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Biological Diversity Act: An Overview

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ABSTRACT

The author has taken the Biological Diversity Act 2002 and analysed the closer look of the national legislation. The article focusses on the functions of the three-tier system and the role played by the judiciary in implementing the Act.

I. INTRODUCTION

The paradigm of International Environmental Law was quite interesting. The journey started from the Stockholm conference to the Rio declaration (United Nations Conference on Environment and Development- UNCED) which is continuing in a perpetual state. The outcome of UNCED resulted in different legally binding agreements, one among them was Convention on Biological Diversity. India ratified the agreement in the year 18th February 1994². By ratifying the Convention India has committed to creating a national framework for protecting its biological resources. Later in the year 2002, India enacted legislation called The Biological Diversity Act, 2002.

Need for the Biological Diversity Act in India

India is one of the 12 megadiversity countries in the world. Around species of microorganisms, plants and animals have been described in the country³. Moreover, the forest cover in the eastern and western ghats in the country is incredible in its biodiversity.

To protect the sovereign rights of India over her biological resources and also to conserve the biodiversity for the future generation, our country needed a legal framework to regulate the access of the biological resources. Thereby the biological diversity Act was passed by the Loksabha on 02.12.2002 and by Rajya Sabha on 11.12.2002⁴.

Basic Objectives of the Act:

- Conservation of biological diversity,
- Sustainable use of its components and

¹ Author is an Advocate in India.

² <https://www.cbd.int/information/parties.shtml>

³ http://nbaindia.org/uploaded/Biodiversityindia/1st_report.pdf

⁴ <https://www.mondaq.com/india/environmental-law/862744/>

- Fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto⁵.

II. SCOPE OF THE BIOLOGICAL DIVERSITY ACT

The scope for the Act extends to the biological resources obtained from India and the knowledge associated with it. The Act defines a biological resource as:

“Biological resources” means plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value-added products) with actual or potential use or value, but does not include human genetic material⁶.

The definition excludes Value-added product and human genetic material.

Significant definitions under the Act:

“biological diversity” means the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of ecosystems;⁷

“commercial utilization” means 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 keeping⁸;

“benefit claimers” means the conservers of biological resources, their byproducts, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application⁹;

“fair and equitable benefit sharing” means sharing of benefits as determined by the National Biodiversity Authority under section 21¹⁰;

Regulation of access to Biological Diversity under the Act, 2002:

Section 3,4,6,7 under chapter II of the Act discuss access to biological diversity in detail:

Section 3: *Certain persons not to undertake Biodiversity related activities without approval*

⁵ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

⁶ Section 2 c- http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

⁷ Section 2 b- http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

⁸ Section 2 f- http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

⁹ Section 2 a- http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹⁰ Section 2 g- http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

of the National Biodiversity Authority:

(1) No person referred to in sub-section (2) shall, without previous approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.

(2) The persons who shall be required to take the approval of the National Biodiversity Authority under sub-section (1) are the following, namely:

(a) a person who is not a citizen of India;

(b) a citizen of India, who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961;

(c) a body corporate, association or organization-

(i) not incorporated or registered in India; or

(ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management¹¹

The definition clearly explains that persons who shall be able to get the approval from National Biodiversity Authority are:

- Any person - not a citizen of India
- NRI (Non Resident Indian)
- a body corporate, association, or organisation not incorporated or registered in India
- incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management

Section 4: *Results of research not to be transferred to certain persons without the approval of National Biodiversity Authority:*

No person shall, without the previous approval of the National Biodiversity Authority, transfer the results of any research relating to any biological resources occurring in, or obtained from, India for monetary consideration or otherwise to any person who is not a citizen of India or citizen of India who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961 or a body corporate or organisation which is not registered or incorporated in India or which has any non-Indian participation in its share capital or

¹¹ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

management¹².

The above definition says the results of the research cannot be transferred to below-listed persons without the approval of the National Biodiversity Authority (NBA):

- Who is not a citizen of India;
- NRI
- a body corporate, or organization not incorporated or registered in India or which has any non-Indian participation in its share capital or management.

Section 6: *Application for intellectual property rights not to be made without the approval of National Biodiversity Authority:*

(1) No person shall apply for any intellectual property right, by whatever name called, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the National Biodiversity Authority before making such application. Provided that if a person applies for a patent, permission of the National Biodiversity Authority may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned: Provided further that the National Biodiversity Authority shall dispose of the application for permission made to it within a period of ninety days from the date of receipt thereof.

(2) The National Biodiversity Authority may, while granting the approval under this section, impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial Application for intellectual property rights not to be made without the approval of National Biodiversity Authority The Biological Diversity Act & Rules 7 benefits arising out of the commercial utilisation of such rights.

(3) The provisions of this section shall not apply to any person making an application for any right under any law relating to the protection of plant varieties enacted by Parliament.

(4) Where any right is granted under a law referred to in sub-section (3), the concerned authority granting such right shall endorse a copy of such document granting the right to the National Biodiversity Authority¹³.

