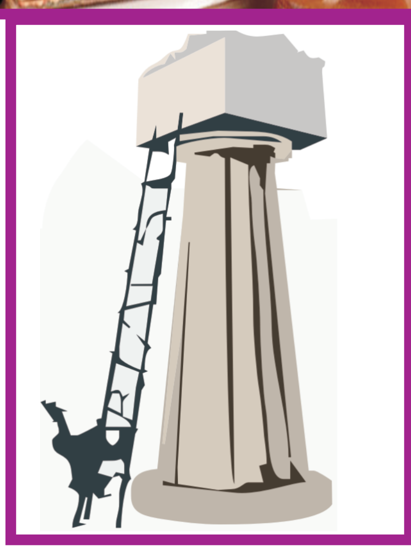
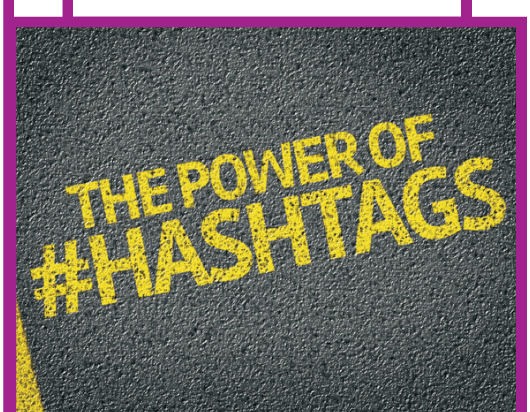
SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

FEBRUARY 2017. Vol. X, Issue II

INDIAN LEGAL IMPETUS®





Singh & Associates
Founder - Manoj K. Singh
Advocates & Solicitors

EDITORIAL

Manoj K. Singh
Founding Partner

It is our pleasure to present the **February 2017** edition of our Newsletter **'Indian Legal Impetus'**. We are extremely grateful to our readers who have always bestowed overwhelming support us, as a result of which we have been successful enough to bring you the latest legal developments in India.

The present edition has dwelled into some of the latest legal issues that have surfaced from the areas of arbitration to that of the world of IPR. The cover article of the current edition, ***S&A helps its Client to Continue with its Waste to Energy Plant at Delhi*** puts forth how we ensured relief for the citizens of Delhi, where the waste management has become a chronic issue. The next article, ***Law Relating to 'Content' Broadcasted by Television Channels in India*** delves into whether the Courts can adjudge the content of television channels, authority of which is originally with Ministry of Information and Broadcasting. It cites judgments of various High Courts of India wherein the Courts have nevertheless indulged in content regulation. Another engaging article is ***The School Next Door*** wherein the Delhi High Court has given its views on the overlapping of the neighborhood criteria with the primary/ pre- primary admissions and the consequential ailment to the parents and children alike. Another article on the topic of Arbitration is, ***Discovery in Arbitration*** wherein the author has affirmed how the Arbitral Tribunals is not bound by process of the Court and are rather free to establish their own procedures. It also gives an interesting insight into the emerging trends for discovery in the field of arbitration such as the Redfern Schedule.

Under the Intellectual Property Rights section we have two stimulating articles for you. The article on ***Trending in IP: #Hashtags*** explores the fast emerging and most unique method of marketing products, hash tags. It digs into whether a hash tag can be registered as a trademark under the Indian Trademark law. It also deals with the situation under USPTO with regards to registration of hash tags as trademark. Another interesting article is ***Secondary Liability in Trademark Disputes: Landmark Judgments*** wherein the author has made an effort to dig into the concept of secondary liability in trademark disputes. Indian judgments have been relied upon to portray how right holders are turning against the internet middlemen and trying to hold them accountable for the wrongdoings of the direct offenders who make use of their networks.

The corporate and commercial laws section includes an article about ***NOC as a Prerequisite for Appointment of Stockist– Anti Competitive*** wherein the author has conducted a case study on the judgment of Competition Commission of Indian in *Belgaum District Chemists and Druggists Association ('Informant')* AND *Abbott India Ltd. & Ors*. It is followed by the article on ***Mandatory for Financial Institutions to Check Revival before Moving for Liquidation***. In this article the author has carried out a detailed analysis of the judgment of *IDFC Bank Limited* v. *M/s. Ruchi Soya Industries Limited* wherein the Hon'ble Court has held that measures should be taken to revive a company first if there is a fair chance of it instead of pressurizing it for winding up. In another article on ***Applicability of SARFAESI Act in the State of Jammu & Kashmir*** a landmark judgment of the Hon'ble Supreme Court has been discussed wherein the Apex Court snubbed the J&K High Court by stating that the state of Jammu & Kashmir had no vestige of sovereignty outside the Constitution of India. Another interesting article is on ***How to decide the liability in respect of provident fund dues of the employees of a contractor who had multiple employers?*** The author has made an effort to evaluate whether the liability of dealing with provident fund would lie with the principle employer or the independent contractors and sub contractors in cases where the employer is engaged in multiple employments. The last article in the edition under the topic of ***Integrated Reporting vide Business Responsibility Report mandated for Top Listed Entities*** probes the SEBI Circular dated February 6, 2017 wherein guiding principles for preparing the Integrated Report have been prescribed.

Lastly we have brought to you brief salient features of the latest ***Trade Marks Rules, 2017*** via our ***Newsbyte*** section which have marked the end of The Trade Marks Rules, 2002.

We hope this issue helps us in further achieving our objective of bringing the laws and recent legal developments in India to your doorstep. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Inputs" a valuable reference point and possession for all.

You may send your suggestions, opinions, queries or comments to newsletter@singhassociates.in.

Thank you.

INDIAN LEGAL IMPETUS®

Volume X, Issue II

Singh & Associates
Advocates & Solicitors

NEW DELHI (HEAD OFFICE)

E-337, East of Kailash, New Delhi - 110065
Email: newdelhi@singhassociates.in

BANGALORE

N-304, North Block, Manipal Centre47,
Dickenson Road, Bangalore - 560042, INDIA
Email: bangalore@singhassociates.in

MUMBAI

48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra - 400021, INDIA

GURUGRAM

Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001

Ph : +91-11-46667000
Fax : +91-11-46667001

www.singhassociates.in

Singh & Associates
Founder - Manoj K. Singh
Advocates & Solicitors

Managing Editor
Manoj K. Singh

Editors
Mr. Vishal Gera
Ms. Anandini Sood
Mr. Ratul Sharma

Published by
Singh & Associates
Advocates and Solicitors

Contents

S&A HELPS ITS CLIENT TO CONTINUE WITH ITS WASTE TO ENERGY PLANT AT DELHI

Nilava Bandyopadhyay and Anandini Sood

Singh & Associates recently represented M/s. Timarpur Okhla Waste Management Company Limited (TOWMCL), which is a ground Company of Jindal saw Limited, in a matter before the Hon'ble National Green Tribunal (NGT) wherein, the issue involve was closure of the Waste to energy Plant maintained by TOWMCL[1]. Initially, the Petitioners 'Resident Welfare Association of Sukhdev Vihar' had approached the Hon'ble High Court of Delhi by filing Public Interest Litigation under Article 226 of the Constitution of India inter alia praying that the construction of the proposed Waste to Energy Plant close to Okhla STP should be stopped and/or to shift the existing plant to any other site and to direct the concerned Authorities to take action against the concerned officers who planned construction and commencement of the Waste to Energy Plant in that area.

This relief was claimed by the Petitioners by invoking Article 21 of the Constitution of India. The Petitioners also claimed in the petition that the Municipal Corporation of Delhi (MCD) was in the process of setting up of a Waste to Energy Plant for processing and disposing municipal waste using Refuse-derived Fuel (RDF) based incineration technology to generate 16 MW of power per day. According to them, once, the said plant became operational, it would bring disaster to the environment and ecology and there would be release of deadly sinister chemicals to the environment causing air and water pollution. Further, 20% of residue left after burning of RDF pellets would be in the form of highly toxic ash, which would pollute the entire carriageway, wherever it is dumped. It would be dangerous to the lives of the residents of these colonies in particular and to the people in the city in general. It was hence averred that the proposed scheme of setting up the Waste to Energy plant at Okhla is a self destructive, anti-people scheme to endanger the lives of thousands of residents of the immediate neighboring colonies and would also affect the lives of lakhs of people in the surrounding colonies. That the whole project was misconceived, misguided and misdirected in terms of the development scheme.

The Hon'ble High Court, although declined the prayer of the Petitioners to stop the construction of the Waste to Energy Plant, however, directed that the said implementation of the Plant will be subject to the final order of the Hon'ble Court. Vide order dated 23rd January, 2013, the matter was transferred to the NGT because the writ petition concerns environmental issues covered under Schedule-I of the National Green Tribunal Act, 2010. After the petition was transferred to the NGT, the Petitioners filed an application seeking Closure of the Plant and also for amendment to the Petition. The Application for the closure of the Plant was rejected by the NGT, wherein the application for amendment was allowed giving liberty to the TOWMCL and the Authorities to raise the questions regarding maintainability at the final stage.

TOWMCL's case in nutshell was that the National Capital Territory of Delhi (NCT of Delhi) had delegated the task of developing and managing Waste to Energy Plant to M/s IL&FS which formed a Joint Venture company in the name of New Delhi Waste Processing Company Pvt. Ltd. (NDWPCL) with the Department of Power, Government of NCT of Delhi and developed the Integrated Municipal Waste Processing Project at NDMC compost plant site at Okhla by virtue of Special Purpose Vehicle (for short 'SPV') created for this project, namely, TOWMCL. The plant started Commercial Operation on 1st September, 2012 and on 20th November, 2012 'Consent to Operate' under both Air Act and Water Act was granted by Delhi Pollution Control Commission (DPCC) validating the period up to 20th March, 2013, which kept on extending from time to time. It was stated that compliance with all the requirements of law had been made and that the Plant was a non-polluting plant. The same had also been established by number of inspections conducted by the Joint Inspection Team. It was also stated that nearly 800 of such plants were operational all over the world where the technology using incineration had been installed in the middle of the cities. Further the

1 *Sukhdev Vihar Residents Welfare Association & Others v. The State of NCT of Delhi & Others [ORIGINAL APPLICATION NO. 22 (THC) OF 2013]*

performance of the project in question was being monitored under the orders of the NGT by a Joint Inspection Team and the emission reports had shown improvements over a period of time as even stated by the Central Pollution Control Board (CPCB) in its affidavit dated 12th November, 2013. It was hence, submitted that the project in question did not violate Article 21 of the Constitution of India in relation to the rights of the Petitioners.

