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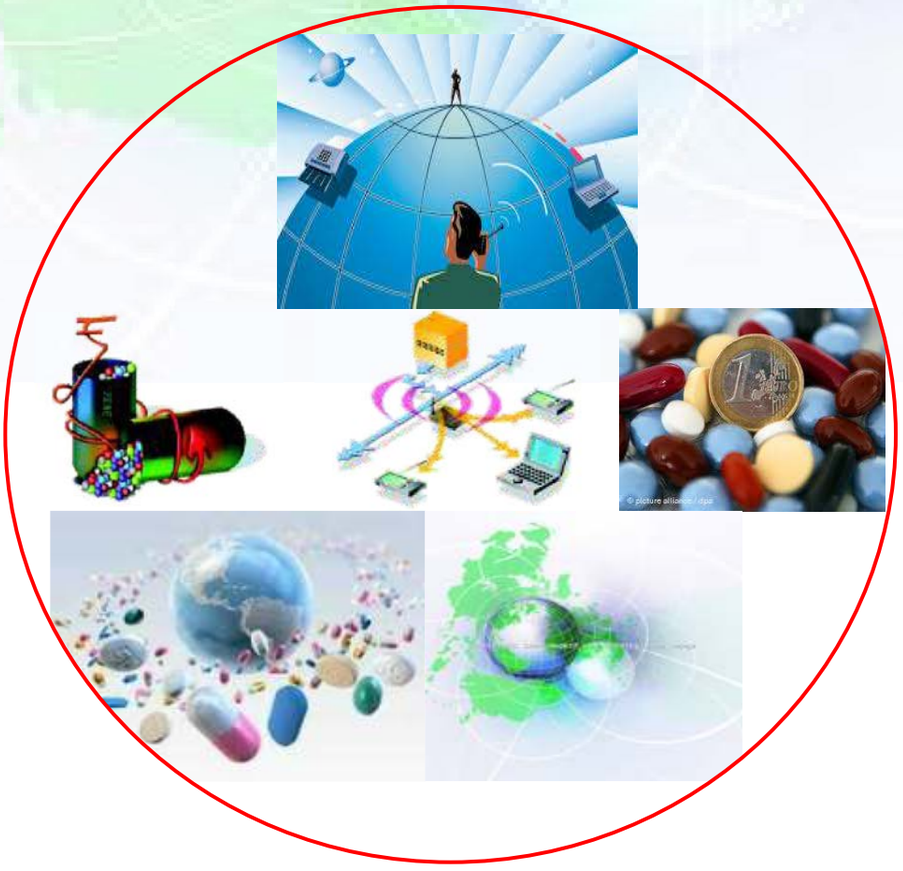
INDIAN LEGAL IMPETUS



FOREWORD

Manoj K Singh
Founding Partner

It gives us immense pleasure to bring forth the October, 2013 edition of our monthly newsletter "Indian Legal Impetus" summarizing the latest development in the legal scenario in India.

In light of the continuous growth and opportunities a new policy on pricing of ever increasing and majorly demanded medicines in the Indian market has been introduced. The Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers, notified the Drug **Price Control Order 2013** which will decrease the pricing of 348 essential medicines on an average of 20-25%.

The Corporate section highlights the change regarding **SEBI lifting restrictions on Call and Put option in Shareholder's Agreement** or Articles of Association of Companies under Section 16 and 28 of Securities Contracts (Regulation) Act, 1956. This will provide an exit route to the parties and will assure them of returns on their investment. Further light has been thrown on the **Laws relating to the Standard forms of Contract.**

With respect to core subjects of litigation, we have provided an article which deals with the provisions of **'Bail'** which does not create any distinction between an Indian resident and Non-resident in the light of Criminal Laws prevailing in India. Another article, which deals with the concept of pre-trial formally known as **Plea Bargaining** for speedy trial which was introduced by the Criminal Law (Amendment) Act 2005. In addition, an article on the **Public Interest Litigation** through which a legal action can be initiated for the enforcement of public interest or general interest in which public or class or class of community have pecuniary interest or some interest by which their legal right or liabilities are affected.

Under the development identified in the field of intellectual property, we have provided a brief insight on the **Doctrine of Sweat of the Brow** which has been an integral part with regards to the copyright protection of a derivative work wherein the courts has taken into consideration the minimal creativity put in by the creator in regards to the creation of work rather than taking into consideration only labour, skill and investment of capital. Another article giving a brief narration on the ***Ericsson vs. Micromax*** **FRAND case,** wherein the need was felt on the role of IP protection in the Telecom industry to keep the investments secured.

The newsletter concludes with the quick glimpse of the latest development in various fields of law which have been summarised under the heading **"Newsbytes".**

We sincerely hope that our esteemed readers find the information furnished through this issue useful. We welcome suggestions, opinions, queries or comments from our readers. You can also send your valuable insights and thoughts to us at ***newsletters@singhassociates.in***.

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"Indian Legal Impetus"

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CONTENTS

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Contents

TELECOM INDUSTRY UNDER THE REGIME OF IPR (A BRIEF NARRATION ON THE ERICSSON VS. MICROMAX FRAND CASE)

By: Priyanka Rastogi & Aayush Sharma

From the past years, we have seen that Intellectual Property Rights (IPR) arise as an important tool of protection for every field viz. Electronics, Biotechnology, Mechanical and to their related industries. These industries are very well depending on IP protection; use it as source of profit and as a strong weapon for protection from their competitors in the country. In many legal cases such as Google vs Samsung, Micromax vs Ericsson, Novartis-Glivec case etc. IP act as a strong legal weapon for protection. Keeping an eye on the success stories of the IPR in different practising areas, this article would like to emphasize on the role of IP protection in the India's biggest industry as Telecom industry.

Before moving forward, one must know about telecommunication and its related industries in the country. Telecommunication may be defined as a communication at a distance by technological means, particularly through electrical signals or electromagnetic waves. Early telecommunication technologies included visual signals, such as beacons, smoke signals, semaphore telegraphs, signal flags, and optical heliographs. Other examples of pre-modern telecommunications include audio messages such as coded drumbeats, lung-blown horns, and loud whistles. Electrical and electromagnetic telecommunication technologies include telegraph, telephone, and teleprompter, networks, radio, microwave transmission, fiber optics, communications satellites and the Internet.

INTRODUCTION

In India, telecom industry is the world's second-largest telecommunications market, with 898 million subscribers as on March 2013. The sector's revenue grew by 13.4 per cent to reach US$ 64.1 billion in FY12. Telecom infrastructure in India is expected to increase at a compound annual growth rate (CAGR) of 20 per cent during 2008-15 to reach 571,000 towers in 2015. With this vast development, industry is facing IPR challenges in the country. These Intellectual protection (IP) challenges depends upon arises factors, government policies, stringent IP laws and with effect of global market in the industry. In India with the rise of global and Indian players in the industry, IP challenges occur and such challenges raises the chance of infringement and IP conflicts. In India Samsung, Ericsson, nokia, ZTE etc are some of the biggest players who filed patent in the Indian.

Telecom technology development is greatly driven by intellectual property rights (IPR), innovations, patents and contributions to standard due to enormous domestic market and steps forwarded Indian telecom technology companies.

With an ever-increasing awareness of IPR, several countries are proactively using IPR reserves to realign their trade policies and influence international standards. For example, China has been working on its home- grown technology called TD-SCDMA since 1998. TD-SCDMA, blessed by the Chinese government, has now evolved into the TD-LTE standard, a 4G technology standard likely to be adopted by Indian operators. In earlier technologies, such as 2G or 3G, most of the IPR has been held by companies from the western world. In contrast, in 4G technology, a significant fraction of the IPR is being held by Asia-Pacific organisations and companies. Despite this amiable trend in favour of the Asia-Pacific region, India's contribution to global telecom standards is practically non-existent. Most of countries having ample telecom market which have maintained their own nationalized standards development organisations (SDO) and take part in the global standards process. India has not participated yet in nationalized standards development organisations (SDO) and there is urgent need to focus on these telecom standards. Indian telecom industry is totally based on imported technology rather than being innovators of the same therefore there is a need of the hour to force IPR and promote standards setting organisations (SSO) participation, In order to catalyse technology development and manufacturing in India.

1. *http://www.ibef.org/industry/telecommunications.aspx*

There should be proper government allocations and need to form an Indian telecom SDO with its active participation from all the sources which are significant and able to give big push towards reflecting Indian IPR and Indian requirements into the global standards. Being a strong telecom force, development of such an SDO would help telecom industry to incorporate some of its specific requirements into the new global telecom standards. Here, academic research also has a big role in leading IPR-driven innovations.

After reviewing the current scenario, it was clearly observed that Indian telecom industry have the potential to create a vivacious ecosystem that can compete with global market. Earlier we have missed the 2G, the 3G and the 4G technology trend, now today is the time for India to jump on to the platform of the next-generation (beyond 4G) technology. This requires creating a framework for IPR generation and global standards participation with a thrust on indigenous product development. We may well enter another phase of exponential telecom growth in the country. Apart from a large domestic market, we have a strong talent pool as well. We, however, lack a vibrant entrepreneurial ecosystem. We need to create an ecosystem to promote companies to design and develop products and incentivise the creation of IPR.

