

# INDIAN LEGAL IMPETUS®





**Manoj K. Singh**  
Founding Partner

Dear Friends,

We are pleased to present the 'February' Edition of Indian Legal Impetus. In the current edition, we have endeavoured to bring to you recent developments as well as commentaries on the practice of law.

To begin with, we have the first article which gives a sneak-peak into the New Drugs Patented under The Indian Patent Act, 1970, with emphasis to their price control in respect of commercial marketing. Moving on, we have an article which analyses the case laws in relation to the omissions and contradictions in relation to recording evidence. There is an analysis of various precedents that omissions and contradictions relate to previous statement made by a witness (most commonly u/s 161 of Code of Criminal Procedure 1973). The article further gives an understating of the leading cases in this regard viz., *V. K. Mishra and another Vs. State of Uttarakhand and another*, *Bhoginbhai Hirjibhai Vs. State of Gujarat and State of U.P. Vs. M. K. Anthony*.

The next article discusses the much highlighted provision of 29A of the Arbitration and Conciliation Act, 1996 (amended as of 2015). As we all know the 2015 amendment came with a plethora of changes in the Arbitration Act, including making it a time-barred event. The Arbitral Tribunal from the day of its reference, is legally bound to complete the process of Arbitration within 12 months. After which, the parties through mutual consent can extend the arbitration for another period of 6 months. If even after the prescribed period of 18 months, the arbitration is not over, either of the parties may move to court for an extension of another 6 months. The circumstances under which the Court allows for such extension and when it doesn't has been discussed through case laws.

Further, we have a write-up which deals with the grey area of the intersection of the domains between competition laws and anti-dumping laws in international trade laws. Competition law has surpassed the anti-dumping laws by leaps and bounds as far as its evolution is concerned. The article discusses how initially, anti-dumping law and competition law were considered to be complimentary to each other, but over the year the roads diverged yet there still remains areas of intersection.

In this edition, we also present an article dealing with the dilemma of single colour trademarks. Trademark laws have a lot of non-conventional areas. One such non-conventional mark which forms a grey area in the Trademarks law is the single colour trademark as single colour inherently lacks distinctiveness and it becomes very difficult for consumers to identify the source of goods or services just by a single colour.

Lastly, we have a closing article that deals with letters patent and original jurisdiction of the high court established under letters patent, with emphasis to the Clause XII. It talks about the oldest High Courts of the country and the jurisdiction it enjoys since before independence.

I sincerely hope this edition finds you in good health and that, you have an enjoyable read. Once again, we welcome all suggestions, opinion, queries or comments. To send in your valuable insights and thoughts, you can write to us at [newsletter@singhassociates.in](mailto:newsletter@singhassociates.in)

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Volume XII, Issue II

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# NEW DRUGS PATENTED UNDER THE INDIAN PATENT ACT, 1970 ARE OUTSIDE THE PRICE CONTROL FOR THE FIRST 5 YEARS FROM THEIR COMMERCIAL MARKETING

**Rajdutt Shekhar Singh & Vijaylaxmi Rathore**

On January 03, 2019 the Central Government in exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955 (10 of 1955), vide order S.O.39(E) ("**Amendment 2019**") has amended Para 32 of Drugs (Prices Control) Order, 2013 ("**DPCO 2013**") which enlists the cases for which the provisions of the DPCO 2013 are not applicable. In addition, the provision of reference data and source data for fixing or revising the ceiling price of scheduled formulations under Para 9 of DPCO 2013 have also been amended by Amendment 2019<sup>1</sup>.

The below table depicts standing of Para 32 and Para 9 of the DPCO 2013 after introduction of Amendment 2019:

DPCO 2013 provisions prior to Amendment 2019	DPCO 2013 provisions after Amendment 2019
<p><b>Paragraph-32: Non-application of the provisions of this order in certain cases.</b> – The provisions of this order shall not apply to, -</p> <p>(i) a manufacturer producing a new drug patented under the Indian Patent Act, 1970 (39 of 1970) (product patent) and not produced elsewhere, if developed through indigenous Research and Development for a period of five years from the date of commencement of its commercial production by the manufacturer in the country.</p> <p>(ii) a manufacturer producing a new drug in the country by a new process developed through indigenous Research and Development and patented under the Indian Patent Act, 1970 (39 of 1970) (process patent) for a period of five years from the date of the commencement of its commercial production in the country.</p> <p>(iii) a manufacturer producing a new drug involving a new delivery system developed through indigenous Research and Development for a period of five years from the date of its market approval in India...</p>	<p><b>Paragraph-32: Non-application of the provisions of this order in certain cases.</b> – The provisions of this order shall not apply to, -</p> <p>(i) a manufacturer producing a new drug patented under the Indian Patent Act, 1970 (39 of 1970) (<del>product patent</del>) and not produced elsewhere, if developed through indigenous Research and Development for a period of five years from the date of commencement of its commercial <del>production</del> <u>marketing</u> by the manufacturer in the country.</p> <p>(ii) a manufacturer producing a new drug in the country by a new process developed through indigenous Research and Development and patented under the Indian Patent Act, 1970 (39 of 1970) (process patent) for a period of five years from the date of the commencement of its commercial production in the country.</p> <p>(iii) a manufacturer producing a new drug involving a new delivery system developed through indigenous Research and Development for a period of five years from the date of its market approval in India.</p> <p>(iv) <u>Drugs for treating orphan diseases as decided by the Ministry of Health and Family Welfare, Government of India.]</u></p>

<sup>1</sup> <http://www.egazette.nic.in/WriteReadData/2019/194703.pdf>

**[Paragraph-9: Reference data and source of market based data;**

- 1) The source of market based data shall be the data available with the pharmaceutical market data specializing company IMS Health (IMS), and if the Government deems it necessary, it may validate such data by appropriate survey or evaluation.
- 2) The Government may in the due course of time come out with other appropriate mechanism of collecting or obtaining the market based data related to drugs and the decision of Government with respect to collection or obtaining of data shall be final.
- 3) The market based data, for fixing the ceiling price of scheduled formulations for the first time after the notification of this order, shall be the data of May, 2012.
- 4) The market based data for fixing the retail price of new drugs available in the market, shall be the data available for the month ending immediately before six months of receipt of application for fixing the price of the new drug.
- 5) The market based data for fixing the ceiling price of a scheduled formulation due to a revision in the first schedule shall be the data available for the month ending immediately before six month of notification of revision in the first schedule.
- 6) Notwithstanding anything contained in this order, the reference date for the formulations which are part of the Drugs (Prices Control) Order, 1995 shall be as per the provisions of paragraph 10 of this Order.

**[Paragraph-9: Reference data and source of market based data;**

- 1) The source of market based data shall be the data available with the pharmaceutical market data specializing company IMS Health (IMS), as decided by the Government and if the Government deems it necessary, it may validate such data by appropriate survey or evaluation.
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- 5) The market based data for fixing the ceiling price of a scheduled formulation due to a revision in the first schedule shall be the data available for the month ending immediately before six month of notification of revision in the first schedule.
- 6) Notwithstanding anything contained in this order, the reference date for the formulations which are part of the Drugs (Prices Control) Order, 1995 shall be as per the provisions of paragraph 10 of this Order.
- 7) Notwithstanding anything contained in this paragraph, for fixing or revising the ceiling price for formulations, the Government may, if it is necessary so to do, consider market based data available for any month, as deemed fit.]

