Judgment Reserved on 07.09.2018

Judgment Delivered on 21.12.2018

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

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

Divya Pharmacy

.............Petitioner

Versus

Union of India and others

` ....Respondents

Present : Mr. R. Parthasarthy, Mr. P.R. Mullick, Mr. Anil Datt,
Mr. Sudarshan Singh and Mr. Sahil Mullick, Advocates for the petitioner.
Mr. Rakesh Thapliyal, Assistant Solicitor General of India with Mr. V.K. Kaparwan, Central Government Standing Counsel for respondent no. 1.
Mr. M.C. Pandey, Additional Advocate General with Mr. Yogesh Pandey, Addl. C.S.C. for the State/respondent no. 4. Mr. Ritwik Dutta and Mr. Saurabh Sharma, Advocates for respondent no. 2. Mr. Alok Mahra, Advocate for respondent no. 3.

Hon'ble Sudhanshu Dhulia, J.

"Divya Yog Mandir", is a Trust, registered under the Registration Act, 1908, and "Divya Pharmacy", which is the sole petitioner before this Court is a business undertaking of this Trust. The Pharmacy manufactures Ayurvedic medicines and Nutraceutical

products, at its manufacturing unit at Haridwar, Uttarakhand. The Trust and the Pharmacy were founded by Swami Ramdev and Acharya Balkrishna, according to the averments of the writ petition.

2. It is an admitted fact that "Biological Resources" constitute the main ingredient and raw materials in the manufacture of Ayurvedic and Nutraceutical products. Petitioner is aggrieved by the demand raised by Uttarakhand Biodiversity Board (from hereinafter referred to as UBB), under the head "Fair and

Equitable Benefit Sharing" (FEBS), as provided under the Biological Diversity Act, 2002 (from hereinafter referred to as the Act), and the 2014 Regulations framed therein.

The Case of the Petitioner :

3. Petitioner's case is simple. UBB cannot raise a demand, under the Head of "Fair and Equitable Benefit Sharing" (FEBS), as the Board neither has the powers nor the jurisdiction to do that and, secondly, the petitioner in any case is not liable to pay any amount or make any kind of contribution under the head of "FEBS". This argument of the petitioner is based on the interpretations of "certain provisions" of the statute, which we may now refer.

4. The Biological Diversity Act, 2002 is a 2002 Act of the Parliament, with three basic objectives:

(A) Conservation of Biological Diversity.

(B) Sustainable use of its components.

(C) Fair and equitable sharing of the
benefits arising out of the use of
biological resources.

5. In this writ petition, we are presently only concerned with the third objective which is fair and equitable benefit sharing (from hereinafter referred to as FEBS).

6. “Biological resources” which is used for this manufacture of ayurvedic medicine are defined under Section 2(c) of the Act as follows:

“**2. Definitions. –** In this Act, unless the context otherwise requires, -

(a)...

(b)...

(c) “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 material;”

7. Under the Act, certain class of persons, cannot undertake an activity, related to biodiversity in India, in any manner, without a “prior approval” of the National

Biodiversity Authority (from hereinafter referred to as NBA). The persons who require prior approval from NBA are the persons defined in Section 3 of the Biological Diversity Act, 2002 (from hereinafter referred to as the 'Act'). Section 3 of the Act reads 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."

8. A bare reading of the above provision makes it clear that prior approval of NBA is mandatory for persons or entities who have some kind of a "foreign element" attached to them. Either they are foreigners or even if they are citizens, they are non residents, and in case of a body corporate again a "non Indian" element is attached to it. Persons having a foreign element have therefore been kept in a distinct category.

9. "Fair and Equitable Benefit Sharing" is defined under Section 2(g) of the Act, which reads as under:

“**2. Definitions.** – In this Act, unless the context otherwise requires, -

(a)... (b)... (c).... (d).... (e).... (f).... (g) “fair and equitable benefit sharing” means sharing of benefits as determined by the National Biodiversity Authority under Section 21.”

10. Section 21 of the Act reads as under:

“**21. Determination of equitable benefit sharing by National Biodiversity Authority.**—(1) The National Biodiversity Authority 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, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.

(2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:—

(a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; (b) transfer of technology;

(c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers; (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation;

(e) setting up of venture capital fund for aiding the cause of benefit claimers; (f) payment of monetary compensation and other non- monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit.

(3) Where any amount of money is ordered by way of benefit sharing, the National Biodiversity Authority may direct the amount to be deposited in the National Biodiversity Fund:

Provided that where biological resource or knowledge was a result of access from specific individual or group of individuals or organisations, the National Biodiversity Authority may direct that the amount shall be paid directly to such individual or group of individuals or organisations in accordance with the terms of any agreement and in such manner as it deems fit.

(4) For the purposes of this section, the National Biodiversity Authority shall, in consultation with the Central Government, by regulations, frame guidelines."

11. Fair and equitable benefit sharing (FEBS) thus has not been precisely defined. Its definition is based on reference to other provisions of the statute, where again it is given by way of illustration in sub-section (2) of Section 21, where "payment of monetary compensation" is one of the means of grant of this benefit.

