



Basmati Rice – The On-Going Domestic Challenge

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Basmati rice holds significance, not only in the daily lives of the Indians but world-wide as well. All over the world, Basmati rice is consumed, which makes it more important to protect the origin and quality of this agricultural product. After APEDA filed an application for acquisition of a GI tag for Basmati in India, the stakeholders in the State of Madhya Pradesh were left out. This turned into an ongoing tussle between the Madhya Pradesh and APEDA for GI tag for Basmati. This article covers and examines the arguments forwarded for non-inclusion of Madhya Pradesh districts in the GI application for Basmati and criticizes the misunderstanding behind the motive of procuring this tag.

Keywords: Geographical Indication, Basmati, TRIPS, Geographical Indication of Goods (Registration and Protection) Act, 1999, Reputation, Origin, Trademark System, *Sui Generis* System

India is a land of varied food culture. Food is part of the local tradition and heritage. Basmati rice, a long-grain aromatic variety of rice, is an example of the common heritage of India and Pakistan. The recorded history of this world-famous rice variety can be traced back to the love ballad, 'Heer-Ranjha', written by Waris Shah in 1766.¹ In its chapter 16, the preparation for Heer's lavish marriage feast included variety of rice preparations like basmati rice. Basmati word has its roots in Sanskrit words 'Vas' meaning 'aroma' and 'Marl' meaning 'ingrained from the origin'. In Hindi, *Vas* became *Bas* and *marl* became *mati*. So, Basmati literally means rice having an aroma.²

Geographical Indication (GI) is one of the ways to protect traditional products from usurpation. GI is accorded to traditional goods like Basmati rice, champagne or scotch whisky where the given 'quality, reputation or other characteristics' are due to its geographical origin.³ Due to its unique quality, Basmati - a registered Indian GI - enjoys unparalleled reputation globally and carries a premium price tag. Today, this aromatic rice variety is traditionally cultivated on parts of Indo-Gangetic plains that covers 7 Northern states in India and the Punjab province of Pakistan. This paper tries to examine the ongoing dispute raised by the state of Madhya Pradesh for being unfairly excluded from the traditional Basmati growing regions of India. This article explores the

issue at length and tries to propose a solution to the problem.

Geographical Indications - Overview

Since times unknown different geographical regions across the world have enjoyed fame for their products. Arab horses, Greek swords or Indian spices are just some of the products which have enjoyed a distinct reputation for centuries due to their geographical origin. As a result of their reputation and distinctive quality, GI goods command a premium price in the market over similar products.

As per the seminal World Trade Organisation (hereinafter "WTO") report, Jamaican Blue Mountain Coffee received a premium of 14.5 dollars per kilo in the consumer market compared to benchmark prices of Columbian milds and French cheese receives a similar premium over non-French GI cheese.⁴ The same report also states that 40% of the consumers are willing to pay a premium of 10% for GI products over other similar products in the market.

Globalization and liberalization have increased opportunities manifold by opening international markets for GI producers and maintains the relevance of producers from an undeveloped and remote geographical location in the consumer market.⁵ In today's world GI is increasingly becoming a form of intellectual property that is commercially indispensable. Importance of GI can be understood from the perspective of both producers and consumers. For producers, it is a mechanism of

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branding their products. GI adds economic value to the quality and reputation of product in the market for producers. On the other hand, for consumers, GIs, like Trademarks, are a strong conveyor of information about product quality and its origin. GI reinforces the trust among consumers that the product comes from the specific area of origin. This helps in improving informational efficiency in otherwise cluttered supermarkets.⁶ In addition, GI also serves the purpose of preserving the local history, traditions and culture. There are also many *fringe benefits* of a GI like rural development, promotion of tourism and preservation of the local biodiversity in the area of origin.⁷

GI is based on the rationale that origin can add value to a product and make it a self-sufficient brand. At the focus of GI is the protection of the associated intangibles – individual or collective reputation.⁸ The practice of protecting traditional products and rural livelihood itself is inward looking and is an example of Gandhian ideal of rural self-sufficiency. However, globalization has helped opening up new markets for such products. Though globalization comes with some unique costs. Most importantly, protection of GIs in foreign markets has emerged as a significant concern for underprivileged producers of developing countries like weavers of *banarasi sari* in India.

