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“India is a secular nation in which every religion must be treated with equality. In the context of the Armed Forces, which comprise of men and women following a multitude of faiths the needs of secular India are accommodated by recognising right of worship and by respecting religious beliefs. Yet in a constitutional sense it cannot be overlooked that the overarching necessity of a Force which has been raised to protect the nation is to maintain discipline. That is why the Constitution in the provisions of Article 33 stipulates that Parliament may by law determine to what extent the fundamental rights conferred by Part III shall stand restricted or abrogated in relation inter alia to the members of the Armed Forces so as to ensure the proper discharge of their duties and the maintenance of discipline among them.”

Dr D.Y. Chandrachud, J.

Mohd. Zubair v. Union of India
(2017) 2 SCC 115, para 10

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Lex Revolution

Journal of Social & Legal Studies

Quarterly Published International Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

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MESSAGE

It is with great pleasure we announce the release of Volume III Issue-1 (2017) of ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Contributors, teachers and Research scholars whose views and opinions have been incorporated in the text.

- **Editorial Board**

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COMMENT ON JAMABANDI / MUTATION LAW

Animesh Kumar*

It is gratifying to note that our welfare state is based on rule of law. It is also a matter of pride that the functionaries of the state are guardians of the rights of citizens. The concept of rule of law would lose its vitality if the functionaries of the state are not enjoined upon the duty of discharging their functions in a fair and purposive manner. We are conscious that such enlightened functionaries always consider that the ends of justice are always higher than the technicalities of law.

In case where it is indisputable that the representationist is in possession fulfilling both its elements i.e. mental (ANIMUS POSSESSIONIDI) and physical (CORPUS POSSESSIONIDI) possession and if it is further evident that the state could not and did not take possession on the land in question and no compensation amount has ever been paid in lieu of the land in question at any point of time. Accordingly, in terms of the Repealing Act the proceeding, if any under the Urban Ceiling Act abated. The term ‘abatement’ is no longer res-integra. The case is squarely covered by the constitutional bench decision of Hon’ble Supreme Court in case of *Angoori Devi v. State of Uttar Pradesh*¹. It stands obliterated from its inception and the order, if any, becomes congenitally void.

One of the basic dictums of law is ‘OUOD AB INITIO NON VALET IN TRACTU TEMPORIS NON CONVALESAIT’ i.e., ‘that which is originally void, does not by lapse of time become valid’. Such dictums of the common law of England are applicable in our country. They are not contrary to any provision of the law of land or any enactment. Accordingly, even in terms of Article 372 of the Constitution of India they are also an integral part of the constitution falling even within the ambit of Article 13(1) enshrined in part III of the constitution.

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¹ AIR 2001 (SCW) 5128

It is well settled that the creation of Jamabandi is neither a mirror of title nor is it a reflection of actual physical possession. The apex court in case of *Jattu Ram v. Hakam Singh*² it has been authoritatively laid down the law as follows:

"It is well settled law that Jamabandi/mutation entries are only for fiscal purpose. It neither creates nor extinguishes title or ownership." This view was reiterated in many decisions including *Sawarni v. Inder Kaur*³. It bears the testimony that such revenue entry is relevant for fiscal purpose alone and is relevant for collection of rent.

However, possession is *sine qua non* for Mutation and issuance of rent receipt. The person in possession alone is entitled to be issued rent receipts. Various authorities including *Depta Tiwari v. State of Bihar*⁴ bears testimony to this proposition with following words:-

"It is not disputed nor can it be in law that an order with regard to mutation has to be passed on the basis of possession only."

It is to be borne in mind that in the earlier Act, being Tenants Holding (Maintenance of Records) Act 1973 or any earlier law of mutation there was no power of cancellation of Jamabandi/order of mutation. Reference may be made to the decision of Hon'ble Patna High Court in case of *Harihar Singh & Others v. Additional Collector I/c Land Reforms*.⁵ Such instance can be multiplied, but VERB SAP. It was for the first time that in Mutation Act, 2011, the power of cancellation of Jamabandi was conferred under section 9 of the said Act upon the Additional Collector with a right to appeal and revision against the same.

Nothing succeeds like success and nothing fails like failure. In such a case it is never too late to mend the ways, correct the tenants' ledger and augment the revenue of the state. It can only be done by revival of earlier order, mutation and by providing rent covering even back years.

² 1994 (1) PLJR 18 (SC)

³ AIR 1996 SC 2823

⁴ 1987 PLJR 1037

⁵ 1978 BBCJ 323

THE PAROL EVIDENCE RULE

Aditi Singhal*

Abstract

The Parol Evidence Rule, also known as Four Corners Rule, is a general rule which enables the courts to focus just on the written terms of the contract, excluding all other evidences related to that contract which can be later used for negotiations and thus, creating confusion in front of the courts. The exemption of these evidences results in reducing the ambiguity from a contract. This paper talks about the concept of the Parol Evidence Rule, its role and limitations. This paper also focuses on the position of this concept in India as well as the limitation prevailing in India with the help of few significant case laws.

Keywords: *Parol Evidence Rule, Four Corners Rule, Ambiguity, Contract, Limitations, other Evidences, Confusion.*

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CONCEPT OF PAROL EVIDENCE RULE

“The essence of the parol evidence rule is that the embodiment of an agreement into a single writing makes all other utterances of the parties on that topic legally immaterial for the purpose of determining what the terms of the contract are.”¹

The Parol Evidence Rule is a general rule which states that when an unambiguous, fully integrated written agreement is executed by the parties, then the parties are forbidden to use any extrinsic evidence to prove either their intent or to specify the meaning of the terms used in the writing.²

“The Parol Evidence Rule deals with a common contractual situation: where initial negotiations, in which preliminary oral or written promises are exchanged, conclude with a writing that appears to embody the entire agreement. The question is whether the courts’s interpretation of the contract should rely at all on evidence related to the earlier negotiations, known as “extrinsic evidence”, or should rely entirely on the writing.”³

“Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement...all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract... and unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added nor subtracted from the parol evidence.”⁴

FOUR CORNERS RULE

¹ Chism v. Omlie, 124 So. 2d 286, 288 (Miss. 1960)

Keith A. Rowley, ‘Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and everything in between)’, (1999), Vol. 69, Mississippi Law Journal, pp. 79-342.

<http://heinonline.org/HOL/Page?handle=hein.journals/mislj69&div=12&start_page=73&collection=journals&set_as_cursor=3&men_tab=srchresults>

² Keith A. Rowley, ‘Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and everything in between)’, (1999), Vol. 69, Mississippi Law Journal, pp. 79-342.

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³ Eric A. Posner, ‘The Parole Evidence Rule, the plain meaning rule, and the principles of contractual interpretation’, (1998), Vol. 146, University of Pennsylvania Law Review, pp. 533-577.

<<http://www.jstor.org/stable/3312625>>

⁴ Syversen v. Hess, [2003] ND 118

While determining and interpreting a written contract, the court tries to understand the intent of the parties by examining the language confined within the four corners of the contract.⁵ This doctrine of restricting to the contract and not including any evidence or negotiation present before or after this contract, is termed as ‘Four Corners Rule’⁶

The Four Corner rule lacked integration and ambiguity as it failed to fill the gaps in the agreement.⁷ So to mitigate this harshness of Four Corner Rule, the courts decided that the contracts may be partially integrated with some relevant terms including oral evidences which would be accepted in the agreement provided the intention of the parties are correct.

EXCEPTIONS OF PAROL EVIDENCE RULE

Parol Evidence can be admitted in the court for the following purposes:

a) Partially/ Fully Integrated Agreements

If the agreement is not final and complete then the parol evidence could be admitted to add, clarify, explain or give meaning to the content of the agreement.⁸ In the case of Keppner v. Gulf Shores, Inc.⁹, the Court held,

“The parol evidence rule has no application where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement. In the case sub judice the agreement between the omelette Shoppe, Wendy’s and Gulf Shore is silent on few subjects. Therefore, the admission of testimony regarding the matter does not violate the parol evidence rule.”¹⁰

b) Integrated Ambiguous Agreements

⁵ Pursue Energy Corp. v. Perkins, 558 So. 2d 349 (Miss. 1990)

⁶ Ibid

⁷ Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d

⁸ J.O Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 400 [Miss. 1996]

Keith A. Rowley, ‘Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and everything in between)’,(1999), Vol. 69, Mississippi Law Journal, pp. 79-342.

http://heinonline.org/HOL/Page?handle=hein.journals/mislj69&div=12&start_page=73&collection=journals&set_as_cursor=3&men_tab=srchresults

⁹ 462 So. 2d 719 [Miss. 1985]

¹⁰ Ibid

If the words or phrases in the agreement are ambiguous, then the parol evidence could be taken to remove the ambiguity from the text.¹¹

c) Intent of the Parties:

When the contract's validity comes under question because of the intent of the parties including Fraud, misrepresentation, mistake, then the Court requires parol evidence to establish the alleged intent of the parties.¹²

In the case of *Deligiannis v. PepsiCo., Inc.*¹³, the Court held that as the plaintiff failed to establish the intent of the defendant, thus, the parol evidence rule would be used to support the allegations of the plaintiff.

d) Explanatory Evidence:

Where the words or phrases have some special meaning attached to it or the parties themselves have attached a certain meaning to a word in their contracts, then the parol evidence could be taken to understand the meaning of these words.¹⁴

POSITION IN INDIA

In India, the parol evidence rule can find its place under section 91 and 92 of Indian Evidence Act, 1872. The Indian Evidence Act is considered one of the most successful acts of codification in the common law world.¹⁵

¹¹ Vivek Kumar Verma, ‘Rule of interpretation of contracts: Pre-contractual documents/ draft agreements, [2014], Indian Case Laws.

<<https://indiancaselaws.wordpress.com/2014/09/20/rules-for-interpretation-of-contracts-pre-contractual-documentsdraft-agreements/>> accessed on 17 November, 2016; Read *Baylot v. Habeeb*, 147 So. 2d 490, 494 [Miss. 1962]

¹² Manuel A. Pietrantoni, Fraud, intent of the parties, Ambiguity and other exceptions to the Parol Evidence Rule, [2012], Vol. 31, Franchise Law Journal, pp.134-139.

<<http://www.jstor.org/stable/pdf/23218380.pdf>> accessed on 17 November, 2016

¹³ 757 F. Supp. 241 [SDNY 1991]

¹⁴ Keith A. Rowley, ‘Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and everything in between)’,(1999), Vol. 69, Mississippi Law Journal, pp. 79-342.

<http://heinonline.org/HOL/Page?handle=hein.journals/mislj69&div=12&start_page=73&collection=journals&set_as_cursor=3&men_tab=srchresults>

¹⁵ Honourable J J Spigelman AC, Contractual Interpretations: A comparative Perspective, [2011], Third Judicial Seminar on Commercial Litigation.

<<http://ssrn.com/abstract=1809331>>, accessed on 16 November, 2016

The concept of Best Evidence Rule specifies that the best evidence available for interpreting a particular case would be allowed by the Court. This concept can be clearly seen under section 91 of the Act.

Section 91 states that when a contract is reduced to writing either by the will of the parties or by the necessity of the law, the text of the contract becomes the primary document and no evidence shall be stated except the contract itself or the secondary evidence if it is admissible.

Section 92 talks about the exclusion of evidence of oral evidence. It states that oral evidence or statement is not admissible, as it might contradict the written document. It further states that when terms of a document or contract has been proved in compliance with section 91, no oral evidence should be admitted in the court subsequently to contradict the primary document.

There are six exceptions to section 92 of Indian Evidence Act which are similar to the parol evidence rule of US and British Laws. Oral evidence or any statement is not admissible in the court except in the following conditions:

- a) If it is required to prove any fact which would nullify the contract due to fraud, intimidation, illegality, mistake, incapacity of parties. Thus, these exceptions deal with the situation where the legality of the contract is in question.

These exceptions under section 92 would be valid only if there are any contradicting terms or the intent of the parties is not clear.

- b) If the document is silent on the terms related to oral agreement, then these evidences can be admitted in the court.

In the case, *Anant Shamrao & Others. v. Nensukh Bherulal Kucheriya*¹⁶, the court held that oral evidence for representation can be included. Thus, nothing under section 92 makes the oral agreement inadmissible as evidence.

- c) If there is any oral agreement which is related to the condition precedent which is related to the contract that is creating an obligation between the parties.

¹⁶ AIR [1956] Bom. 252

In the case, Ram Jatan v. Chandra Bali & Others¹⁷, the court held that the oral evidence can be admitted in the court till it does not contradict the main primary contract. If anywhere, it is inconsistent with the contract then it would not be admitted.

- d) If there is any oral agreement which is reduced to writing that might be required by the court to modify or remove any part of the contract.

In the case, Abdul Kadir v. Noor Mohammed Sait & Others¹⁸, the court refused the oral evidence admitted by the plaintiff stating that oral evidence is admissible only when the contract is registered and reduced to writing.

- e) If any oral agreement which is providing an explanation or adding incident to any part of the contract without contradicting any part of the contract.
- f) If any oral evidence which can remove the ambiguity or any defect from the language of the contract.

In the case, Afar Alias Godai Morol v. Surja Kumar Ghose¹⁹, the court held that the oral evidence is not admissible as it completely modifies the rights of the parties.

LIMITATION OF PAROLE EVIDENCE RULE WITH REGARD TO INDIAN CONTRACT ACT, 1872

The question that arises is whether the exception of parol evidence rule would match the provisions as constituted in Indian Contract Act or not. In the case, A.V.M. Sales Corporation v. Anuradha Chemicals Pvt. Ltd.²⁰, the court held, “*..it is now a settled principle that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contracts Act and cannot be understood as parties contracting against the statute.*”

¹⁷ AIR [1960] All 746

¹⁸ AIR [1959] Ker 400

¹⁹ 7 Ind Cas 842

²⁰ [2012] 2 SCC 315

Therefore, any parties cannot apply parol evidence rule if it is contradicting the statutory provisions of Indian Contract Act 1872.

CONCLUSION

Therefore, it can be stated that parol evidence rule has a major significance in understanding the written documents as it tries to remove the gap and ambiguity from the texts. But while inferring these texts, one should keep in mind that these evidences are taken to interpret the terms and conditions of the contract and not to contradict or harm the interest of the parties. The main purpose of this rule is to support the contract so that no parties could misuse or misinterpret the written document.

EMERGENCES AND DECLINE OF SWEAT OF THE BROW: IN INDIA AND THE UNITED STATES

Akanksha Pandey*

Abstract

Sweat of the brow provides copyright protection on the foundation of the effort, hard work, talent and investment of capital laid in by the maker instead of the originality. According to this principle, an author acquired rights through modest reliability throughout the creation of a work, such as database, directory, factual compilations. It is also recognized as Industrious collection standard. With time this doctrine became an important aspect of copyright. The underlying principle behind this rule was to reward the one who utilized his sweat and strength in assembling the factual work.

*Initially for getting copyright there should be originality, *diminimus* requirement and fixation requirement and most important work should be originated from author not to be derivative work. But now a day judges on different events implies that imitative work need not be unique in its place it should be stated in an entirely novel way in order to be copyrighted. Uniqueness must be adjudicated through seeing at the work as a complete one, not only at its component measures. Therefore, the rule sweat of the brow is in disagreement with the essential norm of the Copyright Act. It led to confusion on the issue of regulating the borders of the notion of originality.*

This paper will discuss the usage of Sweat of the brow doctrine in different countries and how they are not detriment to originality. I will further discuss about the recent cases that have come up and grabbed the attention of this doctrine and also the changes that has been formulated by judges from sweat of the brow to degree of originality and creativity.

Keywords: Copyright, Creativity, Intellectual Property law, Originality, Sweat of the Brow, Industrious collection, Protection.

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INTRODUCTION

In every country for all forms of Intellectual property there have been certain criteria that are sine qua non to conferring de jure protection. Since one has right to get protection over their work. For copyright, in literary work ‘originality of expression’ is of an utmost importance, even in the case of compilation and derivative works. Therefore, in the whole world originality is a basic touchstone for getting copyright in literary work. The basic purpose for protecting a work is to encourage the progress of science and useful arts and to protect a person creative expression not the idea. Originality is not defined anywhere in the copyright law of any country and moreover, what quantum of originality is required to get copyright is not mentioned. In India copyright subsists, *inter alia*, in ‘original’ literary.¹ However, it is still not define anywhere what standard of originality should be followed in India and same with the United States.

This ambiguity is often viewed as a manifestation of a long-standing and ongoing struggle between two different doctrinal schools. On the one hand, the ‘*sweat of the brow*’ or ‘industrious collection’ school holds that labor or industry, even in the absence of creativity, may be sufficient to make out a finding of originality for copyright purposes². On the other hand, ‘Intellectual Creativity’ is a very important aspect of copyright law. For getting copyright protection there should be existences of the minimal level of creativity by the creator. Now a day, the courts are seeing a test of originality from a perspective of creativity aspect more than sweat of the brow doctrine. In other words, copyright law promotes creativity³.

SWEAT OF THE BROW NOT DETERMINANT TO ORIGINALITY

For seeking copyright for a work, it is imperative to ensure that such work is an original. Largely, in every country common law tends to confer copyright protection on any work on which substantial skill or labor has been expended and this doctrine is known as sweat of the brow. This doctrine emphasis on how much labor and diligences a person took to create a work, rather than how original work is.⁴ The origin of this doctrine cannot be acknowledged, but through study this is clear that this doctrine is the result of interpretation of earlier

¹ India Copyright Act 1957, S 13

² Abraham Drassinower, Sweat of The brow, Creativity and Authorship: On Originality in Canadian Copyright Law (2004)

³ Dr. Tabrez Ahmad & Ankur Mishra, Creativity and Copyright: U.S. and Indian Perspective.

⁴ Mini Gautam, Originality Under Copyright Law Is There Any Definite Standard? (2015)

statutes⁵. In case of *University of London Press v. University Tutorial Press*⁶ the court originally propound the doctrine of sweat of the brow and explain that general requirement for originality does not mean that the work must be the expression of the original or inventive thought, it just that it should originate from the author and not be copied work. Skill and labor must have been expended in the creation of the work.

Even in the case of *Desktop Marketing system private Ltd v. Telstra Corporation Ltd*⁷ the court held that relevant database and compilation is an original work in which copyright subsist. Also court stated that originality requirement is not that strict and labor and effort in industrious compilation was sufficient. In the case of *Ladbroke v. William hills*⁸ court have recognized that where there is skill, judgment, labor & knowledge there is copyright involved. Originality is present if there has been the implementation of adequate degree of labor, skill, judgment and knowledge in the production of the substantial work. It was held that “what is worth copying is *prima facie* worth protecting.” Due to this doctrine, work is defined in terms of commercial values⁹.

The generosity of the copyright system, it is well established that railway timetables¹⁰, football fixture list¹¹, examination papers¹² are literary work within the meaning of copyright and included as tables or compilations so there is no doubt that they are protected. There should be sufficient ‘skill, judgement and labour’ accordingly operates as a proviso de minimis. But there is no copyright subsist in Ledger sheet & blank forms, Rules and Recipes, White pages listings of telephone directories, Idea and Principles, Method of operation, Fact and Theories (although particular expression of facts or theories are copyrightable). Even long before the Copyright Act, the U.S. Supreme Court recognized in 1879 the fact-expression dichotomy in the case of *Baker v. Selden*,¹³ explained the reason behind limiting copyright protection on mathematical science. Further, “The owner of copyright under this title has the exclusive rights to do and to authorize to prepare derivative works based upon the

⁵ Tracy Lea Meade, Note, Ex-Post Feist: Applications of a Landmark Copyright Decision, 2 J. Intell. Prop. L. 245, 250 (1994).at 248

⁶ University of London Press v Universal Tutorial Press [1916] 2 Ch. 601
⁷ (2002) 55 IPR 1

⁸ [1964] 1 All ER 465

⁹ Teresa Scassa, Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition (2004)

¹⁰ Blacklock v. Pearson [1915] 2 Ch. 376

¹¹ Football League v. Littlewoods [1959] Ch 637

¹² University of London Press v Universal Tutorial Press [1916] 2 Ch. 601

¹³ (1879) ,101 U.S. 99, 103, 25 L. Ed. 841

copyrighted work¹⁴. The standard of originality should be set at the intermediate level of skill and judgment.

SHIFT OF SWEAT OF THE BROW TO CREATIVE ORIGINALITY

The core objective of copyright is not to reward the labor and effort of authors, but “to promote the Progress of Science and useful Arts”. For getting copyright protection there should be a minimal creativity. Before *Feist Publications, Inc., v. Rural Telephone Service Co.*¹⁵, the courts had developed sweat of the brow doctrine but that is not consistent with the core principles of copyright¹⁶. In order to determine ‘originality’, the word ‘creation’ is employed as a criterion. After *Feist Case*¹⁷ it came out that “originality in copyright involves independent creation and a bit of creativity”. This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright¹⁸. The Supreme Court promoted creativity originality theory and tried to abolish sweat of the brow doctrine. The creative originality doctrine was also applied by various courts, which protected only creative aspect of the compilations¹⁹. The originality requirement articulated in and *Burrow-Giles*²⁰ case remains the touchstone of copyright protection. This Court defined the crucial terms “authors” and “writings”. In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality²¹. Minimum level of creativity should be there for copyright protection. Perhaps sweat of the brow doctrine tries to protect the skill and effort but then by applying this doctrine courts outlawed future compliers from future compilation. On the other hand, creative originality approach guaranteed that future compilers could work on previously created factual compilations, so long as selection as well as arrangement was not copied. This resulted in the fair use of the copyrighted work. Sweat of the brow doctrine is not valid only modicum of creativity is the best one which suits copyright.

PUBLIC DOMAIN

¹⁴ U.S Copyright Act 1976, 17 U.S.C. § 103(a)

¹⁵ (1991) 499 U.S. 340, 351-353

¹⁶ Dr. Tabrez Ahmad, *Creativity and Copyright: U.S. and Indian Perspective*

¹⁷ ibdi

¹⁸ Philip. Miller, *Life after Feist: Facts, The First Amendment and the copyright status of automated database (1991)*

¹⁹ Miller v. Universal City Studios (5th Cir. 1981),Inc., 650 F.2d 1365, Worth v. Selchow & Righter Co (9th Cir. 1987) 827 F.2d 569 ,Eckes v. Card Prices Update (2nd Cir. 1984) 736 F.2d 859

²⁰ (1884), 111 U.S. 53

²¹< https://www.law.cornell.edu/copyright/cases/499_US_340.htm> accessed on 6th October, 2016

Copyright should be viewed as a contract between society and the author consonant with the Constitutional objective of promotion of science and the useful arts²². With growing awareness of and a new emphasis on the importance of maintaining a broad public domain of fact-based works. This analysis thus gives a broader perspective on the historical argument that the industrious collection doctrine has always been the ruling principle of copyright law in the United States and shows this assumption is not entirely valid²³. In case of *Fogerty v. Fantasy*²⁴, Copyright law reflects a balance of competing claims upon the public interest; creative work²⁵ is to be encouraged and rewarded but the copyrighted material should also serve the public at large which means that the art should be available to public for developing knowledge and art in the society.

POSITION AND APPLICABILITY OF SWEAT OF THE BROW

UNITED STATES

USA has the oldest and the most developed Copyright laws in the world.²⁶ After the period of ambiguity for a long time because of criteria for copyright protection with respect to literary work, in 1991 Supreme Court of U.S has being taken a landmark shift from “Sweat of the brow” to “Creativity originality”. In landmark judgment of *Feist Publications v. Rural Telephone Service Company, Inc*²⁷ the U.S Supreme court established a new originality paradigm i.e., constitutional requirement of creativity. In this case court found that there should be creative choice in the selection and arrangement of data for the grant of copyright. And it makes clear that whether copyright should subsist on mere labour or creativity.

Facts- Rural Telephone service was a certified public utility and provided phone services to several communities in north- west Kansas. Rural was obliged to publish annually an updated phone directory consisting of white and yellow pages. Rural get hold of the data from

²² Daniel J. Gervais, FEIST GOES GLOBAL: A COMPARATIVE ANALYSIS OF THE NOTION OF ORIGINALITY IN COPYRIGHT LAW,(2002)

²³ Miriam Bitton, Trends in Protection for Informational Works under Copyright Law during the 19th and 20th Centuries, (2006)

²⁴ (1994) Inc. 510 U.S. 517

²⁵<https://books.google.co.in/books?id=8eniCQAAQBAJ&pg=PA40&lpg=PA40&dq=%22of+competing+claims+upon+the+public+interest:+creative+work%22&source=bl&ots=bfFrw0kAK0&sig=wrEJ5LCq7SqeP3mWrDbVtwsDSDY&hl=en&sa=X&ved=0ahUKEwjtx8bVrIXQAhWMr48KHdhqD44Q6AEIHTAA#v=onepage&q=%22of%20competing%20claims%20upon%20the%20public%20interest%3B%20creative%20work%22&f=false>

²⁶ Analysis of doctrines: ‘Sweat of the brow’ & ‘Modicum of creativity’ vis-a-vis Originality in Copyright Law <<http://www.indialaw.in/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/>> Accessed on 15th October, 2016

²⁷ (1991), 499 U.S. 340

subscribers, who had to postulate their particulars to obtain phone services and circulated its directory free of cost to subscribers but arose revenue from selling yellow pages advertisements. On the other hand, Feist Publications, Inc., was a publishing company specializing in area-wide phone directories, covering much larger areas. The Feist directory that is the subject of this litigation covered 11 different telephone service areas in 15 counties and contains 46,878 white pages listings compared to Rural's approximately 7,700 listings. Both of them compete vigorously for yellow pages advertising. Feist nonetheless used Rural's white pages listings, taking 1,309 names, towns and phone numbers without Rural's consent.²⁸ Feist's directory was also distributed free of charge. Rural as the only provider of telephone service in its area, Rural obtained subscriber information quite easily. Feist is not a telephone company not having any monopoly status, and thus lacked independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies. All agreed except Rural. Feist listing included the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying. Rural successfully sued Feist in district court on the assertion that it could not use the information given in Rural's directory while arranging its own directory and it lead to copyright infringement.

