. SAW PIPES

The Supreme Court, in the case of *Renusagar Power Co. Ltd. v General Electric Co*[3], held that an award against public policy would be an award that was passed in contravention of "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". In 2003, the scope of interpretation of public policy was significantly widened in *ONGC Ltd v Saw Pipes Ltd.*[4] The Court held that in case of an application u/s 34 to set an award aside, the role of the Court was similar to an appellate/revision court, therefore, it had wide powers. Further, the Court also added a new ground – patent illegality - to the grounds enumerated in *Renusagar Power Co. Ltd;* under which the arbitral award could be set aside.

> *"Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, **patently in violation** of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice."*

This opened a floodgate of litigation under S. 34 as every award where there was an alleged error of application statutory provisions could now be challenged.

WIDE INTERPRETATION IN ONGC V. WESTERN GECO

Further expansion of the interpretation of "public policy" was given in the Apex Court Judgment of *ONGC Ltd v Western GECO Ltd.*[5] Here, a three-judge bench of the Supreme Court cited the *Saw Pipes Case,* and noted that the judgment was silent on the meaning of "fundamental policy of Indian Law". The Court went on to interpret "fundamental policy of Indian Law" to comprise of three separate heads – "duty (of the tribunal) to adopt a judicial approach", "adhering to the principles of natural justice (by the tribunal)" and that the decision of the tribunal must not be "perverse or so irrational that no reasonable person would have arrived at the same" – thereby further expanding the scope of "Public Policy", as each of these heads could then be a subject of a challenge. In addition, the Court also held that the award of the arbitral tribunal resulted in a miscarriage of justice, the award could be set aside, or even modified to the extent the offending part was not severable.

Thus, not only did this judgment further leave it open to the Courts to examine arbitral awards based on

3 [1994] AIR 860 (SC)
4 [2003] 5 SCC 705
5 [2015] AIR 363 (SC)

merits, it also stated that under the head of "fundamental policy of India Law" it would be open to Courts to modify the arbitral award as well. This would thus defeat the purpose of arbitration and reduce trust in the arbitral process.

INTERPRETATION OF MORALITY AND JUSTICE IN ASSOCIATE BUILDERS V. DDA

Further, in *Associate Builders v Delhi Development Authority*[6] the Supreme Court also clarified the scope of interpretation of most basic notions of morality and justice. Accordingly, an award could be set aside under the ground of justice when the "award" would be such that it would shock the conscience of the Court. Further, an award against morality was considered to be something that was against the mores of the day that would shock the conscience of the Court.

CHANGES MADE BY THE 2015 AMENDMENT

The Arbitration and Conciliation (Amendment) Act, 2015 made major changes to section 34. The changes were suggested by the 246th Report of the Law Commission of India on Amendments to the Arbitration and Conciliation Act, 1996 of August 2014 and the Supplementary to the 246th Report of the Law Commission of India on Amendments to the Arbitration and Conciliation Act, 1996 of February 2015. These changes were aimed at restricting Courts from interfering with arbitral awards on the ground of "public policy." Accordingly, the amendment added "Explanation 2" to section 34(2) as well as Section 2A. Explanation 2 of section 34(2) states –

> *"For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute."*

Thus, this explanation significantly curtailed the scope of interpretation supplied in *ONGC v Western GECO.* Because of this amendment, Courts would no longer be able to interfere with the award passed by the arbitrator. The explanation makes it especially clear that in no way would a Court be entailed to review the award on merits of the dispute. Similarly, section 2A also curtails the scope of interpretation of "patently illegal" as propounded in *ONGC v Saw Pipes.* Section 2A states –

6 [2015] AIR 620 (SC)

> *"An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiate by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of law or by reappreciation of evidence."*

Thus, Courts can no longer reappraise evidence or set aside awards merely because the Arbitral Tribunal has made errors when dealing with the same. It is interesting to note that the amendment did not make any changes to the interpretation of "justice and morality" as explained in *Associate Builders.*

RECENT TRENDS IN INTERPRETATION OF "PUBLIC POLICY'

Since the amendment, Courts have refrained from giving a wide interpretation to "public policy" or interfering with the merits of the case. In the November2017 Supreme Court Judgment of *Venture Global Engineering LLC and Ors v Tech Mahindra Ltd. and Ors*[7] the Court observed –

> *"The Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the AAC Act and on no other ground. The Court cannot act as an Appellate Court to examine the legality of Award, nor it can examine the merits of claim by entering in factual arena like an Appellate Court."*

A similar view was also taken in the judgment of *Sutlej Construction v. The Union Territory of Chandigarh.*[8]

These judgments show that the recent trend of interpretation of "public policy" has been one where the Courts have refused to examine the arbitral awards on merits, thereby upholding the legislative mandate of "minimal intervention of the Courts in the arbitral process" as reflected by the changes brought by the Arbitration and Conciliation (Amendment) Act, 2015.

7 [2017] 13 SCALE 91 (SC)
8 [2017] 14 SCALE 240 (SC); Judgment dated December 5th, 2017

WAIVER OF COOLING PERIOD UNDER SEC 13B (2) OF HINDU MARRIAGE ACT, 1955

MAHIP SINGH SIKARWAR

INTRODUCTION

In a recent decision of ***Amardeep Singh vs. Harveen Kaur***,[9] the apex court had a chance to interpret the law regarding mandatory 'cooling off' period in cases of divorce by mutual consent of the parties described under sec. 13B(2) of the Hindu Marriage Act, 1955.

In the present case, the parties were living separately for past 8 years and arrived at a settlement for all the disputes between them before filing the petition for divorce. It was sought from them that since the parties have already arrived at settlement, there is no need for them to wait for another six months as required under the section.

In the past, the Supreme Court has given waiver to parties for this 'cooling period' but these cases have been exceptional. The question posed before the court was that whether courts can give relaxation to parties with regard to the 6-month waiting period mentioned under the section without placing reliance on Art. 142 of the Constitution. If the provisions are not mandatory, then there is no need for the courts to apply Art. 142 for waiving off this period.

INTERPLAY BETWEEN ART. 142 AND STATUTORY PROVISIONS OF A LEGISLATION

While arriving at the decision, the court initiated the discussion on the interplay between Art. 142 of the Constitution and the statutory provisions of a legislation. The court cited several decisions of its own court where it was held that Art. 142 cannot be used to subvert or evade the scope of substantive provision of a statute. The power granted under the Article should only be used in certain exceptional circumstances.

The court also examined certain cases where this cooling period was waived because the court felt that the marriage has broken down irretrievably and the waiting period will only cause mental agony to the parties.

In its conclusion, the court held that the correct law has been laid down in ***Manish Goel v. Rohini Goel,***[10] stating that jurisdiction of the Supreme Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion Under Section 13B, as doing so will be passing an order in contravention of a statutory provision. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the Rule of law and not to pass the orders or directions which are contrary to what has been injected by law.

DISCUSSION ON NATURE OF SEC. 13B (2)

In further discussion, the court went on to examine that whether the period mentioned under the section is mandatory or directory for the courts.

It was understood by the court that under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is sacred and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible

9 Amardeep Singh vs. Harveen Kaur (12.09.2017 - SC): MANU/SC/1134/2017

10 MANU/SC/0106/2010: (2010) 4 SCC 393

perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling-off period was to safeguard against a hurried decision if there was otherwise a possibility of differences being reconciled. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option. The period mentioned in Section 13B(2) was not mandatory but directory, it would be open to the Court to exercise its discretion in the facts and circumstances of each case where there was no possibility of parties resuming cohabitation and there were chances of alternative rehabilitation.