## IMPLICATION OF PARA 32 OF DPCO AFTER AMENDMENT 2019:

Prior to the Amendment 2019, only those new drugs were outside the price control which were patented in India (product patent) but were not produced elsewhere and were developed through indigenous research & development. After Amendment 2019, irrespective of the fact that a new drug is developed and produced by a manufacturer outside India, all

new drugs (which are patented under the Indian Patent Act, 1970) are outside the price control under the DPCO for five years from their commercial marketing in India. The Amendment 2019 would surely benefit new drugs manufacturers who were unable to reap the advantages of price control exemption provided under the DPCO only due to the fact that they developed and produced new drugs outside India.

In addition, drugs for treating orphan diseases (as decided by the Ministry of Health and Family Welfare,



Government of India) are also kept outside the price control by Amendment 2019. This would encourage multinational pharmaceutical companies to introduce their drugs in India for treating orphan diseases without price control.

### **IMPLICATION OF PARA 9 AFTER AMENDMENT 2019:**

The amendment broadens the scope of selecting source data/reference data for fixing or revising the ceiling price of formulations and the same is not only limited to IMS health data. However, it is to be seen in the coming times which are the pharmaceutical market data specializing companies whose data will be decided by the Government for ascertaining market based data.

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## OMISSION & CONTRADICTION WHILE RECORDING EVIDENCE

Pushkraj S. Deshpande

**Contradiction** – The dictionary defines it as *contradiction is the act of saying something that is opposite or very different in meaning to something else what is said earlier.*<sup>1</sup> In trials, while cross examination a contradiction happens when a witness under oath says something that is opposite or very different in the meaning or other wise to what is mentioned in the previous statement recorded.

**Omission** - The dictionary defines it as *something that has been left out or excluded.* In trials, while cross examination, an omission takes place when the witness purposely or otherwise misses out/omits any fact or statement he has made in his/her statement recorded earlier.

So, Omissions and Contradictions relate to previous statement made by a witness (most commonly u/s 161 of Code of Criminal Procedure 1973). Omission means missing to state something from the earlier statement. Contradiction means stating something different from the earlier statement. Causes, and more particularly, effects of such 'something missing (omissions)' and 'something different (contradictions)' have to be dealt with by the trial Judge while weighing and appreciating the testimonies of witnesses.

### CREDIBILITY OF TESTIMONY OF WITNESS

The testimony of the witness shall create and inspire confidence in the mind of the sitting judge. Omissions and contradictions come in the way of inspiring confidence about credibility of the witness and the evidence. The terms contradiction and omission are not defined anywhere in the Indian Evidence Act, 1872 (the Evidence Act) or the Code of Criminal Procedure, 1973 (Cr.P.C) but a diminutive reference is perceived under Section 155 of the Evidence Act. Section 155(3) reads as **"by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted"**. U/sec. 157 the former statement of witness may be proved to corroborate the later testimony given in the court during the examination-in-chief and cross examination as of the same fact. As such, only in statement made by a witness as

substantive piece of evidence before the court can be corroborated with the former statement made by him but the question arises when it contradicts the earlier version. Then by conjointly reading section 155(3) its credit gets impeached.

### RECORDING OF CONTRADICTION AND OMISSION

Steps for how and when shall the counsel record the Contradiction during the evidence.

- a. When the Witness is called for his testimony, the advocate for defense may ask the witness any question in order to dig up the contradictions in the statement of the witness recorded before the investigating officer and of what he is deposing in the court. If any such part of his statement u/s 161 of Cr.P.C is found contradictory the said part of his statement shall be brought to the notice of witness himself and he shall be further questioned to the truthfulness of the same. If the witness admits the said contradiction, then it is proved; if he denies to the said contradiction then the presiding judge shall mark the said part of the statement for identification, commonly called as "Portion mark or passage mark".
- b. In order to prove the contradiction, the advocate shall put questions to the investigating officer who recorded the statement of the witness U/s 161, as to whether the Portion marked is true extract and was it recorded by him. If there is some additional information or any contradictory statement by the witness which is different from what has been stated in his statement u/s 161 of Cr.P.C then a question to that effect as why is such an information was not recorded by the investigating officer may be put to him in order to prove the contradiction.

Likewise, the contradiction of the statement can be proved.

<sup>1</sup> <https://dictionary.cambridge.org/dictionary/english/contradiction>



Hon'ble Supreme Court, in **V. K. Mishra and another Vs. State of Uttarakhand and another**<sup>2</sup>, has laid down the procedure of bringing on record contradictions and omissions.

Para-18 of the said citation reads as under - "Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is to be drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction."

## IMPORTANCE OF BRINGING CONTRADICTION AND OMISSION ON RECORD AND HOW CAN IT EFFECT THE CASE

The Hon'ble Supreme Court, in case of **Bhoginbhai Hirjibhai Vs. State of Gujarat**<sup>3</sup> held that:

*"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all important "probabilities factor" echoes in favour of the version narrated by the witnesses"*

The Hon'ble Supreme Court in **State of U.P. Vs. M. K. Anthony**<sup>4</sup>, has held that:

*"Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by him and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole"*

## CONCLUSION

From the above reading the importance to prove contradiction and omission can be symbolized. It is true that if contradictions and omissions are proved they can change the faith of the case for the defense. The proof of the same can help an innocent accused person who must have been roped in a false case by presenting false and twisted case against him. The proof of Contradiction is vital to destroy the credibility of the case of prosecution. Proved contradictions and omissions which can affect the case of prosecution plays a vital role while the Judge decides the faith of the case by appreciating the evidence he has recorded throughout the trial. Cross examination is an art and proving contradiction and omission makes the art even more artistic.

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<sup>2</sup> AIR 2015 S.C. 3043

<sup>3</sup> AIR 1983 SC 753

<sup>4</sup> AIR 1985 SC 48

# EXTENSION OF TIME IN ARBITRATION: REVIEW OF SECTION 29A OF ARBITRATION & CONCILIATION ACT (AMENDMENT ACT 2015)

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## INTRODUCTION

The rapid growth in commerce and industry has led parties to settle their disputes by resorting to the alternate dispute resolution procedure, more particularly to arbitration, and one of the prominent reasons for the parties to opt arbitration is to avoid delayed and protracted litigations. The enactment of Arbitration and Conciliation Act 1996 (hereinafter referred as Act) marked the onset of new era in dispute resolution procedure in the post liberalisation economy of the country. The intent of the legislature from the very inception of the draft of the Act was to provide for an easy, user-friendly and time bound procedural recourse to dispute resolution. But after the enactment of the Act in 1996 many lacunae and laches surfaced which were hindering the proper realization of the intent of the Act. In order to curb the same, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015, (hereinafter referred as Amendment) on October 23, 2015, with a view to amend the Arbitration and Conciliation Act, 1996 ("Act of 1996") in order to make arbitration in India user friendly, cost effective and a preferred method of dispute resolution along with facilitating speedy disposal of cases<sup>1</sup>.

One of the key developments in the Act after the amendment is the insertion of new Section 29A which has imposed strict time limits to conclude the arbitration process. However, strict compliance of the same has also given rise to different facets to it which are evident by the observations of different High Courts across the country and arbitral tribunals.