Issue: Did copyright subsist in the telephone directory?

Court observation: The court in order to decide this case found that originality in literary work is a *sin qua non* of copyright which cannot be ignored. In doing so, court followed a long line of earlier Supreme Court decisions that have limited copyright protection to the "original intellectual conceptions of the author."²⁹ In case of *Burrow Giles*³⁰, the Supreme Court defined "author" as "he to whom anything owes its origin; originator; maker³¹. In Milestone judicial pronouncement of the *Trademark cases*³², "writings" are defined as "only such as are original, and are founded in the creative powers of the mind of the author. Moreover, the court observed that facts are not copyrightable but compilations may be

²⁸ Nine originality, sweat of the brow

²⁹ Philip H. Miller, *Life After Feist: Facts, the First Amendment, and the Copyright Status of Automated Databases* (1991)

³⁰(1884), 111 U.S. 53

³¹ *ibid*

³² (1879) 100 U.S. 82

copyrightable only if compiler selection and arrangement shows sufficient originality. The Supreme Court made this clear in *Harper & Row, Publishers, Ina v. Nation Enterprises*³³, stating emphatically that “no author may copyright his ideas or the facts he narrates”. The Court found statutory support for this standard in section 101 of the Copyright Act of 1976, which defines “compilation” as a work formed by the collection and assembling of preexisting data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”³⁴ The premise that facts are not copyrightable is the most fundamental axiom of copyright law. In rejecting the “sweat of the brow” in this case Supreme Court noted that it arose because of misinterpretation of statutes in 1909 of Copyright Act because of which sweat of the brow doctrine contravenes fundamental copyright principles by protecting underlying facts.

Held: The Court overturned the Lower Court’s judgement and the United States Supreme Court granted Feist’s petition for certiorari and the Court held that Feist Publications did not infringe the copyright held by Rural Telephone. Because Rural fails to prove originality in its coordination and arrangement of facts. It didn’t show de minimis creativity and there was a lack of the requisite originality too. What Feist’s use was the listings and that cannot constitute infringement. This decision makes it clear that copyright rewards originality, not effort. And there should be mere creativity should have involved for grant of copyright.

Applicability of Feist: After Feist, Supreme Court edict that anions the original selection and arrangement standard as the only true judicial measures for determining the copyright status of automated database & other factual compilations. It negate that not novelty but originality was held to be indispensable requirement for the work to be copyrightable. And requisite level of creativity is small. In case of *Key Publications, Inc. v. Chinatown Today Publishing Enterprises Inc*³⁵ court held that directory is subject to copyright protection because it showed creativity and thus it is copyrightable. The Feist statement that “the copyright in a factual compilation is thin” has been borne out in case law subsequent to the Feist decision. In case of *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.* (“BAPCO”) ³⁶held that compilation as whole may be copyrightable, but the defendant will not amount to infringement. In *CCC Information Servs., Inc. v. Maclean Hunter Market*

³³ (1985) ,471 U.S. 539

³⁴ U.S Copyright Act 1976, 17 U.S.C. § 101

³⁵ (CA2 1922) 281 F. 83

³⁶ (11th Cir. 1993), 999 F.2d 1436

*Reports, Inc*³⁷., the Second Circuit posited that there are facts or ideas that are “infused with the author’s taste or opinion,” as opposed to explaining phenomena or furnishing solutions to problems. The court recognized that using the merger doctrine to rule out protection for the compilation itself by characterizing as ideas the criteria used to select or arrange its contents would render copyright for compilations illusory. “The requisite level of originality may differ according to the nature of the work. The strictly limited level “original” achievement that is required in order to attract literary copyright. Thus, in the case of *CCB Canadian Ltd. v. Law Society of Upper Canada*³⁸ the court is of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.

INDIA

Though, ideas themselves are not protected, but the expression of those ideas are protected under Indian Copyright Act, 1957. Idea need not necessarily be new³⁹. It is important to note that with regard to *R.G. Anand v. Delux Films & Others*⁴⁰ there can be no copyright in an idea or subject matter but only in the arrangement and expression of such idea⁴¹. Copyright protection is conferred only on original literary works⁴². And the work must be originated from the author. In *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd*⁴³ Supreme Court held that cl. (a) of section 13 (1) protects original work whereas cl. (b) and (c) protect derivative works. It is currently unclear what standard of originality is followed in India, as Indian courts have not made any clear pronouncements on the concept of originality⁴⁴. The act does not define “originality” or “original” for judicial interpretations. According to section 14 of the Act, only author of the work, subject to sec.17 of the Act is entitled to have copyright protection and can enjoy the exclusive rights therein India is a wealthy country and strongly followed the doctrine of ‘sweat of the brow’ for a considerably long time. And this approach developed in U.K. and had been followed by the Indian Courts

³⁷ (2d Cir. 1994) 44 F.3d 61

³⁸ SCR 339 (Canada), 2004 1

³⁹ Ameet Datta and Suvarna Mandal, Saikrishna & Associate, ‘Originality’ concept under India’s copyright regime (2015)

⁴⁰ (AIR 1978 SC 1614).

⁴¹ ROBBIN SINGH, UNDERSTANDING THE CONCEPT OF ORIGINALITY UNDER COPY RIGHT LAW IN INDIA

⁴² Copyright Act 1957, S 13

⁴³ Indian Express Newspaper (Bombay) Pvt Ltd v Jagmohan (AIR 1985 Bom 229)

⁴⁴ Ranjit Kumar, Database Protection: The European Way and the Impact on India, 45 IDEA

before the test of ‘modicum of creativity’ came into scene⁴⁵. In *Burlington Home Shopping v. Rajnish Chibber*⁴⁶, it came out that compilation can amount to a ‘literary work’ only when it includes one’s time, skill and labour of the author. But no copyright subsists in news per se.⁴⁷ After *Feist Case*⁴⁸ the concept of the creativity originality is evolved and it swung away from sweat of the brow doctrine. It has been witnessed in several cases that the court has taken a shift from sweat of the brow which pronounced in *University London Press v. University Tutorial Press*⁴⁹ to “minimal creativity originality” concept adopted by the U.S Supreme court. In India this shift is interpreted in *Eastern Book Co. v. D.B Modak*⁵⁰. The court set the standard of originality i.e., there should be a mid-way between ‘sweat of the brow’ and ‘minimal creativity’. At the same time, “creativity is not required” to make the work ‘original’.⁵¹ In the judgment of *Dr. Reckeweg & Co. Gmbh. and Anr. v. Adven Biotech Pvt. Ltd*⁵², the court rejected the contention of the plaintiff on the ground that mere compilation of the work was not sufficient to get copyright protection.

DATABASE

Historically, database is protected under copyright laws and its protection test is covered under the doctrine of sweat of the brow. Now a days, in the era of the digitalization, adequacy for protection of database has been increased because it has been key beneficiary of electronic commerce. In section 2 (o) of Copyright Act 1957, includes computer program under literary work. India being a member of the Berne convention and TRIPS agreement, the requirement of originality in selection and arrangement of the content of the database is require attracting copyright protection.⁵³ In the case of *McMillan v. Suresh Chunder Deb*⁵⁴ , *Govindan v. Gopalakrishna*⁵⁵ shows the use of the sweat of the brow in determining copyright protection database by Indian courts .Then the Delhi High Court in the case of *Diljeet Titus & Ors v. Alfred A Adebare & Ors*⁵⁶, dealt with this matter, related to the database protection,

⁴⁵ ibid

⁴⁶ 1995 PTC (15) 278

⁴⁷ <https://home.kpmg.com/content/dam/kpmg/pdf/2014/09/AgenceFrancePresse.pdf> ,accesssed on 15th october 2016

⁴⁸ ibid

⁴⁹ ibid

⁵⁰ SCC 1 (2008) 1

⁵¹ ibid

⁵² MANU/DE/0961/2008

⁵³ Apar Gupta, Protection of Database in India: Copyright termination Sui Generis Conception (2007)

⁵⁴ ILR 17 Cal 951, (1890)

⁵⁵ Mad 391, AIR 1955

⁵⁶ PTC 609, 2006(32)

and held that the copyright protection is extended in the form of modicum of creativity in the selection, arrangement or co-ordination of the contents of a database to attract copyright protection. The database can be protected under copyright law if there is a creative compilation of works that themselves is an original creation. Though India does have a very strong copyright regime, which is in pari materia with the UK “sweat of the brow” doctrine, but the recent decision by the Delhi high court seems to cast a doubt on whether the Indian Copyright regime protects “unoriginal” databases⁵⁷.

CONCLUSION

Nowadays, in India Sweat of the brow is of no more importance in the copyright law, like U.S because it violates the basic principle of copyright. Moreover, Originality is always going to be imperative yardstick for copyright protection in literary work. Even the modicum of creativity is also not too perfect for originality test because then it no-where describes what level of creativity is needed by an author. There should be middle path for both the doctrines either it be sweat of the brow or modicum of creativity which create balance between both. Because as we live in era of digitalization protection of database compilation becomes essential and there should be some separate copyright laws for protection of database. And talking about public consideration if sweat of the brow is given for labour and effort nothing original will exist anymore because one will use the previous work of others and then one will copy the other previous work's. So Copyright protection is not there to entertain every compilers compilation work of already known facts. There should be some importance given to labour of a person but only in few cases not in every mere compilation. As U.S is a developed country, legislature there should be more focused on database protection rather than the creativity aspect for protection. When it comes to India, they should try sui generis of data protection like EU. Though U.S is clear with creativity approach for testing originality but as we come to India, it is still stuck between sweat of the brow and modicum of creativity for determining originality as seen in several cases. Indian courts should put more focus on the originality of work rather than labour of a person because Copyright protection is basically for progress of science and art. By applying sweat of the brow doctrine it will not lead to the progress of science as well as of art.

⁵⁷ Hailshree Saksena, Doctrine of the ‘sweat of the brow’

HUMAN RIGHTS AND THE CONSTITUTION

Sagar Khanna* & Akansha Srivastava**

Abstract

Human rights made in light of specific infringement of human pride, and can henceforth be considered as detail of human respect and moral source. This inner relationship clears up the moral substance and furthermore the perceiving highlight of human rights, they are planned for an intense use of the center good estimations of a libertarian universalism to the extent coercive law. This is an endeavor to clear up this great honest to goodness Janus face of human rights through the intervening part of the possibility of human pride. This thought is a direct result of a superb hypothesis of the particularistic ramifications of those “nobilities” that once was associated with specific honorific capacities and participations. “Human admiration” still holds from its particularistic forerunner thoughts the significance of depending upon the social affirmation of a status-for this circumstance, the status of fame based citizenship. Only participation in a set up political gathering can secure, by giving equivalent rights, the equivalent human poise of everybody.

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INTRODUCTION

Human rights are those rights that are basic for the human life. Human rights will be rights to specific cases and freedom for every human being everywhere throughout the world. These rights, other than being fundamental and universal in character are an accepted international measurement.

These rights guarantee to make man free. Universalization of Rights with no qualification of any sort is a component of human rights. These rights recognize the fundamental human needs and requests. Each nation should ensure guarantee of human rights to its subjects. The Human rights ought to discover its place in the Constitution of each nation.

Basic human rights: The basic human rights include:

1. Right to life, liberty and security of person,
2. Right to freedom of speech,
3. Judicial remedy,
4. Freedom to movement,
5. Right to take part in the governance of one's country.

Economic and social rights: The second types of rights are economic and social rights. The rights included in this group are also very important. These include:

1. Right to work,
2. Right to have a good standard of living,
3. Right to rest and leisure,
4. Right to education, and
5. Right for equal pay for equal work.

Women rights are human rights: The UN has taken a lot of interest for the abolition of victimization ladies. Significance of human rights: The significance of the human rights

development is that it tells individuals that one cannot call the general public a decent and an only society until every one of its natives appreciate these human rights. The human rights law goes for dispensing with low oppression of any human being. The idea of Human rights depends on the guideline of human solidarity, collaboration, and improvement and access of all to the basic legacy of humankind.

The effect and significance of human rights are so deep and solid that the Constitutions of India, Indonesia, Costa Rica and different nations fused large portions of the procurements of rights classified in the said Declaration in their particular constitutions. This might be dealt with as point of interest the historical landmark of progress of human progress.

The Charter of human rights applies enormous weight on all political authorities. Solid cautiousness is seen all through world against the violation of human rights.

Women strengthening: The issue of women empowerment and imbalance has been taken up as a Human rights issue. A few establishments, associations are working hard to create awareness among the masses. The opportunity has already come and went on that each individual inside the general public approach in support ladies in their battle for justice. She ought to be dealt with at standard with men in all venues and avenues of the social system. Her position should be lifted.

Limitations:

1. These rights do not entertain lawful sanction.
2. These are to some degree yet additional lawful and non-reasonable rights.

In any case, it stays to be said that the human rights enrolled worldwide are a firm resolve. Henceforth, the moral principles communicated through these rights, have further, and more significant and more profound impact than any lawful instrument.

HUMAN RIGHTS IN INDIA

Human rights in India: It is the obligation of each country to make such laws and conditions that protects the basic Human rights of its citizens. India being a law based nation, gives such rights to its residents and permits them certain rights including the freedom of expression. These rights which are called fundamental Rights shape a vital part of the Constitution of

India. A noteworthy stride in drafting the International Bill of Human Rights was acknowledged on 10 December 1948, when the General Assembly embraced the Universal Declaration of Human Rights as a typical standard of accomplishment for all people groups and countries.

These rights are basic in three diverse ways.

- First, these are essential human rights. As human creatures we have the privilege to appreciate these rights.
- Secondly, our Constitution gives us these essential rights and ensures. These rights are important for the nationals of our nation to act legitimately and live in an equitable way.
- Thirdly, the methodology for the powerful implementation of these ensured Fundamental Rights has been specified in the Constitution itself. Each subject of India has the privilege to move to an official courtroom on the off chance that he/she needs.

HUMAN RIGHTS AND THE CONSTITUTION OF INDIA

The Constitution of the Republic of India which came into force on 26th January 1950 with 395 Articles and 8 Schedules is a standout amongst the most fundamental laws ever received. The Preamble to the Constitution announces India to be a Sovereign, Socialist, Secular and Democratic Republic. The expression “democratic” means that the Government gets its power from the will of the general population. It gives a feeling that they all are equal “regardless of the race, religion, language, sex and culture.” The Preamble to the Constitution equity, social, financial and political, freedom of thought, expression, belief, faith and love, equity of status and of chance and organization guaranteeing the respect of the individual and the solidarity and trustworthiness of the country to trouble its nationals.

Human Rights in the Indian Constitution can be found in the Preamble of the Constitution of India, Part III of the Constitution on Fundamental Rights and Part IV of the Constitution on Directive Principles, which together have been described as shaping the core of the Constitution which together reflects the essential standards of the Universal Declaration of Human Rights and the Covenants on Civil and Political Rights, Economic, Social and Cultural Rights, and Part IVA of the Constitution on Fundamental Duties, Articles 300A,325 and 326.

It is past the point where it is possible to overemphasize or stress on the developing significance of the subject human rights and the diverse aspects and measurements thereof, both in the national and international circles too. The essential needs of the individuals are all around perceived and recognized in each Constitution of the world and however the structure or language might be distinctive, the fundamental structure seems, by all accounts, to be one and the same the fundamental necessities and requirements of the people.

The idea of human rights has expected extremely awesome worldwide significance, be that an advanced nation, created country or underdeveloped nation. The universal opinion is uniform identifying with protection of human rights. Sir Hersch Lauterpacht was pleased to observe:

“The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international.”

The Universal Declaration of Human Rights, The UN Covenant on Economics, Social and Cultural Rights, the UN Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, Rules of Procedure of the Permanent Arab Commission on Human Rights, are a few illustrations which might be alluded to in this connection.

Shri A.H. Robertson in his “*Human Rights in the World*” had dealt with the importance of human rights and the international protection to be given to such basic rights. The subject had been further dealt with elaborately in “*Human Rights in National and International Law*”, edited by Shri A.H. Robertson. In *Munn v. Illinois*¹, Field, J. observed that life means something more than mere animal existence and inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. In *Baskey*² it was observed by Douglas, J. that the right to work is the most precious liberty because it sustains and enables a man to live and the right to life is a precious freedom.

Article 21 deals with protection of life and personal liberty. In *Olga Tellis v. Bombay Municipal Corporation*³. It was observed by the Supreme Court of India:

¹ 94 US 113 (1877)

² *Baskey v. Board of Regents*, 347 MD 442 (1954)

³ (1985) 3 SCC 545

“The question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching.... An equally important facet of that right is the right to livelihood because; no person can live without the means of living, that is, the means of livelihood.”

In *Consumer Education and Research Centre v. Union of India*⁴ dealing with the expression “life”, it was held⁵:

The expression ‘life’ assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure.”

Personal satisfaction secured by Article 21 is something more than the dynamic significance connected to life and liberty. Right to life incorporates right to human dignity. Right to live with human pride cherished in Article 21 gets life breath from the directive principles of State policy. Right to free legal aid to the poor is a key right. Right to education is a crucial right. Right to life does exclude right to die.

Article 21 of the Constitution examines strategy built up by law and thus it is difficult to contend that by amending CrPC the impact of the technique set up by law in Article 21 can be taken away. Right to life is a characteristic right typified in Article 21 yet suicide is an unnatural end or extinction of life and in this way contrary and conflicting with the idea of right to life. Calling for *bandh* is violative of central privileges of the citizens. To be an individual from a cooperative society is just a privilege gave by the statute and not a fundamental right. Testimonial impulse cannot be connected with the exception of for a situation where a man is constrained to be an observer against himself. Criminal prosecution for offense under Section 138, NI Act is no ground to stay procedures for recovery of sum taking into account of a dishonored cheque. The remote chance of misuse of a provision by those responsible for directing it is not a ground on which it can be held that the provision is procedurally or substantively unreasonable. Being an individual from an cooperative society is a statutory right and not an essential right. Blacklisting of a contractual worker can be put

⁴ AIR 1995 SC 922

⁵ Ibid at para 22

aside by a writ court. Right to haven shapes a vital part of essential right. Right to live incorporates every one of those parts of life which go to make a man's life important, complete and worth living..

Since right to life is more than insignificant creature presence, tribals have a privilege to social and monetary empowerment. Where fundamental rights of petitioners under Article 21 have been abused by the convoluted acts of the State or its servants, established courts can concede help of compensation. Since the jail framework is harassed by nine noteworthy issues like overcrowding, delay in trial, torture, sick treatment, disregard of health and so on., perceptions were made and fitting headings have been given. Right to protect likewise falls inside the ambit of Article 21 of the Constitution. Prison authorities are required to guarantee the life and security of each individual in prison including convicts. Where convenient medicinal treatment was not given to a man needing the same by an administration healing center, it was held that it is violative of his entitlement to life. In *Phoolawanti v. State of Punjab*⁶ it was held that in case of terrorist violence and death of the victim, ex gratia grant cannot be denied on the ground that the deceased was employed.

CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN INDIA

Constitutional guarantees for the human privileges of our people were one of the industrious requests of our leaders all through the freedom battle. It was made as far back as in 1895 in the Constitution of India Bill, properly known as the Swaraj Bill, which was inspired by

Lokmanya Tilak. The demand was repeated in Mrs. Anne Besants' Commonwealth of India Bill, settled by the National Convention of Political gatherings in 1925, by the Motilal Nehru Committee in 1928, at the Karachi session of the Indian National Congress in 1932 and by the Tej Bahadur Sapru Committee, 1944-45.

The qualification between fundamental rights and human rights is that the political choices lead to fundamental rights while the ethical standards lead to human rights. The aforementioned refinement amongst human and crucial rights depends on a qualification amongst profound quality and morals. Human rights show moral universalistic standards, while fundamental rights shape the particularistic morals of the group in which they play the functional role of fundamental standards that legitimize ordinary law. In like manner, human

⁶AIR 2002 P&H 101

rights are universal in view of their being grounded just on the idea of individual, rising above a specific connection. Major rights, rather, are portrayed by their capacity inside a specific legal and political framework, paying little heed to the extent of this framework.

Fundamental Rights are given to the citizens by the Constitution of India. The Fundamental Rights and Duties are among the imperative areas of the Constitution and endorse the major fundamental of the state to its subjects and the obligations of the residents to the state. These are the fundamental components of the constitution and they were produced by the Constituent Assembly of India somewhere around 1947 and 1949. Part III of the Constitution of India portrays the Fundamental Rights offered to the country's citizens. Fundamental Rights are fundamental human rights that can be offered to each resident regardless of position, race, doctrine, and spot of birth, religion or sexual orientation. Fundamental Rights are subjected to particular restrictions and enforceable by courts. These are equivalent to opportunities and these rights are crucial for individual great and the general public on the loose.

Dr. Bhim Rao Ambedkar, the Founder Father of Indian Constitution made a preventative note on the eve of receiving the constitution of India:

Will history repeat itself? Will the Indians put the nation over their statement of faith? Alternately will they put doctrine above nation? It is not sure. However, this much is sure that if the gatherings place statement of faith above nation, our freedom will be placed in peril a second time and likely be lost forever.

Everybody, as an individual from society, has the privilege to government disability and is qualified for acknowledgment, through national effort and global co-operation and as per the association and assets of every State, of the economic, social and social rights imperative for his poise and the free improvement of his identity.

INDIA AND THE UNIVERSAL DECLARATION

India was a signatory to the Universal Declaration of Human Rights. Various central rights ensured to the people in Part III of the Indian Constitution are like the provisions of the Universal Declaration of Human Rights.

In *Keshavananda Bharati v. State of Kerala*⁷, the Supreme Court observed, “The Universal Declaration of Human Rights may not be a legally binding instrument but: it shows how India understood the nature of human rights at the time the Constitution was adopted.”

In the case of *Jolly George Varghese v. Bank of cochin*⁸ the point included was whether a privilege joined in the Covenant on Civil and Political Rights, which is not recognized in the Indian Constitution, might be accessible to the people in India. Justice Krishna Iyer rejected dualism and affirmed that the positive duty of the State Parties lights administrative activity at home yet does not naturally make the Covenant an enforceable part of the ‘*Corpus Juris*’ in India. Along with this, in spite of the fact that the Supreme Court has expressed that the Universal Declaration cannot create a coupling set of rules and that even international treaties may, best case scenario educate legal foundations and rouse authoritative activity. Established translation in India has been unequivocally impacted by the Declaration. In the judgement given in the *Railway Board v. Mrs. Chandrima Das*⁹, the Supreme Court observed that the Declaration has the international recognition as the Moral Code of Conduct having been adopted by the General Assembly of the United Nations. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

THE CONSTITUTION OF INDIA AND UNIVERSAL DECLARATION

The Universal Declaration of Human Rights, which the United Nations Organization, embraced on 10th December 1948, counts different Civil and Political Rights and Economic and Social Rights. This Declaration greatly affected the reasoning and belief system of the Constitution makers, while the Constitution of India was really taking shape around then. Numerous comparative rights were joined in our Constitution under the headings Fundamental Rights and Directive Principles of the State Policy in Chapter III and IV respectively and these rights have an awesome importance for the Indian individuals as they have empowered each national of India to live freely and respectably. A person gets full freedom to create himself rationally and physically, through the principles imbedded by freedom fighters lead by Mahatma Gandhi.

⁷AIR 1973 SC1461

⁸AIR 1980 SC 4708

⁹ AIR 2000 SC 988

The Universal Declaration of Human Rights proclaimed by the United Nations, to which India was a gathering, broadcasted essential human rights, in spite of the fact that it didn't accommodate any apparatus for its requirement. The chronicled battle for political flexibility in India had made a presentation of Fundamental Rights inevitable. In fact, the Indian Declaration at the Round Table Conference had squeezed for the sanctioning of Fundamental Rights in the Constitution which, it was normal the British Parliament would pass. Likewise, World War II saw human conduct even under the least favorable conditions and what were considered as Natural Rights of individuals came to be turned into Human Rights. United Nations took upon itself the part of the crusader for Human Rights. As the preamble of United Nations Charter announced it was resolved "to reaffirm confidence in crucial Human Rights, in the poise and worth of human individual, in equivalent privileges of man and ladies and of the Nations substantial and little". Universal Declaration of Human Rights was embraced in 1948 took after by Covenants on Political and Civil Rights and Social, Economic and Cultural Rights in 1966.

India embraced its Republican Constitution in 1950 and incorporated a unique part on Fundamental Rights. The Universal Declaration of Human Rights embraced and broadcasted by the General Assembly of the United Nations on the 10th of December 1948 is to be sure one of the valuable occasions in the progressing walk of humankind toward refining development and civilization. A standard code of Human Rights for the whole homo sapiens race was made relevant to the entire globe and it was what humankind had been endeavoring over for a considerable length of time. Presently what is comprehended is that 'the premises for the Universal Declaration is that the whole humankind is dealt with as one individual from one human family; the rights are basic and are considered on the establishment of opportunity, equity and peace. Dignity of the human individual is acclaimed and men and ladies with equivalent rights are in reality to walk ahead for the advancement of social advancement and for the better principles of life and environment of such flexibility. The point of human rights is of all inclusive concern and it cuts over all ideological, political and social limits. Regard for human rights is one of the cardinal standards for a powerful operation of Constitution, Law and the Government of any nation. Article 1 of the Universal Declaration of Human Rights depends on two presumptions in particular,

Likewise, however they were included later by the amendment, the fundamental duties enshrined in the Constitution of India, contained in Part IVA, are in consonance with Article

29 (1) of the Universal Declaration of Human Rights, which says, “*everybody has obligations to the group in which alone the free and full advancement of his identity is conceivable*”. ‘We should reaffirm confidence in acknowledgment of the intrinsic dignity and natural privileges of all subjects as the establishment of freedom, justice and peace on the planet, which infers commitments and obligations.’ Human rights, accordingly, run as an inseparable unit with responsibilities. It is extremely vital that all nationals ought to be made mindful of the capability of Article 51A relating to fundamental duties as a way to guarantee the assurance of human rights. In this way is an easy assignment to set up that the Universal Declaration is a pioneer documentation of Human Rights of the humankind everywhere, as pondered, embraced and acknowledged by the International Community. Thus, the interest for compelling security of Human Rights has likewise picked up unmistakable quality by this Declaration.