Mr. Manoj K Singh, the Founding Partner of S&A led the argument on behalf of TOWMCL. Appreciating the arguments advanced by S&A, the NGT decided that the claim of the Petitioners in so far as it challenges the Environmental Clearance granted to TOWMCL was barred by time, as the specific provisions of the NGT Act debar a person from challenging the Environment clearance after a lapse of thirty days[2].

It was also observed by the NGT that in a city like Delhi, where there is space constraint and per day more than 8000 Tons of waste is being generated by the citizens of Delhi. There is problem regarding managing such huge quantity of waste and therefore, one of the possible solution to the problem is to make Waste to Energy Plant, by which at least certain portion of the waste will be treated in a better manner and at the same time, the same will generate electricity.

The NGT further observed that at the same time, the Plant has to strictly follow the emission norms and should not in any manner cause pollution or create environment hazard. The NGT to keep regular check on the functioning of the Plant, also directed for formation of a Joint Committee, which will make inspections including surprise inspections. The NGT at the same time also directed TOWMCL to expedite the process of installation of automatic separator, which will further reduce the emission. Further it was directed by the NGT That the Plant shall operate to its optimum capacity and would not cause any environmental pollution. Joint Inspection Team shall conduct monthly inspections wherein one would be a surprise inspection and another monthly inspection would be carried out upon giving notice to TOWMCL. More directions were given by the Tribunal with respect to increasing the green belt, establishment of an online monitoring system and improving existing landfill sites as well.

The judgment of the NGT, in a way a big relief for the citizens of Delhi, where the waste management has become a chronic issue. The Municipalities, which as per the Statute is required to do the waste management, has its own limitations and in that scenario, to manage such huge quantity of waste, the decision of the NGT to allow the Waste to Energy Plant within the city, is a very welcome move. Sometimes, it has been observed that the waste has covered the face of the city and there should be some immediate step to give Delhi a facelift. Undisputedly, the present Plant of TOWMCL along with two other Waste to Energy Plants will definitely bring some permanent solution to the problem. At the same time, NGT's direction to keep a vigilant check on the Plants, will ensure the maintaining the environment.

2 Section 16 of the National Green Tribunal Act, 2010.

LAW RELATING TO 'CONTENT' BROADCASTED BY TELEVISION CHANNELS IN INDIA

Ruby Panchal

Under the Indian jurisdiction, the content regulation of the television channels initiated from early 2000, when the Ministry of Information and Broadcasting enacted the 'Policy Guidelines for Uplinking in India.' The Uplinking Guidelines are for the TV channels which operate and have their control and management within India i.e. Star Plus, Colors TV. Downlinking Guidelines are for the TV channels which operate and have their control and management outside India i.e. Comedy Central. These guidelines were enacted to regulate the license for uplinking and downlinking by imposing general and specific conditions.

In 2005, Bombay High Court in *Pratibha Naithtani* case,[1] the writ petition was filed by a teacher aggrieved by '*telecast of adult and obscene films shown by the electronic media and the obscene posters and photographs printed by the print media.*' The government amended the Uplinking and Downlinking Guidelines in 2005 according to directions of the Court. The television channels are now required to follow the *programme* and *advertisement code* given in the Cable Television Network (Regulation) Act, 1995 (hereinafter the 'Act').

DEFINING "BROADCASTERS"

These guidelines were initially formed for *cable operators* and *service providers* only. The term broadcaster was added under the Act via 2012 amendment act, and is defined as, '*it means a person or a group of persons, or body corporate, or any organization or body providing programming services and includes his or its authorized distribution agencies.*'

PROVISIONS UNDER CABLE NETWORK (REGULATION) ACT, 1995 AND POLICY GUIDELINES FOR UPLINKING AND DOWNLINKING

Clause 9.2 of the Uplinking Guidelines and clause 10.2 of the Downlinking Guidelines provide a general condition upon the television channels that they shall abide by the programme code and the advertising code. This code is provided under Rule 6 and 7 of the Cable Network (Regulation) Rules, 1995. These rules stipulate grounds for the television channels within purview of which the programmes should be telecasted.

THE PROGRAMME CODE AND ADVERTISING CODE

The *programme code* and *advertising code* is laid down under Rule 6 and 7 of the Cable Television Network (Regulation) Act, 1995. In August 2016, the rules were amended and a new ground for the programme code was added with respect to *prohibition on telecast of cruelty on animals.*

But the moot question lies as to whether Courts can regulate the content of television network under programme code and advertising code as it is held time and again by various High Courts, that 'content regulation' should only be done by the MIB.

In the case, *Deepak Maini* v. *Star Plus & Ors.*,[2] the Delhi High Court held that "*it is not for Courts to frame guidelines to regulate the content on TV as this existence is best left to the Government itself. There is no vacuum as the Programme and Advertisement Code framed under the Act, 1995 as applicable to Downlinking of television channels like the Respondent TV Channel. It is open to Government to take action under Act, 1995.*"

Further in *Sai Lok Kalyan Sansthan* v. *Union of India,*[3] the Petitioner came before court for regulatory decision on '*astrology shows who promises to cure various ailments on payment of money.*' The Delhi High Court cited that there already exists a mechanism consisting of Policy Guidelines which is administered by IMC for violation of Programme Code or Advertisement Code. Thus,

1 *Pratibha Naitthani v. Union of India (UOI) and Ors. AIR 2006 Bom 259.*

2 *Deepak Maini v. Star Plus & Ors. WP (C) 10383 and 10396/2009.*

3 *Sai Lok Kalyan Sansthan v. Union of India WP (C) No. 3252/2014.*

there is already a regulatory mechanism in place; therefore it's not necessary for this court to issue a direction.

The Hon'ble High Court of Allahabad [Misc Bench No. 2685 of 2012] on 10.04.2012 directed MIB to ensure that news relating to movement of troops should be given highest attention.[4] Pursuant to this High Court order, MIB issued an advisory to all the TV channels. This shows that Allahabad High Court entrusted MIB with the content regulation with respect to telecast of movement of troops.

Further, in the case 28.11.2011, the Division Bench of Andhra Pradesh High Court[5] [Writ Appeal 481/2011] upheld the order passed by MIB for prohibiting transmission and retransmission of SS Music Channel under Section 20(2) of Cable Television Networks (Regulation) Act, 1995. Pursuant to this MIB imposed six day suspension on the TV channel. Even in the case *Creative Channel Advertising and Marketing P. Ltd.* v. *UOI,*[6] the court upheld the order passed by R1 for violation of Programme Code.

In the case *Court on its own motion* v. *State*,[7] the Delhi High Court held that channel has violated the Programme code by conducting the sting operation which was fabricated. The Court observed that content is regulated by the Programme Code and keeping in mind the growing electronic media, MIB is inviting suggestions from general public with respect to Broadcasting Bill and Code of Conduct.

However, in *Viacom case,*[8] the Delhi High Court held that when the matter comes before the court, the court can also adjudicate upon the content material to check whether there is violation of Programme Code.

4 *Retrieved from http://www.mib.nic.in/WriteReadData/documents/pc12.pdf.*

5 *Available at http://www.mib.nic.in/WriteReadData/documents/pc11.pdf; Writ Appeal No. 481/2011 of Andhra Pradesh High Court.*

6 *Creative Channel Advertising and Marketing P. Ltd. v. UOI WP (C) No. 3401/2013.*

7 *Court on its own motion v. State 146(2008) DLT 429.*

8 *Viacom 18 Media Private Ltd. v. Union of India 216(2015) DLT 222.*

THE BROADCASTING BILL AND SELF REGULATION CODE

This was introduced in 2006 and it provides a comprehensive regulatory system of the broadcasters. It provides for setting up of Broadcasting Authority of India which would oversee and regulate the content of Broadcasters. The bill also provides for formation of a Self Regulation Code which would be observed by the television channels. However, till the time this regulation Code is formed, Programme and Television code would be applicable. Presently, the Indian Broadcasting Foundation of India has invited comments of various sections of society for amending the bill accordingly.

THE SCHOOL NEXT DOOR

Arunima Singh

BACKGROUND

It is that time of the year when parents are all ready and set to begin their ward's admission process. They conduct research and find the best suitable schools judged on a number of criterion such as tuition fees, distance of the school from their residence, academic excellence, sports and extra-curricular activities etc. But before the ball could have rolled, Directorate of Education and the Government of Delhi NCT circulated a notification bearing No. F/DE/15/1031/ACT/2016/12668 on 07.01.2017 in pursuance of a previous notification bearing No. DE.15(172)/PSB/2016/77 dated 19.12.2016 (hereinafter collectively referred to as "Notification"), which would have directly affected the entire admission process for the primary and pre-primary sections had the High Court of Delhi not come to the rescue. The present article concentrates on the most controversial part of that notification, the history of litigation surrounding it and an opinion as to the likely impact of the implementation of the notification on the little one.

THE PROBLEM PART

In simple terms, it implies that those private unaided schools which have been allotted land from Delhi Development Authority under a covenant on the condition either that:

a. The schools "shall not refuse admission to the residents of the locality"; or that

b. The schools shall undertake to admit 75% of the students from the neighborhood of the locality in which the school is located.

Then on application of the notification, such private unaided schools will have to give preference to the applications made by the kids residing within a certain radius of the school. What we have read above is the 'neighborhood principle' which implies that schools can not refuse to admit (or only admit) children in the neighborhood who live:

a. Within 0-1 KM radius of that school;

b. If seats remain vacant after the above, then within 1-3 KM radius of the school;

c. If by any luck seats still remain vacant, then 3-6KM radius of the school; and

d. Then beyond 6 KM.

The direct implication of this is that given the limited number of seats available, a child residing in east Delhi will most likely not find admission in the elite schools of central Delhi. It is to be noted that this condition was intended to be applied to only those private unaided schools which have taken land on grant from the Delhi Government (DDA) and at the time of allotment, their respective allotment letter contained this condition.

In the flutter of an eye, the High Court was moved with several writ petitions wherein the parties including private unaided schools, parents, children, committees and forums have alleged infringement of their Fundamental Rights by the operation of this notification.

