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## Article

### Impact of International Treaty on Plant Genetic Resources for Food and Agriculture on Sections 3 & 4 of Biological Diversity Act

By **Sudarshan Singh Shekhawat**

The Biological Diversity Act, 2002 (“the Act”)<sup>1</sup>, was passed pursuant to India’s commitment to United Nation Convention on Biological Diversity (“Convention”), which reaffirms the sovereign rights of the States over their biological resources. The main objective of the Convention and the Act is conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits.

The Act, *inter alia*, provides for a National Biodiversity Authority (NBA) having regulatory power to enforce the provisions of the Act. It also prescribes an approval (regulatory) based access and benefit sharing mechanism for various activities such as research, commercialization, obtaining IPRs, etc. Broadly speaking, the mechanism provides a higher degree of scrutiny for foreign individuals or entities having foreign participation in its share capital or management.<sup>2</sup> The definition of ‘biological resource’ is broad enough to cover any material of biological origin, including plants, animals and parts thereof.

The International Treaty on Plant Genetic Resources for Food and Agriculture (“the Treaty”), to which India is also a signatory,

is based on the following principles, among others:

- That all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere;
- To establish a global system to provide farmers, plant breeders and scientists with access to plant genetic materials;
- That plant genetic resources for food and agriculture are the raw material indispensable for crop genetic improvement, whether by means of farmers’ selection, classical plant breeding or modern biotechnologies, and are essential in adapting to unpredictable environmental changes and future human needs.

In view of the above broad principles, it is recognized that food security and agriculture are of paramount importance and it is imperative for countries to develop a system to share such resources among them. The Treaty provides a list of 64 crop species in Annexure-I which are to be provided facilitated access. India, being a signatory is obliged to facilitate such access under the treaty to foreign countries through a recognised framework i.e. a Multi

<sup>1</sup> Effectively came in force vide S.O. 753(E) published in Gazette of India dated 1-7-2004

<sup>2</sup> Sec.3 (1) provides that persons covered in Sec.3(2) shall not obtain any biological resource occurring in India for research, bio-survey, bio-utilization or commercial utilization without prior approval of the NBA; Sec.3(2) lists persons namely, foreign individuals or entities with any foreign shareholding or management; Sec.4 of the Act mandates that no person (including Indians) shall transfer any results of research to a Section 3(2) person without prior approval of NBA.

Lateral System (MLS). As per the MLS a contracting party, through its nodal agency [in India it is Department of Agriculture and Cooperation (DAC)] has to facilitate the prescribed plant resources to another country to fulfill the objective of the Treaty. While doing so the Countries can enter into benefit sharing agreements. In pursuance of these objectives, the Government, through an office memorandum by DAC, came up with guidelines on July 30, 2014 (known as “Guidelines for Implementation of International Treaty on Plant Genetic Resources for Food and Agriculture for Facilitated Access under Multi Lateral System”, in short, ‘Treaty Guidelines’) for facilitation of the prescribed plant resources under the MLS. The treaty guidelines, *inter alia*, prescribe the mechanism and conditions subject to which plant resources can be sent to a requesting signatory country. The guidelines stated that India had notified 9 crops out of the 64 in Annex-I of the Treaty which may be increased later.<sup>3</sup> It may be pertinent to mention that even though the nodal ministry for the Act is the Ministry of Environment, Forests and Climate Change (“MoEF”), the guidelines, were published *vide* an office memorandum of the DAC (not MoEF) and without any express sanction under the Act.

Thus, *prima facie*, there could have been a conflict between provisions of the Act and the treaty guidelines published by the DAC, particularly the obligations of India under the Treaty.

However, on 18-12-2014, the Government of India, through MoEF, came up with a gazette notification. The notification, in exercise of the powers conferred under Section 40 of the Act<sup>4</sup> and in fulfillment of the obligations of the Government of India to the Treaty, empowered the DAC to notify such crop species from those listed in Annex I of the Treaty which are being considered relevant for which will be exempted from Section 3 and 4 of the Act, *for the purposes of utilization and conservation for research, breeding and training for food and agriculture*.

Thus, the DAC was delegated with the duty to determine those crop species out of the 64 listed in Annex-I of the treaty which are considered relevant for the objectives of the Treaty. The DAC, pursuant the above notification of MoEF, came up with a fresh Office Memorandum on 16-2-2015 (OM), declaring that all the crops listed in the Annex-I of the Treaty may be exempted from Sections 3 and 4 of the Act for the purpose of utilization and conservation for research, breeding and training for food and agriculture. It was further declared in the said OM that the exempted crops will be governed by the treaty guidelines (issued in July 2014) to facilitate exchange of plant genetic resources under the MLS.