COURT'S FINAL DECISION

If the Court dealing with a matter is satisfied that a case is made out to waive the statutory period Under Section 13B (2), it can do so after considering the following:

i) The statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year Under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) All efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 Code of Civil Procedure/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) The parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) The waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be at the discretion of the concerned Court. The Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

INTERNATIONAL WORKER – A CONCEPT NOTE

HARSIMRAN SINGH

With rapid globalization there has been a surge of manpower being transferred / migrating from one country to another. At present there are approximately 232 million migrants around the world, representing 3.1 per cent of the global population. Women make up almost half of the migrants. It is estimated that one in eight migrants are between the age of 15 and 24. Migrant workers contribute to the economies of their host countries, and the remittances they send home, help to boost the economies of their countries of origin. Yet, at the same time migrant workers often enjoy little social protection, face inequalities in the labour market and are vulnerable to exploitation and human trafficking. Skilled migrant workers are less vulnerable to exploitation, but their departure has deprived some developing countries of valuable labour needed for their own economies. ILO standards on migration provide tools for both countries of origin and destination to manage migration flows and ensure adequate protection for this vulnerable category of workers.[11]

India, having a large workforce pool, sees a substantial relocation of human resources to foreign lands for work.. It was noticed that such migratory workforce, working in various countries, is mandatorily required to contribute towards social security funds of the host countries; but these contributions were lost as benefits in case of return to homeland and were also not payable before completion of a minimum qualifying period. Therefore, in order to protect interests of the such migrant workforce, the Government of India (GoI) entered into Social Security Agreements[12] (SSAs) with certain countries; in order to put in place exemption from mandatory social security contribution in the country of deployment/working and also the benefits of contribution made abroad to be received by way of totalization and payable to the workforce even in case of return to India. Likewise, there was also a large contingent of foreign nationals who were working in India but there was ambiguity regarding their contribution to the social security fund here.

Foreign nationals were brought under the purview of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (the "EPF Act") in October 2008. The EPF Act governs social security in India. Originally, the EPF Act was applicable only to Indian workers. The Government of India, in 2008, broadened the scope of the Act, to include within its purview specific categories of Indian employees working outside India and non-Indian employees working for an establishment in India. The social security registration and contribution requirements were also extended to international workers (IW) in India, whether employed by a foreign company or a business domiciled in India. It is to be noted that the requirements apply to both the Employee Provident Fund (EPF) and Employee Pension Scheme (EPS), for both contributions and withdrawals.

Consequently, in order to implement the bilateral SSAs, enabling provisions were inserted in the form of *Para 83* of the Employees' Provident Fund Scheme 1952 (the 'Scheme') and *Para 43-A* of the Employees' Pension Scheme 1995 (the 'Pension Scheme'), which came into effect from October 01, 2008. Hence, the concept of IW came into being. If there is a SSA between two countries, the rules regarding provident fund (PF) of International Worker are determined as per the provisions of the relevant SSA. In respect of those countries with which India has not entered into any SSA, the PF provisions are governed by the EPF Act and the Scheme.

The EPF Act governs employee provident fund contributions for employees in scheduled factories and notified establishments in India whereas the Scheme (framed under the EPF Act) requires provident fund contributions to be made in respect of international workers. Every business establishment in India that employs more than 20 workers must register with the national Social Security system, and make mandatory contributions toward retirement and insurance benefits.

11 http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm

12 SSA is a platform that coordinates the social security schemes of two contradicting nations in order to overcome the barriers and facilitate extension of benefits to beneficiaries. SSAs aim to safeguard the interests (social security) of workers posted in other countries.

As per above two noted provisions of the respective schemes, IW means:

> *(a) an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;*
>
> *(b) an employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the Act applies;*
>
> *Provided that the worker who is a Nepalese national on account of Treaty of Peace and Friendship of 1950 and the worker who is a Bhutanese national on account of India-Bhutan Friendship Treaty of 2007, shall be deemed to be an Indian worker.*

Going by the plain reading of the definition of IW, all international workers in an establishment which comes under the purview of the EPF Act must become members of the Employees' Provident Fund Organization (EPFO); however an International Worker, who is an expatriate and who contributes to a social security programme of his/ her country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on reciprocity basis and enjoys the status of a detached worker for period and terms, as specified in such an agreement is exempted from the purview of the EPF Act. Similarly, an Indian employee who, having been a member of the fund, withdraws the full amount of his or her accumulations or whose pay exceeds Rs15,000 (approximately $233) per month will be excluded from the EPF Act.

SSAS

An SSA, being a reciprocal arrangement provides for equality of treatment and avoidance of double coverage, and generally covers three provisions namely:

(i) *Detachment* - Applies to employees sent on posting to another country, provided they are complying under the social security system of the home country.

(ii) *Totalization of benefits* - The period of service rendered by an employee in a foreign country is counted for determining the "eligibility" for benefits, but the quantum of payment is restricted to the length of service, on pro-rata basis.

(iii) *Portability of Pension* - Provision for payment of pension benefits directly, without any reduction to the beneficiary choosing to reside in the territory of the home country as also to a beneficiary choosing to reside in the territory of a third country.

SSAs being reciprocal arrangements (*similar to double taxation avoidance agreements*), seek to avoid double coverage namely coverage under the social security laws of both home country and host country (where the employee is deputed on work). For e.g. an Indian employee who is posted to other country by his/her Indian employer, under subsisting contract of employment in India, will be required to continue to make social security contributions in India as per the law. In such cases, a certificate of coverage (CoC) or detachment certificate must be obtained by such IW to avoid double coverage and the same will be issued by the worker's home country's social security authority (EPFO here) in accordance with the relevant SSA. It is pertinent to note that the CoC serves as a proof of detachment on the basis of which exemption from social security contributions in the host country can be availed for the period of detachment. Consequently, such a detached employee will be exempted from the obligation to make contributions under the host country's social security schemes for the period stated in the CoC.

In India, the EPFO issued guidelines on provident fund contributions for Indian employees getting deployed on work outside India. Under the said guidelines, where wages of such employees are due and payable or accounted for in the books of the Indian establishment, obligation to make provident fund contributions for eligible employees arises notwithstanding whether an employee is deputed to a country with which India has an SSA. Where India doesn't have an SSA, contributions are required to be fulfilled as per the laws of such host country, in addition to the requirement of providing

provident fund contributions in India. Employers are not required to make provident fund contributions in the case of excluded employees or where there is suspension or cessation of employment.

As on date, Indian government has signed SSAs with 19 countries[13] in order to enable Indian migrant workers to seek exemption from mandatory social security contribution in foreign countries.

IMPORTANT POINTS:

1) Every IW employed with an establishment in India to whom the EPF Act applies, is required to become a member of the EPF unless he/she qualifies as an excluded employee. In Indian context, the term "international worker" is defined to include:

   (i). Foreign national working for a covered establishment in India (*India inbound*),

   (ii). Indian national proceeding to a foreign country with which India has a social security agreement (SSA) and entitled to avail its benefits thereof (*India outbound*).