NATIONAL HUMAN RIGHTS COMMISSION

Human rights are better protected at the national level with adequate laws, independent judiciary and effective mechanism and also play a supportive and supplementary role to the existing institutions. The National human rights commissions do not replace the role of the already existing legal and administrative framework in the form of courts, legislatures and executive bodies and other institutions.

Objectives of human rights:

- Introduces to the mechanism for implementation of Human Rights
- Enables you to understand role and function of the national human rights commission.
- Help to learn about the contribution of the National Human Rights Commission in the protection and promotion of human rights.

Functions of NHRC:

The primary function of NHRC is to conduct inquiries into violations of human rights. NHRC conducts inquiries for the following categories of violations:

- Violation of right to liberty, life, equality and dignity
- Violation of international treaties to which India is a party
- Abetment of violation of human rights by a public servant

- Negligence of public servant in prevention of human rights violations.

Gujarat riots case

The National Human rights commission had taken suo-moto cognizance of media reports about the unearthing of a mass grave in Lunawada Village of Panchmahal District of Gujarat. He commission sought a report from the state government and CBI in the matter. Large scale incidences of communal violence were reported in Gujarat during February March 2002. About three thousand people belonging to minority Muslim community were killed and property was destroyed. The Gujarat state government and its police did not take appropriate measures to prevent violence and failed to provide safety, security and justice to the victims of Muslim minority community. Indeed, the NHRC initiated a suo-mot inquiry into these incidents and directed the state government to report the measures taken to resort peace in the state of Gujarat. The commission also approached the Supreme Court of India on behalf of the victims of the Gujarat riots.

Important guidelines issued by the national human rights commission:

One of the primary mandates of NHRC is to inquire into deaths in police custody and Deaths in prison. The first important instruction issued by NHRC in its first year to all the state governments is on mandatory reporting of custodial deaths and rape. NHRC directed on 14th December 1993, to the district magistrate and superintendent of police to report to the commission incidences of custodial death and rape within 24 hrs and stated that failure to send a report within the stipulated time would be presumed as suppression of the incidents. The mandatory reporting was extended to deaths in prison in 1994.

Later, NHRC also issued directions on encounter deaths. NHRC also issued comprehensive guidelines on pre-arrest, arrest and post-arrest after the *DK Basu case*.¹⁰

NOTION OF HUMAN RIGHTS AND VALUE OF LIFE

There is currently close general accord that all people are qualified for certain fundamental rights under any circumstances. These incorporate certain common freedoms and political rights, the most major of which is the privilege to life and physical security. Human rights are the explanation of the requirement for equity, resistance, common admiration, and human

¹⁰ AIR 1997 SC 610

poise in the majority of our action. Talking about rights it permits us to express all people are a piece of the extent of ethical quality and equity.

To secure human rights is to guarantee that individuals get some level of good, compassionate treatment. To disregard the most essential human rights, then again, is to deny people their key good privileges. It is, it could be said, to regard them as though they are not as much as human and undeserving of admiration and respect. Cases are acts normally considered “wrongdoings against humankind,” including genocide, torment, servitude, assault, implemented disinfection or medicinal experimentation, and conscious starvation. Since these approaches are some of the time actualized by governments, constraining the unreasonable force of the state is a critical piece of universal law. Basic laws that preclude the different “violations against mankind” are the guideline of nondiscrimination and the idea that specific fundamental rights apply generally.

A portion of the gravest infringement of the privilege to life is slaughters, the starvation of whole populaces, and genocide. Genocide is regularly comprehended as the purposeful killing of a solitary ethnic, racial, or religious gathering. Murdering bunch individuals, creating them genuine substantial or mental damage, forcing measures to avert birth, or coercively exchanging youngsters are all approaches to achieve the decimation of a gathering. Genocide is frequently viewed as the most hostile unspeakable atrocity.

Women are regularly assaulted by officers or constrained into prostitution. For quite a while, the global group has neglected to address the issue of sexual savagery amid furnished conflict. However, rapes, which frequently include sexual mutilation, sexual embarrassment, and constrained pregnancy, are very regular. Such violations are inspired to some extent by the long-held perspective that women are the “crown jewels” of war to which warriors are entitled. Trafficking of women is a type of sexual subjugation in which women are transported crosswise over national fringes and promoted for prostitution. These supposed “solace ladies” are another case of organized sexual brutality against women amid wartime. Sexual viciousness is now and then seen as an approach to demolish male and group pride or mortify men who can’t “ensure” their ladies. It is additionally used to hush women who are politically dynamic, or essentially dispense fear upon the populace at large. Mass assaults may likewise frame part of a genocidal system, intended to force conditions that lead to the pulverization of a whole gathering of individuals. For instance, amid the 1990s, the media

reported that “assault and other sexual monstrosities were a planned and methodical part of the Bosnian Serb crusade for triumph in the war” in the previous Yugoslavia.

Political persecution may likewise take the type of separation. When this happens, fundamental rights might be prevented on the premise from claiming religion, ethnicity, race, or sex. Politically-sanctioned racial segregation, which denies political rights on the premise of race, is maybe a standout amongst the most serious types of separation. The arrangement of politically-sanctioned racial segregation in South Africa regulated amazing racial isolation that included laws against interracial marriage or sexual relations and prerequisites for the races to live in various regional ranges. Certain people were held to be sub-par by definition, and not viewed as full individuals under the law. The laws built up under this framework went for social control, and achieved a general public isolated along racial lines and portrayed by a deliberate nonchalance for human rights.

Since its origination, Human Rights and esteem forever is a widespread regulation grounded on extensive high good and scholarly values. It is rather said “a hopeful perfect” basic human assumptions taking into account all inclusive standards as opposed to self-ruling solitary rule. Hence, its appropriateness is all inclusive. The predictable of life morals which depends on the idea that human life is sacrosanct, is a profitable understanding communicating moral, social, social and religious aura of human life.

Most likely, rights and values are best reflected in our country when the crusader’s target in light of their belief systems weds with their level of interest. There has been a sight of valuable verbal confrontations over the politicization of human rights enclosure. The willful way of investment taking into account individual and aggregate enthusiasm for exceptional and now and again particular premiums have genuinely obstructed the fitting demonstration anticipated from these gatherings, plainly conveying slander to the entire development of the human rights and social activism. Human rights regarding advancement, support and execution have been done by different deliberate associations and common social orders’ individuals with and without government help.

Numerous have noticed the solid reliance between human rights infringement and immovable clash. Misuse of human rights regularly prompts struggle, and strife commonly brings about human rights infringement. It is not astounding, then, that human rights misuse are regularly at the focal point of wars and that insurance of human rights is vital to struggle resolution.

Infringement of political and financial rights is the main drivers of numerous emergencies. At the point when rights to satisfactory sustenance, lodging, livelihood, and social life are denied, and expansive gatherings of individuals are rejected from the general public's basic leadership forms, there is liable to be incredible social distress. Such conditions frequently offer ascent to equity clashes, in which parties request that their essential needs be met.

For sure, numerous contentions are started or spread by infringement of human rights. For instance, slaughters or torment may excite contempt and reinforce a foe's determination to keep battling. Infringement may likewise prompt further viciousness from the other side and can add to a contention's spiraling crazy.

In situations where compelling infringement of human rights have happened, compromise and peace building turn out to be a great deal more troublesome. Uncertain human rights issues can serve as impediments to peace negotiations. This is on account of it is troublesome for gatherings to move toward strict change and absolution when recollections of extreme viciousness and barbarity are still essential in their brains.

WHAT NEEDS TO BE DONE??

The Government of India realized the need to set up a free body for advancement and assurance of human rights. The foundation of a self-ruling National Human Rights Commission by the Government of India mirrors its dedication for compelling execution of human rights procurements under national and universal instruments. The Commission is the first of its kind among the South Asian nations furthermore few among the National Human Rights organizations, which were set up, in mid 1990s. The Commission became effective on 12 October 1993, by righteousness of the Protection of Human Rights Act 1993.

Suggestions for Union Government

- Review the adequacy of the Protection of Children from Sexual Offenses Act inside a sensible period, and look for alterations in conference with women's rights, children rights, and common freedoms activists to address inadequacies in the Expand and enhance preparing for pediatricians and gynecologists on perceiving and law, including the assumption of blame against the denounced.
- Handling instances of sexual misuse, including by building up a required sex delicate preparing module for therapeutic understudies on treating and looking at casualties of

kid sexual misuse, which ought to be produced in interview with attorneys and specialists on women's, kids' and wellbeing rights.

- Assist state governments in creating rules and preparing to appropriately execute the Protection of Children from Sexual Offenses Act for the police, government and private social laborers, kid welfare panel individuals, specialists who work with kids, judges, and other court staff.

Suggestions for State Government

- Implement the Protection of Children from Sexual Offenses Act and offer need to the preparation of the police, court staff, government and private social specialists, youngster welfare board of trustee's individuals, and specialists who work with kids.
- Conduct a study of all private consideration offices and give this data to kid welfare advisory groups, state youngster rights commissions, and the National Commission for the Protection of Child Rights. Build up a checking system in which kids are autonomously met in a protected situation.
- Draw up rules for schools and other instructive establishments to keep the sexual misuse of kids, as coordinated by the Juvenile Justice (Care and Protection of Children) Rules, 2007.

Suggestions for Global Actors

- Encourage the Indian government to regard its global duties to execute laws ensuring kids.
- Provide specialized backing to India's focal and state governments to guarantee the effective implementation of the Protection of Children from Sexual Offenses Act, the Juvenile Justice Act, and the Integrated Child Protection Scheme.
- Support activities to build consciousness of tyke sexual manhandle and help India develop guidelines to shield kids from sexual abuse. Apart from these activities, there can be different measures which rely on upon individuals' drive to control them from doing any unmoral or unlawful exercises which causes harm.

INTERNATIONAL FOOD TRADE: INDIA'S CONCERN FOR FOOD SAFETY

Diksha Chadha*

Abstract

The money involved in international food trade are enormous and so is India's interest with regards to FDI, employment and majorly the rights of health and life based on nutritious and healthy food guaranteed by the Constitution of India. India's domestic obligations namely with WTO rules, put major challenges before the authorities especially when India faced a huge loss of a case in WTO on health issues. Recently transformed Act called Food Safety and Standard Act, 2006 which aims to alleviate the business of food along with safeguarding consumers' interests is not that effective because of the absence of good food product standards and infrastructures.

The paper will focus on these topics, divided into following parts, respectively:

The first part deals with general introduction as to why there is a need to scrutinize recent controversies related to food at WTO as well as domestic level. In second part elaborates over the volumes of global food trade exchange dollars included the potential development and India's approach towards it alongside strategy measures are discussed. The third part focuses on the core issue: why is food safety issue so much significant in most developing countries like India with so many people to feed, where maximum number of people survives less than a dollar a day. The fourth part of the paper is to undertake India's harmonization with WTO's SPS measures and the case which India lost at both Panel and Appellate Body level against USA in June 2015 relating to 'bird flu'. It will also blanket how India is going to implement the rules of this case and also what risk assessment it will have before 18 months are over and what will be its overall impact on India. In fifth part of the paper, highlight is draws upon the impact of international trade on Indian agriculture and its implications thereof. Finally last segment deduces the conclusion to the entire discussion.

Keywords: WTO, Food Safety, Global Food Trade, SPS Measures.

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INTRODUCTION

For the 1.3 billion people of India, 4 June 2015 was unfavorable as the WTO's Appellate Body upheld most of the findings of Panel in the case concerning India – Measures Concerning the Importation of Certain Agricultural Products¹ (Indian Measures case). The dispute settlement body considered Indian measures prohibiting imports of poultry and other livestock products from countries as they reported modifiable avian influenza (NAI), violating the Sanitary and Phytosanitary Measures (SPS Measures). India banned the importation of these products and declined in giving Sanitary Import Permit for the impending threat risk for avian influenza (AI) which is of two types:

- (i) highly pathogenic avian influenza (HPAI)
- (ii) low pathogenic avian influenza³ in the wake of AI outbreak also called 'bird flu'.²

From the period of 2003 to March 2013, India had officially notified the OIE of 95 outbreaks of HPAI (subtype H5N1) in poultry in India. The United States Department of Health and Human Services recognizes the way that human can get contaminated with 'bird flu' and its viruses can get modified and harm in other forms as well, and this spreads in human by direct or close contact with infected poultry or surfaces contaminated with secretions and excretions from infected birds.³

On the other hand, the months of May, June and July 2015 were filled with news coverage of 'maggi noodles', consisting of led and monosodium glutamate (MSG) in excess and thus violating the labeling rules and propelling of a Nestle item in Indian market without item endorsement and resulting bans on it by the Food Safety Standard Authority of India (FSSAI).⁴ The controversy also dragged with it, the celebrities endorsing these brands on advertisements. Both the matters are related to the safety of human health and cannot be left unchecked because apart from right to life being fundamental rights in India, it likewise cast a sacred obligation up on the officials to give safe and healthy nutritious food to every citizen.⁵

¹ India – Measures Concerning the Importation of Certain Agricultural Products, WT/DS430/AB/R, reported on June 4, 2015. For Panel Report see, WT/DS430/R reported on October 14, 2014.

² Questions and Answers About Avian Influenza (Bird Flu)and Avian Influenza A (H5N1) Virus', Available at <http://www.cdc.gov/flu/avian/gen-info/qa.htm>

³ 'Key Facts About Avian Influenza (Bird Flu) and Highly Pathogenic Avian Influenza A (H5N1) Virus' Centre for Disease Control and Prevention, USA, Available at <http://www.cdc.gov/flu/avian/gen-info/facts.htm>

⁴ FSSAI Order dated 5 June 2015, Available at http://www.fssai.gov.in/Portals/0/Pdf/Order_Nestle.pdf

⁵ Centre for Public Interest Litigation v. Union of India, (2013) 16 SCC 279 @ para 21

Also the definition of ‘food’ under Article 2 (j) and (zk) of the Food Safety and Standard Act, 2006 might be capable of covering the products in the question on both the counts. As one can notice heavy trades in these products, the government has taken up this area of trade sternly, keeping in mind the risk involved and profit secured by countries worldwide. Hence, it is important that the food safety and international food trade needs to be analyzed from Indian view point and also see how the authorities tackle these challenges.

EXPANDING FOOD TRADE OF INDIA

According to IIM-CALCUTTA and Academic Foundations report, India’s food industry will grow 11% annually to reach \$65.4 billion (about four lakh crore) by 2018.¹¹ India is one of the greatest markets for food utilization and thus a significantly potential market for global exchange. As per the data of Ministry of Food Processing Industries of the Government of India the value of India's exports of Processed Food was Rs. 26,067.64 Crores in 2015-16. The last five year trend in export shows that it accounted for 8.3%, 8.2%, 10.4%, 12.1% and 12.1% respectively accounting from 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 of the total export of India.⁶ To boost this sector through FDI, the government has allowed 100 percent FDI through automatic course in food processing area with the exception of certain saved things for Small and Micro Small Enterprises (MSMEs).⁷ The Indian Food Sector is poised for a rapid growth and has potential to turn out to be well founded outsourcing accomplice in the Food Industry given its quality in essential Food Sector. The Indian Food brands are now finding prime shelf space in the retail chains across US and Europe.⁸ This is one of the fastest growing sectors of the Indian economy with 8.4 percent growth rate. This growth is not an unexpected result. The plan was set up way back in 2005 when the Vision 2015 for Food Processing Industries was visualized by the government.⁹

The government is well aware that India accounts for less than 10% of total food in form of processed food unlike ‘very high percentage’ in certain developed and developing countries. Consequently, to promote this sector, the government reduced the excise duty from 10% to 6% on food packaging and processing and provided 100% tax exemption for the profits

⁶ Exports From FPI (Million \$ US), Available at <http://mofpi.nic.in/HDwld.aspx?KYEwmOL+HGqTrhLeUJv1qkQ0u6ur0YH8bufgUbQ7I8nj7GdfDPc8oA>

⁷ ‘Food Processing Sector Attracts \$421 Million FDI in April-January’, THE ECONOMIC TIMES, 29 April, 2015, Available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/food-processing-sector-attracts-421million-fdi-in-april-january/articleshow/47101196.cms>

⁸ ‘Scenario of Indian Food Industry’ Available at: <http://www.indiafoodex.com>

⁹ ‘Vision 2015 for Food Processing Industries’, Available at <http://pib.nic.in/newsite/erelease.aspx?relid=64178>

accruing in the first five years of operation and 25% exemption for next five years of operation, proving to be a good incentive to the investors.¹⁰ The economic weapon of the government-The Reserve Bank of India has classified loan to food and agro-based processing units and cold chain under Agriculture activities for Priority Sector Lending (PSL) with a limiting cap of INR 1 billion per borrower.¹¹ Visualizing the future growth of food processing sector the government of India has set up ‘National Institute of Food Technology Entrepreneurship and Management’ situated at Sonepat, Haryana as the specialized institution to cater the need of Entrepreneurs, Industries, Exporters, Policy makers, the Government and other Institutions. When we look at the agricultural products as a whole which are used as food items either processed or not but falling under the definition of ‘food’ under the Food Safety and Standard Act, 2006 then the trade involved is bound to be higher. The CLSA Asia-Pacific Markets Report 2013 estimates that Indian food services market alone will be of \$175 billion till 2018. Therefore it is evident that International food trade matters a lot for India.

IS FOOD SECURITY INDIA’S CONCERN?

The question that, why does ‘food safety’ matter for India can be easily answered by putting this question to any developed, developing or least developed countries. As per Food and Agriculture Organization (FAO) it is the prime responsibility of the national government to make certain adequate food and fundamental right of freedom from hunger. It also considers “food quality and safety are vital aspects of the right to food. Food safety means the absence or safe levels of contaminants, bacteria, naturally occurring toxins or any other substance that can be said to be harmful to human health”. World Health Organization (WHO) in its Constitution states that highest reasonable standard of health is a fundamental right of every human being. Quite for this reason the WHO established the Codex Alimentarius Commission in 1962 to put forth the food standards and related things. And this got reflected in the Agreement Establishing World Trade Organization in 1995 on the Application of Sanitary and Phytosanitary Measures (SPS Measures). It sets out guidelines how governments will regulate food safety and animal health measures in the WTO regime. The

¹⁰ ‘Complex Regulations Impact Food Processing Industry: Government’, THE ECONOMIC TIMES, May 5, 2015, <http://economictimes.indiatimes.com/news/economy/policy/complex-regulations-impact-foodprocessing-industry-government/articleshow/47160665.cms>

¹¹ ‘Loans to Processing Industry Under Priority Lending: Harshimrat Kaur Badal’, THE ECONOMIC TIMES, May 25, 2015, <http://economictimes.indiatimes.com/news/politics-and-nation/loans-to-processing-industryunder-priority-lending-harsimrat-kaur-badal/articleshow/47421583.cms>

Centers for Disease Control and Prevention data of 2011, provides that in the United States of America which is one of the most scientifically developed country, sees in reality roughly one in every six Americans getting sick, hospitalized, and the death of at least 3000 every year because of the food borne diseases. The general science acknowledges the belief of human civilization for the requirement of different varieties of food as sources of fat, carbohydrates, proteins and minerals for the proper growth of human body and health. But this food should be a source to the above cited requirements rather than being a source of food borne diseases. Since the distance between farm and dining table has increased, the chances of disease being caused due to the contaminated food have grown manifolds. The quality of food is directly proportional to the health and life expectancy. Poor diet has been a major risk factor for killer diseases such as diabetes, cancer and coronary heart disease in United Kingdom. So if in most developed countries like USA where food safety standard and implementation of the same is very high, there are so many food born diseases that we can easily think of in adverse situations as noticed in India which lacks on all the counts such as safety standard, implementation mechanism and the proper resources needed for them. In fact ‘food safety cost’ creates economic problems for the food safety and the health of economy. The safety of food products directly affects international trade as perilous foods will not be allowed in any country’s market. In India already there are huge arrears of health facilities at reasonable cost and there are 363 million people living below poverty line (BPL) therefore spending less than a dollar per day¹² making the requirement of safe food as a must. Thus regulation of food safety is very important for India.

INDIAN MEASURE CASE

The US-India controversy relating to imports of certain agricultural products in India got much attention across the globe as the matter concerned SPS (sanitary and phytosanitary) measures and health issues of human as well as animals and live stocks. India lost this case on both the forums of Panel and Appellate body.

A. SPS Measures: SPS measure¹³ provided under Agreement of WTO started as an effort to elaborate Article XX(b) of existing GATT provision, went too far from it and now it includes new obligations such as of transparency providing notice of , and an opportunity of comment

¹² ‘Report of the Expert Group to Review the Methodology for Measurement of Poverty’, Planning Commission of India, June 2014 available at http://planningcommission.nic.in/reports/genrep/pov_rep0707.pdf

¹³ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), WTO, available at https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

on proposed SPS measures. SPS deals with the protection of human, animal and plant life and health from animal borne paste or diseases, toxins or disease causing organisms in foods, beverages, or feedstuffs but it must not be discriminatory. India is the party to this Agreement since the establishment of WTO. In short SPS measures assures Parties to have their own standards and safety norms suitable for their country, provided it complies with international norms and based on scientific justifications. Thereby on another hand it restricts unjustifiable trade restrictions.

B. Indian measures under SPS Agreement leading to the controversy with the USA

The Department of Animal Husbandry, Dairying and Fisheries (DAHD) under the Live Stock Act 1898 along with its Amendment of 2001, brought the Statutory Order 1663 (E) and published in the Gazette of India on 19 July 2011 and notified to the SPS Committee on 11 October 2011. As per this S.O. the Central Government of India prohibited the import of certain products in view of Avian Influenza (NAI) of both HPNA and LPNA, provided that the Central Government may permit the import of handled poultry meat after sufficient conformity assessment of the exporting country.

Seeing the concerned Indian measures prohibiting certain imports, the US requested consultation with India and sat down to resolve the issue on 16-17 April 2012 which failed. Thus US requested for the establishment of the Panel to settle the dispute by the Dispute Settlement Body of the WTO.

C. Panel's Finding viz a viz AB findings

- a. With respect to Articles 2.2(measures based on scientific principles and scientific evidence), 5.1 (risk assessment to be based on scientific evidence) and 5.2 of SPS Agreement: i. Panel's interpretation of the three provisions stated above was correct. ii. AB reversed in part, the Panel's findings and stated that India's measures are inconsistent with Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific confirm, seeing that those discoveries concern India's import disallowance on wholesome meat of poultry and eggs from countries reporting LPNAI; iii. Panel's findings are correct, that India's measures are inconsistent with Articles 5.1(risk assessment to human, plant and animal life) and 5.2 (risk assessment to be based on scientific evidence).

- b. With respect to Articles 3.1 (measures based on international standards, guidelines or recommendations) and 3.2 (measures to conform international standard and be presumed to GATT 1994) of SPS Agreement: i) Panel's findings are correct that India's AI measures are inconsistent with Article 3.1 and will not get benefit of Article 3.2.
- c. With respect to Articles 6.1 (measures to be based on sanitary or phytosanitary characteristics of the area- where all of a country, part of a country or all or parts of several countries) and 6.2 (recognition of the concepts of disease free areas and areas of low pest or disease prevalence) Panel's finding is correct that India's measures are inconsistent with Articles 6.1 and 6.2.
- d. With respect to Articles 5.6 (measures not to be more trade restrictive than required to achieve the objective) and 2.2 (based on scientific principles) Panel's findings that India's measures are inconsistent with Article 5.6 because they are significantly more trade prohibitive than required to accomplish India's fitting level of security (ALOP) with respect to products covered by Chapter 10.4 of the OIE code.
- e. With respect to Article 2.3 of the SPS Agreement: i) Panel's findings that India's measures are inconsistent with Article 2.3, first sentence. India has to comply with this judgment and harmonize its measures with the findings up till 18 months from the date of the judgment of the Appellate Body.

WHERE INDIA LACKED IN ITS DEFENSE?

India was very casual in its approach as the summary document which it provided to US and EU was based on good faith and was informal document. It emphasized before the panel that it was informal document and it could not provide any new document based on scientific assessment of risk involved. It does not mean there was no risk to human, plant or animal life. Also India referred to risk assessment conducted by Australia in banning meat and meat products from LPNAI occurring countries in poultry. But Australia contends that India misread the Australian measures as it does not put a blanket ban on imports rather allows from the country or zone that is HPNAI/LPNAI free or that has been processed to destroy AI virus.¹⁴ The point to be noted here is that why India is referring to risk assessment of other countries and not having its own assessment as the impact of viruses or chemicals in food

¹⁴ Third Party Oral Statement of Australia in Indian Measures WT/DS430/R, Available at: <http://dfat.gov.au/international-relations/international-organisations/wto/wtodispute-settlement/Pages/india-measures-concerning-the-importation-of-certain-agricultural-products-wt-ds430.aspx>

differs from place to place based on geography. It simply means India was not prepared to do so which it can do in future if it works on this area.

The Sanitary Import Permit of DAHD required the compliance signature of importing country's veterinary doctor's signature that the product is NAI-free. But it has no format or specific requirements. It simply is a blank form which you can subjectively fill and sign making it non-uniform. Also none of the health certificates provided by India covers all the products listed. It shows Indian officials did not do homework before bringing that format of health certificate. It could not draw the parallel between 'bird flu' and 'swine flu' both caused by HxNy virus combination falling under AI whereby still India is facing human deaths by 'swine flu' in thousands. Although swine flu spreads more by human contacts but still live pigs remain the host of the virus in whom it mutates and take new form of a new virus of even remain the same one.

