CLASIS LAW

# Newsletter

July 2018

**Clasis Law has been ranked amongst the Top 40 Indian Law Firms by RSG Consulting Rankings 2017**

# Welcome to the July Edition of the Clasis Law Newsletter

This edition brings to our readers a featured article titled “Scraping the amorphous contours of Whistleblowing”.

This article attempts to analyse the amorphous paradigm of whistleblowing laws in India in comparison with other jurisdictions on various parameters which usually forms part of legislations on this subject such as issue of permitted disclosures, coverage and confidentiality. The article also briefly explores the interplay and overlap of issue of whistleblowing with other laws, whether domestic or extraterritorial and the internal policies/ processes within an organisation. While the article presents the overarching framework on whistleblowing, it tapers around the specificity of this issue in relation to private players in the economy.

We continue to highlight certain key judgements passed by the Hon’ble Court as well as changes in Corporate and Commercial laws and updates on Projects and Intellectual Property.

Your inputs and feedback are always welcome and we look forward to our interactions with you.

“Clasis Law’s Managing Partner and Head of Corporate Practice, Vineet Aneja is recognized as one of India’s Most Trusted Corporate Lawyers by ICCA, 2017”

## Contents


# SCRAPING THE AMORPHOUS CONTOURS OF WHISTLEBLOWING

## INTRODUCTION

*"The question of whether I as a whistleblower should be pardoned is not for me to answer."*
**Edward Snowden**

Whistleblowing is a complicated and dark affair stemming from individuals manoeuvring the fine line of corporate social responsibility and the safety net of their jobs.

For organisations, however, it's a behemoth task of balancing corporate interests, doing right by the whistleblower and complying with the legal requirements involved around the issue of whistleblowing, all while protecting their reputation and brand image.

The legal framework on whistleblowing in countries is usually in the form of identified issues which are considered breach of applicable legal requirements and are encouraged to be legally reported or disclosed such as bribery, unethical conduct, financial fraud, serious violations of laws etc.

Besides this, there may be laws specifically for whistleblowers, containing provisions on (i) protection against retaliation, wrongful dismissal and discharge, (ii) maintaining confidentiality, and (iii) outlining the layout and channel for reporting and handling of such incidents by the employers and concerned authorities.

Furthermore, legislations could also prescribe the requirement for organisations to formulate an internal whistleblowing policy/vigilance mechanism which facilitates a safe channel for internal whistleblowing by employees' vis. a vis. an organisation.

In this context, it is interesting to note that the whistleblowing laws across jurisdictions have evolved in a distinct fashion. Laws have been gradually evolved in protecting whistleblowing done in good faith and with an element of public interest involved. The test of disinterested individual or observer which precludes the requirement of reportable issue to fall under the area of responsibility of whistleblower has evolved slowly, thereby increasing the ambit of who could qualify to be a whistle blower. Confidentiality of reporting has always been protected however anonymity in reporting has faced legislative resistance. As the laws evolved, they also mandated requirements to formulate an internal mechanism for whistleblowing by corporate entities.

## WHISTLEBLOWING LAWS: INDIA AND COMPARSION WITH OTHER JURISIDCTIONS

Coverage:

In India, the Whistle Blowers Protection Act, 2011 ("**WP Act**") governs the mechanism for making permitted public interest disclosures against allegation of corruption, misuse of power etc. by public servants(including former public servants).The whistleblower under this act could be any person including former or current employee, third party vendor, client or any unrelated party. However, the WP Act does not cover cases which involve only private persons or entities, without any wrong doing by a public servant.

Unlike the above, in USA, at the federal level, the Whistleblower Protection Act of 1989 offers a rather constricted approach of providing protection to only the federal employees (including former employees) as whistle blowers.

Further, laws such as the Sarbanes-Oxley Act of 2002 and Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd Frank Act**") cover private sector corporate employees working in publicly traded companies.

Although, certain laws in the US, do offer protection to employees working in a particular industry in the private sector while blowing the whistle on wrong doing within the private sector. For instance: the Occupational Safety and Health Act of 1970, protects employees who report any health or safety hazard in an organisation.