2) An Indian employee sent on posting to a country with which India has an SSA becomes an 'International Worker' and is required to contribute on full salary. He/She can, however, seek exemption from the social security legislation of the country in which he is posted on the basis of a detachment certificate issued under the terms of the SSA. If an Indian employee is directly employed by a local employer abroad, such an employee shall be covered by the foreign country legislation. If an Indian employee prior to his posting abroad qualifies/happens to be a contributing member of the EPF, he will continue to be a member of the EPF during his posting to a country with which India does not have an SSA;

3) Every International Worker employed to do any work, in or in relation to any establishment to which this Scheme applies, other than an excluded employee, shall be entitled and required to become a member of the Fund from the beginning of the month following that in which this paragraph comes into force, if on the date of such coming into force, such employee is a subscriber to a provident fund maintained in respect of that establishment in India;

4) Where the Scheme applies to an establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every International Worker who, but for the exemption would have become and continued as a member of the Fund shall become a member of the Fund forthwith.

5) Every International Worker thereof, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member from the beginning of the month;

6) An excluded employee of an establishment shall, on ceasing to be such an employee be entitled and required to become a member of the Fund from the beginning of the month following that on which he ceases to be such employee.

7) Every International Worker who is a member of a private provident fund maintained in respect of an exempted establishment and who, but for the exemption, would have become and continued as a member of the Fund shall, on joining an establishment to which this Scheme applies, become a member of the Fund forthwith.[14]

8) There is no minimum period of stay in India or a minimum threshold of monthly pay for triggering PF compliance. Every eligible IW has to be registered under the EPF Act from the first date of his/her employment in India. Also, there is no cap on the monthly pay up to which the PF contribution has to be made by both the em-

13 *Belgium, Germany, Switzerland, Denmark, Luxembourg, France, South Korea, Netherlands, Hungary, Norway, the Czech Republic, Finland, Canada, Japan, Sweden, Austria, Portugal, Australia and Brazil (signed on March 16 2017 and is not yet operational). Six proposals with respect to the execution of an SSA are in the pipeline with Spain, Thailand, Sri Lanka, Russia, Cyprus and the United States (http://pib.nic.in/newsite/PrintRelease.aspx?relid=137561). Since the US is not a signatory, Indians going to work in the US have to subscribe to the US scheme, and end up forfeiting the contributions if they return to India in less than ten years.*

14 *Notification No. GSR706(E), 01.20.2008, Ministry of Labour and Employment.*

ployer as well as the IW;

9) Indian employees proceeding to work in a foreign country with which India has a SSA will not qualify as IW provided they have obtained the CoC from the EPFO. After obtaining CoC, as they are exempted from contributing to the social security system of the foreign country, they are also not eligible to avail the benefits under the social security program of that foreign country, and hence, will not qualify as IW. In other words, Indian employees proceeding to work/ working in a country with which India has an SSA will qualify as IW if they do not possess COC issued by the EPFO;

10) Once Indian employees attain the status of IW, they will retain the status until they avail the benefits under the Indian social security schemes. This was a hardship for repatriating Indian employees on account of higher contributions required and the challenges posed on account of restrictions on withdrawal of accumulated balance, as was applicable to IWs. EPFO issued a clarification in this regard on June 8, 2017, attempting to consider these IWs as Indian employees upon their repatriation to India on completion of overseas assignment. However, the wording of this clarification created further confusion. To correct this, the clarification dated June 8, 2017, has now been withdrawn by the issue of a fresh clarification on June 23, 2017.[15] EPFO clarified that an Indian employee qualifying as an IW, on account of working/ having worked in a country with which India has an SSA, will reacquire the status of Indian employee upon repatriation to India after completion of overseas assignment. Accordingly, such employee will not be subject to the special provisions applicable to IW after repatriating to India. The clarification has finally laid to rest the confusion that persisted with regard to repatriating Indian expatriate employees being subject to provisions for IW for contributions and corresponding withdrawal. This comes as a welcome relief to both employer and employees, as this has finally removed a genuine burden on both, which will lead to better compliance. However, the aspect of higher contributions already made by such employees require further clarity/ guidelines from the EPFO in the near future.[16]

11) As with all employment and labor laws, compliance with the pension fund requirements is also mandatory for foreign businesses. Employers are legally obligated to deduct and remit contributions via the Form IW-1 (for IWs) on a monthly basis, and failure to comply will result in a range of payments and penalties for the employer. The severity of the penalties illustrates the serious approach taken by Indian authorities for compliance by all businesses;

12) If an employer does not make the required contribution, they are liable for the past due payments plus 12% interest per annum accrued from the original payment due date.

13) Damages can be recovered from the business depending on the period of non-payment on any employer in default of contributions. Damages are levied at a rate of 5% to 25% on the amount owed;

14) In addition to damages, the employer or other involved parties (such as a local branch or partner) may face criminal prosecution for non-compliance. Convictions can result in fines and imprisonment up to one year. This type of criminal penalty may seem unwarranted for unmet pension contributions, but if a company is aware of the requirements and intentionally attempts to avoid payment, that behavior could be seen as fraudulent.

LABOUR CODE ON SOCIAL SECURITY 2017

The Labor Code on Social Security 2017 endeavors to simplify, rationalize, consolidate, and amend the laws relating to social security of workforce so as to make them less complex for easier comprehension, implementation and enforcement. The labor code on social security bill was passed in the year 2017 and it contained some provisions concerning IWs as well. Some of the provisions are-

- Clause 1.5 of the draft bill provides that the code shall apply to IWs who have been defined

15 *http://epfindia.gov.in/site_docs/PDFs/Circulars/Y2017-2018/IWU_Definition_InternationalWorker_5041.pdf*

16 *In this regard please also refer to write up included in Volume X Issue VI of Indian Legal Impetus.*

under the Code as employees other than *Indian citizens working for an establishment situated in India, and excludes citizens or permanent residents of such country or countries as may be notified by the Central Government in the Official Gazette from time to time. Further clarified that the employee who is citizen or permanent resident of such excluded countries shall have the status of an Indian employee under the Code*;

- Clause 14.1 says that every establishment is required to apply for registration under this Code. The same clause further says that notwithstanding anything contained in sub-section (1), any entity employing an international worker shall be required to apply for registration under this code.
- Clause 24.5 further says that the Central Government may, by notification in the Official Gazette, frame scheme for the International workers' pension scheme for-

(i). Superannuation pension, retirement pension or permanent total disablement pension to the international workers; and

(ii). Widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such international workers.

FAQS

1. What are the Pension Fund Contributions for International Workers in India?

IWs are required to contribute 12% of their salaries to the Employee Provident Fund without any cap or exemption based on salary amount. The employer must contribute an equal 12% amount as their share (allocated between the EPF and EPS), underscoring how this benefit requirement has a significant financial impact on businesses that hire or assign IWs in India.