12. Before NBA grants approval under Section 19 or under Section 20 of the Act, it has to ensure that the terms and conditions for granting the approval are such

which secure equitable sharing of benefits arising out of the use of "Biological Resources". In other words, FEBS would only arise if an approval is being taken under Section 19 and 20 of the Act, and in no other contingency. All the same, both Sections 19 & 21, are the sections meant for only "foreign entities", who require approval from NBA in one form or the other. These provisions do not apply in case of the petitioner which is purely an Indian Company.

13. Under Section 19 and 20 of the Act, a prior approval is required from NBA, only by persons who have been defined under Section 3(2) of the Act. Such persons are the ones who are not citizens of India, or though a citizen of India are still non-resident Indian, and if it is a body corporate, association or organization, it is not incorporated or registered in India, or if incorporated or registered in India under any law for the time being in force, it has a non-Indian participation in its share capital or management. To put it simply prior approval for NBA is only required when there is a "foreign element" involved.

14. For an Indian entity such as the petitioner, the provision is given in Section 7 of the Act, which speaks of "prior intimation" to be given, that too not to NBA but to the State Biodiversity Board (SBB). 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 organization 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 *vaids* and *hakims,* who have been practicing indigenous medicine."

15. As the petitioner does not fall in any of the categories as defined under sub-section (2) of Section 3, there is no question of a prior approval from NBA by the petitioner, and logically therefore there is no question of any contribution under FEBS, as a contribution under FEBS only comes from those who require a prior approval from NBA.

16. The petitioner would also argue that the State Biodiversity Board (SBB) has no power to impose FBES in respect of persons referred in Section 7 of the Act of 2002, i.e. in respect of "Indian entities". Even NBA does not have the powers under the Act, to delegate these powers to SBB, as the NBA itself is not authorised to impose FEBS on an "Indian entity". In short the petitioner would argue 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. FEBS is only for foreigners! The statute is clear about it. Sri Parthasarthy would finally submit that the elementary principle of statutory interpretation is to give plain meaning to the words used. Reliance is placed on a decision of the Hon’ble Apex Court in the case of **State of Jharkhand**

and another v. Govind Singh reported in (**2005) 10 SCC 437.** Para 17 of the said judgment reads as under:

> “17. Where, therefore, the “language” is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here.”

The rebuttal by the State Biodiversity Board of Uttarakhand.

17. To the contrary, the learned counsel for the SBB Sri Ritwik Dutt would submit that FEBS is one of

the three major objectives sought to be achieved by the Act of 2002, and this has always to be seen as a continuation of the long history of international conventions and treaties, which preceded the parliamentary legislation. The Act and the Regulations framed therein are a result of our international commitments. Reference here is to the Rio de Janeiro Convention and Johannesburg Declaration, and most importantly Nagoya Protocol. The learned counsel for the SBB would argue that there is no distinction between a "foreign entity" and an "Indian entity", as far as FEBS is concerned, 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 learned counsel would submit that whereas a foreign entity under Section 3 has to take prior approval of NBA before venturing into this area, an

Indian entity has to give "prior intimation" to SBB before venturing into this area, under Section 7 of the Act. The

regulation and control, as far as Indian entity is concerned, is given to SBB under the Act, and therefore it is the SBB which is the regulatory authority in case of an Indian entity, such as the petitioner, and FEBS is being imposed by SBB as one of its regulatory functions.

18. The functions of SBB are defined under Section 23 of the Act of 2002, which read as under:-

"**23. Functions of State Biodiversity Board.**—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 utilisation of biological resources; (*b*) regulate by granting of approvals or otherwise requests for commercial utilisation or bio-survey and bio-utilisation 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."

19. The powers of SBB are given under Section 24 of the Act of 2002, which read as under:-

“24. Power of State Biodiversity Board to restrict certain activities violating the objectives of

conservation, etc.—(*1*) Any citizen of India or a body corporate, organisation 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 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.”

20. Learned counsel would argue that under sub-section (a) of Section 23 of the Act of 2002, powers are given to the SBB to advise the State Government in this area of biodiversity, whereas in sub-section (b) of Section

23, the SBB has got powers to regulate the grant of approvals or otherwise to request for commercial utilization or bio-survey and bio-utilisation of any biological resource by Indians. The powers given under Sub-section (c) of Section 23 of the Act of 2002 are general powers given to SBB to carry out the provisions of the Act or as may be prescribed by the State Government.

21. Sub-section (b) of Section 23 has to be read with Section 7 of the Act of 2002 and reading of the two provisions together would mean that although an Indian entity has only to give "prior information" (as against "prior approval" to NBA, in case of a foreign entity), it does not mean that SBB has no control over an Indian entity. Section 23 stipulates that 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". Regulation by imposition of fee is an accepted form of regulatory mechanism, the learned counsel for SBB

would argue. This has again to be seen with sub-section (2) of Section 24, where 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.

22. Learned counsel would then rely on Section 52A of the Act of 2002, which is a provision for appeal before the National Green Tribunal, inter alia, against any order passed by NBA or SBB regarding determination of benefit sharing. Learned counsel would therefore emphasise that the very fact that an Appellate Authority has been provided, inter alia, against any order which has been passed by the SBB regarding FEBS, would imply that SBB has powers to impose FEBS.

23. Reliance has also been placed on Section 32 of the Act, which provides for constitution of State Biodiversity Fund, where, inter alia, all sums received by the State Biodiversity Board or such other sources have

to be kept, hence a holistic reading of the entire provisions of the Act, would show that SBB has got an important role to play, particularly in the field of FEBS, the learned counsel for the SBB would submit.