HISTORY OF JUDGMENTS

In *TMA Pai Foundation*[1] judgment it was held by the Hon'ble Apex Court that private unaided schools enjoy maximum autonomy in day-to-day administration in the exercise of their fundamental right under article 19(1)(g). In the case of *P.A. Inamdar*[2], the Apex Court held that maximum autonomy is also enjoyed by minority institutions insofar as minority unaided institutions have the unfettered fundamental right to devise a procedure to admit students subject to the said procedure being fair, reasonable and transparent. In 2014, in *Pramati Educational and Cultural Trust (Registered) and Ors*[3]., the Apex Court has reiterated

1 *TMA Pai Foundation v. State of Karnataka reported as (2002) 8 SCC 48.*

2 *P.A. Inamdar v. State of Maharashtra reported as (2005) 6 SCC 537.*

3 *Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Ors. Reported as (2014) 8 SCC 1.*

that the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions includes the right to admit students of their choice and autonomy of administration. All the above three judgments were quoted by the High Court of Delhi while deciding upon a similar notification[4] which gave overbearing weightage to neighbourhood criteria. In the latter most matter between *Forum for Promotion of Quality Education for All*[5], it was held that such notification by the Department of Education relying heavily on the neighborhood of the child for consideration of admission is arbitrary, unreasonable, and against public interest.

JUDGMENT

After the panicked schools forums and committees, parents and children approached the Hon'ble High Court of Delhi for relief, due to urgency of approaching admission deadlines, arguments were conducted in a "truncated" manner. In the end, the judicial system came to the rescue of Fundamental Rights.

The above notification has been stayed by the Hon'ble High Court of Delhi vide its interim order dated 14.02.2017[6]. However, such stay is to operate only until the disposal of the concerned writ petitions pending before the Court. The major principles laid out in the judgment dated 14.02.2017 are as follows:

a. 25% quota for economically weaker sections has been based on the neighborhood criteria only to prevent children (belonging to economically weaker sections) from dropping out of schools because of the long travelling distance from schools to homes. However, the same cannot be applied to fee paying general category students;

b. Apart from section 12(1)(c) of the Right to Education Act, 2009, no other section of the same act applies to private unaided schools and that 12(1)(c) fixes the extent of responsibility of private unaided schools to admitting 25% students belonging to economically weaker sections;

c. Unilateral definition of a term/condition in the allotment letter cannot be done by Department of Education;

d. State has the power to regulate private educational institutions as the school's rights are not unqualified and absolute under 19(1)(g) however, the notification prima facie fails the twin test of being in general public interest and of being a reasonable restriction under Article 19(2);

e. Children and parents under Articles 19(1)(a) and Article 21 as well as under Article 26(3) of the Universal Declaration of Human Rights have a fundamental right to be considered for admission in a school of their choice;

f. The primary cause of chaos surrounding nursery admissions is lack of adequate number of quality schools in Delhi; and

g. A parent/guardian will have the paramount right of choice with respect to its ward and the State cannot step into the shoes of a parent and decide what is best or beneficial for such a child.

CONCLUSION

Being in Delhi, the fight of admission comes down to a handful of elitist private schools given that the government schools in the city are not at par with the private ones. Also, given the dense population of Delhi, it is highly unlikely that seats will remain vacant for admission beyond the 3-6Km mark. The only positive side which the author can understand from the implementation of the present notification is that the elite private schools will not be able to prefer a child coming from an influential family (who lives beyond 6 km) over a child who belongs to a humble background (within 3 km). However, this positive is completely subsided by the huge suffering of that child who will be denied admission in a school of his choice merely because of his placing on a map. Thus, the judgment of Delhi High Court staying the notification for the interim has come to the rescue of fundamental rights of schools and parents, but the most, it has come to the true rescue of the future of that little one.

4 In form of Office orders dated 18.12.2013 and 27.12.2013 issued by Lt. Governor of Delhi amending Clause 14 of earlier notifications pertaining to nursery admissions.

5 Forum for Promotion of Quality Education for All v. Lt. Governor of Delhi and Ors. Reported as (2015) 216 DLT 80.

6 Passed in batch petitions with lead matter as Forum for Promotion of Quality of Education for All and Ors. v. DDA and Ors. in Writ Petition © No. 287 of 2017.

DISCOVERY IN ARBITRATION

Kunal Kumar

'Witness may lie but the documents do not.'[1]

The production of documentary evidence holds major importance towards the outcome of any commercial dispute. Production of documents is necessary as it helps the tribunal to deliver a reasoned award. Parties submit the documents to the arbitral tribunal to support their claim, counter claim or defense. The problem usually arises when parties rely on the documents which are in the possession of the opposite party.

Domestic arbitrations in India are governed by Arbitration and Conciliation Act, 1996. In the case of *Thyssen Krupp Werkstoffe GMBH* v. *Steel Authority of India,* MANU/DE/0386/2010, it was held that though there is no specific provision under the Arbitration and Conciliation, 1996 specifically conferring power on the arbitrator to direct discovery, the arbitrator has absolute power and flexibility to conduct the proceeding as he may consider appropriate and is not bound by the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908.[2] Further, it was held that Section 27 of the Arbitration and Conciliation Act, 1996 only deals with third-party discovery and not with the discovery of parties. However, in the case of the *Delta Distilleries Limited* v. *United Sprits Limited,* AIR 2014 SCC 13, the Hon'ble Supreme Court interpreted that the term 'any person' under Section 27 (2) (C) of the Act, 1996 is not just limited to the witnesses but also covers the parties.

Likewise, in another case *Silor Associates* v. *Bharat Heavy Electrical Limited*[3], 213 (2014) DLT 312, it was submitted by the Supreme Court that the tribunal is empowered by its own to direct the parties to produce the documents without taking assistance from the court under Section 27 of the Arbitration and Conciliation Act, 1996 and upon failure to comply with the directions of the tribunal to produce the documents, the aggrieved party may draw adverse inference against the defaulting party or may require the tribunal to enforce the same direction with the assistance of the court under Section 27 of the said Act.

The parties cannot just directly approach the court under Section 27 to seek assistance from the court. It is necessary for the parties to seek permission from the arbitral tribunal before filing an application under Section 27 before the court.[4] The tribunal is not under any obligation to grant such permission. The pleadings are before the tribunal and the arbitrator(s) are the master of the case. The tribunal has to conclude whether or not the evidence requested to be produced is relevant or not.[5] It is appurtenant to note that the exercise of power under Section 27 is to just assist in taking evidence and not to determine the admissibility, relevancy, materiality, and weight of any evidence.[6]

The reason why parties prefer arbitration over litigation is due to the flexibility arbitration has to offer. The parties are free to choose their own arbitrator, the number of arbitrators (odd number), the governing law, the seat of arbitration, whether or not to have any witnesses, whether or not to have any documentary evidence or just have it completely oral based (like in the cases of fast-track procedures). However, in most cases parties prefer having documentary evidence. Production of documents helps the parties to support their claims by which the arbitrator can deliver a well reasoned award. Therefore, the arbitral tribunal has the power to get the evidence as it may become necessary.[7]

EMERGING TRENDS FOR DISCOVERY IN THE FIELD OF ARBITRATION

REDFERN SCHEDULE

It is a collaborative document which both parties and the tribunal use for the production of documents. It is

1 *Vishnu @ Undrya v. State of Maharashtra, [2005] Insc 671 (24 November 2005), Para 12. Line 13.*
2 *Section 19, Arbitration and Conciliation Act, 1996.*
3 *Silor Associates v. Bharat Heavy Electrical Limited, 213 (2014) DLT 312.*
4 *Satinder Narayan Singh v. Indian Labour Co-operative Society ltd., (2008) 1 Arb LR 355.*
5 *Hindustan Petroleum Corporation v. Ashok Kumar Garg (2007) 1 Arb LR368.*
6 *Thiess Iviinecs India v. NTPC Limited & Anr, MANU/De/0748/2016.*
7 *Delta Distellaries Limted United Spirit 2014 case.*

usually used for international arbitrations to create records for the requests for production of documents and responses between both parties.

SAMPLE OF REDFERN SCHEDULE

S. No.	Claimant's Request	Claimant's Reason for Request	Respondents Objection	Claimant's Comments/ Reply	Tribunal's decision

The only reported case to have used Redfern Schedule is *Thiess Iviinecs India* v. *NTPC Limited*.

E-DISCOVERY

In legal proceedings, it is not uncommon to have discovery. E-discovery is the electronic discovery. It is the process of storing, compiling and securing data such as files, E-mails, documents, database, bills, etc. for evidence in legal proceedings. E-discovery is very helpful as it is reliable and saves time. More than 3 Zettabytes (1ZB= 1 Billion of Terabytes (TB)) of the digital data is stored around the world. A large amount of time is being used in litigation and also in arbitration. Although parties may agree to limit discovery or have no discovery at all (in arbitration) but there is still a large amount of data being used in proceedings these days.[8] With the advancement in technology, promising software such as TAR (Technology Assisted Review) has now come into existence. This software runs on an algorithm which helps in prioritizing the documents in terms of their relevance. It provides accurate discovery and also delivers more consistent review. This kind of technology should be used more often as it saves time and cost, significantly. TAR was first used by US courts[9], followed by the Irish courts[10]. Recently, even the UK Courts have joined the US and Irish courts accepting E-discovery[11].

"E-discovery is a game changer," proclaimed Jayesh H., founder, Juris Corp. "Any data, which could be denied in discovery, can be retrieved using recovery software," "But E-discovery is not a search and seizure process. If handled well, it can expedite dispute resolution."[12]

CONCLUSION

After the amendment of Arbitration & Conciliation, 1996 the Indian courts have become more arbitration friendly. Indian arbitration proceedings should not hesitate from using Technology software programs such as TAR which are likely to change the future of discovery in arbitration.

8 *How Technology Assisted Review Can Decrease the Cost of E-Discovery in Arbitrations By Ignatius Grande and Joseph Lee.*

9 *Da Silva Moore v. Publicis Groupe, Judge Peck. 11 Civ. 1279 (ALC) (AJP).*

10 *Irish Bank Resolution Corp. v. Quinn, [2015] IECH 175.*

11 *Pyrrho Investments Ltd. v. MWB Property Ltd., 2016 EWHC 256 (Ch), Judge Master Paul Matthews.*

12 *http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/Quotes/India_Can_Become_Global_Arbitration_Hub.pdf.*

TRENDING IN IP: #HASHTAGS

Himanshu Sharma

INTRODUCTION

The emergence of liberal markets across the world has become a feeding ground for the new marketing techniques and key players in market are now coming up with fresh approaches in the field of marketing their products. In the recent times, the classical methods of marketing are proving to be redundant as consumers have become tech savvy and that they can only be catered by the methods which are more novel and unique. The technology also have played a big role in the transformation of marketing techniques and has provided new marketing platforms such as social media, web portal etc. One of the recent and most unique methods of marketing products is through # hash tags.