2. What are the important aspects to be understood about the registration and contributions requirements for IWs?

(i). Contributions by both employee and employer are based on total salary; regardless of whether it is paid in India or another country, in any manner or from a source outside India,

(ii). Total salary includes all regular and holiday pay, food allowances and any retaining allowance, but excludes housing allowances, overtime, bonuses and commissions,

(iii). Registration and contributions for IWs are required from the first day of employment in India with a foreign or domestic company,

(iv). Only IWs working under an employment visa are subject to the regulations, and contractual work or short-term business travel is exempt. (This has led to a stricter evaluation of what type of work requires an employment visa to prevent avoiding the contribution mandate),

(v). IWs can claim a deduction from income taxes in India for contributions of up to INR 150,000 per year

3. What are the available exemptions from the contribution requirements?

(i). SSA exemptions are granted when:

- The IW contributes to their home country social security system, or;
- The IW has 'detached worker' status as specified in the SSA, which excludes them from the requirements

(ii). Economic agreement exemptions are granted when:

- The IW either contributes to the home country system, or;
- Participation in India's social security system is specifically exempted by the economic

agreement

- Despite these exemptions, only a few countries have entered into an SSA with India. This limits the availability of exemptions for IWs, including those from the UK and US, who are yet to ratify an SSA with India.

4. Is an Indian worker holding COC (Certificate of Coverage), an International Worker?

   Merely holding the CoC does not make an employee an International Worker. He/she becomes IW only after being eligible to avail the benefits under social security program of any country. After obtaining CoC, the employee is exempted from contributing to the social security systems of the foreign country with whom India has SSA, hence he/she is not eligible to avail the benefits under the social security program of that country.

5. Which category of establishments shall take cognizance of these provisions?

   All such establishments covered/coverable under the EPF Act (including those exempted under section 17 of the Act) that employ any person falling under the category of 'International Worker' shall take cognizance of these provisions.

6. 'Monthly Pay' for calculating contributions to be paid under the Act?

   The contribution shall be calculated on the basis of monthly pay containing the following components actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis:

   - Basic wages
   - Dearness allowance (all cash payments by whatever name called paid to an employee on account of a rise in the cost of living)
   - Retaining allowance
   - Cash value of any food concession

7. Under what circumstances accumulations in the PF account are payable to an International Worker?

   The full amount standing to the credit of a member's account is payable in the following circumstances:

   (i). *persons covered under SSA*

   on ceasing to be an employee in an establishment covered under the Act.

   (ii). *persons NOT covered under SSA*

   - On retirement from service in the establishment at any time after 58 years of age;
   - On retirement on account of permanent and total incapacity for work due to bodily or mental infirmity, duly certified by the authorized medical officer;

8. How long can an Indian employee retain the status of "International Worker"?

   An Indian employee attains the status of "International Worker" only when he becomes eligible to avail benefits under the social security program of other country by virtue of the eligibility gained or going to gain, under the said agreement on account of employment in a country with whom India has signed SSA. He/she shall remain in that status till the time he/she avails the benefits under EPF Scheme.

Note: this article is an attempt to collate as on date available information on IW and legal regime applicable thereto. This article does not construe to be an advice (legal or otherwise) of any sort. Please get in touch with the author on harsimran@singhassociates.in in case you have any queries.

TRIPLE TALAQ, JUDGMENT OF HON'BLE SUPREME COURT AND THE MOST ANTICIPATED TRIPLE TALAQ BILL

PUSHKRAJ DESHPANDE

WHAT IS TRIPLE TALAQ?

Instant Talaq or "Triple *Talaq*" or "*Talaq-e-Biddat*" is an Islamic practice that allows men to divorce their wives immediately by uttering the word "*talaq*" (divorce) three times. The pronouncement can be oral or written, or as in recent times, delivered by electronic means - telephone, SMS, email or social media.

DIFFERENT TYPES OF TALAQ IN ISLAM: (DON'T MISUNDERSTAND ALL OTHER TYPES OF TALAQ WITH TRIPLE TALAQ)

Muslim Personal Law says that a *talaq* can either be given by the husband or by the wife. It can also be a mutual divorce.

TALAQ GIVEN BY HUSBAND ARE OF FOLLOWING TYPES:

As per the shariat there are 3 ways in which a husband can divorce his wife/wives - Talaq-e-Ahsan, Talaq-e-Hasan and Talaq-e-Biddat. It is claimed that Talaq-e-Ahsan and Talaq-e-Hasan are recognized by the Holy Quran but Talaq-e-Biddat is a creation of the Ummayad Kings for their ill-intentions.

"Talaq-e-Sunnat" or "Talaq-ul-Raje" is a revocable divorce that can be pronounced in Hasan or Ahsan forms.

"Talaq-e-Ahsan" is the 'most proper' form of *talaq* in which the husband expresses divorce in single sentence - "I have divorced thee" - during the period of *tuhr* (when the wife is not menstruating) and then has to wait till the *iddat* period is over. *Iddat* period for a woman who has been divorced by her husband is usually three menstrual cycles. During this time, she cannot marry another man. If before the completion of *iddat*, the husband resumes co-habitation with his wife or says that "I have retained thee", the divorce is revoked.

In case the woman is pregnant, the *iddat* period lasts until she gives birth. The waiting period for a woman after menopause is three months.

"Talaq-e-Hasan" is the 'proper' form of *talaq*. In this form, three successive pronouncements of *talaq* are made by the husband in three successive *tuhrs* (when the woman is not menstruating). In case of a non-menstruating woman, its pronouncement may be made after the interval of a month or thirty days between the successive pronouncements. This form of *talaq* can be revoked any time before the third pronouncement.

"Talaq-e-Biddat" or ***"Talaq-ul-Bain"*** (Irrevocable divorce) is instant Triple *Talaq* and is effective as soon as the word "*Talaq*" has been pronounced thrice. In this form of *talaq*, three pronouncements can be made during a single *tuhr* (when the woman is not menstruating) by saying "I divorce thee" thrice at the same instant i.e. there need not be any waiting period between two successive pronouncements.

The Hon'ble Supreme Court of India, in its recent landmark judgment of Sayara bano Vs. Union of India pronounced on August 22, 2017, has set aside the practice of Talaq-e-Biddat or "Triple Talaq" with the majority Ration of 3:2. The Judgment by the minority bench further directed the Government of Union Of India to lay a proper legislation in order to regularize the proceedings of divorce as per shariat law.

WHAT IS THE LANDMARK JUDGMENT PASSED BY THE HON'BLE SUPREME COURT IN SAYARA BANO VS UOI.

The Hon'ble Supreme Court heard the Petition for ban of practice of Triple Talaq through a Constitution bench comprising of 5 Judges from different religions - Justice Kurian Joseph, a catholic, Justice UU Lalit, a Hindu and Justice RF Nariman, a Parsi, Chief Justice Khehar, a Sikh and Justice Abdul Nazeer, a Muslim. On August 22, 2017, this bench declared **Triple Talaq or Talaq-e-**

Biddat as unconstitutional by a 3:2 majority. Justices Kurian, Lalit and Nariman delivered the majority judgement while Chief Justice Khehar and Justice Nazeer dissented with the majority.

CHIEF JUSTICE KHEHAR AND JUSTICE ABDUL NAZEER [MINORITY JUDGMENT- WRITTEN BY CHIEF JUSTICE KHEHAR]

The minority bench observed that:

*"we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to '**Talaq-e-Biddat**'. We hope and expect that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind".*

WHILE DISSENTING THE MAJORITY VIEW THE MINORITY BENCH OBSERVED AS FOLLOWING

*"Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing '**talaq-e-biddat**' as a means for severing their matrimonial relationship.*

*The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining '**talaq-e-biddat**' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate".*

JUSTICE KURIAN JOSPEH [PART OF MAJORITY]

Justice Kurian Jospeh has boldly shown his disagreement on the Minority view of CJI by stating that:

"I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law."