Section 6 says that no person can apply for IP Rights in or outside India for any invention based on research or information on a biological resource obtained from India

¹² http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹³ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

without the previous approval of the NBA.

Section 7: *Prior intimation to State Biodiversity Board for obtaining biological resource for certain purposes:*

No person, who is a citizen of India or a body corporate, association or organisation which is registered in India, shall obtain any biological resource for commercial utilisation, or bio-survey and bio-utilisation for commercial utilisation except after giving prior intimation to the State Biodiversity Board concerned:

Provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaidas and hakims, who have been practising indigenous medicine¹⁴.

Section 7 is connected with the Indian companies and Indian researchers. Though a plain reading of the section says prior intimation is required, however, the section 7 is to be r/w section 24 of the Act, wherein the regulatory powers of State Biodiversity boards are explained in detail:

Section 24: *Power of State Biodiversity Board (SBB) to restrict certain activities violating the objectives of conservation etc.*

1. Any citizen of India or a body corporate, organization or association registered in India intending to undertake any activity referred to in section 7 shall give prior intimation in such form as may be prescribed by the State Government to the State Biodiversity Board.

2. On receipt of an intimation under sub-section (1), the State Biodiversity Board may, in consultation with the local bodies concerned and after making such enquires as it may deem fit, by order, 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: Provided that no such order shall be made without giving an opportunity of being heard to the person affected.

(3) Any information given in the form referred to in sub-section (1) for prior intimation shall be kept confidential and shall not be disclosed, either intentionally or unintentionally, to any person not concerned thereto¹⁵

The deep reading and understanding of the Act explicitly explain that SBBs after enquiry with local bodies can prohibit or restrict any kind of activities that is contrary to the object of

¹⁴ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹⁵ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

the Act.

Section 20: Transfer of biological resource or knowledge:

(1) No person who has been granted approval under section 19 shall transfer any biological resource or knowledge associated thereto which is the subject matter of the said approval except with the permission of the National Biodiversity Authority.

(2) Any person who intends to transfer any biological resource or knowledge associated thereto referred to in sub-section: (1) shall make an application in such form and in such manner as may be prescribed to the National Biodiversity Authority.

(3) On receipt of an application under subsection (2), the National Biodiversity Authority may, after making such enquiries as it may deem fit and if necessary after consulting an expert committee constituted for this purpose, by order, grant approval subject to such terms and conditions as it may deem fit, including the imposition of charges by way of royalty or for reasons to be recorded in writing, reject the application: Provided that no such order for rejection shall be made without giving an opportunity of being heard to the person affected.

(4) The National Biodiversity Authority shall give public notice of every approval granted by it under this section¹⁶.

Any person discussed under section 3(2) of the Act who intends to transfer any biological resource or knowledge associated shall get the approval from National Biodiversity Authority as per the procedure prescribed in the Biological Diversity Rules 2004.

III. EXEMPTIONS UNDER THE BIOLOGICAL DIVERSITY ACT, 2002:

- To growers and cultivators, vaidas and hakims (practitioners of traditional medicinal systems) to use bioresources (Sec 7)¹⁷
- Through notification by Central Government of normally traded commodities so as not to adversely affect trade of the items mentioned in the list (Sec 40)¹⁸
- To collaborative research through government-sponsored institutes subject to overall guidelines and approval of Central Government. (Sec 5)¹⁹
- For research by Indians in India (Sec 7)²⁰
 - To access value-added products²¹.

¹⁶ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹⁷ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹⁸ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

¹⁹ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²⁰ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

Three-tier system:

To implement this Act, the activities are regulated through a three-tier system. At the national level National Biodiversity Authority (NBA), at state level SBBs and at the local level Biodiversity Management Committees (BMCs).

National Biodiversity Authority²² (NBA) established for the purpose of this Act, the head office of NBA shall be at Chennai.

Functions of NBA²³:

1. It regulates activities referred to in section 3,4,6,20 and also issue guidelines for access to biological resources and fair and equitable benefit sharing.
2. Advise the central government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources.
3. Advise the state government in the selection of areas of biodiversity, the importance of notification for biodiversity heritage sites, measures for the management of the biodiversity heritage sites.

State Biodiversity Boards²⁴:

28 SBBs are established by the respective government for the purpose of this Act²⁵. As per section 22, the board is a body corporate, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall by the said name be sue and be sued.

Functions of SBBs²⁶:

1. advise the State Government, subject to any guidelines issued by the Central Government, on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of the benefits arising out of the utilisation of biological resources;
2. regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilization of any biological resource by Indians;

²¹ Section 2(c) http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²² Section 8 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²³ Section 18 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²⁴ Section 22 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²⁵ <http://nbaindia.org/content/22/2/1/aboutnba.html>

²⁶ http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

Biodiversity Management Committees²⁷ (BMCs):

Every local body like panchayat, municipality, mandal shall constitute a Biodiversity Management Committee within its area for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity. BMCs plays a noteworthy role in the successful implementation of the Act.