IMPACT OF THIS RULING OVER INDIA: NEUTRALIZING THE IMPACT OF THE WTO RULING THROUGH DOMESTIC FSSA, 2006

It will be interesting to see, once the products enter the Indian boundary how it is handled by FSSAI under FSSA, 2006 because the definition of 'food'¹⁵ under the Act might cover those products in issue. As till now there is no final authority on the point that 'food' will cover poultry, its products, live pigs etc. in the absence of any judicial decision or statutory clarification, the point can be tilted judiciously in favor. The FSSAI has enormous power in terms of regulating product standard, packaging, labeling, food approval for non- standard food etc. If it is activated by FSSAI then some of the problems can be removed which resulted out of India loosing at the WTO level. But it won't be easy as legally tenable means would be required to justify these moves. Since the FSSAI is already in mess it will remain an interesting thing to see how FSSA 2006 can be effectively used to mitigate the risk created by the Indian measures case at WTO.

INTERNATIONAL TRADE AND ITS IMPACT ON INDIAN AGRICULTURE

Agriculture trade contributes 15% of total foreign exchange earnings. Agricultural and agro-based products can be divided into three categories; raw products, semi-raw products and processed and ready to yield products.

¹⁵ Section 2 (j) and (zk) of the FSSA, 2006

The major agro-exports of India are cereals, rice, basmati rice and non-basmati rice, spices, oilcake, tobacco un-manufactured, tea, coffee and marine products. Due to high tariffs and pronounced non-tariff barriers the export is hampered in developing countries.

Subsequent to the economic reforms initiated in June 1991, removing the restrictions and protective licensing administration, facilitated commerce in an expansive number of things has turned into the request of the day.

As many farmers are not given a level playing field for cultivation, they are not able to compete with their western counterparts in agricultural production and exports.

The emergence of World Trade Organization (WTO) required the member's compliance to:-

- a. All non-tariff barriers are replaced by tariff barriers and tariffs to be reduced by 36% by industrialized countries and 24% by developing nations.
- b. Nations with closed farm market should import no less than 3% of local utilization of the item, ascending to 5% over a time of 6 years.
- c. Trade support to farmers will have to cut by 20% over a period of 6 years by developed and by 13.3% by developing countries.
- d. The value of direct export subsidy will have to be cut by 36.1% and the volume of subsidized exports by 21% over a period of 6 years, while in the manifestation of creating nations direct export subsidies should diminish by 24% and the quantity of subsidized exports will have to reduce by 14% over a period of 10 years.

IMPLICATIONS: The agreement reached is not favourable to many developing nations including India because:

- (a) The government is forced to withdraw/reduce subsidies to its farmers.
- (b) The nation is constrained to import no less than 3% of the household interest for horticultural items.
- (c) Policies like Public Procurement and PDS will be abandoned.

- (d) Patenting of seeds will drive Indian ranchers to purchase seeds from Multinational foreign enterprises.

CONCLUSION

The international food industry both processed and unprocessed is very big in terms of volume and money. In India, there are restrictions on mobility and trade in agricultural goods, stocking constraints, monopolistic state buying agencies, genuine bottlenecks coming about because of an assortment of policies restricting supply of key inputs as credit, infrastructure services, storage etc.

The Indian share in terms of imports and exports are also very high. In processed food area the kind of export and FDI India is receiving is very happy situation, because it is generating job and providing foreign exchanges. The potential growth is high in this sector. India's processed food market is high as against other developed and developing countries. But the bigger question is how India is going to handle this sector efficiently where the investors need not face unduly bureaucratic hurdles and the domestic concerns also balanced. For this India came out with a new and consolidated Food Safety and Standard Act, 2006. But it is not a very well and calculated enactment rather a cut copy paste kind of thing as no home work is done to bring out product standards as only 370 standards are there against several thousand present in different countries. At the international level after the adverse findings of both Panel and Appellate body in Indian Measures Case, there are undoubtedly higher chances of getting Indian market flooded with unsafe food product of poultry and pigs in India. The menace of bird flu and swine flu will remain a greater threat in this environment. But the untested domestic law of Food Safety and Standard Act, 2006 remains a hidden weapon to counter those situations because those products might fall under the definition of 'food' bringing this law in action. As food safety becomes a fundamental need of the country for the number of poor and non-capacity to afford the health facilities and government's incapacity to take care of every ill person, the precautionary approach to provide safe and healthy food has to be given primacy.

The solution lies in more effective allotment of assets to administrative units, institutional reinforcing and capacity building, tighter strategic and operational coordination among agencies, and the maintenance of a balance-of-powers system in which one government branch calls out other government bodies for incompetence. Restrictions and sanctions should be applied in areas needing urgent policy attention; however focusing on prominent items

trying to flag administrative movement is counterproductive. It will be interesting to see how India copes up with the situation and save its interest as there is very high stake involved in terms of human health and foreign exchange and jobs to the people.

EVOLUTION OF CORPORATE GOVERNANCE AND PROTECTION OF THE RIGHTS OF MINORITY SHAREHOLDERS

Tamanna Nayeem*

Abstract

What comes to a person's mind when he thinks about corporations? It is usually imagined as a large company consisting of more than hundred employees. With these many people working together within a company there has to be a code of conduct which is to be followed by the employees so that no one abuses each other's rights. That code of conduct is called as corporate governance.¹

Corporate governance is the process of directing and controlling a company. There have been a lot of conflicts arising between the management of the company and the shareholders due to the ownership division between the managers and the shareholders of the company. However, there are various rules existing for the protection of the rights of the minority shareholders been incorporated in the new Companies Act 2013, so that the powers are not abused by the majority shareholders. The rules of protection do exist but are either not efficient enough or are not implemented properly. This gap in the corporate governance regulatory framework can only be filled by propagating the laws relating to minority shareholder's right. The legal reforms taking place has renewed the role of shareholders as subject of great debate.² This paper will be dealing with the evolution of corporate governance and protection of the rights of minority shareholders.

Keywords: Evolution, Corporate Governance, Protection, Rights, Minority Shareholders

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¹ Klazema (2014) 'The importance of corporate governance', *Udemy Blog*, <https://blog.udemy.com/importance-of-corporate-governance/> (Accessed 15 November 2016)

² Sara Pockkathayil Jacob, Shareholders' rights and empowerment in India & U.S. <http://arno.uvt.nl/show.cgi?fid=128853>

INTRODUCTION

The country has seen a lot of major scams and scandals in the past few years. These scams and scandals have shaken the foundation of a lot of companies. These scams reveal the most commonly existing condition in the country i.e. lack of proper management. With the failure of companies like SATYAM, Enron etc. the need to improve the level of corporate governance in India was felt, and a committee was constituted by the SEBI (Securities Exchange Board of India) considering the emergence of best practices of corporate governance all over the world i.e. Cadbury reports, Greenbury committee reports etc.

Managing a company is like running that company and corporate governance is the procedure to see that it runs efficiently. The term ‘governance’ refers to the process of governing and ‘corporate governance’ refers to the process by which a company is governed. The concept of corporate governance has gained importance because of the demand of the public for a regulated and a more transparent market in order to cope up with the challenging environment. Sound corporate governance helps the companies to operate in a more efficient manner. Corporate governance is the framework as per which the business decisions take place.

The owner of a corporation is the shareholder and the effectiveness of corporate governance depends as to how the rights of the shareholders are protected. The recent financial crisis and failure of companies as discussed above had an eloquent impact on the shareholder’s view on corporate governance, raising the question of their voices being heard in the management of the company.

The old Companies Act 1956 consisted of basic framework with which the companies were to be regulated. With the incorporation of certain provisions in the new companies act 2013, the minority shareholders have gained importance because the new provisions incorporated provide a check on the powers of the board of the companies.³

A committee on corporate governance was created by SEBI (Securities Exchange Board of India) considering the emergence of best practices of corporate governance all over the world i.e. Cadbury reports, Greenbury committee reports etc. This was done to raise the standard of

³ SEBI, Available at: http://www.sebi.gov.in/cms/sebi_data/boardmeeting/1392730475840-a.pdf (Accessed 16 November 2016)

corporate governance of all the listed companies by inserting a new clause in the listing agreement i.e. clause 49.

The shareholder's trust has been shaken after the recent SATYAM scam where on average a shareholder lost about \$2.8 billion.⁴ Unlike other countries, India follows an insider model of corporate governance,⁵ where most of the companies are either controlled by the state or controlled by the family. Thus the corporate governance models of other countries are not much efficient here because of the issue of insider model of corporate governance being followed. This paper deals with the issue of protection of rights of minority shareholders with the present form of corporate governance and possible measures to improve the condition of the minority shareholders.

The structure of this paper starts with a brief introduction of corporate governance and minority shareholders under part I. The II part deals with the rights of the minority shareholders. Part III of the paper deals with the possible measures to improve their condition. The paper ends with the conclusion.

MINORITY SHAREHOLDER PROTECTION

To start with the topic, it is important to understand who minority shareholders are and what the rights available to them are. Technically, a man who possesses even a solitary share is a minority shareholder yet this term applies to people who claim the shares in the organizations with bigger stake. Thus a minority shareholder is the one who holds less than 51% shares in a company for example a person having 5% shares in Johnson n Johnson will be considered as a minority shareholder.⁶ A company's main concern is to protect the rights of minority shareholders. The rights of the minority shareholders are bound to be protected where there is proper corporate governance. And thus in order to protect the rights of minority shareholders, effective corporate governance is demanded. The companies Act of 1994 had this provision of protecting the minority shareholders as their priority but it is evident from the records that

⁴ Tellis, O. (2009), "Whiter Justice for Satyam Investors?", Deccan Chronicle, December 02. <https://www.questia.com/library/journal/1P3-2170212581/satyam-fiasco-corporate-governance-failure-and-lessons>

⁵ Varottil, U., "A Cautionary Tale of the Transplant Effect on Indian Corporate Governance", National Law School of India Review, Vol. 21, No. 1, 2010, pp. 1–49. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331581

⁶ Farlex (2003) 'Minority shareholder', in Available at: <http://financial-dictionary.thefreedictionary.com/Minority+Shareholder> (Accessed: 16 November 2016)

the act has failed to deliver the security to the minority shareholders that were expected from the act.⁷

The main framework of effective corporate governance should be based on providing an equal treatment to all the shareholders who includes the equal treatment of minority shareholders because they should be treated as other shareholders. There should be a proper mechanism in order to ensure that the minority shareholders have reasonable grounds to believe that their rights in the company are protected. The directors of the company keep using the minority shareholder which has led to a lack of faith among the minority shareholders and that is why a strong need for an efficient corporate governance to govern the organisation has become the need of the hour so that no more minority shareholders are exploited.

There are various conducts done by the directors of the company and the majority shareholders which results in the exploitation of the minority shareholders and some of the conducts can be termed as frauds with the minority shareholders and are discussed below:

- The actions taken by the directors have to be discriminatory.
- The actions taken by the directors have to be in contravention of the provisions of the company.
- As it was held in the case of *Hogg v. Dymock*⁸, any improper exclusion of a minority shareholder from the management of the company was regarded as discriminatory and thus was regarded as oppressive to the minority shareholders.
- As it was held in the case of *Foody v. Horewood*⁹, it was held that the failure of the directors of the company to act in contravention of the provisions of the company and not giving proper notice to the minority shareholders about the meeting to be held was regarded as fraud done to the minority shareholders.

An economist indicates that equal protection of the rights of the minority shareholders is as important as equal treatment to other shareholders because these minority shareholders contribute a lot in the success of an economy.

⁷ Priyanka Kanta Bose, “Corporate Governance & Plight of Minority Shareholders: An Attempt to Reconcile” <http://jassh.in/index.php/jassh/article/download/49/77>

⁸ (1993) 11 ACSR 14

⁹ (1995) 13 ACLC 1113 ; 17 ACSR 478

A minority shareholder is the one who does not exert control over the company. Majority shareholders are the ones who have absolute control over the company. The minority shareholders do not even have the voting control of the firm in light of their underneath half proprietorship in the organization. There are various rights available to the minority shareholders in order to diminish the mishandlings by the directors which are discussed below:

- 1) They have the right of decision making in the appointment of the directors and the directors so appointed will be considered as independent directors.
- 2) When the management of the company goes in a direction which is prejudicial to the interest of the company, the minority shareholders have the privilege to apply to the tribunal.
- 3) The minority shareholders have the right to offer their shares to the majority shareholders.
- 4) The minority shareholders can file a class action suit as per the companies act 2013.

The companies have taken steps in order to protect the rights of the minority shareholders which are as follows:

- 1) *Piggybacking Provision:* This provision protects the interest of the minority shareholder by including him in any deal by the majority shareholder to sell his shares. This is called piggy backing.
- 2) *Compulsory Dividend:* There is a provision in every company to give compulsory surplus to all the minority shareholders.¹⁰

The beginning of the manhandling of minority shareholders comes basically from the insatiability of a portion of the dominant part shareholders, who now and again has no restriction. Those majority shareholders trust that they can do anything, chance increasingly, since they get themselves unpunished, while staying inside the vast edges of the law. This is the reason it is expected to look at top to bottom the legitimate security of those minority shareholders and its proficiency, keeping in mind the end goal to confirm if the law suffices

¹⁰ *RIGHTS OF MINORITY SHAREHOLDERS AS PER COMPANIES ACT 2013 definitions: Rights of minority shareholders* (2013) Available at: http://www.atulauto.co.in/upload/corporate_report/1431596881_Policy%20for%20safeguarding%20rights%20f%20minority%20shareholders.pdf (Accessed: 16 November 2016).

for their assurance, or if the minority shareholders require a moral insurance, which has a much more extensive degree.¹¹

The Indian corporate administration framework, as specified prior, has characteristics of insider framework. Indian corporate division like numerous other Asian nations illustrates prevalence of family-controlled organizations while state-controlled associations shape a basic segment of the corporate section. Moreover, predominant remote shareholders control various multinational organizations. As indicated by the Prowess database of the Centre for Monitoring Indian Economy (CMIE), in BSE 500 organizations that roughly represents 93 % of the market capitalization of all BSE recorded organizations, the normal promoter holding is 51.52 %, and organizations in which promoters have under 25 percent stake is just 7.8 %. In the BSE 500 list, percent of firms controlled by remote promoters (MNC) and state are 9% and 9.4 % percent separately. Rest of firms are predominately possessed and controlled by families and business bunches. In India, organizations with scattered shareholding just exist as an exemption. Notwithstanding immediate stake, the proprietorship fixation by promoters in the organizations is further expanded by a few different systems like cross holding, pyramiding and burrowing.¹²

The relative quality of shareholders and their impact in an organization rely on its possession structure. The above passage obviously infers that promoters are the insiders, which are most overpowering shareholders in the Indian corporate segment. Promoters, the dominant part shareholders, have capacity to control the undertakings of the organization by goodness of their controlling rights. Alternate shareholders of the organization shape the portion of minority shareholder fragment. Aside from direct possession, promoters, because of across the board burrowing, cross holding and pyramiding in enterprises obtain voting rights more than that of their proprietorship rights. In organizations with predominant shareholders, overpowered shareholder can seize riches from minority in a few ways. Predominant shareholders can redirect firm assets by offering resources, merchandise, or administrations to the organization through self-managing exchanges. Promoters, they can acquire advances on special terms. Researchers have alluded that noteworthy measures of burrowing in Indian business bunches happen by means of non-working part of the benefits. This helps

¹¹ *Definition of minority shareholder* (2003) Available at: <http://www.lawteacher.net/free-law-essays/business-law/problems-faced-by-the-minority-shareholders-business-law-essay.php> (Accessed: 16 November 2016).

¹² Chakrabarti, R., Megginson, W. and Yadav, P.K. (2008) ‘Corporate governance in India’, *Journal of Applied Corporate Finance*, 20(1), pp. 59-72 Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-6622.2008.00169.x/full> (Accessed: 16 November 2016)

controlling shareholders to passage association's assets for their private advantages. What's more, Goswami point promoters act in subversive way that "denies the de jure rights of ownership of the minority shareholders without adversely influencing enterprises profits, including issuing special value portions to promoters and their partners at rebates or exchanging offers through private purchase-outs bargains at value well underneath those predominant in the auxiliary market".

There are a few different examples, where promoters, because of their overwhelming position and control over the organization administration removed more advantages at the cost of minority shareholders, records number of cases). The Satyam case is a run of the mill case in which promoters, because of their position and control on administration redirected firm assets for their private advantage and prompted a tremendous misrepresentation.¹³ All the more as of late, SEBI has made a move to drop Initial Public Offerings (IPO) of seven organizations.¹⁴ Promoters of these organizations were included in controlling the IPO that brought about enormous misfortunes to open. Every one of these occurrences involve that proprietorship fixation close by of controlling shareholders, the promoters, give noteworthy powers and raise the potential corporate administration issue of ensuring minority shareholder rights.

Shielding minority shareholders have likewise other imperative ramifications. Security of minority shareholders is considered as a vital determinant of accomplishment of its capital market. Nations that don't give adequate security to financial specialists and shareholder have negligible obligation and value advertise. Interestingly nations that have better security to minority shareholders and financial specialists' rights have more esteemed and wide value showcase¹⁵ and valuation of firms is likewise higher. India, in the contemporary situation, needs more prominent security to minority shareholders and speculators to pull in outside capital and venture, important to maintain and move its monetary development.

¹³ Singh, J.P., Kumar, N. and Uzma, S. (2011) *Satyam fiasco: Corporate governance failure and lessons therefrom* by J.P. Singh, Naveen Kumar, Shiguftha Uzma: SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736505 (Accessed: 16 November 2016).

¹⁴ Economic Times (2012), "Sebi's Tough Stand Against IPO Cheats Sends Out Right Signals", January 2, [Online] Available: http://articles.economictimes.indiatimes.com/2012-01-02/news/30587433_1_ipo-market-ipo-process-merchant-bankers (Accessed 15 November 2016)

¹⁵ La Porta, R.; Lopez-de-Silanes, F.; Shleifer, A., "Law and Finance", Journal of Political Economy, Vol. 106, No.6, 1998, Available at: <http://www.isid.ac.in/~tridip/Teaching/DevEco/Readings/06Institutions/06LaPorta&LopezDeSilanes&Shleifer&Vishny-JPE1998.pdf>

ANALYSIS OF INDIAN FRAMEWORK OF PROTECTION OF MINORITY SHAREHOLDERS

This segment surveys current Indian practices and benchmarks it on the OECD Principles of Corporate Governance that proposes that every shareholder ought to be dealt with similarly including all the minority and foreign shareholders.¹⁶

1. *Impartial Treatment of Shareholders Particularly in Reference to Minority Shareholders:* Minority shareholders have been given insurance under the Companies Act, 1956. The Section 397 and 398 of the Companies Act, lays down that minority shareholders may look for alleviation by drawing nearer the Company Law Board (CLB) if there should be an occurrence of persecution or blunder by controlling shareholder/administration. Be that as it may, minority shareholders may look for redressal from CLB just under state of no less than 100 shareholders or hold no less than 10% of shares under segment 399 of the Act. Minority shareholders if not fulfilled may document an appeal to in the High Court or Supreme Court of India.
2. *Restrictions on Insider Trading and Self-Abusive Dealing:* Insider trading is restricted in India and controlled by SEBI's Prohibition of Insider Trading Regulations, 1992. Under Clause 49 of the Listing Agreement, senior administration needs to make revelations to the board identifying with all material monetary and business exchanges, where they have an individual interest that might be conceivably clashing with the enthusiasm of the organization on the loose.
3. *Disclosure of all Material Interest by the Directors and the Managers:* As per the code of Conduct & Ethics for the directors, the directors and the managers are required to disclose all the material interest which they have in the company which might affect the corporation. For a good governance, it is a good practise of revealing any material interest in the standing notice at the time of the director's meeting.¹⁷

Certain measures to ensure protection to minority shareholders and raise the standard of Indian corporate administration are discussed below:

¹⁶ Naveen Kumar, J.P. Singh "Corporate Governance in India: Case for Safeguarding: Minority Shareholders Rights" IJMBS Vol. 2, Issue 2, April - June 2012 <http://www.ijmbs.com/22/naveen.pdf> (Accessed: 12 November 2016)

¹⁷ Code of Conduct and Obligations for Board Members and Senior Management http://new.abb.com/docs/librariesprovider19/default-document-library/code-of-conduct_duties-of-ind-directors-updated.pdf?sfvrsn=2 (Accessed: 12 November 2016)

1. *Appointment of Directors:* Currently, the promoters hold a dominant position in the appointment of directors and controlling of the board. The minority shareholders must be given rights to appoint the directors in proportion to the shares they hold.
2. *Checking the Related Party Transactions:* The role of the audit committee should be more specified in relation to the related party transaction. The approval of the transactions by the board should be limited and the minority shareholders should be given more preference over them.
3. *Enforcement:* Stringent punishments and even thorough detainment are required in the event of non-compliance that truly affects the rights of the minority shareholder.

HOW EQUITABLE TREATMENT TO THE MINORITY SHAREHOLDERS CAN BE ENSURED

- It is important to ensure that the board of directors adopt the perspective of minority shareholders while making important decisions related to the company.
- The company belongs to the minority shareholders also irrespective of the amount of shares they hold in the company, so any suggestions regarding the governance of the company should have equal participation by the minority shareholders too.
- Having time to time communications with the minority shareholders, increasing interactions between the board of directors and minority shareholders is very necessary to build strong relations between the company and the shareholders.
- The minority shareholders must be communicated well in advance of the meetings to be held and they possess the rights to seek information from the company in relation to the registers of the board or directors, they have the right to audit the accounts, they have the rights to inspect minutes of the meetings held etc.
- The minority shareholders have the right to voice their opinion in the cases of appointing of directors, right to vote etc.¹⁸

CONCLUSION

With the series of recent scandals and scams, a plenty of corporate administration standards and gauges have grown far and wide. The development of guidelines and setting up of various administrative norms or standards are a good way of improving the corporate

¹⁸ Priyanka Kanta Bose, "Corporate Governance & Plight of Minority Shareholders: An Attempt to Reconcile", Available at: <http://jassh.in/index.php/jassh/article/download/49/77>

governance. The bigger challenge faced by India however, is the implementation of such norms at the ground level. There exist various provisions relating to the protection of the minority shareholder's rights but they are not properly implemented. Thus having a proper law on the protection of minority shareholders also is of no use because it is not been looked upon and the majority shareholders end up abusing the rights of the minority shareholders. Thus it is very important to secure protection of the rights of the minority shareholders and setting up of good governance guide helps in achieving the guaranteed protection to the minority shareholders under the act.

The above examination plainly sets up that the best way to enhance the corporate administration in India is to give enough protection to minority shareholders. An analysis of minority shareholder's rights and assurance¹⁹ implicates that India is stagnant in giving sufficient protection to the investors. There exist laws on the protection of minority shareholder, however they are not satisfactory. Comparably, there exists a critical hole in Indian corporate administrative system that warrants most extreme shields to minority shareholder rights. The makers of the policy can do this by making a helpful domain and proclaiming laws for security of minority shareholder rights. The issue has additionally genuine implications on Indian economy that is searching for more noteworthy remote capital and venture to support its financial development. The above recommend various measures unquestionably will give more protection to minority shareholders and raise the Indian corporate administrative norms. The above mentioned actions should be taken care of in order to provide equitable treatment to the minority shareholders.

¹⁹ World Bank, Report on the Observance of Standards and Codes (ROSC), Corporate Governance Country Assessment: India, World Bank-IMF, Washington, DC, USA, 2004 <http://www.nfcgindia.org/rosc.htm> (Accessed 15 November 2016)

HAS POCSO BEEN SUCCESSFUL IN SHATTERING THE SILENCE SURROUNDING CHILD ABUSE IN INDIA: A META-ANALYTICAL STUDY

Dr. Ritu Agarwal* & Aisha Moonis**

Abstract

It took a whopping 336% rise in Child Rape cases (2001-2011) to ultimately compel our government to acknowledge the ugly truth concerning offenses against children in India. Bringing up children in today's treacherous environment is a herculean task for parents. 39% of the total population of our country comprises of children but have we done enough for their safety and security? For the first time, National Crime Record Bureau (NCRB) has tabulated data in terms of relationship of abuser with the victims in rape cases (2015). These statistics makes it official, that in 94.8% of cases, the abusers were persons known to the victims with most coming under the category of neighbours. POCSO Act 2012 came as a respite to this silent epidemic. A progressive, profound and comprehensive legislation with stringent provisions is our saviour of hope. The preventable pitfalls are proper implementation/enforcement of POCSO, periodic training, familiarization, discontinuing outdated methods to collect evidences and sensitization of Special Juvenile Police Unit (SJPU), local Police, legal professionals, judiciary, medical professionals and child care providers. National Commission for the Protection of Child Rights (NCPCR), State Commission for the Protection of Child Rights (SCPCR) and all states shall equally ensure that the regulatory and monitoring bodies which are constituted should be made functional. Higher conviction rates shall act as a deterrent. Mass awareness campaigns on child abuse prevention shall illuminate the future of our children from darkness to light.

Keywords: POCSO, NCRB, Sensitization, Child Rape, Awareness

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INTRODUCTION

The future of a nation which boasts of having the largest number of children¹ in the world is shaken. 2 out of every 3 children in this country is a victim of physical, emotional, or sexual abuse.² This dark reality was kept under wraps and India was living in a state of denial for decades. Often child abuse victims are given a life sentence and forced to live in the shadows of their abusers³. Although there is very little empirical data available on the scale of abuse in India, this paper makes an attempt to take a 360 degree view on POCSO Act, 2012 by studying pre and post-POCSO indicators, post-POCSO challenges with feasible recommendations.

