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INDIAN LEGAL IMPETUS

"Market abuse in the Securities Market - a broader interpretation"

FOREWORD

Manoj K Singh
Founding Partner

It gives me an immense pleasure to present to our dear readers the May, 2013 Edition of our Newsletter "*Indian Legal Impetus*" which is a blend of knowledge contributions relating to diverse areas of legal sphere which includes Litigation, IPR, Corporate, etc.

Indian market is growing at a fast pace. Companies are constantly striving to be ahead of their competitors and take leading positions in the market. In the race of the competition, some of the companies adopt unfair tactics and exploit the trust of public to make huge financial gains. One such practice is "***Market abuse***" which is discussed in the first article which has been given a broader interpretation by a recent judgment passed in March, 2013. The Second article titled '***Are gene patents a hindrance to innovation?***' throws light on the implications involved in granting monopolies to gene sequences An insight of the **enforceability of foreign arbitration** awards in India has been provided in the succeeding article.

Keeping in mind the vast development in science and technology, Indian Courts have started giving wider recognition to the role of expert opinion/evidence to reach a fair conclusion. The Article titled "***Relevancy of expert opinion before Court***" enlightens us on this aspect. The succeeding article gives a bird's eye view of the protocols and norms for ***assessing patent applications related to biotechnological and allied sciences inventions*** that are set by several provisions of Indian Patents Act, 1970. The sixth article provides the exposure to the concept of ***Optionally Fully Convertible Debentures (OFCD)***.

'Anticipation' is a prime criterion in assessing the novelty of an invention for granting a patent. However, there are situations where anticipations of invention are exempted and the same is dealt with by our next article '***What are not Anticipations under the Indian Patent's Act***'. The eight article cites various case laws on the judicial intervention on the ***enforceability of international arbitral awards in Indian scenario***.

The doctrine of ***Contra Proferentem*** is generally applied by the Judges to analyze the real intention of such agreement and the same is discussed in the succeeding article. Followed by it is another article that provides with the ***overview of the amendments of pleading***. Towards the end, is an article on aspects related to ***consumer protection rights*** which deals with the "maintainability of Consumer Compliant when the goods are meant for Commercial purposes."

The newsletter concludes with the quick glimpse of the latest developments in the various fields of law which have been summarized under the heading "**Newsbyte**".

We hope that this edition has been able to achieve its objective of providing you with significant information related to the legal arena. We invite your valuable suggestions and comments on improving our newsletter which would help us in making 'Indian Legal Impetus" more resourceful and informative. You may send your suggestions, opinions, queries and comments to **newsletter@singhassociates.in**

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EXPANDED SCOPE OF THE TERM "MARKET ABUSE" IN THE SECURITIES MARKET

Rohit K. Gupta

The term "Market Abuse", a practice that is against the laws laid down in SEBI Act and the Companies Act has been given a broader interpretation by the Hon'ble Apex Court vide its Judgment dated 26.04.2013 in the appeal titled as "***N. Narayanan vs. Adjudicating Officer, SEBI***" by a Bench of Hon'ble SC comprising K.S. Panicker Radhakrishnan and Dipak Misra, JJ[1].

Vide this judgment, Hon'ble Apex Court has demonstrated that "market abuse" has now become a common practice in the Indian security market and, if not properly curbed, the same would result in defeating the very object and purpose of SEBI Act which is intended to protect the interests of investors in securities and to promote the development of securities market.

The judgment speaks about the right and interest of investors. Prevention of market abuse and preservation of market integrity is the hallmark of Securities Law. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse.

Vide dismissing the above appeal, Hon'ble Court has held that the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company. Further, subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of "*acta exteriora indicant interiora secreta*" (meaning external actions reveals inner secrets) applies with all force.

While dismissing the appeal, Hon'ble Apex Court concluded that SEBI has rightly restrained the Appellant for a period of two years from the date of that order from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company and that the adjudicating officer has rightly imposed a penalty of Rs. 50 lakhs under Section 15HA of SEBI Act.

The ***brief facts***, which lead the filing of subject appeal, are as under:

The Appellate Jurisdiction of Hon'ble Apex Court has been invoked challenging a joint order dated 5.10.2012 passed in Appeal Nos. 28 and 29 of 2012 passed by Securities Appellate Tribunal, Mumbai (for short 'Tribunal') upholding the order passed by SEBI dated April 18, 2011 restraining the Appellant for a period of two years from buying, selling or dealing in securities as well as imposing a monetary penalty of Rs. 50 Lacs.

The Appellant was the promoter as well as a whole time Director of M/s. Pyramid Saimira Theatre Limited (PSTL), a company registered under the Companies Act, 1956. The shares of PSTL were listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange (NSE) at the relevant time. The company was involved in the business of Exhibition (Theatre), Film and Television,

1. Civil Appeal Nos. 4112-4113 of 2013 (D. No. 201 of 2013)

Content Production, Distribution, Hospitality, Food & Beverage, Animation and Gaming and Cine Advertising, etc. The company had nine Directors, including the Appellant himself. The investigation department of SEBI noticed that the company had committed serious irregularities in its books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements thereby violated the provisions of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003.

Consequently, a notice was issued to the Appellant and to the other Directors to show cause why appropriate directions as deemed fit and proper under Sections 11, 11B and 11(4) of the SEBI Act read with Regulation 11 of Regulations 2003 be not issued against them and subsequently another notice dated April 8, 2010 under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 was issued to the Directors to show cause why penalty be not imposed under Section 15HA of the SEBI Act for the alleged contravention of the provision of the Act.

The Appellant's main contention was that, though he was the Whole Time Director as well as Promoter of the company, yet was not involved in the day-to-day management of the company and that he was looking after the Human Resource Department of the company. Further, it was also stated that the financial statements, accounts etc. were prepared and duly audited by the statutory auditors, verified by the audit committees and reviewed by the managing Director and that, in the company, the role of each Director was confined to his field of operation and there was no justification for holding a Director to be in over-all charge and control of the affairs of the company. Further, it was also pointed out that the auditors were well versed in accounts and finance; therefore, there was no reason for the Directors who have no expertise or knowledge of the intricacies of the accounts and finance to suspect them or sit in judgment over their decisions. In such circumstances, it was contended, that there is no justification in debarring them from buying, selling or dealing in securities or accessing securities market or to impose penalty since there is no mens rea on the part of the Appellant in intentionally stating any untrue statement or preparing false records and that he has no role as such in preparing the accounts and finance of the company.

After considering personal hearing as well as written Submissions by the Appellant, the Board noticed following specific violations:

(a) manipulated accounts by fictitious entries;

(b) made false disclosures to the stock exchange;

(c) did not co-operate with the investigations, and

(d) did not maintain certain books of accounts.

On facts, all the above-mentioned violations had been established and consequently, the Whole Time Member (WTM) of SEBI, in exercise of the powers conferred on him, passed an order restraining the Appellant and other Directors for a period of two years and three years respectively from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market directly or indirectly and from being Director of any listed company and also held that the Appellant and other Directors are liable for monetary penalty under Section 15HA of SEBI Act whereby a penalty of Rs.50 Lacs was imposed on the Appellant

The above order was affirmed in an appeal by the Tribunal, the legality of which is the subject matter of this appeal.

Hon'ble Apex Court observed that the investigation had revealed that the financial results contained in the quarterly report filed with the stock exchanges contained inflated figures of the company's revenue profits, security deposits and receivables. Further, the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters pledged their shares to raise substantial funds from financial institutions.

The object and purpose of the Section 12A of SEBI Act and Regulations 3 and 4 of 2003 Regulations are to curb "market manipulation". As per Palmer's Company Law, "Market manipulation" is normally regarded as the "unwarranted" interference in the operation of ordinary market forces of supply and demand and thus undermines the "integrity" and efficiency of the market." Reference was also be made to the penalty provisions which is contained in Chapter VI A of the SEBI Act of which is mainly concerned with Section 15HA which deals with penalty for fraudulent and unfair trade practices and Section 15J which deals with the factors to be taken into account by the adjudicating officer while adjudging the quantum of penalty.

Hon'ble Supreme Court has observed that the company had made false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not in existence. The deposits shown were turned out to be not genuine but mere book entries to hide receivables in the balance sheet.

Negating the stand of the appellant that he was not conversant with the accounts and finance and was only dealing with the human resource management of the company, hence, he had no fraudulent intention to deceive the investors, the Hon'ble Court has held Directors of the companies, especially of the listed companies, have access to inside knowledge, such as, financial position of the company, dividend rates, annual accounts etc. Directors are expected to exercise the powers for the purposes for which they are conferred. Sometimes they may misuse their powers for their personal gain and makes false representations to the public for unlawful gain.

It was observed that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person.

It was further observed that after the declaration of financial results on January 31, 2008, containing inflated profits, revenues for the quarter ended on 31.12.2007, the Managing Directors of the company, his wife and the Appellant had together pledged 72, 75, 455 shares of the company with various banks and financial institutions and raised 97.30 crores as loans. We have noticed that the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company.

The conduct of the Appellant and Ors. was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15HA read with 15J of the SEBI Act and accordingly the appeal has been dismissed. ◆◆◆

ARE GENE PATENTS A HINDRANCE TO INNOVATION?

Mrinalini Gupta

Gene patenting has always been a controversial matter and due to the recent **revelation of Angelina Jolie's preventive double mastectomy**, the matter is again in limelight. Much of the ink has been spilt on Gene patenting ever since the issue of patenting of genetically modified organism arose in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

Myriad genetics, a Utah based private biotechnology company, has a monopoly on two genes called BRCA1 and BRCA2. Mutations in these genes can radically raise a woman's chance of developing breast or ovarian cancer. Since Myriad owns the patent rights on these two genes, it is the exclusive provider of the tests related to these genes in United States, thus blocking other diagnostic centres from offering tests based on these genes. Granting monopoly on a DNA sequence through gene patenting has direct impact on various other areas of worldwide medical research such as, drug designing, etc.