24. The Act ensures that funds are available with the SBB for protection and regeneration of biological diversity, so that long term sustainability is ensured and the indigenous and local communities get incentives for benefit of conservation and use of biological resources.

25. The importance of FEBS has then been emphasised by the learned counsel for SBB relying upon the preamble of the Act of 2002, (which refers to the Rio de Janeiro Convention of 1992), where "Fair and Equitable Benefit Sharing" is one of the three important posts of the entire movement of conservation of biodiversity, and one of the main purposes of the statute. Emphasising the importance of preamble of the Act of 2002, the learned counsel has relied upon the decision of Hon'ble Apex Court in the case of **Kavalappara Kottarathil Kochuni v. State of Madras and Kerala [AIR 1960 SC 1080].**

26. The learned counsel for the SBB would then argue that in the present context, a simple and plain reading of the statutory provisions may not be correct. The definition clause of the Act of 2002 starts with the words "In this Act, unless the context otherwise requires". The learned counsel would hence argue 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 looses its purpose, the context requires a different examination.

27. Thereafter the learned counsel for the SBB emphasised the importance of International Conventions in construing domestic legislations, apart from the Rio de Janeiro Convention and Johannesburg Declaration, and particular emphasis was given to Nagoya Protocol of 2010 for the reason that in the Nagoya Protocol, the entire emphasis was on "fair and equitable benefit sharing" and the importance of indigenous and local communities in this regard.

28. In short, in the concept of FEBS, no distinction is made between a foreign entity and an the Indian entity, and the only distinction which the Act makes within Indian entities is in proviso to Section 7 of the Act of 2002 where an exception has been created for local people and communities in that area, including growers and cultivators of biodiversity, and *vaids* and *hakims,* who have been practicing indigenous medicine.

29. The above stand taken by the SBB is adopted by the remaining respondents such as Union of India and the State of Uttarakhand.

30. Having heard the rival submissions, it is clear that at the heart of the dispute here is the interpretation of what constitutes "fair and equitable benefit sharing", and whether this liability can be fastened on an Indian, or an Indian company.

31. The petitioner is an Indian company, without any element of foreign participation, either in its share capital or management, and therefore has challenged the

imposition of an amount by the SBB, under the head of "fair and equitable benefit sharing", precisely on the ground that an Indian entity cannot be subjected to this burden. The entire argument of the petitioner rests on a textual and legalistic interpretation, particularly of the term "Fair and Equitable Benefit Sharing".

32. In the first blush it seems only obvious that the law here does not subject an Indian entity to FEBS. But what seems obvious, may not always be correct.

The definition of FEBS in the statute and its implementation

33. The entire case of the petitioner, as placed by its learned counsel Sri Parthasarthy, moves on the definition clause of "Fair and Equitable Benefit Sharing" and based on that he would argue that "Fair and Equitable Benefit Sharing" would not involve an Indian entity.

34. The question is whether the context here requires a plain and textual interpretation. It is true that

in normal circumstances, a definition has to be interpreted as it is given in the definition clause, but Section 2 of the Act, which defines various expressions in the Act opens with some important words, which are, "unless the context otherwise requires". Meaning thereby that it is not mandatory that one should always mechanically attribute an expression as assigned in the definition clause. Yes, ordinarily this must be done, but when such an interpretation results in an absurdity, or where it defeats the very purpose of the Act, then it

becomes the duty of the Court to assign a "proper meaning" to the words or the phrase, as the case might be. It is for the reason that the Legislature, for abundant precaution, by and large in all statues, start the definition clause with the words "unless the context otherwise requires", or such similar expressions.

35. G.P. Singh in his Classic, Principles of Statutory Interpretations* explains this aspect as follows:

"...where the context makes the

> definition given in the interpretation clause inapplicable, a defined work when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subject to the qualification – 'unless there is anything repugnant in the subject or context, or 'unless the context otherwise requires'."

36. But then before a different meaning is given to a definition, reason must be given as to why it is being done. It is also true that in a case where the application of a definition as given in the definition clause makes the provision unworkable or otiose, it must be so stated, that the definition is not applicable because of the contrary context.**

* 12th Edition, page 191

** Justice G.P. Singh: Principles of Statutory Interpretation, 12th Edition, page 192

37. The frequently cited case in this regard is **Venguard Fire and General Insurance Co. Ltd., Madras v. Fraser & Ross, AIR 1960 SC 971.** In the said case, the Hon'ble Apex Court, explained this position as under:

> "It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, 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 statues generally being with the qualifying words, similar to the words used in the present case, namely, 'unless there is anything repugnant in the subject or

context'. Therefore, in finding out of the meaning of the word, "Insurer" in various sections of the Act (Insurance Act, 1938) the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely 'unless there is anything repugnant in the subject or context'. In view of this qualification, the Court has not only to look at the words but also to look at the

context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances."

38. The facts of the above case must be stated

here in order to get a proper perspective. The Government of India had been receiving complaints against an Insurance Company and consequently the Government on 17.07.1957 passed an order under Section 33 of the Insurance Act, 1938 directing the Controller of the Insurance to investigate the affairs of the Company called Venguard Fire and General Insurance Co. Ltd. The company was also informed of the order. The company wrote back to the Controller stating that since it has closed down its business, investigation cannot be done against the company.