In UK, the Public Interest Disclosure Act, 1998, protects employees, working both in private and public sector and includes individuals engaged in the capacity of contractors and certain category of trainees besides the full time employees and complaints can be made against wrong doings of only private individuals.

Thus, as opposed to the Indian framework, the legislations in UK and to some extent in US provide an avenue for whistle blowing vis. a vis. reporting of allegations by a private person against another private person or entity.

Protection:

While the WP Act in India has not yet been notified, its framework is used as a reference points by the Indian courts while deciding cases related to whistle blowers against public servants. The WP Act offers protection against victimisation and imputes an obligation of maintaining confidentiality of the whistle blower.

The laws in US also protect covered employees making lawful disclosures from retaliation from co-workers and adversarial modification of their terms of employment. US legislative framework goes a step ahead in so far as the Dodd Frank Act offers a mechanism for financially rewarding the whistleblowers for having made the relevant disclosure.

Similarly, the Public Interest Disclosure Act, 1998, in UK, protects against retaliation and even extends vicarious liability on the employer in the event the whistleblower is detrimentally treated by a co-worker.

Further, France offered protection from victimisation, harassment and unfair modification of their terms of employment under its labour code, to employees, who made complaints regarding alleged corruption. In this regard, France has recently introduced legal framework to deal with corruption i.e. the *"Loi Sapin II pour la transparence de la vie économique*" ("**SAPIN II**") which has penalties in place, in the event a whistleblower is prevented from making disclosures or if the confidential information related to the whistleblowers is revealed by an individual. SAPIN II provides that the whistleblowing mechanism shall aim to maintain strict confidentiality and anonymity of the whistleblower.

Permitted Disclosures:

Presently, in India, since the WP Act has not been notified, there is a comparable mechanism to report, by any person, in the capacity of whistleblower, on any allegation of corruption or of misuse of office by a public servant (including an employee of a government company), to the Central Vigilance Commission, which is the designated agency to receive such complaints.

There is currently no restriction on the nature of disclosure which is permissible provided whistle blowing complaint is filed with all the supporting documents and is not anonymous.

Furthermore, in addition to the WP Act, the Companies Act, 2013, read with rules made thereunder provides that the listed companies, companies which accept deposits from the public and companies which have borrowed money from banks or public financial institutions in excess of INR 500,000,000 need to establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances.

This mechanism is implemented by companies by formulating a standalone policy in this regard. The employees can make disclosures ranging from complaints on violation of code of ethics of company, conflict of interest, frauds, corruption and harassment. The Companies Act, 2013 does not expressly provide for protection of whistle blowers, the nature of complaints or process of disclosure. As a practice companies in their policies usually state that confidentiality of the whistleblower shall be maintained, there shall be no retaliation and complaints can or cannot be made anonymously.

Further, as per regulations prescribed by the Securities and Exchange Board of India, listed entities need to devise an effective whistle blower mechanism enabling stakeholders (including employees) to freely communicate their concerns about illegal or unethical practices. Under these regulations, the brief details of the complaints received from the stakeholder and the status and manner of resolution of these complaints should be outlined in the business responsibility report to be published by the listed companies in India.


In this context, it is pertinent to note that jurisdictions like the US and UK have stricter standards for what are deemed permitted disclosure and the threshold of reasonable belief, which needs to form the basis of the allegations being made.

For Instance: Disclosure under the Whistleblower Protection Act of 1989, in US, is protected if it is based on the reasonable belief of the whistleblower. This legislation uses the test of "disinterested observer" when ascertaining the reasonable belief of a whistleblower. Thus if in a given situation, a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant would arrive at a similar conclusion as the whistleblower and conclude that the actions of the public officials evidence a violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, then the reasonable belief of the whistleblower would not be ordinarily questioned.