## TIME LIMITS TO AN ARBITRATION PROCESS SECTION 29A

Clause (1) of the section 29A<sup>2</sup> mandates that all the arbitration proceedings **must be completed within the 12-month time period starting from the date when arbitration tribunal enters upon the reference**; the arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment. Although if the arbitrator or arbitral tribunal, as the case may be, **fails to deliver the award within the stipulated time as clause (1) of the section 29 A mandates, the parties to the dispute in consensus may extend the period of arbitration, but no more than 6 months according to clause (3) of Section 29 A**. Also, **if the arbitration tribunal fails to deliver award in the due period mentioned in clause (1) and extended period mentioned in clause (3), then the mandate of the arbitration tribunal stands terminated unless** the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction<sup>3</sup>, **either before or after the expiry of period mentioned in clauses (1) and (3) extends the period of arbitration** and this provision is contained in clause (4) of Section 29A. It is also pertinent to mention here that as per clause (5) of Section 29A, an application for extension of time can be made by either of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.<sup>4</sup>

<sup>1</sup> Amendments to the Arbitration and Conciliation Bill, 2015, Press Information Bureau of India, August 26, 2015.

<sup>2</sup> Section 29A of Arbitration and Conciliation Act 1996, Ins. by Act 3 of 2016, sec. 15 (w.e.f. 23.10.2015)

<sup>3</sup> Section 2 (e)(i) of the Arbitration and Conciliation Act, 1996, Subs. by Act 3 of 2016, sec. 2, for clause (e) (w.e.f. 23.10.2015)

<sup>4</sup> Supra. Note 2

## SCOPE AND APPLICATION OF SECTION 29A OF THE ACT

### 1. SECTION 29A IS APPLIED PROSPECTIVELY

The amendment came in to effect from 23.10.15, and so does Section 29A of the Act, hence it is applicable on the arbitration proceedings in which the reference has been made after the aforementioned date i.e. 23.10.15 and does not have any retrospective effect on the arbitration which have already commenced in this regard, the same was held in the judgment of Madras High Court **M/s. Divya Dev Developers Pvt. Ltd. vs. M/s. G.S. Developers Pvt. Ltd.**<sup>5</sup> wherein the arbitrator has declared his office functus officio on conclusion of 12 months' period, and no response has been made by the parties to increase the time period by 6 months as per Section 29A (4) of the Act, the High Court ruled that since the proceedings of the arbitration commenced, when the notice for invoking the arbitral clause has been made by the applicant to the respondent as per section 21 of the Act which was much before the amendment came into existence therefore the Section 29A has no effect on arbitral proceedings.

Also it was further observed by the court, that the amended act envisages in itself provision under Section 26 of the Act, wherein it is very explicitly mentioned that the application of amendment will not have retrospective effect on the arbitration proceedings commenced before the amendment. Also in the case of **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.**<sup>6</sup> commenting on the scope of Amendment 2015, as per Section 26 the Hon'ble Supreme Court held that "The scheme of Section 26 is thus, clear that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force." The same opinion is abided by the Delhi High Court, while deciding a mention in the appeal **Republic of India through Ministry of Defence vs. Augusta Westland**<sup>7</sup>.

### 2. THE APPOINTMENT OF NEW ARBITRATORS DOES NOT VITIATE THE EARLIER ARBITRATION PROCEEDINGS

Clause (6) of Section 29A, provide that the court while extending the period of arbitration as per Section 29A (4) can substitute all or any of the arbitrators and prescribed fee thereof and the proceedings shall commence from

the stage where it was, the same has been duly applied by the Hon'ble Supreme Court of India in the case of **IDBI vs. Haryana State Industrial and Infrastructure Development Corporation Ltd.**<sup>8</sup> Hence, it is evident that appointment of new arbitrators or constitution of new arbitral tribunal does not affect the observations and records of the previous arbitrator nor even invalidates the interim awards passed by the previous arbitrator.

### 3. CALCULATION OF TIME PERIOD OF ARBITRATION

Clause (1) of Section 29A very categorically provides that the period of arbitration is to be calculated from the date when the arbitration tribunal enters upon the reference, which is deemed to be the date when the arbitrators have duly received notice of their appointment to the arbitration tribunal, but in exceptional circumstances the court decides the date for calculation of the period of arbitration process, as in the case of **Manbhupinder Singh Atwal vs. Neeraj Kumarpal Shah and anr.**<sup>9</sup> wherein a new arbitrator had been appointed as the first nominee failed to assume office within the stipulated period. The Hon'ble Apex Court ordered that the calculation of period of arbitration process shall be calculated from the date of first sitting of the arbitration process.

### 4. ILLEGALITY OF AWARD MADE AFTER THE STIPULATED TIME PERIOD OF ARBITRATION AS PER SECTION 29A

The arbitral award made after the stipulated time provided in Section 29A (1), (3) and (4) will be patently illegal and the same has been opined by the Madras High Court in the case of **M/s. Satyam Caterers Pvt. Ltd. vs. Asst. Commercial Manager, Southern Railways & Anr.**<sup>10</sup> Also, in the case of **Union Of India vs. Advanced Polymer Technology**<sup>11</sup> the parties agreed for extension of time after 12 months of the proceedings and hence the proceedings got extended for a further period of 6 months; before expiry of 6 months the parties approached the High Court for further extension of time, meanwhile the extended period of 6 months got expired, but arbitrator without the order of the court in this regard continued to organize arbitral meetings, the Court in consonance to the provisions contained in section 29 A extended the time but invalidated the arbitral proceedings held by the arbitrator between the expiry of 6 months period and order of the court.

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<sup>5</sup> AC No.41/18 & 38/18 passed by Madras High court, 30/07/2018

<sup>6</sup> (2018) 6 SCC 287

<sup>7</sup> CS(COMM) 9/2019, order dated 09/01/2019

<sup>8</sup> *Petition(s) for Special Leave to Appeal (C) No(s). 230-231/2018, order dated 7<sup>th</sup> May 2018.*

<sup>9</sup> *M.A. NO. 1482 of 2017 in Arbitration Petition No. 14 OF 2017, order dated 4<sup>th</sup> December, 2017*

<sup>10</sup> *O.P.No.592 of 2018, Madras High Court, Dated, 09.08.2018*

<sup>11</sup> *OP(ICA).No. 5 of 2018, Kerala High Court, Dated, 03.12.18*

# ANTI DUMPING LAW AND COMPETITION LAW: A CASE OF INTERSECTING LINES

**Rishab Khare**

## INTRODUCTION

In the present world, Competition Law has already shackled the hands of businessman by making the competition fair and reasonable for all the players in the market. After the coming of concept of Anti-Dumping<sup>1</sup>, fair competition in the market has also been affected a lot. Anti-Dumping means the export country charging a lower price than what it charges at his home country, thus trying to remove the domestic market players as in to dominate the market, and thus effectively affecting the fair competition in market by reaching the threshold limit of Appreciably Adverse Effect on Competition. Several commentators have observed that anti-dumping law was extra territorial application of competition law.<sup>2</sup>

Competition law has surpassed the anti-dumping laws by leaps and bounds as far as its evolution is concerned. Initially, anti-dumping law and competition law were considered to be complimenting each other.

Competition law has taken into its' ambit those firms outside its jurisdiction which effect the national market. Whereas, the genesis of anti-dumping laws can be traced to WTO provisions. Anti-dumping laws are now used as a protectionist tool to avoid market distortions.

The jurisprudence behind the anti-dumping law justifies the prevention of dumping on various economic and social grounds. However, the concept of distributional justice is the primary reason behind the development of anti-dumping law. In other words, anti-dumping law seeks to achieve distributive justice.

The objective of distributional justice seeks to maintain balance between the varying degrees of power among the different states. Such power imbalance is relevant for the purpose of anti-dumping law as firms may

choose to take benefit of such imbalances in order to give effect to trade distortions. This is where the anti-dumping laws achieve supreme importance. Anti-dumping law justifies the imposition of anti-dumping duty by Government to undo these trade distortions.