CHILD ABUSE INDICATORS IN THE PRE- POCSO ERA

In 1993-94, a Bangalore-based NGO, Samvada undertook one of the first specific studies⁴ on Child Sexual Abuse (CSA) through a series of workshops for 348 girls aged between 15 and 21 years, who were from 11 schools and colleges in Karnataka. The study reported that 47 per cent of the girls had been molested and 15 per cent had been subjected to serious sexual abuse, including rape.⁵

In 1997, the Sakshi Violation Intervention Centre, a Delhi-based group, undertook a study of 350 schoolgirls.⁶ Of these 63 per cent had been sexually abused by someone in the family; 25 per cent had been raped, made to masturbate the perpetrator or perform oral sex. Over 30 per cent of the girls had been sexually abused by their fathers, grandfathers or male friends of the family.

In 1998, the Delhi-based NGO Recovering and Healing from Incest (RAHI) carried out a study in selected States on ‘Women’s Experience of Incest and Childhood Sexual Abuse’⁷. The study had found that 76 per cent of middle and upper class women in Chennai, Mumbai, Kolkata and Goa had been sexually abused as children, and 71 per cent of them had been

¹ Available at: www.cry.org/resources/pdf/types_of_corp_parts_sep11.pdf

² Available at: www.medind.nic.in/daa/t12/i2/daat12i2p416.pdf

³ Herbert, W. 2008

⁴ Available at: <http://arpang.org.in/the-issue/csa-in-the-indian-context/>

⁵ Available at: www.boloji.com ; Enfold www.enfoldindia.org

⁶ Available at: http://www.chitrapunjab.com/assets/CHILD_ABUSE.328174846.pdf

⁷ RAHI 1998 cited by WCD 2007b

abused by relatives or someone they knew and trusted. The study revealed that some women only realized that they had been abused when they were responding to the questionnaire

In 1999, the Tata Institute of Social Sciences, Mumbai, interviewed 150 girls and found that 58 of them, more than one in three had been raped before the age of 10.⁸

In 2006 a Chennai-based NGO Tulir with the support of the international organization save the Children undertook a study of CSA in Chennai. The results of the study showed that out of a total of 2211 child participants, 939 had faced at least one form of sexual abuse at some point in time. The study results show that 39 per cent of the girls faced sexual abuse, compared to 48 per cent of the boys; taken together this is 42 per cent of the children.⁹

In 2007, the largest nationwide study on child abuse ever undertaken in the world was done by the Ministry of Women and Child Development (MWCD)¹⁰. It looked at different forms of child abuse: Physical Abuse, Sexual Abuse and Emotional Abuse and Girl Child Neglect in five different evidence groups, namely, children in a family environment, children in school, children at work, children on the street and children in institutions. The results of this report aren't hidden from anyone.¹¹

NCRB's statistics stated that 48,338 child rape cases were recorded during 2001-2011 in India.¹² This is an increase of 336 percent since 2001.

These findings are just the tip of the iceberg, reflecting the most severe instances of sexual abuse that were prosecuted. Most other incidents of sexual abuse in children often go unreported. Additionally, the alarmingly high figures are limited not just to child sexual abuse, but also reported for incidents of physical and emotional abuse, and neglect¹³

CHILD ABUSE INDICATORS IN THE POST-POCSO SCENARIO

⁸ Available at: <http://arpan.org.in/the-issue/csa-in-the-indian-context/>

⁹ Available at: <http://tulir.org/images/pdf/Research%20Report1.pdf>

¹⁰ Ministry of Women and Child Development, Study on Child Abuse: India 2007, p.74, Available at <http://wcd.nic.in/childabuse.pdf>

¹¹ 53.22% children reported having faced one of more forms of sexual abuse. Out of these 53% child victims, 57% were boys

¹² Asian Centre for Human Rights (2013)

¹³ cf. Zolotor et al., 2009

National Crime Records Bureau¹⁴ As per available data, a total of 8,904 cases was registered under POCSO Act during 2014.¹⁵

Women and Child Development Minister Maneka Gandhi informed Lok Sabha that 45,498 cases have been registered between November 2012 and March 2015, based on information collected from the states/UT and collated by the National Commission for Protection of Child Rights (NCPCR), 45,498 cases have been registered under the POCSO Act, out of which 4,316 cases are pending with the state police and 35,700 cases are pending before courts.

NCRB for the first time has tabulated data in terms of relationship of abuser with the victims in rape cases (2015).

These statistics makes it official, that in 94.8% of cases, abusers were persons known to the victims with most coming under the category of neighbours.

A 360° ANALYSIS OF POCSO 2012

Silent on other forms of child abuse and neglect: There is no explicit legal definition of other forms of child abuse and neglect except for child sexual abuse in POCSO and only a handful of research studies exist on this. Nevertheless, a few studies including the MWCD report, reveals high incidence of all forms of child abuse and maltreatment in India.¹⁶

Inadequate structural compliances: Most states have still not notified Special Courts or appointed Special Public Prosecutors, forget about vulnerable witness room, for child witnesses giving evidence or usage of special tools and facilities to record child testimonies¹⁷. The records of NCPCR indicate that since its constitution, there are 605 Special Courts and 478 public prosecutors across the country. Ironically, only a handful of these are fully and dedicatedly functional. Goa, Assam, Delhi, Chandigarh, Telangana¹⁸ and Hyderabad are the only States and Union territories with fully functional separate child- friendly courts as mandated under POCSO Act.¹⁹

¹⁴ Available at: www.ncrb.nic.in/StatPublications/CII/CII2014/Compendium%202014.pdf

¹⁵ Available at: www.pib.nic.in/newsite/PrintRelease.aspx?relid=136923

¹⁶ Charak & Koot, 2014

¹⁷ Section 36 of the POCSO Act

¹⁸ Available at: <https://www.inshorts.com/.../telangana-gets-south-indias-1st-childrens-court-1472097>

¹⁹ Available at: www.dnaindia.com/.../report-over-500-cases-of-sexual-offences-against-children-pen...

Encumbered procedural compliances: 4 years on, cases of child sexual abuse are still being brought before regular criminal courts, thus denying children their right to a child-friendly system and structure. The 2015 Crime in India report by the National Crime Records Bureau (NCRB) has revealed that 60% of victims in all the cases registered under Section 377 – IPC provision that outlaws ‘unnatural sex’ – are children²⁰. The collaborators of child abuse are still in-adept with the basic provisions of POCSO²¹. They use outdated methods to collect evidences with shoddy investigations leading to acquittal of most of the abusers.²² Their failure to comply with provisions has devastating effect on victims of child abuse and their families.

Investigative machinery’s non-sensitive approach: The Protectors of child rights themselves failed to realize the scope of child abuse. Cases of vulnerable children should be dealt differently than the traditional cases. The thoughts, emotions, thinking capacity, immaturity of children are to be considered while dealing with them. It is extremely difficult to get responses from children on such a sensitive subject because of their inability to fully comprehend different dimensions of child abuse including how to express their trauma.²³ This insensitive approach of authorities in question is contrary to the whole idea of the child-friendly legislature, which is that the child who has already been victimized by the perpetrator should not face any uncomfortable situation or mental trauma during such recording of statement.²⁴

Rampant misuse of mandatory reporting: Children are unable to avoid themselves from the abusive conditions and hence, they need adults to act on their behalf.²⁵ Misuse of section 19 and also section 22 is on rise, as cases of under-reporting, over-reporting and false complaints provide misleading information and makes the purpose of mandatory reporting futile.²⁶ In such cases, this act would be a potent assault weapon and would land the accused

²⁰ Available at: <http://thewire.in/66397/sexual-crimes-against-children-still-registered-under-section-377-not-pocso/>

²¹ Available at: www.icmr.nic.in/ijmr/2015/july/editorial.pdf

²² *State v. Avadesh*, Delhi District Court (Delhi Central) in SC No.82/13 decided on 01.08.2014

²³ Model guidelines u/s 39 of POCSO Act for examining child witnesses before & after trials issued by MCD

²⁴ Available at: <http://www.livelaw.in/trial-court-can-recommend-action-police-officers-flouting-provisions-pocso-act-orissa-hc/>

²⁵ Section 19 of POCSO Act

²⁶ Mandatory reporting protects children from further abuse and prevents the abuser from abusing again

person in hot water.²⁷ However, mandatory reporting alone cannot ensure effective intervention in all cases of abuse.”²⁸

Conflated child sexuality with child sexual abuse: POCSO has been a little unfair to the rights of teenagers (16-18) as it pays no regards to the idea of consent given by persons under 18. The act has risen the age of consent from 16 to 18 years without considering scientific evidence on adolescent sexuality.²⁹ Furthermore, children involved in sexual activity will be treated as juveniles in conflict with the law. POCSO has failed to consider nuances of age, age difference, and child development. Moreover, judges commit gross violation of victims' fundamental rights by passing bizarre orders of marriages between perpetrators and their child victims, which not only sanctions marital violence, but child marriage – both of which are illegal, and requires to be prohibited.³⁰ Hence the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of humiliation on adolescents.

Issue of hostile witnesses: In huge proportion of cases victims turned hostile. Most of the children between 12-18 years turn hostile due to delayed FIRs, technical snags, unclear procedures, calling victims to testify repeatedly along with tremendous pressure to compromise despite of extraordinary efforts put in by the SJPU or local Police. People don't understand it is not a wrong it is a sin – the abusers cannot be forgiven.³¹

Gap in law: Plight of a child victim who has to testify twice, as per the procedural requirement, before the Special Court as well as Juvenile Justice Board (JJB)³² could be avoidable. Secondly, the minimum sentences under the POCSO Act are very high and discretion of sentences should be given to the judges. Lastly, admissibility of statements recorded under Section 164 CrPC can be used as examination- in-chief provided these statements are recorded uniformly in a transparent manner.

CONCLUSION

²⁷ Available at: http://www.telegraphindia.com/1140122/jsp/opinion/story_17850822.jsp#.V99FRo9OLIU

²⁸ Available at: <https://jilsblognujs.wordpress.com/2015/06/27/mandatory-reporting-under-pocso-are-we-ready/>

²⁹ Available at: <http://www.satyamevjayate.in/child-sexual-abuse/reviewing-pocso.aspx>

³⁰ Available at: <http://www.tarshi.net/inplainsspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/>

³¹ Available at: <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf>

³² In cases in which the accused persons include a juvenile as well as an adult, the child victim will have to testify twice, as per the current legal framework.

POCSO has been successful in shattering the silence surrounding child abuse in India to a prodigious extent. POCSO is the ideal solution to all sexual offences affecting children without which India was crippled for decades. POCSO is the voice of the silent hullabaloos of victims of abuse who were denied justice earlier. India's first gender neutral legislation exclusively defines all forms of sexual offences against children and fulfils the mandatory obligations of India as a signatory to the UNCRC.³³ POCSO follows best international standards to safeguard interests of the child. POCSO is exceptional as it requires all actors within the legal system to modify their professional practice while dealing with child victims of sexual offences. From child friendly mechanisms for reporting and recording of evidence; to investigation and speedy trial of offences; trial in-camera without revealing the identity of the child through designated Special Courts, everything is enshrined in golden letters in this landmark legislation.³⁴ However, provisions of criminal liability of children in consensual sexual relationship needs to be reconsidered. The definition of a child in the Act should also include transgender under 18 years. In fact, the legal definition of child should be uniform across all laws and acts and should be brought under the ambit of POCSO. All forms of child abuses and neglect should be covered under the umbrella of POCSO. The Ministry of Women and Child Development (MWCD)³⁵ has taken a leadership role in spreading awareness and breaking the silence. POCSO E-box³⁶ is the most recent initiative taken by MWCD. (August 2016)³⁷. Only when every individual along with different agencies of the State, i.e. the police, judiciary and child protection machinery, unite and adopt a sensitive approach towards securing justice for victims of child abuse, can POCSO Act be successfully implemented, benefit the victims and transform the society; in the process will be one of most revolutionary laws in recent times and a legendary legislation success in years to come.

RECOMMENDATIONS:

- Sensitization and procedural training of all law enforcement agencies, child protection institutions, judiciary and society shall play a paramount role in effective implication of POCSO. Workshops and training programs for the same should be formulated and imparted.

³³ United Nations Convention on the Rights of The Child, acceded to on December 11, 1992.

³⁴ Available at: www.wcd.nic.in/sites/default/files/childprotection31072012.pdf

³⁵ Ministry of Women and Child Development

³⁶ POCSO e-Box, is an online complaint management system for easy and direct reporting of sexual offences against children and timely action against the offenders under the POCSO Act, 2012.

³⁷ Available at: www.ncpcr.gov.in/index2.php

- Vigilant NCPCR and SCPCRs to monitor the implementation of laws would control incidence of rape and molestation would reduce drastically.
- Universities and other institutes of higher education, police and medical training academies should develop specialized courses and training programs focusing on child abuse and its consequences, and children's rights.
- State governments have to ensure that all child-friendly requirements specified under the law are duly met.
- Special Courts to be directed on the award of interim and final compensation in cases under the POCSO Act clarifying the role of various authorities in the awarding and disbursement of compensation amount.
- Citizens of India should conduct mass awareness campaigns for prevention and protection of children from the menace of child abuse.

TRADEMARK DILUTION: A COMPARATIVE STUDY BETWEEN INDIA & UNITED STATES

Prateek Gupta*

Abstract

Trademark is generally identified as a mark, symbol, design or an expression which is used to distinguish a product or a service from the products or services available in the market and to create a unique identity for these products or services. Trademarks can be displayed in various ways such as label of the product or even the building owned by the owner of the trademark. For Example, tick label by Nike, the Apple trademark, etc.

Dilution occurs when someone uses a famous mark in a way that reduces the value of the mark. In other words, dilution weakens the capacity of a famous mark to identify and differentiate goods or services, regardless of the competition between the owner of the famous mark and other parties, and Likelihood of confusion, mistake, or deception. Dilution is therefore different from trademark infringement, because trademark infringement always involves a possibility of customer confusion, whereas dilution can occur even if customers wouldn't be misled. For example, if a person sells Wooden Window base named "Microsoft," no consumer is likely to associate this product with the software company, Microsoft. However, because Microsoft has become such a strong and famous mark, the use of the word on Wooden Window base would definitely underestimate the software company's mark.

This paper is aimed to analysis the trademark dilution doctrine and its applicability in India and United States of America. Section 2 of the paper will briefly discuss about the History and development of the doctrine of Dilution of Trademark, Section 3 will discuss the Dilution in India and America, and Section 4 will focus on the Comparison between India and America's approach to Dilution.

Keywords: Trademark, Dilution of Trademark, confusion, India, USA

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INTRODUCTION

History and Development of Dilution

It is believed that the Doctrine of Trademark Dilution was first time used by the German Court in 1925 where the manufacturer of a mouthwash “Odol” was able to restrain a railroad and steel company to use the same mark. Whereas some believes that the Doctrine was developed in England in 1898 in the case of *Eastman Photographic Material Co. v. John Griffiths Cycle Corp.*¹ in which the court refused to allow the bicycle company to use ‘Kodak’ name for their bicycles, even though they do not compete with each other in the market. This case, also known as the Kodak doctrine, was the first important shift from traditional trademark protection.²

However, it was Frank Schechter who actually came up with the concept of trademark dilution in his paper The Rational Basis of Trademark Protection³ in 1927. It was a turning point as Dilution was a concept which did not protect the rights of the consumers. According to Schechter, the main purpose of a trademark is to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public, he rejected the theory that the exclusive role of a trademark was to serve as a source identifier and claimed that injury occurs to a trademark owner whenever a trademark is used by another, even when used on non-competing goods.⁴

According to Schechter, injury for the owner of the trademark happens when there was a thinning out of identity and control on the consumer public perspective of the trademark through the use of the trademark on non-competing products or services⁵. This was especially the case according to the author where the mark could be regarded as being distinctive and thus the need for there to be deeper and strong protective measures upon such a mark to

¹ 15 RPC 105 (High Ct. Of Justice, Ch. 1898)

² Brajendu Bhaskar, “Trademarks Dilution Doctrine: The Scenario Post TRDA, 2005” 1 NUJS L. Rev. 640 (2008)

³ Frank I. Schechter “Rational Basis of Trademark Protection” 40(6) Harv. L. Rev. 813 (1927) available at: <http://www.jstor.org/discover/10.2307/1330367?uid=3738256&uid=2129&uid=2&uid=70&uid=4&sid=21100737655691> Accessed on 19th October, 2016

⁴ Frank I. Schechter “Rational Basis of Trademark Protection” 40(6) Harv. L. Rev. 813 (1927) available at: <http://www.jstor.org/discover/10.2307/1330367?uid=3738256&uid=2129&uid=2&uid=70&uid=4&sid=21100737655691> Accessed on 19th October, 2016

⁵ C. Pulig C. Simmons and R. Netameyer, Brand dilution: When do new brands hurt existing brands? Journal of Marketing, 70 (2006) k 52-66

ensure that the image of the trademark and its entity would not be negatively affected owing to being connected to another product or services".⁶

DILUTION IN INDIA AND UNITED STATES

United States of America

In the United States of America, the use and benefits of having a trademark is not defined by the registration of the mark, the owner or the user of the mark automatically gets a right to use and own the mark in the geographical area in which he operates. This concept was adopted from the exclusive use and display of the mark they use or own in relation with the goods or services they offer to the consumers.⁷ However if a person wants to use or reserve the mark and use it nationwide he may register the mark with the US patent and Trademark Office (USPTO), but USPTO can after proper examination of the mark can deny for the registration. According to the federal laws a mark can be considered as abandoned if it is not used for consecutive three years.⁸ Traditionally two persons were allowed to use same trademark on the argument that the two persons are in different line of business and have no similarities in the goods and services offered. But when one of the mark becomes more famous and is recognised by a large number of people then there is a need to protect that famous mark⁹. This kind of protection is what makes dilution different from the infringement and hence trademark dilution was created in the Lanham Act Section 43(c).

In the case of *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*¹⁰ the plaintiff operated annual triathlon event conducted in New York Tri, and went to court arguing that the defendant is using the mark used by them to promote its club, and the club changed its name from SBR Triathlon Club to the NYC Triathlon Club and before the change in name the plaintiff warned the defendant over the use of the mark. The court held that the mark used

⁶ C.Pulig C. Simmons and R. Netameyer, Brand dilution: When do new brands hurt existing brands? *Journal of Marketing*, 70 (2006) k 52-66

⁷ Intermatic Inc. V. Toeppen, 947 F. 1227- Dist. Court, ND Illinois 1996

⁸ T.G. Agitha, Trademark Dilution: Indian Approach, <[http://14.139.60.114:8080/jspui/bitstream/123456789/12866/1/009_Trademark%20Dilution_Indian%20Approach%20\(339-366\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/12866/1/009_Trademark%20Dilution_Indian%20Approach%20(339-366).pdf)> accessed on 30th October 2016

⁹ T.G. Agitha, Trademark Dilution: Indian Approach, <[http://14.139.60.114:8080/jspui/bitstream/123456789/12866/1/009_Trademark%20Dilution_Indian%20Approach%20\(339-366\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/12866/1/009_Trademark%20Dilution_Indian%20Approach%20(339-366).pdf)> accessed on 30th October 2016

¹⁰ 704 F. Supp. 2d 305 (S.D.N.Y. 2010)

by the plaintiff has a goodwill which is to be protected and hence an injunction shall be granted and the club shall stop using the name.

In *Moseley v. V Secret Catalogue, Inc.*¹¹ the Petitioners operated a retail store under the name ‘Victor’s Secret’. Respondents notified the petitioners that such use of the name would likely cause confusion with the trademark of Respondents and would also “dilute the distinctiveness” of their said famous mark. In response, petitioners changed the name of the store to “Victor’s Little Secret.” Not being satisfied, Respondents filed suit, alleging among other causes of action, that the said use of that name was “likely to blur and erode the distinctiveness” and “tarnish the reputation” of the famous trademark. The owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner’s mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

India

Prior to the Trademark Act of 1999, the Trademark Laws in India was governed by the Trade and Merchandise Mark Act, 1958. Section 47¹² of the Trade and Merchandise Act, 1958 provided Defensive registration of well-known trademark and passing off. The test for defensive registration was whether the mark has become so well known that the use of it even in goods of dissimilar nature would be taken as indicating a connection between the two. However, it is pertinent to know that the TMM Act did not define ‘well known trade mark’ and the concept was developed through judicial precedents¹³.

¹¹ 537 U.S. 418 (2003)

¹² TMM Act, S. 47(1)- Defensive registration of well-known trademarks Where a trade mark consisting of any invented word has become so well-known as respects any goods in relation to which it is registered and has been used, that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in Section 46, the mark may, on application in the prescribed manner by such proprietor, be registered in his name in respect of those other goods as a defensive trade mark and while so registered, shall not be liable to be taken off the register in respect of those goods under the said section.

¹³ Vishnu Konoorayyar, Doctrine of Dilution of Trademark: A comparative study on the Indian and American Jurisdiction < <http://www.uniassignment.com/essay-samples/law/doctrine-of-dilution-of-trademark-law-company-business-partnership-essay.php>> accessed on 30th October 2016

In India the concept of dilution was first used in the case of *Daimler Benz Aktiegessellschaft Anr. v. Hybo Hindustan*¹⁴ the issue of this case was the use of the mark of BENZ along with a ‘three pointed humans being in a ring’. The Delhi High Court issued injunction in favour of plaintiff and observed that use of similar mark such as MERCEDES BENZ by anyone including the defendant would result in perversion of the trademark law in India. The Delhi High Court held that “Such a mark is not up for grabs-not available to any person to apply upon anything or goods. That name is well known in India and worldwide, with respect to cars, as is its symbol a three pointed star.” The Court further held: In the instant case, ‘Benz’ is a name given to a very high priced and extremely well engineered product. In my view, the defendant cannot dilute that by user of the name ‘Benz’ with respect to a product like under-wears.

However, this situation changed with the development of the Section 29(4)¹⁵ of the Trademark Act, 1999, which came in effect on 2003.

In the case of *Bata India Ltd. v. Pyarelal & Co*¹⁶, the defendant was in the business of manufacturing mattresses, sofas, cushions, and automobile seats, which he sells by the name of BATAFOAM, the plaintiff Bata India Ltd. Filed a case in the District Court Meerut and stated that plaintiff’s mark BATA is a famous footwear brand in India holding registrations for canvas, rubber, rubber plates, and leather shoes. The plaintiff argued that by using the mark BATAFOAM, the defendants were guilty of deceiving customers and such fraudulent and mala fide conduct amounted to passing off the plaintiff’s goodwill and reputation. The defendants, denying these allegations, alleged that they were involved in business different from that of the plaintiff, and because their product was sold as BATAFOAM, there could not be any confusion or deception. The District Court rejected the plaintiff’s claim by holding that the plaintiff had no registration for the mark BATA for mattresses, sofas, cushions, automobile seats, etc., and that because the defendants’ mark BATAFOAM was not identical in appearance to the plaintiff’s mark BATA, there could be no passing off. The decision of

¹⁴ AIR 1994 Delhi 239

¹⁵ A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which:

(a) is identical with or similar to the registered trade mark; and
 (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

¹⁶ AIR 1985 All. 242

the District Court, on appeal, was reversed by the High Court of Allahabad. The court said that the defendant failed to give any reasonable or valid justification for the use of the name “BATAFOAM” which was likely to arise confusion in the mind of the unwary purchaser of average intelligence that it was a product of the plaintiff.¹⁷

In *Kirloskar Diesel Recon Private Ltd. v. Kirloskar Proprietary Ltd*¹⁸, the plaintiffs, in a District Court of Pune, argued that the use defendants' use of the trademark KIRLOSKAR as part of their trade name amounted to passing off and such adoption of this mark was also in bad faith as one of the defendants had formerly worked for the plaintiffs. The District Judge passed an order restraining the defendants from using the aforesaid mark. On appeal before the Bombay High Court, the defendants argued that the nature of the business of both parties was different, thereby ruling out the question of likelihood of confusion or deception. They further alleged that the mark being a surname, any person with that surname was entitled to use it. The respondent plaintiffs argued that a trade name's exclusive reputation was entitled to protection from tarnishment and also pointed out that the adoption of the surname by the defendants was not bona fide. Relying on the ruling of Mercedes Benz case, the Bombay High Court affirmed that the law on passing off protected goodwill in a trademark against erosion, and that it was not intended to protect a person who deliberately set out to take advantage of somebody else's commercial reputation. Also, taking into account that one of the defendants was once involved in the plaintiffs' image-building program, the Court rejected the defendants' appeals and affirmed the order of the District Judge¹⁹.

In *Caterpillar Inc. v. Mehtab Ahmed*,²⁰ a famous trademark CATERPILLAR came under attack when a local defendant in Delhi adopted it representing footwear. The plaintiff company, Caterpillar Inc. established since 1904 in USA, filed a suit for passing off and copyright infringement before the Delhi High Court. The Court framed two issues for

¹⁷ Sankalp Jain, Dilution of Trademark: An Introduction <[¹⁸ AIR 1996 Bom. 149](http://poseidon01.ssrn.com/delivery.php?ID=3640850890291010861201161030251211006204905307606303012000010411309407107606610606903212400010010401100410312307008700102800105105004703600610409812700901300600202603405800712302409212100069116020095065093095020121101069078122064070078069028087095084&EXT=pdf> accessed on 29th October 2016</p>
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¹⁹ Sankalp Jain, Dilution of Trademark: An Introduction <[²⁰ 8 2002 \(25\) PTC 438 \(Del.\)](http://poseidon01.ssrn.com/delivery.php?ID=3640850890291010861201161030251211006204905307606303012000010411309407107606610606903212400010010401100410312307008700102800105105004703600610409812700901300600202603405800712302409212100069116020095065093095020121101069078122064070078069028087095084&EXT=pdf> accessed on 29th October 2016</p>
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consideration. Firstly, whether the trademarks CAT and CATERPILLAR could be monopolized by anyone; and secondly, whether the plaintiff was required to prove the use of the mark by showing sales of its goods under the mark in the country where it alleged passing off. The Court after making a detailed analysis of trademark dilution found that the object of protecting well-known marks was to avoid the weakening or dilution of the concerned mark. The Court opined that it was a commercial invasion by the subsequent user and such kind of dilution or weakening of the trademark need not be accompanied by an element of confusion.