***Sui Generis* and Trademark System of GI Protection**

Geographical Indication is an industrial and commercial property. As such it deserves protection through law. One of the most common issue in GI commercialization is the free-riding problem. This problem is resolved through various strategies which have evolved with time. A prominent way is by countries entering into an understanding through multilateral or bi-lateral agreements for mutual protection of GI. TRIPS, a multilateral agreement enforced from 1 January 1995 as part of the Agreement establishing WTO, is a significant milestone in GI protection with 164 countries as its members.⁹ TRIPS is flexible in its approach and as per Article 1.1 sets only the minimum standard of protection of GI.¹⁰ Member countries are free to provide more comprehensive protection. As per Article 22 (2) of TRIPS every member country has an obligation to give recognition and legal protection to GIs in their territory.

TRIPS provides for a minimum standard system that results in a diversity of ways in which GI are protected across countries. For instance, GI products are protected under the existing trademark regime in countries like USA, Canada and Australia (also

known as trademark system of GI protection). In contrast, India and European Union provide for a special body of law for protection of GI (also known as *sui generis* system of GI protection).

Interestingly, these two legal systems are also not homogenous within themselves. For instance, Indian *sui generis* system encourages a greater state involvement in all steps from registration to regulation of GI. This is in stark contrast to French *sui generis* system which encourages participation of the producers at all stages of GI registration. This diversity is an attribute of the difference in understanding the nature of GI and its importance in different contexts.

***Sui Generis* Law on Geographical Indications in India**

Prior to 15 September 2003, there was no specific law for GI protection in India. Misuse of GI was prevented by one of the following three ways:

- (i) Under consumer protection law
- (ii) Through passing off action in court
- (iii) Through certification trademark.¹¹

Before the enforcement of present 'Geographical Indication of Goods (Registration and Protection) Act, 1999' (hereinafter "GI Act"), GIs were commonly protected as certification marks in India under the Trade and Merchandise Marks Act, 1958. This was sufficient to meet the minimum standard requirement of TRIPS. Therefore, it is a myth that India enacted its *sui generis* law on GI to comply with TRIPS obligations. Instead, two significant events in 1990s pushed Indian into enacting a *sui generis* law for GI in 1999. Opening of the Indian market in 1990s meant the domestic products and rich traditional knowledge of India had to be protected. *Secondly*, a number of bio-piracy cases happened in the 1990s. In 1997 an American agri-based company, RiceTec, was awarded the patent to a new variety of Basmati rice by the US patent office. For better protection of similar products, India enacted the GI Act and the 'Geographical Indication of Goods (Registration and Protection) Rules, 2002' (hereinafter "GI Rules"). India used the flexibility provided by TRIPS to enact a law based on domestic requirements. GI Act and GI Rules were subsequently enforced from September 15, 2003.

GI Act defines geographical indication and establishes its relationship with a deceptively similar trademark, allows for registration of *only goods* as a GI, provides for a GI Registry in India and finally provides for both civil and criminal remedies against cases of infringement.¹² Registration of GI is renewable every

10 years and, interestingly, is optional under the law. As per Section 23, a GI registration is only a *prima facie* evidence i.e. validity of a GI registration can be challenged in the court of law. The objective is to protect the gullible, poor and often illiterate producers of GI products from the unscrupulous traders and intermediaries.

Darjeeling Tea was the first GI to be registered in India in 2004-05. As per the Geographical Indications Registry of India as of May 2020, 370 GIs have been successfully registered under the GI Act. However, GI Act is one of the least contested laws in India. In almost 17 years since its enforcement only 6 cases have been heard by different High Courts or the Supreme Court (as of October 2020).¹³

GI Protection in India

MP-Basmati Case

Since 2010, the State of Madhya Pradesh has been fighting for inclusion of its 13 districts as Basmati growing regions of India.¹⁴ Madhya Pradesh has raised two distinct issues. *Firstly*, the delimited area, comprising 7 states, is vague, broad, and unscientific. The second issue pertains to the non-inclusion of 13 districts of MP as traditionally Basmati rice cultivating area.