The genomics revolution brought about by the genome sequencing and mapping, cloning, selective expression, regulation and silencing of genes, prediction of the three-dimensional structures of a protein etc, has contributed a lot to the rapid development of health care & life sciences. These technologies along with genetic testing to predict a person's predisposition to genetic disorders, have tremendously improved the health care services. Patenting a gene sequence might impede the advancement of genetic testing which helps in detecting the risk of disease before the actual expressing of it. Gene patenting has, therefore, genuinely raised concerns pertaining to the scenario of the genetics research and its possible benefits to health sector.

THE CONTROVERSY

Patent is granted to an inventor for a limited period of time to encourage him and to have exclusive control over the innovation. While a patent is in force no one is allowed to use it without a license. The major issue in granting patent over a gene sequence is that the sequence normally becomes the property of the company which hinders any further research by another company. Further, from the point of view of a new researcher the increase in the number of gene patents can lead to negotiation of multiple licenses for the advancement of genomic research. Owing to the multiple licenses and royalty payments the cost of research and development is automatically increased. The burden of this increased cost is finally borne by the public.

Another issue which arises in patenting a gene is that they are naturally occurring substances and many countries, including India, bar products of nature from being patented. The thought that a biological material, such as set of genes, existing inside a person's body is owned by someone else is difficult to accept. For this reason, a DNA sequence or a gene is obviously held disqualified from patenting on the grounds that they are discovered and not invented. However, patents are still being granted to a gene sequence on the grounds that they are isolated from their natural environment, purified *in vitro* and then inventively reconfigured to give rise to a sequence that is new, inventive and has industrial application.

In addition to this, isolation of a specific DNA sequence, mutational analysis and further development of diagnostic methods is an expensive affair which uses huge amount of public funds. Thus, the public may end up paying double the amount- firstly for the research and secondly for high-priced diagnostic methods.

SCENARIO OF GENE PATENTS UNDER THE INDIAN PATENTS ACT, 1970

According to Section 3(c) of Patents Act, 1970 '*the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature*' is not considered patentable. Similarly, Section 3(j) renders '*plants and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals*' not patentable.

Thus, in the light of above mentioned Sections, simply isolating a gene from a living thing amounts to 'discovery' and not 'invention' and hence not patentable. That is to say, under the current Patent regime naturally occurring DNA sequences cannot be patented as such. They can only be patented when after isolating the sequence they are purified and chemically modified resulting into a sequence that is new, inventive and has industrial application.

Further, Section 3(i) says that inventions related to '*any process for the medicinal, surgical, curative, prophylactic, diagnostic therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products*' are not patentable. That is, the method of diagnosis practised on the human or animal body are strictly excluded from patenting. However, the diagnostic methods carried out on tissues or fluids, which have been permanently removed from the body fall under the category of patentable inventions provided that they also fulfil the other patentability criteria.

GENE PATENTS AS GATEKEEPER PATENTS

Gatekeeper patents are also known as Blocking Patents. It has been defined as "a patent relating to a particular area of technology which prevents another patent from being used because the other patent relies on technology covered by the first."[1] Genes are an essential element and starting point of many genomic researches. Therefore, if a patent is obtained over a gene, it can hinder the development of potential technologies which might be developed using the basic research technology. The patented basic gene sequence is said to guards the entry of other inventions/gene therapies using that basic sequence. Hence, those patented basic gene sequences are known as gatekeeper patents.

A patent is used as blocking patent by claiming all the essential features of the invention so that no new invention can be invented around it. To invent around it you have to have the license of the blocking patent.

In genomic research and diagnostics, having a patent over a gene sequence or a part of it can be regarded to obstruct the further development of genetic tests as it is impossible to devise an alternative way of testing the disease without using that patented gene sequence or a part of it. For instance, Human Genome Sciences Inc. (HGS), a biopharmaceutical company, obtained patent over a human gene CCR5 that was later identified to have key role in HIV infection. When the company filed the patent application for CCR5 in 1995, it had no clue that there was a link to AIDS. Later, when it was discovered by the scientists across the world that CCR5, a cell surface receptor, is used by Human Immunodeficiency Virus (HIV) to gain entry to a cell it was extensively feared that this patent would act as gatekeeper and would block further research on AIDS. However, HGS did not prevent scholars from undertaking unlicensed research on CCR5. On the other hand, if HGS had taken a contrary decision, it would have had created a calamitous impact on AIDS research.

CONCLUSION

A gene, though being a natural substance, qualifies the patentability criteria on the basis that are isolated from the body, purified *in vitro* and then inventively reconfigured to give rise to a sequence that is new, inventive and has industrial application.

The patent regime confers exclusive right upon the holder of the patent to make, use and sell that invention for a period of twenty years. As it is practically not possible for an individual to enlist all the mutations and potential gene therapies based on them at once, it can therefore be concluded that the monopoly granted to a patent holder over a gene sequence can exorbitantly elevate the costs of genomic research and further development of new gene therapies.. ◆◆◆

1. http://en.wiktionary.org/wiki/blocking_patent

FOREIGN ARBITRAL AWARD - TERRITORIAL JURISDICTION

Karan Gandhi & Tanya Srivastava[1]

Arbitration is understood as a method of alternate dispute resolution across the world and recognized as the most effective method of solving commercial disputes, especially those of an international dimension. Arbitration in India is governed in accordance with the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). Part II of the Act deals with the foreign awards and applies to the parties, member to the New York Convention. The enforceability of a foreign award in the countries where the parties to an arbitration agreement do not have any presence has been in discussions and are a subject matter of multiple interpretations. Section 44 of the Act defines "foreign award" as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. The Section further provides that the above mentioned provisions should be in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

ARBITRATION: AN AMICABLE MEASURE FOR DISPUTE RESOLUTION

The parties in the international commerce and businesses prefer arbitration as an amicable measure for resolving disputes alternate to the litigation process which is considered as a lengthy process. The rights evolved pursuant to the arbitral award can be of various natures and may be required to be enforced in other countries as the case may where the right accrued by the Arbitral Award lies.

RECOGNITION OF FOREIGN AWARD

Such right in a third country can be enforced after the execution of the Arbitral Award in that particular country. Section 46 of the Act provides the criterion as to when such foreign award would be binding on the parties. According to the said Section, any foreign award which would be enforceable shall be treated as binding for all the purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or any other purpose in any legal proceedings in India. Therefore, an Award may be recognized without being enforced, but if it is enforced, then it is necessarily recognized.

EVIDENCE

Section 47 of the Act provides the requirement as to the evidence, which are required for enforcement of the Arbitral Award. Section 47 of the Act reads as under:

1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-

a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b) the original agreement for arbitration or a duly certified thereof; and

c) Such evidence as may he necessary to prove that the award is a foreign award.

2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation- In this Section and all the following Sections of this Chapter," Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject- matter of the award if the same had been the subject- matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

1. Intern (New Law College, Bharati Vidyapeeth University, Pune)

According to Section 47 of the Act, any person applying for enforcing an Award in India shall produce before such court, the original award or a copy thereof (duly authenticated), Original Agreement for arbitration or a certified copy thereof, such evidence as may be required to prove that the award is a foreign award.

Further, the explanation to Section 47 of the Act, provides that the application is to be filed in the court where the subject matter of the award lies. The subject matter of an award can be of any nature which could be the part of the evidence as provided under Section 47 or any other relief which may arise during the course of Arbitration proceedings. For example, if the subject of an international arbitration is a licensing agreement between the parties, and the award provides certain other reliefs which are related to the intellectual property of either of the parties in some other country in which neither of the party has any actionable assets or claims lying, it may be necessary to enforce the foreign arbitral award in that third country. It can be said that, per se, the right/relief provided by a foreign arbitral award to a judgment debtor cannot be exploited in a third country until such foreign award is enforced in that particular country. Once such foreign award is enforced in such country, it would be the decree of such court and the rights conferred by such decree can be enforced.

The idea of enforcing the award in a country where there is no place of business of any of the parties, has been discussed and examined by various courts in the light of the extent of scope and jurisdiction of such courts .

THE EXTENT AND SCOPE OF JURISDICTION

In the case of Tata International Ltd. vs. Trisuns Chemical Industry Ltd.[2] Bombay High Court has held that, in an arbitration the Court would consider the subject matter of the arbitration; in the enforcement of the award the Court would consider the subject matter of the award as the determining factors. This stands to reason and logic. The subject matter of the arbitration may be a certain contract, a certain property., etc. The territorial jurisdiction of the Court would be where the contract was entered into or where the some or all the properties of the respondent would be. Once the arbitration is concluded and has to be enforced, it is the subject matter of the award which would have to be seen. That would be whether the award is a money award (analogous to a money decree in litigation) or a declaration or other relief with regard to a contract or a property. The award would have to be filed for its enforcement in a Court which would be able to enforce that award. It would be futile to file it where a cause of action may have arisen, if the respondent would have no properties in that jurisdiction. Similarly, it would be of little use to file it where the respondent resided or carried on business. It would have to be filed where the respondent would have properties, movable or immovable, which could be attached and sold in execution of the award.

The decision of the Bombay High Court was followed in the matter of Wireless Developers Inc Vs. India games Limited[3] where the Court held that, if the party has a foreign award in its favor it can seek to enforce the award in any part of the country where it is sought to be enforced as long as money is available or suit for recovery of money can be filed.

Moreover, the fact that the enforcement of an award can be made in the countries where the arbitration is held, the parties to the arbitration have their place of business or any other place as can be construed on perusal of the Judgment of the Hon'ble Supreme Court of India in the case of Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Limited, Saudi Arabia & Ors[4]. The Supreme Court was of the view that, the arbitration between the parties should be in a neutral forum. The parties may not have any assets under the jurisdiction of such neutral forum. The award cannot, therefore, be enforced there. Instead the enforcement of the award must be in a country where the properties of the judgment debtor would be. It is, therefore, held that foreign awards must, therefore, be recognizable and enforceable internationally and the

2. 2002(2) B.C.R. 88
3. 2012(3)MhLj449
4 AIR1994SC1715

place of such enforcement would not be chosen by the parties, but would depend upon the circumstances of each particular case.

