

Appeal No. 03/2013(CZ)

**Lilason Breweries Ltd. Bhopal Vs. MP State Bio Diversity Board**

**QUORAM : HON'BLE MR. JUSTICE M.CHOCKALINGAM, JUDICIAL MEMBER  
HON'BLE DR. AJAY A. DESHPANDE, EXPERT MEMBER**

**PRESENT : Applicant : Shri Ajay Gupta, Adv.  
Respondent : Shri Deepesh Joshi, Adv.**

<b>Date and Remarks</b>	<b>Order of the Tribunal</b>
<b>Item No. 2</b>  <b>2<sup>nd</sup> August, 2013</b>	<p>The appellant has challenged the proceedings of the respondent Board in MPSBB/ABSCell/2013/894 dated 02.05.2013 as it is illegal and contrary to law. The Tribunal heard the Counsels on either side and also looked into the materials made available.</p> <p>The case of the appellant, in short, is that his Company having factory at Industrial Area, Govindpura, Bhopal engaged in manufacture of Beer which has been in operation for the last 40 years. The respondent, MP State Bio Diversity Board (hereinafter called Board) initially issued a notice No. MPSBB/M/(Bio)/2013/543 dated 13.03.2013 under Section 7 of the Biological Diversity Act, 2002 directing the appellant to intimate in prescribed Form No. 1 for commercial utilisation of biological resources alongwith utilisation fee of Rs. 1000/- and also informed to deposit 2% of gross sales or gross revenue on the financial year basis towards the benefit sharing in Biological Diversity Fund of the State Bio Diversity Board as access and benefit sharing as described under the Biological Diversity Act, 2002. On receipt of the said notice, the appellant placed a reply on 26.03.2013 informing that they were not using any bio-resource for commercial utilisation and thus, they were not liable to pay. Not satisfied with the reply, the respondent issued the second notice No. MPSBB/ABS-Cell/2013/692, Bhopal dated 01.04.2013 stating that since malt is a by-product of plant material and thus, it is a bio-resource under Section 2(C) of the Act and therefore, reiterated its earlier averments in the first notice in respect of which the appellant thought he was not obliged to intimate the same to the State Authority or not to make deposit the benefit sharing to the State Bio Diversity Fund. The Board issued another</p>

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notice no. MPSBB/ABSCell/2013/894 dated 02.05.2013, which is the subject matter of challenge.

Aggrieved over the same, the appellant has brought forth this appeal. On service of notice, the Board appeared through its Counsel and filed its initial reply placing its preliminary objections regarding the maintainability of the appeal.

Advancing the arguments on behalf of the respondent Board, the Learned Counsel would submit that the appeal itself is premature. An appeal can be filed under Section 16(J) of the NGT Act only by a person when he is aggrieved by in determination of benefit sharing or order made on or after the commencement of the NGT Act, 2010 by the National Bio Diversity Authority or the State Bio Diversity Board under the provision of Biological Diversity Act, 2002. The appeal has to be dismissed for the simple reason that the notice under challenge dated 02.05.2013 was only a notice issued under Section 7 of the said Act which is very evident on the face of the notice and it is not an order passed under Section 24 of the Biological Diversity Act, 2002 which alone can be challenged by way of appeal under the NGT Act, 2010 and thus, the appeal is misconceived and deserves to be dismissed as not maintainable. It is not a case where any final order has been passed. In the instant case, no final order could be passed under Section 24 of the Act on account of non-submission of Form 1 under Section 7 of the State Biological Diversity Act, 2002.

The Learned Counsel would further add it is also significant to note that no order for revenue sharing was passed under Section 24 of the Act.

Under such circumstances it is not appealable and no question of challenge could arise and thus the appeal itself is not called for and has to be dismissed as not maintainable at the threshold.

In answer to the above, the Learned Counsel appearing for the appellant placing in reliance on all the notices issued by the Board to the appellant would submit that thought it was named by the Board as notice under Section 7 of the Biological Diversity Act, 2002, there was a direction to the appellant to intimate in prescribed Form No. 1 for commercial utilisation of biological resource and it was

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also informed to deposit 2% of the gross sales or gross revenue on financial year basis towards benefit sharing in State Bio Diversity Fund of the State Bio Diversity Board.