In the case of *ITC Ltd. v. Philip Morris Products SA & Ors*²¹, Court in this case held for the first time, that the test evolved for infringement actions were inapplicable or inapposite to cases falling under Section 29(4), and therefore dissociated comprehensively the likelihood of confusion test from all actions falling under this Section. The Court observed that the absence of a presumption of infringement under Section 29(4), unlike the preceding clauses of Section 29, was indicative of the legislative intent requiring a higher standard of proof in cases falling under Section 29(4). The court emphasized that the following four essential elements need to be established in order for a dilution case to succeed²²:

- i. The diluting mark is identical or similar to the injured mark;
- ii. The injured mark has a reputation in India;
- iii. The use of the impugned mark is without due cause;
- iv. The use of the impugned mark amounts to taking unfair advantage of, or is detrimental to, the distinctive character or reputation of the registered trade mark.²³

In *Reckitt & Colman of India Ltd. v. Kiwi TTK*²⁴, both parties were in the business of manufacturing shoe polish, the defendants, whose brand name was 'Kiwi' marketed an advertisement comparing a bottle of their shoe polish with another bottle, marked as 'Product X' whereby the virtues of the defendant's product were extolled while disparaging the other unnamed product. And the plaintiff claimed that 'Product X' bore a striking resemblance in design to their own product namely, 'Cherry Blossom' and that the advertisement disparaged

²¹ 2010 (42) PTC 572 (Del.)

²² Palak Jain, Trademark Dilution in India <<http://www.rslr.in/rslr-blog/trademark-dilution-in-india>> accessed on 29th October 2016

²³ Palak Jain, Trademark Dilution in India <<http://www.rslr.in/rslr-blog/trademark-dilution-in-india>> accessed on 29th October 2016

²⁴ 63 (1996) DLT 29

its product. Based on the stated reasoning, the Delhi High Court granted an injunction against the defendants for the disparaging contents of the advertisement.

In the *Reckitt & Colman of India Ltd. v. MP Ramachandran*, the plaintiffs were engaged in the manufacturing of blue whitener under the name of ‘Robin Blue’ for which they had a design registration over the bottle, the defendants, who were in the same business, issued an advertisement comparing their product to others stating that not only was their product cheaper, but also more effective. In this depiction they compared their product to a bottle having the same shape and pricing as that of the plaintiff’s product. While holding that the advertisement was made with the intent to disparage and derogate the plaintiff’s product.

COMPARISON BETWEEN THE INDIAN APPROACH AND UNITED STATES OF AMERICA’S APPROACH TO DILUTION

Significant distinctiveness is found when it comes to analyse the Indian and American version of Trademark Dilution laws, for e.g. according to Lanham Act, 1946 there is a requirement that the mark shall be famous and it should be ‘distinctive, inherently or through acquired distinctiveness’, as for the requirement that the mark is famous there is a presentation that the mark should be widely recognised in the general public of United States as a Source of a goods or services produced by the owner of the mark.

Whereas in Indian Laws, Dilution is not clearly mentioned and there is no requirement that a mark should be famous. And there is no such requirement that the reputation be considered as per the US Laws.

In comparison with the US law, there is a change as to public, in Indian system, the sector of Public is what is recognized by the court as being limited, whereas in US the recognition is among the general consuming Public. In the Indian scenario there is a requirement that there shall be a knowledge of the mark be recognised in the relevant market in the public and is known as the “Relevant Sector of the public”²⁵

In the trademark Act, 1999 there is a provision in which the trademark is considered as being infringed upon where a similar or identical mark that exist even on unrelated products and

²⁵ That constitutes the actual or potential consumers, the persons that are involved in the channels of distribution of the goods or services, and the immediate business environment that deals with the goods and services that the trademark is applicable.

services is found to be used in the course of commerce in a manner that without due cause takes unfair advantage or cause harm to the distinctive character or repute of the registered trademark.²⁶

There are different provisions under the US law and Indian Law for the protection of the famous marks, under the Indian law the mark is not required to be ‘famous’ the provision under the Indian laws are not defined.

The high court in India attempted to trace the definition if the term dilution of trademark from Indian perspective but failed in the case if *Yale Electric Corp. v. Robertson*²⁷, in this case injunction was offered against the defendant where they used a mark that was found to be similar to that of the plaintiff through the production of goods that were found to be unrelated to those produced by the plaintiff.

CONCLUSION

In the layman’s term infringement happens when the two goods can be considered as one and the same. This term was initially used in the German Court. The Indian courts use a liberal approach as held in the two famous cases *Kirloskar Diesel Recon (P) Ltd v. Kirloskar Proprietary Ltd*²⁸ and in the case of *Daimler Benz & Others v. Hybo Hindustan*.²⁹ In the Indian perspective passing off and Trademark Dilution are considered to be one of the same. Thus in conclusion, regarding to the trademark dilution in India the courts shall not focus on creating provisions in their law that recognize the concept, as per the comparison with the US Judicial System that finds the strengthen the protection against the trademark Dilution.

²⁶ S 29 (4) Indian Trademark Act, 1999

²⁷ 26 F.2d 972 (2d Cri 1928)

²⁸ AIR 1996 Bombay 149

²⁹ AIR 1994 Delhi 236

COMPARATIVE STUDY OF U.S. & INDIAN PATENT LAW

Sahiba Shafique*

Abstract

A Patent is an exclusive set of rights conferred upon the inventor to make, use, sell, exploit, export or assign his invention for a limited period of time. When any of the above act is performed by other without the prior permission or license of the inventor then it amounts to infringement. In this changing scenario where innovation is playing an important role in every field be it pharmaceutical products, technology etc. now it can be said that the 'Inventor' has become much more aware about protecting his invented product. The 'Inventor' is now aware how to challenge the validity of his invention.

The Patents Act 1970 does not clearly define as to what infringement is. But, Section 48 of Indian Patent Act confers exclusive right on the patentee that his patented invention can be prevented from being used, made or sold.

This paper basically presents the comparative study of U.S and Indian Patent Laws. It brings out various different provisions of U.S and Indian Patent laws which will be supported by landmark judgements. It contains of few opinions regarding harmonization between countries to achieve global advancement and development followed by various advantages.

Keywords: Patent, Comparative study, India & U.S, Harmonization, Advantages

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INTRODUCTION

*“Invention is the root of innovation. Innovation is the major force for change in the future”.*¹

Historical Background of Indian Patent Law

In the year 1857, India was the first country to have Patent Laws. This law was basically the outcome of the colonial rulers who wanted to protect the imported products / technologies from ‘reverse engineering and copying’. After Independence India revised and reviewed the laws and one such example was the Patent Act of 1970. This was formed by Justice N Raj Gopala Ayyangar Committee which clearly states the ‘patent literacy’ and also the guidelines available to the newly independent nation.² The Ayyangar Committee was largely based on recommendations. One such recommendation was to allow only process patents in connection to inventions of food, drugs, medicines and chemicals. Later India became a signatory to many international organizations with an aim to strengthen its patent law and also to achieve co-operation in the modern world³. As the acceptance of TRIPS could be achieved only with the balance between patent law policy and competition to match the national needs as well as the political economy. Though there were many dispositions by many working group still the Patent Act 1970 was amended in three stages to make it TRIPS compliant. With the effect from 1st January 2005 India has now become fully TRIPS compliant and the new system of IPR is applicable to all fields of technology including agriculture for a term of 20 years.⁴

Historical Background of U.S Patent Law

In the year 1474, a law was accepted in Italy for granting exclusive rights to the creators for their inventions. By many this is considered as the first very Patent Law. After 150 years a new proposal was forwarded named “Statute of Monopolies” which stated patent as ‘new invention’ and the monopoly on the new invention to be up to 14 years. After various laws passed by Italy, England and France the U.S Constitution finally established the U.S Patent Law under Article 1, Section 8 which states “promoting the progress of science and other

¹ Philippe Kahn, <http://izquotes.com/author/philippe-kahn>, Accessed on 21.10.2016

² <http://www.manupatra.co.in/newsline/articles/Upload/FB63D8BC-CA73-483A-9B16-62D24A669FCF.pdf> Accessed on 21.10.2016

³ Jaya Bhatnagar and Vidisha Garg , Patent Law in India, Available at: <http://www.mondaq.com/india/x/54494/Patent+Patent+in+India> Accessed on 21.201.2016

⁴ Available at: <http://www.manupatra.co.in/newsline/articles/Upload/FB63D8BC-CA73-483A-9B16-62D24A669FCF.pdf> Accessed on 21.10.2016

useful arts and securing the work of the inventors and authors by providing exclusive rights to their respective works". The first U.S Patent Act was established in the year 1790 with the validity of the patent being 14 years. The most important significant of this Act was it required all the patent submissions to have a description of the invention at the time of application. After many amendments and modifications, the U.S Patent Act was completed when the Congress passed the 'Leahy-Smith America Invents Act (AIA)' in the year 2011. This recent amendment is interesting as it shifts the U.S Patent system from a "first to invent" to a "first to file"⁵.

COMPARATIVE STUDY OF U.S AND INDIAN PATENT LAWS

The study is divided into two parts- 1) Substantive and 2) Procedural

Substantive Aspects

PATENT TERM ADJUSTMENT

United States Patent Law

Section 154(b) deals with the term of Patent Adjustment.⁶ According to this provision Utility and Plant patents may be eligible for Patent Term Adjustment which may usually result from delays due to interference proceedings or any secrecy orders.

There are three main bases for Patent Term Adjustment

- Failure of Office to take actions within specified time set forth in 35 USC 154(b)(1),
- Failure of Office to issue a Patent within three years of actual filing of application under 35USC154 (b)(1),
- Delay due to interference proceedings and secrecy order under 35 USC 181

CASE LAW

In *Janssen Pharmaceutical N.V. v. Kaposi*, a federal Court in Virginia has rule that a patentee seeking review of USPTO determination adjusting a patent term under section 154(b) provision which allows extension of a patent term for a delay between the date when the

⁵ Pamela Collins, Available at: http://www.hjklaw.com/blogs/archive/entry/a_brief_history_of_us_patent_law Accessed on 21.10.2016

⁶ Contents and Term of Patent, Reference from Indian Patent Act 1970, Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/in/in065en.pdf> Accessed on 19.10.2016

application is filed and when it is ultimately issued must comply with the time limitation prescribed by patent law and not which are set forth in Administrative Proceedings Act (APA). The patentee contended that the action was timely as it was filed within 180 days. USPTO urged the Court to determine the Statute of Limitation begins to run from the date the patent is issued and not from the date of agency's final PTA determination. The matter was transferred to District court on the ground that the complaint was time barred⁷.

Indian Patent Law

The patent term extension was for the first time considered by the Second Committee appointed by the Government of India in the direction of Hon'ble High Court of Delhi in the Nitto Denko Case. According to the Second Committee the time lost during the processing of the application in the Patent Office needs the Patent Term Extension. But it was observed that this particular provision exists only in U.S and the patent term of India which is 20 years in itself is too long where 20 years' monopoly is considered blocking the competition. It was also considered that in today's world where the technologies are covered by the patent becomes unused hence encouraging unused technologies and protecting them with longer patent term is not advisable.

COMPULSORY LICENSE

Indian Patent Law

The Indian Patent Law deals with Compulsory License under Section 84.⁸ Section 84 speaks of, at any time after the expiration of three years from the date of grant of patent any person shall make an application to the Controller for grant of compulsory license on patent under the following grounds,

- that the reasonable requirements of the public have not been satisfied,
- that patented invention is not available to the public at affordable service,
- that the patented invention is not used in the territory of India.

⁷ Shook Hardy & Bacon LLP, Court determines patent law limitations, not APA, apply to Section 154 extension matters, Available at: <http://www.lexology.com/library/detail.aspx?g=00edc17e-1ef5-4763-ac63-8b2097541191> Accessed on 27.10.2016.

⁸ Supra Note 6

CASE LAW:

In *Bayer Corporation v. Union Of India*, Bayer Corp a drug multinational giant based at Germany invents a drug named ‘SORAFENIB’ which could be used as a life extending drug in liver and kidney cancer treatment ‘NEXAVAR’ was the name of the brand. An Indian generic pharmaceutical company ‘Natco’ filed an application with Bayer for voluntary license of the drug Nexavar. Bayer was selling the product in exorbitant price which most people could not afford. On 9th March 2012 The Patent Controller granted Compulsory License to Natco Pharma to make and market an affordable generic version of Nexavar. Bayer unsuccessfully challenged the order before IPAB and later at Bombay High Court which will be priced 97% lower than Bayer’s price. As Bayer was not in a position to disclose all the R&D costs and also it failed to supply the drug to large number of cancer patients, the Supreme Court dismisses the SLP filed by Bayer. This grant of Compulsory License to Natco for anti-cancer drug is the first of its kind in India⁹.

United States Law

Under the United States code of Patent Law there is no recognition of ‘Compulsory License’.

Procedural Aspects

Under the Procedural aspects the following points are differentiated

PATENTABLE SUBJECT-MATTER

United States Law

The United States Code defines Patent under Section 101 and Patentable Subject Matter under Section 102 & 103. Section 101¹⁰ defines Patent as A Patent is a right granted to the inventor who invents or discovers process; manufacture etc. which is new, useful and non-obvious. It is specifically the right to exclude others from making, selling etc.

CASE LAW

⁹ Available at: <http://www.lawyerscollective.org/uploads/supreme-court-says-no-to-bayer-upholds-compulsory-license-on-nexavar.html> Accessed on 22.10.2016

¹⁰ Reference from U.S Patent Act, Available at: <https://www.law.cornell.edu/patent/patent.part2.table.html#chapt15> Accessed on 19.10.2016

In KSR v. Teleflex, the dispute was about the usage of electronic sensor based adjustable gas pedals. In this particular case, Teleflex accused KSR International of using the gas pedal technology which was claimed by Teleflex. KSR argued that Teleflex on the first place cannot be granted a patent as the combination of electronic sensor and gas pedal technology was something obvious based on prior art. On reversing the decision of the lower court, the U.S Supreme Court held that sensor- based technology was obvious from the other patents and hence, Teleflex's patent is invalid¹¹.

Indian Patent law

The Indian Patent Law defines inventions under Section 3¹² of Indian Patent Act 1970 and they are as follows:

- an invention which is contrary to well established natural law
- an invention which is contrary to public order and morality
- mere discovery of a scientific principle
- mere discovery of something which is a known substance etc.

CASE LAW

In Novartis Ag v. Union of India, the dispute was related to section 3(d) of Patents Act. The petitioner filed a patent application with regard to ANTI LUEKEMIA drug called 'GLEVIC' which was slightly different from their 1993 version. The petitioner contended that section 3(d) is unconstitutional as it violates the TRIPS agreement and also that Indian Patent Act does not define 'efficacy'. The Court rejected both the contentions stating first, WTO's Dispute Settlement Body provides for remedy and the complete mechanism for violating TRIPS Agreement. Second, the Court observed that 'Efficacy means ability to produce a desirable result'. It further added that test of efficacy would include the utility, function and purpose of the product. Hence, the Supreme Court found that since the petitioner did not pass the test of section 3(d) the patent application filed by the petitioner is rejected.¹³

PATENT FOR PLANTS

¹¹ Rishab Jain, Patentability Criteria of an Invention and when it is not Granted-India, Available at: <https://www.hg.org/article.asp?id=19759> Accessed on 19.10.2016

¹² Supra Note 6

¹³ Aayush Sharma, Section 3(d) of Indian Patents Act1970: significance and interpretation. Available at: <http://www.lexology.com/library/detail.aspx?g=3f92413f-107c-4886-aca7-24633a341e22> Accessed on 19.10.2016

United States Law

The United States Code deals with Plant patents under Section 161-164. Section 161 states that whoever invents or discovers and asexually reproduces any new variety of plants which includes hybrids, mutants, newly found seedling other than a tuber propagated plant may obtain a patent with subject to certain conditions.

Section 162-164, these sections deals with various other provisions such as grant of patent, description and claim and assistance of department of agriculture.

Explanation of Section 161, asexually propagated plants are those plants which are reproduced not merely from seeds but rather by using other methods such as grafting, budding, layering, inarching etc.

Indian Patent Law

The Indian Patent Law deals with Patents for plants under Section 3(j).

Section 3¹⁴ deals with the non-inventions among which one of them are Plants and animals in whole or in part thereof other than micro-organisms but which include seeds, species and other biological processes for propagation or production of animals.

CASE LAW

In *Monsanto Technology v. Controller General of Patents* the issue involved was whether patent could be granted to an invention which is explained as a method of producing transgenic plant with increased heat, drought and salt tolerance. The Indian Patent Office refused to grant patent on the following grounds:

- Lack of inventive step in the claim of subject matter,
- Claim in the application was not considered as invention as the function of cold shock protein was disclosed in the prior art which makes obvious to a person who is skilled in the art,
- Most important the Patent Application does not fall within the meaning of Section 3(j) of the Indian Patent Act 1970. This became the primary reason for rejecting the application.

¹⁴ Supra Note 6

After the rejection Monsanto files an appeal before the IPAB (Indian Patent Appellate board). In view of the IPAB's view the method which was claimed for grant of patent was not merely a leap from prior art to the invention, it did involve a journey of individual steps involving human intervention which was considered sufficient to overrule the findings of the Patent Controller. Hence, IPAB held that human intervention in plant cell and its production was enough to grant patent at least to the process claim if not to the product¹⁵.

COMPULSORY LICENSE

Indian Patent Law

The Indian Patent Law deals with Compulsory License under Section 84. Section 84¹⁶ says, after the expiration of three years from the date of grant of patent any person shall make an application for grant of compulsory license on patent to the Controller under the following grounds

- that the reasonable requirements of the public have not been satisfied,
- that patented invention is not available to the public at affordable service,
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CASE LAW

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¹⁵ Swarup Kumar & Shivaarti Bajaj, *Challenges to the patenting of essentially biological processes in India*, Available at: <http://www.remfry.com/wp-content/uploads/rs-articles/challenges-patenting-essentially-biological-processes-in-india---lsipr.pdf>. Accessed on 19.10.2016

¹⁶ Supra Note 6

patients, the Supreme Court dismisses the SLP filed by Bayer. This grant of Compulsory License to Natco for anti-cancer drug is the first of its kind in India¹⁷.

United States Law

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GRANT OF OPPOSITION

U.S Patent Law

The Leahy-Smith America Invents Act (H.R. 1249) introduced Post-grant review proceedings into U.S Patent Law. 35 USC 301-307¹⁸ deals with Post -grant opposition. U.S only deals with the concept of Post-Grant opposition.

The provision reads as follows: Any person who is not the owner of the Patent may file an application in case of any opposition which should not be less than 9 months from the date on which the patent is actually granted to the owner of the Patent. The post-grant opposition has a few advantages:

- Promise to improve patent quality by bringing more information into the process.
- Focuses on the most valuable patent. Patent that are most likely to have an effect in the market are most likely to be opposed.
- Price lowers on reducing the number of invalid patents.
- Offers increased flexibility. It addresses the uncertainty that hampers innovation (lessens licensing, commercialization and marketing).

Indian Patent Law

The Indian Patent Law deals with Pre as well as Post grant opposition under Section 25(1) and 25(2)¹⁹ of Indian Patent Act 1970.

¹⁷ < <http://www.lawyerscollective.org/updates/supreme-court-says-no-to-bayer-upholds-compulsory-license-on-nexavar.html> > Accessed on 22.10.2016

¹⁸ 35 USC 301-307: Post Grant Opposition, Reference from U.S Patent Act, Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/in/in065en.pdf> Accessed on 19.10.2016.

¹⁹ Supra Note 6

Pre-grant opposition Section 25(1): Any person can represent for opposition against the grant of a patent after the publication of application for a patent but has not before its grant. This acts as a safety not to record any questionable patent before the patent has been actually granted.

Post grant opposition Section 25(2): Any interested person can file a notice for a post-grant opposition before the expiry of one-year term from the date of publication of grant of patent.

CASE LAW

In *Hindustan Lever Ltd. v. Godrej Soaps*, a patent was filed by Hindustan Lever Ltd. On 14th Oct 1992 in India which was opposed by Godrej Soaps. This particular Patent had two priorities of U.K dated 14th Oct 1991 and 14th July 1992 and was granted on 18th May 1996 in India. The ground of opposition was:

- Prior Publication
- Prior Public Use
- Obviousness and Lack of Inventive step.

Thus, the court held that the applicant has failed to comply with the requirements mentioned under section: 8 or has disclosed such information which he knew was false. After making the amendments and specification in claim, the opposition was dismissed²⁰.

PATENT AGENT

U.S Patent Law

37 CFR (Code of Federal Regulation) 11.6 describes the requirements of a Patent Agent.

Registration of Attorneys and Agents,

- Attorney - any citizen of U.S who is an Attorney and an alien who is an Attorney and who lawfully resides in U.S may be registered as a patent Agent.
- Agent - Any citizen who is not an Attorney and resides lawfully in U.S and an alien who is not a resident of U.S may be registered as a Patent Agent.

²⁰ Patent Opposition Systems in India and Other Countries, Available at:
<http://www.ipproinc.com/admin/files/upload/5f5e1080d1259a6b3d4e60c193a58351.pdf>
Accessed on 25.10.2016

- Foreigner - any foreigner who is not a resident of U.S shall file proof that he or she is registered in good standing before the patent office of the country in which he or she resides and practices may be registered as a Patent agent (with some conditions)²¹.

CASE LAW

In *Hsuan-Yeh Chang v. Kappos*, Plaintiff Hsuan-Yeh Chang in his official capacity as undersecretary of Commerce for Intellectual Property and Director of USPTO brings an action against the defendant. The Complainant alleges that the PTO acted arbitrarily and capriciously and in excess of its statutory authority in violation of administrative procedures Act by denying his full registration as a patent agent under 35 C.F.R 11.6 (b) on the basis of his immigration status. The parties have cross moved for summary-judgement. The court finds that PTO has not acted within its statutory authority and was not an abuse of its discretion, therefore Court denies Plaintiff's motion and grants defendant's cross - motion²².

Indian Patent Law

Section 126 of Indian Patent Act 1970 deals with Patent Agent.²³ It states that a person shall be eligible to have his name entered in the register of Patent agents on fulfilling certain conditions,

- He is a citizen of India,
- he has completed the age of 21 years,
- has obtained a degree in science, engineering and technology,
- has passed the qualified examination for the purpose,
- for a total period of not less than 10 years, functioned either as examiner or as Controller.

CASE LAW

In *Sp. Chockalingam v. Controller of Patents*, an advocate filed a writ petition under section 226 of the Indian Constitution before Madras High Court declaring the deletion of Patent amendment of 2005. He contended that amendment of 2005 has been unconstitutional as it omitted the words 'Advocates' from section 126. He also pointed out that where in one

²¹ Legal Information Institute, 37 C.F.R 11.6 - Registration of attorneys and agents, Available at: <https://www.law.cornell.edu/cfr/text/37/11.6> Accessed on 25.10.2016

²² Amy Berman Jackson , HSUAN-YEH CHANG V. KAPPOS , Available at: <https://casetext.com/case/hsuan-yeh-chang-v-kappos> Accessed on 26.10.2016

²³ Supra Note 6

hand advocates are allowed to argue patent cases on the other hand they are not allowed filing patent case for their clients. In this particular case the Madras High Court held that the writ petition is allowed and the impugned order as unconstitutional, ultra vires, void and unenforceable thus, meeting the ends of justice²⁴.

OPINION

From the above mentioned points it is visible that India and U.S possess different patent laws. Each country grants patent to the inventor within its own territory on various reasons such as social conditions, political issues etc. According to me, India and U.S are not the only countries having different patent laws but there are many. In this globalizing world where the economic activities are becoming increasingly globalized, it has become a need for harmonization. To achieve harmonization between countries there must be some sort of balance between the patent diversity and patent harmonization. This concept of harmonization comes with many advantages which are as follows: -

- *Process of obtaining a patent is simplified:* Since different countries have different patent laws the patentability requirements differs among all making the procedure difficult for the applicants. By harmonizing the substantive patent law this process can be simplified for all applicants.
- *Reducing the work load of the patent office:* If the Patent laws are harmonized then the report of one country could be relied by other countries on the basis of search and examination including steps like determination of patent claim, prior art and claim system. This will result in load reduction.
- *To broaden the patentable subject matter:* The subject matter of patent varies among countries. Some have restricted laws of patentable subject matter. The advantage of broadening the subject matter could be encouraging new generation technologies like information technology, nanotechnology and biotechnology.
- *Increase in legal certainty:* If there occurs harmonization between countries, and an invention obtains patent in one country then probability of it obtaining a patent in another country becomes quite predictable. This will result in legal certainty.

²⁴ Sp. Chockalingam v. Controller of Patents, Available at: <https://indiankanoon.org/doc/194075199/> Accessed on 26.10.2016.

- *Reducing cost patenting:* The cost to obtain a patent is high and it is not affordable to all. Different patent laws bring with it difference in forms, formats and procedures. On harmonizing, the cost, procedure, forms and formats could be unified.

This concept of harmonization has some disadvantages too:

- If some country has strong IPR then manufacturers of the patented invention would consider delivering their products to the country which has appropriate conditions. This in turn will harm the other countries as they will lose opportunity to create employment for society.
- If all patent laws will be harmonized, then there will be a lot of mistakes which will be carried from one patent office to another. Moreover, these mistakes will remain unchecked.
- Countries with different stages of development have different needs and expectations from the system of Intellectual Property. Having a harmonized system, developed, developing and under developed countries will have to search for a center of gravity to reach to a conclusion and as well as which balances all their view points.

According to me all countries should select the best practices from the various patent systems of different countries without limiting itself to one's own system.

CONCLUSION

Achieving Harmonization is not an easy task. It is a long journey which involves a number of steps. India in its initial steps of harmonizing the provisions of prior art, inventive step, novelty etc. can achieve mutual benefit of exploitation of search and examination results of different countries which led to reduction in the duplication and backlog of work and also resulting in the reduction of cost patenting.

