



Hygienic Research Institute Private Limited vs. H.P.
State Biodiversity Board and others.

CWP No. 3051 of 2024.

24.05.2024 Present: Mr. Neeraj Gupta, Sr. Advocate with Ms. Shradha Karol, Advocate, for the petitioner.

Mr. Anup Rattan, Advocate General, with Ms. Priyanka Chauhan, Deputy Advocate General, for respondents no.1, 2 and 3-State.

Mr. Balram Sharma, Deputy Solicitor General of India, for respondents no. 4 and 5.

CMP No. 7599 of 2024.

This application is filed by the petitioner to place on record proceedings issued on 09.05.2024 in continuation of the impugned order dated 11.10.2023 (Annexure P-7). Since, this application is not opposed, the same is allowed and the proceedings dated 09.05.2024 is taken on record.

CWP No. 3051 of 2024.

Learned Deputy Solicitor General of India seeks time to file reply on behalf of respondents no. 4 and 5.

For filing of such reply, list on **12th August, 2024.**

CMP No. 4846 of 2024.

Petitioner is a Company engaged in manufacturing, trading and marketing of cosmetics (haircare and skin care products) having its registered office at Mumbai and manufacturing unit at Baddi, Himachal Pradesh and other places in the country.

2. According to the petitioner, it is manufacturing ayurvedic products and has obtained an ayurvedic manufacturing licence from the respondent No.3. It has also obtained No Objection Certificate from the respondent No.1- State Bio- diversity Board for the purpose of availing access to the biological resources required in the manufacturing process. The petitioner is aggrieved by the letters dt. 11.10.2023, 19.12.2023, 09.05.2024 issued by the respondent No.1 and letter dt. 12.12.2023 issued by the respondent no.3.

3. In the letter dated 11.10.2023, the respondent No.1 had directed the petitioner to pay a sum of Rs.5,00,00,000/- as benefit share @ Rs.2,50,00,000/- per year for financial years 2021-22 and 2022-23 alleging that the petitioner had accessed the biological resources from initiation of production, without submission of prior intimation and without obtaining the approval of the State Biodiversity Board and the levy is justified under Sections 7 & 24 of the Statute read with Rule 12 of the Himachal Pradesh Biological Diversity Rules, 2019 and Regulation 4 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014. It is stated that the demand of Rs.5,00,00,000/- has been calculated @ 0.5% of the annual gross ex-factory sale price of products prepared from biological resources as declared by the petitioner as Rs.500 crore on Form-1, for the financial year 2021-22. It is also

stated that the annual gross ex-factory sale price of the products for the financial year 2022-23 has been considered on the basis of turnover submitted for the Financial year 2021-22. Demand was also made to provide the certified copies of balance sheets of previous three years so as to determine the accurate details about the purchase of biological resources and gross ex-factory sales of the products to calculate the benefit share.

4. The Letter dt. 19.12.2023 of respondent No.1 is in continuation of letter issued on dt. 11.10.2023 reiterating the demand to provide certified copies of balance sheets of previous three financial years 2020-21, 2021-22 and 2022-23 so as to allegedly enable the respondent No.1 to determine the accurate details about the purchase of biological resources and gross ex-factory sales of the products to calculate the benefit share.

5. The Letter dated 12.12.2023 is issued by the respondent No.3 on the same lines as letter dated 19.12.2023 issued by the respondent No.1.

6. Shri Neeraj Gupta, learned Senior Counsel appearing for the petitioner has contended that under the provisions of Biological Diversity Act,2002 the petitioner being a 'local' Company would not fall within Section 3 thereof and is not required to take any *prior* approval of the National Biological Authority; and under Section 7 of the said statute is only required to give prior information to the State Biodiversity

Board for its commercial utilisation, or bio-survey and bio-utilisation for commercial utilisation. He further contends that under Section 23 of the Act, the State Biodiversity Board has the function to advise the State 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 resource etc., but the Board itself is not empowered to issue the letter dated 11.10.2023 demanding payment of any amount as benefit share for the financial year 2021-22, 2022-23. According to him, there is no provision in the Act or the Rules which empower the First respondent Board to make such a demand.

7. The State has filed its reply disputing the contention of the petitioner and opposing the grant of interim relief to the petitioner.