CONCLUSION

From the above, it can be inferred that the territorial jurisdiction for enforcement of a Foreign Award can be understood by referring to the place where the right as conferred by the Award accrues. The territorial Jurisdiction of the Court for the purpose of a Foreign Arbitral Award applies on the rights conferred by such award and the test is to examine that whether it is required to enforce such foreign arbitral award in order to enforce such right or not. The settled principal in the regime of an international arbitration is the fact that the right vested by an international award in any country except the country in which such award is made can be exploited only when such foreign award is enforced in such country. Further, the territorial jurisdiction can be understood in the light of the subject matter of the award. ◆◆◆

RELEVANCY OF EXPERT OPINION BEFORE COURT

Rohit K. Gupta

Earlier, the Courts required expert evidence to some limited field i.e. medical doctors, engineers, architects, stockbrokers etc. With the vast development in science and technology, the need of expert opinion/evidence has now become very common as well as helpful to the Courts to reach upon a fair conclusion regarding commission of an offence. Today the role of experts has been widened and the Courts take their assistance in various aspects viz. ballistic experts, forensic experts, scientists who decide the legitimacy by DNA tests, chemical examiners, psychiatrists, radiologists and even track-dogs are playing a vital role in investigation of crimes and their evidence is admissible in the court of law.

When there is some technical issue or such issue which relates to foreign law or of science or art, or as to identity of handwriting or finger impressions and the Court has to form an opinion upon that point, then the opinion of skilled/experienced persons in their respective areas may be taken into consideration.

EXPERT EVIDENCE IN INDIAN EVIDENCE ACT

Expert evidence is covered under Ss.45-51 of Indian Evidence Act. S.45 of the Act allows that when the subject matter of enquiry related with science or art, as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to form correct judgment. It allows an expert to tender evidence on a particular fact in question and to show to the court that his findings are unbiased and scientific.S.46 of the Act states that facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinion of experts when such opinions are relevant. S.47 of the Indian Evidence Act exclusively deals with the opinion as to the handwriting. The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. The expert opinion is not confined to handwriting alone. The opinions in relation to customs are also admissible according to S. 48 of Indian Evidence Act.

The next question that arises is who can be called an Expert, what is the function of opinion given by expert in a matter before Court and further what is the character of opinion/advice adduced by an expert in forming opinion by the Court?

Hon'ble Supreme Court in the case titled as **Ramesh Chandra Agarwal v/s Regency Hospital Ltd.** has broadly dealt and interpreted the scenario and held that, an expert is a person who devotes his time and study to a special branch of learning. However, he might have acquired such knowledge by practice, observation or careful study. The expert is not acting as a judge or jury. It was further held that in order to bring the evidence of a witness, as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject. The real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials. An expert is not a witness of fact (like other witnesses) and his evidence is really of an advisory character. The duty of the expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria. No expert can claim that he could be absolutely sure that his opinion was correct.

Hon'ble Supreme Court has further laid down in the case titled as **State of Maharashtra v/s Damu s/o Gopinath Shinde and others, AIR 2000 SC 1691**, that mere assertion without mentioning the data or basis in support of his opinion is not evidence, even if it comes from an expert. It is held that such evidence though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value without examining the expert as a witness in Court. Therefore, no reliance can be placed on an opinion alone.

In the case titled as **Kabul Singh v/s Gurinder Singh**, opinion of the expert was sought regarding signatures put on a document. However, the expert also gave opinion that certain digits were changed which opinion was not sought for. The Hon'ble High Court of Punjab and Haryana held that such an opinion should be ignored and that expert should have confined himself to the relevant facts.

However, there is a probability to lean the opinion of private experts in favour of the party calling them. In such like cases, when there is a conflict of opinion between the experts, then the Court is competent to form its own opinion with regard to signatures on a document or such like matters.

Another important issue under consideration is that whether the Courts are bound by the opinion given by an expert on a particular fact in a case. Hon'ble Supreme Court has answered this question in the case titled as **Malay Kumar Ganguly v/s Dr. Sukumar Mukherjee**, wherein it has been held that, a Court is not bound by the evidence of the experts which is to a large extent advisory in nature. The Courts have full powers to derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes. The opinion could be admitted or denied. Whether such evidence could be admitted or how much weightage should be given thereto, lies within the domain and discretion of the Court. The evidence of an expert should, however, be interpreted like any other evidence.

Thus, it can be concluded that the expert opinion in numerous matters relating to identification of thumb impression, handwriting, footprints, fixing paternity, time of death, age of the parties, cause of death, possibility of the weapons used, disease, injury, sanity and insanity of the parties and other question of science or trade has become the need of hour and the person having required skill on that subject (called experts), are allowed to give their opinions in evidence as well as testify to facts/details leading to their opinion. The opinion of an expert having special skill in that particular field is relevant for the point of admissibility before the Court of law. There may be exceptions to this rule, in spite of it when there direct evidence is lacking, then to corroborate the existing evidence, expert opinion is sought. ◆◆◆

BIOTECHNOLOGY AND ALLIED SCIENCES PATENT PROVISIONS IN INDIA

Saipriya Balasubramanian

The biotechnological inventions majorly include products and/or processes of gene engineering technologies, methods of isolation of micro-organisms from culture medium, methods of mutation, cultures, mutants, transformants, plasmids, processes for making monoclonal antibodies, etc.,[1] Often, the focus is laid on controversial issues surrounding biotechnology patenting such as criteria for patenting plants and animals, the patenting of gene sequences and related morality issues. Contrary to the aforesaid issues, majority of biotechnology patent applications are decided on serious issues of patent system such as novelty, inventive step and industrial application as well as the sufficiency of disclosure and support of the description to the claims.

Biotech inventions are considered in the same light as the other inventions. The Patents Act, 1970, seeks to help the applicants as well as the examiners of patents as it covers not only at how the basic issues of protecting biotechnological inventions have been applied in the past but also at how they should be applied, subject to guidance from courts and the Intellectual Property Appellate Board (IPAB) in the context of recent developments in the technology. This article endeavors to throw light of such aspects and explicitly discusses the provisions with regard to patenting of biotechnological inventions.

PRIOR ART SEARCH

The draft guidelines issued by the Indian Patent Office on 25th March 2013 mandates the examiner to design a comprehensive search strategy by combining various search parameters including key words, IPC, sequences etc., and thorough search should be carried out in patent as well as non-patent literature. If a patent application consists a sequence listing of nucleotides or amino acids then Rule 9 (1) of the Patents Rule (2003), specifies that the same is to be filed by the applicant in electronic form[2]. A thorough search of the sequence has to be carried out by the examiner on the commercial databases available to the office using BLAST, FASTA, etc.

NOVELTY

It is mandated that novelty has to be assessed in the same manner as that for other inventions. Novelty has to be interpreted vis-à-vis prior art as provided under Section 13 of the Act. To ascertain novelty as per Sec 2(1)(j) of the Act, the following different kinds of claims can be evaluated namely,

1. Product-by-process claims: A claim describing a product should not be anticipated by a prior disclosure of that particular product per se regardless of the method of production of the product. The claimed product cannot be considered as novel, if the process by which it is produced is novel. In order to establish novelty, technical evidences are required to show that the modifications in the processes result in other products which are distinct with regard to their properties over the products known in the prior art.

2. Sequence claims: If any applicant claims that a polynucleotide sequence which was already available in a library is not novel, even if the function of that particular sequence was not previously characterized. If any sequence of a polynucleotide from a prior art doesn't match exactly to the claimed sequence of polynucleotide, then the subject matter is considered novel. The same applies to a polypeptide sequence.

3. Combination/Composition claims: The claims of combination of products of biotechnology are often missed out while assessing novelty instead is dealt

1 Guidelines For Examination of Biotechnology Applications For Patent, Office of The Controller General of Patents, Designs and Trade Marks, March 2013; available from http://www.ipindia.nic.in/whats_new/biotech_Guidelines_25March2013.pdf , (Last accessed on 03th June, 2013)

2 Manual of Patent Office Practice and Procedure, Office of The Controller General of Patents, Designs and Trade Marks, March 2011, available from http://www.ipindia.nic.in/ipr/patent/manual/HTML%20AND%20PDF/Manual%20of%20Patent%20Office%20Practice%20and%20Procedure%20-%20html/Front%20page.htm (Last accessed on 3thJune,2013) under the inventive step or other relevant clauses of Section 3 of the Act. However, since combination/ composition claims have already fallen into the public domain, they have to be dealt under novelty.

INVENTIVE STEP

According to the Patents Act, 1970, an invention will have inventive step if it is technically advanced or economically advanced when compared to the existing knowledge and it should be non-obvious to a person with ordinary skilled in that art. Example, structurally and functionally similar polynucleotide/polypeptide sequences are considered to be obvious. Similarly claim for a sequence with minor variations/mutations in the amino acid sequences which do not alter the activity and function of a protein sequence which is already in public domain cannot be patented due to the lack of inventive step. Therefore, the applicant should provide evidences to highlight the difference between the encoded protein disclosed in the prior art and that encoded by the claimed DNA for which a patent is being sought.

INDUSTRIAL APPLICATION

As per Section 2(1) (ac) of the Act, "Capable of industrial application" in relation to an invention, means that the invention is capable of being made or used in an industry. Mere discovering a gene sequence and the protein encoded by it doesn't ensure patent protection unless a distinct and credible use of the gene sequence is specified. To establish industrial applicability of a gene sequence, the use of the sequence and the significance of the product encoded by it has to be stated. Section 64(1) (g) of the Act provides that if the invention do not meet the criteria of industrial applicability, it is deemed to be revoked.

FRAGMENTS/EXPRESSED SEQUENCE TAGS (ESTS)

Fragments/ESTs are allowable only if they satisfy the question of usefulness and industrial application. A credible and substantial use of the EST should be disclosed. For Example, use of ESTs as a probe or chromosome marker to diagnose a specific disease condition.

It is mandated that adequate care has to be taken while examining inventions whose commercial exploitation is speculated to be contrary to public order, morality or causes serious prejudice to human, animal or plant life or to the environment as per the provisions mentioned in Section 3(b) of the Act. (e.g., cloning of mammals, modifications in the germ line and genetic identity of living organisms, terminator gene technology and use of human embryos)

As per Section 3(c) of the Act, the products such as microorganisms, nucleic acid sequences, proteins, enzymes, compounds, etc., which are directly isolated from nature are not patentable subject matter. However, the exception to this provision is the processes of isolation of these products can be considered subject to requirements of Section 2(1) (j) of the Act.