Similarly, under the Public Interest Disclosure Act, 1988, in UK, qualified disclosures, which can be made under this law, range from episodes when a criminal offence has been / is being or is likely to be committed. It further includes reporting a miscarriage of justice or failure by an individual to comply with his or her legal obligation or in the event health or safety of any individual has been or is being or is likely to be endangered or damaged. However, the above issues relating to qualified disclosures will not be reportable if the reporting individual is also involved in the wrong doing or in breach of legal professional privilege. The threshold for a reportable issue to fall in the category of qualified disclosure is higher when such disclosure is made to an external prescribed authority or media as opposed to reporting internally within the organisation. Individuals are offered protection only if they make qualified disclosures in good faith and the whistleblower must objectively and reasonably believe that the issue falls under the category of qualified disclosure and it must be distinct from an allegation or opinion. The amendments to this act have introduced the requirement of public interest test to be met to validate the reasonableness of the disclosure. For disclosures made to the media, such disclosures should be substantially true and should fall within the reporting person's ambit of responsibility.

In France, previously, the protection offered to whistleblower was contingent on existence of sufficient evidence vis-a-vis the disclosure. With the advent of SAPIN II, the scope of disclosure is extended by providing that disinterested individuals can also report provided the disclosure is made in good faith.

With respect to entertaining of anonymous complaints, certain statutes in US protect anonymous whistle blowing but in UK the legislation protects confidential reporting rather than anonymous reporting.

## THE DYNAMICS AND DILEMMA AROUND WHISTLEBLOWING MECHANISM IN INDIA FOR PRIVATE ENTITIES

Issue of extraterritorial application of laws

In India, laws on whistleblowing primarily revolve around allegations where a public servant is involved with a private entity in capacity of a client, vendor or the concerned authority in relation to compliance of applicable laws by such an entity. However, legislations like Companies Act, 2013 and regulations prescribed by the Securities and Exchange Board of India; mandate certain companies to formulate a robust internal mechanism for whistle blowing.

Even in the absence of such a mandatory requirement, employers generally have in place whistleblowing policies which provide an avenue for the employees to raise concerns on any violations of legal or regulatory requirements or the employer's internal code of conduct.

To this end, a whistleblowing policy generally includes provisions relating to reportable issues, protection of whistleblowers, reporting procedures, process of handling disclosures, accountability of whistleblower in case of false disclosure, retention of records etc. Preferably, a whistleblowing policy also provides for reporting of unethical or improper practice and violations of the employer's internal code of conduct (not necessarily being a violation of law).

The policies by such private entities can borrow the tests of "*good faith*", "*public interest*", "*reasonable belief*", "*disinterested observer*" etc. , which feature in laws of other jurisdictions, while defining the scope of permitted disclosures under their policies.


This voluntary approach by the employers reinforces their commitment under the Companies Act, 2013, which requires the directors' to include a business responsibility statement with the director's report stating that the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

Besides such voluntarily formulation of a robust mechanism, there is also an urgent need to assess the extra territorial application of certain laws such as the anti-corruption laws, data privacy laws for companies operating in multiple jurisdictions and engaging in cross border transactions, to ensure that their internal mechanism for whistleblowing is compliant with such laws. The extra territorial application of anti-corruption laws, data privacy laws also affect the whistleblowing procedures and policies adopted by multinational companies across jurisdictions, for instance a parent entity becoming liable in the home country, for the breaches or lapses of a subsidiary, affiliate or group company in foreign jurisdictions.

Therefore, for Indian companies which are part of multinational group it becomes essential to ensure that policies and internal compliance systems of the Indian entity are aligned with foreign laws, where applicable.

For instance: Since the applicability of the French Law, SAPIN II, extends to subsidiaries of and companies controlled by the parent company, to whom SAPIN II is applicable, it would be essential for such Indian entities to ensure that their internal compliance mechanism envisages the requirements set out under this law including the anti-corruption policies and channel for reporting and protection for the whistle blowers.