Functions of BMCs²⁸:

1. Preparation of Peoples Biodiversity Register (PBRs). The PBRs shall contain information about the biological resources, their medicinal value, traditional knowledge associated with the resources. Apart from this, the PBR can also be documented with the traditional custom, GIs available in that BMC jurisdiction.
2. Providing consulting to NBA and SBBs while taking any decision relating to the use of biological resources and knowledge associated within the territorial jurisdiction of the Biodiversity Management Committee.
3. The Biodiversity Management Committees may levy charges by way of collection fees from any person for accessing or collecting any biological resource for commercial purposes from areas falling within its territorial jurisdiction

IV. OFFENCES AND PENALTIES UNDER THE BIOLOGICAL DIVERSITY ACT

*Offences under this Act are cognizable and non-bailable*²⁹. This section says the gravity of the offences which has been categorized under the Act.

Section 54³⁰:

No suit, prosecution or any other legal proceedings shall lie against the central or state government employees or employee of NBA or SBB for anything which is in good faith done or intended to be done under this Act or the rules or the regulations made under the Act.

Section 55³¹:

Any person who contravenes or attempts to contravene or abets the contravention of the provisions of section 3,4,6 shall be punishable with:

²⁷ Section 41 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²⁸ Section 41 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

²⁹ Section 58 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

³⁰ Section 54 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

³¹ Section 55 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

1. imprisonment for a term which may extend to 5 years or with fine which may extend to 10 lakh rupee and
2. damage cost exceeds 10 lakh rupees such fine may commensurate with damage caused or with both.

Any person who contravenes or attempts to contravene or abets the contravention of the provisions of section 7 or section 24(2) shall be punishable with:

1. imprisonment for a term which may extend to 3 years or with a fine which may extend to 5 lakh rupee or both.

Section 57: Offences by companies:

Every person who at the time of the offence or contravention was committed

- was in charge of, and
- was responsible to, the company for the conduct of the business of the company shall be deemed to be guilty of the offence or contravention

It is proved that the offence or contravention has been committed with

- the consent or
- connivance of,
- or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence³²

Appeal³³:

Section 52A of the Act provides for filing an appeal against the determination of benefit sharing or any other order made by the NBA or SBBs. The appeal may be filed by an aggrieved party *within a period of thirty days* from the date of communication of the orders.

The National Green Tribunal (NGT) has the appellate jurisdiction to hear appeals under the BD Act. Further, there is a provision for seeking a review of a decision of the NGT, and finally, any person aggrieved by the decision of the NGT may appeal to the Hon'ble Supreme Court *within a time limit of 90 days*.

V. ROLE OF JUDICIARY IN THE SUCCESSFUL IMPLEMENTATION OF THE ACT

*Divya Pharmacy v. Union of India, 2018*³⁴:

³² Section 57 http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

³³ Section 52 A http://nbaindia.org/uploaded/act/BDACT_ENG.pdf

The Uttarakhand High Court held that all Indian companies which are extracting biological resources are liable to seek prior approval as well as share part of their revenue with the local communities that are responsible for conserving and protecting such resources. The final judgment was an outcome of litigation spanning multiple hearings over two years in which Divya Pharmacy vehemently opposed either seeking prior approval from the State Biodiversity Board or sharing a part of its revenue with the local communities as 'fees' under what is termed as 'fair and equitable sharing of benefit'.

The court finally held that the State Biodiversity Board does have the jurisdiction to demand "fair and equitable sharing of benefits" from Divya Pharmacy and, by implication, from all Indian companies.

***Chandra Bhal Singh v. UOI, 2016*³⁵:**

In July 2016, a petition was filed by activist Chandra Bhal Singh before the National Green Tribunal (NGT) for effective implementation of the BDA 2002. Subsequently NGT passed multiple orders directing the Indian government's Ministry of Environment, Forest and Climate Change (MoEFCC), the NBA and the SBBs to ensure compliance; the first significant order was passed in August 2018. The green tribunal directed compliance in the constitution of BMCs and preparation of PBRs within six months and directed the MoEFCC and the NBA to monitor the same. The NGT orders, in this case, are a shining example of how the courts can play an important role in bringing back to life a dormant and largely forgotten legislation.

VI. CONCLUSION

Its high time the people of India must realize not only fundamental rights to be demanded from our constitution but also obey the fundamental duty³⁶ and the responsibility to be carried by every individual in protecting the environment in a wider sense which includes biosphere and biodiversity. The concept of implementing sustainable development is possible only if our needs are met without compromising the ability of future generations to meet their own needs. The legislation empowers the BMC to implement the basic objective of the Act. It is not always the government to take the responsibility but the people must corroborate active participation in implementing the Act through BMC.

³⁴ <https://www.mondaq.com/india/financial-services/785118/biological-resources-are-property-of-the-nation-divya-pharmacy39s-challenge-to-fair-and-equitable-benefit-sharing-dismissed>

³⁵ <http://nbaindia.org/content/730/66/1/CourtOrders.html>

³⁶ Article 51 A of the Indian constitution