Section 3(d) of the Act provides that any minor modifications in the already existing substance in the prior art are not patentable unless the improved property or efficacy of the modified substance is established. With respect to biotechnology patent applications, section 3(d) is applicable to those inventions relating to a three-dimensional or crystal structure of a polypeptide unless it is proved that such polypeptide differs significantly in properties with regards to therapeutic efficacy.

Further, Section 3(e) establishes that a composition comprising a combination of substances naturally occurring in nature is not patentable subject matter unless the synergistic effect of the components is established. In the light of chemical and biotechnological sciences, Section 3(e) of the Act reflects the legislative intent on the law of patenting of combination inventions.

According to Section 3(h) of the Act, a method of agriculture (a method of spraying insecticide for controlling pests) or horticulture is not considered as patentable subject matter. Conventional methods performed on actual open fields should be construed as method of agriculture/horticulture.

Section 3(i) of the Act emphasizes that any method of treatment including diagnostic procedures or method of drug administration either to humans or animals are not patentable. Some inventors draft composition of drugs in certain dosage forms and claims that subject matter relates to application or administration of individual drugs. In such cases, although the claims are directed to a combination of drugs, but the claimed invention resides in the method of administration of individual drugs in the said manner and thus, it falls within the scope of Section 3 (i) of the Act. Patenting on gene based diagnostics is completely ruled out.

As per Section 3(c) of the Act, it is mandated that microorganisms are not patentable. It is implied also that only modified microorganisms are patentable subject matter under the Act. Claims relating to basic biological processes of growing plants, germination of seeds, of development stages of plants and animals are not patentable. In relation to biotechnological inventions, bio-informatics is relatively a new science that has evolved from the combination of information technology and biotechnology. Determination of patentability of inventions pertaining to bio-informatics is examined vis-à-vis the provisions mentioned under section 3(k) of the Act.

Section 10(4) of the Act requires that every complete specification shall fully and particularly describe the invention and its operation or its use and by the method by which it is to be performed. In case of biotechnological inventions, it is possible that the gene may play a vital role in the treatment of one or more of the listed diseases. But it is very unlikely that the gene or the protein it produces will have a role in all of the diseases. Such claims are made when the function of the protein is not fully characterized. Therefore the potential uses of the protein claimed are speculative. It is hence evident that if there is no evidence in the complete specification as filed that the gene/ polypeptide is of therapeutic or diagnostic use in the laundry list of different diseases listed, then the specification is insufficient.

Claims to antibodies that may have therapeutic or diagnostic potential are not valid if a role for the target protein in a specific disease has not been identified and proved by sufficient data.

Section 10(5) of the Act, provides that the claim(s) shall be clear and succinct and shall be fairly based on the matter disclosed in the specification. Also, the claim(s) of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept. In case of genetic engineering patent applications, it is very frequently observed that an application claim a large number of polynucleotide/polypeptide sequences. Lack of unity create problem during publication, examination and searching stage. Further, it is unclear whether the claimed sequence relates to a single invention or to a group of inventions linked so as to form a single inventive concept.

DEPOSIT OF BIOLOGICAL MATERIAL

The draft guidelines mandate that the biological material which cannot be described in a sufficient manner and which is not available to the public has to be deposited to an International Depository Authority (IDA) under the Budapest Treaty. The deposit is to be made before filing of the patent and a reference of the deposit is to be submitted within three months from the date of filing of the patent application in India. It is necessary for the inventory to correctly identify and indicate the characteristics which are to be included in the specifications and it should also include name, address of the depository institute and the date and number of the deposit. In India, Microbial Type Culture Collection (MTCC), Chandigarh is the International Deposit Authority (IDA).

THE BIODIVERSITY ACT, 2002

The BD Act came into force on 1st July 2004.The BD Act provides a mechanism to prevent the misappropriation of biological resources and traditional knowledge by introducing provisions for mandatory prior permission from the National Biodiversity Authority by the applicant for any patent application based on research or any information related to biological resources obtained from India.

According to this Act, the applicant has to provide a mandatory disclosure of the source and geographical origin of the biological material in the patent application. An applicant has also to provide a declaration in Form 1 of the Patent Rules, 2003 about the permission from the competent authority.

CONCLUSION

In addition to the basic patenting issues, special issues such as moral and ethical concerns, cloning of farm animals, stem cells, gene therapy, patenting of DNA and ESTs of gene sequences, etc., have also evolved. Therefore, setting norms and protocols for assessing biotechnological inventions poses challenges to the applicants for patents as well as to the Patent Office. In view of the aforesaid, the biotechnology and allied sciences patent provisions in India serves as a potential guide in order to establish uniform and consistent practice with regard to the patent applications made in the said technologies. ◆◆◆

OPTIONALLY FULLY CONVERTIBLE DEBENTURES – WHETHER SECURITIES OR NOT?

Yogesh Malhan

The Supreme Court on 31st August, 2012 in Sahara India Real Estate Corporation Limited ('SIRECL') and Sahara Housing Investment Corporation Limited ('SHICL"), & Ors., the Appellants) v.s Securities and Exchange Board of India & Anr. ('SEBI'), the respondents had passed a landmark judgment wherein, the Hon'ble Court ordered business conglomerate and leading sports sponsor Sahara to refund all the money together with interest which it collected from millions of small investors.

The matter came into the picture when SEBI, in November 2010, had restrained the two companies from raising funds in the form of Optionally Fully Convertible Debentures (OFCD), against which, Sahara got SEBI order in December 2010, stayed in Allahabad High Court. The Allahabad High Court in April 2011, ordered Sahara to approach the apex Court. In May 2011, the Supreme Court directed SEBI to continue its OFCD probe.

In June 2011, SEBI ordered the two companies to refund back the money to the investors, in response to which Sahara in July 2011, appealed in the Supreme Court stating that SEBI has no jurisdiction in the case. The Supreme Court, however, ordered Sahara to approach the Securities Appellate Tribunal (SAT). In October 2011, SAT upholds the SEBI order. In November 2011, Sahara challenges the order passed by SAT and obtains stay. But, finally on 31st August, 2012 the Hon'ble Supreme Court delivers the verdict against Sahara and ordered the companies to pay the collected amount i.e. Rs 24, 400 Crore + 15% interest to its 2.21 crore investors.

ISSUES RAISED/ COVERED UNDER SC JUDJEMENT	• To analyze the powers of the SEBI u/s 55A(b) of the Companies Act, 1956 to administer various provisions relating to issue and transfer of securities to the public by listed companies or companies which intend to get their securities listed on any recognized stock exchange in India • Whether appellants had violated the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ['DIP Guidelines'] and various regulations of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ['ICDR 2009'], • Whether Optionally Fully Convertible Debentures ('OFCDs') offered by the appellants should have been listed on any recognized stock exchange in India, being Public Issue u/s 73 read with Section 60B and allied provisions of the Companies Act • Whether OFCDs issued are securities under the Securities Contracts (Regulation) Act, 1956 ['SCR Act'].
DEFENCES BY SAHARA GROUP	SIRECL and SHICL had issued the OFCDs pursuant to a special resolution under Section 81(1A) of the Companies Act, 1956 passed on 3.3.2008 and 16.9.2009 respectively. • They had issued and circulated an Information Memorandum ('IM') prior to the opening of the offer and that Red Herring Prospectus ('RHP') issued by SIRECL dated 13.3.2008 was filed with RoC, U.P. and Uttarakhand and RHP issued by SIHCL dated 6.10.2009 was filed with RoC, Maharashtra. • OFCDs issued by the company would not fall under Sections 55A(a) • Company has specifically indicated in the RHP that they did not intend to get their securities listed on any recognized stock exchange

	• It was urged that Regulations 3 and 6 of ICDR 2009 would not apply, since there was no public issue either in the nature of an initial public offer or further public offer • It was also urged that OFCDs issued were in the nature of "hybrid" as defined u/s 2(19A) the Companies Act and SEBI did not have jurisdiction to administer those securities since Hybrid securities were not included in the definition of 'securities' under the SEBI Act, SCR Act etc. • It was also urged that such hybrids were issued in terms of u/s 60B of the Companies Act and, therefore, only the Central Government had the jurisdiction under Section 55A(c) of the Companies Act. Further, it was also pointed out that Sections 67 and 73 of the Companies Act could not be made applicable to Hybrid securities, so also the DIP Guidelines and ICDR 2009.
DETAILS OF THE ISSUE BY "SIRECL"	• SIRECL, in its Extraordinary General Meeting held on 3.3.2008, resolved through a special resolution passed u/s 81(1A) of the Companies Act to raise funds through unsecured OFCDs by way of private placement. • Company authorized its Board of Directors to decide the terms and conditions and revision thereof, namely, face value of each OFCD, minimum application size, tenure, conversion and interest rate. • Board of Directors, consequently, held a meeting on 10.3.2008 and resolved to issue unsecured OFCDs by way of private placement, the details of which were mentioned in the RHP filed with the Registrar of Companies ("RoC"), Kanpur. • SIRECL had specifically indicated in the RHP that they did not intend to get their securities listed on any recognized stock exchange • It was also stated in the RHP that only those persons to whom the IM was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply • SIRECL, under Section 60B of the Companies Act, filed the RHP before the RoC, Uttar Pradesh on 13.3.2008, which was registered on 18.3.2008. • In April 2008, circulated IM along with the application forms to its so called friends, associated group companies, workers/employees and other individuals associated with Sahara Group for subscribing to the OFCDs by way of private placement • IM carried a recital that it was private and confidential and not for circulation.
PURPOSE FOR WHICH MONEY RAISEDBY "SIRECL"	• To carry out infrastructural activities and the amount collected from the issue would be utilized in financing the completion of projects, namely, establishing/constructing the bridges, modernizing or setting up of airports, rail system or any other projects which might be allotted to the company from time to time in future • Intention of the company to engage in the business of electric power generation and transmission