Overlap with other procedures/policies in the organisation

While the whistleblowing mechanism sets out the framework for making disclosures regarding legal and ethical indiscretions which may be present in an organisation, it is essential that there are in place other policies which define the scope and ambit of these reportable indiscretions such as policy on anti-corruption, sexual harassment, gifts and gratuities, charitable contributions, conflict of interest, policy against receiving commissions or kickbacks, ethics code etc.

Additionally, the incidents relating to whistleblowing often result in initiation of disciplinary proceedings against the delinquent employees, even leading up to invoking legal action in cases of serious breach. If the whistle blower is also a witness to the alleged incident of misconduct then often a conflict arises between protecting the identity of the whistle blower vis. a vis. the respondent's right to know and examine the witness.

While the complications which arise in a whistleblower incident are inevitable, however clarity in protocols, a sound understanding of applicable laws, their overlap with other policies and careful handling of such incidents can help employers navigate through conflicting interests and protect the organisation.

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# Legal Alerts

## CLAIMS CAN BE ACCEPTED TILL THE DISTRIBUTION OF ASSETS BY LIQUIDATOR

The National Company Law Tribunal, New Delhi Bench ("**Adjudicating Authority**") in its recent order dated May 21, 2018 passed in *M/s Globe Express Services (Oversees Group) Ltd. & Anr. vs. M/s M.M. Cargo Container Line Pvt. Ltd. & Ors., Case No. (IB) 204(ND)/2017* has clarified the position with respect to the acceptance of claim by Creditors after commencement of the liquidation process. The Adjudicating Authority, by way of the present order, has held that till the distribution of the assets by the liquidator, the claim of the Creditor can be considered.

The brief facts which necessitated passing of the present order are that SBS Transpole Logistics Pvt. Ltd. ("**Creditor**") had filed an application before the Adjudicating Authority seeking inclusion of its claim and for consideration of the same in the process of the liquidation.

The Adjudicating Authority while entertaining the application, took into account that the fact that the name of the Creditor was reflected in the balance sheet of the Corporate Debtor. Further, in the present case the Resolution Professional also confirmed that the at the point of finalizing the Resolution Process the claim of the Creditor was considered by him.

The Creditor's application before the Adjudicating Authority was objected by the liquidator/Resolution Professional on the grounds that it would increase the costs and/or once the liquidation proceedings have commenced, he cannot include the claim unless permitted by the Bench (Adjudicating Authority).

However, the Adjudicating Authority was not inclined to accept the aforementioned arguments/objections on the following grounds:-:-

(a) The Insolvency and Bankruptcy Code, 2016 mandates the Resolution Professional to collect all the claims and therefore, it would be the duty of the liquidator to entertain and ascertain all claims whether or not filed by the Claimant;

(b) The Creditor's claim was considered by the Resolution Professional at the point of finalizing the Resolution Process;

(c) In the present case, name of the Creditor was reflected in the balance sheet of the Corporate Debtor and the Resolution Professional also confirmed that at the point of finalizing the Resolution Process the claim of the Creditor was considered by him.

(d) There have been precedents which suggest that the claim was taken into account at the winding up stage wherein it was considered just and expedient;

(e) The increase in expenses would be a part of the liquidation process.

Accordingly, the Adjudicating Authority allowed the Creditor's application and directed the liquidator to consider the claim of the Creditor. While passing the order, the Adjudicating Authority categorically clarified that till such period the assets under liquidation are not distributed, non-inclusion of a verified claim should not be summarily rejected and it is only after the distribution of assets that no further claim can be entertained.

## Corporate and Commercial

### Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018

On July 4, 2018, the Insolvency and Bankruptcy Board of India (IBBI) notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 today. The following are the key salient amendments to the regulations:

1. The regulations provide that wherever the corporate debtor has classes of creditors having at least ten creditors in the class, the interim resolution professional shall offer a choice of three insolvency professionals in the public announcement to act as the authorised representative of creditors in each class.
2. An application for withdrawal of an application admitted under section 7, 9 or 10 of the Code (for closure of corporate insolvency resolution process) may be submitted to the interim resolution professional or the resolution professional, as the case may be, before issue of invitation for expression of interest, along with a bank guarantee towards estimated cost incurred for certain purposes under the process.
3. Where rate of interest has not been agreed to between the parties in case of creditors in a class, the voting share of such a creditor shall be in proportion to the financial debt that includes an interest at the rate of eight per cent per annum.
4. Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed.
5. A meeting of the CoC shall be called by giving not less than 5 (five) days' notice in writing to every participant.

