



GEOGRAPHICAL INDICATIONS: AMBIGUITY IN LEGAL PROVISIONS IN INDIA

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Abstract

Geographical indications is an intellectual property which is unique in nature, as it is not a private right, like patent, trademark, copyright or design right, but a community right; it is owned collectively by all the producers. The fundamental concept behind geographical indications is that the product quality which is coming from the specific geographical location, either due to the geographical factors like soil quality, temperature, humidity etc, or due to the traditional or cultural factors, cannot be replicated anywhere else. The Geographical Indications of Goods (Registration and Protection) Act, 1999 (hereinafter, GI Act 1999) has been passed by the Government of India. Indian legal regime for geographical indications is unique in nature as it includes different categories of goods into its purview, like natural goods, agricultural products, food stuffs, manufactured goods and the handicrafts. The applicants are either government institutions or association of producers, but these are clearly suggesting that if the association of producers become applicant of the geographical indications and involved actively in the supply chain management, the utilization of geographical indications can be maximized. It may be inferred that when the producers themselves are involved as applicant into the process of registration of geographical indications, they can create the better value chain and can maintain it in post-registration phase, hence they gain maximum economic benefit from the commercial utilization of their goods. There are other ambiguities in the GI Act. The use of different terms like ‘producer’, ‘registered proprietor’, ‘authorised user’, etc are used randomly in the Act, rule and the Manual of geographical indications in India and also their inclusion in Part A and Part B of the Register; which is the source of huge confusion. This paper will discuss the key aspects of these source of ambiguity, will look into the applicants in the GI applications and their list of authorised users, analysing the applications to look into the root cause of the confusion, and will try to come up with suggestions and recommendations as possible solution which can be forwarded to the appropriate authority for implementation.

I. INTRODUCTION

Geographical indications is an intellectual property which is unique in nature, as it is not a private right, like patent, trademark, copyright or design right, but a community right; it is owned collectively by all the producers. Like trademark it used to provide protection to the products and its reputation; but unlike trademark, geographical indications identifies a product originating from a particular region, and the characteristics and particular quality of the product is attributable to that geographical location. The fundamental concept behind geographical indications is that the product quality which is coming from the specific

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geographical location, either due to the geographical factors like soil quality, temperature, humidity etc, or due to the traditional or cultural factors, cannot be replicated anywhere else. That makes the quality and characteristics of the specific product unique, and that is protected under geographical indications. Provisions of geographical indications under different international agreements, provisions of European Union and Indian statute will be considered and the ambiguities in Indian legal regime will be discussed, with specific suggestions and recommendations to resolve those ambiguities.

Protection of Geographical Indications in International Agreements

The TRIPS Agreement sets out the standard of protection for all intellectual property rights. But prior to the TRIPS Agreement some international agreements had provisions related somehow to geographical indications. The Paris Convention, 1883 was the first international agreement to mention specific provisions for geographical indications, it included the geographical indications as a subject of industrial property; but instead of using the term 'geographical indications' it used the term 'appellations of origin' which was one of the categories of indication of source of the goods. The Madrid Agreement, 1891 under the Paris Convention was the first international agreement which provided the specific provisions for false and deceptive indications of source. The Lisbon Agreement, 1958 was dedicated for the protection of appellations of origins. The TRIPS Agreement, 1995 sets out the minimum standard of protection for geographical indications; and for the first time the quality, reputation and other characteristics of the goods were connected with the geographical location.

II. PROTECTION OF GEOGRAPHICAL INDICATIONS IN INDIA

The Geographical Indications of Goods (Registration and Protection) Act, 1999 has been passed by the Government of India. The said Act was passed with the object of providing protection, as a Geographical Indication, to any agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry including food stuff. Indian legal regime for geographical indications is unique in nature as it includes different categories of goods into its purview, like agricultural products, food stuffs and the handicrafts. Protection of traditional cultural expression is not yet available in India, hence the traditional cultural goods and handicrafts (including textiles, paintings, artefacts, jewellery etc) have got a platform of protection in this way. Geographical indications, being a community right, seem to be very effective in providing economic benefit for the group of producers and the upliftment of brand value of the products. But if the success stories of geographical indications are analyzed, two different sets of pictures will be found, which are poles apart. The success stories of Darjeeling tea, *Makrana* marble, *Kesar* mango or Nasik grapes and Nasik valley wine show the expected increment in export and profit, and establishment of brand value after protection of geographical indications; on the other hand stories of textile products like *Bagru* print, *Sanganeri* print, or *Kota Doria* are much meagre and hopeless than the other stories. One significant difference in these cases is very specific, i.e. the applicant for geographical indications in Darjeeling tea, *Makrana* marble, *Kesar*