8. Learned Advocate General contends that Section 23 empowers the State Diversity Board to make such a demand; that there was an amendment to the statute through Act no. 10 of 2023 on 03.08.2023 which amended Section 23 of the Principal Act by substituting previous clause as under:-

“21. In section 23 of the principal Act, for clauses (a) and (b), the following clauses shall be substituted, namely:—

“(a) advise the State Government on matters relating to the conservation of biodiversity, sustainable use of its components and fair and equitable sharing of benefits arising out of the utilisation of biological resources or traditional knowledge associated thereto, in conformity with the regulations or

guidelines if any, issued by the Central Government or the National Biodiversity Authority;

(b) regulate any activity referred to in section 7 by granting or rejecting approvals;

(ba) determine the fair and equitable sharing of benefits as provided under the regulations made in this behalf by the National Biodiversity Authority while granting approvals;"

9. He contended that by virtue of said amendment which is alleged to be clarificatory in nature, the State Biological Diversity Board issued the impugned proceedings. He has also placed reliance on the judgment of the learned Single Judge of the Uttarakhand High Court (***Divya Pharmacy vs. Union of India and others, dt. 21.12.2018 in Writ petition (M/S) No. 3437 of 2016***), who had dismissed the similar Writ petition filed by a local entrepreneur challenging the demand for benefit share. He sought to contend that there ought to be a *purposive* interpretation of the provisions of the Statute i.e. Biodiversity Act, 2002 as was done by the learned Single Judge of the Uttarakhand High Court and the said High Court has rejected the Writ petition submitted by the petitioner which had also contended that it was not a 'foreign' entity and was not liable to contribute the benefit share under the statute and such power lies only with the National Biodiversity Authority.

10. Learned Advocate General has also referred to the regulations of Himachal Pradesh Biological Rules, 2019, which empowers the first respondent to issue the impugned letters to the petitioner. According to him, the statute as is

originally stood read with the Rules framed by the State empowers the first respondent to make demands like the one which is impugned in this writ petition.

11. We have noted the submissions of both the sides.

12. As we have noted above, respondents no. 4 and 5 have not filed the reply.

13. However, in view of the coercive action initiated against the petitioner by the first respondent, we are considering the interim application filed by the petitioner.

14. Section 3 of the Biodiversity Act, 2002, states as under:-

“3. Certain persons not to undertake Biodiversity related activities without approval of 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 utilisation or for bio-survey and bio-utilisation.

(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 (43 of 1961);

(c) a body corporate, association or organisation-

(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 management.”

15. Section 7 of the Act reads as under:-

“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 vaidis and hakims, who have been practising indigenous medicine.”

16. A reading of these provisions indicate that the petitioner, being a Indian Registered Company, would not fall within the provisions of Section 3 and would not need to obtain previous approval of the National Biodiversity Authority in order to obtain access to any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization and would only be required to give prior information to the Biodiversity Board concerned.

17. Annexure P-5 is the provisional No Objection Certificate issued in favour of the petitioner by the respondent

No.1 which is valid upto 31.03.2024 and from the issuance of the same, it is clear that Section 7 is complied with because the said NOC has been issued on the petitioner's application for registration with the respondent No.1.

18. Section 18(1) of the Act empowers the National Biodiversity Authority to regulate activities referred to in sections 3, 4 and 6 and by Regulations issue guidelines for access to biological resources and for 'fair and equitable benefit sharing'. The said Regulations were issued by the Central Government on 21.11.2014 and are placed on record as Annexure P-3 by the petitioner.

19. As regards the functions of the State Biodiversity Board are concerned, they are dealt with in Chapter-VI of the Act and Section 23 as originally enacted reads as under:-

23. The functions of the State Biodiversity Board shall be to-

- a. *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 utilization of biological resources;*
- b. *regulate by granting of approvals or otherwise requests for commercial utilization or bio-survey and bio-utilization of any biological resource by Indians;*
- c. *perform such other functions as may be necessary to carry out the provisions of this Act or as may be prescribed by the State Government.*

20. Section 24 states as under:-

24. Power of State Biodiversity Board to restrict certain activities-

(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 its conservation, 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 thereto.

Provisions of sections 9 to 17 to apply with modifications to State Biodiversity Board

21. As can be seen from sub-Section (a) of Section 23, the State Biodiversity Board is *prima facie* entitled to only *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

share of the benefits arising out of the utilization of biological resources. Under sub-Section (c) it may also perform such other functions as may be necessary to carry out the provisions of the Act or as may be prescribed by the State Government.

22. Pursuant to the said power, the State Government had enacted vide Annexure-V, dt. 22.11.2019, Himachal Pradesh Biological Diversity Rules, 2019. Rule 12 thereof relied upon by the learned Advocate General in support of the contention that the State has the power to demand benefit share.

The said Rule 12 reads as under:-

“12. Procedure for access to or collection of biological resources.—

(1) Any person seeking approval of the Himachal Pradesh State Biodiversity Board for access to biological resources and associated knowledge for commercial utilization shall make an application in Form-1.

(2) Every such application in Form-1, shall be accompanied by fees in the form of demand draft from Nationalized Bank, drawn in favour of the “Himachal Pradesh State Biodiversity Board” as prescribed below for different kinds of commercial utilization of biological resources:

(i) For commercial utilization, including trading and manufacturing : Rs. 10,000/-

(ii) For bio-survey/bio-utilization/research etc. meant for commercial utilization: Rs. 5,000/-

(iii) For bio-survey/bio-utilization/research etc. not for commercial utilization : No fee:

Provided that the above fee may be revised by the Board from time to time.