BRIEF THEORY ON PATENT LITIGATION CASE IN INDIA- ERICSSON VS. MICROMAX

INTRODUCTION

Ericsson, world's biggest telecom network equipment maker filed a patent infringement suit against Micromax (Indian Telecom Giant), for allegedly infringing 8 of its telecom patents for a range of wireless technologies, including 3G, AMR and Edge. This case enlightened the new concept in the arena of Telecom IP laws i.e. ***Reasonable and non-discriminatory terms*** *(RAND), also known as* ***Fair, reasonable,*** *and non-discriminatory terms (FRAND), are a licensing obligation that is often required by standard-setting organizations for members that participate in the standard-setting process.*

In this case Ericsson filed a suit, involves a huge claim of Rs. 100 cr made by Ericsson by way of damages (one of the biggest case in terms of damages in telecommunications sector). Before going further we should understand the facts behind this case. In telecom industry, Standard-setting organizations (SSO) are those industry groups that set common standards for a particular industry where there main motive is to ensure compatibility and interoperability of devices manufactured by different companies. These groups owned certain rules that govern the patent ownership which they apply to the standards they adopt. These ownership rights comprises of patent rights apply on standards which are based on "Reasonable and Non-Discriminatory Terms" (RAND) or on "fair, reasonable, and non-discriminatory terms" (FRAND). Standard-setting organizations include this obligation in their bylaws as a means of enhancing the pro-competitive character of their industry. They are intended to prevent members from engaging in licensing abuse based on the monopolistic advantage generated as a result of having their intellectual property rights (IPR) included in the industry standards. Under the FRAND terms and conditions any organization who are offering a FRAND license are required to offer such license to anyone who may or may not a member of such group. In these terms if any member who is offering licenses and without such commitment, members could use monopoly power inherent in a standard to impose unfair, unreasonable and discriminatory licensing terms that would damage competition and inflate their own relative position. Under IP-Telecom regime Essential patents are very well declared as standards for the entire industry and such standards are set by SSO only on the basics of fair, reasonable and non-discriminatory terms to anybody ready to seek such a license. Such an arrangement is considered to be a trade-off for the patentee because it ensures that its patents are used by the entire industry, it will have to adhere to fair and reasonable terms.

CONCLUSION

In telecom sector today it's a very essential factor to identify the innovation for the country's growth. Major steps should be taken by the industry and by the government for promoting the telecom industry under the IP regime. Ericsson vs. Micromax case is the first

2. *http://www.skyscrapercity.com/showthread.php?t=493224&page=32*
3. *http://articles.economictimes.indiatimes.com/2012-08-16/news/33232949_1_telecom-equipment-indian- ipr-telecom-market*

example of the negligence of the IP challenges in telecom sector. It can be said that these mobile infringements are said be starting of telecom wars in India. The dispute in itself has been of considerable significance because it marked the arrival of patent wars on the Indian shores, with similar feuds between tech giants including Samsung, Apple, Google and Microsoft already going in courtrooms around the world.

Firstly, government should establish the National Innovation Council (NIC) which helps in encouraging the creation of several areas of Councils that are aligned to government ministries. Such NIA research and comments have led the Ministry of Commerce & Industry to prepare a draft of National Intellectual Property Right (IPR) Strategy. The Strategy will outline the vision for IPR laws in the country and open the field to more transparent understanding of India's IPR architecture along with CGPDTM. The Government is cognizant of the realities of the market and the needs of the investors. For example, in the telecom space, where India is among the top telecom markets around the world, the draft National Telecom Policy puts a special emphasis on domestic manufacturing and products for which IPRs reside in India. In the coming few months, investors will see an IPR environment in India which is stronger and keeps their investments secure.

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4 *http://en.wikipedia.org/wiki/Reasonable_and_non-discriminatory_licensing*

5. *http://blog.daum.net/khbae1224/514*

6. *http://www.iipta.com/ipr/comment/reply/1574*

SEBI LIFTS RESTRICTION ON CALL AND PUT OPTIONS IN SHAREHOLDER'S AGREEMENT

By: Pradhumna Didwania

The Securities and Exchange Board of India (SEBI) had issued a notification in the year 2000 (Notification Number S.O.184 (E), dated the 1st March, 2000) by which it permitted only spot delivery contract or contract for cash or hand delivery or special delivery or contract in derivatives among the Shareholders of a Public Company imposing restriction on other forms of Contracts like contract imposing future purchase or sale obligation of Shares on the promoter or Investor of the Company respectively. The restrictions were imposed in order to prevent undesirable speculation in securities of Public Companies. Due to the restriction imposed, enforceability of clauses such as Call and Put options and preemption rights like Right of First Refusal, Tag along Rights, Drag along Rights, etc., inserted into Shareholders Agreements or Articles of Association of Public Companies, became a subject matter of litigation as they were not in line with 2000 Notification of SEBI.

SEBI in the case of Cairn-Vedanta deal and other cases was of view that put option and call option arrangements and the Right of First Refusal do not conform to the requirements of a spot delivery contract nor with that of a contract of Derivatives as provided under section 18A of the Securities Contracts (Regulation) Act, 1956 therefore they are in violation of Notification No. SO 184(E) dated March 1, 2000. However, lately a need was felt to legalise put /call option and other rights in the Agreements between Shareholders/Investors and Articles of Association of the Company as parties involved preferred such clauses in order to protect their interest. Keeping in mind the same, SEBI on 3rd October, 2013 issued Notification under section 16 and 28 of Securities Contracts (Regulation) Act, 1956 vide which it lifted the restriction imposed on insertion of clauses with respect to call and put options in Shareholders Agreements or Articles of Association of Companies. Along with call and put options, SEBI also allowed insertion of pre-emption rights like Right of First Refusal, Tag along Rights, Drag along Rights, etc. in the Shareholders Agreements or Articles of Association of Companies.

THE FOLLOWING TYPES OF CONTRACTS HAVE BEEN PERMITTED UNDER NOTIFICATION DATED 3RD OCTOBER, 2013 ISSUED BY SEBI :

a) spot delivery contract;

b) contracts for sale or purchase of securities or contracts in derivatives, as permissible under the Securities Contracts (Regulation) Act, 1956 or the Securities and Exchange Board of India Act, 1992 and the rules and regulations made under such Acts and rules, regulations and bye-laws of a recognized stock exchange;

c) contracts for pre-emption including right of first refusal, or tag-along or drag along rights contained in shareholders agreements or articles of association of companies or other body corporate;

d) contracts in shareholders agreements or articles of association of companies or other body corporate, for purchase or sale of securities pursuant to exercise of an option contained therein to buy or sell the securities, where-

i. the title and ownership of the underlying securities is held continuously by the selling party to such contract for a minimum period of one year from the date of entering into the contract;

ii. the price or consideration payable for the sale or purchase of the underlying securities pursuant to exercise of any option contained therein, is in compliance with all the laws for the time being in force as applicable; and

iii. the contract is settled by way of actual delivery of the underlying securities:

The contracts specified in clauses (a) to (d) above, will have to be in accordance with the provisions of the Foreign Exchange Management Act, 1999 and rules or regulations made thereunder:

The Notification also provided that any contract for sale or purchase of government securities, gold related securities, money market securities, contracts in currency derivatives, interest rate derivatives and ready forward contracts in debt securities entered into on the recognized stock exchange shall be entered into in accordance with, —

a. the rules or regulations or the bye-laws made under the Securities Contracts (Regulation) Act, 1956 (42 of 1956), or the Securities and Exchange Board of India Act, 1992(15 of 1992) or the directions issued by the Securities and Exchange Board of India under the said Acts;

b. the rules made or guidelines or directions issued, under the Reserve Bank of India Act, 1934 (2 of 1934) or the Banking Regulations Act, 1949 (10 of 1949) or the Foreign Exchange Management Act, 1999 (42 of 1999), by the Reserve Bank of India;

c. the notifications issued by the Reserve Bank of India under the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

The 3rd October, 2013 Notification rescinded the 2000 Notification. It became effective from 3rd October, 2013 and will have a prospective effect i.e. it will be applicable only to those Agreements which are made on or after 3rd October, 2013.

Apart from the 2000 Notification of SEBI and provisions of Securities Contract (Regulation) Act, 1956, call/put options and other rights were also hit by provisions of Companies Act, 1956 and Reserve Bank of India (RBI) regulations in case of overseas investors. The new Companies Act i.e. the Companies Act, 2013 has allowed the insertion of clauses relating to options and other rights in the Articles of Association however a clarification in this regard is awaited from RBI because in case of overseas investment, RBI terms the investment as debt i.e. External Commercial Borrowings (ECB) and not equity as call/put options guarantee returns to the Investors.

It is pertinent to note that the notifications and provisions of Securities Contracts (Regulation) Act, 1956 are applicable to Listed Companies as well as Unlisted Public Companies. The Hon'ble Supreme Court of India in the case of Bhagwati Developers Pvt. Ltd. vs Peerless General Finance & Investment Company Ltd and Anr. [Civil Appeal No.7445 of 2004, Judgment date 15th July, 2013], made the following observations with regards to applicability of Securities Contracts (Regulation) Act, 1956 to Unlisted Public Companies.

"When the word 'Securities' has been defined under the Regulation Act, its meaning would not vary when the same word is used at more than one place in the same Statute, otherwise it will defeat the very object of the definition Section. Accordingly, our answer to the first question set out earlier is that the provisions of the Regulation Act would cover unlisted Securities of Public Limited Company. In other words, shares of Public Limited Company not listed in the stock exchange is covered within the ambit of Regulation Act."

CONCLUSION

SEBI vide its present Notification has granted a big relief to the Companies which are planning to enter into Shareholders Agreements, Merger and Amalgamation Transactions and Private Equity (PE) deals, which fall within the ambit of Securities Contract (Regulation) Act, 1956. The relaxation was required in order to provide an exit route to the parties and to assure them of returns on their investment. The relaxation will promote domestic as well as foreign investment in Indian Companies however a clarification from RBI is awaited in this Matter.