mango or Nasik grapes and Nasik valley wine are group of producers themselves; but the applicant of geographical indications of certain products is the government departments, as in these cases there is no association of producers and the producers are not equipped enough to get into the legal process of registration of geographical indications. According to the statutory provisions, “any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply”¹ for geographical indications. Indian farmers, artisans, and other producers are not always well versed with the legal provisions and complex application procedures, so the provision is kept in the statute that “any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods” can apply on behalf of the producers. In reality there exist three categories of people who is found to be involved as the applicant, namely the actual producers of good (as in case of *Thewa Art* and *Kesar mango*), the Association connected with producers (like Tea Board, or *Makrana marble*) and non-connected entities like governmental departments. These examples are clearly suggesting that if the association of producers become applicant of the geographical indications and involved actively in the supply chain management, the utilization of geographical indications can be maximized. It may be inferred that when the producers themselves are involved as applicant into the process of registration of geographical indications, they can create the better value chain and can maintain it in post-registration phase, hence they gain maximum economic benefit from the commercial utilization of their goods. But when any governmental department come up as an applicant for geographical indications, the actual producers remain uninvolved with the process and in such cases those producers fail to establish proper value chain in post-registration phase and cannot gain proper economic benefit out of it. So, it is better for the government not to get involved in the process as applicant to help the producers; the case study of *Bagru print*, *Sanganeri print*, or *Kota Doria* is suggestive of the fact that in such cases the producers get disconnected and finally the utilization of the intellectual property right does not provide them enough economic incentive.

Here ‘producer of the goods’ term is used to comprehend the group of people or the community who are producing the goods in concern, but there is a gross confusion in the terminology used in the statute of geographical indications in India, and the demarcation of Part A and Part B of register for geographical indications. Different terms like ‘producer’, ‘registered proprietor’, ‘authorised user’, etc are used randomly in the Act, Rule and the Manual of geographical indications in India; which is the source of huge confusion. According to section 2 of The Geographical Indications of Goods (Registration and Protection) Act, 1999, following are the definitions of each term:

“Producer” in relation to goods, means any person who if such goods are agricultural goods, produces the goods and includes the person who processes or packages such goods; if such goods are natural goods, exploits the goods; if such goods are handicraft or industrial

¹ The Geographical Indications of Goods (Registration and Protection) Act, 1999, s. 11(1).

goods, makes or manufactures the goods, and includes any person who trades or deals in such production, exploitation, making or manufacturing, as the case may be, of the goods;

“Registered proprietor”, in relation to a geographical indication, means any association of persons or of producers or any organisation for the time being entered in the register as proprietor of the geographical indication; and

“Authorised user” means the authorised user of a geographical indication registered under section 17. According to section 17 “any person claiming to be the producer of the goods in respect of which a geographical indication has been registered under section 16 may apply in writing to the Registrar in the prescribed manner for registering him as an authorised user of such geographical indication.”²