(3) The Board after due appraisal of the application and after consultation with the

concerned Biodiversity Management Committee and local body and after collecting such additional information as it may deem necessary, dispose-off the application, as far as possible, within a period of six months of its receipt.

(4) On being satisfied with the merit of the application, the Board may grant the approval or reject any such activity if it is of the 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 rejection order shall be made without giving an opportunity of being heard to the person affected.

(5) The approval/permission shall be in the form of a written agreement for Access and Benefit Sharing (ABS) duly signed between an authorized officer of the Board and the applicant. The format of the agreement shall be as decided by the Board from time to time:

Provided that Access and Benefit Sharing shall be implemented in the manner provided in the guidelines/regulations as notified by the National Biodiversity Authority/Central Government from time to time.

(6) The approval/agreement of access to biological resources may provide special measures for conservation and protection of biological resources as per the Act and related regulations.

(7) Any information given in the Form-1 shall be kept confidential and shall not be disclosed, either intentionally or unintentionally, to any person not concerned thereto.

23. The first four Sub-Rules of Rule 12 deal with grant of approval by the Board for access to biological resources and associated knowledge for commercial utilization. Clause (5) deals with approval/permission to be in the form of a written agreement for access and benefit sharing duly signed between an authorized officer of the Board and the applicant and the format of the agreement shall be as decided by the Board from time to time. It is also stated that the access and benefit sharing shall be implemented in the manner provided in the guidelines/regulations as notified by the National Biodiversity authority/Central Government from time to time.

24. In our *prima facie* opinion neither Section 23 nor Section 24 nor Rule 12(5) authorize the respondent No.1 to demand any amount towards the benefit share explicitly.

25. If we look at the amendment made in August, 2023 to Section 23, which has already been referred to above, by introducing clause (ba) in Section 23, the same indicates that the Board is to determine the fair and equitable sharing of benefits as provided under the regulations made in this behalf by the National Biodiversity Authority while granting approvals.

26. As per amendment Act 10 of 2023, introducing the amendment, the amendments would come into force as provided in sub-section (2) of Section 1 thereof, on such date as

the Central Government may by notification in the Official Gazette, appoint.

27. It is not in dispute that notified date for bringing into force the amended provisions of the Act was 01.04.2024.

28. Assuming for the sake of arguments without considering that there is some veracity in the arguments of the learned Advocate General that the amendment permits the State Biodiversity Board to levy the amount as it did in the letter dated 11.10.2023 issued by it, the amended provision had come into effect only on 01.04.2024, and it was not in existence on 11.10.2023 (when the letter in question making the demand of Rs.Five crores was issued on the petitioner).

29. Also *prima facie*, such conferment of powers by way of amendment would be a change in the substantive law and so *prima facie* would not have retrospective operation. (See ***CIT v. Vatika Township (P) Ltd.*¹ *Vijay vs. Union of India & Ors., Civil Appeal No. 4910 of 2023 dt. 29.11.2023***).

30. We are also of the opinion that in fiscal matters in the absence of express provisions, it is well settled law that the delegating authority cannot impose a tax or a fee. There has to be a specific power of imposition of a tax or a fee by the delegating authority and it is not permissible to imply such a power to a delegating authority for imposition of a tax or a fee.

1 (2015)1 SCC 1

(See *Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla and Others*²)

31. *Prima facie* we are, therefore, unable to agree with the view expressed by the Uttarakhand High Court in *Divya Pharmacy* (supra) that by way of *purposive* interpretation the State Biodiversity Board can be said to have such implied authority to make demand though the Act is silent in that regard at the relevant point of time.

32. Therefore, for all the aforesaid reasons, pending further orders, there shall be stay of further proceedings pursuant to letters dated 11.10.2023, 19.12.2023 and 09.05.2024 issued by respondent No.1 .

33. As regards the demand made by the respondent No.3 from the petitioner in letter dated 12.12.2023 (Annexure P-11) to send information with regard to balance sheet of revenue generated from previous three financial years is concerned, no provisions of law has been brought to our notice by the learned Advocate General empowering the respondent No.3 to make such a demand. Though, the learned Advocate General has referred to certain orders passed in CWP No. 4379 of 2019, those orders to which one of us (MSRJ) is a party, were passed while considering the steps to be taken by the State to implement the provisions of the Act, and in that order there was no permission accorded to the licensing authority i.e.

2 (1992)3 SCC 285

Respondent No.3 to call for such information from persons like the petitioner.

34. Therefore, there shall be stay of further proceedings pursuant to letter dated 12.12.2023 issued by the respondent No.3 also until further orders.

(M. S. Ramachandra Rao)
Chief Justice.

(Satyen Vaidya)
Judge.

24th May, 2024.
(jai)