NATURE OF SECURITIES ISSUED BY "SIRECL"	Particulars	Nature of OFCD's		
		Abode Bond	Real Estate bond	Nirmaan Board
	Tenure	120 months	60 months	48 months
	Face Falue	Rs. 5000/-	Rs. 12000/-	Rs. 5000/-
	Redemption Value	Rs. 15530/-	Rs. 15254/-	Rs. 7728/-
	Early Redemption	After 60 months	NIL	After 18 months
	Conversion	On completion of 120 months	On completion of 60 months	On completion of 48 months
	Min. Application Size	Rs. 5000/-	Rs. 12000/-	Rs. 5000/-
	Nominee System	Double Nominee	Double Nominee	Double Nominee
	Transfer	Yes	Yes	Yes
DETAILS OF MONEY RAISED BY "SIRECL"	• Company floated the issue of the OFCDs as an open ended scheme • Collected an amount of Rs.19400.87 Crores from 25.4.2008 to 13.4.2011. • Company had a total collection of Rs.17656.53 Crores as on 31.8.2011, after meeting the demand for premature redemption • The above mentioned amounts were collected from 2,21,07,271 investors			
DETAILS OF THE ISSUE BY "SHICL"	• SHICL, a member of Sahara Group companies, also convened an Annual General Meeting on 16.9.2009 to raise funds by issue of OFCDs, by way of private placement • RHP was filled on 6.10.2009 u/s 60B of the Companies Act with the RoC,Mumbai, Maharashtra, which was registered on 15.10.2009.			
NATURE OF OFCD'S ISSUED BY "SHICL"	• OFCDs of the nature of Housing Bond; conversion price of Rs.5,000/- for each five bonds • OFCDs of the nature of Income Bond, conversion price of Rs.6,000/- for six bonds; • OFCDs of the nature of Multiple Bond, conversion price of Rs.24,000/- for two bonds. • Interest accrued on each of the three types of bonds was to be refunded to the bond holders.			
DETAILS OF MONEY RAISED BY "SHICL"	• Collected an amount of Rs.6,380.50 crores till 13.4.2011. • Company had a total collection of Rs.6,373.20 crores as on 31.8.2011, after meeting the demand for premature redemption • The above mentioned amounts were collected from 11.78 lakhs investors			
PERSONS TO WHOM ISSUE WAS MADE BY "SIRECL" & "SHICL"	• Issue was subjected to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara Group of Companies (for short 'Sahara Group') without giving any advertisement to general public.			

INTRODUCTION OF SEBI & SAT INTO THE MATTER	• SEBI, had come to know of the large scale collection of money from the public by Saharas through OFCDs, while processing the RHP submitted by Sahara Prime City Limited, another Company of the Sahara Group, on 12.1.2010 for its initial public offer. • SEBI then addressed a letter dated 12.1.2010 to Enam Securities Private Limited, merchant bankers of Sahara Prime City Limited about the complaint received from one Roshan Lal alleging that Sahara Group was issuing Housing bonds without complying with Rules/Regulations/Guidelines issued by RBI/MCA/NHB. • SEBI issued a show cause notice dated 24.11.2010 informing both SIRECL and SHICL that issuance of OFCD's are public issue and therefore liable to be listed u/s 73 of Companies Act and also directed to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, since they had violated the provisions of the Companies Act, SEBI Act, erstwhile DIP Guidelines and ICDR 2009. • SIRECL had challenged the show-cause-notice dated 24.11.1010 before the Allahabad High Court, Lucknow Bench which the court had stayed on 13.12.2010 but it permitted SEBI to proceed with its against both the companies. • SEBI took up the matter before this Court in S.L.P. (Civil) No. 36445 of 2010 and this Court did not interfere with the interim order, but ordered early disposal of the writ petition. • SEBI pointed out the fact before the High Court, that SIRECL is not supplying the necessary information as desired and after considering the facts the Court vacated the interim order dated 13.12.2010. • SEBI passed its final order through its whole-time member on 23.6.2011 and upheld its previous order. • Appellants, aggrieved by the above mentioned order of SEBI, filed Appeal Nos. 131 of 2011 and 132 of 2011 before the Securities Appellant Tribunal (SAT) and the Tribunal passed a common order on 18.10.2011.
INTRODUCTION OF SUPREME COURT INTO THE MATTER	• Appellants, aggrieved by the order of SEBI, filed an appeal before the Securities Appellate Tribunal (SAT) and the Tribunal passed a common order on 18.10.2011 directing Sahara to refund the money to the investors. • Aggrieved by the order of SAT, SIRECL and SHICL filed an appeal before this Court u/s 15Z of the SEBI Act which came up for admission on 28.11.2011
SUPREME COURT JUDGEMENTAS ON 31.08.2012	• OFCDs issued by Saharas were public issue of debentures, hence securities • If there is an intention to issue shares or debentures to the public, it is/was obligatory to make an application to one or more recognized stock exchanges, prior to such issue. • Registration of RHPs to ROC does not mean that the mandatory provisions of Sections 67(3), 73(1) and DIP Guidelines be not followed. • Saharas could not have filed RHP or any Prospectus with RoC, without submitting the same to SEBI under Clauses 1.4, 2.1.1. and 2.1.4 of DIP Guidelines • Unlisted companies like Saharas when made an offer of shares or debentures to fifty or more persons, it was mandatory to follow the legal requirements of listing their securities.

	• Once the number 49 is crossed, the proviso to Section 67(3) becomes effective and it is an issue to the public, which attracts Section 73(1) and an application for listing becomes mandatory which fall under the administration of SEBI u/s 55A(1)(b) of the Companies Act. • SEBI u/s 11A of SEBI Act has a duty to protect the interests of investors in securities either listed or which are required to be listed under the law or intended to be listed. U/S 11B, SEBI has the power to issue appropriate directions in the interests of investors in securities and securities market to any person who is associated with securities market. • SEBI, in the facts and circumstances of the case, has rightly claimed jurisdiction over the OFCDs issued by Saharas. Saharas have no right to collect Rs.27,000 crores from three million (3 crore investors) without complying with any regulatory provisions contained in the Companies Act, SEBI Act, Rules and Regulations already discussed.
OTHER UPDATES	• Supreme Court on 19.10.2012 declined the application filled by the appellants for interlocutory orders in respect of the judgment dated 31.08.2012. • Supreme Court in dated 08.01.2013 also dismissed the review petition filled by the appellants. • Supreme Court in dated 02.05.2013 has stayed all further proceedings pending before the Securities Appellate Tribunal, Mumbai and before the High Court of Judicature at Allahabad, Lucknow Bench, in order to verify if the appellants have complied with the various conditions stipulate in its order dated 31.08.2012. • On 08.05.2013 it was held that the money so far deposited by appellants to be refunded to the genuine investors, with interest, after verifying the genuineness of the documents. • The next date of hearing regarding the matter has been fixed on 17.07.2013

OBSERVATION

- The Optionally Fully Convertible Debentures ('OFCDs') issued by the SAHARA Group were hybrid in nature and as defined u/s 2(19A) of Companies Act, 1956 *"hybrid" means any security which has the character of more than one type of security, including their derivatives*. The Optionally Fully Convertible Debenture is a kind of debenture which can be converted into shares at the expiry of a certain period at a predetermined price, if the debt holder (investor) wishes to do so. The *"securities" as defined u/s 2(45AA) of Companies Act means securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956, and includes hybrids*.

The "*securities*" as defined u/s 2 (h) of Securities Contract (Regulation) Act, 1956 *include -*

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;]

(ic)security receipt as defined in clause (zg) of section 2 of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;]

(id) units or any other such instrument issued to the investors under any mutual fund scheme;]

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities;

Hence after analyzing the above definitions of "OFCD", "hybrid" and "securities" it could be rightly concluded that an OFCD being a hybrid security falls under the definition of "securities" as defined u/s 2 (h) of Securities Contract (Regulation) Act, 1956 and u/s 2(45AA) of Companies Act, 1956 as it inherits the characteristics of debentures initially and also that of the shares at a later stage if the option to convert the securities into shares being exercised by the security holder. Therefore the Securities Exchange Board of India has the powers to administer the same.

- Passing of Special Resolution u/s 81(1A) of Companies Act, 1956 for preferential allotment by Private Placement of OFCDs does not confers the right to the company to issue such securities to large number of people. The company is bound to comply with the other applicable laws as once the number 49 is crossed, the proviso to Section 67(3) of Companies Act becomes effective and it is considered to be an issue to the public, which attracts Section 73(1) of Companies Act and an application for listing of such securities on any recognized stock exchange in India becomes mandatory which fall under the administration of SEBI u/s 55A(1)(b) of the Companies Act. Moreover the company is also bound to comply with the relevant provisions of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ['DIP Guidelines'] and various regulations of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ['ICDR 2009'] related to an issue to the public.

- The submission of Information Memorandum ('IM') and that Red Herring Prospectus ('RHP') u/s 60B of the Companies Act with Registrar of Companies ("ROC") doesn't implies that the company has complied with all the provisions of the said act. The company also needs to file the same to the SEBI for its scrutiny on the ground of being an issue to the public and the involvement of the stake of large number of people.

CONCLUSION

In the light of the above, it can be concluded that the Optionally Fully Convertible Debentures or any other security issued by any company no matter whether it is listed or unlisted, private or public if issued to the public whether by way of public issue or private placement or any other manner would come under the jurisdiction of Securities Exchange Board of India if the number of the persons to whom allotment is made exceeds 49 (forty nine) as the proviso to Section 67(3) becomes effective which attracts Section 73(1) and an application for listing becomes mandatory which fall under the administration of SEBI u/s 55A(1)(b) of the Companies Act. ◆◆◆

WHAT ARE NOT ANTICIPATIONS: EXCEPTIONS PROVIDED UNDER THE INDIAN PATENTS ACT

Kailash Choudhary

One of the first and foremost conditions for the grant of patent is that the invention should be new or novel. In other words, it can be said that the invention should not be anticipated by any publication anywhere in the World. However, it is very difficult to preserve the invention before applying for the grant of patent. In the normal course of development of an invention, many people may be involved in the same or due to the nature of the invention, same is required to be worked out or its results are to be analyzed in order to ascertain the effectiveness or efficiency. So in nutshell, it is nearly impossible to keep the invention private so as not to become public and cause problems in getting patent protection. The Indian Patent Act, 1970 (hereinafter "Act") has provided various provisions wherein exceptions are provided for anticipation. In the present article, endeavor is made to explain the provisions of the Act related to anticipation.