In absence of common rules on competition law makes anti-dumping a necessity.<sup>3</sup> Apart from the same, anti-dumping still holds its' value in light of the fact that international application of competition law has not been politically feasible.<sup>4</sup>

"While both competition and anti-dumping laws originated with the same objective (e.g. the Antidumping law of 1916 in the USA which was clearly meant to address competition concerns arising out of the practice of 'transnational price predation') the objectives surrounding the use of antidumping laws have since evolved and modern antidumping practice has come to actually facilitate the kind of unfair and anti-competitive behavior it was intended to prevent."<sup>5</sup>

The effect of anti-dumping law has resulted in the firms choosing to seek protection against the imposition of anti-dumping duty for profit maximization. Whereas, the competition law seeks to promote healthy price competition between the firms as long as it does not constitute predatory pricing.

The gradual evolution of objectives of anti-dumping law and competition law has resulted in both the set of laws being conflicting rather than being complimentary. Several authors have observed that with growth of national laws, jurisprudence has attained extra territorial reach. Thus, the anti dumping law has

<sup>1</sup> Study on Anti-Dumping and Competition Law, [http://www.cci.gov.in/sites/default/files/Antidumping\\_20090420151657.pdf](http://www.cci.gov.in/sites/default/files/Antidumping_20090420151657.pdf) accessed on March 11, 2018

<sup>2</sup> Knorr Andreas, "Antidumping rules versus competition rules", Institute for World Economics and International Management, Universitat Bremen

<sup>3</sup> Hoekman, Bernard, "Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements", World Bank and CEPR, 1998

<sup>4</sup> In this regard, OECD (2000) notes that it "does not retain options that have been discarded in joint discussions as unrealistic, such as full harmonisation of competition laws, or an international antitrust authority with supranational powers."

<sup>5</sup> Supra Note 1



overlived its' utility.<sup>6</sup> Being extremely critical of anti-dumping, it has also been compared to witches' brew that comprises of money, bad politics and power.<sup>7</sup>

## PUBLIC INTEREST UNDER THE TWO REGIMES: THE WAY FORWARD ?

The effect of duty imposed under anti-dumping regime is to ensure the transfer of finances from local community to the domestic producers of a like product. Economists argue that since consumption often exceeds output for an imported good, consumers lose more than what the producers tend to gain.

Picking up the cue from European Union, Brazil and Korea, public interest test should be incorporated as far as anti-dumping rules and regulations are concerned. The effect of public interest test in anti-dumping regime has been that it introduces competition concerns into the anti-dumping regime. Anti-dumping law focuses upon protecting the interest of the domestic producers. However with insertion of the public interest clause, the public interest shall include in its' ambit consumer interest. The interpretation and implementation of this clause can give effect to the governments imposing duty in consumer interest.

WTO agreement provides for inclusion of such considerations,

"The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality."<sup>8</sup>

The Competition Act, 2002 as well as the erstwhile, Monopolies and Restrictive Trade Practices Act, 1969 prescribes for this public interest test.

In **Haridas Exports v. Float Glass Manufacturers Association**<sup>9</sup>, "Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. If the normal or export

price of any goods outside India is lower than the selling price of an indigenously produced item then to say that the import is prejudicial to the public interest would not be correct. The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor, as was sought to be submitted by the respondents."

Apart from the above, bilateral trade agreements can be used to address the issues pertaining to competition law. Inclusion of provision of competition law in free trade agreements. The inclusions of such provisions are often preceded by removal of rules on anti-dumping.

## JUDICIAL POSITION VIS-À-VIS INTERACTION BETWEEN COMPETITION LAW AND ANTI-DUMPING LAW

While dealing with the question of difference in jurisdiction between MRTP Act, 1969 and Custom Tariff Act, 1975; the Hon'ble Supreme Court observed in the case of **Haridas Exports v. Float Glass Manufacturers Association**<sup>10</sup>:

"The jurisdiction of the MRTP Commission, in our opinion, is not ousted by the Antidumping provisions in the Customs Act. The two Acts operate in different fields and have different purposes. The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such a challenge will amount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have. It is not a Court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to decide whether the action of the Government in permitting import of float glass even at predatory prices is valid or not. The Commission cannot prohibit import, its jurisdiction commences after import is completed and any restrictive trade practice takes place."

However, in jurisdictions such as United States and European Union, primacy is given to antitrust laws over anti-dumping laws. In a case of **United States of America v. SKW Metals and Alloys INC., and Charles**

<sup>6</sup> Knorr Andreas, "Antidumping rules versus competition rules", Institute for World Economics and International Management, Universitat Bremen

<sup>7</sup> Finger, J. Michael, Editor, "Antidumping How It Works and Who Gets Hurt", Ann Arbor" University of Michigan Press, 1993

<sup>8</sup> Article 6.12 of the WTO, Anti-dumping Agreement

<sup>9</sup> 2002 (145) E.L.T. 241 (S.C.), para 54.

<sup>10</sup> 2002 (145) E.L.T. 241 (S.C.)

**Zak**<sup>11</sup>, the three largest producers of ferrosilicon came together in order to establish a cartel. Using the nuances of anti-dumping regime, this cartel was able to impose anti-dumping duty on any exporter.

Eventually, anti-dumping duty was imposed upon a brazilian exporter. The conspiracy was exposed and the participants of the cartel were brought to book. The participants suffered several civil and criminal consequences. The International Trade Commission revoked its' anti-dumping orders after serious conduct and allegation of perjury was made against the cartel members.

The above authorities indicate that if the imposition of anti-dumping duty creates marketing distortion, it shall not be levied.

## REPLACEMENT OF ANTI-DUMPING LAW WITH A REFINED VERSION OF COMPETITION LAW

There also have been arguments against abolishing anti-dumping. It is hereby suggested that steps should be initiated in the direction of free trade agreements.

Regional Trade Agreements can go a long way in developing free trade. The same can be achieved by removing the imposition of anti-dumping duty along with tariff elimination. There are positive indications in that regard as the world at large has started understanding the complexities of multi trade agreements. Also, it is expected that there will be a decent growth in the number of regional trade agreements in the times to come.

The main aim of the Anti-Dumping Law is to conserve and protect the interest of the domestic industries. Does it mean that the industries which are less efficient should also be protected? In fact as in reference to Competition Act, 2002 less efficient industries should close down with immediate effect and exit the market if they are not able to compete and trade with the other players in the market<sup>12</sup>. The competition law doesn't have a protective attitude whereas the Anti-Dumping Law has protectionist behavior. Both of these contradict each other, they cannot co-exist together at the same

time; they are analogous<sup>13</sup>. Over the past few years it has been advised that anti-dumping measures and competition measures are replicas, and that too of the complementary mechanisms, and that one should take place of the other and both shall not take place simultaneously. Anti-Dumping steps are, henceforth not generally a way of revitalizing fair trade (although sometimes may be), rather they are somewhat up to a particular extent, of protective mechanism. It would be very confident to presume that the withdrawal of Anti-Dumping<sup>14</sup> measures would smoothly follow from the widespread standardisation of competitive measures.