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1. *www.sebi.gov.in/takeover/cairnlof.pdf*

SWEAT OF THE BROW: AN APPROACH IN CONTRAST TO MINIMUM CREATIVITY

By Himanshu Sharma

As per copyright law, an idea is not copyrightable instead it is the expression of idea on which a copyright can be claimed. As per section 13 of the copyright Act, 1957, a copyright subsists in original, literary, dramatic, musical, artistic, cinematography and sound recording subject to the exceptions provided in Sub-sections (2) and (3) of Section 13.
For copyright protection, all literary works have to be original as per Section 13 of the Act. Broadly speaking, there would be two classes of literary works:

(a) **Primary or prior works**: These are the literary works not based on existing subject-matter and, therefore, would be called primary or prior works; and

(b) **Secondary or derivative works**: These are literary works based on existing subject-matter. Since such works are based on existing subject-matter, they are called derivative work or secondary work.

The term original is not defined any where in the Act hence the interpretation for the same would be based on the judicial pronouncement of the term by the Courts. However the idea of originality of the work has been changing with the passage of time.

Initially it is considered by courts on various occasions that a derivative work need not be original instead it should be expressed in a completely new way in order to be copyrighted. A person can claim a copyright over a work which cannot be novel in nature but has been expressed differently. The protection for this kind of work is provided according to the doctrine of 'Sweat of the Brow' under which an author gains rights through simple diligence during the creation of a work, such as a database, or a directory. Substantial creativity or "originality" is not required. The Delhi High Court judgment in the case of

Burlington Home Shopping v. Rajnish Chibber, where it was held that a compilation may be considered a copyrightable work by virtue of the fact that there was devotion of time, labour and skill in creating the said compilation.

This interpretation of originality was based upon the decision of the Privy Council in the case ***Macmillan Company v. J.K. Cooper***, wherein it was laid down that copyright over a work arises and subsists in that work due to the skill and labour spent on that work, rather than due to inventive thoughts.

DEVIATION FROM THE APPROACH:

In the recent times the courts has deviated from the doctrine of Sweat of Brow rather than considering only the skill and labour spent on the work the courts has started to take in to consideration the original thoughts of the author put in the work for considering the same for the copyright protection.

In ***Feist Publications Inc. v. Rural Telephone Service Co. Inc*** , the United States Supreme Court held that the sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. The Court further held that no one claim originality as to the facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so

1. *61 (1995) DLT 6*
2. *(1924) 26 BOMLR*
3. *MANU/EG/0440/1991,*

that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. The Court goes on to hold that the primary objective of copyright is not to reward the labour of authors, but to promote the progress of science and useful arts. To this end, copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. Only the compiler's selection and arrangement may be protected; however, the raw facts may be copied at will. The Court rejected the doctrine of the "sweat of the brow" as this doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement - the compiler's original contributions - to the facts themselves. A subsequent compiler was not entitled to take one word of information previously published, but rather had to independently work out the matter for himself, so as to arrive at the same result from the same common sources of Information. "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law that no one may copyright facts or ideas. The "sweat of the brow" doctrine flouted basic copyright principles and it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of writings by authors.

Similarly the Supreme Court of India in case of ***Eastern Book Company v. D.B. Modak*** held that "collection of material and addition of inputs in the raw text does not give work a flavour of minimum requirement of creativity, as skill and Judgment required to produce the work trivial. To establish copyright, the creativity standard applied is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required - Selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity, which does not as a whole display sufficient originality so as to amount to an original work of the author. To claim copyright, there must be some substantive variation and not just a trivial variation, not the variation of the type where limited ways of expression available and author selects one of them. Inputs put by the Appellants in the copy-edited Judgments do not touch the standard of creativity required for the copyright. However inputs and task of paragraph numbering and internal referencing requires skill and Judgment in great measure having a flavour of minimum amount of creativity. Further putting an input in form of different Judges' opinion shown to have been dissenting or partly dissenting or concurring, etc. requires reading and understanding the questions involved Appellants have a copyright, which nobody can utilize"

The doctrine of Sweat of the Brow which has been an integral part in regards to the protection to a derivative work earlier has now been looked upon from a different perspective wherein the courts has taken into consideration the minimal creativity put in by the creator in regards to the creation of work rather than taking into consideration only labour, skill and investment of capital.

CONCLUSION:

The derivative works which are in the contemporary times have a major part of the services industry, are looked from completely different point of view in comparison to the classical approach. The work need to have some creativity attached to it in order to be eligible for the copyright protection. Classically the work was only judged on the basis of labour, skill and investment of capital put in by the creator. As per modern approach in addition to these elements the work is required to have some creativity attached to it which in itself differentiates work from any other work.

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AIR 2008 SC 809

EFFECT OF ARBITRATION AGREEMENTS ON THE COMPANY WHEN ENTERED IN ARTICLES OF ASSOCIATION OF THE COMPANY

By: Karan Gandhi & Syed Aftab Ahmed

INTRODUCTION:

Section 9 of the Companies Act, 1956 provides that the provisions of the Companies Act, 1956 shall override the provisions of the memorandum and articles of association of the company. Such section also provides that where any provisions of memorandum and articles of association, or any agreement entered into by any parties having its effect on the memorandum and articles of association, agreement or resolution, if any entered into or passed by the Company is repugnant to the provisions of the Companies Act, 1956 **('the Act'),** the same shall become or be void.

It is generally seen that in case of share purchase or Shareholders or shareholders and share subscription agreements entered into by the Purchaser/Investor and the promoters/management of the Company, the Company is also a party to the transaction. The Company plays a specific role of the confirming party. The intent of which can be understood with the fact that generally in the aforesaid agreements, the Purchaser/Investor secures its interest in the day to day management of the Company by making the Company a party to such Agreement. To secure such interest in day to day management of the Company, such restrictions are incorporated in the articles of association of the Company so that the management of the Company and the Company is bound by such restrictions.

CHOICE OF DISPUTE RESOLUTION & REFERENCE TO ARBITRATION:

In the aforesaid agreements, the parties thereto generally choose the dispute resolution methodology and either separately or within such agreements agree to the mediation & Arbitration of disputes, if any arisen. The remedies for the shareholders or the stakeholders are also available under the Act which provides that the parties can approach to various forums for the redressal of their grievances including the Company Law Board. However, there have been numerous instances when the Investor have approached the Company Law Board for redressal of their grievances against the oppression and mismanagement even if there is an arbitration agreement contained in the Agreements and as a consequence in the Articles of Association of the Company.

Section 8 of the Arbitration & Conciliation Act, 1940 provides that a Court can refer the parties to a dispute to the Arbitration if the pre requisites as contained under the Section 8 are found in the Dispute. Section 8 of the Arbitration & Conciliation Act, 1940 reads as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement.

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Therefore, the requisites under Section 8 which the Court generally observes in order to refer the dispute to Arbitration are:

- Whether the subject matter of the dispute is capable to be decided by Arbitration?
- Whether there is a valid Arbitration Agreement?
- If dispute already raised and arbitration notice has been served, whether the dispute and the cause of action before the judicial authority are same?

Arbitration is an alternative to litigation. As with the court in litigation, the decisions of the arbitrator are final and binding. The arbitration clause or agreement,

1. *(1977) 47 Com Cases 277*
2. *(1977) 47 Com Cases 279*

as the case may be sets out the place of arbitration, its procedural governing rules including provisions governing the appointment of the arbitrator and his powers.

OPINION OF VARIOUS FORUMS ON DIFFERENT ASPECTS:

The question that arises here is that whether the arbitration clause that is in the company's charter documents can override the jurisdiction of Company Law Board.

Where the issue regarding arbitration clause between the shareholders of the Company involving an application under section 397/398 of the Act, the High Court of Delhi, in ***Surendara Kumar Dhawan and another v. R.Vir*** and others , observed that If the conditions mentioned in Section 399 of the Companies Act are fulfilled, the shareholders of a company will have a right to file a petition for relief against mismanagement or oppression under section 397 or section 398 of the Companies Act, 1956. The provisions in the article of association of the company cannot bar the right of the parties seeking relief. The jurisdiction of the Company Law Board cannot be debarred by any article of the company which refers to arbitration in the matter arising out of any dispute between the directors of the company and its members.

On the basis of the presence of the arbitration clause the court is not liable to dismiss the proceeding under section 397 and section 398 of the companies act. On the same footing, the High Court of Delhi, in ***O.P.Gupta v. Shiv General Fianance (P.) Ltd.*** and others , held that where the article of association of the company provides for the disputes between the members of the company to be resolved by arbitration, such clause would not make it mandatory for the court to stay the petition, subject matter of which involves relief in the case of oppression and mismanagement. Existence of arbitration clause in articles of the company thus, would not be enough for the purpose of staying proceedings under section 397 or section 398.

It has become a prevalent practice to insert an arbitration clause, so that the same can come into effect where there arises a dispute in any corporate contract. Even so, the administration of the company is run by the guidelines provided by the articles of the company which is usually expressed in clear and simple language, it is possible that the effect of arbitration clause could not be restrained due to the language used in such articles.

The Bombay High Court in ***Mohanlal Chhaganlal v. Bissessarial Chirawalla*** approved the broad construction of such article. However in the case of Khusiram v. Honutmal , Kolkata High Court denying such elaborate structure of the article, has emphasized on limited interpretation of the articles and held that only where the dispute has arisen between members who are in close association with the company then in such case it can be held sufficient to invoke the arbitration clause.

In order to not to frustrate the agreement relating to commercial dealing between the members of the company the Bombay high Court in ***Shiv Omkar v. Bansidhar Jagannath*** has shown its support for a broad interpretation of the articles of the company, subject to the condition that the transaction in question which gave rise to such disputes are within the purview of the article of association of the company. With respect to private commercial contract regarding members among themselves could held to be liable to be enforced by the arbitration agreement till the time the matter of the dealing is such where the company is affected by it.