Majority view of Justices R.F **Nariman and U.U Lalit [Majority- Judgment written by RF Nariman]**

The bench held that the practice of Triple talaq is arbitrary in nature by observing the following:

"It is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the 393 fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act (Muslim Personal Law Shariat Application Act), insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."

Taking into consideration the arguments of various religious groups and aggrieved petitioners, the Hon'ble Supreme Court with the majority ration of 3:2 set aside the practice of Triple Talaq or Talaq-e-Biddat by holding it unconstitutional and arbitrary in nature; the Hon'ble Court further directed the Government of Union of India to consider the views taken by the court in the Judgment and lay down a proper legislature to regulate the practice of divorce in Muslim community.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2017 (TRIPLE TALAQ BILL)

Taking into consideration the views of the Hon'ble Supreme Court in the Judgment of Shayara bano Vs. Union of India, the Hon'ble Law Minister Shri Ravi Shankar Prasad took an initiative to present the ***Triple***

Talaq Bill before the Lower House, Lok Sabha, which was passed by majority by the Lower house on December 28, 2017. The Statement of Objects and Reasons of the Bill notes that the judgment has not worked as a deterrent in bringing down the number of instances of triple talaq. It explains, "It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat, urgent suitable legislation is necessary to give some relief to them.

The Union Government claims that the legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help sub-serve their fundamental rights of non-discrimination and empowerment.

HIGHLIGHTS OF BILL

The preamble of the Bill reads as "***To protect the rights of the Married Muslim Women and prohibit divorce by pronouncing Talaq by their Husbands and provide for matters connected therewith or incidental thereto***"

The main highlights of the said bill are Sections ***3 and 4*** which criminalize the practice of Triple Talaq. Section 3 of the Bill states that "talaq-e-biddat" shall be 'void' and 'illegal'. This is followed by consequence of such void action in terms of Section 4 thereof, stating, whoever pronounces ***talaq-e-biddat*** shall be punished with imprisonment which may extend to three years and fine. Further ***Section 7*** of the Act makes the offence cognizable and non-bailable offence.

The said Bill has gained appreciations at the same time the Bill has been heavily criticized by many.

The Bill will now be placed before the Upper House i.e. before Hon'ble Rajya Sabha on January 2, 2018, and if the said Bill is passed with Majority the same will be sent for approval to the Hon'ble President of India and if the Hon'ble President assents to the said Bill then the new act will come in force as **The Muslim Women (Protection of Rights on Marriage) Act.**

INTERPRETATION OF SECTION 8 AND 37 OF THE AMENDED ARBITRATION AND CONCILIATION ACT, 1996 *VIS-À-VIS* CONSUMER PROTECTION ACT, 1986

AKSHAT BAJPAI

In the recent case of "***Emaar MGF Land Ltd and Ors v Aftab Singh"***[17], the Delhi High Court has harmoniously interpreted Section 37 and 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) in light of the amendment brought to the Act. However, the remedy provided for appeal in the Consumer Protection Act, 1986, has been held as to not authorize the High Court to hear appeals from the orders passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as NCDRC) in exercise of its original jurisdiction.

The appellant had approached the High Court under Section 37 (1) (a) of the Act, against two orders of the National Consumer Disputes Redressal Commission, wherein identical applications of the appellant seeking a reference under Section 8 of the Act, were dismissed. The subject matter of consumer complaints of the respondents against the appellants was grievance of deficiency of service -primarily on the ground of failure on the part of the appellants to deliver timely possession of the residential villas (flats/plots, etc) being developed by it, in Mohali (and other places). The appellants, upon being served with the notices, on the basis of consumer complaints, submitted the applications under Section 8 of the Act, referring to an arbitration clause in each such buyer's agreement and praying for a reference accordingly.

The High Court framed the moot issue for consideration as to whether the appeals can be maintained before it, under Section 37 1(a) or not. Relevant provisions of law considered by the High Court were:

SECTION 37 OF THE ACT, APPEALABLE ORDERS

"… (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

Section 8 of the Act, Power to refer parties to arbitration where there is an arbitration agreement

"…8(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists…"

SECTION 23 OF THE CONSUMER PROTECTION ACT, 1986, APPEALS

"…Any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 21, may prefer an appeal against such order of the Supreme Court within a period of thirty days from the date of the order…"

The High Court, relying on the established jurisprudence, affirmed that while considering an application for the parties to a dispute to be referred to arbitration on the ground that it is subject to an arbitration agreement in terms of Section 8(1), the judicial authority exercises the jurisdiction conferred upon it by the Act, and not the jurisdiction it exercises under the law where under it has been established. In addition, debunking the finer details of Section 8 of the Act, the High Court highlighted the fact that while conferring the jurisdiction to refer the parties to a dispute to arbitration, the law refers to the forum as a "judicial authority", and not a "court".

17 FAO 395/2017

The High Court then elaborated, that the remedy of appeal was provided in Section 37(1) till 2015 Amendment against orders of a court with reference to the jurisdiction conferred on the "court" (as defined in Section 2) for "interim measures" (under Section 9) or to consider "setting aside an arbitral award" (under Section 34) only. Hence, the provision in Section 37(1) prior to its amendment, was not concerned with act of any forum except a "court". The High Court then interpreted that the words "the court passing the order" appearing in Section 37(1), post the amendment, acquired a new dimension and needed to be properly construed so as to harmonize them with Section 8 which confers the jurisdiction to pass the order that may be challenged in appeal.

It was elucidated by the High Court that Section 8 does not restrict such a power to a "court" but extends it to every "judicial authority". Thus, under section 37(1)(a) the forum conceived by the expression "the court passing the order" under the amended law has to be read contextually and understood to connote "the judicial authority" which passed the order making or refusing the reference. The expression "original decrees of the Court passing the order" under section 37 was held to mean a decision taken by a court of first instance in exercise of its original jurisdiction.

Despite harmonizing Section 8 and 37 of the Act, the High Court went on to hold that the High Court is not authorized by the law to hear appeals from the orders passed by NCDRC in exercise of its original jurisdiction due to Section 23 of the Consumer Protection Act, 1986, which expressly provides that such an appeal is available under the said law, only before the Supreme Court. Thus, it was held that the appeal against the order of NCDRC (making or) refusing the reference of the dispute to arbitration, cannot be brought before the High Court since appeals against orders of said forum lie before the Supreme Court.

The order by the High Court establishes the point that the remedy of a consumer of services is independent of the contractual terms providing for arbitration to settle disputes. This is a pro-consumer order which saves the consumer from the clutches of an adhesion contract just like in the present case between the builder and buyer with uneven bargaining powers. The order also gives credence to the ratio that remedies provided for in a special law, will hold the ground vis-à-vis the procedure enunciated in the Act.

It needs to be noted that in an appeal before the Supreme Court of India (Civil Appeal Diary No (s). 37997/2017) against the order of the NCDRC dated 13-07-2017, the order of both the NCDRC and the Delhi High Court have been stayed and the matter has been listed for final hearing on February 07, 2018.

ESSENTIAL COMMODITIES (CONTROL OF UNETHICAL PRACTICES IN MARKETING OF DRUGS) ORDER, 2017 – AN OVERVIEW

PRIYA DHANKHAR

The need for governing the relationship between pharmaceutical companies and medical practitioners has been felt ever since the exponential growth of the pharmaceutical industry. With this in view, the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, as amended up to February 01, 2016, (*"**MCI Regulations**"*) were implemented. Regulation 6 (Unethical Acts) of the MCI Regulations prescribes the code of conduct for medical practitioners in their relationship with Pharmaceutical & Allied Health Care Industry. However, the MCI Regulations are applicable only on medical practitioners.