From the economics point of view, there is no sufficient ground to second any anti-dumping law, since price discrimination across the markets is a legitimate and exactly rational, shrewd and legitimate profit-enhancing action. Under this line of altercation, there is no rationalization for criticizing certain export prices only because they appear to be lower than the prices in other markets. Domestic price discrimination i.e., change in pricing between one country's domestic markets, generally is not penalized. There is debatably no fiscal sense for looking upon-international price discrimination strictly by striking dumping duties. Out of the altogether different categories of dumping, only predatory pricing dumping and many instances of strategic dumping boosts overall welfare concerns.<sup>15</sup>

## CONCLUSION AND SUGGESTIONS : HARMONIZATION OF THE TWO REGIMES

While at first sight there appears to be an overlap between both policies, the reality is much more complicated. Anti-dumping and Competition Law,

<sup>11</sup> *United States Court of Appeal for the Second Circuit, Nos. 547, 569, 703 -- August Term, 1998*

<sup>12</sup> *Business Week, December 2, 1991: 38-9. Restricting imports of machine tools had different but equally adverse consequences. See The New York Times, October 7, 1991: D1,D4.*

<sup>13</sup> *Finger J.M., Francis Ng and Sonam Wangchuk (2000) 'Antidumping as safeguard policy' presented at the University of Michigan, Gerald R.Ford School of Public Policy and Japan Economy Program conference, Oct 5-6,2000.*

<sup>14</sup> *Edwin Vermulst, The WTO Anti-dumping Agreement (OUP 2005) 324*

<sup>15</sup> *Vermulst,E 1997,'Adopting and implementing Anti-dumping Laws-Some suggestions for Developing Countries', Journal Of World Trade, vol 31, no:2,pp 5-24*



though coming from a same tree, have a lot of similarities and differences at the same time as far as their motives and ways to achieve them are concerned.

It has been observed by various legal scholars that impositions of anti-dumping duties by government are often political in nature. There is a need to minimize the manipulation of anti-dumping laws and limit the discretionary powers of the state authorities. In light of the same, it is hereby suggested that express rules are enacted and the process of imposing such duty should be made transparent.<sup>16</sup>

Anti-dumping Law and Competition Law are concerned as oxymoron to each other. On one hand Anti-dumping law is a protectionist tool<sup>17</sup>. Being a protectionist tool, it seeks to protect the domestic industries by the so called invasion by the foreign companies. However in that process, protection is granted to the less efficient industries. This is exactly the opposite of the objective of competition law.

How competition law and anti-dumping law affect each other's functioning can be understood from the following example. Determination of "relevant market" can be used as "domestic industry" for the purposes of imposing anti-dumping duty. In a case of simultaneous investigations, credibility of investigation agencies may be highly jeopardized. It is highly possible that finding in one investigation by one investigative agency can be used by the other investigative agency without verifying the facts for itself.

It also needs to be noted that a refined version

of anti-dumping regime is not the answer to the existing problems. As several scholars have observed that an effective competition policy is the answer to the existing issues that have plagued the anti-dumping regime. The result of replacing the anti-dumping regime with a competition regime will be that the anti-competitive domestic producers shall not be able to cause market distortions. The primary reason of the conflict between the two regimes is that they use different modes to achieve the same goal i.e. avoiding market distortions.

Also, the other concern with the anti-dumping law is that there are only two ingredients required to institute a case of anti-dumping. Firstly, there should be dumping. Secondly, there should be injury caused. These ingredients are insufficient in nature and also, they leave a lot of scope for abuse of power.

It is hereby suggested that a case of Anti-dumping should be proceeded with only if it fulfills the criteria under competition law. This step shall ensure that no abuse of anti-dumping powers takes place. It is to ensure that anti-dumping policies are not rendered as a political tool. Moreover, such step will ensure that the anti-dumping cases are instituted only when there is abuse of market by the companies.

From the point of view of economics, price difference across borders is considered to be legitimate and valid. Such price difference can arise due to a lot of factors. Such factors may not even be in the control of the "foreign entity". Slapping penalty in such a case is highly unfair in today's liberalized world.

<sup>16</sup> Greg Mastel, *Anti-Dumping Laws and the U.S Economy* (Economic Strategy Institute, 1998) 211

<sup>17</sup> Bhattacharjee A. (2000a) : Predation, protection and the public interest' *Economic and Political Weekly*, Dec 2, 2000, 4327-4336.

Despite the various shortcomings of anti-dumping laws, it has been felt that it is not feasible to strike off anti-dumping regulation in absence of any effective alternative. Anti-dumping is a necessary evil in order to counter the issue of cross border price discrimination and predatory pricing. Another way by which the conflict between anti-dumping law and competition law can be mitigated is by way of introducing International Competition Law framework.

Another issue with anti-dumping law is that it may have far reaching consequences on the consumers of the product that has been subjected to anti-dumping duty by the Government.

However, the most potent way of countering that shortcoming of anti-dumping law could be to make use of regional trade agreements. The effect of Regional Trade Agreement shall be that it will push the sovereign states to relinquish their powers. It shall be the first step in the direction of eliminating the anti-dumping provisions.

Many scholars have suggested replacing the anti-dumping law with an effective competition law regime. However, the problem associated with such a step is the issue of jurisdiction. Firstly, if a country believes that the other country is dumping its' goods in its territory, it shall have to investigate in the other homeland. This power doesn't exist in reality.

Also, many of the states do not have a strong and effective competition authority. Many of them are inexperienced and in the learning phase.

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# SINGLE COLOUR TRADEMARKS - THE DILEMMA

*Gaurav Tiwari (Law Intern)*

## GROWING SCOPE OF TRADEMARK

With growing industrialization, there was a compelling need to compete in the commercial sector. To mark their own products and services as definite, unique and attractive, branding came into picture and so did trademarks. Innovation paved the way to increase the spectrum of trademark and its subject matter.

Trademark is a mark capable of being represented graphically and distinguishes the goods and services of one person from those of others<sup>1</sup>. There is an endless list as to what can be trademarked. The reason being that the definition is inclusive in nature and anything not expressly excluded can be included provided it meets the requisites given in the Act. This means names, colours, shapes, symbol, device and many more can be included in the list if distinctiveness and graphical representation is present.

Brand names (words or phrases), symbols, signs and logos, all of which may collectively or individually make a mark cannot be without colours and thus colours started gaining significance in terms of trademark.

With passage of time, industrialists and big entrepreneurs started using these colours and its combinations; it helps customers to relate the goods to their source which helps to increase the market of a particular source and also excludes others from deriving any benefit accrued from this unique mark.

This is the reason why trademarks or any other Intellectual Property for that matter are considered right *in rem* rather than right *in personam*. For instance, the bitten apple from the famous tech-giant Apple has excluded all others from using this mark as it is not just its brand's recognition but also the goodwill attached to it is the sole property of the company such that anyone who sees the device is able to locate the source of the product (it has more than 40 registrations in classes 9 and 16).

The problem however arose with respect to non-

conventional marks, the registration of which became difficult to be given exclusive rights for.

## PROBLEM WITH SINGLE COLOUR TRADEMARKS

One such non-conventional mark which forms a grey area in the Trademarks law is the single colour trademark as single colour inherently lacks distinctiveness and it becomes very difficult for consumers to identify the source of goods or services just by a single colour.<sup>2</sup> It is even harder to determine whether such colour has actually gained distinctiveness among customers wherein they can identify the source of the product just by its colour. Similarly, if the trademark is granted on a single colour it is deemed to attract opposition from other players in the market and objection under Section 9(1)(a) of the Trademarks Act, 1999<sup>3</sup>, as no one will let go the right to use that colour, the obvious reason being that there are a limited number of colours (colour depletion theory)<sup>4</sup>.

Allowing one trader to exclusively use this colour would create unjust competitive practice in form of monopolistic power of use in favour of one trader only and what if all single colours that exist are trademarked? It will also open a Pandora's box of multiple litigations.