39. Section 33(1) of the Insurance Act, 1938 gave powers to the Central Government to do investigation. The provision reads as under:

> "The Central Government may at any time by order in writing direct the controller or any other person specified in the order to investigate the affairs of any insurer and to report to the Central Government on any investigation made

> by him Provided that the controller or the other person may, whenever necessary, employ an auditor or actuary or both for

> the purpose of assisting him in any investigation under this section."

40. Section 2D of the Insurance Act, 1938 further states as under:

> "Every insurer shall be subject to all the provisions of this Act in relation to any class of insurance business so long as his liabilities in India in respect of business of that class remain unsatisfied and not otherwise provided for."

41. However, the case of the Company before the High Court and the Hon'ble Apex Court was that both Section 33(1) and Section 2D refer to an "insurer" and an insurer is what is defined in Section 2(9) of the Act, which is "a person carrying on the business of insurance". Since the business of insurance was closed

down completely by the company, it no longer remained an “insurer”, and the provisions of the Act will not apply to the company. This was the short argument on behalf of the company. On this argument, the Hon’ble Apex Court said as under:-

> “......though word “insurer “ is as given in the definition clause (S. 2(9) and refers to a person or body corporate etc. carrying on the business of insurance, the word may also refer in the context of certain provisions of the Act to any intending insurer or quondam insurer. The contention therefore that because the word “insurer” has been used in S. 33 or S. 2D those sections can only apply to insurers who are actually carrying on business cannot necessarily succeed, and we have to see whether in the context of these

> provisions an insurer will also include a person who was an insurer but has closed his business.”

42. In the above case, as the Hon’ble Apex Court

had observed, the nature of the case, demanded a deviation from the normal interpretation i.e. from a plain reading, to a purposive reading. In the above case if a straightjacket meaning, as given in the definition clause was to be adopted, then that would have defeated the very purpose of the statute. Thus depending on the context and the nature of the case, the Court must give meaning to a statute. "The court has not only to look at the words but also to look at the context" (Venguard Fire and General Insurance Co. Ltd. (supra).

What is fair and equitable benefit sharing and the importance of international treaties?

43. Indigenous and local communities, who either grow "biological resources", or have a traditional knowledge of these resources, are the beneficiaries under the Act. In return for their parting with this traditional knowledge, certain benefits accrue to them as FEBS, and this is what FEBS is actually all about.

44. This benefit the "indigenous and local communities", get under the law is over and above the market price of their "biological resources".

45. But to fully appreciate the concept of FEBS, we may have to go back to the legislative history behind the enactment and the long struggle, by and on behalf of the local and indigenous communities.

46. At this juncture, it may also be worthwhile to mention that India is a country which is extremely rich in biodiversity. It is one of the top 17 megadiverse countries of the world.[1] Megadiverse, as the word suggests, would mean “having great diversity”, and a megadiverse country must have atleast 5000 species of endemic plants and must border marine ecosystem[2]. Significantly, apart from USA, Australia and China, which are in the list of 17 top megadiverse countries of the world, due to their size alone, the remaining countries in this pool, are the developing countries, such as India, Colombia, Ecuador, etc. It is the developing world which has raised a long struggle in conserving its biological resources, and to save it from exploitation and extinction.

47. The effort of the world community for a

sustainable biodiversity system goes back to the United Nations conference on human environment, which is better known as Stockholm conference of 1972. It was the first United Nations conference, which focused on international environment issues. The Stockholm manifesto recognised that earth's resources are finite and there is an urgent need to safeguard these resources.

48. Twenty years later in 1992 due to the combined efforts of the developing nations, United Nation Convention of Rio de Janeiro was signed, of which India is a signatory. The preamble of the convention recognised and declared the importance of biological diversity for evolution and for maintaining life sustaining systems of

1. www.biodiversity-z.org
2. www.biodiversity-z.org

biosphere, and the need for its conversation. It also raised concern and cautioned the world, that biological

diversity is being reduced significantly by unchecked human activities. The Preamble also recognises "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."

49. The first Article of the Rio de Janeiro Convention declares its objectives as follows:

> "The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate finding." (*emphasis provided)*

50. Ten years later, in 2002, the world community again took stock of the movement, this time at Johannesburg, South Africa. The conference resulted in

an important declaration known as “Johannesburg Declaration on Sustainable Development, 2002”. The Johannesburg Declaration reasserts the challenges it faces in the world regarding conservation of biodiversity. What is important for us is that at Johannesburg the

vital role of indigenous people in the field of sustainable development was reasserted. It also recognized that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. Though technically Johannesburg declaration may not be a treaty, yet it is an important milestone in this movement.

51. The same year i.e. in 2002 our Parliament, in recognition of its international commitments, enacted the Biological Diversity Act, 2002, which was published in the Gazette of India on 01.10.2003. The Preamble of the Act shows the purpose of bringing the legislation in India. It is extremely important and therefore it must be

reproduced in full, which reads as under:

"An Act to provide for conservation of Biological Diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto,

WHEREAS India is rich in biological diversity and associated traditional and contemporary knowledge system relating thereto;

AND WHEREAS India is a party to the United Nations Convention on Biological Diversity signed at Rio de Janeiro on the 5th day of June, 1992;

AND WHEREAS the said Convention came into force on the 29th December, 1993; AND WHEREAS the said Convention has the main objective of conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits arising out of utilization of genetic resources;

AND WHEREAS it is considered necessary to provide for conservation,

sustainable utilisation and equitable sharing of benefits arising out of utilisation of genetic resources and also to give effect to the said Convention."