Hash tags is a word or phrase preceded by a hash sign (#), used on social media websites and applications to identify messages on a specific topic. The initiator of a hash tag has an intention to maximize the reach of the topic to the people and it also serves as a common platform for a topic. The content become viral and results in the generation of a #tag, which then garners the attention of a wider audience. The companies then try to en-cash upon these moments of publicity and promote their product while increasing their association with the consumers.

HASH TAGS AS TRADEMARKS UNDER INDIAN TRADEMARK LAW

Now the question is, whether a hash tag can be registered as a trademark under the Indian Trademark Act, 1999.

The definition of a mark is provided under Section 2 (m) of the Indian Trademark Act, 1999 which states that

> *"Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof"*

Now as per the above definition a hash tag can qualify as a mark under a combination of words and numeral but in order to qualify as a trademarks same has to qualify the definition of a trademark provided under the Indian Trademark Act, 1999 under section 2 (zb) which states as below:

> *"Trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods or their packaging and combination of colours"*

The two conditions mentioned under the Act for a mark to be qualified as a trademarks are as mentioned below:

1. Capable of being represented graphically; and
2. Capable of distinguishing goods and services of one person from other person.

When we put these two conditions to a hash tags which is applied for the registration as a trademarks, we see that first condition is met instantly as a hash tag is a combination of words and numerals which can definitely be represented graphically.

Now the second condition, which is the ultimate test for a hash tag to qualify as a trademark should be analyzed. As the hash tags have a limited life because topics which trends for a brief period die their own death in a short span of time and the trending topic easily fall in to oblivion. There are numerous hash tags trending in a very short period and the second condition, which is also interpreted as distinctiveness under Indian Trademark Law, is not easy to achieve and rallied over a longer period of time in case of hash tags. The trademarks are a source identifier and the hash tags which can fulfill this criterion can qualify for registration under the Act.

Under Section 9 of Indian Trademark Act, 1999, the absolute grounds of refusals are given and under sub-section (1) of section 9 states that:

> *"The trademarks -which are devoid of any distinctive character, that is to say, not capable of*

distinguishing goods or services of one person from those of another -shall not be registered"

Considering the above section, it is easy to deduce from the above section that only hash tags which are distinctive in nature can be registered as a trademark under the Indian Trademarks Act, 1999.Hash tags which are distinctive in nature or have become distinctive with the passage of time can only be qualified for registration as a trademark.

The distinctiveness mentioned under the Act may be classified in two:

1. Inherent distinctiveness; and
2. Acquired distinctiveness.

A hash tag can easily fall under any of abovementioned two categories, it may either be inherently distinctive in nature due to it being an invented word or it may be something which trends for a longer period of time such that the people start to identify the source through hash tag only. Further it shall also be kept into the mind that applying a hash tag to a common word or generic word would not make it a trademark as putting a hash tag will not make it distinctive. The trademark needs to pass the test of distinctiveness of trademark provided under the Act.

SITUATION IN USPTO

The registration of hash tags as a trademark is catching up in the US market and there are numerous trademarks filed in USPTO. The USPTO in 2013 under TMEP §1202.18 of Trademark Manual of Examining Procedure recognized that only a term containing the hash symbol or the term "hash tag" which can function as a source identifier of an applicant goods and services can be registered as a trademarks. The USPTO has already granted over 100 hash tag registrations since 2013. Further there are other important notes under the TMEP such as TMEP § 1202.18 which provides that a hash tag may be registrable as a trademark if it includes a disclaimer of the wording "hash tag" or the hash symbol "in cases where they are separable from other registrable matter." Further it is also provide that USPTO will not allow registration of marks which consist only of the hash symbol or the term "hash tag" combined with merely descriptive or generic wording for goods or services.

Although the USPTO is providing the protection to the hash tags as trademarks but a US federal District Court has certainly put the hash tags trademark applicant's in to quandary. In case of *Eksouzian* v. *Albanese*, the court held that *"because hashtags are merely descriptive devices, not trademarks, unitary or otherwise, in and of themselves." Id. at 15 (emphasis added)*. The court also held that that the term *"pen" was merely a descriptive term for the products at issue and cited the TMEP provision stating "[t]he addition of the term HASHTAG or the hash symbol (#) to an otherwise unregistrable mark typically cannot render it registrable."*[1]

This judgment of the court has put a question mark over the registrability of hash tags as trademark in USA for the time being but same decision is under review by higher Court. Still the USPTO is providing the registration to the hash tags as trademarks which are capable of serving as source identifier of the goods and services of the Applicants.

CONCLUSION

Although the registration of hash tags as trademarks is still not very popular in India but the craze of social media is catching up with the mass due to availability of cheap data for usage due to the telecom war started with the entrance of 'Reliance-Jio' in the market. The market has suddenly expanded beyond imagination and people who earlier only heard about the power of internet, are now have easy access to the same. This will certainly lead to the emergence of hash tags as trademarks in order to cater the new consumer force and companies will definitely wants to take advantage of new consumers available in market.

1 *No. CV 13-00728-PSG-MAN (C.D. Cal. Aug. 7, 2015).*

SECONDARY LIABILITY IN TRADEMARK DISPUTES: LANDMARK JUDGMENTS

Tanuka De

INTRODUCTION

"Trademark infringement is nothing but the unauthorised use of a trademark or a service mark or in connection with goods and/or services in a manner that is likely to cause confusion, deception or mistake about the source of the goods and/ or services.[1] Now, if the infringer directly infringes the mark then the infringer will be primarily liable for his action. But with passage of time the concept of secondary liability is becoming rampant as right holders are turning against the internet middlemen and trying to hold them accountable for the wrongdoings of the direct offenders using their networks. That is the reason indirect liability has been given new urgency. Secondary liability can be based either on participation or relationship. The participant based liability occurs when the infringer induces or contributes to or facilitates the illegal conduct of the primary infringer which is also known as contributory infringement under the US law. Alternatively, secondary liability may also arise where the defendant benefits from the harm and is sufficiently close in relationship to the primary infringer and the law will treat them as one and the same.[2] A secondary infringement action is very efficient because in a single proceeding relief against a party who is enabling multiple acts of infringement by a number of primary infringers can be stopped.[3] The trademark rights holders have the potential to influence the business structure and models of the intermediaries with the help of the fear induced by them in the form of secondary liability. This is because secondary liability actions against these intermediaries help transfer costs of trademark enforcement to these internet intermediaries which happens when the owners of marks approach the Courts for relief or to undertake detection and prevention methods.

1 *About Trademark Infringement United States Patent and Trademark Office, http://www.uspto.gov/page/about-trademark-infringement.*

2 *Hard Rock Café Licensing Corp. v. Concession Services Inc., 955 F.2d 1143, 1150 (7th Cir. 1992).*

3 *Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).*

INDIAN CASE LAWS

One of the leading cases in India regarding the issue was *Consim Info Pvt. Ltd* v. *Google*[4] where the plaintiff company provides matrimonial services using the medium of internet which includes 15 regional portals, providing service to millions of Indians as well as people living outside India. Mr. Janakiraman Murugavel who was the promoter/ founder Director of said company obtained trademark registration for a host of trademarks adopted by him, which were assigned to the company which called itself Bharat Matrimony.com Pvt. Ltd by virtue of a deed of assignment which was subsequently changed to Consim Info Pvt. Ltd. in 2008 (the Plaintiff company. The plaintiff's claim was that the defendants 2 to 4 who also rendered matrimonial service on the internet were infringing the plaintiff's registered trademarks by using ad words and texts which were identical or deceptively similar to that of the plaintiff's. The plaintiff's asked for a permanent injunction against the defendant's and all people connected with the defendant company from using their registered trademarks as a relief and also a permanent injunction to prevent the defendants or any person working on behalf or connected with the defendant company from diverting the business of plaintiff to its potential competition by using the plaintiff's registered trademarks or and domain names which facilitated others to carry out the business of the plaintiff. The plaintiff's also demanded that the defendants should renounce any material bearing the plaintiff's registered trademark. They also claimed for damages to the tune of Rs 10,05,000 for such trademark infringement by the defendant. The plaintiff's also demanded temporary injunction against the defendants on the above grounds during the pendency of the suit.

The defendants were Google.com, second being shaadi.com, a domain offering matrimonial services and the third being a business division of the company going by the name of Info Edge India Ltd which also

4 *Consim Info Pvt Ltd v. Google, 2013 (54) PTC 578 (Mad).*

had a domain offering matrimonial services by the name www.jeevansathi.com. The fourth defendant also being a domain offering matrimonial services by the name www.simplymarry.com.

Whenever a web surfer would browse with the help of the Google search engine the name of the Plaintiff's 22 trademarks as keywords or any of its constituted parts, the defendants' (2 to 4) websites would appear as "sponsored links" on the right hand side of the page. A sponsored link consists of three parts, namely a) an ad title, b)an ad text and c)the URL which is the Uniform Resource Locator. The defendants therefore by using a deceptively similar or identical trademark of the plaintiff's in its ad title or ad text allowed an infringement to happen. Thus the plaintiff charged defendants 2 to 4 for direct infringement and Google search engine (Defendant no 1) for contributory or indirect infringement for aiding the occurrence of the trademark infringement. They held Google liable for the abetment because though the advertiser gets to choose the ad texts or ad titles they also get keyword suggestions which are provided by the search engine.

Section 28 of the Trade Marks Act, 1999 confers certain rights on the registered trademarks. The main dispute however arose concerning "the use of the trade mark" within the meaning of section 28(1) of the Trades Mark Act, 1999.

THE DEFENCE OF THE DEFENDANTS

Their first defence was how the plaintiff's registered trademarks consisted of generic and descriptive words which were outside the realm of protection. The terms used by Plaintiff such as "Tamil" and "matrimony" were in fact descriptive but the Plaintiff argued that they had received registration on the combination of such which through this combination has become distinctive. The Court held that they could not prevent the defendants 2 to 4 from using those words as they were carrying out the same line of business where such words were in fact necessary to use. The Court also held that by granting injunction to the Plaintiff they would have monopoly over the term "matrimony" which could have disastrous results. The second defence of the defendants which arises from section 15 and 17 of the Act was that the plaintiff had received registration for the combination of words and not the words itself and the plaintiff cannot claim monopoly over the individual words. However the Court on this ground favoured the plaintiff's as they had no intention of preventing the defendants from using the individual words.

Third defence was that words used by the Plaintiff such as "Tamil", "Telegu" etc were used more in the descriptive sense than in the trade mark sense and that their use of words do not constitute the "use of a mark" as explained under section 2(2)(b) or 2(2)(c) and was therefore not an infringement under section 29. After the Court had carefully analyzed section 29 it came to the conclusion that "various acts of infringement revolve either around the use of the mark in the course of trade or the use of the mark as a trade/business name or the use of the mark on packages, labels and advertisements." The Court finally held that the defendants should not have any unfair advantage in industrial or commercial matters within the meaning of section 29(8)(a).