Thus, it is obvious that very high standard of distinctiveness needs to be attached to such mark if the same has to be claimed for trademark protection and that also in exceptional circumstances.

## THE LAW SURROUNDING THE MATTER

This issue for the registrability of single colour marks was addressed by World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>5</sup> which broadened the legal definition of trademark to encompass "any sign...capable of

<sup>1</sup> Section 2 (1)(zb) of Trademarks Act, 1999

<sup>2</sup> UK: Colour Marks: The Issue of Trademarking Colours, JACK KENNY

<sup>3</sup> Section 9 gives absolute grounds for refusal of registration of Trademark

<sup>4</sup> India: Protection and Enforcement of Colour Marks- SHILPI JAIN

<sup>5</sup> TRIPs is an international treaty which sets down minimum standards of protection and regulation for most forms of intellectual property in all member countries of the WTO.

*distinguishing the relevant goods or services of one undertaking from those of other undertakings.<sup>6</sup> The only benchmark for registrability of a colour being that it is “visually perceptible”, “inherently capable of distinguishing the relevant goods or services” or “registrability which may depend upon distinctiveness acquired through use.”*

The definition of the word ‘mark’ and ‘trademark’ provides for “combination of colours” or “any combination thereof.”<sup>7</sup> Moreover, the Act also provides for a device represented by a particular colour or colour combination, the Registrar is given the discretion to impose as a condition of registration, the limitation of the mark to a particular colour or any combination of colours.<sup>8</sup> TRIPs agreement which embarks member states of World Trade Organisation has a similar provision as per the Indian law under its protectable subject matter, but it also provides that an applicant may acquire trademark protection if he proves that his mark has acquired distinctiveness through use.

Single colour is nowhere expressly or impliedly excluded from the purview of the definitions. The Indian law has recognised the registration of single colour marks in the Manual of Trademarks, Practice and Procedure, 2015, wherein it shall be protected on strict evidence of acquired distinctiveness and protection granted strictly to the extent of that particular shade of colour.<sup>9</sup> However, the standards have been kept high for obvious reasons. Moreover, the Frequently Asked Questions (FAQ’s)<sup>10</sup> provided by the Controller General of Patents, Designs and Trademarks clearly provides that trademark protection can be granted to single colours.

## SINGLE COLOUR- THE WAY OUT

Now the question that arises is how a single colour can become distinctive. An applicant needs to satisfy two-fold essentials to establish his single colour mark as distinctive. Firstly, it is very unusual and peculiar in a business such that there is no connection between the product and the colour. Secondly, it is recognised by

the consumers as a symbol of origin for particular goods.

This however is a very exhaustive practice and a matter of luck that a certain brand gains heavy popularity in the industry, so much so, that the colour itself becomes the identity of the product. This is easier if the mark becomes a well-known mark.<sup>11</sup> According to the definition the registration is not mandatory but recommendatory. Thus, if the applicant acquires the status of a well-known mark through usage, it becomes easy to acquire registration of such mark, even if it is of a single colour.<sup>12</sup> But, acquiring the status of well-known mark is also a big deal. Evidences showing extensive sales and recognition along with past usage for a long period of time are helpful to prove a well-known mark and subsequently to get a single colour trademark registration.

For instance, Cadbury proved that the colour purple on the wrappers has gained a distinctive character<sup>13</sup>. Public survey was submitted as a proof to this assertion and the same was granted to it. However, later when Cadbury attempted to widen the scope of its trademark to widen its shade to its other products, it was rejected by the court of appeals<sup>14</sup>.

Around the world there are several single colours that have been granted trademark protection under their prevailing laws.<sup>15</sup> For instance, the US courts have held that a colour could be given trademark protection provided the colour has acquired ‘secondary meaning’<sup>16</sup>.

The courts in India have, however, been holding an uncanny stance in this regard. In the year 2007, the

<sup>6</sup> Article 15(1)- Protectable Subject Matter, TRIPs Agreement

<sup>7</sup> Section 2(m) defines the word ‘mark’ and Section 2(zb) defines the word ‘trademark’ in the Trade marks Act, 1999

<sup>8</sup> Section 10 of Trade marks Act, 1999

<sup>9</sup> Manual of Trademarks, Practice and Procedure, 2015 pg. 57 and 84

<sup>10</sup> Answer to question no. 5 “What are different types of trademarks that may be registered in India?” provided on <http://www.ipindia.nic.in/faq-tm.htm> assessed on 10/01/2019 18:23 hrs.

<sup>11</sup> Section 2(zg) of the Trade marks Act, 1999 defines a well known mark as “well-known trade mark”, in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.”

<sup>12</sup> Rule 124 of Trademark Rules, 2017 provides for “Determination of well-known trademark by Registrar”

<sup>13</sup> Société des Produits Nestlé S.A. v. Cadbury UK Limited. [2012] EWHC 2637 (Ch) (1 October 2012).

<sup>14</sup> CADBURY UK LIMITED v. THE COMPTROLLER GENERAL OF PATENTS DESIGNS AND TRADE MARKS & SOCIÉTÉ DES PRODUITS NESTLÉ S.A.(Case No: A3/2016/3082)

<sup>15</sup> SINGLE COLOUR TRADE MARKS, Intellectual Property Owners Association

<sup>16</sup> Qualitex Co. vs. Jacobson Products Co. Inc. 514 U.S. 159(1995)

Delhi High Court, in ***Cipla Limited vs M.K. Pharmaceuticals***<sup>17</sup> did not allow trademark protection to a blister packaging containing a distinctive orange-coloured, oval-shaped tablet. John Deere on the other hand was given protection for its green paint with yellow strips on its vehicles manufactured for agricultural use.<sup>18</sup> The blue colour of Parachute oil bottle was also granted protection by the Delhi High Court.<sup>19</sup> Other successful cases of single colour trademarks registrations include entities like Victronix AG (#1394234- brown colour label) and Telekom AG (#1462271-magenta colour label) have successfully registered their single colour marks in India.<sup>20</sup>

But in the year 2018 the same court denied the red shoe sole to Christian Louboutin which is among the top 5 luxury brands for women fashion and is well known among the consumer group belonging to an upper class society and declared that red shoe sole does not fall within the definition of 'mark' as provided in its definition in the Act and is not even a trademark to be afforded protection.<sup>21</sup> The court denied it trademark protection even though the same court had earlier granted it the status of a well-known mark.<sup>22</sup>

The court failed to take in purview that the definition provided in the Act is inclusive and not exclusive in nature while a coordinate bench of Delhi High Court<sup>23</sup> had earlier propounded that the definition is inclusive and that is why it includes single colour marks.

kept high. However, there is no exhaustive test as to whether the colour has acquired distinctiveness and it all depends upon how the customers perceive the colour and how the court is able to capture it. But what is clear is that contradictory judgements will cause confusion among applicants and they would be forced to play safe and apply for a unique combination of colours rather than a single colour, while big corporations with big pockets having capacity to fight high-profile cases will take the benefit as well as the risk of protecting single colours in their favour. This is again a hypocrisy of the democracy which tends to create unfair competitive advantages in favour of the rich. The Supreme Court or the Parliament should therefore, lay down strict principles in regards to this aspect to avoid contradictory judgements of the High Courts and also provide protection against anti-competitive practices. If not, the Trade Marks Registry should issue rules or follow a uniform practice in registering single colours as trademarks. This is difficult but not impossible.