It is not uncommon today to see dispute arising out of documents other than the Articles of the Company. In today's scenario we see countless number of disputes arising out of such other documents, be it shareholders agreement or any other form of Joint Venture Agreement. Our court rooms and arbitration tribunals are crammed with such contest. It generally takes place when an investor is introduced in the company and a shareholder's agreement is executed containing terms and conditions regarding the functioning and administration of the company. Such agreement by just its nature and content tends to act as a second set of articles for the company.

In recent times we have seen various pending suits where shareholder's agreement are submitted for litigation and the same are taken to be as a complete governing body of a company without giving much importance to the articles of the company. Under such

3. *A.I.R. 1947 Bom. 268 (India)*
4. *53 CWN 505 (H)*
5. *A.I.R. 1956 Bom. 459 (India)*

occurrence it becomes doubtful that the arbitration agreement which is incorporated in the Articles of the company and not in the shareholders agreement, would still govern the members of such company or not. This therefore gives rise to a quandary regarding the invocation of an arbitration clause aggravated in the Articles of a company.

OTHER ASPECT:

There is yet another aspect that can be looked into is regarding the enforcement of arbitration clause where there is a presence of third party in the dispute. It can be argued by the party who wishes to avoid the arbitration proceedings, that the arbitration agreement cannot be invoked as the dispute in question also involves such third party who are not associated with the functions of the company and are not governed by the articles of the company. Such third party is a stranger in context of the articles of the company. We find ourselves surrounded by large number of cases dealt by our judicial system which govern such issue of third party and invocation of arbitration clause.

In this regard, the Andhra Pradesh High court in the case of ***M/s. Srivenkateswara Constructions and others v. The Union of India*** , observed as under: "in order to escape the arbitration proceedings it is commonly seen that the parties unnecessarily involve such third party to the proceedings and the court has gone forward in granting stay to such proceedings". It has also been laid down that the parties to the suit cannot escape or avoid arbitration proceedings by involving such party to the dispute against whom no relief or claim is sought.

Where the dispute in question involves parties some of whom fall in the ambit of arbitration clause and some of them are outside the purview of such agreement, in such a case taking a different view Hon'ble Supreme Court in ***Sukanya Holdings v. Jaiyesh Pandya***, held that the court should continue with the suit without ramifying the cause of action.

CONCLUSION:

Therefore, it is clear that the possibility of invoking an arbitration clause in the Articles even to cover disputes between members of a company and concerning the affairs of a company would be established keeping the subject matter of the dispute in mind. The time and energy thus spend would become very significant in resolving even the fundamental doubt as to whether or not certain disputes are necessarily governed by arbitration procedure.This reality is susceptible enough to umbrage the intended charm of a quicker relief from our arbitration laws.

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6. *A.I.R. 1974 A.P. 278 (India)*
7. *Cekop v. Asian Refractories Ltd (1969) 73 Cal WN 192 (India)*
8. *(2003) 5 S.C.C. 531 (India)*

LAW RELATED TO STANDARD FORM OF CONTRACTS

By Vandana Pali

Standard contracts are contracts which are drafted by one party and signed by another party without any modification or change. Though standard contracts present the advantage of preprinted standard format; they are essentially "take it or leave it" contracts with no room for negotiations. These contracts are criticized for killing the bargaining power of the weaker party and open up wide opportunity for exploitation.

In Cheshire's Law of Contract, 12th Edition 'Use of standard form contracts' is dealt with at page 21 in following terms:

The process of mass production and distribution, which has largely supplemented if it has not supplanted individual effort, has introduced the mass contract -- uniform documents which must be accepted by all who deal with large-scale organizations. Such documents are not in themselves novelties; the classical lawyer of the mid-Victorian years found himself struggling to adjust his simple conceptions of contract to the demands of such powerful bodies as the railway companies. But in the present century many corporations, public and private, have found it useful to adopt, as the basis of their transactions, a series of standard forms with which their customers can do little but comply.

ISSUES WHICH ARE GENERALLY INVOLVED WITH STANDARD FORM OF CONTRACTS RELATE TO:

- **CONSENT**

In the case of commercial contracts courts have repeatedly held that contracts even if entered into the standard format, are meant to be performed and not to be avoided. Unless it is shown that consent is obtained by fraud, mistake or duress a consent given by party to a contract cannot be vitiated. As defined under Section 13 of the Contract Act, 1872 two or more persons are said to consent, when they agree upon the same thing in the same sense. Consent, according to Section 14, is free, when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. Thus where the parties with equal bargaining powers have fairly consented to the terms of the contract without any fraud, duress or mistake courts have refused to interfere.

- **UNFAIR TERMS OF THE CONTRACT**

Courts have looked into the terms of the contract in relation to the bargaining powers of the parties and have interfered in cases where the bargaining power of the parties was not equal. ***In Life Insurance Corporation of India v. Consumer Education and Research Centre and others*** the Hon'ble Supreme Court has held that "if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract".

In Central Inland Transport Corporation Limited v. Brojo Nath, Hon'ble Apex Court while giving some illustrations of unreasonable and unfair clauses in contracts, based on unconscionable bargaining in para 90 of the decision and explaining the scope of expression "public policy", in para 93 held in para 94 that the type of contracts to which the principle formulated by us above applies, are not contracts which are tainted with illegality, but are contracts which contain terms, which are so unfair and unreasonable that they shock the conscience of the court. It is apt to reproduce the relevant extract of para 90 as under:-

"90. This principle is that the courts will not enforce and will when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations

1. *MANU/SC/0772/1995*

which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard from or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a cause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

Thus courts will not enforce and will, strike down an unfair and unreasonable contact or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction.

Further cases where the terms of the contract are unreasonable as to the nature of the contract courts have struck them out following the principles as laid down under Contract Act or under common law. In ***M Siddalingappa v. T Nataraj*** , where applicability of the clause printed on the back of the laundry receipt which read as:

"All articles for cleaning and dyeing are accepted on conditions that the company shall incur no liability in respect of any damage which may occur and for delay or in the event of loss for which the company may accept the liability which shall in no case exceed eight times the cleaning charges." was in question Court held that petitioner is, undoubtedly, a bailee in respect of the sarees given to him and there is a minimum duty of care imposed upon all bailees under Section 151 of the Contract Act which they cannot contract themselves out of it is not subject to any contract to the contrary between the parties. Under that section, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Once that minimum duty is imposed upon the bailee by the law, a breach of that duty undoubtedly clothes the party affected with the right to recover damages commensurate with the consequences".

- **UNCONSCIONABLE NATURE OF THE CONTRACT**

Basic test of "unconscionability" of contract is whether under circumstances existing at time of making of contract and in light of general commercial background and commercial needs of particular trade or case, clauses involved are so one-sided as to oppress or unfairly surprise party.

Precursors of Unconscionability: Courts of equity did not share the reluctance of common law courts to police bargains for substantive unfairness. Though mere "inadequacy of consideration" alone was not a ground for withholding equitable relief, a contract that was "inequitable" or "unconscionable" one that was so unfair as to "shock the conscience of the court" would not be enforced in equity.

In ***Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and another,*** Supreme Court of India refused to interfere in adhesion contract on the ground that it was not unconscionable so as to "shock the conscience of the court"

2. *MANU/SC/0439/1986*
3. *AIR1969 Kant 154*
4. *(Black's Law Dictionary (Fifth Edition) at page 1367)*

- **INEQUALITY OF BARGAINING POWERS**

Courts have strictly ruled against those standard contracts which exploit the position of an employee vis a vis the employer. They have repeatedly held that in case of employment contract between the employer and employee, there is a universal tendency on the part of the employer to insert those terms, which are favorable to him in a printed and standard form, leaving no real meaningful choice to the employee except to give assent to all such terms. In such a situation the parties cannot said to be in even position possessing equal bargaining power. Where the parties are put on unequal terms the standard form of contract cannot be said to be the subject-matter of negotiation between the parties and the same is said to have been dictated by the party whose higher bargaining power enable him to do so.

In ***Superintendence Company of India (P) Ltd v. Sh. Krishan Murgai***, Hon'ble Supreme Court held that

"It is well settled that employees covenants should be carefully scrutinized because there is inequality of bargaining power between the parties; indeed no bargaining power may occur because the employee is presented with a standard form of contract to accepts or reject. At the time of the agreement, the employee may have given little thought to the restriction because of his eagerness for a job; such contracts "tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression."

Such a protection is also given against the action of the state where the Courts have ruled that that the action of the State in contractual field also must be fair and reasonable. The requirement of Article 14 of the Constitution should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled, the State cannot cast of its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist. Therefore, total exclusion of Article 14 non-arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contacts where the bargaining power is unequal so that these are not negotiated contracts but standard form of contracts between unequals. Bringing the State activity in contractual matters also within the purview of judicial review is inevitable.