### Companies (Amendment) Act, 2017

On July 5, 2018, the Ministry of Corporate Affairs, issued the Companies (Amendment) Act, 2017. This notification provides August 15, 2018 as the date on which the following provisions of the Companies Amendment Act, 2017, shall come into force:

a) section 15 – relating to prohibition on acceptance of deposits from public,

b) section 16 - relating to repayment of deposits, etc., accepted before commencement of the Companies Act, 2013,

c) section 75 – relating to companies capable of being registered, and

d) section 76 – relating to the obligations of companies capable of being registered under part II of the Companies Act, 2013.

Further, the Ministry of Corporate Affairs, appointed July 5, 2018 as the date on which the provisions of Section 20 (relating to reporting of payment or satisfaction in full of any charge registered in the name of a company) of the Companies Amendment Act, 2017 shall come into force.

### Guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT) /Obligations of Securities Market Intermediaries

On July 4, 2018, the Securities and Exchange Board of India (SEBI) updated the guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT) /Obligations of Securities Market Intermediaries, in the context of recommendations made by Financial Action Task force (FATF) on anti-money laundering standards is enclosed. Every banking company, financial institution (which includes chit fund company, a co-operative bank, a housing finance institution and a non-banking financial company) and intermediary (includes a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, asset management company, depository participant, merchant banker, underwriter, portfolio manager, investment adviser and any other intermediary associated with the securities market and registered under Section 12 of the SEBI Act, 1992, shall have to adhere to client account opening procedures and maintain records of such transactions as prescribed by the Prevention of Money Laundering Act, 2002 and rules notified there under.

The aforementioned guidelines have been divided into two parts; (i) the first part is an overview on the background and essential principles that concern combating Money Laundering (ML) and Terrorist Financing (TF) and (ii) the second part provides a detailed account of the procedures and obligations to be followed by all registered intermediaries to ensure compliance with AML/CFT directives. These guidelines shall also apply to the branches and subsidiaries located abroad, especially, in countries which do not or insufficiently apply the FATF Recommendations, to the extent local laws and regulations permit. When local applicable laws and regulations prohibit implementation of these requirements, the same shall be brought to the notice of SEBI.

## Projects, Energy and Natural Resources

### Indian Infrastructure Sector Could See Investment From Saudi Arabia

India has been seeking investment from Saudi Arabia for its infrastructure sector for a longtime. The efforts have intensified now, with the world's biggest oil producer, Saudi Aramco, partnering with the consortium of Indian state-run companies to set up the largest global refinery and petrochemical complex at Ratnagiri in Maharashtra at an investment of $44 billion. Saudi Aramco will enter fuel retailing in India, where the energy demand is likely to grow at 4.2% in the next 25 years. Further the Public Investment Fund (PIF) of Saudi Arabia, which is an investor in SoftBank's Vision Fund and Uber, is now looking to invest in India's infrastructure sector. PIF, which is the Kingdom's chief investment vehicle, intends to increase its assets under management from $230 billion to more than $400 billion by the year 2020. Building "strategic economic partnerships" is among its key objectives.

### Govt. Of Andhra Pradesh Inks Concession Agreement For Development Of Nellore Airport

Nellore International Airport Pvt Ltd, a consortium of SCL-Turbo, has inked the concession agreement for the development of a greenfield airport and a cargo hub at Dagadarthi, about 25 km from Nellore in Andhra Pradesh.

Managing Director of Nellore International Airport, inked the concession agreement with the Managing Director of Andhra Pradesh Airport Development Corporation Ltd. Described as one of the no-frills airports to be developed in the country, it will be developed on a 1,350 acres of land, for which the acquisition is complete. As per the concession agreement, a revenue share of 9% has been offered to the government.