Fourth defence of the defendants was that the Plaintiff was equally guilty of what they alleged was the wrongdoing of the defendants, that when web surfers would search for the defendants' 2 to 4 on the search engine the plaintiff's links would come on the right hand side under "sponsored links", thus arguing that the plaintiff's cannot ask relief for something that they themselves were guilty of doing but the Court did not wish to decide this dispute. The fifth defence was that the registration of plaintiff's marks is in violation of section 9(1)(b) but such was not accepted by the Court Section 31(1) was prima facie evidence of its validity. Thus it was not accepted by the Court.

The sixth defence was that " the plaintiff ought to have availed of the remedy provided under the Uniform Domain Names Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) and that they should not have rushed to this Court." to which the Court said that "the jurisdiction conferred upon this Court by statute, is not ousted by the said Policy. There is no bar of jurisdiction of this Court, to adjudicate a dispute relating to the alleged infringement of a registered trade mark and of passing off in the internet.", the claim was therefore rejected.

A similar tone echoed in the Delhi High Court when it heard the case of *Christian Louboutin Sas* v. *Nakul Bajaj and others*[5]. In this case the plaintiff filed a suit for

5 *Christian Louboutin Sas v. Nakul Bajaj and others, CS(OS) 2995/2014.*

infringement of trademark, publicity rights, passing off, unfair competition among many other things against the defendants. The plaintiff company, a French company derived its name from the famous designer Mr. Christian Loubotin and was known for selling high end luxury products. It had its business spread over 60 countries including India and carried it out through high end fashion boutiques like SAKS, SELFRIDGES, HARRODS etc. The plaintiff had registration for the trade mark CHRISTIAN LOUBOTIN along with the plaintiff's "Red sole" trademark. The defendants organized an event at Town Hall, Khan Market, New Delhi where they were exhibiting various luxury brands including the plaintiff's.

The case of the plaintiff's was that the defendants would be exhibiting the plaintiff's products at an event called Bridal Asia 2014 at the Ashok Hotel, New Delhi. Another reason for filing the trademark infringement case was the fact that the plaintiff's products were sold through www.darveys.com which was confirmed when the plaintiff visited the site. The plaintiff stated that, "(i) Defendant" goods are deemed to be counterfeit as they are being sold without the due permission, authorization and quality control of the plaintiff, on the internet. Even in case the defendants are selling grey market goods, the normal rule applicable in respect of grey market goods does not extend to the internet. The potentiality of harm on the internet is much higher as compared to the physical world, due to anonymity and ubiquity of the internet, where it is impossible for a proprietor of a trademark to verify the authenticity or exercise quality control over products bearing the proprietor's trademarks. It is almost impossible to enforce any damages awarded against such wrong doers as it is very easy for such operators to hide behind the veil of anonymity which the internet provides."

The Court after going through the merits of the case realised that the balance of convenience lies in favour of the plaintiff and against the defendant and if injunction was not granted the plaintiff would suffer irreparable loss and injury. Thus the Court restrained the defendants from selling, offering for sale, advertising, or directly or indirectly dealing in footwear and leather goods including shoes, handbags, purses, footwear or any other goods bearing the registered trademarks through their e-commerce website www.darveys.com and/or any of their outlets and/or during any event or exhibition whatsoever till the next date of hearing.

CONCLUSION

It is crystal clear that the Internet service providers get a certain level of protection from liability only if they lacked knowledge of infringements occurring. However if it can be proved that the intermediaries had sufficient knowledge regarding infringements yet did not take sufficient measures to eliminate or take care of such a situation then they should be penalised accordingly.

Right now in most of the countries in the world the benefit of safe harbour is given to the internet service providers if they act as a mere medium. The rationale behind such a law is that it is simply impossible to detect every infringement taking place as innumerable buyers and sellers come and utilise the platform provided by the ISPs and also because of the simple rationale that one must not suffer for the sins of others. The problem with such a law is that it is very difficult to claim damages from the direct infringers as they might be anywhere in the world. So these entities whose counterfeit products are being sold through these ISPs, most of the time, cannot recover the loss which it has suffered.

We, the authors of this paper feel that there should be a penalising statute which shall take care of the ISPs in cases where they have knowledge of such infringements, yet they continue to not take any measures to remove such infringement and thus protect the rights of the trademark holders.

As above mentioned if in spite of having knowledge the ISPs continue to encourage such infringement or remain oblivious to it then they shall compensate the trademark holders by the amount of loss suffered by such trademark holders from the time which the ISPs had such knowledge till the time they continued to encourage or allow such infringement.

NOC AS A PREREQUISITE FOR APPOINTMENT OF STOCKIST – ANTI COMPETITIVE

Rajdutt S. Singh

The Competition Commission of India ('*CCI*') in the Belgaum District Chemists and Druggists Association ('*Informant*') AND Abbott India Ltd. & Ors.[1]:

- Held that Karnataka Chemists and Druggists Association's ('*KCDA*') practice of mandating NOC as a prerequisite for appointment of stockist and fixing of trade margins for retailers and wholesalers is anti-competitive under Section 3(1) read with Section 3(3) of the Competition Commission of Act, 2002 ('*Act*').
- Directed KCDA to cease and desist from indulging in the aforesaid practice.

BRIEF FACTS

The Informant filed a complaint before erstwhile Director General of Investigation and Registration, Monopolies and Restrictive Trade Practices Commission ("DGIR") in August 2009, alleging that Abbott India Ltd. ('*Abbott*') and Geno Pharmaceuticals ('*Geno*') stopped supply of essential medicines to some of its members on the ground that they have to first obtain 'No Objection Certificate' ('*NOC*') from All India Organisation of Chemists and Druggists ('*AIOCD*') or from KCDA; and due to such conduct, supplies of essential medicines have been restricted.

Pursuant to repeal of the Monopolies and Restrictive Trade Practices Act, 1969, the erstwhile DGIR transferred this matte to the CCI under Section 66(6) of the Act with the observation that at that stage, the alleged practice appeared to be a restrictive trade practice of refusal to deal. The CCI, vide its order dated 29th June, 2010, directed the Director General ('*DG*') to cause an investigation to be made into the matter.

DG'S INVESTIGATION

DG found that the guidelines and norms prescribed by AIOCD and followed by KCDA impose restrictions inter alia on account of NOC or Letter of Cooperation ('*LOC*') from the state Chemists and Druggists Association is necessary for the appointment of new stockist or additional stockist. If the Association does not grant NOC/LOC, new or additional stockist cannot be appointed.

The DG further found that KCDA and AIOCD have indulged in actions and practices that are anti-competitive in nature and their guidelines, rules and regulations coupled with their anti-competitive conduct contributed to appreciable adverse effect in the market for pharmaceutical products, in contravention of the provisions of Section 3(3)(a) and Section 3(3)(b) of the Act.

DG also found that the margin of retailers and wholesalers have been fixed at 20% and 10% respectively. The DG concluded that KCDA prescribed the margins for wholesalers and retailers, which not only has the effect of fixing margins but also the effect of determining the sales price of nonscheduled drugs.

CONTENTIONS OF AIOCD

AIOCD contended that NOC practice acts as a benchmark to ensure that adequate quantity of drugs are available in the market and quality is not compromised. AIOCD claimed that NOC practice has evolved to prevent entry of spurious/doubtful quality drugs purchased from unauthorised sources. AIOCD also contended that there is no prohibition in law on manufacturers to consult an association regarding credibility of the person sought to be appointed as stockist.

Regarding fixing of trade margins, AIOCD submitted that Para 19 of Drugs (Prices Control Order) 2013 fixes trade margin of 8% and 16% for stockists and retailers respectively for scheduled formulations and therefore, the same cannot be termed as anticompetitive. Since DPCO did not fix margin in respect of nonscheduled formulations, a little higher trade margin of 10% for wholesalers and 20% for retailers has been agreed between manufacturers and stockist/retailers.

1 *Case No. C-175/09/DGIR/27/28-MRTP.*

CCI'S FINDINGS AND ORDER

The CCI noted that the Complaint originated from the Informant's allegation that Abbott and Geno refused to supply drugs to the members of the Informant as they were not having NOC from KCDA or AIOCD. However, based on DG's findings it was noted by the CCI that there is no contravention by Abbott and Geno as temporary suspension of supply of medicine is due to the non-submission of the demand draft/ cheque or periodic internal review and not on account of want of NOC from KCDA or AIOCD.

The CCI found that the practice of mandating NOC prior to the appointment of stockists results in limiting and controlling of the supply of drugs in the market and amounts to anti-competitive practice, in violation of the provisions of Section 3(1) read with Section 3(3)(b) of the Act. Therefore, the CCI concluded that KCDA contravened the provisions of Section 3(1) read with Section 3(3)(b) of the Act.

The CCI further concluded that fixation of trade margins for wholesalers and retailers by KCDA has resulted in determination of the sale and purchase price of wholesalers and purchase price of retailers, which ultimately impacts and determines the sale price of the pharmaceutical products, that would have otherwise been determined by the market forces. Thus, the determination of trade margins for wholesalers and retailers by KCDA is in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

In view of the above findings, the CCI directed KCDA to cease and desist from indulging in the practice of mandating NOC as a prerequisite for appointment of stockist and fixing of trade margins for retailers and wholesalers.

CONCLUSION

Sale, stock and distribution of drugs are undertaken by pharmaceutical companies through their distributors, stockists, sales consignment agents, etc. In view of the above order of the CCI, the pharmaceutical companies should keep in view that supply to drugs to any person/entity or their appointment as distributor/stockist ought not to be subject to any NOC from any association or organization.

MANDATORY FOR FINANCIAL INSTITUTIONS TO CHECK REVIVAL BEFORE MOVING FOR LIQUIDATION

Amrita Lala

BOMBAY HIGH COURT

a. Re-establishes the fact that the circulars/directives issued by the Reserve Bank of India from time to time are statutory in nature and are binding on all financial institutions;

b. Emphasizes that the inability to pay debts depends on various sets of facts and circumstances and could not become the sole criterion for exercise of the power to wind up; and

c. Mentions that the interest of creditors, contributories, stakeholders, and workers in majority must be safeguarded before considering the option of winding up on the request of a single creditor.