CONCLUSION

Despite absence of a specific legislation courts have shown a marked willingness to interfere with standard form of contracts where there is evidence of unequal bargaining power. Courts have given reliefs in cases where weaker party has been burdened with unconscionable, oppressive, unfair, unjust and unconstitutional obligations in a standard form contract. In ***D.C.M. Ltd. v. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota*** where the division bench had to consider the question whether the Rajasthan State Electricity Board functioning under the Electricity Act of 1910 and the Electricity (Supply) Act, 1948 could in exercise of its powers under Section 49 of the Supply Act require the consumer-appellant before them to pay by way of minimum charges at nearly three times the normal rate charged from other consumers being heavy industries consuming heavy demand of 25 MW. Even though the appellant before them, D.C.M. Ltd., had entered into such an agreement with the Board it was held that the said term in the agreement was unreasonable and consequently the demand of such excessive minimum consumption charges was not justified and could not be countenanced on the touchstone of Article 14 of the Constitution of India as the Electricity Board was an instrumentality of the State. The Court in this connection had to consider the nature of the written agreements entered into by the consumers of the electricity with the Board which was a monopolist and the further

5. *Farms worth on contract, 2nd Edn. 319,320 para 4.27*
6. *AIR1993 SC 2005*
7. *Unikool Bottlers v. Dhillon Cool Drinks, Pepsi Food Limited, AIR 1995 Delhi 25*
8. *AIR 1980 SC 171710. MANU/RH/0014/1988*

question whether an apparently inconceivable and unjust term in the written contract could be enforced by the Board against the consumer. Following pertinent observations were made by J.S. Verma, C.J in paragraph 24 of the Report:

...We may further add that for the reasons already given it is obvious that the giving of such an undertaking by execution of the agreement was no doubt a conscious act of the petitioner, but in the circumstances it cannot be held to indicate the petitioner's willingness to be bound by such an onerous condition, if it had the option; It is obvious that there was no option to the petitioner and, therefore, it cannot be said that the petitioner voluntarily and willingly chose and accepted the more onerous condition of a higher rate instead of the normal rate for payment of minimum charges. The willingness to accept such an onerous term with free consent can be assumed only where a consumer has an option or in other words he can get the supply of electricity he wants even without agreeing to any such term specified by the Board for being incorporated in the written contract without execution of which the consumer cannot insist on supply of electricity to him. It is not the Board's case that it was willing to honour the petitioner's requisition and make the supply even without the petitioner undertaking in writing to pay minimum charges according to Clause 16(c). How can it be said that the petitioner willingly accepted this term when the fact is that it had no option in the matter. It is further observed that Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of large enterprises (both private and public) and the consumer that terms have often been imposed upon him which are onerous or unfair in their application and which exempt the party putting forward the document, either wholly or in part, from his just liability under the contract. This may be one of the reasons why, at common law, the Courts evolved certain canons of construction which normally work in favour of the party seeking to establish liability and against the party seeking to claim the benefit of the exemption. The impression should not be given, however, that the" application of these canons of construction render exemption clauses generally ineffective. If the clause is appropriately drafted so as to exclude or limit the liability in question, then the Courts must (subject to the powers now conferred on them by the Unfair Contract Terms Act 1977) give effect to the clause. Moreover, as between businessmen, exemption clauses can perform a useful function in that they may, for example, anticipate future contingencies which hinder or prevent performance, establish procedures for the making of claims and provide for the allocation of risks as between the parties to the contract. In a business transaction, the effect of an exemption clause may simply be to determine which of the parties is to insure against a particular risk. Exemption clauses in business transactions are not necessarily unfair or inequitable. But even in business transactions the Courts must be satisfied that the clause, on its wording, does have the effect contended for by the person relying on it, that is, the party seeking to exclude or restrict his liability. (a) Strict interpretation of the clause. 'If a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words.' The words of the exemption clause must therefore exactly cover the liability which it is sought to exclude. So an exemption clause in a contract excluding liability for 'latent' defects' will not exclude the condition as to fitness for purpose implied by the Sale of Goods Act."

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9. Shrilekha vs. State of U.P, AIR 1991 SC 537
10. MANU/RH/0014/1988

BAIL, A MATTER OF RIGHT: NOT TO BE DENIED ON THE GROUND OF NATIONALITY

By: Bijoylashmi Das

The Constitution of India is the supreme law of the land. The Fundamental Rights are available to all the "Citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen". This reflects that the Indian Legal system does not bring the nationality of an individual into consideration while granting him/her the benefit of the provisions of bail. There is no discrimination or differentiation in granting bail to a foreign national in India.

The Personal liberty is of utmost importance in our constitutional system recognized under Article 21. Deprivation of personal liberty must be founded on the most serious considerations relevant to welfare objectives of the society as specified in the Constitution. The Apex Court of the Country has laid down in its judgments that

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by 'law'.

Thus personal liberty is not curbed except in accordance to the procedure established by law in order to strike a balance between the right to individual liberty and the interest of society.

"Bail" has been defined as:

"The process by which a person is released from custody"

-Webster's Third New International Dictionary

In the Indian legal system, the procedure of bail is provided in the Criminal Procedure Code. Bail has not been defined in the code although the offences are classified as bailable and non-bailable. In the former class, the grant of bail is a matter of course. It may be given either by the police-officer in charge of a police station having the accused in his custody or by the court. The release may be ordered on the accused executing a bond and even without sureties . In the latter class, the accused may be released on bail but no bail can be granted where the accused appears on reasonable grounds to be guilty of an offence punishable either with death or with imprisonment for life. But the rule does not apply to a person under 16 years of age, a woman, a sick or infirm person. As soon as reasonable grounds for the guilt cease to appear, the accused is entitled to be released on bail or on his own recognizance; he can also be released, for similar reasons between the close of the case and delivery of judgment. When a person is released on bail the order with reasons therefore, should be in writing.

The Indian courts have umpteen number of times held that merely because the accused is a foreign national he cannot be deprived of the benefits of bail. The Hon'ble High Court of Delhi had observed that *"Law does not permit any differentiation between Indian Nationals and Foreign citizens in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the court can impose different conditions which are necessary to ensure that the accused will be available for facing the trial. It cannot be said that an accused will not be granted bail because he is a foreign national."*

1. *The Chairman, Railway Board & Ors. Vs. Mrs. Chandrima Das & Ors. (2000)2SCC465*
2. *Babu Singh and Ors. v. State of Uttar Pradesh MANU/SC/0059/1978 : 1978CriLJ651*
3. *Section 436 (1) of the Code of Criminal Procedure, 1973*
4. *Commentary on the Code of criminal procedure by Ratanlal & Dhirajlal, 19th Enlarged edition 2010.*
5. *Anil Mahajan vs. Cojmmissioner of customs & Anr, 2000 CriLJ 2094.*
6. *Mohammed Kunju and Another v State of Karnataka, AIR 2000 SC 6*

In the case of Mohammed Kunju , the accused was a foreign national. When he was granted bail, he jumped it and slipped out of India. As a result, legal action against his sureties for levy of the penalty under their forfeited bail bonds was initiated. That action was challenged by the sureties before the Hon'ble Supreme Court of India Court. While dealing with the legality or otherwise of the said legal proceeding against sureties, an observation was made by Hon'ble Supreme Court that while granting bail to the accused foreign national, the Court could have imposed the condition to surrender his passport as a measure to prevent him to escape out of India. Thus the Indian Courts while granting bail to a foreign national firmly believes in imposing certain conditions like surrender of passport, bail bonds, attendance before consulate or the investigating officer, etc in order to prevent misuse of the provision as there may be chances of the accused absconding after getting bail.

The Hon'ble High Court of Delhi in the case of Lambert Kroger vs Enforcement Directorate while allowing the bail application of the foreign national made an observation that *"Admittedly the petitioner 's passport is with the respondent and ordinarily the petitioner cannot leave the country without the passport. Though the possibility of fleeing from trial may be more in the case of foreign national. It cannot be said that an accused cannot be granted bail merely because he is a foreign national. There is no law which authorizes or permits discrimination between a foreign national and an Indian national in the matter of granting bail what is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions to ensure that the accused will be available for facing trial."*

In Sartori Livio's case the counsel for the state raised an argument stating that the petitioner is an Italian national and if he is released on bail, there is every likelihood that he may flee from justice. The Hon'ble High Court by relying on the judgment in Nasimjon Komlov vs. Customs in CRLM (M) No. 2038/2000 observed that the argument must be rejected.

The Court said that "it would be a shame if courts are going to keep persons incarcerated merely because they are of foreign origin even though prima facie no case is made out against them. This would be a negation of valued principles of rule of law and vocative of the constitutional mandate and principles of human rights."

The Court further held that just because a foreign national is involved, it does not mean that he is to be denied the benefit of bail. In this case the Court released the petitioner on bail on furnishing a personal bond in the sum of RS.25,000/- with one surety of the like amount to the satisfaction of the concerned trial court. The Court also directed the petitioner to deposit his passport in the custody of the I.O. and not to leave the National Capital Region without the prior permission of the concerned court.

In Haroub Slaum Sleyoum , the Hon'ble High Court of Delhi reiterated the law on bail to a foreign citizen.

The Court observed that *"While considering an application for grant of bail, various factors are to be taken into consideration, such as, the nature and seriousness of the offence, the stage of investigation, a reasonable possibility of the presence of the accused not being secured at the trial, a reasonable apprehension of evidence being tampered with or such other circumstances which may be brought to the notice of the Court which might hamper proper investigation into the matter" The Court after considering the facts of the case held that "I find force in the submission of learned counsel for the petitioner that merely because the petitioner is a foreign national this by itself cannot be a ground for declining the bail. No special circumstances have been shown to this Court to show that the petitioner is likely to interfere with course of justice nor any material to show that there are strong reasons that the petitioner is likely to leave the country. Accordingly, I have considered it a fit case to grant bail and release the petitioner."*

In a latest case, the Court of Session's Judge for Greater Bombay allowed the bail application of a Chinese national whose bail application was earlier rejected by the Metropolitan Magistrate, 22nd Court Andheri Mumbai on the ground that the applicant being a foreign national shall not be granted bail as it would be difficult to secure her presence. The Learned Session's judge allowed the application by imposing certain conditions like furnishing of bail bond, not to leave India more specifically Mumbai without prior written

7. *Lambert Kroger vs Enforcement Directorate on 28 February, 2000 85 (2000) DLT 62*
8. *Sartori Livio vs. The State, 118 (2005) DLT 81*
9. *Haroub Slaum Sleyoum vs. Shri Abdul Qadir*

permission from the Court, reporting before the Chinese Consulate once in a week and also to the IO.