Chapter VIII, sections 29 to 34 of the Act deal with the situations where anticipation of invention is exempted.

SECTION 29: ANTICIPATION BY PREVIOUS PUBLICATION

This section states that the invention claimed in a patent application shall not be deemed to be anticipated by reason only that the same was published in a patent application made in India and dated before 1st January, 1912.

Further, it provides that an invention will not be deemed to be anticipated by reason that the same was published before the priority date, if the applicant proves that the matter was published without his consent or without the consent of person from whom he derives the title and after getting knowledge of such publication, application for the grant of patent was made as soon as reasonable practicable. However, the above will not be applicable where the invention is commercially worked in India before the priority date of the invention with the consent of the applicant.

It also states that an invention claimed in a patent application shall not be anticipated by reason only that any other application filed for the same invention is in contravention of the rights of the applicant or by reason only that after the date of filing of other application, the invention was published or used by that other person without the consent of the first applicant.

SECTION 30: ANTICIPATION BY PREVIOUS COMMUNICATION TO GOVERNMENT

An invention shall not be deemed to be anticipated by reason that the same was communicated to the government to investigate the invention or its merits.

SECTION 31: ANTICIPATION BY PUBLIC DISPLAY

This is an important section dealing with the anticipation by public display at an industrial or other exhibition. According to this section, an invention will not be anticipated by public display at industrial exhibition or publication of description of the invention or use of the invention in consequence of such display or disclosure of invention before the learned society by the applicant or any person deriving title from him.

Further, the invention will not be anticipated by use of the invention after such display or use at an exhibition, by any other person without the consent of the applicant

However, in order to claim the benefit of the above, the application for grant of patent shall be made within 12 months from the first disclosure of invention at such industrial or other exhibition or reading or publication of the paper.

SECTION 32: ANTICIPATION BY PUBLIC WORKING

The invention shall not be anticipated by public working in India at any time within one year before the priority date of the invention by the applicant or any person deriving title from him. Provided that the working was affected for the purpose of reasonable trial or the working was necessary, having regard to the nature of the invention.

The above sections 31 and 32 provide for 12 months time period, also termed as "grace period", for filing of an application for grant of patent after the public display or use of the invention. Most of the countries including United States and EU also provide for the same type of exception. This is an opportunity provided to the inventors who has mistakenly or in good faith, displayed or used the invention publicly before applying for the grant of patents.

SECTION 33: ANTICIPATION BY USE AND PUBLICATION AFTER PROVISIONAL SPECIFICATION

According to the above section, the invention shall not be refused to grant the patent and the patent shall not be revoked by reason that the matter described in the provisional specification was used in India or published in India or elsewhere at any time after the date of filing of that specification. Further, in case of convention application filed in India, the invention will not be refused to grant or revoked by reason that the same was used in India or published in India or elsewhere at any time after the priority date of the application.

SECTION 34: NO ANTICIPATION IF CIRCUMSTANCES ARE ONLY AS DESCRIBED IN SECTIONS 29, 30, 31 AND 32

The above sections state that notwithstanding anything contained in the Act, the Controller shall not refuse to grant a patent and a patent shall not be revoked or invalidated by reason of any circumstances which, by virtue of sections 29, 30, 31 and 32, do not constitute anticipation.

CONCLUSION

By the way of above exceptions, an opportunity is provided to the legitimate inventors or applicants to secure the patent rights despite of making the invention public or use of the same publicly under certain circumstances. It is important to protect the rights of the inventors who have, due to ignorance of the laws or in good faith, published their inventions in any exhibition or tested the working of the invention in public. Based on the above, it can be concluded that the Indian Patent Act, being at par with the laws of the other developed countries, provides for exception to the anticipation under certain circumstances. ◆◆◆

INTERNATIONAL ARBITRAL AWARDS: JUDICIAL INTERVENTION REDEFINED

Akshay Malhotra

INTERNATIONAL SCENARIO: OVERVIEW

Arbitration is an alternate means of resolving conflicts wherein an impartial Arbitrator is appointed to settle the dispute without the need to proceed with formal court proceedings. Nowadays, Arbitration is often used to resolve disputes related to commercial transactions, particularly international commercial transactions owing to ever so evolving international trade and commerce across the borders. Arbitration is perceived as a dominant method of resolving International trade disputes as it is expeditious in nature as compared to formal court proceedings and can be enforced in other countries. In recent past, upsurge in globalization and international trade has paved way for commercial contracts between Indian & Foreign Companies. These commercial contracts are becoming more international in character owing to a global integration.

Increasing competitiveness often leads to conflicts between entrepreneurs resulting in commercial disputes between the parties obliged by commercial contracts. Foreign investors have acknowledged Arbitration as an effective dispute resolution mechanism as it can achieve equitable solutions more swiftly as compared to formal court procedures, it is cost effective, it is confidential and allows the parties to decide seat of Arbitration proceedings. Hence, it is the need of the hour to ensure restricted judicial intervention in the Arbitration seated outside India.

In India, Arbitration is governed by the Arbitration & Conciliation Act, 1996 which is based on United Nations Commission on International Trade law (UNICATRAL) model law on International Commercial Arbitration. India is also a signatory to New York Convention (1960) and Geneva Convention (1924).

INTERNATIONAL & DOMESTIC ENFORCEMENT REGIME : COMPARISON

Part I of the Arbitration and Conciliation Act, 1996 deals with provisions for domestic Arbitral procedures whereas Part II of the Act deals with the enforcement of international awards governed by the New York Convention or the Geneva Convention. A domestic award passed within the territory of India can be challenged under Section 34 of the Act. A domestic Award is enforceable as a decree passed by a Civil Court after the period provided for challenge is over or if challenged, the challenge fails (Section 36). However, provision for enforcement of foreign award is provided under Section 49 of Arbitration & Conciliation Act, 1996. The procedure set out in this section ensures legality, validity and existence of an award so that it can be executed as a decree of the court. In case of a foreign Award, the party seeking enforcement has to satisfy the court that the award is enforceable under Section 49 of the Act. The award becomes enforceable as a decree passed by the Civil Court if the party succeeds in satisfying the court about the enforceability of the award. Similarly, an International Arbitral Award can also be challenged under Section 48 (2) of the Arbitration & Conciliation Act, 1996 which provides:

"Enforcement of an arbitral award may also be refused if the court finds that –

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of India

(b) Or if the enforcement of award would be contrary to the public policy of India." [1]

Thus, an international award whether under New York Convention or Geneva Convention cannot be enforced if the award relates to a matter which cannot be settled under Indian Law or if the award is contrary to the Public Policy of India.

CASE LAW STUDY : HISTORY

Arbitration & Conciliation Act, 1996 provides for provisions for enforcement of International awards under Part II of the Act. However, in the past there was an ambiguity if Part I of the Act is also applicable to

1. Law of Arbitration & Conciliation by Justice R.S Bachawat international awards. Indian courts have applied Part I of the Arbitration Act, 1996 to an award passed in International Commercial Arbitration seated outside India. In **Bhatia International Vs Bulk Trading S.A. and Anr.**[2] it was held that "*in cases of international commercial arbitration held out of India the provisions of Part I would apply unless the parties to agreement whether express or implied exclude all or any of the provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply*". Same view was upheld in another judgment passed by Supreme Court of India, in **Venture Global Engineering Vs Satyam Computer Services Ltd.**[3] *it was held that a foreign award can be set aside by an Indian court under Section 34 of the Act*. This view taken by the Supreme Court of India received a lot of criticism as it was not at par with the observations made in foreign judgments such as **Empresa Colombiana de Vias Ferreas Vs Drummond Ltd.**[4] wherein a challenge to a French ICC arbitral award was turned down by the Columbian Courts. Same view was upheld by the Courts of United States of America and other foreign Courts.

LATEST SUPREME COURT RULING: KEY IMPLICATIONS

The Supreme Court of India has recently dealt with the issue of applicability of Part I of the Act to the International Awards and overruled the judgments passed in **Bhatia International and Venture Global Engineering.** Recently**, Bharat Aluminum Co. Vs Kaiser Aluminum Technical Service [C.A 7019 of 2005]**[5] and other matters were placed before Constitutional Bench to decide the confusion whether Part I of Arbitration & Conciliation Act, 1996 would apply to International Arbitral Awards or not. In a detailed judgment passed in *Bharat Aluminum Co*, the Constitutional Bench was of the view that there is no provision under Code of Civil Procedure or Arbitration & Conciliation Act for a Court to grant *interim measures* in an Arbitration seated outside India even if the parties by Agreement have made Arbitration Act, 1996 as the governing law of Arbitration. Further, the applicability of Section 34 of the Act to the International Arbitral awards has also been clarified in the judgment. It was held that Section 34 of the Act would have no application to International Commercial Arbitration seated outside India. The court further held that no application for interim relief will be maintainable in Indian Court either by Arbitration or by filing a suit. However, the judgment has a prospective applicability and is only applicable to Arbitration Agreements drafted subsequent to 6th September, 2012. Therefore, this will create ambiguity amongst the Arbitration Agreements executed before 6th September, 2012 and a certain amount of uncertainty will still prevail.

CONCLUSION

Following the decision in *Bharat Aluminum Co.* a foreign award cannot be set aside under Section 34 of Arbitration Act, 1996. This judgment has settled the confusion of applicability of Part I of the Arbitration Act, 1996 to an International Arbitral Award which is seated outside India. In past, the view taken in *Bhatia International and Venture Global Engineering* by the Apex Court received massive criticism as it allowed the International Awards to be challenged under Section 34 of the Arbitration Act, 1996. In guise of this settled law, not only were the International Awards challenged under Section 34 of the Act but the parties used to approach the Courts of India for an interim relief under Section 9 of the Arbitration Act and even under Order 39 of Code of Civil Procedure. This approach jeopardized the whole object of the Act as the parties seeking to delay Arbitration proceedings were entertained by the Indian Courts which caused immense prejudice to the opposite parties. Now as a result of this judgment, the foreign awards (passed outside India) cannot be challenged under Section 34 of Arbitration & Conciliation Act, 1996 and the parties seeking to resist the enforcement of the award has to take recourse to one of the grounds provided under Section 48 of the Act. Further, interim remedies under Section 9 of the Act have also been restricted where the Arbitration is seated outside India.