INTRODUCTION

The Hon'ble Bombay High Court ("Court") in the case of *IDFC Bank Limited ("IDFC")* v. *M/s. Ruchi Soya Industries Limited ("RSIL & Company")*[1] dismissed a winding-up petition filed by IDFC seeking winding up of RSIL, *inter alia*, on the following grounds:

a) Non-compliance of mandatory RBI guidelines that states the due recovery process could not be initiated until the corrective measures of rectification and restructuring are seen as not feasible;

b) A winding up order could not be made on a creditor's petition simply on the basis that the company is unable to pay its debts temporarily because of conditions out of its control if there's a chance of revival, as it would not benefit him or the company's creditors, contributories, stakeholders, and workers in general because the company could revitalize itself under favourable conditions; and

c) Wishes of large number of creditors could not be marred, who are trying to revive the company, by allowing the winding-up petition filed by minuscule creditor, as the process of rectification and restructuring on one hand and the process of recovery on the other hand cannot be permitted simultaneously and at the same time.

BRIEF FACTUAL BACKGROUND

RSIL is a public listed company, which processes 15% of the processing capacity of India's edible oil requirements and has more than 25000 shareholders, 8325 employees, a customer base of around 15 Crores, and supports the lives of 7-8 million farmers approx. It provides nutritious and value oriented foods through a network of 21 manufacturing units across the India built over last 30 years.

RSIL took loans from many financial institutions including IDFC. Though the contribution of IDFC comprises only 2% of the total debts owed by RSIL to the consortium lenders and only 1 % of the debts of the total creditors, IDFC served several due recovery notices and finally moved for winding up under section 433 and 434 of the Companies Act, 1956.

As per provisions of RBI circular, Framework for Revitalizing Distressed Assets in the Economy – Guidelines on Joint Lender's Forum ("JLF") and Corrective Action Plans ("CAP"), dated 26th February, 2014, it is said where the amount over Rs.100 Crore is found due and payable by a borrower to the lenders and if the account was not serviced for 60 days, it has to be classified as Special Mention Account-2 and in that event, it is mandatory that a Joint Lenders Forum (JLF) is formed comprising of all the lenders. Hence, a JLF was formed by consortium of financial institutions.

Since JLF was working on the revival of RSIL and IDFC filed a company petition for winding up, Consortium through its leader IDBI filed a petition to oppose the winding up.

1 Company Petition No. 570 of 2016, Company Application No. 455 of 2016 in Company Petition No. 570 of 2016 and Company Application No. 470 of 2016 in Company Petition No. 570 of 2016.

ISSUES

1. Whether the Consortium of Financial Institutions be allowed to intervene in the winding-up proceeding at the stage of admission, before a notice is issued for final hearing;

2. Whether the circulars issued by Reserve Bank of India are statutory in nature and are required to be complied with during the process of liquidation initiated under Company Act, 1956 (debt recovery); and

3. Whether a case has been made for the winding up of the company.

HELD

Regarding the first issue, the Court finds that if the creditors, workers, and contributories are allowed to intervene whether they oppose or support the winding-up petition, the Court can take a balance view and hence allowed the Consortium of Financial Institutions to intervene at the stage of admission in light of the observations made by Hon'ble Supreme Court in the cases of *National Textile Workers' Union & Ors.*[2] and *M/s. Madhusudan Gordhandas & Co.*[3] and the judgment of the Hon'ble Bombay High Court in case of *Bharat Petroleum Corporation Limited*[4]

Regarding the second issue, the Court held that the circulars issued by the RBI are statutory in nature and are required to be complied with by the financial institutions, as per findings of Hon'ble Supreme Court in the cases of *Canara Bank* v. *P.R.N. Upadhyaya and Ors.*[5], *Sudhir Shantilal Mehta* v. *Central Bureau of Investigation*[6], and *Central Bank of India* v. *Ravindra*[7].

In this way, it is obligatory for IDFC to abide by JLF Guidelines. The court also pointed that not signing the Inter Creditor Agreement and Debtor Creditor Agreement could not be an excuse to escape from the obligations under JLF Guidelines.

The court stated that the circular dated 24 September, 2015 clearly provided an exit option for dissenting lenders who were not willing to participate in rectification or restructuring of the account. They could sell their exposure to new or existing lender within the prescribed time line for implication of the agreed CAP. It is further stated that it was not open to the dissenting lender to continue with its existing exposure and simultaneously not agree for rectification or restructuring as part of the CAP.

Regarding the third issue, the Court relied on the guidelines set by Hon'ble Gujarat High Court in deciding the winding up petition in the Case of *Tata Iron and Steel Co.* v. *Micro Forge (India) Ltd.*[8] alongwith the findings of Hon'ble Supreme Court in case of *M/s. Madhusudan Gordhandas & Co.* v. *Madhu Woolen Industries Private Limited* (supra), and the judgments of Bombay High Court in cases of *Bharat Petroleum Corporation Limited* v. *National Organic Chemical Industries Ltd.* (supra) and *Tata Capital Financial Services Ltd.* v. *Infraprojects Ltd.*[9]

The court observed that RSIL had a temporary setback and was making a sincere attempt of its revival with the assistance of large number of the creditors, and it would not be desirable and in the interest of all the creditors including IDFC to pass any order of winding up against RSIL at this stage.

ANALYSIS

The present judgment dealt with a winding up petition under sections section 433 and 434 of the Companies Act, 1956 and relied heavily on the guidelines laid down by Hon'ble Gujarat High Court in the case of *Tata Iron and Steel Co.* v. *Micro Forge (India) Ltd.*, which are to be kept in mind before reaching a decision for winding up petition or for passing an order of winding up.

The judgment of Hon'ble Gujarat High Court shows concern regarding the provisions of the clause (e) of section 433, which provides that the company court is empowered to pass an order of winding up if the company is found unable to pay its debts. The Court is

2 *National Textile Workers' Union v. P.R. Ramkrishnan & Ors; 1983 SCC (1) 228.*
3 *M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.; 1971 (3) SCC 632.*
4 *Bharat Petroleum Corporation Limited v. National Organic Chemical Industries Ltd. & Anr; 2004 (2) Mh. L.J. 114.*
5 Canara Bank v. P.R.N. Upadhyaya and Ors.; (1998) 6 SCC 526.
6 Sudhir Shantilal Mehta v. Central Bureau of Investigation; (2009) 8 SCC 1.
7 Central Bank of India v. Ravindra; 2002) 1 SCC 367.
8 Tata Iron and Steel Co. v. Micro Forge (India) Ltd; (2001) 104 Comp Cas 533.
9 Company Petition No. 443 of 2014.

of opinion that the inability to pay debts is required to be judged from various sets of facts and circumstances. Inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up. Inability may arise for a variety of reasons and the court is obliged to consider whether the inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market.

The opinion of the court is that winding up should be the last thing the court would do and not the first thing to do. A winding up petition ought not to be aimed at pressurizing the company to pay the money. Such an attempt would be nothing but tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the court.

Measures should be taken to revive the company first if there is a fair chance of it. This is what reflected in the present judgment of Hon'ble Bombay High Court.

RBI through its JLF Guidelines makes sure that the recovery process only starts when measures taken for rectification and restructuring fails.

The Hon'ble Gujarat High Court while delivering its judgment in the year 2000 felt the need of some Insolvency Law, like the United Kingdom had at that time.

With the introduction of Insolvency and Bankruptcy Code, 2016 in India, it is ensured that no one could demand liquidation directly in case of inability to pay before an attempt for restructuring the dues payable. In Bankruptcy & Insolvency Code, Financial Creditors have to first initiate Insolvency Resolution Process (IRP), which is a revival measure, and if the measures fail then only can proceed for liquidation.

Now the issue is that circular(s) issued by the Reserve Bank of India have not been overridden by the provisions of the Insolvency and Bankruptcy Code, 2016 and both are in simultaneous existence.

The simultaneous existence of both, gives rise to various questions like where Insolvency Resolution Process ("IRP") has to be initiated when JLF is already in existence and CAP is being formulated and if yes, then which process would supersede the other. Similarly, wouldn't the initiation of IRP where JLF has already been formed result in duplication of restructuring process leading to delay in IRP process and thereby defeating the purpose and objective of Bankruptcy and Insolvency Code?

The co-existence of simultaneous process requires co-ordination and synchronization. Therefore the burden is upon the Reserve Bank of India/ Legislature to view the entire situation in practical, realistic and holistic manner to bring about the needed clarity in the process of debt restructuring and recovery to be followed by financial institutions.

APPLICABILITY OF SARFAESI ACT IN THE STATE OF JAMMU & KASHMIR

Kumar Deep & Teena Arora

BACKGROUND

The High Court of Jammu & Kashmir ("J&K"), on July 16, 2015 in a petition[1] filed by the State Bank of India ("SBI"), invoked the special status of J&K and held that various provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") are outside the legislative competency of the Parliament of India. The Hon'ble High Court of J&K in the said petition observed that SARFAESI Act was in collision with Section 140 of the J&K Transfer of Property Act, 1920 and thus not applicable to banks. A division bench of the J&K High Court comprised of Justice Muzaffar Hussain Attar and Ali Muhammad Magrey underlined how the SARFAESI Act is not applicable to J&K owing to its unique constitutional position.

Consequent to this, SBI filed appeal before the Hon'ble Supreme Court. The appeal had been heard by a division bench of the Apex Court comprising of Justices Kurian Joseph and Rohinton Fali Nariman. The said appeal had been disposed off by the Apex Court on December 16, 2016 by setting aside the verdict of J&K High Court. Accordingly, the banks including SBI are allowed to use coercive methods and recover its loans in accordance with the provisions of SARFAESI Act.

FACTS OF THE CASE

SARFAESI is an enactment which inter alia entitles banks to enforce their security interest outside the court's process as per Section 13 thereof and giving power to take possession of secured assets of the borrower and sell them outside the court process. The High Court of J&K held that various key provisions of the SARFAESI Act were outside the legislative competence of Parliament, as they are in collision with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. The High Court of J&K in its judgment held that:-

1) The parliament does not have the power to make laws under Section 13, Section 17(A), Section 18(B), Section 34, 35 and 36 of the SARFAESI Act, so far as they relate to the State of J&K;

2) The SARFAESI Act cannot be enforced in the State of J&K;

3) The provisions of the SARFAESI Act can be availed of by the banks, which originate from the State of J&K for securing the monies which are due to them and which have been advanced to the borrowers, who are not State subjects and residents of the State of J&K and who are non State subjects/non citizens of the State of J&K and residents of any other State of India excepting the State of J&K; and

4) The provisions of SARFAESI Act cannot be applied to the State of J&K, since, it is a contradiction in terms to state that SARFAESI Act can be availed of by banks which originate from the State of J&K for securing monies which are due to them and which have been advanced to borrowers who are not the residents of the State of J&K.