CONCLUSION:

The above discussion clearly throws light on the fact that the normal rule is **"BAIL NOT JAIL".** The Indian Legal system does not create any discrimination or differentiation between Indian Nationals and foreign nationals when it comes to granting bail. The Indian Courts have in catena of judgments rejected the "foreign national" plea and have allowed the bail applications of the foreign nationals by imposing certain conditions in order to secure their presence during the course of trial. The fundamental right to "equality before law" provided by the Constitution of India is not denied to the foreign nationals merely on the ground of they being non citizens of this country. For Indian legal system the "right to personal liberty" of foreign nationals is equally important as that of the Indian nationals and the same is curbed when the security of the society is put at stake.

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PLEA BARGAINING: AN OVERVIEW

By Sugandha Nayak

Plea bargaining is essentially derived from the principal of 'Nalo Contendere' which literary means 'I do not wish to contend'. The Apex Court has interpreted this doctrine as an "implied confession, a quasi confession of guilt, a formal declaration that the accused will not contend, a query directed to the court to decide a plea guilt, a promise between the Government and the accused and a government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only. It has been introduced in the criminal procedure code in the chapter XXI A wide criminal law (amendment) Act 2005.This has change the prospect & the face of the criminal justice system.It is not applicable in cases where the offence is committed against a women or a child below the age of 14 years. Also once the court passes an order in the case of plea bargaining, no appeal shall lie to any court against the order.

"Plead Guilty or bargain for lesser sentence" is the straight & shortest possible meaning of plea bargaining. Plea bargaining refers to pre - trail negotiation between the defendant usually conducted by the counsel & the prosecution during which the defendant agrees to plead guilty in the exchange for certain concessions by the prosecutor. Plea bargaining is the result of modern judicial thinking before the introduction of plea bargaining most courts used to ignore Plea Bargaining. The concept of Plea Bargaining was not recognized in jurisprudence of India. However accused used to plead guilty only for petty offences & pay small fine whereupon the case is closed. Initially the concept of Plea Bargaining was opposed by the legal experts, judiciary etc.

The law commission of India advocated the introduction of Plea Bargaining in the 142th, 154th & 177th reports. The 154th report of the Law commission recommended the new XXI A to be incorporated in the criminal procedure code. Based on recommendation of the Law Commission, the new chapter on plea bargaining making plea bargain in cases of offences punishable with imprisonment up to seven years has been included.

RELEVANT PROVISION & PROCEDURE FOR PLEA BARGAINING

- As Per **Section 265-A,** the plea bargaining shall be available to the accused who is charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding to seven years. Section 265 A (2) of the Code gives power to notify the offences to the Central Government. The Central Government issued Notification No. SO1042 (II) dated 11-7/2006 specifying the offences affecting the socio-economic condition of the country.

- **Section 265-B** contemplates an application for plea bargaining to be filed by the accused which shall contain a brief details about the case relating to which such application is filed, including the offences to which the case relates and shall be accompanies by an affidavit sworn by the accused stating therein that he has voluntarily preferred the application, the plea bargaining the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case that he has not previously been convicted by a court in a case in which he had been charged with the same offence. The court will thereafter issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused for the date fixed for the plea bargaining. When the parties appear, the court shall examine the accused in-camera wherein the other parties in the case shall not be present, with the motive to satisfy itself that the accused has filed the application voluntarily.

- **Section 265-C** prescribes the procedure to be followed by the court in working out a mutually satisfactory disposition. In a case instituted on a police report, the court shall issue notice to the public prosecutor concerned, investigating officer of the case, and the victim of the case and the accused to participate in the meeting to work out a satisfactory disposition of the case. In a complaint

1. *http://www.neerajaarora.com/plea-bargaining-a-new-development-in-the-criminal-justice-system/, last retrieved on 10.10.2013.*

case, the Court shall issue notice to the accused and the victim of the case.

- **Section 265-D** deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same. If in a meeting under section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding office of the Courts and all other persons who participated in the meeting. However, if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265-B has been filed in such case.

- **Section 265-E** prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out. After completion of proceedings under S. 265 D, by preparing a report signed by the presiding officer of the Court and parities in the meeting, the Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence. While punishing the accused, the Court, as its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence.

- Section 265-F deals with the pronouncement of judgment in terms of mutually satisfactory disposition.

- **Section 265-G** says that no appeal shall be against such judgment.

- **Section 265-H** deals with the powers of the court in plea bargaining. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers vested in respect of trial of offences and other matters relating to the disposal of a case in such Court under the Criminal Procedure Code.

- **Section 265-I** specifies that Section 428 is applicable to the sentence awarded on plea bargaining.

- **Section 265-J** talks about the provisions of the chapter which shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A.

- **Section 265-K** specifies that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose as mentioned in the chapter.

- **Section 265-L** makes chapter not applicable in case of any juvenile or child as defined in Section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

For a valid disposal on plea bargaining it is important to follow the aforesaid procedure contemplated in Chapter XXI-A. Even though 'plea bargaining' is available after the introduction of the said amendment is available, in cases of offences which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposal of the case which may also include the giving of compensation to victim and other expenses and same cannot be done without including the victim in the process of arriving at such settlement.

The Hon'ble High Court in the case of **Sh. Charan Singh v. M.C.D**. has held that no disqualification on account of conviction could be attached to petitioner as he had been released on probation. In this case, the Hon'ble Delhi High Court has quoted the case of **Trikha Ram v. V. K. Seth and Anr** wherein the Hon'ble Supreme Court held that the benefit of Section 12 of The Probation of Offenders ACT, 1958 can be extended to the service of the offender.

2. *(Writ Petition (Civil) No. 18725/2005)*
3. *AIR 1988 SC 285*
4. *Volume I: Report of Committee on reforms in the Criminal Justice System, Govt. of India, Ministry of Home Affairs, India: March 2003.*

CONCLUSION

Plea Bargaining does not solves the entire problem but reduces its severity of penalty. The introduction of plea bargaining is a shortcut aimed at quickly reducing the number of under-trial prisoners and increasing the number of convictions, with or without justice. It is undoubtedly a disputed concept since few have welcomed it while others have abandoned it. The consequences will be felt most obviously by the countless numbers of poor languishing in the country's prisons while awaiting trial. Taking into account the advantages of plea-bargaining, the recommendations of the Law Commission Plea bargaining was clearly recognized as the need of the hour and by no stretch of imagination can the taint of legalizing a crime will attach to it. At this stage it can be safely held that 'Law is not a Panacea. It cannot solve all problems, but it can reduce the severity'. Plea bargaining in India endeavors to address the same, which despite its shortcomings can go a long way in speeding the caseload disposition and attributing efficiency and credibility to Indian Criminal Justice.

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THE DRUG (PRICES CONTROL) ORDER 2013- AN OVERVIEW

By: Gopal

With the objective to improvise and endow with the basic health care and availability of basic medicines at an affordable price across the country, the Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers, , notified the Drug (Prices Control) Order 2013("DPCO 2013") in May 2013, which may fluctuate the pricing of 348 essential medicines. Prior to the 2013 regime, the DPCO 1995 included 74 bulk medicines within its ambit and the pricing of the drugs were fixed on the basis of manufacturing costs declared by the drug manufacturers.

The DPCO 2013 empowers the National Pharmaceutical Pricing Authority ("NPPA") to regulate prices of 348 essential drugs. As per the new DPCO 2013, all strengths and dosages specified in the National List of Essential Medicines (NLEM) will be under price control.
This article endeavors to provide an insight of the key aspects of the DPCO 2013 and discusses the manner in which such provisions have been implemented.
Para 2(i) of the DPCO 2013 defines the term "Formulation" as a medicine processed out of or containing one or more drugs with or without use of any pharmaceutical aids, for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease and, but shall not include –

i. any medicine included in any bonafide Ayurvedic (including Sidha) or Unani (Tibb) systems of medicines;
ii. any medicine included in the Homeopathic system of medicine; and
iii. any substance to which the provisions of the Drugs and Cosmetics Act, 1940 (23 of 1940) do not apply;

As per the DPCO 2013, "Scheduled formulation" means any formulation, included in the First Schedule whether referred to by generic versions or brand name. "Non-scheduled formulation" has been defined as a formulation, the dosage and strengths of which are not specified in the First Schedule.

"Schedule" is the Schedule appended to the DPCO 2013.

1. *http://pharmaceuticals.gov.in/dpco2013gaz.pdf*

PRICING OF SCHEDULED FORMULATION:

Para 4 of the DPCO 2013 provides formula for the calculation of ceiling price of a scheduled formulation as follows –

Step1. First the Average Price to Retailer of the scheduled formulation i.e. P(s) shall be calculated as below:

- **AVERAGE PRICE TO RETAILER, P(S)** = (Sum of prices to retailer of all the brands and generic versions of the medicine having market share more than or equal to one percent of the total market turnover on the basis of moving annual turnover of that medicine) / (Total number of such brands and generic versions of the medicine having market share more than or equal to one percent of total market turnover on the basis of moving annual turnover for that medicine.)

Step2. Thereafter, the ceiling price of the scheduled formulation i.e. P(c) shall be calculated as below:

P(c) = P(s). (1+M/100), where
P(s) = Average Price to Retailer for the same strength and dosage of the medicine as calculated in step1 above.
M = % Margin to retailer and its value =16

Calculation of Ceiling Prices of following has also been provided in the DPCO 2013.

a. Ceiling price of a scheduled formulation in case of no reduction in price due to absence of competition
b. Calculation of Retail price of a new drug for existing manufacturers of scheduled formulations.