52. At this juncture, we must emphasize the importance of international treaties and conventions on municipal laws. The Constitution of India emphasizes this aspect. Article 51 (c) of the Constitution states as

under:-

> "51. Promotion of international peace and security:- The State shall endeavour to (a)... (b)... (c) foster respect for international law and
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> treaty obligations in the dealings of
>
> organised peoples with one another;"

53. The Hon'ble Apex Court in the case of **T.N.**

Godavarman v. Union of India (2002) 10 SCC 606 has

emphasised the importance of international conventions

and treaties as under: "Duty is cast upon the Government under Article 21 of the Constitution of India to protect the environment and the two salutary principles which govern the law of environment are : (i) the principles of sustainable development, and (ii) the precautionary principle. It needs to be highlighted that the Convention on Biological Diversity has been acceded to by our country and, therefore, it has to implement the same. As was observed by this Court in Vishaka v. State of Rajasthan in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law."

54. In the case of **Apparel Export Promotion**

Council v. A.K. Chopra (1999) 1 SCC 759, the Hon'ble

Apex Court has observed as under:

"These international instruments cast an obligation on the Indian State to gender-senitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law."

55. The Hon'ble Apex Court in the case of **National Legal Services Authority v. Union of India and others** reported in **(2014) 5 SCC 438** has observed as follows:

"Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If Parliament has made any legislation which is in conflict with the international law, then Indian courts are bound to give effect to the Indian law, rather than the international law. However, in the absence of a contrary

legislation, municipal courts in India would respect the rules of international law. In Kesavananda Bharti v. State of Kerala, it was stated that in view of Article 51 of the Constitution, the Court

must interpret language of the Constitution, if not intractable, in the light of the United Nations Charter and the solemn declaration subscribed to it by India. In Apparel Export Promotion Council v. A.K. Chopra, it was pointed out that the domestic courts are under an obligation to given due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic laws. Reference may also be made to the judgments of this Court in Githa Hariharan v. RBI, R.D. Upadhyay v. State

of A.P. and People's Union for Civil

Liberties v. Union of India."

56. In a recent judgment in the case of **Commr. Of Customs v. G.M. Exports** reported in **(2016) 1 SCC 91**, the Hon'ble Apex Court sums up this aspect in para 23 of its judgment, which reads as under:-

"23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law

and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) 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. It is in the light of these principles that we must now examine the statute in question."

57. In the light of the above, we have to understand the importance of the 2002 Act as it is a result of our international commitments.

58. India is a party to the United Nations Convention on Biological Diversity signed at Rio on 5th of June 1992. Being a signatory to the International treaty,

India was under an obligation to give effect to the provisions of the treaty. Article 8 of the Rio Convention is regarding IN-SITU Conservation. Article 8 (j) and (k) are relevant for our purposes here. It reads as follows:

> “Article 8. IN-SITU CONSERVATION
>
> Each Contracting Party shall, as far as possible and as appropriate: (a).... (b).... (c).... (d).... (e).... (f).... (g)..... (h)..... (i)..... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
>
> (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations."

59. Further Article 15 of the Rio Convention relates to - Access to Genetic Resources. Clause (1) & (7) of the above Article, read as under:-

> "Article 15. Access To Genetic Resources
>
> 1. Recognizing the sovereign rights of the States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
>
> 2.....
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> 3. ....
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> 4. ....
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> 5. ....
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> 6. ....
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> 7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."

60. Being a signatory to the Rio Convention, India was committed to bring appropriate legislation in the country in order to give effect to the provisions of the treaty. It was in this background and on these international commitments that the Parliament enacted the Biological Diversity Act in 2002.

61. Another important international convention must be referred here, which is Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity. The Nagoya Protocol

of 2010 is a supplementary agreement to the 1992 Rio de Janeiro Convention on Biological Diversity.

62. It must be stated, even at the cost of repetition, that the conservation of biological diversity has three main pillars or objectives. The first is the conservation of biological diversity, the second is sustainable use of its components and the third is fair and equitable sharing of the benefits arising out of utilisation of genetic resources. Nagoya Protocol of 2010 focuses on the third component (with which we are presently concerned), which is fair and equitable sharing of genetic material, including the traditional knowledge associated with the genetic resources and the benefits arising out from their use.

63. The preamble of Nagoya Protocol, inter alia, recognised the "importance of promoting equity and fairness in negotiations and mutually agreed terms between providers and users of genetic resources". It also recognised "the vital role that women play in access and benefit-sharing and affirming the need for the full participation of women at all levels of policy-making and implementation for biodiversity conservation." Article 5 of the Nagoya Protocol describes "fair and equitable benefit-sharing", which is reproduced as under:-

> "Article 5. Fair and Equitable Benefit-sharing 1. In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a faire and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with

> the Convention. Such sharing shall be upon mutually agreed terms.

2. Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the

established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms. 3. To implement paragraph 1 above, each Party shall take legislative, administrative or policy measures, as appropriate.