Thus, the DAC by the said OM has extended the exemption notified by MoEF to all the 64 crops listed in Annex-I of the Treaty. This raises the question - whether the exemption

<sup>3</sup> Page 5, 3rd paragraph

<sup>4</sup> Section 40 gives power to the Central Government to exempt from the provisions of Act such biological resources that are traded as commodities.

extends to individuals or entities in India researching on crops listed in Annex-I and possibly commercializing and if yes, under what circumstances.

The notification of MoEF particularly reads as under:

*“Now, thereof the Central Government, in consultation with the National Biodiversity Authority, hereby declares that the Department of Agriculture and Cooperation may, from time to time specify such crops as it considers necessary from amongst the crops listed in the Annex I of the ITPGRFA, being food crops and forages covered under the Multilateral System thereof, and accordingly exempts them from Section 3 and 4 of the said Act, for the purpose of utilization and conservation for research, breeding and training for food and agriculture.”*

As can be noted above, while the names of crops have to be provided by the Department of Agriculture (DAC), the exemption from Sections 3 and 4 of the Act come from the Central Government without mentioning the category of persons to which it is extended. This is because the notification has to be read with Sections 3 and 4 which make it abundantly clear as to who the provisions are applicable to. Section 3 is applicable to foreign individuals or entities with foreign shareholding or management whereas Section 4 is applicable to all.<sup>5</sup> Thus, as far as the above

question is concerned, it is clear that the exemption necessarily applies to Section 3(2) persons in India which include companies with foreign shareholding. The exemption is also extended to purely Indian companies/entities who are into research and may have to transfer results of their research to Section 3(2) persons or outside India. Needless to say, Section 3(2) persons also include breeders located outside India who may want to exercise MLS provisions through respective nodal state agencies. *However, the exemption is not absolute but highly qualified* (emphasis supplied).

The wordings of the MoEF’s notification and consequent OM of DAC are highly specific to the purpose of exemption. While Section 3(1) uses, *inter alia*, research, bio survey, bio-utilization and “*commercial utilization*”<sup>6</sup>, the notification uses the words “*for the purpose of utilization and conservation for research, breeding and training for food and agriculture*”.

In other words the purpose is limited to access for

- a) Research for food and agriculture,
- b) Breeding for food and agriculture and
- c) Training for food and agriculture.

The phrase ‘food and agriculture’, derived from the Treaty, implies that the exemption is only restricted to the biological resources

<sup>5</sup> *Supra* 2

<sup>6</sup> Section 2(f) of the Act defines Commercial utilization as “*end uses of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic intervention, but does not include conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping*”

relevant for food and agriculture. *Prima facie*, it seems crops like cotton may not be covered.

The question then is whether “commercial utilization” can be read as part of “utilization for research, breeding and training for food and agriculture”. The word ‘*utilization*’ has not been used in a broad sense, but restricted to research, breeding and training ‘for food and agriculture’. The rule of interpretation is not to read words in a provision when the same are absent. The intention must be discerned from the plain language of a statute. Definition of “commercial utilization”<sup>7</sup> includes uses which are traditionally not considered as part of “food and agriculture” such as *fragrance, cosmetics, oleoresins, genetic intervention etc.* The definition in Section 2(f) brings home the point that such ‘*end use*’ of *biological resources for commercial utilization* does not include *conventional breeding, traditional practices in agriculture etc.* which can be said to be, more or less, in line with the intent of the Treaty. The

legislature did not intend agriculture, food, etc., to fall under ‘commercial utilization’. In other words, if the exempted plant resources i.e. the crops listed by the DAC, are used for commercial utilization as defined under the Act, such as cosmetics, fragrances etc., the same shall not be exempted.

The MoEF’s notification and consequent OM by DAC would go a long way in streamlining extensive research work being done in agriculture in India towards food crop improvement and high yielding varieties. Such research works not only involve companies with foreign shareholding but also Indian companies, public institutes who have to transfer results of research to Section 3(2) persons. This would ultimately benefit the breeders, the farmers and consumers who are the ultimate beneficiaries to the Treaty as well as the Act.