- **PRICING OF NON-SCHEDULED FORMULATIONS:**

Apart from the price fixation of the Scheduled Formulations, the NPPA is also empowered to monitor the maximum retail prices (MRP) of all the drugs,

2. *http://timesofindia.indiatimes.com/business/india-business/Govt-steps-in-to-end-impasse-in-pharmaceutical-industry/articleshow/23664764.cms, last visited on 16.10.2013*

including the non-scheduled formulations and ensure that no manufacturer increases the maximum retail price of a drug more than ten percent of maximum retail price during preceding twelve months and where the increase is beyond ten percent of maximum retail price, it is empowered to reduce the same to the level of ten percent of maximum retail price for next 12 months. The manufacturer shall be liable to deposit the overcharged amount along with interest thereon from the date of increase in price in addition to the penalty.

- **DISPLAY OF PRICES OF SCHEDULED & NON-SCHEDULED FORMULATIONS AND PRICE LIST:**

Para 24 and 25 of the DPCO 2013 mandate that every manufacturer of a Scheduled & non-Scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the maximum retail price of that formulation with the words "Maximum Retail Price" preceding it and the words 'inclusive of all taxes' succeeding it. Para 26 lays down that no person shall sell any formulation to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof, whichever is less.

- **RECOVERY OF OVERCHARGED AMOUNT UNDER DPCO 1987 AND 1995:**

Para 23 states that notwithstanding anything contained in the order, the Government shall by notice, require the manufacturers, importer or distributor or as the case may be, to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the provisions of Drugs (Prices Control) Order, 1987 and Drugs (Prices Control) Order, 1995 under the provisions of this Order.

- **MARGIN TO RETAILER & MAXIMUM RETAIL PRICE:**

Para 7 lays down that while fixing a ceiling price of scheduled formulations and retail prices of new drugs, sixteen percent of price to retailer as a margin to retailer shall be allowed. Para 8 specifies that the maximum retail price of scheduled formulations shall be fixed by the manufacturers on the basis of ceiling price notified by the Government plus local taxes wherever applicable. Even the loose quantities of any formulation shall not be sold at a price which is in excess of pro-rata price of the formulation.

CONCLUSION:

Undoubtedly, the response to the new DPCO 2013 would always going to remain double coined as for the reason that whereas on one hand, it would prove as a boon to the common mass and would bring hopes to thousands of poor and needy ones who are usually deprived from the basic health care as the Government has assured of continued availability of medicines, however, on the other hand, the new pricing policy would never be appraised by the other category of the market which plays significant role in manufacture of the medicines and making them available to the public as it would certainly effect in the profit up gradation at large which would affect their growth and strength in expanding to the global market.

Lately, it is reported that after the implementation of the DPCO 2013, apparently there has been decrease in the stock of the medicines in the market. Hospitals and doctors in most of the states are facing scarcity of the essentials medicines for the consumption of their patients. However, in a bid to overcome such situation being faced across the country, the government has been diligent in taking immediate steps to resolve the contentious issue of margins between the pharma industry and trade channels. In a first such communication, the department of pharmaceuticals which formulated the policy has directed top state government and state health officials to ensure the availability of medicines, stating that since these are essential commodities, their uninterrupted supply has to be ensured.

Thus, considering the fact that the price domain of pharmaceutical market being leased by the policy has bought along both pros and cons across the country, however, it is worth appreciating that the Government has been prompt in taking initiatives and put further efforts to harmonize the benefit of both aspects i.e the maker of the drugs as well as the end-user of the drugs.

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PUBLIC INTEREST LITIGATION: A NEW HORIZON

By Anjali Srivastava

"There may be times when we are powerless to prevent justice' but there must never be a time we fail to protest": Elie Wilsel

Justice is an idea that affirms social equality against any kind of discrimination or abuse out of social class or any other reason. It is a concept involving fair, moral and impartial treatment of all people who faces injustice in some or the other way. Public Interest Litigation commonly known as PIL is a tool in the form of legal action initiated in a Court of Law regarding a matter which concerns public interest.
PIL is not a very old concept it is a new stream in field of dispute resolution. Its aim to transform the society and paves the way for the elimination of various social injustices such as sexual harassment, environmental pollutions, monetary frauds and other issues etc.

MEANING

Public Interest Litigation is not defined in any statute or act yet it is a well founded concept. It has been interpreted by judges to consider the intent of public at large.

In ***Black's Law Dictionary:*** Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which public or class or class of community have pecuniary interest or some interest by which their legal right or liabilities are affected.

PIL can be broadly defined as litigation in the interest of public in general. PIL is the power given to the public by courts through judicial activism. Any person who believes that injustice being done to the society at large can approach the court for judicial remedy.

ORIGIN

PIL in India is more or less an improved version of PIL filed in USA. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer were among the first judges to admit PILs in court. In 1979 this case ***Hussainra khatoon vs. State of Bihar*** (1979) which was filed through an Advocate, based on the newspaper article published in Indian Express of the hardship of under trial prisoners of Bihar prison and a judgment was pronounced by then Justice PN Bhagwati recognized the right of speedy trial and justice. This case opened a window of thought and thereafter Courts were flooded with number of cases on different issues. Before PIL, the locus standi to file the case only belonged to the person whose right was infringed but by the introduction of PIL the locus standi is given to person acting bonafide and having sufficient interest in the proceeding of PIL can approach the court to wipe out violation of fundamental rights or any other injustice. In 1981 Justice P. N. Bhagwati in .***S. P. Gupta v. Union of India***, articulated the concept of PIL which are as follows, "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."M C Mehta is a very renowned name in the field of PIL his contribution in this field especially in environment is remarkable which helped in the protection of India natural and cultural treasures like Ganga (***MC Mehta vs. Union of India***) and Taj Mahal. (***M.C. Mehta (Taj Trapezium Matter) v. Union of India and Ors.***) He also advocated for alternate energy in transport system and his contribution in curbing child labour is also commendable.

1. *AIR1979SC1360*
2. *AIR 1982 SC 149.*
3. *[1988] 2 S.C.R. 530*
4. *AIR1997SC734*
5. *(2011)3SCC287*

GUIDELINES OF SUPREME COURT FOR ENTERTAINING/FILING A PUBLIC INTEREST LITIGATION

There are many examples of frivolous Public interest litigation In ***Kalyaneshwari vs Union of India***, the court cited the misuse of public-interest litigation "The Courts, while exercising jurisdiction and deciding a public interest litigation, has to take great care, primarily, for the reason that wide jurisdiction should not become a source of abuse of process of law by disgruntled litigant. Such careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose true facts and approach the Court with clean hands.Thus, it is imperative that the petitions, which are bona fide and in public interest alone, be entertained in this category. Abuse of process of law is essentially opposed to any public interest. One, who abuses the process of law, cannot be said to serve any public interest, much less, a larger public interest. A petition which lacks bona fide and is intended to settle business rivalry or is aimed at taking over of a company or augmenting the business of another interested company at the cost of closing business of other units in the garb of PIL would be nothing but abuse of the process of law".

The Supreme Court as issued a set of guidelines for entertaining PIL in the country:-

(Extract of guidelines based on Full Court decision dated 1.12.1988 and subsequent modifications).

No petition involving individual/ personal matter shall be entertained as a PIL matter except as indicated hereinafter.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:-

1. Bonded Labour matters.

2. Neglected Children.

3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).

4. Petitions from jails complaining of harassment, for (pre-mature release)* and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right.

5. Petitions against police for refusing to register a case, harassment by police and death in police custody.

6. Petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping etc.

7. Petitions complaining of harassment or torture of villagers by co- villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.

8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.

9. Petitions from riot -victims.

10. Family Pension.

Cases falling under the following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell, as the case may be:

1. Landlord-Tenant matters.

2. Service matter and those pertaining to Pension and Gratuity.

3. Complaints against Central/ State Government Departments and Local Bodies except those relating to item Nos. (1) to (10) above.

4. Admission to medical and other educational institution.

5. Petitions for early hearing of cases pending in High Courts and Subordinate Courts.

One should follow these guidelines before filing public interest litigation in strict sense before filing frivolous PIL.

CONCLUSION

Public interest litigation is a revolutionary stream which helps the common man to reach the remedy which is beneficial for public at large which was not earlier available to them even before actual damage is done. Public interest litigation has opened the new window of thought. We should thank our judiciary who have coined this new concept which is very useful for public at large because there are many examples present with us which shows that it really helped the common person in field of pollution, environment, bonded labour, scams corruption etc . By filing the Public Interest Litigation one can assure the justice to the aggrieved people.

"The positive energy has to flow from all nations to each other. Only then, we can protect; we can preserve; we can think; we can be the same citizens. We can be a peaceful citizen of the world.":-From the Film The World is On Fire.

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JUVENILE JUSTICE ACT AMENDMENT "NEED OF HOUR"

By: Rahul Pandey

INTRODUCTION:

"In our country children are considered as a gift from the heaven and if the child is a boy then nothing could be more soothing for the family and from the very beginning children are exempted from severe punishment for any wrong committed on their part irrespective of the gravity of the act".

The Apprentices Act, 1850 was the first legislation dealing with children in conflict with law, providing for binding over of children under the age of 15 years found to have committed petty offences as apprentices. Subsequently, the Reformatory Schools Act, 1897 provided that children up to the age of 15 years sentenced to imprisonment may be sent to reformatory cell.

Juvenile Justice Act, 1986 was enacted by our parliament in order to provide care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles as a uniform system of juvenile justice mechanism throughout our country. Under the Act of 1986, Section 2(a) defined the term juvenile as a "boy who has not attained the age of 16 years and a girl who has not attained the age of 18 years" but later on the parliament enacted Juvenile Justice Act, 2000 (herein after 'JJ Act') and the age bar was raised to 18 years for both girl and boy. The JJ Act, 2000 lays down that juvenile in conflict with law may be kept in an observation home while children in need of care and protection need to be kept in a children home during the pendency of proceedings before the competent authority. This provision is in contradistinction with the earlier Acts which provided for keeping all children in an observation home during the pendency of their proceedings, presuming children to be innocent till proved guilty. The maximum detention could be imposed on a juvenile is for 3 years remand to Special Home irrespective of the gravity of offence committed by him and JJ Act, 2000 immunes the child who is less than 18 Years of age at the time of the commission of the alleged offence and from trial through Criminal Court or any punishment under Criminal Law in view of Section 17 of the Juvenile Act.