Therefore, the Department of Pharmaceuticals ("***DoP***") on December 12, 2014, made the Uniform Code of Pharmaceuticals Marketing Practices ("***UCPMP***") applicable with effect from January 01, 2015, for a period of 6 months for voluntary adoption. The DoP, at the time of notifying UCPMP, clarified that it was a voluntary code for the Indian Pharmaceutical Industry and also cautioned that if it is found that UCPMP has not been implemented effectively by the Pharma Associations/Companies, then the Government may consider making it a statutory code. Thereafter, the DoP on August 30, 2016 extended UCPMP till further orders.

Although the UCPMP was the first of its kind and provided extensive regulations; since it was voluntary, the DoP sought to replace the voluntary code with mandatory guidelines. Accordingly, the DoP in July 2017 sent the draft Essential Commodities (Control of Unethical Practices in Marketing of Drugs) Order, 2017 ("***Order***") to the Law Ministry for final clearance.

However, the Order which is now sought to be enacted under the ambit of the Essential Commodities Act, 1955 is facing concerns from the Law Ministry. It is pertinent to highlight here, that the Order is outside the scope of the Essential Commodities Act, 1955 ("***Act***"), the objectives of which are specifically to control production, supply and distribution of essential commodities and not to regulate the marketing of drugs.

In 2015, UCPMP was extended to the medical devices industry, i.e. an industry worth over Rs 25,000 crore per year. However, since the DoP is in the process of drafting and releasing a separate code of marketing practices for the medical device industry (which would be voluntary for six months), the Order states that it will not apply to medical devices.

Like UCPMP, the Order prohibits pharmaceutical companies from offering cash, gifts and sponsorship or providing travel facility or paid vacations for doctors, chemists and pharmacists. Paragraph 3 of the Order prohibits offering of gifts, cash cards, hampers or any article that may generate monetary benefit or allow gains in kind to a medical practitioner or any retail chemist or pharmacists or their 'family members' by any pharmaceutical company or its agents. However, it allows the sponsorship of academic conferences organised by medical associations and screening camps or awareness campaigns to be organised in government owned healthcare facilities, while stipulating that these cannot be used as surrogate advertising.

Further, the Order also prohibits a pharmaceutical company or its agent to offer free samples to any medical practitioner. However, an exception to this rule has been created by allowing pharmaceutical companies to provide free samples up to a full course of medication for a maximum of three patients. But, three is a small number for any medical practitioner to understand and analyse the effects of a new drug on patients.

It is pertinent to highlight that the definition of the term "Agent" in paragraph 2(b) of the Order, is very wide and includes any personnel, company, society, non-government organisation or other institution, which has been employed or authorized, *by third*

party who call on any healthcare facility regarding the promotion of drugs of a pharmaceutical company. The Order also mandates that the MD or CEO of a company shall be responsible for ensuring compliance of the Order.

Paragraph 5 of the Order, *inter alia*, provides that all complaints regarding violations of the Order shall be looked into by an Ethics Compliance Officer (ECO) appointed by the Government of India, who shall not be below the rank of a Joint Secretary to the Government of India.

It is to be noted that Paragraph 4 of the Order imposes a penalty on a company or its agent which fails to comply with the provisions of sub-paragraph (a) (b) (c) or (d) of paragraph 3 of the Order. Further, Paragraph 5(4) of the Order lays down the procedure for levying penalty by suspending the marketing of the violating company's highest selling product from the preceding 12 months, for a period of three months to one year. The Order also provides that the companies could apply to commute the marketing suspension by paying a penalty ranging from Rs 5 Lakh to Rs 10 Lakh. As per the Order, the appellate authority will be the DoP Secretary, and the appeals from the orders of the Appellate authority shall lie with the courts.

SARFAESI & ARBITRATION

PRANNOY RAIKHY AND TUSHAR ROY

That the Hon'ble Supreme Court of India in its recent judgment titled as *M.D.Frozen Foods Exports Pvt. Ltd. & Ors. vs Hero Fincorp Limited* numbered as Civil Appeal No. 15147 of 2017 arising out of SLP (C) No. 19559 of 2017 have decided the issues as laid down as under:

- Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?
- Whether resort can be had to section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement / mortgage created prior to the application of the SARFAESI Act to the respondent?
- A linked question to question (ii), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(m) has been issued after the account became an NPA under Section 2 (1)(o) of the said Act?

FACTS:

M.D.Frozen Foods Exports Pvt. Ltd. aka Appellants borrowed monies for their business against security of immovable properties by the creation of equitable mortgage (seven properties) by deposit of title documents on 30.09.2015 and 21.10.2015. The financial discipline was not adhered to, apparently almost from the inception, and the account of the appellants became a "non performing asset" (NPA) within the meaning of Section 2 (1) (o) of the SARFAESI Act on 06.07.2016 itself.

The agreement executed between the parties contained arbitration clause and thus, the matter went to arbitration on the lender / respondent invoking the arbitration clause on 16.11.2016.

Prior to the invocation of the arbitration clause, notification was issued on 05.08.2016, whereby, Hero Fincorp Limited aka Respondent were conferred the rights under section 13 to section 19 of the SARFAESI Act, 2002. In view of the notification, the Respondent issued notice under Section 13 (2) of the SARFAESI Act, 2001 on 24.11.2016 for one of the seven properties.

Statement of claim was filed by the Respondent on 14.12.2016 and interim orders were granted by the Arbitrator on 05.01.2017 restraining the Appellant from creating any third party interest over the properties. Respondent had again issued another Section 13(2) notice for two more properties. The arbitration order dated 05.01.2017 were confirmed on 03.03.2017. In order to remove any possible impediment in the SARFAESI proceedings, an application was filed by the Respondent to substitute the order of status quo qua parties with the name of the Appellants / Borrowers, which was allowed on 19.05.2017. Being aggrieved by the order the Appellant had filed an appeal under Section 37(2)(b) before the Hon'bel Delhi High Court and which came to be dismissed and henceforth the instant petition was filed by the Appellant.

ARGUMENTS:

- Respondent cannot take benefit of notification dated 05.08.2016, as it is impermissible to take recourse to the provisions of the SARFAESI Act in respect of an account already declared an NPA, as that would amount to retrospective application of a substantive law.
- Respondent qualifies with the requirement of the notification dated 05.08.2016 and is entitled to initiate SARFAESI proceeding.
- Rights of SARFAESI and RDDBFI can be invoked by the Respondent as the same are complimentary to each other.

JUDGMENT:

The observation of the Hon'ble Supreme Court of India is laid down as under:

- Matter which came within the scope and jurisdiction of the Debt Recovery Tribunal

under the RDDBFI Act, 1993, can be referred to arbitration.

- The provisions of the SARFAESI Act are a remedy in addition to the provisions of the Arbitration and Conciliation Act, 1996 (as amended on 2015).
- SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.
- Hon'ble Supreme Court of India affirmed the view of the full bench of the Orissa High Court in Sarthak Builders Pvt. Ltd. vs Orissa Rural Development Corporation Limited, the full bench of the Delhi high Court in HDFC Bank Limited vs Satpal Singh Bakshi and the Division bench of the Allahabad High Court in Pradeep Kumar Gupta vs State of UP.
- The date on which a debt is declared as an NPA would have no impact.
- The provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the Respondent.