The Learned Counsel would further add very reading of the notice under challenge dated 02.05.2013 would clearly indicate it was in the nature of an order and not a notice and if not the direction found in that proceedings followed, the respondent would launch prosecution. Under such circumstances, once a direction has been issued in the form of an order at no stretch of imagination it can be called as a notice though the Board has stated that it was issued under Section 7 of the Biological Diversity Act, 2002. Under circumstances, the only course open and available to the appellant was to approach the Tribunal for the necessary relief by way of preferring an appeal which has been accordingly done. Under the circumstances the appeal is maintainable and it has got to be enquired by the Tribunal.

The Tribunal paid its anxious consideration on the submissions made. Admittedly, the appellant is a company having factory at Industrial Area, Govindpura, Bhopal carrying on manufacture of beer. The first notice issued on 13.03.2013 under Section 7 of the Biological Diversity Act, 2002 where a direction was issued to the appellant to intimate in prescribed Form No. 1 and the appellant was informed to deposit 2% of gross sale or gross revenue on financial year basis towards benefit sharing in State Biological Diversity Fund. In the instant case, the appellant not only issued a reply on 26.03.2013 and placed its objections that the appellant industry was only manufacturing beer from malt and did not need any access to any bio-resources. Under circumstances, it can be well stated that the case of the industry was that it was not utilizing any bio-resource for commercial utilization and thus they are outside the purview of the Biological Diversity Act, 2002 and need not pay as per the directions. It is a matter of surprise to know once the Form-I submitting to the demand made by the Board, the course open to the authority is to make an order after making the assessment of the situation. In the instant case, the Board has issued second notice dated 02.05.2013 which is the subject matter of challenge. Without going to the merits

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or otherwise of the rival contentions put forth by either sides and whether the provisions of the Act could be made applicable to the appellant, the Tribunal has to look into only as to the maintainability of the appeal at this stage i.e. whether the proceedings issued by the respondent Board dated 02.05.2013 under challenge is only a notice as stated by the Counsel for the respondent and thus, the appeal is premature and not an order under Section 24 of the Act or it is an order by the respondent Board, hence, the appeal was the only available remedy for the appellant to approach the Tribunal.

It is pertinent to point out that the notice under challenge dated 02.05.2013 reads as follows:

*With reference to your letter dated 27.04.2013 and your reply through your advocate Mr. Ajay Gupta, High Court of Madhya Pradesh, it is to inform you that you appeared before this office on 18.04.2013 date for personal hearing and I explained to you that you are utilizing malt which is gain and that is by product of barely.*

*As per definition of the biological resource under section 2 (c) by product of biological resource is biological resource.*

*You are utilizing by product of biological resource i.e. malt for commercial utilization hence you have to intimate to Stare Biodiversity Board in Form -1 regarding quantity of biological resource and total gross sale value of products made from biological resource together with all relevant information given in Form -1.*

*You have exhausted your chance of personal hearing and you have been inform by this office by way of notice under Section 7, but you have not complied our order so you will be made liable for legal action as per provisions of Biological Diversity Act, 2002, Section 55 (2), Section 56 and Section 57.*

*You are hereby given one more chance of personal hearing on dated 15.05.2013 at 5.00 PM, kindly come up with complete information in Form -1. If you fail to appear before this office on 15.05.2013 then you yourself will be responsible for legal action to be taken for continuously contravening the*

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*provisions of Biological Diversity Act, 2002.*

The reading of the above part of the said notice would clearly indicate that following the notice by the Board, there was a reply from the appellant, that there was a personal hearing and at the time of personal hearing it was explained to the appellant that he was liable to pay, and further the appellant has also not complied with the notice under Section 7 of the Act and hence, he was liable for legal action under the provisions of Biological Diversity Act, 2002. It was also made clear in the said notice that if not followed, the legal action would follow. All the above would clearly indicate that though it was called a notice by the respondent Board, it is a proceeding issued after determination that the appellant was liable to pay his share as per the provisions of the Act. The Tribunal is at a loss to understand how the proceedings of Board could be termed as a notice which was issued after the determination that the appellant is liable to pay his share under the provisions of the Bio Diversity Act 2002 with a threat that the non compliance of which will lead to legal action. Under such circumstances, the contention put forth by the Learned Counsel for the respondent that it was only a notice under Section 7 though attractive at the first instance, it does not stand the scrutiny of law. The contentions put forth by the respondent Counsel has to be rejected as meritless and in the opinion of the Tribunal, appeal is maintainable and it has got to be taken on file. The registry is directed to take the same on file.

The interim order original issued continues till further orders. The replies to be filed within two weeks.

The matter is posted to 26.08.2013.

.....JM  
(M.CHOCKALINGAM)

.....EM  
(Dr. AJAY A. DESHPANDE)