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## Ratio Decidendi

### Trademarks – Comparative advertising when not disparaging

In the dispute wherein the petitioner had impugned the defendant’s advertising campaign comparing their product with that of the petitioner, the Delhi High Court has held that a comparison, which is unfavourable to a competitor, does not necessarily mean that it is dishonest or unduly detrimental. Dismissing the application contending denigration or disparagement of plaintiff’s mark, the court held

that mere trade puffery, even if uncomfortable to the registered proprietor, does not bring the advertising within the scope of trade mark infringement. Holding that failure to point out competitors advantages is not necessarily dishonest, the court observed that in Indian law there is no rule which requires that all the features of a product have to be necessarily compared in an advertisement. The court in this regard rejected the contention of the petitioner that as prices of similar products had

<sup>7</sup> Ibid

been compared, the defendants were bound to mention all other relevant parameters/features in the advertisement. The defendant in their advertisement had compared only some of the parameters.

The court in this regard further laid down the conditions for permitting comparative advertising. It was observed that comparative advertising is legal and is permitted when the goods or services are meeting the same needs or are intended for the same purpose; one or more material, relevant, verifiable and representative features (which may include price); and the products are with the same designation of origin (where applicable). The court in this regard also noted that the primary objective of Sections 29(8) and 30(1) of the Trademarks Act, 1999, is to allow comparative advertising as long as the use of a competitor's mark is honest, and that the test of honest use is an objective test which depends on whether the use is considered honest by members of a reasonable audience. It was held that the words "industrial or commercial matters" in the said provisions do not mean that the court should look at statutory or industry-agreed codes of conduct. [*Havells India Ltd. v. Amritanshu Khaitan* - CS(OS) 107/2015, decided on 17-3-2015, Delhi High Court]

### **Trademark infringement – Defendant can plead invalidity of mark only when registration totally illegal or fraudulent**

Considering the plea of the defendant in an infringement action, pleading invalidity of the plaintiff's registered trade mark, the Bombay High Court has held that the defendant can

challenge the registration only on the ground the same is so fraudulent or is so apparently invalid that the court should not grant an injunction in favour of the plaintiff. The court in this regard relied upon a recent full bench decision in the case of *Lupin Ltd. v. Johnson and Johnson* and held that a very heavy burden lies on the defendant to rebut the strong presumption in favour of the plaintiff at the interlocutory stage. The court in the facts of the case, directed for continuation of its ad-interim order holding that the defendant's plea that the Tobacco Board describes tobacco produced in the Anand area of Gujarat as "SAFNA" (trademark of the petitioner) can be taken up by the IPAB in the pending rectification proceedings. [*Sopariwala Exports v. Shreenathji Overseas* - Notice of Motion Nos. 407, 149 and 1883 of 2014 in Suit No. 920 of 2013, decided on 31-3-2015, Bombay High Court]

### **Copyrights – Producing jewellery articles using designs – 'Article' different from 'artistic work'**

Deliberating on the distinction between the 'artistic work' and the 'article' produced on the basis of the same, Bombay High Court has granted interim injunction in the case where the branded jewellery articles were produced allegedly using designs of the petitioner. The court in this regard observed that an 'artistic work' so long as it can qualify as an artistic work reproduced in any form shall continue to enjoy the copyright available to it under the Copyright Act, 1957 but, when it is used as the basis for designing an article by an industrial

process, it would enjoy a lesser period of protection of copyright under Section 11 of the Designs Act, 2000, if registered as a design under that Act, and if not so registered, would cease to enjoy any copyright after more than fifty such applications, under Section 15(2) of the Copyright Act, 1957. The court was of the view that an ‘artistic work’ is the drawing itself and the copyright of the artist consists in its reproduction in any medium and in any dimensions, while the features of shape,

configuration, etc., which are elements of a design, are “applied to any article”. The court also stated that there is a need to draw lines to distinguish the ‘design’ from ‘artistic work’. Thus, it opined that what was produced in the case was the artistic work and that work ought to enjoy full protection under the Copyright Act. [*Pranda Jewellery Pvt. Ltd. v. Arya 24 kt* - Notice of Motion No. 2235 of 2012 in Suit No. 2477 of 2011, decided on 1-4-2015, Bombay High Court]

## News Nuggets

### The art of invasion

Disturbing but not outrageous was how the act of a photographer who took pictures of his neighbours without their knowledge, was described. This was because he used the photographs to convey his thoughts and ideas to the public. Quoting a number of earlier decisions including one in which a judge was caricatured as a devil, the US Supreme Court,

Appellate Division, on 9th April, denied relief to the complainants and opined that the issue of addressing privacy concerns was better addressed by the legislature. The court did not agree that the work had been used for purposes of advertising or trade though indubitably the exhibition must have entailed some publicity to the photographer.

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