In October 2008, Section 10A was added to the APEDA Act, 1985 through an Ordinance.¹⁵ Under Section 10A, APEDA, a central government agency, was authorized to register and protect special products including Basmati rice. Subsequently, the APEDA filed the application for GI registration of Basmati rice in November 2008. After initial scrutiny, on 31 May 2010, the GI Registry of India published the APEDA application in its GI Journal Number 34. APEDA's application mentioned 5 states in entirety (Delhi, Haryana, Punjab, Himachal Pradesh, Uttarakhand) and parts of 2 states (Jammu Kashmir and Uttar Pradesh) as 'traditional Basmati cultivating areas'. The State of Madhya Pradesh filed opposition under Section 14 of the Act disputing its exclusion by the APEDA. The Assistant Registrar found substance in the opposition. On 31 December 2013, Assistant Registrar held that the "*Applicant has therefore failed to satisfy the fundamental requirement of clear, specific and reasoned demarcation of Basmati-cultivation areas*" and, therefore, directed the APEDA to refile the application within 60 days after clearly identifying the traditional Basmati growing region including the 13 districts in MP.¹⁴

The APEDA challenged the order before the Intellectual Property Appellate Board (IPAB). On 5 February 2016, the IPAB directed the Assistant Registrar to proceed with registration and issue the GI certificate to APEDA within four weeks for the areas demarcated in the original APEDA application. IPAB gave further direction to the Assistant Registrar to consider afresh the issue of inclusion of areas of MP. As a result of the IPAB order, GI registration certificate was issued on 15 February 2016 in respect of the 7 states identified in the original application. APEDA became the registered proprietor of Basmati rice in India.

Subsequently, the Assistant Registrar rejected the contention of MP state on 15 March 2018 for inclusion of its 13 districts as traditional Basmati growing regions of India.¹⁶ In the order, Assistant Registrar acknowledged the special characteristics of MP rice, but it was held to be insufficient in this case. It was pointed out that MP has failed to adduce any evidence that MP rice from the 13 districts enjoys the same public recognition or reputation as Basmati rice.¹⁷ Reputation was identified as a fundamental principle for GI recognition and thus became the ground for rejection. Reputation is an essential ingredient of a GI under Section 2(1)(e).

Appeals in the form of writ petitions were preferred before the Madras High Court against the orders of the Assistant Registrar and the IPAB passed on 15 March 2018 and 5 February 2016, respectively. By judgment dated 27 February 2020 the High Court dismissed the writ petitions challenging the IPAB order by asking parties to raise all the issues in the writ petition against the order of the Assistant Registrar. On 2 September 2021, in appeal, Supreme Court¹⁸ set aside the High Court judgment holding that the issues were wrongly clubbed under a single writ petition, since distinct issues had to be adjudicated upon in the writ petitions.

In 2021, the Supreme Court¹⁸ directed the Madras High Court to reconsider the plea by the state of MP of over-inclusion by APEDA. This suggests that the legal battle is far from over. IPAB held that since the Registrar completely failed to consider the evidence by the APEDA therefore it ordered to have fresh proceedings to hear the issue whether Madhya Pradesh should be included in the GI tag for Basmati rice. It further held that APEDA was eligible to be provided Basmati as a GI for the areas it had demarcated in the abovementioned application.

The Unsettled Issues in the Case:

After the Supreme Court's decision, now, there are two main issues to be decided in this case. Firstly, APEDA needs to provide a legal basis for delimiting 7 northern states as traditional Basmati growing regions of India. Secondly, APEDA needs show why MP state has been excluded from the traditional Basmati growing region.

Reputation

Most GIs are *place names* like Darjeeling tea, Champagne or Tequila as they indicate a direct link between the product and the area of its production. They are known as direct GIs. Indirect GIs are those products which do not contain the geographical name of its area of origin or production e.g. Basmati is an indirect GI.¹⁹ In India, indirect GIs are recognised under the proviso of Section 2(1)(e). As per the proviso to this Section, delimitation of the geographical area is bound to be critical in case of an indirect GI. For exact delimitation of the territory we need to take guidance from the definition itself. As per the definition in Section 2(1)(e), a good can be granted GI tag only if a qualitative link can be established between the product and its geographical origin. The link can be in the form of –

- (i) Quality; or
- (ii) Reputation; or
- (iii) other characteristic of such goods, which is essentially attributable to its geographical origin.

It is noteworthy that each of the abovementioned attributes are independently sufficient to get the GI tag.

In the present case, the APEDA claimed that Basmati is traditionally grown only in a specific region of Indo-Gangetic Plains on the Foothills of Himalaya.²⁰ The specific region covers only the 7 Northern Indian states namely Punjab, Haryana, Himachal Pradesh, Delhi, Uttarakhand and parts of Uttar Pradesh and Jammu Kashmir. In support, the APEDA furnished various literary, scientific and trade related evidences during the proceedings. Citing reputation as a standalone criteria, APEDA has defended inclusion of only 7 Northern states as the traditional Basmati growing regions.