SCRUTINISING THE PERTINENCE OF SERVICE TAX IN E-COMMERCE

Omar Munir* & Rudra Dutta**

By far there seems to be no particular definition and explanation to the term ‘E-Commerce’. It is taken as a sense of denoting a way rather than through conventional physical means. The means being spoken about include ‘click & buy’ method, which uses computer systems and also ‘m-commerce’, which make use of various cellular phones. E-Commerce accounts for not only the buying act or/and availing services via online platforms but also various other activities in connection with transactions:

- Delivery
- Payment Facilitation
- Supply Chain and Service Management

Traditional benchmarks are said to have been fractured and it had got to the front different business models aiming to empower consumers. According to ***Greenstein and Ferman***, “*Electronic commerce (e-commerce) is defined as the use of electronic transmission medium (telecommunication) to engage in the exchange, including buying and selling of products and services requiring transportation either physically or digitally from location to location.*”¹ The very first phase of e commerce gave rise to a new business hierarchy and nomenclature using various combinations of business and consumers. This phase has its own advantages and disadvantages in the traditional business methods. Therefore, e-commerce has changed the global economy’s dynamics and made it more interactive.

The e-commerce sector has been said to be the arguably the most exciting sector of the Indian economy. It is on trial to become the world’s most thriving e-commerce market. The Internet is manoeuvring in the Indian market and also the pocket of the consumers. The total tally of more than 11.47 million broadband users has been fulminating.

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¹ Cost Accounting; <https://www.coursehero.com/file/p310d05/According-t-o-Greenstien-and-Ferman-2008-eI-electronic-commerce-e-commerce-is/>

The dominance of e-commerce transactions is worldwide. These transactions take place between parties residing in not just different states but also divergent countries. The magnitude of cross-border or cross-boundary transactions has witnessed a tremendous increase. The accessibility of Internet has sanctioned the companies which were earlier confined to their local areas to venture into the World Wide Web and to sell their goods, services and information at an international platform. Such a step has also seen a significant reduction in the transaction costs of communicating and selling without cognizance to geographic borders or the size of the company.

THE BUDDING E-COMMERCE INDUSTRY IN INDIA

Every industry's presence has a very significant role to play in the economic growth of a country. Lately, India has witnessed the enormous growth of the communication industry. This industry is regarded to be the most promising for the near future. Out of all communication means, Internet seems to be of most importance. It facilitates access to the knowledge banks and also renders services of world-class standards. It is providing for a new way of executing, conducting and managing business using the updated technology. Succinctly, e-commerce in India has made things a lot easier and faster

The Internet and Mobile Association of India has published a report which reveals that the e-commerce market in India is expected to grow by 37% to touch the USD 20 Billion mark by 2015.²

A report provided by the *Forrester Research* shows that the revenues incurred by e-commerce in India will shoot up by more than five times by 2016, the trajectory will be from USD 1.6 Billion in 2012 to USD 8.8 Billion in 2016. It also said that the shoppers in metros are primarily availing the e-commerce services in the areas of travel, consumer electronics and online books.³

In India, the e-commerce industry has grown drastically over the past few years. This increase has benefitted other individual industries as well. The travel industry accounts for

² Report November 9th, 2014; <http://www.livemint.com/Industry/ZH8rVd65WLhQzsUFYE9zCJ/Indian-e-commerce-market-to-reach-20-billion-next-year-report.html/>

³ Trends in India e-commerce Market; Report provided by Forrester Research for ASSOCAM's 2nd National Conference on e-commerce, 2012

nearly three-fourths of the business that happens online, which is the maximum with approximately 71%. E-Tailing comes in second with a minute share of 16%.

The presence of e-commerce has radically brought about massive change in the travel industry to the extent that a vacation now seems a click away. The increase in the number of users of IRCTC, i.e., the website for Indian Railways, is the best example to prove the presence of e-commerce. A huge chunk of services are available on these websites, not only can you book tickets but also find the best hotel accommodations, nearby restaurants, car rentals etc.

While only a minor chunk of the market share is devoted to e-tailing industry, it does not contradict the growing influence of online shopping on consumers. The e-tail business faces a major hurdle in form of the direct connection that the customer had with the product⁴, which the industry is trying to overcome by incorporating different technologies to form a near virtual world over the internet. Initially, e-tailing was seemingly more known for buying of computer products and till date it contributes a majority of e-tailing to it, but lifestyle product shopping is the going trend over the net. The businesses are majorly capitalizing over the convenience factor of online shopping, websites like Flipkart, Amazon and host of other players are using this factor as their success mantra.

Financial services too seem to be taking the spotlight in the e commerce industry. While in 2008 there was hardly any share of this sector in the industry but now it is at par with e tailing.

The Foreign Direct Investment Policy in India states e-commerce activities as “*an activity of buying and selling by a company through the e-commerce platform.*”⁵

The fast growth of the e-commerce industry in India does not only show the rapid receptiveness of the people but also proves than the use of e-commerce helps build up our economy and supports the development of the country. The e-commerce industry have faced major developments in the investment sector in the recent times, embroils:⁶

⁴ Tech to make e-tail as real as retail as Retail; <http://www.dnaindia.com/analysis/column-using-tech-to-make-e-tail-retail-17445323>

⁵ E-Commerce in India – Legal, Tax and Regulatory Analysis, July 2015, Pg.6, Nishit Desai Associates

⁶ Top 15 e-commerce investments in India in 2014, November

- Flipkart, has raised USD 1 Billion from Tiger Global Management and Naspers. Singapore's sovereign wealth fund, GIC and also the existing investors Accel Partners, DST Global, ICONIQ Capital, Morgan Stanley Investment Management and Sofina, were participants in the latest financial round.
- The financial service arm of the Japanese telecommunication and Internet Corporation, Soft Bank Internet and Media, Inc. committed \$627 million funding in New Delhi-based online marketplace, Snapdeal. Following the investment, Soft Bank became the biggest stakeholder in the company.
- In February 2014, Kunal Bahl-led Snapdeal amassed \$133 million funding led by eBay, Kalaari Capital, Nexus Venture Partners, Bessemer Venture Partners, Intel Capital and Saama Capital.
- Mukesh Bansal-led Myntra secured \$50 million (about RS300 crore) investment led by Premji Invest along with existing investors Accel Partners and Tiger Global.
- Grocery e-tailer Bigbasket snapped up \$33 million from Helion Ventures, Ascent Capital, Zodius Capital and Lionrock Capital in September 2014.
- Fashion e-commerce major Jabong secured \$27.5 million (Rs 173 crore) from British development finance institution CDC in a deal in February 2014.
- Furniture e-tailer Urbanladder closed \$21 million (approx Rs.120 crore) Series B funding from Steadview Capital along with the existing investors, SAIF Partners and Kalaari Capital, in January 2014.

LEGAL VALIDITY OF ELECTRONIC TRANSACTIONS

Internet has become an integral part of India's population bringing in a digital revolution altogether. A major change in lifestyle has been noted in the urban areas due to the decrease in rise for using Internet and also the convenience that the Internet brings along with it supporting this revolution. All businesses conducted by various computer networks, *whether B2B, B2C, C2C, C2B or B2B2C*, are regarded under e-commerce. The transactions involved in e-commerce may seem simple on the outside but are complex and involve serious legal issues.

Alter the liberalization of Foreign Direct Investment by the government of India and the introduction of regulations under the FEMA, 1999⁷ 100%. FDI has been permitted on an automatic basis for e-commerce transactions. With an exception in Indian entities that carry out single brand retail or multi brand retail through e commerce. If the transaction takes place through the automatic route then there shall be no need for a prior approval of Ministry of Commerce and Industry.

The major legal issues to be dealt with in electronic transactions are:

E-contracts: These are governed by the basic principles of the Indian Contracts Act, 1872⁸, which states that there should be free consent of both the parties for a lawful consideration. Section 10A of the Information Technology Act, 2000⁹ states the validity of e-contracts. Hence both these statutes need to be read together so as to provide for the proper understanding of the legal validity of e-contracts. In the case of *Trimex International FZE Ltd, Dubai v. Vedanta Aluminium Ltd*¹⁰, it was held that if both the parties exchange emails regarding mutual obligation then that shall be regarded as consent. The stamping of contracts is the other issue. It has been regarded as a basic principle of law that if an instrument has not be stamped appropriately it may lose its evidentiary value and not be admissible until the stamp duty along with the penalty has been cleared. The payment of stamp duty is not applicable in case of e-contracts. But lately as payment of stamp duty has become online there has is now a possibility that the duty might be asked on e-contracts as well.

Data Protection: The protection and the privacy of the information provided during an online transaction is the main issue in e-commerce. Section 43A of the Information Technology, Act, 2008¹¹ talks about the failure to protect data and the compensation for it. Any web portal or site collect in data should have a policy to protect the privacy of its users in place, the consent of the user must always be taken when sensitive information is being obtained and the portal must maintain reasonable security. Any sort of unauthorized access or misuse of the sensitive information must be taken care by the service providers. In the case of *Kharak*

⁷ Foreign Exchange Management Act (**Act no 42 of 1999**)

⁸ *Indian Contract Act*, 1872. (Act no. 9 of 1872)

⁹ Section 10A Validity of contracts formed through electronic means, IT Act,2000 (1 of 2000)

¹⁰ 2010(1) SCALE 574

¹¹Section 43A Compensation for failure to protect data; IT Act, 2008

*Singh v. State of Uttar Pradesh*¹² and *People's Union of Civil Liberties v. Union of India*¹³, the 'right to privacy' was recognized as a part of the larger Right to Life and Personal Liberty under Article 21 of The Constitution of India¹⁴.

Intellectual Property Rights: The infringement and violation of trademark, Copyright or patents is of enormous possibility over the Internet. In the case of *Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd.*¹⁵, the Supreme Court held that a domain name may pertain to the provision of services within the ambit of section 2(a) of the Trademarks Act, 1999¹⁶. Domain names are said to have trademark protection as if there are similar domain names it may lead to disputes.

Efficient delivery system: (An effective supply chain and service management) in e-commerce it is necessary to keep the consumer protection issues in consideration. The *Consumer Protection Act, 1986* looks upon the relationship the consumer and the provider share, though there are no specific provisions dealing with online transactions. *The Information Technology (Intermediaries Guidelines) Rules, 2011*, states that the intermediaries are under the obligation to publish the rules and regulations also the public policy and user agreements for access or usage of the intermediary's computer resources by another person. In the case of *Consim Info. Pvt Ltd v. Google India Pvt. Ltd*¹⁷, the court recognizes that until the triple test is passed, no injunction can be granted to Consim. The test was of

- 1) Prime facie case
- 2) Balance of convenience
- 3) Irreparable hardship

But here the court decided depending on the fact that the trademark dispute was generic in nature. The court said that though Google cannot be held liable for infringement as it was not possible to always check online posted advertisements. The court finally made an observation

¹² AIR 1963 SC 1295

¹³ 1997 (1) SCC 318

¹⁴ Art.21 Protection of life and personal liberty; The Constitution of India

¹⁵ AIR 2004 SC 3540

¹⁶ Section 2 (a) 'Appellate Board' means the Appellate Board established under section 83; The Trademarks Act, 1999

¹⁷ 2013 (54) PTC 578 (Mad)

subjected to Section 3(4)¹⁸ *The Information Technology (Intermediaries Guidelines) Rules*, and Google was asked take an action within 36 hours of receipt of order, failing which the court may hold it to be liable.

PAYMENT MECHANISM OF E-COMMERCE

The onset of e-commerce brought about a need for refined, tech savvy and efficient payment systems. Initially a payment system for an electronic transaction may sound very simple - as the person chooses a product, buys it online, clicks ‘pay’, enters payment details and it is done. In reality, it is way more complex than the normal methods of payment. A number of players are involved in this payment mechanism.

- A payer -the customer
- A payee -the seller
- An issuing bank -the payer’s bank
- An acquiring bank the seller’s bank Credit or Debit card companies, entities such as Master or Visa-typically associations of bank or; other financial institutions, providing an array of payment products to the financial institutions
- One or more payment processors or gateways providing technology for the receipt and process payment instructions and settlement, or actually receiving and holding funds received from the customer for onward payment to the merchant
- Certification authorities, like Payment Card Industry Security Standards Council

System of Payment

The Payment and Settlement Systems Act, 2007, regulates both the traditional as well as the electronic payment systems in India. This Act defines ‘*payment system*’ as, “*a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement services or all of them but does not include a stock exchange.*”¹⁹

¹⁸ Section 3: Due diligence to be observed by intermediary; *The Information Technology (Intermediaries Guidelines) Rules, 2011*

¹⁹ Section 2(n) of the PSS Act defines “Settlement”

The definition of '*payment systems*' in the Act includes the system that enables credit card and debit card operations, smart card operations, money transfer operations or similar operations. It also empowers the Reserve Bank of India to govern the operations of the payment system. Except for this Act, there are several other rules and regulations, especially those established by the RBO governing the system that involves 'clearing, payment or settlement' of a payment, depending upon the nature of service or undertaking involved.²⁰

Players involved in the system

The players or service providers present in the ecosystem of payment system in e-commerce are:

- *Payment Processors*: Clearing, payment and settlement are mainly involved in the payment processing functions. These activities constitute the core function of a payment system. The RBI as well as other statutes regulates them. Under the *Payment and Settlement Systems Act, 2007*, only those banks or financial institutions that have authorization of RBI can perform such functions.
- *Intermediaries*: RBI defines 'Intermediaries' as "entities that collect monies received from customers for payment to merchants using any electronic/online payment mode, for goods and services availed by them and subsequently facilitate the transfer of these monies to the merchants in final settlement of the obligations of the paying customers". Keeping in mind the growth in the use of electronic payment methods across India, the RBI issued certain 'Directions for opening and operation of accounts and settlement of payments for electronic payment transactions involving intermediaries' which regulate account operations for the receipt and payment of funds by such intermediaries.²¹
- *Technology Providers*: A technology provider mainly looks into the technology or solutions to facilitate transmission of customer/merchant data, instructions, approval etc. That is within a payment system, it should be in form of software or hardware. Mostly, providers are not regulated.

TAXATION OF E-COMMERCE TRANSACTIONS

²⁰ E-Commerce in India – Legal, Tax and regulatory Analysis, July 2015, Pg.14; Nishit Desai Associates

²¹ Definition of Intermediary by The RBI notification number DPSS.CO.PD.NO.1102/02.14.08/2009-109

With the absence of any kind of boundaries and the physical nature of e-commerce transactions relating to the goods and services, the taxation of these transactions becomes an issue in itself. As the accessibility to the Internet is across borders, the people involved in the transaction may be residents of diverse countries. Thus, the income earned out of this business may be taxed in one or more country.

The Committee on Fiscal Affairs of OECD²² framed policies which mainly spoke about the “*neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility*” as the main principles for the taxation of e-commerce transactions.²³

Another report by the Central Board of Direct taxes constituting the High Powered Committee in India was submitted in September 2001. It considered and thought upon the need for introduction of a separate tax regime for e-commerce transactions. The principles laid down by the OECD were taken into account in the report with some exemptions. Basing its theory on the principle of ‘*neutrality*’²⁴, the High Powered Committee maintained that the prevailing laws were satisfactory to tax the e-commerce transactions and there was no need for a separate regime.²⁵

The Indian tax authorities have been trying their best to tax e-commerce in a way that conflict with international approaches. The International companies or enterprises catering to India face difficulties as a result and give rise to significant litigation in this respect, mainly in relation to characterization of income and withholding of taxes. Henceforth, it becomes important to carefully structure e-commerce transactions so as to reduce tax risks, especially the risk of double taxation or taxation in more than one country, without the availability of credit for payment of taxes in countries other than the resident country.

The Internet has modified many of the primary, basic and long standing concepts of direct and indirect taxation. Various issues in regard to taxation of e-commerce transactions are raised worldwide; this is mainly because of the lack of complete understanding of:

- i. Technology dealing with communication,

²² the Organization for Economic Cooperation and Development

²³ “Electronic Commerce: Taxation Framework Conditions” A report by the committee on Fiscal Affairs, OECD

²⁴ The concept of neutrality is the underpinning of the canonical goal of tax reform: achieving a broader base with lower rates

²⁵ The eCom Taxpert Group, “Taxation of Electronic Commerce in India”, {2002} Asia-Pacific Tax Bulletin July/August 241

- ii. Complexity of the business offered over the Internet and
- iii. Particular method of business on the Internet that has made the operation of tax legislations complex.

The Information Technology Act, 2000, was the first legislation to deal with e-commerce says nothing about the taxation of it. A major chunk of state revenue that is incurred through direct and indirect taxes is lost because Internet transactions remain untaxed.

The foundations of taxation policy are formed by several basic principles. The most important ones are efficiency, equality, certainty and positive economic effect²⁶. Not following these basic principles proves to be fatal for the tax system of that country. Taxation is said to be a mechanism for stabilization and regulation of the economy. This fact further provides that the legislature has emphasized the economic effects of these principles with a major focus on encouraging economic growth.

The Internet activities are divided into two parts, one is I and the other is “*content service*”²⁷. In access service, the individual is provided with the access to the internet and in the content service, the information is delivered electronically.

Internet service provider is provides the service for accessing Internet whereas, the online service provider provides service through Internet. The service is given in return for the payment of subscription and usage fees. These services are subjected to tax.

The taxation of commerce transaction can further be discussed under two broad categories:

- *Direct Taxes*
- *Indirect Taxes*

DIRECT TAXES

For the taxation of income in India, the provisions of the Income Tax Act, 1961 are to be looked into. Under this Act, the residents are subjected to tax on their total income, local as

²⁶ The Net and the Tax Net – The Indian Tax Structure and the challenges posed by E-commerce; Chetan Nagendra; Nandan Kamath(ed.) Law relating to Computers, Internet and E-Commerce; pg 349

²⁷ A General Theory of Tax structure change during Economic Development, Cambridge, Harvard Law School, 1996

well as worldwide and if non-resident then income is taxed on income sourced in India. *Section 9* of the *Income Tax Act* allows particular incomes to be accumulated or accrued in India under prescribed conditions. But, if a non-resident taxpayer is a resident of a foreign country with which India has signed a tax treaty, then that person shall be relieved under such a treaty.

The 2015 Budget has proposed a reduction of 5% in corporate tax, reducing it from the current 30% to 25%, excluding surcharge and cess, over the next four years. Surcharge has been increased by 2% for local companies, increasing the maximum effective rates to 34.61%. The withholding rates applicable in the case of royalty and fees for technical services to offshore entities are proposed to be reduced from 25% to 10%, on gross basis.²⁸

In regard to the taxation of income generated by non-residents from e-commerce mainly there are two main issues:

- a) *Characterization of Income*: Whether a particular income has been earned from the use or the sale of good, such as software and electronic databases. The sale of advertising space etc. shall be regarded as royalty or business income or capital gains.
- b) *Permanent Establishment*: The issues those are mainly there due to the presence of an electronic terminal or a server in India, a hosting of websites or other technical equipment etc.

In the case of *Amadeus Global Travel v. Deputy Commissioner of Income tax*²⁹, the Tribunal concluded that non-resident companies working with computerized reservation systems are to be taxed in India to the extent of booking fees received from Indian residents. The Tribunal decided on the grounds that these companies shall have ‘virtual’ presence in India, constituting a ‘virtual’ permanent establishment. In the landmark judgment of *Vodafone India Services Pvt. Ltd v. Union of India*³⁰, the Bombay High Court held that transfer pricing would increase only when an element of real income is involved and the hypothetical income is not subjected to transfer pricing regulations.

INDIRECT TAX

²⁸ E-Commerce in India - Legal, Tax and Regulatory Analysis, July 2015, Pg. 28-29, Nishit Desai Associates

²⁹ (2008) 19 SOT 257 DELHI

³⁰ Writ Petition no. 871 of 2014

A number of indirect taxes are levied at the central and state levels. The government is making efforts to introduce the Goods and Service Tax Act so as to rationalize the indirect tax regime of the country. Main indirect taxes levied are:

1. *Service Tax* With the introduction of the negative list approach, the service tax regime has drastically changed. As per this approach, all those services, except those on the negative list or those specifically exempted, would be charged with service tax. No e-commerce transaction has been prescribed under this negative list. Mainly, the location of the receiver of the product is treated as the place of service rendered. In case of e-commerce, the location of the service rendered would be that where the service provider is located. The 2015 Budget proposes to increase the Service tax from 12.36% (inclusive of cess) to 14%.
2. *Sales Tax* In India, there are two types of taxes levied on the sales of goods. First is the Central Sales Tax (CST), which is central and is generally payable on the sale of goods when inter-state trade takes play at the rate of 2%. The second type of tax is Value Added Tax (VAT), which is governed by the state. VAT rate differs from state to state. With respect to e-commerce transactions, sales tax is relevant on the sale of intangible goods.
3. *Customs Duty* Customs Act, 1962 deals with the levy of customs duty, which is either export or import duty. The customs duty is calculated based on the percentage of assessable or custom value³¹. The payment for the right to reproduce or redistribute imported goods should not be added to the customs value. But any fees paid as royalties or license fee must be added to the customs value.
4. *Central Excise Duty* The Central Excise Act, 1944, governs the excise duty. It is an indirect tax levied on goods manufactured in India. It is a duty collected by the central government. The valuation of the good shall incorporate the cost of engineering, development, design, artwork, plans and sketches taken place at places other than in the factory of production of such goods³². The excise on customized software is exempted but it needs to be paid in case of non-customized software.

APPLICABILITY OF SERVICE TAX

³¹ Section 14 (1) of The Customs Act, 1962 or Tariff value under section 14(2) of The Customs Act, 1975

³² *Pawan Biscuits Co. Pvt. Ltd. v. CCE, Patna*; (2002) 120 ELT 24 SC

There has been so much jubilation with respect to the Indian E-commerce story and it is on track to be the world's fastest growing E-commerce market³³. The businesses springing up need to be sure and known about the tax liability they shall face. The main liability in e-commerce is that of service tax.

To understand service tax, Lets first understand the basic models of e-commerce. The common business models facilitated by e-commerce are:

- **B2B:** E-commerce has made various other businesses capable to form new relationships with the other businesses for efficiently managing the several other business functions. This model comprises of various models, including the distribution of services, procurement services, etc. IndiaMART.eom is one such example.
- **B2C:** There has been a model in which there exist direct dealings between businesses and consumers. These transactions have gained momentum after e-commerce boomed. In the traditional model, the distribution starts mainly with the manufacturer and goes through the wholesaler to the retailer, who finally provides to the consumer. Over the Internet, the manufacturer or the intermediaries are directly trading with the consumer.
- **C2C:** In the commercial scenario, the dealings amongst consumers have been very few. E-commerce has in turn made it possible to bring together consumers and provide for a platform to trade. Portals such as *eBay* and *Quikr* are examples of this model.
- **C2B:** This is regarded to be a new model of commerce. Here the consumer provides for the business and creates value for the business. This can be seen in forums where consumers provide for product development ideas or online where product reviews are given by the consumers which are used for advertisement purposes.
- **B2B2C:** Variant of the B2C model. There is an additional intermediary business to assist the first business with the end consumer. This model is programmed to do much

³³ Analysis on Applicability od Service Tax on E-Commerce platforms, March 17, 2015; Karan Sahi

better in e-commerce with reduced costs of having an intermediary. Flipsrt is the best example for this type of model.

These are the general models of e-commerce, now lets see the various e-commerce models from the indirect tax perspective:

→ *SUPPLY OF GOODS* A Memorandum of Understanding is entered into between the seller and the ecommerce platforms to promote the seller's business. This type of business has several models and service tax is to be levied accordingly.

- a) Direct Supply from Seller to Customer: The seller have their own website to feed their business and do not rely on any online aggregators like Snapdeal, Amazon for listing goods. In this case VAT shall be charged by seller in case of intra state transaction and CST in case of inter-state movement of goods.
EXAMPLE: 'A' orders a pen from the website xstationary.com. X maintains site stationary. They would generate the invoice and VAT shall be levied on the product.
- b) Supply from Seller to Customer via online intermediary/Aggregators: Listing of products on websites like *Flipkart, Snapdeal, Amazon* etc, who have signed Memorandum of Understanding with the e-commerce platforms. The orders are given to the seller to complete. The seller shall make the invoice and deliver the same to the customer directly. Again VAT shall be charged in the invoice of the company, but the online portal shall generate their own invoice of services like *booking, commission, courier, shipping etc.* in the name of the seller. These services are covered under the definition of taxable service in the provisions of The Finance Act, 1994. The invoice of the online portal shall vary according to the MoU's with the sellers.
EXAMPLE: 'A' ordered the pen from Flipkart. The site books order on behalf of X stationery. So, Flipkart will contact with the X Stationery to deliver the goods to the customer. The seller shall levy the VAT on the goods sold by the seller. New Flipkart shall generate an invoice of services in the name of the seller. Flipkart will hence generate an invoice and levy service tax.

- c) Seller to Online Portals to Customer: The e-commerce platform shall directly sell the product bought by the seller to the final customer. The role of the site shall not be limited to provide interface but not the site shall be the owner of the goods. *EXAMPLE: 'A' ordered the pen from the site alidaddy.com. this site will book the pen on behalf of the seller and the purchase the pen from X stationary to deliver goods to customers. The invoice of X stationary would be addresses to the website and VAT would be levied. The site would also generate an invoice in which service tax would be levied over the services taken.*

RENDERING OF SERVICES

Service can be defined as per Finance Act. 2012, as any activity carried out by a person for another, for consideration and includes a declared service, but shall not include;

- a) An activity which constitutes MERELY,
 - a. A transfer of title in GOODS or IMMOVABLE PROPERTY, by way of sale, gift or in any other manner; or ii. A transaction in money or ACTIONABLE CLAIM
- b) A provision of service by an employee to the employer in the course of or in relation to his employment.
- c) Fees taken in any court or tribunal established under any law for the time being in force. Explanation 1.-For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to-
 - i. the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that ethos as such member; or
 - ii. The duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

- iii. The duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section³⁴.