Registration of geographical indications is for 10 years.³ During the end of that 10 years time period, the Registrar shall send a notice to the ‘registered proprietor’ or the ‘authorised user’, as the case may be, regarding the date of expiration and renewal of registration.⁴ In the similar way, the terms ‘registered proprietor’ and ‘authorised user’ are used together in various other sections of the statute, like in section 21 (rights conferred by registration) and section 22 (infringement). In the GI Rule, in several places the terms ‘applicant for registration of a geographical indications’ or ‘an authorised user’ are mentioned in different perspectives, such as in rule 15 for particulars of address of applicants and other persons, rule 16 for statement of principal place of business in India, rule 17 for address for service, rule 18 for address for service in application and opposition proceedings, rule 25 for statement of user in application and rule 29 for transliteration and translation. In other places ‘registered proprietor’ is used in rule 53 where registration is discussed. According to the definition, the ‘registered proprietor’ is the producer or association of producers who used to produce (in case of agricultural goods like Darjeeling tea and *Kesar* mango) or make/manufacture (in case of handicrafts or industrial goods like *Thewa* art, *Bagru* print and *Kathputli*) or exploits (in case or natural goods like *Makrana* marble) the goods. ‘Registered proprietor’ may be involved in the process of registration of geographical indications as the applicant or someone else can be the applicant on their behalf. On the other hand, ‘authorised user’ by the literal meaning should be the ‘users’ of registered geographical indications with permission from the ‘registered proprietor’ or the ‘right holders’. Part A of the register of geographical indications contains particulars of the registered geographical indications and Part B of the register contains the particulars of the registration of authorised users.⁵ According to literal understanding the ‘registered proprietors’ or ‘producers’ will produce or manufacture or exploits the goods in the respective geographical location, they may do the packaging on their own, they may also do the marketing by themselves (like Tea board); in such instances the retailers of packaged goods including end users should be the ‘authorised users’ and should be incorporated in Part B of the register. There may be situations where ‘registered proprietors’ or ‘producers’ will produce or manufacture or exploits the goods in the respective geographical location, but they may not be doing the packaging and marketing

² *Id.*, s.17(1).

³ *Id.*, s. 18(1).

⁴ *Id.*, s.18(4).

⁵ *Id.*, s. 7.

and may have given the packaging and marketing responsibility to some third party, in such cases any other entity doing the packaging and marketing and the retailers of packaged goods including end users should be the 'authorised users' and should be incorporated in Part B of the register. In both instances, however, there is clear cut demarcation between 'registered proprietors' or 'producers' and the 'authorised users'. In practicality, the 'producers' of the registered geographical indications are all listed in Part B of the register as the 'authorised users' and the certificate provided to them as 'authorised users' after the registration. This is evidently seen in the geographical indications workshop in National Law University, Jodhpur, Rajasthan where all Rajasthan state GI holders had come with their certificates; it was jointly organized by IPR Chair National Law University and Department of Science and Technology, Government of Rajasthan. This certificates and the Part B register is ambiguous and creating a lot of confusion. Moreover, the GI holders require huge capacity building regarding their legal rights and the advantages of registration of geographical indications, otherwise they are disconnected and not able to utilize their rights to gain economic incentive.

III. SUGGESTIONS AND RECOMMENDATIONS: THE WAY FORWARD

- i. Government departments should not come forward as an applicant to help the producers of the geographical indications, instead the relevant departments should take initiative to do the capacity building in such a way that the producers or their association can be well versed with the legal formalities and procedure of application and registration of geographical indications. In that way they will be involved in the whole process, they can find their way out to establish the value chain, and hence can utilize their legal rights to maximize the economic benefit in post-registration period.
- ii. Ambiguity in the Part A and Part B of the register should be rectified with an immediate effect. Part A of the register should include the 'registered proprietors' or 'producers' who are the right holders of geographical indications. Part B of register on the other hand should include the 'authorised users' who after getting permission will be involved in the packaging and/or trading and marketing, including the end users (e.g. small retailers). Producers should do the production on their own, also preferably the packaging to maintain the characteristics and the specified quality of the product; if production also handed over to the third party, then chances of dilution of quality will be there, and products will lose their authenticity and credibility. Empirical study done with GI holders in Bihar, Maharashtra, and Rajasthan and it was found that the holders in all places feel threatened by the producers outside the community and worried about the diluted quality of products produced by such producers. Quality assurance will be much more for the GI protected products by limiting the production of goods by the original GI holders. Statutorily, the 'registered proprietors' or 'producers' and the 'authorised users' have co-equal rights in terms of obtaining the

relief in respect of infringement of the geographical indications⁶ and that will be helpful in gaining maximum commercial benefit.