A GLIMPSE OF JUVENILE LAW IN OTHER COUNTRIES:

1. In **U.S.A** age to determine juvenility varies from state to state, in most of the states it is 18 years but in few it is 17 years and 16 years respectively. Many states permit execution of juvenile of 16 years for murder as an adult and could be tried by criminal courts for prosecution and punishment as adults as per the gravity of the alleged offence. Till now many juvenile offenders have been executed under capital punishment but in 2005 Supreme Court of U.S.A in the case of **Roper v. Simmons** , held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18.

2. In **U.K** child between 10 to 18 years becomes criminally responsible for his action and be tried by the Youth Court and could be tried in an adult court as per the gravity of the offence committed.

3. In **France** no criminal charge can be brought against a child up to the age of ten years; and for child between ten to thirteen years of age, only educational penalties such as placing in a specialized Centre or home are to be given, while between thirteen to sixteen years of age, minors will get only half of the adult sentence. Lastly, between sixteen to eighteen years of age, person would be remanded to Criminal Court and plea of juvenility can be set aside.

The basic rule which is followed by most of the countries legislature is that the plea of juvenility would be set aside and he would be tried in a criminal court if the crime committed by the minor is a heinous one such as murder, rape etc.

1. *543 U.S. 551*

CURRENT SCENARIO IN OUR NATION:-

In our country the time has come in order to bring some reform in the Juvenile laws as there is a steep rise in serious crimes involving youth of 16 – 18 years of age and they very well know that below 18 years is the 'getaway pass' for them from the criminal prosecution. The punishment should be made a bit deterrent in order to inject the feeling of fear in the mind of the criminal. The recent rape case of **"Nirbhaya"** has caused utter dismay, concern and outrage amongst the people. The gruesome act of brutalizing her with an iron rod was done none other but by a juvenile and he has been sentenced for a period of 3 years as per Section 15 of JJ Act, 2000 as per our law for juveniles. The principal ought to have been followed for trying juvenile offenders is that Juvenility should be decided as per the state of mind and not just the state of body.

In our country it's a general trend to get our age reduced by 2-3 years at the time of matriculation so even if the offender is above 18 years but on record he is a juvenile as per his birth certificate then he would be treated as a juvenile. In the recent Nirbhaya's rape case all the other co- accused are awarded death sentence but the person who committed the most brutal part of the case has been awarded a mere 3 years of remand as per JJ Act, 2000.

CONCLUSION:-

The heinous crimes such as rape, murder etc are crimes which totally destroys the moral of the victim's family and if it's a rape then it's a lifelong stigma for the girl and her family member. Many offenders of these crimes walk free after serving a minimal period of sentence after being proven juvenile as per the so called records. Thousands of cases go unreported in our country just because of the stigma attached and most of the time victims are shunned from the society and are left unmarried just because that she was not physically strong enough in order to fight for her freedom from the clutches of the person or persons . The juvenile who commits crime of this gravity should not be left to walk free after serving maximum of 3 years that too in special home. It is high time that the law should be amended on the same footing of countries like U.S, U.K etc where a juvenile is also tried in a criminal court depending on the gravity of the offence committed by the minor.

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NEWSBYTES

1. INDIAN PATENT OFFICE IS NOW ISA AND IPEA UNDER PCT

On 15th October, 2013 The Indian Patent Office has achieved yet another milestone in the history of Indian patent system. Indian Patent office has start functioning as International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation.

This is a major development and in itself is a huge responsibility as well for the Indian Patent Office (IPO). The IPO will now be examining the PCT applications and preparing and providing International Search Reports (ISRs) and International Preliminary Examination Reports (IPERs) to the Applicants. The official language for search and examination by the IPO will be English. To avail this facility, Indian patent office has announced a nominal search Fee of approx 2500/10000 (Individual/ Company).

2. DYNAMIC UTILITY TO ASCERTAIN STATUS OF PATENT BY PUBLIC

Controller General of Patent Design and Trademarks launches a dynamic utility which will allow the public to conduct a search to ascertain the status of a patent. Also, the following information is made available in a readily comprehendible format (26 September, 2013)

1. Patents which have expired, i.e. the 20 years term is over.
2. Patents which have ceased to have effect by reason of failure to pay the renewal fee.
3. Patents, according to their Number, Title & Technical / Scientific field, which have expired or have ceased to have effect by reason of failure to pay the renewal fee.

The utility displays the Patents that have ceased to be in effect u/s 53(2). The displayed list is dynamic (Real time basis) and may be updated upon official actions u/s 60 (Restoration). Actual legal status may be confirmed from the respective jurisdiction of Patent Office. The list also depends upon the digitization status of Patents.

Link: http://ipindiaservices.gov.in/eregisterreport/

3. THE CENVAT CREDIT (SECOND AMENDMENT) RULES, 2013

The CENVAT Credit Rules 2004 have been amended by the Central Bureau of Excise and Customs through a notification on 27th of September, 2013, whereby a difference has been carved for clearance of used capital goods and the capital goods cleared as waste and scrap in rule 3 (5A). Subject to enforcement from date of publication in the official gazette, the CENVAT on used capital goods and waste and scrap shall be calculated separately.

The capital goods on which CENVAT credit has been taken are removed after being used, the amount that is required to be paid shall be the higher of, the CENVAT credit reduced by percentage points calculated on straight line method for each quarter or the amount duly leviable on the transaction value.

The notification specifies the percentages according to which such calculation may be made that is summarized as follows;

a) For computer and computer peripherals:
   10% for each quarter in first year
   8% for each quarter in second year
   5% for each quarter in third year
   1% for each quarter in fourth and fifth year

b) For capital goods other than computer and computer peripherals: @2.5% for each quarter

The provision for capital goods cleared as waste and scrap goods however, remains unaltered which means the manufacturer is liable to pay duty leviable on the transaction on the transaction value.

4. OVERSEAS FOREIGN CURRENCY BORROWINGS BY AUTHORIZED DEALER BANKS

Reserve Bank of India vide its circular bearing No RBI/2013-14/293, A.P. (DIR Series) Circular No. 54 dated 25.09.2013 has reduced the minimum maturity period

requirement from three years to one year for borrowings by the authorized banks beyond 50% of their unimpaired Tier I capital.
The said facility is available for borrowings made by banks on or before 30.11.2013 for availing swap facility from Reserve Bank of India.

5. THE RAJIV GANDHI NATIONAL AVIATION UNIVERSITY BILL:

The Rajiv Gandhi National Aviation University Bill, 2013 has received the assent of president of India. The bill provides for creation of first national aviation university in Rae Bareli, Uttar Pradesh named after Rajiv Gandhi to promote aviation studies and research to achieve excellence in areas of aviation management, policy, science and technology, aviation environment, training in governing fields of safety and security regulations on aviation.

6. THE PARLIAMENT (PREVENTION OF DISQUALIFICATION) AMENDMENT BILL, 2013

Parliament (Prevention of Disqualification) Act, 1959 list out certain office of profit, holding of which will not disqualify a holder from being chosen as Member of Parliament.
National Commission of Scheduled Caste and Schedule Tribes was bifurcated into two independent commissions i.e National Commission for Schedules Caste and National Commission for Scheduled Tribes in by Constitution(89th)amendment Act, 2003. To give effect to this amendment, Parliament (Prevention of Disqualification) Act, 1959 was also amended on 23.09.2013. With the said amendment Chairperson of National Commission for Schedules Caste and Chairperson of National Commission for Scheduled Tribes are kept out of the preview of office of profit.

7. SUPREME COURT SETS UP COMMITTEE TO MONITOR JUVENILE HOMES IN THE COUNTRY

The Supreme Court has decided to monitor juvenile homes across the country. The Chief Justice of India (CJI) has asked all High Court Chief Justices to appoint a judge each to inspect the functioning of state juvenile homes. At the Supreme Court level, the CJI has nominated Justice Madan Lokur as Chairperson of the Juvenile Committee for effective implementation of the Juvenile Justice (Care and Protection of Children) Act. He has been asked to suggest improvements in the working of the homes and organizations as envisaged in the Act and Rules. Judges appointed at the State level will consult Justice Madan Lokur in this regard. This committee is a debut effort from the SC after a large number of complaints about maintenance at these homes.
The CJI's initiative follows the recent escape of over 30 young boys from a juvenile home in Delhi. As a number of complaints were received due to poor maintenance of juvenile, shelter and children's homes and of facilities and benefits not reaching the intended beneficiaries.

8. MADRAS HIGH COURT DECLARES SUPPLY OF ELECTRICITY AS A LEGAL RIGHT

The Madras High Court has declared that denial of power supply to any person will be considered as violation of fundamental human rights.The declaration came in response to a petition from a group of washermen. The washermen filed a petition saying though they had been living on an unauthorized land along the holy Girivalam path in Tiruvannamalai for several decades, they have been denied access to power supply.

Justice S Manikumar directed Tiruvannamalai district administration and Tamil Nadu Electricity Board (TNEB) to facilitate power supply to more than 180 families of washermen living along Girivalam (circumambulation) path in Tiruvannamalai. He has directed the TNEB authorities to provide electricity connections to the families within four weeks.

In his order, Justice Manikumar said electricity supply is an aid to get information and knowledge. Children without electricity supply cannot even imagine competing with others. He said "It is the fundamental duty of the authorities to show compassion to those who are living in huts and tenements for long. When socio and economic justice is the mandate of the Constitution, it is a travesty of justice to deny electricity to the petitioners."

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