Service rendered by Online Portals to the Service Recipient

The service provider will levy the Service Tax, if the service provider is providing service to the customer with help of an intermediary. The intermediary shall generate an invoice towards the service provider and the service tax shall be levied on it. *EXAMPLE - MakeMyTrip.com provides for hotel information. They have entered into a MoU with the hotels. The invoice is raised by hotel on the customer. MakeMyTrip raises invoice towards hotel. Service Tax to be levied on the amount of bill issued by MakeMyTrip.*

1. Direct rendering of Service from Service Provider to Service Receiver

If the service provider is rendering online services; the service provider will only be liable to charge the service tax from the customer. *EXAMPLE online repairing services availed by 'B' from a company, the company shall levy a service tax from 'B'.*

2. Service being provided from Customer to Customer.

There shall be no chargeability of *Sales Tax*. In this case, the customers deal amongst themselves, the website only provides for a platform for make the sale or purchase. The website charges a commission on which it charges service tax for rendering the platform.

3. Crowd-funding Websites

Crowd-funding is the practice of funding a projector venture by raising monetary contributions from a large number of people, typically via the Internet. Lately, these have been gaining a lot of popularity. The mount of fee they charge for raising an amount if target funding is achieved is liable for service tax. *EXAMPLE pikaventure.com. indiegogo.com,*

THE ISSUES

³⁴ Section 65b(44); The Finance Act, 2012

There have been a lot of issues circulating around the taxation aspect of e-commerce transactions. The current dispute in this sector is relating to the storage of goods procured from different sellers in their warehouses before dispatching them to the respective buyers. The authorities are of the view that the e-commerce companies are involved in supplying and distribution of goods and hence should qualify as '*dealers*'. The authorities are also of the view that these companies act as commission agents or consignment agents of sellers. This is the reason why these companies are liable to discharge VAT. Times of India had reported that the Karnataka Government plans to amend VAT Act and bring the transactions from e-commerce marketplaces under its ambit. Such an amendment is slated to be passed in the upcoming winter session of the state legislature³⁵. Action taken by one state will change the whole country's scenario. The position of service tax would need to be re-assessed after this.

The previous issue of recognizing the e-commerce companies as service providers has been solved. It has been decided that the primary object of the e-commerce companies is to offer online portals where the buyer and seller meet and the buyer places an order for goods advertised on the portal. The seller raises the invoice on the buyer. The e-commerce company issues no invoice on the buyer in respect of the goods. The company is clearly a service provider only.

In March 2015, when the Union Budget 2015 was announced, it was proposed in the finance bill that changes need to be made in the Service Tax rules with respect to certain e-commerce transactions involving aggregator model, impacting cab services of Uber and Ola Cabs. The Finance minister of The Union of India, Mr. Arun Jaitley while presenting the budget said that if any service is provided under the aggregator model, then the aggregator or its representative in India shall be made liable to pay Service Tax, provided service rendered using the aggregator's name³⁶.

Analysis of Amazon Tax in Karnataka

The main issue is relating to the taxation of the company. The tax issue in this case revolves around the "*Fulfilled by Amazon*" service. This service is provided by Amazon, in which the seller of a particular product stores its items in one of the warehouses of Amazon, mainly to reduce the delivery time. Amazon uses the best of technologies, including data mining and

³⁵ Analysis On Applicability Od Service Tax on E-Commerce Platforms, 19/03/2015; Karan Sahi

³⁶ Union Budget 2015: E-Commerce transactions on 'aggregator' platforms turn costly, 01/03/2015

critically analyzes the data to predict the products future popularity and they store the same in the warehouse so as to have quick deliveries and provide prompt service to the customers.

In both cases, Amazon would get money from the buyer, it will take a particular percentage if he sales proceed as commission and would return the rest to the seller. Amazon hence would be liable to pay Service Tax to the Central Government and the seller would be applicable to pay VAT or sales tax directly. On August 24, 2012, it was held that Amazon “is providing online retail distribution channel and the associated logistical services”³⁷ and thus, is clearly a service provider. A notice has associated logistical services been slapped on all the sellers who have Amazon as their warehouse as an additional place of business. Plus there is no rule stating the limit on a maximum number of vendors that can register in a warehouse, but a complete reading other provisions of law reveals that the registration need to be manned by certain clauses in terms of having a separate place to keep the goods and have provision to display notice boards outside the premises of the warehouse. The issue in short is mainly prevalent due to the self-contradicting laws and loopholes. Though this issue is yet to be solved but it is a classic example in itself of what happens in the taxation department of e-commerce transactions.

E-Commerce Entrepreneurs Expectations

The online merchants wish to promote investment in sectors like logistics and new technological invention for which they are looking forward to tax incentives. A revolutionary effect shall take place if these spheres are given a slight boost, this boost shall be beneficial for both the business as well as the consumers. Still, there needs to be better clarity regarding the tax guidelines for transactions like e-wallet, drop shipment or gift voucher.

For their online business, the entrepreneurs want more funding options. A 100° 0 FDI is expected by them for e-commerce. A strategic investment by foreign investors in small online retailers can prove to be a huge gain for the whole ecosystem. In the current scenario, 100% FDI is allowed by the Government of India in single brand ecommerce companies and up to 51% FDI is allowed in multi brand e-commerce companies.

The least these entrepreneurs expect is a well-planned e-commerce and online business policy to make it more to the ladder of success.

³⁷ Taxation Issues in E-Commerce ventures – An analysis of the Amazon tax issue in Karnataka

CONCLUSION

As the name itself suggests, ‘*service tax*’ is a tax on a service. Nowadays, practically everything can be included in the term ‘service’. The figures show that in the year 1994 there were only 3 services that were taxed compared to over 114 services in 2012 out of which many are included in the e-commerce sphere³⁸.

While talking about taxation in e-commerce, specifically when we think about the applicability of service tax in e-commerce, a lot of questions come up in our mind. The very first being, how can an online transaction be regarded as a service? Then, how is the service tax calculated on such transactions?

Though e-commerce seems to be all sorted and simple but when it comes to service tax, e-commerce some pretty complex issues start to arise.

It is crucial to note that:

- Temporary transfer or permitting the use or enjoyment of any intellectual Property Right and
- Develop, design programme, customize, adapt, upgrade, enhance, implementing of information technology software are considered to be ‘*declared services*’³⁹.

As per this, a temporary transfer of patent registered in outside India would also be taxable, if the place of service of temporary transfer is in India. But under no circumstances can a transfer of an IPR or any other service in a foreign country thereof shall be taxable in India.

The extremely fast pace of growth of the e-commerce industry is not only indicative of the increasing economic growth of the country but also signifies the improvement in the living standards of the country.

This research though brings in clarity as to the applicability of service tax in the e-commerce transactions, but still the Government needs to make amends so as to make the system free of loopholes and try and remove all the discrepancies in the taxation system.

³⁸ E-Commerce Startups; Here is What you need to know about AT and Service Tax liability

³⁹ Section 65B; The Finance Act, 1994

On a larger perspective, the base of the tax system should be broadened. Though, it should be left simple within the administrative capacity of the government. With increase in tax rates, though the government tries to enhance its revenue but as tax payers we oppose it. Hence, there needs to be a line drawn which the government will have to follow as exclusive taxes shows ill on the economy of the country.

A further clarity with regard to the levy of indirect taxed on e-commerce transactions is needed to make things smooth sailing. The Government should focus in providing increments and incentives to this sector. They should think about making it competitive rather than burdening the players in the e-commerce market with unnecessary taxes. Only by bringing up this sector will the Government be able to achieve its vision of “Make in India Campaign”.

CSR AND INCOME TAX ACT: AN ANALYSIS

Sakshi Goel*

Abstract

Corporate social responsibility as a concept rests on the theory that companies utilise resources given by the nature and the society and thus it has a moral responsibility to give back to the society by ensuring welfare of nature and society, and that the actions of companies does not affect only its shareholders. Corporate social responsibility was considered as a voluntary activity that a company indulged in to improve its image and boost societal benefit as well as market competitiveness, until Companies Act 2013 under section 135 codified corporate social responsibility and made it mandatory. However, the effect of this has been dimmed by the Financial Bill 2014 which provides that under section 37 of Income Tax Act, 1961 corporate social responsibility expenditure cannot be claimed as deductions. This paper aims at pointing out and analysing the clash between Companies Act 2013 and taxation law which has not yet been clarified.

Keywords: CSR, Income Tax, Moral Responsibility, Market, Expenditure

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INTRODUCTION

Corporate social responsibility (CSR) in India is based on two theories namely the stakeholder's interest theory and the Gandhian trusteeship theory. The first theory is based on the principle that the actions of a company affect more than just its stakeholders, the society or the public holds an equal stake in the company. The second theory is founded on the concept that a company uses the resources of the nature and society for its own benefit thus it has the moral duty to act as a trustee to the nature and society ensuring its welfare and development.

There is no fixed definition of CSR given by the Indian legal system. Though the scope CSR can be inferred from the definition provided by the European Commission:

*"It is the responsibility of enterprises for their impacts on the society.... Enterprises should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders."*¹

The above definition sees CSR as an investment societal benefits and environmentally responsible technology that goes beyond legal obligation and increases the market competitiveness of the company. CSR in the form of training, skill improvement, working conditions have a direct impact on productivity, a source of reconciling social development with improved competitiveness.

The new Companies Act 2013 has introduced CSR as a legal obligation under Section 135. The Ministry of Finance has been very considerate to social sector development while interpretation of the CSR provision, the Finance Bill 2014 has dulled the enthusiasm of CSR promoters, by disallowing CSR expenditure as a deduction under Section 37 of Income Tax Act, 1961.

This provision has been attacked with the very basic argument of why would a company spend on CSR when it has zero tax benefit given to the fact that there are other government

¹ EC, Green Paper, Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 (18/07/2001), para 20, Available at:

<http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52001DC0366&from=EN>, Last accessed on 17/11/16

notified schemes in which the contribution made to them can be claimed as a 100% tax deduction. This paper attempts to shine a light on the conflicts between these two realms.

COMPANIES ACT 2013

Before the Companies Act 2013, there were two views as to whether CSR should be voluntary. The enactment of this act put the debate regarding CSR to a rest by providing express provisions for it. Section 135 and schedule VII of the act combined with the CSR Policy Rules, 2014 (CSRP Rules) govern and determine the scope of CSR initiatives by companies.

The Central Government Ministry of Corporate Affairs (MCA) has listed the guiding principles for CSR in preamble of CSR rules²:

CSR is not mere charity. CSR is a way of conducting business, by which corporate entities contribute to social good.

CSR is the process by which an organisation evolves and thinks about its relationship with stakeholders for common good and shows its commitment by adopting appropriate business process and strategies.

CSR projects of a company should be used to focus on integrating business models of a company with social and environmental priorities to create shared value.

CSR should be used to integrate economic, environmental and social objectives with company's operations and growth.

Section 135 of Companies Act, 2013

Section 135 provides certain conditions, if any one of them is satisfied by a company in any financial year then the mandatory CSR provision is applicable and the company must comply with it every year. These conditions are³:

- A company having net worth of Rs. 500 crore or more during any financial year,
- A company having a turnover of Rs. 1,000 crores or more during any financial year and

² See <http://www.cuts-international.org/pdf/Draft-CSR_Rules_2013.pdf> accessed 17 November 2016

³ See <<https://www.mca.gov.in/SearchableActs/Section135.htm>> accessed 15 November 2016

- A company having a net profit of Rs 5 crore or more during any financial year

The strict rigor of section 135 is somewhat relaxed by the rule 3(2) of the CSRP rules 2014 which provides that if a company does not fulfil any of the said conditions continuously for a period of three financial years it will be exempted from the mandatory CSR under section 135, however the section will again resume if the company reaches any of the marks in any subsequent financial year.⁴

The clause requires the board of directors to ensure that at least 2% of the average net profits of the company for the next three years be spent on the CSR plan approved by the board of the company.⁵

FEATURES AND SCOPE

Any activity which has been undertaken in normal course of business of a company is not a CSR activity.⁶

Any CSR activity that a company undertakes should give preference to local area or the area out of which the company operates.

Only the subjects mentioned in schedule VII of the Companies act 2013, should be taken up a project for CSR activity.⁷

Any profit or surplus that arises because of CSR activity will not be added to business profit and should be spent on the CSR activity.⁸

Any activity which is exclusively for the benefit of the employees or family members will not be considered as a CSR activity.⁹

A CSR activity can also be conducted in partnership or collaboration with another company as per the rules specified.¹⁰

⁴ See http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf

⁵ See <https://www.mca.gov.in/SearchableActs/Section135.html> Section 135(5) of companies act 2013

⁶ Rule 2 (e) The Companies (Corporate Social Responsibility Policy) Rules, 2014

⁷ Ibid

⁸ Ibid at Rule 6 (2)

⁹ Ibid at Rule 4 (5)

¹⁰ Ibid at Rule 4 (3)

A company can undertake CSR activity by itself and or registered society or trust or a company established under S8 of Companies Act 2013, by itself, its holding or subsidiary subject to a cap of maximum 5% of total CSR expenditure of the company in a financial year.¹¹

CSR EXPENDITURE AND INCOME TAX ACT, 1961

Before the introductions of Section 135 and CSRP Rules there were numerous judicial decisions that held that CSR expenditure will be considered as a part of the business expenditure under section 37(1).

Section 37(1) basically says that any expenditure which does not fall under the umbrella of revenue expenditure under Section 30 to Section 36 or is a capital expenditure or personal expenditure shall be considered as a business expenditure if it is wholly and exclusively for the purpose of business or profession shall be allowed as business expenditure while computing income from profit and gains from business or profession. While determining whether a transaction is wholly and exclusively for business purpose the courts of India have taken two stands, the first being that a businessman is the best judge for business expediency¹² and thus the questions whether the expenditure was prudent or necessary are irrelevant questions.¹³ And the second is that the first stand is no bar to the assessing officer from enquiring into the true nature of the transaction, whether it was truly entered into for business purpose or was for some other reasons.¹⁴ Thus the stance taken by the court depends on the circumstances of the case and each case is dealt with on its merits.

DISPUTATIONS

¹¹ Ibid at Rule 4 (2) MCA Notification on Companies' CSR Policy Amendment Rules 2016, Available on <http://caclub.in/companies-csr-policy-amendment-rules-2016-notified-by-mca/> Last accessed on 17/11/16

¹² *Jaipur Electro (P.) Ltd. v. CIT*, [1996] 134 CTR 237 (Raj)

¹³ *Narsingdas Surajmal Properties (P.) Ltd. v CIT*, [1981] 127 ITR 221 (Gau)

¹⁴ *Ramanand Sagar v. Dy. CIT*, [2002] 255 ITR 134 (Bom)

The area of dispute arises when it is examined and questioned whether CSR expenditure is a charge to the income or appropriation of income, a dispute that has not acquired any clarification yet. Schedule VII¹⁵ allows expenditure of various natures, for example:

Direct expenditure on charitable activities in local area

Direct expenditure on charitable activities

Direct expenditure on capacity building of employees and implementing NPOs

Grant to trust and societies

Transfer to other corporates under pooling of expenditure

Donation to Govt. recognised funds where 100% tax relief is available

Some of these such as grants, donations etc. cannot be charged as expenditure against income as they are voluntary appropriation of income, the schedule VII allows all these types of transactions as CSR expenditures.¹⁶ The words “shall ensure” in section 135(5) signify that there is a legal obligation to spend 2% of average net profit of the past three years on CSR activity. Thus, a valid argument that rises is that all CSR expenditure are seen by the legislature as mandatory and thus they cannot be an appropriation.

On the other hand, there are some CSR activities that are undertaken by the companies which result into creation of capital assets such as training facilities, treatment facilities, hospitals, schools etc., will they be categorized as capital expense or revenue expense? This of consequence because Section 37(1) of income tax provides expenditure deduction for expenditure that is not capital in nature. If such expenditure is categorised as capital expenditure, it may promote CSR expenditure which is not capital assets of taxpayers' ownership. According to judicial interpretation if the asset does not belong to taxpayer, the expenditure cannot be classified as capital expenditure.¹⁷

CSR EXPENDITURE EXEMPTIONS

¹⁵ See http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification3_2014.pdf

¹⁶ M. Fogla, PreBudget: Confusing and Debatable Issues in CSR (Taxmann), Available at:

<http://www.taxmann.com/file/t3/prebudgetconfusingdebatableissuesundercsr.aspx>, last seen on 17/11/16

¹⁷ [1996] 89 TAXMAN 92 (SC)

Exemption has been provided to CSR expenditure for payment of any sum to a public sector company or a local authority or an institution or an association approved by the National Committee for undertaking eligible scheme or project, under section 35 AC of Income Tax Act.¹⁸ The eligible projects or schemes as mentioned in Section 35 AC are specifically provided for in Rule 11K of the 1962 Rules.¹⁹ If rule 11K is analysed in detail it will be found that many of the guidelines of activities as recommended are compatible with the subjects given in the Schedule VII of the Companies Act, 2013.

JUDGEMENTS-CSR

Before the introduction of Section 135 there were a lot of judicial decisions in which the courts were faced with the question of if CSR expenditure under Companies Act 1956 is qualified as business expenditure under section 37(1) of the income tax act. The decisions do differ as per the factual situations however a common rule did appear from them- CSR expenditure qualified as business expenditure if “wholly and exclusively laid out for purpose of business or profession”

Few such judgments have been discussed below:

*Sri Venkata Satyanaryana Rice Mill Contractors Co. v. CIT*²⁰: The assessee was in the business of rice export from Andhra Pradesh. Before exporting rice a permit had to be obtained from the District Collector, which were granted only after payment was made to a welfare fund established by the District Collector. The assessee claimed the contributions made to the welfare fund as business expenditure. The ITO disallowed the deduction by holding that the said payment was neither mandatory nor statutory but was only discretionary and further that the welfare fund had not been approved for the purposes of S. 80G. The ITAT held that though there was no compulsion on the part of assessee to make contribution to welfare fund the scheme showed that an advantage would accrue for the benefit of the assessee on the payment of the contribution and, therefore, the same was allowable as deduction.

The Andhra Pradesh HC disallowed this deduction by adjudging this expenditure as a compulsory extraction and therefore contrary to public policy.

¹⁸ See <http://www.taxexemption.in/35ac.html>

¹⁹ See http://www.cainindia.org/news/7_2010/incometax_rules_rule_no_11k.html

²⁰ [1996] 89 TAXMAN 92 (SC)

On appeal, the Supreme Court reversed the decision of the HC and held this to be business expenditure. According to the Supreme Court, the correct test for determining the nature of business expenditure was not whether it was compulsory for the assessee to make the payment or not but commercial expediency²¹

*CIT v. Andhra Bank*²²: The assessee claimed an amount of Rs. 2,04,34,107 spent on Andhra Bank Rural Development Trust, which is engaged in conducting several trainings for providing self-employment to rural youth. After the training, the bank also provided finance to the rural youth. This amount, claimed by the assessee was disallowed by the Assessing Officer because this activity was nowhere related to banking and thus could not be claimed to be for business u/s 37 (1). The CIT (A) on consideration of the detailed objectives of the trust and the scheme conducted by the assessee of training and empowerment of rural youth allowed the expenditure.²³

*Krishna Sahkari Sakhar Karkhana v. CIT*²⁴: The assessee was a registered cooperative society which engaged in sale of sugar. It paid a sum to an Education Fund of the State Federal Society as required under S. 68 of the Maharashtra Cooperative Societies A. The cooperative society claimed deduction of the same as business expenditure. The ITO allowed the claim but the Commissioner set aside the assessment and directed disallowance of the claim. On appeal, the Tribunal upheld the disallowance stating that the contribution made by the assessee to the education fund was not “wholly and exclusively” for the benefit of the assessee and there was no relation between the contribution made by the assessee society and any advantage gained by it as a result thereof. On appeal, the Bombay HC allowed the expenditure u/s 37(1).²⁵

CONCLUSION

The explanation attached to section 37(1) has now made the concept of corporate social responsibility in the current demography more questionable and dismal. It excludes all CSR expenditure from under the umbrella of business expenditure as the CSRP Rules specify that only activities that are not taken for business purpose are termed as CSR activities. Also,

²¹ Ibid

²² MANU/IH/0457/2014, decided on 18/07/2014

²³ Ibid

²⁴ [2000] 112 TAXMAN 246 (Bom)

²⁵ Ibid

these leads to shelving of all the judgments discussed above and many more which had favoured the assesee-corporation in allowing taxation exemption for CSR activities.

The bill's explanatory memorandum states that CSR expenditure is not solely for carrying on business and thus is not allowed as a deduction under Section 37(1) of the Income Tax Act. Though it had been well established through judicial decisions that when income is used for self-imposed obligations it is constituted as application of income and where income moves out of an independent title it is diversion of income.²⁶

The aim of CSR policy is to include Corporate India in the development of the Indian society and give them the role of a stakeholder in the community. Section 30 to section 36 provides expenditure deductions for eligible projects which mean that the tendencies of the companies will shift towards spending in those areas only as they will want to get maximum tax benefit irrespective of the needs of the local area thus negatively affecting the fund flow in other social sector programmes. Thus, it can be concluded that the Financial Bill 2014 offers companies a mixed bag for CSR initiatives.

²⁶ M. Allirajan, 'Cos can avail tax benefits on CSR expenditure' (The Times of India, 04/09/2014), Available at <http://timesofindia.indiatimes.com/business/indiabusiness/CoscanavaltaxbenefitsforexpenditureonCSR/articleshow/41640139.cms>

BOOK REVIEW

Tanaya Agrawal*

**GORAS AND DESIS: MANAGING AGENCIES AND THE MAKING OF
CORPORATE INDIA**

Omkar Goswami¹; *Penguin Random House India; Gurgaon; 2016; 276 pp.*

Managing Agencies have been part of initial industrial development not only in India but everywhere in developing world where entrepreneurial talent was lacking and seed capital was hard to raise. The system of managing agencies allowed few persons to exercise control over large number of independent joint stock companies, without having to hold majority shareholding and have disproportionate control over cash flows. Generally, it involved raising capital for the company from public and then executing the contract with the company for providing the services of promotion, management, underwriting and financing of company. In lieu of these services, managing agency was to get fixed fees often called agency costs, share in revenue and profits and charges for providing other allied services. The profit so earned by managing agency was then used to raise capital for another business. It is these Managing Agencies which are at the centre of book “*Goras and Desis*”.

Chapter one of the book, “*Setting the Stage*”, as the name suggests is introductory in nature with writer explaining the concept of managing agency, their mode of functioning, reasons for their rapid growth especially like establishment of Calcutta Stock Exchange which facilitated raising of capital from vast number of people and other external events. He then emphasises on the difference between *Agency House* and *Managing Agency*, with former preceding the latter in antiquity.

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¹ Omkar Goswami secured his D.Phil from Oxford in 1982. From then to 1996, he researched and taught at the Delhi School of Economics, Tufts University, Jawaharlal Nehru University, Rutgers and Indian Statistical Institute and was consultant to World Bank, the Asian Development Bank and the Organisation for Economic Co-operation and Development. He also served as editor of Business India and as Chief Economist at the Confederation of Indian Industry. Since 2004, he runs a corporate and economic consulting firm called CERG Advisory.

Chapter two, begins with story of Dwarkanath Tagore also referred to as “The King of Calcutta” in the book, his enterprising nature and views on social matters. Dwarkanath Tagore was instrumental in setting up first managing agency “*Carr, Tagore and Company*” in partnership of William Carr and which got into hugely successful business of Steam navigation for ferrying coal from coal mines to markets. Chapter is also about his monumental failures in his foray in business of Salt, Ferries and Banking, which ultimately led to its liquidation. Of failures, most important is of Union Bank established to finance the agency’s businesses, but failure to diversify financing beyond indigo financing spelled doom. Perhaps his failure does provide a lesson or two for current banking enterprises where over-leverage in particular sector can be ruinous.

“*Year after year our trade increases*”, a statement by Scottish chairman of Indian Jute Mills Association, forms the title of Chapter three. As the name suggests this chapter deals with rise of managing agencies particularly after the liquidation of “*Carr, Tagore and Company*” covering period from 1875 till Independence. This chapter is divided in two parts, first of them covering time period between 1875-1929 and second of between 1930-1947. Beginning with the exploits of Scottish and British owned agencies like *Jardine Skinner, Arbuthnot, McLeod, Andrew Yule* in Calcutta, chapter later focuses on Indian entry in world of Managing Agency whether be it of *Birla* in Calcutta, *Parsis* in Bombay or *Gujaratis* in Ahmadabad. Chapter three in separate segments, thus, covers development of industries in field of Jute, Cotton, Coal, Cement and Construction, Shipping, Iron and Steel, Sugar and Tea.

India economy after Independence was based on Nehru’s vision of planned economy based on socialist principles, which involved greater control of private enterprise. Thus, story of Managing agencies after independence is of control and demise and this sets the theme for Chapter four of the book. Author in his book mentions several reasons for demise of Managing Agencies such as establishment of long term finance institutions like IDBI and ICICI which reduced the need to raise capital from public, rise of Multi National Corporations in India, nationalization of institutions, distrust of Nehru in private sector and most importantly Mundhra affair and Dalmia episode which finally led to termination of Managing Agencies in India, first in year 1967 in limited manner and later completely on 3rd April, 1970.

Fifth and final Chapter is mostly supplementary in nature devoted to system of Managing Agencies in other parts of the world *Zaibatsus* of Japan, *Chaebols* of Korea or *Taipans* of

Hongkong and similar systems elsewhere. Author also lays emphasis on certain practices similar to that of Managing Agencies being still carried out in India even after the termination of legal validity of the managing agencies.

This book thus provides a informative account of the Corporate India between the years of 1830's when Dwarkanath Tagore started the managing agency till 1970 which pulled the curtains on this system. There are, however certain shortcomings in the book such as segments within the chapters are sometimes incoherent which hamper the smooth flow of reading, nevertheless, book will prove to be an interesting read not only of the students of the subject but also to layman.