- iii. Packaging of the goods under registered geographical indications are very important and should be done under strict supervision with all relevant information regarding the mention of authenticity of the product. All 'authorised users' should carefully carry out the business with properly packaged goods and should showcase the registration certificate of the relevant goods under registered geographical indications. Packaging should be ideally done by the 'registered proprietors' or 'producers' themselves, or it should be done under strict rules and guidance, if it is done by any third party. European Union established use of mandatory logos for 'Protected designation of Origin' (PDO) and for 'Protected Geographical Indications' (PGI) for agricultural products and the foodstuffs.⁷ Similar kind of concept can be introduced for the Indian registered geographical indications, which will be mandatorily appeared in the packaging, and which will help in differentiating the registered geographical indications from the fake/counterfeit products. With this system, not only producers and authorised users will be benefitted, but also the customers will be able to get the authenticated registered geographical indications products.
- iv. Quality management process is another check point which is done very carefully by European Union for their registered geographical indications. In European Union, joint management system is made by private and public stakeholders to ensure the quality of the concerned products. The association of producers are primarily responsible for defining the content of the goods under registered geographical indications; control bodies (may be private or public) are responsible for quality check and verification of the compliance; finally competent authorities from public sector of the member state are responsible for the official control of the reputation and authenticity of the goods under registered geographical indications.⁸ Random quality check is done for maintenance of the quality of the products under registered geographical indications. Similar mechanism can be started by the state governments in India, for which again the capacity building at all level is essentially required, right from the grass root level.
- v. It is difficult to find out all the producers of certain goods undergoing registered geographical indications, more so in cases of goods of handicrafts and artefacts of traditional cultural expression. In those circumstances identifiable producers need to be given quite some time to identify all the other producers. When all the producers are identified, who are pioneers in their field, should be involved into making the association of producers. As is already mentioned, all of the members of such

⁶ *Id.*, s. 21.

⁷ The rules regarding the PDO and PGI logos were defined in Commission Regulation (EC) n°2037/93 which has been replaced by Commission Regulation (EC) 1898/2006 (art.14 and annex V). This Regulation was modified by Commission Regulation (EC) N°628/2008 which introduced a different colour code in order to make easier for consumers to distinguish between the two concepts, Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI).

⁸ Thual D. & Lossy F., Q&A Manual, European Legislation on Geographical Indications, 2011, *available at*: www.ipr2.org (last visited on December 10, 2019).

vi. association should be included in Part A of the register as the right holders. Then Part B of the register, as also mentioned earlier, contains the list of authorised users, who are involved into the packaging and/or marketing, in both domestic as well in international market. GI being a community right hence non-transferrable, so the ‘authorised users’ cannot be given license or assignment from the holders; in that case if they are engaged into packaging and/or marketing the issue of profit sharing is uncertain. No statutory guidance is given in the Act, or in the Rule or in Manual of GI, but for all practical purposes the specific legal provision of benefit sharing is urgently required in such cases. Percentage of benefit sharing may vary in case-by-case basis, but some guidance is required in the Rule or in the Manual which can be followed during such commercial exploitation of GI protected goods. Not only that, IP valuation of GI products also to be done, before fixing the benefit sharing in each case. Traditional cost method or market method of valuation may not be useful for valuation of goods under GI, which is an unconventional IP; a more complex method like intrinsic value method may be helpful for GI valuation. Economic certainty for the producers can be ascertained by this way for the GI holders, and the actual holders, who has nurtured the process may be for hundred years, will be benefitted maximally.

India is a huge multi-cultural country with more than 300 registered geographical indications, and with many more goods with the potential for getting registered geographical indications. The advantages of registered geographical indications are many fold, if the aggressive marketing can be done like trademark protected products, the economic benefit for the registered geographical indications holders will be immense. The involvement of associations of producers with proper capacity building will ensure the proper establishment of value chain system. Involvement of relevant government departments is essential for necessary amendments in the legal regime as well as formation of quality control bodies for ensuring the characteristics and authenticity of the goods under registered geographical indications. Promotion and awareness of registered geographical indications is very much needed, along with that provision of all the above mentioned factors like demarcation of Part A and Part B of register, management of systematic value chain, establishment of quality control mechanism, IP evaluation of goods under registered geographical indications, and benefit sharing mechanism, together will create the holistic development of registered geographical indications.