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## CONCLUSION

It is therefore, clear that for registrability of single colour trademarks there needs to be a 'plus' factor or a secondary meaning to the colour when it is attached to the product. Because single colour lacks the inherent capacity to be distinct, the standard of proof has been

<sup>17</sup> *Cipla Limited vs M.K. Pharmaceuticals* MIPR 2007 (3) 170

<sup>18</sup> *Deere & Company & Anr. Vs. Mr. Malkit Singh & Ors.* CS(COMM) 738/2018 Decided on 08.08.2016

<sup>19</sup> *Marico Ltd. vs. Mr. Mukesh Kumar & Ors.* 2018(76)PTC168(Del)

<sup>20</sup> *IP EXPRESSIONS, A biannual publication from the Office of Controller General of Patents, Designs and Trademarks, India Vol No.1 Issue 2, January, 2015*

<sup>21</sup> *Christian Louboutin SAS vs. Abubaker and Ors.* (25.05.2018 - DELHC) 2018(74)PTC301(Del)

<sup>22</sup> *Christian Louboutin SAS vs. Pawan Kumar and Ors.* (12.12.2017 - DELHC) 2018(73)PTC403(Del)

<sup>23</sup> *Colgate Palmolive Company v Anchor Health and Beauty Care Pvt Ltd.* 2003 VIIIAD Delhi 228



# CLAUSE XII OF LETTERS PATENT AND ORIGINAL JURISDICTION OF THE HIGH COURT ESTABLISHED UNDER LETTERS PATENT

*Pushkraj S. Deshpande*

## WHAT ARE LETTERS PATENT?

Letters Patent is a type of legal instrument in the form of a published written order issued by a monarch, president, or other head of state, generally granting an office, right, monopoly, title, or status to a person or corporation. Letters patent can be used for the creation of corporations or government office. In 1823, in the British-India the letters patent was issued by the monarch of England in order to create another Supreme Court in the Presidency of Bombay similar to that of Supreme Court of Madras and Calcutta. King George IV issued Letters patent in the year 1823 for establishment of the Supreme Court of Judicature at Bombay. Now there were 3 Supreme Courts operating in British India. The eastern part of India which came under the Bengal Presidency had Supreme Court of Judicature at Fort William (Calcutta) established in 1774, the southern part of India which came under the Madras Presidency had Supreme Court of Judicature at Madras established in the year 1817 and the western part of India came under the Bombay Presidency had the Supreme Court of Judicature at Bombay, established by the letters patent by the King George the IV in the year 1823.

In the year 1857, the great Indian revolt against the British East India Company took place and as an impact of the great revolt the control of the East India Company over India was transferred to the Crown by the new enactment the Government of India Act, 1858. This Act ended the dual raj on India and all the administration thereafter came under the Crown. In the year 1961 the British Parliament passed an enactment as "The Indian High Courts Act 1861" which received the assent of the Crown. Accordingly by the letters patent dated 26<sup>th</sup> June 1862, the earlier letters patent for establishment of the Supreme Courts were revoked and new High Courts were to be established in Bombay on 14<sup>th</sup> August 1862, Calcutta on 2<sup>nd</sup> July 1862 and in Madras on 15<sup>th</sup> August 1862. All these courts enjoyed and still enjoy the Original Jurisdiction.

## EXTRACT OF REVOCATION OF LETTERS PATENT OF 1802 WHEREBY ESTABLISHMENT OF SUPREME COURT WAS REVOKED

*"Now know ye that We, upon full consideration of the premises, and of Our especial grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof, as hereinafter provided and subject to the provisions thereof) revoke our said Letters Patent of the Twenty-sixth of June One thousand Eight hundred and Sixty-two except so far as the Letters Patent of the Fourth year of His Majesty King George the Fourth dated the Eighth day of December One thousand Eight hundred and Twenty-three, establishing a Supreme Court of Judicature at Bombay, were revoked or determined thereby".*

Vide the above Letters Patent the earlier Letters Patent issued by King George the IV was revoked.

## ESTABLISHMENT OF THE HIGH COURTS

*"And We do by these presents grant, direct, and ordain that notwithstanding the revocation of the said Letters Patent of the Twenty-sixth of June One thousand Eight hundred and Sixty-two, the High Court of Judicature, called the High Court of Judicature at Bombay, shall be and continue as from the time of the original erection and establishment thereof, the High Court of Judicature at Bombay for the Presidency of Bombay aforesaid, and that the said Court shall be and continue a Court of Record and that all proceedings commenced in the said High Court, prior to the date of the publication of these Letters Patent, shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force, except so far as the same are altered hereby until the same are altered by competent authority".*



## CLAUSE XI OF THE LETTERS PATENT (LOCAL JURISDICTION OF THE COURT)—

*"And We do hereby ordain that the said High Court of Judicature at Bombay shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time, be declared and prescribed by any law made by the Governor in Council, and until some local limits shall be so declared and prescribed, within the limits of the local jurisdiction of the said High Court of Bombay at the date of the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction".*

## CLAUSE XII OF THE LETTERS PATENT—

*"And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court."*

Clause XII of the Letters Patent of the High Court empowers the High Courts at Bombay, Calcutta and Madras to try certain suits in the exercise of their **Ordinary Original Civil Jurisdiction** (O.O.C.J) where the claim of the suit exceeds a particular amount and are within the local original territorial jurisdiction of the Court. In exercise of Jurisdiction under the Letters Patent, the High Court is also empowered to hear the suit outside the local original territorial Jurisdiction of the Court. In order to use those powers under Clause XII of the Letters patent, the Court has to ascertain if the Leave under Clause XII shall be granted to any such suit which is outside the territorial jurisdiction of the court or whether to reject such a suit.

## WHICH SUITS FALLS UNDER THE CATEGORY BY CLAUSE XII OF THE LETTERS PATENT

Let us divide the above extract of the Clause XII in parts in order to understand the meaning and essence of the Clause XII.

### Part 1 - Suits for Land

*"And we do further ordain.....shall be empowered to receive, try, and determine suits of every description (any suit), if, in the case of suits for land or other immovable property...."*

From the above extract it can be understood that vide Clause XII, suit of any description including suits for land or other immovable property can be tried by the High Court under its original Jurisdiction.

*"...such land or property shall be situated (within the local limits), or in all other cases if the cause of action shall have arisen, either wholly (entire cause of action has arisen within the local jurisdiction of the court), or, in case the leave of the Court shall have been first obtained, in part (Leave under clause XII to be obtained if cause of action arises partly outside the local limits), within the local limits of the ordinary original jurisdiction of the said High Court..."*

- a. If the land or property is situated wholly within the local limits of the Ordinary Original Civil Jurisdiction of the said High Court, suit can be tried by the High Court without grant of any leave.
- b. Only with the leave of the Court the suits other than mentioned in "a" where the part of the property is situated outside the local limits of the original jurisdiction of the court or where the cause of action partly has arisen outside the local limits of the original jurisdiction of the High Court. These suits can be tried only after the leave under this clause is obtained from the High Court.
- c. If it is a suit for land, i.e. Partition Suit, suit for declaration of the rights of property, suit for specific performance of the agreement relating to the dealing of land and if such a land or property or flat or house or plot is completely outside the local limits of the Original Jurisdiction of the court then no question of the leave under clause XII arises.