4. Benefits may include monetary and non-monetary benefit, including but not limited to those listed in the annex.

5. Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising form the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms."

64. Who are to be the beneficiaries of this FEBS?

The protocol here speaks of the "local and indigenous communities". They are the ones that need this protection and they are the ones who were at the centre of concern at Nagoya.

65. Article 7 of the Nagoya Convention reads as under:

"ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established."

66. Article 12 of the Nagoya Protocol reads as under:

"TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

1. In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.
2. Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.
3. Parties shall endeavour to support, as appropriate, the development by

indigenous and local communities, including women within these communities, of: (a) Community protocols in relation to access to traditional knowledge associated with genetic

resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge; (b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and (c) Model contractual clauses for benefit- sharing arising from the utilization of traditional knowledge associated with genetic resources.

4. Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention."

67. Article 15 of the Nagoya Protocol reads as

under:

"COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed

consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party. 2. Parties shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above. 3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or

regulatory requirements referred to in paragraph 1 above.

68. Article 16 of the Convention reads as under:-

"COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFITSHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.

2. Each Party shall take appropriate, effective and proportionate measures to address situations of non- compliance with measures adopted in accordance with paragraph 1 above.

3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above."

69. Article 21 then speaks of awareness raising of the "indigenous and local communities". It reads as under:

"AWARENESS-RAISING

Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. Such measures may include, inter alia:

(a) Promotion of this Protocol, including its objective;

(b) Organization of meetings of indigenous and local communities and relevant stakeholders;

(c) Establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders;

(d) Information dissemination through a national clearing-house;

(e) Promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local

communities and relevant stakeholders;

(f) Promotion of, as appropriate, domestic, regional and international exchanges of experience;

(g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations;

(h) Involvement of indigenous and local communities and relevant stakeholders in the implementation of this Protocol; and

(i) Awareness-raising of community protocols and procedures of indigenous and local communities."

70. The above provision of the Nagoya Protocol makes it clear that FEBS is for the benefit of "the local and indigenous communities".

71. In the above background of our international commitments, we find that as the Biological Diversity Act, 2002 is a follow up to the Rio Convention of 1992, similarly, the Regulations of 2014, is a consequence of the Nagoya Protocol. By the Regulations, the

commitments at Nagoya are being enforced. In fact the Preamble of the 2014 Regulations* mentions that the Regulations are in pursuance of the Nagoya Protocol.

72. The concept of FEBS, as we have seen, is focused on the benefits for the “local and indigenous communities”, and the Nagoya Protocol makes no distinction between a foreign entity and an Indian entity, as regards their obligation towards local and indigenous communities in this regard. Consequently the “ambiguities” in the national statute have to be seen in the light of the International treaties i.e. Rio and Nagoya and a purposive rather than a narrow or literal interpretation has to be made, if we have to arrive at the true meaning of FEBS. In our case the Biological Diversity Act, 2002 has been enacted not merely in furtherance of an International treaty but it is rather to enforce a treaty obligation and therefore in case there is any difference between the language of a municipal

* Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014.

Law and corresponding provision of the treaty, "the statutory language should be construed in the same sense as that of the treaty". This is what has been held by the Hon'ble Apex Court in **Commr. Of Customs v. G.M. Exports.**[1]

73. After going through the entire history of this movement, which is a movement towards the conservation of biological diversity, one gets a sense that the main force behind this movement which resulted in the international conventions and finally the municipal legislations, is the protection which the developing countries required from the advanced countries in this particular field. All the same, the rights of "indigenous and local communities" were extremely important and emphatically declared in the Nagoya Protocol. These rights have to be protected, equally from outside as well as from within.

74. The focus of the Nagoya Protocol is on FEBS,

and protection of indigenous and local communities, and the effort is that the indigenous and local communities must get their fair and equitable share of parting with their traditional knowledge and resources. India being a signatory to the Rio and the Nagoya Protocol, is bound to fulfill its international commitments and make implementation of FEBS effective and strong.

75. Having said this, however, if we read the provisions of the Act as have been read before this Court

1. (2016) 1 SCC 91, Pages 115-116.

by the learned counsel for the petitioner Sri Parthasarthy, i.e. if we make a plain reading of the provisions, and take a very conservative and textual approach to the interpretation of the relevant statutory provisions, we would find that the Act does make a distinction between a "foreign entity" and a "domestic entity", as far as FEBS is concerned, particularly when

we read the definition of FEBS. But will that be the correct approach!

76. A simple textual interpretation as submitted by the petitioner would indeed show that the petitioner which is not a foreign entity is not liable to contribute to FEBS and the powers to impose FEBS lie only with the NBA.

77. But then a plain and textual interpretation here defeats the very purpose, for which the law was enacted!

The Purposive Interpretation

78. The entire controversy before this Court, ultimately revolves around the interpretation of certain provisions of Biological Diversity Act, 2002, such as what constitutes "Fair and Equitable Benefit Sharing", and whether such a demand can be made by the State Biodiversity Board, or such powers can be delegated by the National Biodiversity Authority. Over the years, the Courts have been relying on a theory of "interpretation", which is now well known as the "purposive interpretation

of law”. The Hon’ble Apex Court has applied the theory of the “purposive interpretation” not only in its

interpretation of the Constitution, but also in its interpretation of ordinary statutes.