The consortium has reportedly, collaborated with a French airport operator for operations and maintenance. It is expected to handle a capacity of up to 2 million passengers a year and 55,000 tonnes of cargo. This airport is expected to play a key role in the fast growing industrial hub and the proposed Cargo Village will serve as a cargo hub not just for Andhra Pradesh State and also for Chennai.

### Govt. Of Odisha To Set Up 20 New Hospitals On PPP Mode

The Government of Odisha has decided to set up 20 new hospitals at an estimated cost of Rs 1,000 crore on public private partnership (PPP) mode. The decision in this regard was taken at a high level meeting chaired by the Chief Minister. The hospitals would be developed in eleven high priority districts under Odisha Health Service Investment Policy-2016. The planned hospitals would be built with an investment of over Rs 1000 crore and are expected to generate employment opportunities for over 10,000 para-medics. The hospitals would be developed on Hub and Spoke model under the Affordable Health care Project of the State Government. Out of the total 20 hospitals, some hospitals will function as central hospitals and the rest will operate as branch hospitals or spokes.

### Delhi Metro Phase-IV And Many Other Metro Projects Granted In-principle Approvals

The Ministry of Finance has granted an in-principle approval to three corridors of Delhi Metro Phase-IV which have a combined length of 61.66 km, out of the total 104 km of the proposed Phase-IV project of the Delhi Metro.

The three corridors, for which approval has been sought in the first phase, would be built at a cost of Rs 29,000 crore. As per the original plan, work on this phase would have commenced in April 2016 however, in the absence of the Government approval, the start date kept getting postponed. The Ministry of Finance has also granted in-principle approval for metro projects in Indore, Bhopal, Kanpur, Agra, and Meerut. The final approval would be granted under the aegis of new Metro Rail Policy, which was cleared by the Union Cabinet in 2016. Besides, the Finance Ministry has also approved a proposal of rapid rail project connecting Delhi to Meerut. All such proposals would be put up before Public Investment Board (PIB) to evaluate and scrutinise the investment plans pertaining to these projects. Once the PIB approves these projects , the proposals would be put up to Union Cabinet for approval.

The new Metro Rail Policy seeks to introduce Public-Private Partnership (PPP) component in the sector by making it mandatory for seeking central assistance. As per policy, private investment and other innovative forms of financing of metro projects has been made compulsory to meet resource demand for capital intensive high capacity metro projects. The new policy also aims at ensuring provision of last-mile connectivity and preventing escalation in cost of projects.

# IP Updates

### Copyright exploitation right emanates from contract

This is regarding an appeal filed in the Madras High Court by Kajal Agarwal (the "**Appellant**") against the judgement and decree passed by the Single Judge in a suit filed by the Appellant against the Managing Director, V.V.D. & Sons Pvt. Ltd. (the "**Respondent**") for restraining the Respondent to commercially exploit the cinematograph film created for promoting hair oil products by the Appellant.

The Respondent approached the Appellant, who is a famous actress, to endorse their hair oil products and created a cinematograph film for this purpose. The Appellant performed in the cinematograph film and also did photo shooting for two days. The Appellant and the Respondent mutually agreed the terms of the Appellant's performance in the cinematograph film and these terms were reflected in an agreement dated 29th December, 2008 ("**Agreement**"). The Respondent signed the Agreement but the Appellant did not sign the Agreement stating that the Agreement did not contain all the agreed terms. The Appellant commenced advertising its hair oil products through the cinematograph film. The Appellant stated that even though she didn't sign the Agreement the Respondent was entitled to exploit her performance in the cinematograph film only for one year, that is, from 29th December 2008 to 28th December, 2009. The Appellant claimed that the Respondent violated the terms of the Agreement by commercially exploiting the cinematograph film beyond the agreed term of one year. The Respondent contended that they didn't violate the terms of the Agreement as the specific terms of the Agreement conferred copyright over cinematograph film in favour of the Respondent which entitled the Respondent to exploit the cinematograph film for the copyright term, that is, a period of 60 years as per the provisions of the Copyright Act, 1957 ("**Act**"). The Respondent also contended that the Appellant cannot claim royalties under Section 38-A of the Act as this provision came into force on 21st June, 2012, having prospective effect, when the subject suit was not instituted.