An important advantage of GI is in facilitating flow of product information to the consumers. This results in reducing the consumer confusion and increases overall efficiency in the consumer market.⁸ Therefore, role of a consumer and his perception of GI product is of great value in understanding the need for having a legal regime for protection of GI.

Defining Reputation

Reputation of a product depends on the image a consumers forms in his mind. This image depends primarily on the quality of the product and its characteristics.²¹ It is surprising that none of the documents submitted by the APEDA throw light on the consumers' perception about Basmati rice. The APEDA has glaringly ignored this fact. In the landmark Feta cheese case, the European Court of Justice relied on direct consumer survey and product packaging to understand whether consumers perceive Feta cheese as a cheese variety from Greece.²²

Most of the evidence adduced by the APEDA are inconclusive, irrelevant and fail to show any direct reputational link between Basmati and the 7 states. For example, the Gazetteer of Kashmir and Ladak (1890) or the dictionary meaning of Basmati are too remote and far-fetched in establishing the reputation. For reference, the relevant portion from the Gazetteer (1890) is reproduced below:

“Rice is of many varieties, but the main division is into white and red. The latter is the food of the poor. Of the former, two or three kinds specially esteemed, but the best and dearest is the basmati.”

Of all the exhibits, only the rice packaging used by various basmati rice traders can be said to have any relevance. However, that too seems quite inadequate, remote and indirect as the packages do not refer to the same specific geographical region in India. Secondly, none of the packages mention any of the 7 northern states or have any indication that the traditional Basmati growing region is only a 'specific region of Indo-Gangetic Plains on the Foothills of Himalaya'. For reference, geographical description from two rice packages is reproduced below:

(i) *St. Michael Basmati Rice – “Basmati rice come from the foothills of Himalayas.”*

(ii) *Maharani Basmati Rice – “This ‘Maharani’ or Queen of all rice is produced only in the foothills of Himalayas and Great Plains irrigated by perennial rivers fed with Pristine Himalayan water.”*

It requires no knowledge that 'foothills of Himalaya' extends to the eastern state of West Bengal and includes Bihar.²³ Moreover it clearly excludes states like Delhi, Haryana and Punjab as they fall outside the Himalayan region. Lastly, 'Himalayan river' as a geographical reference has its own problems like the drainage basin of river Ganga (a perennial Himalayan river) extends from India to Bangladesh before it discharges into the Bay of

Bengal.²⁴In case of Basmati rice, the distinctive aroma and size of the rice kernel gives it the unique image in consumer's mind. It is APEDA's duty to show that the general public finds a strong link between Basmati rice and the 7 northern states. The same way Darjeeling tea evokes an image of tea estates in Darjeeling, West Bengal. Interestingly, in the recent Basmati case in which APEDA was also a party, the General Court of the European Union held "*The evidence produced during the procedure before EUIPO supports the claims relating to the Indian and Pakistani origins of the word 'basmati' and knowledge of the Indian subcontinent on the part of consumers in the European Union.*"²⁵This may prove to be another bottleneck for the APEDA because among general consumers in Europe Basmati rice evokes an image of India as its origin and not the 7 states claimed by APEDA as the exclusive producers of the rice variety. Thence, the APEDA misunderstands the meaning of reputation while assessing the states inclusion for Basmati.

Agricultural products are primarily fruits of the nature. The geographical origin i.e. topography, soil, climate, altitude etc. are responsible for its unique quality. For instance, reputation of Alphonso Mango or Darjeeling tea depends on their superior quality in comparison to other similar products. Therefore, it would have made more sense for APEDA to have relied on the test of 'quality' instead of 'reputation' for Basmati GI registration. Professor Dev further adds that reputation as a link in GI should only be used for craft products (like Mysore Silk Saree) where human influence is more dominant than nature's influence.²⁶

Section 8(4) – Power to Determine Geographical Origin of Basmati

In the registration form GI-1, applicants are required to conclusively establish the qualitative link between the product and the claimed geographical origin. This is subsequently verified by a Consultative Group formed under Rule 33. Aided by these two steps, the Registrar then takes the decision on the product's geographical origin. Section 8(4) states that the decision of the Registrar shall attain finality in respect of determining the geographical origin. This is probably so because the legislature intended to treat the exercise of identifying the actual geographical origin as a pure question of fact to be settled at the application stage itself. Consequently, no challenge in the form of an appeal can lie against the Registrar's

decision. The only recourse seems to be a review by Registrar of his own decision under Section 60 of the GI Act.