79. In **Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others** reported in **(2009) 10 SCC 123,** a three-Judge Bench of Hon’ble Apex Court had an occasion to examine certain provisions of Employees’ Provident Funds and Miscellaneous Provisions Act, 1952. Since Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 was a social welfare legislation, it was held that as the basis purpose of the Act was to protect the interest of the weaker section of the society i.e. the workers, the Court must “give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution”.

80. Again in the case of **Shailesh Dhairyawan v. Mohan Balkrishna Lulla** reported in **(2016) 3 SCC 619,**

while interpreting the provisions of Arbitration and Conciliation Act, Justice Sikri in his concurring, though separate judgment, relied upon the seminal work of Aharon Barak*, and applied the theory of "purposive interpretation".

81. Most recently, a Constitution Bench of Hon'ble Apex Court in the case of **Government (NCT of Delhi) v. Union of India and another** reported in **(2018) 8 SCC 501** examined the contentious issue of interpretation of Article 239-AA and 239-AB of the Constitution of India, which was a bone of contention between the Lt. Governor

* Aharon Barak, *Purposive Interpretation in Law (Princeton University Press, 2005)*

of Delhi on one hand and the Ministers who were elected representatives of the voters of Delhi, on the other, and while deciding the issue again purposive interpretation of law was relied upon.

82. In the above case (Government of NCT of Delhi), the Hon'ble Apex Court frequently quoted Aharon

Barak, in order to emphasise the principle of purposive interpretation of law and cited earlier cases of Supreme Court, where the Court relied more on the purpose of the legislation rather that the plaint language of the statute.

83. It is true that in the above case, the principle of purposive interpretation of law were applied while interpreting constitutional provisions, but it must be stated that the principle of purposive interpretation are equally applicable while interpreting ordinary statutes. In fact, principle of purposive interpretation is applicable not only in interpreting the Constitution and the statutes, but also in the interpretation of a will or a contract.*

84. I would now come to an important decision in this regard, which is often considered to be the *locus classicus* in this field. The reference is to a decision of Supreme Court of Canada, which was rendered in a appeal filed by the former employees of a company. The case is commonly referred by the name of the company which is Rizzo & Rizzo Shoes Limited (from hereinafter referred to as Rizzo)**.

* Aharon Barak, *Purposive Interpretation in Law (Princeton University Press, 2005)*

** 1998 SCC Online Can SC 4: [1998] 1 SCR 27

85. The facts must be stated first. Rizzo & Rizzo Shoes Limited owned and operated a chain of retail shoe stores across Canada. In April, 1989, a bankruptcy petition was filed against the company by a creditor. This was followed by receiving orders on the Rizzo's property and the employment of Rizzo's employees came to an end. Trustee was appointed for Rizzo's estate and the trustee paid all the wages, salaries, commissions and vacation pay that was earned by Rizzo's employees till the date of receiving order.

86. In November, 1989, the Ministry of Labour for the Province of Ontario, raised claim on behalf of the former employees of Rizzo for termination pay and vacation pay thereon before the trustee. This claim was disallowed by the trustee, as it was of the opinion that the bankruptcy of an employer does not mean dismissal from service employment and therefore no entitlement to

severance, termination or vacation pay is created under the Employment Standards Act.

87. The Ministry of Labour appealed to the Ontario Court (General Division), which allowed its claim, setting aside the order of the trustee. However, later the Court of Appeal overturned the decision of the trial court and restored the decision of the trustee. Since the matter was not taken forward by the Ministry of Labour, five former employees of Rizzo moved the Supreme Court of Canada for their claim and it was on the above facts that the highest appellate court of Canada was to decide their claim.

88. Before the Supreme Court of Canada, primarily the matter was an interpretation of two statutes – (A) Employment Standards Act (from hereinafter referred to as ESA) and (B) Bankruptcy Act (from hereinafter referred to as BA). For our purpose and understanding, it may be sufficient to know that ESA gave certain benefits to the employees in the event of

their termination of employment such as termination and severance pay. On the other hand, the BA protected an employer in the event of bankruptcy. In the words of Supreme Court itself in para 20 of the judgment, at the heart of the conflict is an issue of statutory interpretation. Para 20 reads as under:

> "At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete."

89. It then emphasised that instead of taking a plain meaning of the provision, a purposive approach is required in order to see the purpose and intent behind the legislation i.e. ESA, and it said as under:

"In my opinion, the consequences or effects which result from the Court of Appeal's

interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Cote, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspects of it pointless or futile (Sullivan,

construction of Statutes, supra, at p. 88).

28. The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the large the investment he or she has made in the employer and the

great the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these

payments."

(*emphasis provided)*

90. Ultimately the Court held as under:

"As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits- conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose

termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does not give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to applicability of s. 7(5) of the ESA."

91. The Supreme Court of Canada also noticed that ESA benefits on the workers. Therefore being a beneficial legislation it ought to be interpreted in a broad and generous manner. "Any doubt arising from difficulties of language should be resolved in favour of the claimant".

"Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interest of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant."

92. It would be important to note that the

purposive interpretation of law becomes particularly relevant when the legislation, which requires interpretation, is a socially or economically beneficial legislation. Here in the case at hand, it is clear that behind the very concept of FEBS lies the concern of the legislatures for the "local and indigenous

communities". 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.

