DIVYA PHARMACY V UNION OF INDIA AND OTHERS 2018

Writ Petition (M/S) No. 3437 of 2016

The primary issue in the above case was whether purely Indian entities with no foreign participation were required to share benefits from use of biological resources or knowledge associated therewith, as provided under the Biological Diversity Act, 2002.

Swami Ramdev and Acharya Balkrishna founded a Trust by the name "Divya Yog Mandir". Divya Pharmacy is a commercial arm of the Trust and is the Petitioner in the present case. The Petitioner is involved in manufacturing of ayurvedic products and it was agreed that Biological Resources are the main ingredient and raw material for manufacture of the same.

The Petitioners was aggrieved by the notices sent to them by the Uttarakhand Biodiversity Board (UBB) to pay Fair and Equitable Benefit Sharing (FEBS) as provided under the Biological Diversity Act, 2002 (hereinafter Act) and the Rules and Regulations framed thereunder.

Petitioners Contentions

The Petitioner contented that it was not required to make any payment to the UBB as FEBS did not apply to Indian entities. The argument was based on several definitions as provided in the Act. The Petitioner's first contention was with regard to the definition of "fair and equitable benefit sharing" as provided under Section 2(g) which says "fair and equitable benefit sharing" means sharing of benefits as determined by the National Biodiversity Authority (NBA) under Section 21. Section 21 further provides that "the NBA shall while granting approvals under Section 19 or Section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources…." The Petitioner contended that from the definition of FEBS it is clear that the same can only be imposed by the NBA and not by the State Biodiversity Boards.

The second contention of the Petitioner was a follow up to the previous one. It argued that Section 19 and Section 20 are applicable only to persons referred to in Section 3(2) of the Act. Section 3(2) refers to two classes of persons; in context of a natural person it refers to persons who are not a citizen of India, or is a citizen but a non-resident as defined under the Income Tax Act, and in context of a legal person it applies to organisations which are either not incorporated or registered in India or have a non-Indian participation in its share capital

or management. Since the Petitioner does not fall in any of the categories as mentioned under Section 3(2) hence Section 19 and Section 20 did not apply to it and thus it is not liable to pay FEBS as provided under Section 2(g).

The Petitioner further contended that Indian entities are governed by the law provided under Section 7 of the Act which only speaks of prior intimation to the SBBs and prior intimation cannot be read as prior approval, as the elementary principle of statutory interpretation is to give plain meaning to the words used. Thus the Petitioner concluded that that there is no provision in the Act where a contribution in the form of "fee"/monetary compensation, or a contribution in any manner is required to be given by an Indian entity.

Respondents Contention

The Respondents contended that the Act differentiated between Indian and foreign entities **only with respect to jurisdiction of the authorities** to whom they need to report and obtain permission/ approvals from. The Act **does not** differentiate between Indian and foreign entities with respect to whether or not FEBS should be paid, "and if a distinction is made between a foreign entity and Indian entity in this respect, it would defeat the very purpose of the Act, and would also be against the international treaties and conventions to which India is a signatory."

The Respondents further contended that when Section 7 is read with Section 23(b) it becomes clear that the SBBs duty is not limited to a mere bystander who would only receive prior information from the Indian users of biological resources. On the contrary, it is stipulated that the SBB has powers "to regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilisation of any biological resource by Indians". They also claimed that regulation by way of imposition of fees is an accepted form of regulatory mechanism. Also reference was made to Section 24(2) which provides that "the SBB, in consultation with the local bodies and after making such enquiries can prohibit or restrict any such activity, if it is of opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity," therefore the UBB was well within its powers to demand FEBS from the Petitioner.

The counsel for Respondents further relied on Section 52 A which provides that any person aggrieved by any determination of benefit sharing by NBA or SBB may file an appeal to the NGT. This again goes on to show that the legislature intended to allow SBBs to demand

FEBS and it is only for this reason that an appellate authority has been provided against any determination of FEBS by SBBs. The Respondents also argued that FEBS was one of three objectives of the BD Act and was mentioned in the Preamble and therefore its importance cannot be undermined. The counsel submitted that in the present context, a simple and plain reading of the definition provided and going by the literal method of interpretation, would defeat the purpose of the Act and would be in negation to India's obligations under the CBD and other International agreements. The definition clause of the Act of 2002 starts with the words "In this Act, unless the context otherwise requires". The learned counsel hence argued that the definitions of different words and phrases given in Section 2 of the Act of 2002, are the ones which have to be applied under normal circumstances, **but when the application of the definition loses its purpose, the context requires a different examination.**

Courts Observation:

The Hon'ble High Court observed that on plain and simple reading of the provisions under the BD Act it is obvious that a purely Indian entity is not subject to FEBS, however the court cautioned that "what may seem obvious may not always be correct." It mentioned various provisions of the BD Act and International Agreements, and also discussed the history behind these legislations so as to be able to throw light upon the real intention of the Legislature in drafting the said law.

The first observation was the opening phrase of Section 2 which read as "Unless the context otherwise requires…", the court emphasised that the said phrase is often inserted in legislations so that the Judges may be able to mould the definition of a particular word as per the context. This is done because the literal interpretation of a word may not always serve the purpose for which the law was passed. In this context the court referred to G.P.Singh's "Principles of Statutory Interpretations" which stated that where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; it also referred to *Venguard Fire and General Insurance Co. Ltd., Madras v. Fraser & Ross,* AIR 1960 SC 971 wherein the Hon'ble Supreme Court held that "It is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case,"

The court further observed that the beneficiaries under the Act are the indigenous and local communities and the benefit that they get as FEBS is over and above the market price of their

biological resources. The Hon'ble court also emphasized on the importance of international treaties and conventions on municipal laws by referring to several cases including that of *Commr. Of Customs v. G. M. Exports* (2016) 1 SCC 91 wherein the Hon'ble Supreme Court held that when a statute is made in furtherance of an international treaty obligation then a purposive interpretation is preferred over a narrow literal interpretation, it further said "In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations." Therefore the Hon'ble High Court of Uttarakhand stated that ambiguities in our national statute have to be seen in light of the CBD and the Nagoya Protocol so that we may be able to determine the true meaning of FEBS. Thus the court held that since the Nagoya Protocol does not make any distinction between foreign entity and an Indian entity as regards their obligation towards local and indigenous communities hence the national legislation also cannot make such distinction.

The Hon'ble High court also emphasised, that when interpretation of provisions of socially beneficial legislations like the one in the present case, is in question, then a purposive interpretation is required. "FEBS in the form of a "fee" or by any other means is a benefit given to the indigenous and local communities by the Act, and the Regulations, which again have to be examined in the light of the international treaties where the importance of FEBS has been explained." The court also questioned the arguments of the Petitioner on the ground that how could the Parliament on one hand recognise the rights of indigenous and local communities over their biological resources and associated knowledge and on the other hand allow Indian entities to violate these rights?

For reasons mentioned above the Hon'ble High Court finally held that the SBB has got powers to demand Fair and Equitable Benefit Sharing from the petitioner, in view of its statutory function given under Section 7 read with Section 23 of the Act and the NBA has got powers to frame necessary regulations (in the instant case, the ABS Guidelines of 2014) in view of Section 64 of the Act which provides for the power to make regulations by the NBA, read with Section 18(1) which contains the powers and functions of the NBA, and Section 21(2) (4) which allow the NBA to frame guidelines for access and benefit sharing. The Court

however declined to pass judgment on the retrospective operation of the provisions as the same had not been demanded by the SBB.