State Bank of India, aggrieved by the verdict of J&K High Court, filed an appeal against the same in the Supreme Court of India. The Supreme Court had to decide in this appeal whether the SARFAESI Act in its application to the State of J&K would be held to be within the legislative competence of the Parliament. The learned Attorney General Shri Mukul Rohtagi and Shri Rakesh Dwivedi, learned Senior Advocate, on behalf of the Appellants i.e. SBI, presented their submission before the bench as per below:

1. The provisions of Article 370 (i.e. Temporary provisions with respect to the state of J & K) of the Constitution of India, read with Section 5 of the Jammu & Kashmir Constitution, 1956 which states that the executive and legislative powers of the state extends to all the matters except those on which the Parliament has power to make laws for the State under the provisions of the Constitution of India. The Instrument of Accession of Jammu and Kashmir, 1947 itself makes it clear

1 *State Bank of India v. Santosh Gupta and Ors.*

that List I of the 7th Schedule to the Constitution of India of the Government of India Act, 1935 would apply, and that the various Constitution Application to J&K Orders issued from time to time Under Article 370 makes it clear that Article 246(1) read with Entry 45 (Banking) and Entry 95 (deal with jurisdiction and powers of all courts, except the Supreme Couret, with respect to any of the matters in this list admiralty jurisdiction) of List I would empower the Parliament with power to enact SARFAESI Act;

2. Even the impugned judgment of the J&K High Court concedes to this;

3. According to the learned counsel of Appellant, once Entry 45 List I has no other competing Entry, in as much as List II of the 7th Schedule to the Constitution of India has not been extended to the State of J&K, and Entry 11A dealing with Administration of Justice contained in List III of the 7th Schedule to the Constitution of India does not apply to J&K, and Entry 6 List III dealing with transfer of property also does not apply, it is their case that Entry 45 List I is to be read in its full plenitude and is not cut down by the provisions of any other Entry. If it is found that the entire SARFAESI Act is in fact enacted under Entry 45 read with Entry 95 of List I, it would be clear that no other enquiry is necessary, as the Act in doctrine[2] of pith and substance would be preferable to these two entries. This being the case, the State's legislative power comes in only if none of the entries of List I or III are attracted. To refer to Entry 11A and to Entry 6, and further to state that Section 140 of J&K Transfer of Property Act would render the key provisions of SARFAESI Act without legislative competence, is wholly incorrect; and

4. It was submitted that recovery of loans is as much part of the banking business as the giving of loans, and that therefore the entire 2002 Act would fall within Entry 45 read with Entry 95 of List I.

2 As per Background Paper on Concurrent Powers of Legislation under List III of the Constitution by Shri P.M. Bakshi "Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, then the incidental encroachment by the law on the State List does not make it invalid."

DEFENSE OF RESPONDENTS IN THE APPEAL

Shri Vijay Hansaria, learned senior advocate, appearing on behalf of the private Respondent, had argued that-

1. Since both the Constitution of India and the Constitution of J&K are expressions of the sovereign will of the people, they have equal status and none is subordinate to the other. His basic argument to meet the contentions of the Appellants is that the SARFAESI Act, in pith and substance, relates to "transfer of property" and not "banking" and would, therefore, be outside the legislative competence of Parliament and exclusively within the competence of the State Legislature;

2. Parliament has limited power under Article 370(1)(b) of the Constitution of India whereas, the State legislature has unlimited and absolute powers over all the matters under Constitution of J&K except those where the Parliament has power to make laws. The subjects mentioned in the State List of the 7thSchedule to the Constitution of India can never be delegated or conferred on Parliament so long as Article 370 remains and therefore any transference of a State List subject to the Concurrent List later cannot apply to the State of Jammu & Kashmir;

3. That it is not enough Under Article 370 to confer power on Parliament by a Presidential Order, but that every time Parliament enacts a law under such power, before such law can operate in the State of Jammu & Kashmir, the State Governments concurrence must be obtained;

4. Section 140 of the J&K Transfer of Property Act is in direct conflict with Section 13 of SARFAESI Act and therefore, the Transfer of Property Act must prevail;

5. Section 17A and 18B of the SARFAESI Act, being Sections relatable to administration of justice, which is purely a State subject, would also be ultra vires Parliament; and

6. That local statutory laws prohibit transfer of land belonging to State residents to non State residents and accordingly, it will not be permissible under section 13 of the SARFAESI Act to sell property belonging to a permanent resident of the State to a person who is not a permanent resident of the State.

THE JUDGMENT

The Division Bench comprising of Justices Kurian Joseph and Rohinton Fali Nariman after heard both the learned counsels of the Appellant and Respondent, held that:

1. Section 140 of J&K Transfer of Property Act relates to auction sales that take place within the State. This being the case, it is clear that there is no collision or repugnancy with any of the provisions of SARFAESI Act and therefore, High Court is absolutely wrong by saying that the provisions of SARFAESI Act are outside the legislative competence of Parliament;

2. The State legislature having enacted Section 140 of the J&K Transfer of Property Act, therefore, having clearly stated that the State's subjects/citizens are by virtue of the said provision protected, SARFAESI cannot intrude and disturb such protection. The whole approach is erroneous;

3. Entries 45 and 95 of List I gives Parliament with exclusive power to make laws with respect to banking, and the provisions of SARFAESI can be said to be referable to Entry 45 and 95 of List I ,7th Schedule to the Constitution of India;

4. Section 5 of the Jammu & Kashmir Constitution will only operate in areas in which Parliament has no power to make laws for the State Thus, it is clear that anything that comes in the way of SARFAESI by way of a Jammu & Kashmir law must necessarily give way to the said law by virtue of Article 246 of the Constitution of India as extended to the State of Jammu & Kashmir, read with Section 5 of the Constitution of Jammu & Kashmir;

5. Sections 13(1) and (4) cannot be held to be beyond the legislative competence of Parliament as has wrongly been held by the High Court;

6. It is wholly incorrect to refer to Entry 11A of List 3 and to state that since it is not extended to the State of J&K, Parliament would have no legislative competence to enact Sections 17A and 18B of SARFAESI;

7. It is not possible to dissect the provisions of SARFAESI and attach them to different Entries under different Lists. As has been held by us, the whole of SARFAESI is relatable to Entry 45 and 95 of List I. Entry 95 List I is a source of legislative power of the Parliament for conferring power and jurisdiction on the District Court and the High Court respectively in respect of matters contained in SARFAESI. The subject "Administration of Justice" is only general and can be referred to only if Entry 95 List I read with Entry 45 List I are not attracted. Most importantly, even if it is found that Section 140 of the Jammu & Kashmir Transfer of Property Act entitles only certain persons to purchase properties in the State of Jammu & Kashmir, yet, as has been held hereinabove, Rule 8(5) proviso which recognizes this provision, has been brushed aside. In any case an attempt has first to be made to harmonize Section 140 of J&K Transfer of Property Act with SARFAESI, and if such harmonization is not possible, it is clear that by virtue of Article 246 read with Section 5 of the Jammu & Kashmir Constitution, Section 140 of the J&K Transfer of Property Act has to give way to SARFAESI, and not the other way around;

8. Article 1 of the Constitution of India and Section 3 of J & K constitution states that India shall be the Union of States and therefore, state of J & K shall be the integral part of Union of India; and

9. Therefore, Apex Court set aside the judgment of the High Court. As a result, notices issued by banks in terms of Section 13 and other coercive methods taken under the said Section are valid and can be proceeded with further. The appeals are accordingly allowed with no order as to costs.

CONCLUSION

This is one of the landmark decisions of the Hon'ble Supreme Court wherein the pronouncement of Jammu and Kashmir High Court for asserting the state's "sovereignty" and "sovereign powers", has been snubbed by the Supreme Court by stating that the state of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India. It is also apprehended that the Constitution of J&K is subordinate to the Constitution of India. Further, the residents of the J&K are governed first by the Constitution of India and also by the Constitution of J&K. The Apex Court in this appeal not only decided the applicability of the SARFAESI Act, which deals with recovery of debts due to banks and financial institutions, in the state of J&K saying that it is relatable to a subject under the Union List and parliamentary legislation did not require concurrence of the state government since the Centre had power to make law on this subject but also clarified that the residents of J&K are "first and foremost" citizens of India and that there is no dual citizenship as is contemplated by some other federal Constitutions in other parts of the world.

HOW TO DECIDE THE LIABILITY IN RESPECT OF PROVIDENT FUND DUES OF THE EMPLOYEES OF A CONTRACTOR WHO HAD MULTIPLE EMPLOYERS?

Surbhi Darad

The definition of the term 'employee' Under the EPF Act includes all workers working with the establishment or in connection with the work of the establishment either directly or indirectly. Act deals with provisions and instances to provide for the institution of provident funds for employees in factories and other establishments.

The nature of the business is such that establishments have some permanent staff and in relation to such staff they are paying P.F. contribution and dispute is about coverage of casual workers or site workers or temporary workers employed through contractors or otherwise. They claim that because of peculiar nature of their activity and work, they are required to engage contractors having specialization in particular area and these contractors in turn engage their own subcontractors and the subcontractors may again engage further petty contractors or labour contractors for doing work at various stages.

Para 26(2) of the ACT makes it mandatory that every employee employed in or in connection with the work of that factory or establishment is entitled and required to become a member of the fund from the date of joining the factory or establishment.

Para 30(3) of the Employees Provident Fund Scheme makes it clear that it is the responsibility of the principle employer to pay both the contribution payable by himself in respect of the employees. Under Para 36(B) it is the duty of every contractor to submit to the principal employer showing the recoveries of the contributions in respect of all the employees as required under the scheme to the commissioner.

Probable question that surrounds these circumstances have been dealt by the judiciary *Saraswati Construction Company* v. *Focal Board of Trustee*[1] as–

Regardless of whether there is employer-employee relationship amongst Petitioner and such specialist/ worker can be discovered by analyzing circumstance in light of "control test" or "integration test"- Where representative as often as possible changes his boss/ contractual worker and does not acknowledge a commitment to report for obligation consistently, on the off chance that he can be recognized and achieved, advantage of scope can be reached out to him.

While evaluating the technique under the 7A procedures Courts have additionally highlighted that it is obligation of the establishment to furnish the name of all workers to provident Fund Commissioner for check and estimation of the risk of the foundation. The purpose for the same is that every one of the subtle elements and records are asked amid the 7A procedures in view of which the report is readied.