93. The imposition of FEBS for the local and indigenous communities can also be appreciated by way of an illustration. In Uttarakhand, in fact in the entire Central Himalayan region, there is a "herb" or "biological resource", found in the high mountains, called "Yarsagumba". Its local name is "Keera Jadi", which is said to be an effective remedy for various ailments. It is

also known as the “Himalayan Viagra”.

94. The local and the indigenous communities in Uttarakhand, who reside in the high Himalayas and are mainly tribals, are the traditional “pickers” of this biological resource. Through ages, this knowledge is preserved and passed on to the next generation. The knowledge as to when, and in which season to find the herb, its character, the distinct qualities, the smell, the colour, are all part of this traditional knowledge. This knowledge, may not strictly qualify as an intellectual property right of these communities, but nevertheless is a “property right”, now recognised for the first time by the 2002 Act, as FEBS. Can it be said that the Parliament on the one hand recognised this valuable right of the local communities, but will still fail to protect it from an “Indian entity”. Could this ever be the purpose of the legislature? “Biological resources” are definitely the property of a nation where they are geographically

located, but these are also the property, in a manner of

speaking, of the indigenous and local communities who have conserved it through centuries.

95. In the light of what we have discussed above, we shall now examine and finally determine whether in view of the above provisions of law, the State Biodiversity Board (i.e. SBB) has got power to impose "Fair and Equitable Benefit Sharing (FEBS)" in respect of persons who have got no foreign element attached to them, such as the petitioner, and whether the National Biodiversity Authority (i.e. NBA) has got powers to delegate to SBB power to impose FEBS to persons who are covered by Section 7 of the Act.

96. As the power to impose FEBS has been given to the SBB by the Regulations framed by the NBA i.e. 2014 Regulations, which is presently under challenge, let us refer to the relevant provisions of the Act and the Regulations.

97. The NBA has got powers to frame Regulations under Section 64 of the Act of 2002. Section 64 of the Act of 2002 reads as under:

“**64. Power to make regulations. –** The National Biodiversity Authority shall, with the previous approval of the Central Government by notification in the Official Gazette, are regulations for carrying out the purposes of this Act.”

98. This provision is again to be read along with sub-section (1) of Section 18, which is reproduced below:

“**18. Functions and powers of National Biodiversity Authority. –** (1) It shall be the duty of 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.”

99. Under sub-section (2) of Section 21, the benefit sharing can be given effect to in all or any of the manner provided therein, such as, grant of joint ownership of intellectual property rights, “transfer of technology”, etc.

where “payment of monetary compensation and other non-monetary benefits of the benefit claimers as the National Biodiversity Authority may deem fit” is one of the manners in which benefit sharing can be determined. Further for this, under sub-section (4), the NBA has power to make regulation. Sub-sections (2) and (4) of Section 21 reads as under:

“**21. Determination of equitable benefit sharing by National Biodiversity Authority. –**

(1) .... (2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:—

(a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers; (b) transfer of technology; (c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers; (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio- utilisation;

(e) setting up of venture capital fund for aiding the cause of benefit claimers; (f) payment of monetary compensation and other non-monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit.

(3).... (4) For the purposes of this section, the National

Biodiversity Authority shall, in consultation with the Central Government, by regulations, frame guidelines."

100. Primarily what has been challenged is Regulation 2, 3 & 4 of the 2014 Regulations, which read as under:

"**2.Procedure for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization. –** (1) Any person who intends to have access to biological resources including access to biological resources harvested by Joint Forest Management Committee (JFMC)/Forest dweller/ Tribal cultivator/ Gram Sabha, shall apply to the NBA in Form-I of the Biological Diversity Rules, 2004 or to the State Biodiversity Board (SBB), in such form as may be prescribed by the SBB, as the case may be, along with Form 'A' annexed to these regulations.

(2) The NBA or the SBB, as the case may be, shall, on being satisfied with the application under sub-regulation (1), enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization referred to in that sub-regulation

3. Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio- utilization for commercial utilization.— (1) Where the applicant/ trader/ manufacturer has not entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly

from these persons, the benefit sharing obligations on the trader shall be in the range of 1.0 to 3.0% of the purchase price of the biological resources and the benefit sharing obligations on the manufacturer shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources:

Provided that where the trader sells the biological resource purchased by him to another trader or manufacturer, the benefit sharing obligation on the buyer, if he is a trader, shall range between 1.0 to 3.0% of the purchase price and between 3.0 to 5.0%, if he is a manufacturer: Provided further that where a buyer submits proof of benefit sharing by the immediate seller in the supply chain, the benefit sharing obligation on the buyer shall be applicable only on that portion of the purchase price for which the benefit has not been shared in the supply chain.

(2) Where the applicant/ trader/ manufacturer has entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the applicant shall be not less than 3.0% of the purchase price of the biological resources in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer:

(3) In cases of biological resources having high economic value such as sandalwood, red sanders, etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB, as the case may be, and the successful bidder or the purchaser shall pay the amount to the designated fund, before accessing the biological resource."

4. Option of benefit sharing on sale price of the biological resources accessed for commercial utilization under regulation 2.— When the biological resources are accessed for commercial utilization or the bio- survey and bio-utilization leads to

commercial utilization, the applicant shall have the option to pay the benefit sharing ranging from 0.1 to