It is an established principle of law that appeal is not a matter of right but a creature of the statute.²⁷ So, right of appeal can only be conferred by express words of the statute.²⁸ Also, IPAB as a quasi-judicial body does not possess any inherent powers like a civil court. So, IPAB could not have travelled beyond the provisions of the statute in this matter.²⁹ Thus, it brings into question the legal validity of all subsequent appeal against the initial order dated 31 December 2013 wherein Registrar had directed APEDA to include the disputed areas of MP state.

Opposition v Rectification

IPAB in its 2016 order directed the Registry to issue GI registration certificate for the region claimed by APEDA while also asking the Assistant Registrar to reconsider the opposition of MP *afresh*. Accordingly, GI certificate was issued to APEDA on 15 February 2016. As per the GI Act, 'opposition proceeding' is pursued under Sections 14 and 12 before the registration certificate is issued (pre-registration procedure). The underlying principle is that registration certificate can be issued only after all opposition's proceedings have been conclusively resolved in favour of the applicant. After registration certificate has been issued only 'rectification proceeding' can be launched under Sections 27 and 29 (post-registration procedure). Both 'opposition proceeding' and 'rectification proceeding' serve different purpose and are therefore vastly different.

In light of the scheme of the Act, the IPAB's order of 2016 created an anomalous situation. As per the GI Act, after registration certificate is issued only 'rectification procedure' is possible. However, IPAB on one hand directed the Registry to issue the registration certificate while on the other hand allowed the 'opposition proceeding' launched by MP to continue even at the 'post-registration stage'.³⁰

It is reiterated, IPAB as a quasi-judicial body does not possess any inherent powers like a civil court. So, IPAB could not have travelled beyond the express provisions of the statute in this matter.³¹ Thus, it brings into question the legal validity of IPAB order.

Conclusion

Article 39 of the Constitution of India provides that the State must have a policy towards restricting

concentration of wealth. Although GI is a commercial and industrial property but this dispute should not be seen as private dispute between two parties alone. It involves interest of millions of farmers and traders. Therefore, the courts should be sensitive to the effect this case will have. GI is a public policy instrument. Madhya Pradesh, being a backward agrarian state, if GI is provided, would benefit and improve the livelihood of farmers.

One of the objectives of the Indian constitution is to create a welfare state.³² A welfare state aims to ensure good standard of life by improving the socio-economic conditions of its citizens.

Basmati rice is being exported to different countries. The export quantity is increasing year on year leaving enough scope for MP farmers to sell Basmati rice. MP should be allowed to partake in the prosperity Basmati export brings. However, MP first needs to show commercial cultivation of Basmati rice in the 13 districts. Until now MP has failed to submit any conclusive proof that Basmati rice grown in MP has been sold in the consumer market before 2008. Without such proof any claim to a GI tag of Basmati will flounder. No doubt, rice from the above MP regions is unique and may apply for a GI tag claiming unique taste, aroma and 'quality'. It can then, on such grounds, be granted a fresh GI tag for the Basmati it grows.

Free-riding and misrepresentation are the two most significant issues in GI commercialization. They need to be dealt with effectively. The APEDA's claim to include the seven states is arbitrary and lacks force of law. The jurisprudence of Geographical Indication Law is largely underdeveloped in India. Few cases have been decided by High court and none by the Supreme Court. This case is an opportunity for the court to clarify some substantial issues in GI Act, 1999.

Before even delving deeper into the question, we should ask if there have been other cases of change in delimited area for a GI product. Point in case is the champagne from France. It is not the first time that geographical area is being disputed or changed. France delimited the champagne region in 1908, frozen by 1927 law, to include 319 communes.³³ Adjoining communes which were excluded launched a high-pitched political battle. Inclusion of area in delimited region has many potential benefits not only the producers become part of the exclusive club which has a monopoly over the product but also some incidental benefits like higher land prices. As per one estimate, land in the champagne region could cost 20 times

more than in the adjoining region.³⁴ Furthermore, due to the increase in global warming, the alarming concern should be and is of the quality of rice, instead of its origin only.

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