ANALYSIS:

In view of the aforementioned observation of the Hon'ble Supreme Court of India it can be concluded that remedy under Arbitration and Conciliation Act, 1996 (as amended in 2015) is an addition and not in derogation with the Debt Recovery laws, hence, the Banks/Financial Institutions would have the option to invoke either or both the remedies. Further, the date of classification of NPA would have no impact and the provisions of the SARFAESI Act would be applicable qua all debts which are still payable by the borrower, live and enforceable under law.

NOTICE UNDER SECTION 21 IS MANDATORY BEFORE REFERRING THE DISPUTES TO ARBITRATION

SWATI SINHA

OBJECT OF SECTION 21 OF THE ARBITRATION AND CONCILIATION ACT 1996

The Delhi High Court in a recent judgment dated February 28, 2017, delivered by Justice S. Murlidhar in **Alupro Buildings Systems Pvt Ltd Vs. Ozone Overseas Pvt Ltd,** has given a much needed interpretation and clarity to the object and purpose of issuing the notice under Section 21 of the Arbitration and Conciliation Act (hereinafter referred to as the Act) holding that the provisions under Section 21 of the Act are mandatory in nature and cannot be dispensed with and forms the preceding act in initiation and reference of the disputes between the parties . It was further held that the provisions of Section 21 are not limited only for the purpose of determining limitation and a party cannot straight away file a claim before the Arbitrator without issuing the notice under Section 21 of the Arbitration and Conciliation Act.

The judgment infused mandatory overtones to the provisions of Section 21 and held it to be a paramount procedure for the initiation of the arbitration process between the parties and dispensing with same could be one of the grounds for challenge of the award under Section 34 of the Act.

The date of the reference of the disputes to arbitration under Section 21 shall be the date from which the limitation will start running for the purposes of computation of limitation under **Section 43(2)** of the Act. The Court held that in the absence of an agreement to the contrary, notice under Section 21 of the Act by the Claimant invoking the arbitration clause, preceding the reference of disputes to arbitration is mandatory.

In other words, without such notice, the arbitration proceedings that are commenced would be unsuitable in law. The Court further clarified that mere acceptance of supplies by a party on the basis of invoices mentioning an arbitration clause would not amount to acceptance by the party of such arbitration clause. The Court clarified that there could not be an arbitration agreement by implication and a mere endorsement of receipt of goods on such invoices cannot lead to an inference that a party agreed to the arbitration agreement which could be validly invoked. The present case raised objections under Section 34 of the Act to an award rendered by an arbitrator, unilaterally appointed by the Respondent, without invoking arbitration under the terms of Section 21 of the Act. The non-compliance of Section 21 of the Act rendered the arbitration proceedings unsustainable in law, vitiating the award as null and void and without any jurisdiction.

IS THE NOTICE UNDER SECTION 21 OF THE ACT MANDATORY?

Section 21 of the act reads as under:

"21. *Commencement of the arbitral proceedings- unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute to be referred to arbitration is received by the Respondent*"

A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of the arbitration proceedings would be the date on which the recipient of the notice receives from the Claimant, a request for referring the disputes to arbitration .**The reasons why notice under Section 21 of the Act is mandatory in nature is five-fold**:

(i) The parties to the Arbitration Agreement against whom a claim is made should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the dispute between the parties may thus be narrowed down.

(ii) Such a notice provides an opportunity to the recipient of the notice to identify if the claims are time barred or is barred by law of estopped or is untenable in view of the factual matrix of the dispute between the parties.

(iii) Such notice identifies the procedure to be adopted for the conduct of the arbitral proceedings/and appointment of an arbitrator. Unless, there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure for the appointment of an arbitrator, other procedures as envisaged in the arbitration clause have been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties; there has to be consensus between the parties. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

(iv) Even if the notice under Section 21 of the act permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be 'disqualified' to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the Claimant may be persuaded to appoint a qualified person.

(v) The purposes of Section 11(6) of the Act, without the notice under the Section 21 of the Act, a party seeking reference of disputes to the arbitration will be unable to demonstrate that there was a failure by one party to adhere to procedure and accede to the request for the appointment of an arbitrator. The trigger for the court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

CONCLUSION

Considering that the fulcrum of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of disputes, the determination of which disputes remain unresolved, which disputes are time-barred, identification of claims and counter-claims and most importantly, on the choice of the arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that the absence of an agreement to the contrary, the notice under Section 21 of the Act by the Claimant invoking the arbitration, preceding the reference of the disputes to arbitration, is mandatory and without such notice, the arbitration proceedings which are commenced would be unsustainable in law.

DRUGS AND COSMETICS (TENTH AMENDMENT) RULES, 2017

VIJAYLAXMI RATHORE

"The licenses once issued, shall remain valid forever, unless suspended or cancelled by the licensing authority"

On October 27, 2017, the Ministry of Health and Family Welfare has published the Drugs and Cosmetics (Tenth Amendment) Rules, 2017 through official gazette, in exercise of the powers conferred by section 12 read with section 33 of the Drugs and Cosmetics (D&C) Act, 1940 (23 of 1940); further after consultation with the Drugs Technical Advisory Board has proposed the following rules to amend the Drugs and Cosmetics Rules, 1945, namely:-

DURATION OF LICENSE

1) As per the amendment a various licenses once issued under Form 20, 20A, 20B, 20BB, 20F, 20G, 21, 21A, 21B, 21BB, Form 25, Form 25B, Form 25F, Form 32, Form 32A, Form 33 and Form 37; whereas loan license also issued in Form 25A shall remain valid, if licensee deposits a license retention fee referred to in sub-rule (2) before the expiry of a period of every succeeding five years from the date of its issue, unless, it is suspended or cancelled by the licensing authority.

2) The license retention fee referred to in sub-rule (1), shall be equivalent to the respective fee required for the grant of such license excluding inspection fee paid for grant of license.

3) If the license holder fails to pay license retention fee on or before the due date as referred to in sub-rule (1), he shall be liable to pay license retention fee along with a late fee calculated at the rate of two per cent of the license fee for every month or part thereof up to six months, and in the event of non-payment of such fee, the license shall be deemed to have been cancelled.

INSPECTION FOR GRANT OF LICENSE AND VERIFICATION OF COMPLIANCE

1) Before grant of manufacturing license under Form 25, Form 25A, Form 25B, Form 25F, Form 28, Form 28A, Form 28B, Form 28D, Form 28DA, Form 32, Form 32A and Form 33, the licensing authority shall cause the establishment in which the manufacture of drugs is proposed to be conducted or being used, to be inspected jointly by the Drugs Inspectors appointed by the Central Government and the State Government under this Act who shall examine the establishment intended to be used or being used for the manufacture of drugs.

The premises licensed under sub-rule (1) shall be jointly inspected by Inspectors appointed by the Central Government and the State Government to verify compliance with the conditions of license, the provisions of the Act and these rules, not less than once in three years or as needed as per risk based approach."

INSPECTION FOR VERIFICATION OF COMPLIANCE

The licensing authority shall cause inspection, by the Inspector appointed under the Act, of each premise licensed under this Part, to verify the compliance with the conditions of license and the provisions of the Act and these rules, not less than once in three years or as needed as per risk based approach.