The Court upon observing the facts along with evidence filed by both the parties considered the following points:

*A) Where the Act gives the first owner of the copyright of the cinematograph film a term of 60 years to exploit the work under section 26 of the Act, whether the same could be restricted by the parties by way of a contract for a lesser period?*

*B) Whether in a cinematograph film more particularly in an advertisement film, where apart from the Appellant as performer it also involves various other players like the cameraman, music director, director of the advertisement film etc., and the Respondent as a producer and the first owner of the copyright of the film can be restricted to exploit his production for a lesser period than the one conferred by the Act based on an agreement entered into by him with one of the performers?*

*C) What is the scope of proviso (c) to Section 17 of the Act and whether the order passed by the division bench of this Court during the interlocutory stage on this issue will have a binding effect while deciding this issue at the stage of final hearing when all the materials are before the Court?*

*D) What is the effect of the deletion of sub Sections (3) and (4) of section 38 and the insertion of Section 38-A of the Act and whether the Appellant can take advantage of these provisions which came into effect from 21/06/2012?*

*E) Whether the exploitation of the cinematograph film by the Respondent beyond the period stipulated by the Agreement will restrict/prevent the Appellant from endorsing or acting in the advertisement film of the competitors or other persons who deal with similar products?*

The Court first analysing issue C stated that the parties did not dispute that they entered into the Agreement, and the counsel for the Appellant relied upon clause 9 of the Agreement stating that the Agreement was for a period of one year, and that the Respondent cannot be considered as the first owner of the cinematograph film as the terms of the Agreement is contrary to the claim of the Respondent. The Court analysed various provisions of the Act pertaining to "author", "cinematograph film" and further analysed Clause 3 and 4 of the Agreement and stated that the advertisement created by the Respondent would mean a cinematograph film as per the provisions of the Act and the Respondent would fall within the definition of "author" and consequently a "producer" as the Respondent produced the cinematograph film which falls under the term "work" under the Act. Therefore, the Respondent being the author of the work would also be the first owner of the copyright having the exclusive right to communicate the cinematograph film to the public and such right would subsist for a period of 60 years.

The Court then analysed whether consequent to clause 9 of the Agreement, the Respondent would be permitted to enjoy the copyright therein for a period of 1 year and not beyond. The counsel for the Appellant suggested that by virtue of the provisio (b) and (c) to Section 17 of the Act, and due to an Agreement to the contrary, the Respondent cannot become the first owner of the copyright. The Court analysing Section 17 of the Act stated that to enforce the provisio under Section 17, the parties should agree that the producer will not have the copyright in the film. However, under the Agreement, the Appellant had agreed that the entire copyright in the film and the promotional material would vest with the Respondent. Analysing provisio (c) to clause 17 the Court held that the Respondent made the cinematograph film and as the producer took the initiative and responsibility for making the work and not under any employment under a contract of service. Therefore, the Court held that this provisio does not apply to this case and the Respondent is the first owner of the copyright in the cinematograph film and the promotional materials produced by the Respondent.

In relation to the contention of the Appellant that the Single Judge did not consider the order of the Division Bench in favour of the Appellant for granting interim relief and stay on the cinematograph film, the Court stated that the order was passed at the interlocutory stage based on prima facie consideration of the materials for deciding the interim injunction application. Hence, the Appellant cannot rely upon this interim order when a case is taken up for final hearing as the entire materials are before the court to come to a final conclusion.