Thus, the intervention of Indian Courts has been minimized to provide a platform for an effective and efficient dispute resolution mechanism. This proactive approach taken by Indian judiciary will be appreciated by jurists all over the world. ◆◆◆

2 AIR 2002 SC 1432
3 AIR 2008 SC 1061
4 Yearbook of Commercial Arbitration, Vol. XXIX (2004), Columbia No. 4, P.643
5. Available at http://supremecourtofindia.nic.in/outtoday/ac701905p.pdf

DOCTRINE OF CONTRA - PROFERENTEM IN CONTRACTS

Arvind Thapliyal & Rishabh Mishra[1]

The need for interpreting a contract can arise in two situations. Firstly, if the Judge or Arbitrator is of that opinion that "a gap is needed to be filled" in order to interpret the Contract and secondly, if she/he believes that "an ambiguity is needed to be resolved" in order to find the correct intention of the contract. The Doctrine of ***Contra Proferentem*** is generally applied by the Judges in the later case where a contract appears ambiguous to them.

With the passage of time, the Judges have started appreciating the significance of this doctrine. This doctrine which has derived its essence from Insurance law, applies in a situation when a provision in the contract can be interpreted in more than one way.[2] In that case, the court will prefer the interpretation which is more favorable to the party which has not drafted the agreement. In other words, the Judge will be more oriented towards the interpretation which goes against the party who has inserted the **ambiguous** or the disputed clause in the agreement.

RELEVANCY

In this epoch of Globalization, normally the Corporate giants frame their agreement in such way, that the ultimate user or the consumer is left with no choice but to sign it. At that moment, the doctrine of ***Contra Proferentem*** is helpful to protect the rights of the Consumers. Sometimes, even in a perfect agreement, an interpretive problem may arise.

If one observes the judicial trend in Insurance law keenly, he/she will notice that in several cases the Judges have applied this doctrine against the insurer. The reason behind is that normally their policy is a contract of adhesion in which the other party is left with hardly any bargaining power, compare to the insurer. The justification for this doctrine is that many a times, the parties to a contract do not stand at the same level while signing it, and it has been noticed that usually one party dominates on the other. For example, in Standard form contract, the party framing the contract is the one at higher footing and the other party has very less or no bargaining power at all. Thus, to save such parties from the abuse of such clauses in the agreement which may be interpreted both ways, the valid interpretation is taken to be the one which favors the one who had no part in inserting such clauses in the agreement.

Contra- Proferentem places the cost of losses on the party who was in the best position to avoid the harm.

AMBIGOUS CONTRACT TERMS

The precondition for the applicability of this Doctrine is the existence of ambiguity. In a recent celebrated case of *Horne Coupar v. Velletta & Company*[3], the Supreme Court of British Columbia observed that ambiguity in the contract is a requisite of the application of this rule, however, once ambiguity is established, the rule is fairly straightforward in application.[4]

Similarly in India, the Judges have adopted a similar line of reasoning in the cases involving ambiguous contract. In *Bank of India vs. K. Mohan Das*[5] where the question arose with respect to the interpretation of some of the provisions of the voluntary retirement scheme of 2000 of the appellant bank, Judge Lodhia opined that as it was the bank who ultimately formulated the terms in the Contractual Scheme which stated "*the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995,*"therefore, they bear the risk of lack of clarity, if any.[6] He further said that in these kind of cases the interpretation against the party is preferred who have drafted the policy or agreement.

1 Intern

2 See, Nirmal Goel, Doctrine of Contra- Proferentem in Contracts Management, Central Vigilance Commission, available at http://cvc.nic.in/r_CTE22032011.pdf

3 See, Horne Coupar v. Velletta & Company, 2010 BCSC 483

4 Ibid

5 See, Bank of India vs. K. Mohan Das, 2009 (5) SCC 313

6 Ibid

COMMON LAW DEVELOPMENT OF THE DOCTRINE AGAINST THE EXCLUSION OF LIABILITY CLAUSES

An exclusion clause or exemption clause is a term in a contract which restricts the liability or rights of the parties to the contract. There are several ways in which a party may curb or reduce its liability in a contract. For example, a party can insert a clause under which for certain types of losses, the party will not be liable to pay.

Likewise, in many common law countries, particularly in Britain, the courts have taken a similar stand whereby if the court notices that the terms are framed in such a way to exclude or limit a party's liability, then the court will use the Doctrine of ***Contra Proferentem*** and construct the term against the party which is getting benefitted from the exemption clause.[7] But it is important to keep a fact at the back of one's mind while dealing with the exemption clause and that is, the court do not go through similar rigorous exercise, where the clause merely limits (instead of excluding) liability. At this juncture, the Court will look into whether the intention of the party is to exclude or limit liability has been appropriately explained to the other party or not.

Lord Morton laid down very comprehensive guideline which is to be followed by the parties if they wish to exclude the 'negligent act' from the contract. He said "*if the clause contains language which expressly exempts the person in whose favor it is made from the consequence from the negligence of his own servants, effect must be given to that provision.*"[8] Although, the approach is stated in terms of excluding liability of the acts of the defendant's servant, but will equally apply to the situation where the defendants is directly liable for negligence.

Borrowing from the same line of reasoning, it was held in *Monarch Airlines Ltd. London Luton Airport*[9] that the clause *"act, omission neglect or default"* will undoubtedly include the act of negligence.

The most important task of the Judges while interpreting the agreement is to honor the intention of the parties who have knowingly signed the contract. Based on this statement, the court in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*[10] established that even though the agreement had general exclusion for misrepresentation in 'truth of statement' clause but still fraudulent misrepresentation and non disclosure cannot be done. Only the innocent and negligent misrepresentation and non disclosure were excluded effectively.

Now this doctrine will be applicable even in the cases of indemnity clause, exclusion clause and liquidated damages clause.[11] ◆◆◆

7 See, Andrews V. Singer (1934) 1 KB 17 ; Wallis, Son and Wells V. Pratt(1910)2 KB 1003

8 See, Privy Council in Canada Steam ships Line Ltd V. The King [1952] UKPC 1

9 See, Monarch Airlines Ltd. London Luton Airport, (1997) CLC 698

10 See, HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6

11 See, Miller v LCC (1934) 50 T.L.R. 479; Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 B.L.R. 111

AMENDMENT OF PLEADINGS - AN OVERVIEW

Puneet Garg

Amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceedings. It is in the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. There can be a situation where there is change of circumstances in the course of pendency of a proceeding and if a matter in issue arises upon such change of circumstance, then amendment becomes necessary. Amendment of pleadings is provided under Order VI Rule 17 of the Code of Civil Procedure, 1908, which reads as under:

According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of cost or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit. At the same time, the *Proviso* to Order VI Rule 17 puts a mandate upon the Court not to allow such amendment after the trail has begun (i.e. if issues have been settled), if its finds that the party could have raised the pleadings by due diligence at an earlier point of time.

However, the *Proviso* need not be given a very rigid effect in all cases as the same is subject to the discretion of the Court. The main object of the legislation is to enable the Court to allow amendment at any stage. The purpose of the *Proviso* cannot do away with the intent of the legislation. Thus, if an application for amendment of pleadings has been filed after trial has begun, the Court will normally be tilted against the applicant, if it could be raised by due diligence at any earlier stage of proceedings. But in proper cases if the point to be amended is very essential to the suit, the Court may, in the interest of justice and equity, allow the amendment on such conditions as the Court deems fit and proper in the facts and circumstances of the particular case.

It was held by the Hon'ble Supreme Court in ***Salem Advocate Case***[1], that by the 2002 Amendment, which added the *Proviso to Order VI Rule 17*, the burden of proof has been shifted upon the applicant who makes the application for amendment after the trail has commenced, to prove that despite due diligence he could not have raised the issue before the commencement of trail. This is for the purpose of preventing frivolous application to delay the proceedings.

GUIDELINES FOR AMENDMENT OF PLEADINGS

➢ Cause of action in a suit cannot be altered by amendment of pleadings. The cause of action will not be allowed to be substituted in totality and the reason being that the cause of action is the very basis of a suit. If a new/distinct cause of action is there, the parties are always free to go to the Court with such cause of action in an independent suit. But there can be cases where the cause of action has got further aggravated by any further violation or some continuing cause of action which can be joined in the present suit due to subsequent change of circumstances. In such cases, the Court in its discretion is free to allow the amendment as that would not be a case of substitution of cause of action.

➢ The Amendment of pleadings shall be allowed to bring or to clarify all matter in issue before the Court. The matter in issue is essential for the determination of the suit and therefore amendment can be made. Similarly, relief also can be amended. In such cases, if the amendment is not allowed, the bar of res *judicata* or as the case may be, the bar of Order II Rule 2 of the Code of Civil Procedure, 1908 may apply. Therefore, the Court should try to bring a balance between the injustice that might be caused to the applicant in case of refusal to grant relief and at the same time, in case of allowing the application, the requirement of injustice caused to the other party in the present suit.

1 AIR 2005 SC 3353

➢ If a right has already accrued in pleadings to the opposite party, then the Court shall normally be reluctant to allow the Amendment of pleadings. However, in such cases, if the loss that will be caused to the other party can be adequately compensated for by cost then amendment shall be allowed. [2]

➢ When the court hears the application for Amendment of pleadings it does not go into the merits of the case. While considering the prayer for amendment of the pleadings, the Court cannot go into the issue of merits vis-à-vis maintainability of the suit, but can consider only whether the amendment is necessary to determine the real controversy between the parties.[3]

➢ If there is an undue delay in the filing of the application for amendment, without there being sufficient cause shown to condone the delay, then the Court may normally not allow the amendment.