## Part 2 - Suit other than Suit for Land

*".....or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court...."*

- a. The 1<sup>st</sup> part of the above extract can be understood as that, the court can try the suit under its original jurisdiction, if the cause of action has arisen wholly within limits of the original Jurisdiction of the High Court. In this case there is no need to take leave under Clause XII to try suit in the High Court's Original Jurisdiction.
- b. The 2<sup>nd</sup> part mentions about the leave under clause XII. If the cause of action has arisen in part only within the local limits of the original Jurisdiction of the High Court then such a suit can only be tried once the leave under the Clause XII is obtained by the Plaintiff.

## Part 3

*"...or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court."*

- a. If the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain outside the local limits of the original jurisdiction of the High Court then the suit can be tried in the High Court only after the Leave under Clause XII has been obtained by the Plaintiff. Here outside the local limits does not only mean outside the local limits but within India, the defendant even if he is carrying out business outside India then leave of the Court Under Clause XII shall be obtained.

## WHEN AND HOW TO OBTAIN LEAVE

Under Order IV Rule 1 of the Code of Civil Procedure (C.P.C), the suit shall be filed with the plaint along with other relied annexure/exhibits as per and in accordance with Order VI and VII of the C.P.C.

Under Order IV rule 2 of the C.P.C which reads as *"Register of Suits- The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose*

*and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted "the register of Suits is to be maintained"*. This means that once the suit is filed and if it is in accordance with Order IV, Order VI and Order VII of the C.P.C then the said suit shall be entered/admitted into the Register of Suit.

If the suit falls within the dimensions of the earlier mentioned conditions then the leave under clause XII shall be obtained in order to commence with the hearing of the suit in the High Court. Now as soon as the suit is lodged the Leave Petition (L.P) shall be filed with the High Court to obtain leave under Clause XII of the Letters Patent Act. The said petition is then listed before the Hon'ble Judge of the High Court in order to evaluate if the said suit falls under the ambit of the leave under Clause XII and the leave is either granted or rejected.

The general practice of the filing department at the High Court of Bombay is, on filing of the suit i.e. the plaint along with all the relied annexures/exhibits relied upon by the Plaintiff, the department provides you with a lodging number of the suit indicating that the suit has been lodged but not admitted into the register of suits. This lodging number is indicated as "Suit (L) No. 000 of 2019". On lodging of the suit the suit is further sent to other departments in order to get the objections raised in that suit to check if the said suit is in accordance with Order IV, Order VI and Order VII of the C.P.C. and if the leave under any of the clause of Bombay Letters Patent Act is required to be obtained. Once all the defects in the suit are removed then the suit is said to be admitted and newly numbered as per the register of the suits. The suit will now be indicated as "Suit No. 123 of 2019".

**What if in the mean time the matter is listed before the Hon'ble Court for hearing on interim relief when the suit is still bearing the "Lodging" number and not entered in the Register of Suit, is it too late to obtain the Leave under Clause XII?**

A similar proposition was raised in the case of **Caribjet Inc. v. Air India (2005 (2) MhLj 461)** Ltd which was dealt with by the Hon'ble Bombay High Court

In paragraph 11, the Hon'ble Bombay High Court held that, *"In our opinion, the legal position has been correctly set out by P. B. Sawant, J. (as he then was) in **Union Bank***

**of India v. Sunpack Corporation and Ors.**, (1986 Mh.L.J. 237) as follows : As per the existing practice the plaint is presented to the Prothonotary and Sr. Master of this Court who is the officer appointed for the acceptance of the plaint as per Order IV, Rule 1 of the Code of Civil Procedure. Then follows the next stage mentioned in Rule 2 of the said Order, namely, the entry of the particulars of the suit in the register of suits and their seriatim numbering according to the order in which the plaints are admitted. Order V, Rule 1 then states that it is only when the suit has been duly admitted that the summons is to be issued to the defendant or defendants as the case may be. This is also clear from the provisions of Order VII, Rule 9. The Code itself, therefore, envisages two stages - first, of the presentation of the plaint, and the next, of the admission of the plaint. The suit is not admitted to the register of suits and number is given to it, merely on the presentation of the plaint. After the presentation, the plaint is scrutinized. If there are any defects in the same, the plaintiff is required to remove them. The removal of defects is a matter of procedure. It is only after the defects are removed that it becomes eligible for an entry and a number, in the register of suits. One of the defects can be the absence of leave of the Court to institute the suit where it is necessary, including leave under Clause 12 of the Letters Patent. So long, therefore, as the plaint is not admitted and entered in the register of suits, all defects including that of the absence of leave under the said clause, can be removed without returning the plaint. It was pointed out that it is the confusion between the two stages, namely presentation of the plaint and of its admission to the register of suits after the removal of the defects, if any, which is responsible for the faulty procedure adopted by the office. Sawant J. directed the office not to return the plaint for want of leave under Clause 12 of the Letters Patent but only require the plaintiff to obtain the leave and admit it to the register when leave is obtained. The office followed and implemented the directions of Sawant J. However, it appears that after the decision of Suresh J. in Rhoda Mehta's case (supra) which has taken a contrary view, the office again changed the practice. Incidentally, neither in Rhoda Mehta's case nor in the other decisions rendered by the learned single Judge the decision of Divisional Bench in Ramgopal Chunilal's case was noted. Those decisions are clearly per incuriam. We are informed that following an unreported decision of Kochar J. dated 11th March, 1977 in **Nat Steel Equipment Pvt. Ltd. v. Bangalore Heart Hospital and Research Centre** (Summary Suit (Ld) No. 213 of 1999) the old practice of not returning the plaint for want of leave has been restored by the office. In the circumstances, the fact

that the suit was accepted by the authorised officer of this Court prior to obtaining leave under Clause 12 will make no difference inasmuch as it is only upon numbering of the suit that it can be said to have been "accepted" by this Court. It is, therefore, not possible to accept the submission that the plaint as **lodged on 20th July, 2001** was improper presentation. In the present case, admittedly, leave under Clause 12 was granted on 8th September, 2001 and only thereafter the suit came to be **numbered on 13th September, 2001**. There is thus no reason to interfere with the order granting leave under Clause 12. Appeal is accordingly dismissed. "As long as the plaint is not admitted and entered in the register of suits, all defects including that of the absence of leave under the said clause, can be removed without returning the plaint."

The Hon'ble High Court differentiated what is lodging number and what is the final number. When the Suit is on its Lodging Number it is not admitted in the Register of the Suits and all the defects raised by the Court's offices can be dealt with until it is on its lodging number. Obtaining clause XII if not obtained on lodging of the suit, can still be obtained before the Suit is admitted in the Register of the Suits under Order IV Rule 2 of the C.P.C.

## CONCLUSION

The Leave under Clause XII is a vital and important power granted to the High Courts of Bombay, Madras and Calcutta. This defines the Power of the Higher Judiciary to have its own independent original Jurisdiction wherein the cases with complexity can be directly filed to the higher court which is capable to handling the case which includes several cause of actions and properties in question which are situated in different parts of state or country. It also avoids the multiplicity of the judicial proceedings which would likely happen taking into consideration the separate cause of actions and properties situated at different parts of country. The reason for establishment of the High Courts then meant the end of the Rule of the East India Company which was later dissolved, and the administrative powers were transferred to the Crown, the then Queen Victoria. With the establishment of the High Courts in 3 provinces came an end of the Supreme Court in those 3 Provinces. All the appeals from the High Courts were directed to the Privy Councils. The Queen, vide the Letters patent, granted wide powers to the High Courts of the 3 Provinces in order to have a total control over the administrative and judicial

powers of the Country then ruled by her. The Powers under the letters patent were so vital that it is still in force and practiced in the High Courts, even after 70 years of Independence for the good and well being of the litigants.

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