Apart from this, a paragraph in Schedule A regarding various forms has been amended as follows:

"The license, unless sooner suspended or cancelled, shall remain valid perpetually. However, the compliance with the conditions of license and the provisions of the Drugs and Cosmetics Act, 1940 (23 of 1940) and the Drugs and Cosmetics Rules, 1945 shall be assessed not less than once in three years or as needed as per risk based approach." Moreover, the word "Renew or Renewal or Renewed" shall be omitted from various forms of Schedule A"[18].

Note - The Drugs and Cosmetics (Tenth Amendment) Rules, 2017 is effective from March 27, 2017. However, the CDSCO has published following interim guidelines to ensure the smooth processing of applications for

18 *http://www.cdsco.nic.in/writereaddata/GSR%201337(E)%20dated%2027_10_2017.pdf*

grant of manufacturing licenses; and for joint inspection of manufacturing premises –

1. Application for the grant of manufacturing licenses, complete in all respect as per the provisions of Drug and Cosmetic Act, 1940 and Rules, 1945 should be submitted by manufacturer to the respective State Licensing Authority.

2. The State Licensing Authority should fix a date at least seven days prior to the date of joint inspection of the manufacturing premises, in coordination with the respective zonal/ Sub-zonal offices of CDSCO.

3. In case drug inspector of CDSCO zonal/sub-zonal offices is not available on any specific date, drug inspector from CDSCO (HQ) will be deputed for the joint inspection.

4. Proper coordination between State Licensing Authorities, CDSCO HQ and Zonal/ Sub-zonal offices should be ensured for timely inspection and processing of applications.

5. In case of deficiency in the application in respect of any inspection, the joint inspection team may verify such document during the inspection and record detail of the same in the inspection report[19].

However, valuable feedback or suggestions for these guidelines will be also appreciated by CDSCO for further improvement in the implementation of the new rules.

19 http://www.cdsco.nic.in/writereaddata/library%2024.11.17.pdf

INDIA'S TAKE ON CONSERVATION OF BIOLOGICAL DIVERSITY

SHRIMANT SINGH

To meet the obligations under the Convention on Biological Diversity also known as *Biodiversity Convention*, India enacted The Biological Diversity Act, 2002 [hereinafter termed as "the Act"]. The present article is an effort to provide the context and summarize main provisions and stipulations under the Act.

The objective of the Act is "*conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.*" India is amongst the foremost developing nations to initiate the process of identification of its vast biodiversity, formulating guidelines for sharing of knowledge and use of it biodiversity, and setting up the National Biodiversity Authority to facilitate the same. The Act aims at striking a balance between a regulated and fair use of the country's biodiversity.

The National Biodiversity Authority (NBA) was established as per the provisions of the Act in 2003 at Chennai, under the Ministry of Environment and Forests, Government of India. The same was followed by State Biodiversity Boards (SBB) in 28 States along with 31,574 Biological Management Committees (for each local body) across India[20]. The NBA consists of a Chairperson, five non-official and ten ex-officio members to be appointed by the Central Government to represent various Ministries. The prime objective of NBA is to account for, maintain/conserve biodiversity and ensure sustainable use of India's rich biodiversity and associated knowledge.

The NBA, *inter alia,* deals with matters relating to requests by foreign individuals, institutions or companies for access to India's biological resources and transfer of results of research to any foreigner. The SBBs constituted by the State Governments deal with all matters relating to access by Indians for commercial purposes. The institutions of self-governments set up Biodiversity Management Committees (BMCs) in their respective areas for conservation, sustainable use, documentation of biodiversity and chronicling of knowledge related to biodiversity.

Under Section 2(b) "biological diversity" is defined as *the variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-systems*. Further, as per Section 2(c), "biological resources" means *plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value, but does not include human genetic material*.

Section 3 of the Act stipulates that all foreign entities, including foreign individuals, non-residents or body corporate, shall get approval from the NBA prior to obtaining any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.

Section 4 prohibits transfer of results of any research relating to any biological resources occurring in, or obtained from India, to any person who is not a citizen of India or a citizen of India who is non-resident as per Income Tax Act or a body corporate not registered in India or having non-Indian participation in its share capital or management.

With regards to Intellectual Property Rights (IPR) vis-à-vis Biological Resource, Section 6 of the act stipulates that-

> (1) No person shall apply for IPR protection in or outside India for any invention based on research or information on a biological resource obtained from India without obtaining the previous approval of the NBA before making such application.
>
> Provided that if a person applies for a patent, permission of the NBA may be obtained after the acceptance of the patent but before the sealing of title patent by the patent authority concerned.
>
> Provided further that the NBA shall dispose of the application for permission made to it

20 https://en.wikipedia.org/wiki/Biological_Diversity_Act,_2002

within a period of ninety days from the date of receipt thereof.

(2) The NBA may, while granting approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights.

(3) The provisions of this section shall not apply to any person making an application for any right under any law relating to protection of plant varieties enacted by Parliament.

(4) Where any right is granted under law referred to in sub-section (3) of Section 6, the concerned authority granting such right shall endorse a copy of such document, granting the right, to the National Biodiversity Authority.

Accordingly, before applying for IPR protection for an invention based on research or information regarding biological resource obtained from India, the applicant is first required to obtain approval from the NBA. However, in case of patent protection, said permission or approval from NBA can be obtained any time before recordal of patent at the respective patent authority in India or outside India. Further, the provision is not applicable for registration under Plant Varieties Act. However, the concerned authority while granting such registration is required to provide a copy of the same to the NBA.

In view of the "NBA approval" required for IPR protection, especially for patents, we have observed that under the current Indian Patent Office (IPO) practice, the Controller as a routine inserts a requirement in the first examination report (office action) for furnishing of NBA approval in the case of use of any biological resource obtained from India. Accordingly, the applicant needs to comply with this extra requirement if the invention is based on or has even a mention of the biological resource obtained from India in its specification.

The NBA plays a vital role in achieving the objectives of the Biological Diversity Act. The functions and powers of the NBA are lined out in Section 18 of the Act, which stipulates that:

(1) It shall be the duty of the NBA to regulate activities referred to in sections 3, 4 and 6 and by regulations issue guidelines for access to biological resources and for fair and equitable benefit sharing.

(2) The NBA may grant approval for undertaking any activity referred to in sections 3, 4 and 6.

(3) The NBA may (a) advise the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources; (b) advise the State Governments in the selection of areas of biodiversity importance to be notified under sub-section (1) of section 37 as heritage sites and measures for the management of such heritage sites; (c) perform such other functions as may be necessary to carry out

the provisions of this Act.

(4) The NBA may, on behalf of the Central Government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.

So as to enforce the regulations prescribed Sections 2, 4 and 6 of the Act, the penalties are given under Section 55(1), which is self-explanatory: Whoever contravenes or abets to the contravention of the provisions of section 3 or section 4 or section 6 shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten lakh rupees [1 million INR] and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both.

Thus, while restrictions are there, the same also facilitate sustainable use and informed sharing of knowledge relating to India's biological recourses. In today's time when commercialization has penetrated each walk of life and innumerable resources which were unrecognized as resources only a few decades back, legislations such as Biological Diversity Act place checks and balances over uses and knowledge sharing of a biological resource and protecting it from excessive/harmful misuse in future.

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