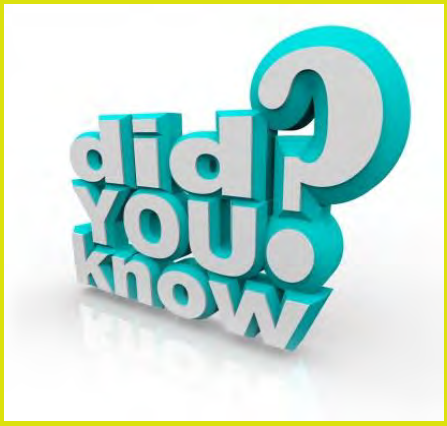
In regard to issue A and B, the Court stated that the Appellant was one of the performers in the cinematograph film and Respondent was the author of such film which makes him the first owner of the film. Hence, he enjoys the copyright over that cinematograph film for a period of 60 years which cannot be taken away by a performer in the film by virtue of any agreement. The Court further stated that clause 9 of the Agreement should mean that the Respondent has the right to produce the cinematograph film and the promotional materials for a period of 1 year and the clause does not curtail the copyright of the Respondent.

The Court while answering issue D further stated that a reading of Section 38-A of the Act makes it very clear that if a performer by a written agreement, consents to incorporate the performance in a cinematograph film, the performer cannot object to the producer's right in the cinematograph film, unless there is a contract to the contrary. In the present case, as the Appellant consented to incorporate her performance in the cinematograph film, the Appellant cannot prohibit the Respondent from enjoying their producer's right. The Court further reiterated that the Agreement did not contain any clause to the contrary which restricted the Respondent from having the copyright in the cinematograph film or restricting its rights as the producer. The Court stated that the Appellant cannot claim royalties under Section 38-A as Section 38-A was not in force at the time of initiating the suit. Even though the Court can take note of any subsequent development in the interest of the parties, the Court in this case was unable to determine the royalty entitlement to the Appellant due to lack of evidence to substantiate her claim. The Court also noted that the Respondent was unable to commercially exploit the cinematograph film from 2011 onwards due to the interim order restraining the Respondent to exploit the cinematograph film.

The Appellant's claim for compensation from the Respondent due to exploitation of the cinematograph film beyond the period of one year and that the Appellant was not able to endorse similar products were not entertained by the Court. The Court held that the Appellant is not entitled to any compensation as the Appellant failed to provide any basis for her demand and the fact that the Respondent was permitted to commercially exploit the cinematograph film being the first owner of the copyright. As the Agreement between the parties was for a period of one year, the court held that there was no restriction or prohibition on the Appellant from endorsing or acting in advertisement or films of other producers dealing with similar products.

The Court dismissing the appeal vide its order dated 25th June, 2018 stated that the Appellant would be at liberty to file fresh proceedings in the Court for the enforcement of the right to receive royalties under Section 38-A of the Act.

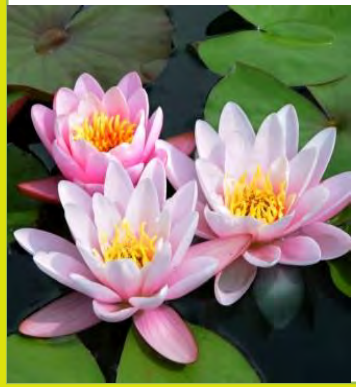
# JULY TRIVIA




- July month is named after a famous Roman general Julius Caesar.
- Theoretically, the middle day of the year is in the month of July. July 3rd happens to be the mid-point of any given year; for only non-leap years though.
- July is the hottest month of the year in the Northern hemisphere, whereas it is winter time in the Southern hemisphere.

- July's birthstone, the ruby, considered the king of gems; the ruby symbolizes love, passion, energy and success.
- Sometimes the hot, long days of July are called the "dog days of summer".
- There are many countries which have their Independence Day during the month of July. These include the United States, Belarus, Venezuela, Argentina, Belgium, the Bahamas and the Maldives. The national days for France and Canada also occur in July.
- India celebrates Doctor's day on July 1.


- This month always starts on the same day of the week as April every year and January in leap years.



- Water lily and Larkspur are the birth flower of July month.

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