➢ Change of law: The law can be a change of substantive law either prospective or retrospective. If it is a prospective change then it normally not effect cause of action and matter in issue in the pending suit and therefore, amendment is not needed. Whereas it is a retrospective change, amendment might be needed and shall be allowed. If it is a change of procedural law then normally pleadings will not be allowed to be amended but the court shall itself take note of the change of procedural law. [4]

Further, Order VI rule 18 of the Code of Civil Procedure, 1908 casts a duty on the party to carry out the amendment, if allowed by the Court, within the time limited for the said purpose by the order and if no time is thereby stated, then within 14 days from the date of the order. In case the party fails to carry out amendment within the said period, he shall not be permitted to carry out the amendment after the expiration of time limited, unless the time is further extended by the Court. [5]

CONCLUSION

In view of the aforesaid, it can be concluded that the amendment of pleadings cannot be claimed by the party as a matter of right nor can be denied by the Court arbitrarily. However, the discretion to be exercised by the Court is guided by the principles mentioned hereinabove and depends on the facts and circumstances of each case. Thus, rational behind the provision of Order VI Rule 17 of the Code of Civil Procedure, 1908 can be summarized as "*Court shall allow application of amendment if granting of an amendment really subserves ultimate cause of justice and avoids further litigation*". ◆◆◆

2 J. Samuel and Ors. Vs. Gattu Mahesh and Ors.: 2012 (1) SCALE 330

3 Andhra Bank Vs. ABN Amro Bank N.V. & Ors.: AIR 2007 SC 2511

4 Omprakash Gupta Vs. Ranbir B. Goyal: AIR 2002 SC 665

5 Delhi Development Authority Vs. S.S. Aggarwal and Ors.: AIR 2011 SC 3265

MAINTAINABILITY OF CONSUMER COMPLIANT WHEN THE GOODS ARE MEANT FOR COMMERCIAL PURPOSES

Vandana

After the amendment Act 62/2002 in the Consumer Protection Act, 1986, that came into force with effect from 15.03.2003, the definition of the expression "consumer" as defined in Section 2 of the Consumer Protection Act, 1986, was amended and it excluded from its purview a person who obtains such goods for resale or for any commercial purpose.

Further, an Explanation was added to the definition which reads that, *"for the purpose of this clause "commercial purpose" does not include use by any person of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood by means of self employment".*

In *Super Engineering Corporation Vs Sanjay Vinayak Pant & Anr* [1992 CPJ (1) 95 NC], The Hon'ble National Commission observed that the intention behind the amendment of the Parliament is to deny the benefits of the Act to persons purchasing goods either for the purpose of resale or for the purpose of being used in profit making activity engaged on a large scale. Thus, the persons who purchase goods for consumption or use in the manufacture of goods or commodities on a large scale with a view to make profit, will all fall outside the scope of the definition of "consumer".

As far as the words "commercial purpose" and livelihood" are concerned neither of these terms have been defined under the Consumer Protection Act or under the Rules framed therein. Therefore, interpretation of these words is to be seen as per the facts of the case and the judgments as have been elucidated by the courts in a number of cases.

In *Synco Textile Private Ltd Vs Greaves Cotton and Co Ltd* (1991) 1 CPJ, the Court while emphasizing on the word "commercial purpose" laid down that "*for any commercial purpose are wide enough to take in all cases where goods are purchased for being used in any activity directly intended to generate profit*". Synco Textile's case implicates that "commercial purpose" should be distinguished from commercial organization or commercial activity.

While dealing with the ambit and the scope of the term "Commercial Purpose " the Hon'ble Supreme Court in *Lakshmi Engineering works Vs PSG Industries, AIR 1995 SC 1428*, has laid down the test of close and direct nexus with the commercial activity. The Court has further held that the explanation appended to Sec 2(d) (ii) reduces the question "what is a commercial purpose" to a question of fact to be decided in the facts of each case. The Court further held that it is not the value of the goods that matters, but the purpose to which the goods bought are put to. The several words employed in the explanation viz "uses by himself" "exclusively for the purpose of earning his livelihood" and "by means of self employment" make the intention of the Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood.

The Court has further held that the purpose for which a person has bought goods is a commercial purpose within the meaning of definition of expression "consumer" in section 2(d) of the Act and is always a question of fact to be decided in the facts and circumstances of the case.

In *Bhuperndra Guna Vs Regional Manager and others (II 1995 CPJ 139)*, the National Commission held that a tractor purchased primarily to till the land of the purchaser and let or on hire during the idle time to till the lands of others, would not amount to commercial use.

In Kalpavruksha Charitable Trust Vs Toshniwal Brothers (Bombay) Pvt Ltd 2000 (1) SCC 512 where the question involved was whether the appellant is a consumer within the meaning of Consumer Protection Act, 1986, and whether the goods in question were obtained by him for "re-sale" or for any "commercial purpose". The Hon'ble Supreme Court held that, since every patient who is referred to the diagnostic center and who takes advantage of the CT scan, etc has to pay for it and only ten percent patients are provided free service. That being so, the "Goods" (machinery) which are obtained by the appellants were being used for commercial purposes.

In C. P. Moosa - Vs. - Chowgle Industries Ltd 2001-CPJ-3-9-NC ; 2001-CPR-2-92-NC ; the appellant had purchased

EPBAX system for his hotel with warranty and annual maintenance contract. There was deficiency of service during warranty period and AMC period. The National Commission held that the case falls under Section 2(1) (d) (ii) and appellant entitled to compensation. In Super Computer Centre V. Globiz Investment Pvt. Ltd. III (2006) CPJ 265 (NC) where the complainant, a company, had purchased computer system along with related accessories from the opposite party. The intellifax machine, which was supplied with the computer, was not giving performance up to the mark and the same was defective. When the dispute went to the redressal forum under the COPRA, the opposite party contended that the complainant was not a consumer as the computer and the machine were purchased by the company for business purpose i.e. for commercial purpose. However, the defect in the machine was intimated to the opposite party within the warranty period. The National Commission held that the purchaser of the machinery would certainly be a consumer in respect of defect in machine during period of warranty. In Action Construction Equipment Ltd & Anr vs Bablu Mridha 4(2012)CPJ245(NC), the Hon'ble National Commission has said that the law on this point is well settled, that when a buyer takes the assistance of one or two persons to assist/help him in operating the machine, he does not cease to be a consumer. Since, in the present case also, respondent is having only two machines and same are being used by the respondent for earning his livelihood, by no stretch it can be said that respondent is engaged in commercial activities.

CONCLUSION

Thus by way of several judgments the Hon'ble Supreme Court and National Commission have clearly delineated the scenarios under which consumer compliant are maintainable even where the goods are meant for commercial purposes. ◆◆◆

NEWSBYTE

Notification of draft Patents (Amendment) Rules, 2013

Recently, a notification was issued by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India regarding amendment of Patent Rules, 2003, by the draft Patent (Amendment) Rules, 2013, for public comments or suggestions on the same. The said draft rules aims to amend some provisions of the Patent Rules, 2003, particularly the First Schedule which states the official fee for filing and prosecution of patent applications.

The draft rules proposed a huge hike in the official fee which is double of the present official fee. Further, for the first time, in order to promote online filing of patents, different schedule of charges is proposed for the online and offline filing whereas high official fee is proposed for offline filing as compared to the online filing.

The draft amendment rules will be published in the official gazette of the Government of India in the coming months with or without changes, after receiving comments from the general public on the same.

RBI AMENDS CONDITION REALTING TO ISSUE OF EQUITY SHARES UNDER THE FDI SCHEME ALLOWED UNDER THE GOVERNMENT ROUTE AGAINST PRE-OPERATIVE/PRE-INCORPORATION EXPENSES

Reserve Bank of India vide RBI/2012-13/502 A.P. (DIR Series) Circular No. 104 dated 17th May, 2013 reviewed the policy issued vide A.P. (DIR Series) Circular No. 74 dated 20th June, 2011 read with A.P. (DIR Series) Circular No. 55 dated 9th December, 2011 wherein it was allowed to issue equity shares/ preference shares under the Government route by conversion of import of capital goods, etc. subject to terms and conditions, stated therein. On a review it was decided to amend condition at Para 3(II)(c) of A.P. (DIR Series) Circular No. 74 dated 20th June, 2011. Earlier, the condition Para 3(II)(c) stated that "Payments should be made directly by the foreign investor to the company. Payments made through third parties citing the absence of a bank account or similar such reasons will not be eligible for issuance of shares towards FDI. The revised condition is as follows, "Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations.

RBI BRINGS DOWN THE PERIOD FOR REALIZATION AND REPATRIATION FOR VALUE OF GOODS OR SOFTWARE EXPORTED

RBI vide A.P. (DIR Series) Circular No. 105 dated 20th May, 2013 decided to bring down the period of realization and repatriation to India, of the amount representing the full value of goods or software exported, from twelve months to nine months from the date of export, with immediate effect, till 30th September, 2013. The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in a Special Economic Zone (SEZ) as well as exports made to warehouses established outside India were kept unchanged. The period was earlier of six months which was increased to twelve months vide A.P. (DIR Series) Circular No. 52 dated November 20, 2012.

MINISTRY OF CORPORATE AFFAIRS (MCA) ISSUES CLARIFICATION REGARDING POWER OF ROC'S TO OBTAIN DECLARATION/AFFIDAVITS FROM SUBSCRIBERS/FIRST DIRECTORS AT TIME OF INCORPORATION

MCA vide Circular No. 11/2013 dated 29th May, 2013 clarified that in order to protect the interest of investors and to ensure that companies raise monies in accordance with the provisions of the Companies Act/Deposit Rules, in exercise of the powers under the Companies Act, the Registrar of Companies may obtain declaration/affidavits from subscribers/first directors first at the time of incorporation and from directors, subsequently whenever company changes its objects, to the effect that company/directors shall not accept deposits unless compliance with the applicable provisions of Companies Act, 1956, RBI Act 1934 and SEBI Act, 1992 and rules/directions/regulations made there under are duly complied and filed with concerned authorities.

DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION (DIPP) INSERTS DEFINITION OF GROUP COMPANY IN THE CONSOLIDATED FDI POLICY

DIPP vide its Press Note No. 2 (2013 Series) dated 3rd June, 2013 incorporated the following definition of 'Group Company' in the FDI Policy contained in 'Circular No. 1 of 2013 – Consolidated FDI Policy' which was made effective from 5th April, 2013.

"Group Company" means two or more enterprises which, directly or indirectly, are in a position to:

i. exercise twenty -six per cent, or more of voting rights in other enterprise; or

ii. appoint more than fifty per cent, of members of board of directors in the other enterprise

The definition was inserted with immediate effect.◆◆◆

NOTES

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