Evaluating the situation that a worker employed directly or indirectly is doing the work of the establishment, then whether he will be considered as a part of the establishment or as a part of the contractor who deputed him at the said location. If he cannot be associated with either one of them then he stands ignored despite of the fact that he has performed the work in the regular nature as an employee of the establishment. This will create a gap giving the opportunity to overlook the liability of the principle employer and curtail the spending over provident funds. Identification of employee is therefore held to be must before effecting such recovery.

The underline intend behind the EPFC Act is to ensure worker's identity and stability in the establishment which will lead to stability and continuity of work for the worker. The identification of the employer tends to play very important role failing of which will hamper the right of the workmen. So as held in the case of

1 Construction Company v. Focal Board of Trustee, Manu/ DE/0827/2010.

Shrirampur Education Society v. *Regional Provident Fund Commissioner.*[2]

Identification of the status of employees is a must task before recovery of PF amount as it is the part of wages earned by such employees which is being deducted by the P.F. department. If the identity of the employer is not know or clear then there is no point in effecting such deductions from employer on account of such workers.

The inquiry shall be focused on determination of functional integrity between the two i.e. the establishment and the workman as the same shall ease the task of imposing liability for PF deductions. When any inquiry is being conducted in this regard then the burden to prove the status of employees lies with the establishment and burden to inquire and access the same lies with the authority conducting the inquiry. They cannot take the defense as that the establishment did not provided appropriate details and they sent the report on acute information made available to them without proper digging.

The authorities conducting the enquiry were required under law to first determine as to whether the provisions and requirement of section 1 sub-section 3(a) or (b) is made out and then only make assessment. Without discharging this burden and recording a finding with regard to applicability of the Act on the petitioner's establishment proceeding with the matter was not permissible.

The arrangement between the contractor/Sub-contractor and the establishment is clear on the point that who is playing the role of mere headman and who is actually having the control and management of the employees with respect to services to various establishments across India[3]. But this is not the general rule as the agreement between Contractors is on principle to principle basis different for every project.

The moot point here is not regarding the liability as to who will remit the PF amount rather the mandatory duty to be fulfilled by an organization/establishment.

In *Silver Jubilee Tailoring House* v. *Chief Inspector of Shops and Establishments*[4] reported in, the right of rejection of an employer was a key factor in determining whether the contractor was independent or a contractor under the control of the employer as also relied by the Supreme Court in *Mangalore Ganesh Beedi Works* v. *Union of India.*[5]

The nature of work which is given to contractors or to the site-workers is of limited duration. The Supreme Court has, therefore held that the word "employment" must be construed as employment in the regular course of business of the establishment. An employment for short period on account of passing necessity or a temporary emergency beyond the control of the Company would not be included. However, what is material is that each case would require the determination of its own facts and ultimately a factual determination has to be made based upon the facts & circumstances of the case applicable to each establishment.

There are varied views and difference of opinion on this point if we observe various judgments of difference judicature. But going by the law it would be suffice to say that if the employer is engaged in multiple employments then it is not the duty of the principle employer to access its status rather it shall be covered under the headings of independent contractors or the sub-contractors who is handling the work and management in this regard.

2 *Shrirampur Education Society v. Regional Provident Fund Commissioner, Manu/MH/0867/2014.*

3 *Tata Engineering and Locomotive Company Ltd. v. Union of India and Ors. 1991 (62) FLR 191.*

4 *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, AIR 1974 SC 37.*

5 *Mangalore Ganesh Beedi Works v. Union of India, AIR 1974 SC 1832.*

INTEGRATED REPORTING VIDE BUSINESS RESPONSIBILITY REPORT MANDATED FOR TOP LISTED ENTITIES

Arpita Karmakar

The Securities Exchange Board of India ('SEBI'), vide Circular No. SEBI/HO/CFD/CMD/ CIR/P/2017/10, on February 6, 2017 has prescribed the Guiding Principles for preparing the Integrated Report ('IR') as presented by International Integrated Reporting Council ('IIRC') to be followed by the top 500 listed entities.

SEBI has mandated the requirement of submission of Business Responsibility Report ('BRR') for these listed entities under Regulation 34(2)(f) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR').

By issuing the framework of Integrated Report, SEBI aims at providing the investors both financial and non-financial information so that they are well equipped with requisite details for making the investment decision.

Accordingly, in order to improve the disclosure standards, SEBI, in consultation with industry bodies and stock exchanges, has advised the listed entities, which are required to prepare Business Responsibility Report, to adopt the Integrated Reporting on voluntary basis from the financial year 2017-18.

The International Organization of Securities Commissions ('IOSCO') is an association of organizations that regulate the world's securities and futures markets. IOSCO Principle 16 states that "*there should be full, accurate and timely disclosure of financial results, risks and other information that is material to investors' decisions.*"

Further, Regulation 4(1)(d) of SEBI LODR states that *"the listed entity shall provide adequate and timely information to recognised stock exchange(s) and investors."*

The IIRC has prescribed the following Guiding Principles which lay out the framework for preparation of an Integrated Report:

STRATEGIC FOCUS AND FUTURE ORIENTATION:

An Integrated Report should provide insight into the organization's strategy, how it relates to the organization's ability to create value in short, medium and long term and to its use of and effects on capital;

CONNECTIVITY OF INFORMATION:

An Integrated Report should show a holistic picture of the combination, interrelatedness and dependencies between the factors that affect the organization's ability to create value over time;

STAKEHOLDER RELATIONSHIPS:

An Integrated Report should provide insight into the nature and quality of the organization's relationships with its key stakeholders, including how and to what extent the organization understands, takes into account and responds to their legitimate needs and interests;

MATERIALITY:

An Integrated Report should disclose information about matters that substantively affect the organization's ability to create value over the short, medium and long term;

CONCISENESS:

An Integrated Report should be concise;

RELIABILITY AND COMPLETENESS:

An Integrated Report should include all material matters, both positive and negative, in a balanced way and without material error; and

CONSISTENCY AND COMPARABILITY:

The information in an Integrated Report should be presented:

- On a basis that is consistent over time; and
- In a way that enables comparison with other organizations to the extent it is material to the

organization’s own ability to create value over time.

IIRC HAS ALSO CATEGORIZED THE FORMS OF CAPITAL AS FOLLOWS:

a. Financial capital;

b. Manufactured capital;

c. Intellectual capital;

d. Human capital;

e. Social and relationship capital; and

f. Natural capital.

All the organizations depend on the various aforementioned forms of capital for their growth and working. Accordingly, the stakeholders should be well informed with all such capital to enable them to take investment decisions.

Also, SEBI has advised the listed entities that the Information related to IR may be provided separately in their Annual Report under a specific head, or under the head of ‘Management Discussion & Analysis’ in the Annual Report, or in a separate report as per IR framework. In case the IR is not provided in Annual Report, then the entities may host IR on its website & reference of the same shall be incorporated in their Annual Report.

NEWSBYTE

THE TRADE MARKS RULES, 2017

The Ministry of Commerce and Industry on the 6th March, 2017 marked the end of The Trade Marks Rules, 2002 which has now been replaced by more comprehensive and effective Trade Marks Rules, 2017.
A brief of the salient features of the TRADE MARKS RULES, 2017 are:

CATEGORIZATION OF APPLICATION FORMS

As per the new rules, forms are now categorized as per the functions and all the categories as per the function performed are mentioned as below:

1.	**TM-A :**	Application for the registration of trademark of different categories;
2.	**TM-M :**	Application/Request for miscellaneous functions in respect of a trademark Application/ Opposition/Rectification under the Trade Marks Act.
3.	**TM-C :**	Request related to the copyright search under Rule 23(3) of The Trade Marks Rules, 2017;
4.	**TM-O :**	Notice of Opposition/Application for Rectification of the Register by cancelling or varying registration of a trademark / Counter-Statement / Request to refuse or invalidate a trade mark;
5.	**TM-R :**	Applications for the renewal/restoration of trademarks;
6.	**TM-P :**	Applications for the post registration changes in the trademarks;
7.	**TM-U :**	Application for the registration/ cancellation/variation of registered user and notice of intention to intervene in the proceedings in cancellation/variation;
8.	**TM-G :**	Applications for the registration as trademark agents;

CHANGES IN OFFICIAL FEE

- An extensive overhaul has been carried out in the Fee Structure for registration of Trademark Application. Where, the fee for application for the registration of trademark applicants under the categories of Individuals / Start-ups / Small Enterprises, has been fixed at INR 5000; meanwhile, the applicable fee for all other categories of applicants would be INR 10000.

- Apart from the application fees, all the other categories fee are also changed and importantly, Official fee for the additional class for the post registration changes in a multi-class application is now removed and only fee for a single trademark will be charged in cases of post registration.

E-FILING DISCOUNT

As an attractive incentive to encourage users to avail the digital filing facility, a 10% rebate on the official fee for all applicable office actions has also been incorporated.

EMAIL COMMUNICATION FROM INDIAN TRADEMARK OFFICE

In order to cut down on the time gap created due to delay in communication, the email communication from the Indian Trademark Office, shall now be treated as Official Communication and shall also act as applicable deadline in matters concerning the filing of Reply to the Official Examination Report, etc.

RECOGNITION OF WELL-KNOWN TRADEMARKS

Recognizing the need for an established process to help an applicant get a trademark declared as Well – Known Trademark, inclusions have now been made in the Trade Marks Rules, 2017; where in the applicant with prescribed paperwork and Official Fee can attain the same.

RENEWALS

The effective time span for filing for renewal of a registered trademark has now been extended to 1Year against the earlier prescribed time span of 6months, before the expiry of the mark.

Several other minor procedural changes have also been incorporated which aim at creasing out the irregularities of the application process, and at the same time adapt according to the needs of the hour.

THE DETAILED AMENDMENTS MADE THROUGH TRADE-MARKS RULES, 2017 WILL BE SHARED LATER.

NOTES

Singh & Associates

Founder - Manoj K. Singh

Advocates & Solicitors

NEW DELHI [HEAD OFFICE]
E-337, East of Kailash, New Delhi-110065
Phone : +91-11-46667000
Fax : +91-11-46667001
newdelhi@singhassociates.in

MUMBAI
48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai, Maharashtra-400021
mumbai@singhassociates.in

BANGLORE
N-304, North Block, Manipal Centre
47, Dickenson Road, Bangalore - 560042
Ph : +91-80-42765000
bangalore@singhassociates.in

GURUGRAM
Unit no. 701-704, 7th Floor, ABW Tower
IFFCO Chowk, Gurugram,
Haryana-122001