

# **A Critical Analysis of the Registration of Geographical Indications vis-à-vis Recipes**

-Ruchika Chouhan\*

## **ABSTRACT**

*The recent registration awarded by the Registrar to the State of West Bengal for the Banglar Rasgulla was considered a reason to rejoice for the State. However, the decision has not only brought to light the battle over the origin of the sweet between Odisha and West Bengal, but has also opened a Pandora's box of anticompetitive behaviour, market structures modelled on fake goods and low supply.*

*This paper looks into how the grant of registration of geographical indication to a recipe such as the one for Banglar Rasgulla is flawed owing to the non-fulfilment of the tests enshrined in the provisions of the sui generis statute, coupled with judicial interpretations. Furthermore, the paper elucidates the possible demerits of awarding such registrations to recipes and the negative consequences unleashed by such a decision.*

*Lastly, the paper presents and discusses possible solutions to this problem by analysing the entities gaining and losing from this decision, the rationale for having a geographical indication, the conditions for awarding such a registration and finally, by examining the rights secured by such a registration, thereby keeping the interests of the market in line with the Utilitarian justification of intellectual property rights. The biggest advantage of adopting the solution discussed in the paper, is the true realization of the maximization of benefits, essentially intended to be achieved by the Legislature, which is otherwise defeated under the current registration scheme of geographical indications.*

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\* Ruchika is a 5<sup>th</sup> year undergraduate law student of the Christ (Deemed to be University), Bengaluru. The author may be contacted at [ruchika.chouhan95@gmail.com](mailto:ruchika.chouhan95@gmail.com).

## INTRODUCTION

The importance of geographical indications (GI) has long been recognized in the international arena of protection and enforcement of intellectual property rights. It is the legal status afforded to a commodity originating in a particular place, possessing unique characteristics owing to factors such as production methods and geographical conditions<sup>1</sup>.

The first form of protection accorded to geographical indications was in 1883 under the Paris Convention for the Protection of Industrial Property, in the form of ‘appellations of origin’<sup>2</sup> and ‘indications of source’<sup>3</sup>. Furthermore, Article 10bis of the Paris Convention provided a basic framework for protection against ‘confusing, false or misleading geographical indications’<sup>4</sup>. Subsequently, protection to geographical indications was awarded by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958 and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1967. Moreover, the importance of geographical indications strengthened owing to the largescale implementation of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) in 1995.

The basic functions of any geographical indication are multifold<sup>5</sup>. *Firstly*, it performs the function of identifying the goods’ origin in some particular territory, region or country, as a ‘source-identifier’<sup>6</sup>. *Secondly*, it indicates to the consumers that the goods originating in an area, possess some unique quality, reputation or any other feature of the good, which is ‘essentially attributable’ to its that geographical place<sup>7</sup>, thereby serving the quality function and communicating to the consumers, ‘guarantees of the quality’ of the product<sup>8</sup>. *Thirdly*, geographical indications provide means for promotion of the goods of the producers belonging to a particular area by creating goodwill in the midst of consumers, which facilitates the

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<sup>1</sup> Dr. Faizanur Rahman, *An Exploration of the Laws and Systems for the Protection of Geographical Indications in USA, China and India: A Comparative Analysis*, 1 Manupatra Intellectual Property Reports 125 (2016).

<sup>2</sup> THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, 1883, Art. 1(2), [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=287556](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=287556).

<sup>3</sup> THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, 1883, Art. 10 and Art. 10<sup>ter</sup>, [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=287556](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=287556).

<sup>4</sup> M.M.S. KARKI, *GEOGRAPHICAL INDICATIONS: SOURCE IDENTIFIERS, INTELLECTUAL PROPERTY RIGHTS BASIC CONCEPTS* 214 (Atlantic Publishers & Distributors (P) Ltd. 2009).

<sup>5</sup> V.K. AHUJA, *INTELLECTUAL PROPERTY RIGHTS IN INDIA*, 789 (1 ed. 2009).

<sup>6</sup> Tara Capsuto, *Criteria for US Geographic Indications*, Berkley Law, (May 6, 2012), at 2, [https://www.origin-gi.com/images/stories/PDFs/English/papers/Tara\\_Capsuto\\_OriGin\\_paper\\_May\\_2012.pdf](https://www.origin-gi.com/images/stories/PDFs/English/papers/Tara_Capsuto_OriGin_paper_May_2012.pdf); KARKI, *supra* note 3, at 210.

<sup>7</sup> TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS AGREEMENT 1995, art. 22.1.

<sup>8</sup> KARKI, *supra* note 3, at 210; Capsuto, *supra* note 5.

distribution and sale of the goods<sup>9</sup>. *Fourthly*, a geographical indication caters to ‘valuable business interests’<sup>10</sup>. *Lastly*, a geographical indication helps in protecting the traditional knowledge of indigenous communities or the ‘common heritage of such communities’<sup>11</sup>, who are the original producers of the subject matter of the GI tag<sup>12</sup>, in the form of ‘small businesses’, ‘old techniques’ or ‘rural regions’<sup>13</sup>.

The object of awarding GI to products has been viewed as an important mechanism to safeguard the reputation the product has acquired, owing to its special characteristics or quality or reputation, particularly stemming from its geographical origin, which may be easily targeted by free riders. This problem of free riding has been realized as harmful to the consumers as well as the suppliers of the products. Therefore, the ultimate goal of having a GI tag assigned to a particular product is to curtail the existence of unfair competition, detrimental to the interests of both, the consumers and the producers<sup>14</sup>.

In the global context, GI has been granted to varying range of goods. Darjeeling Tea, Basmati rice, Alphonso mangoes, Malabar pepper, Champagne, Swiss watches, Chulucanas, Comte Cheese, Roquefort, Banarsi sarees, Thai Silk, Kanchipuram silk sarees, Kolhapuri chappals are some of the popular examples of geographical indications<sup>15</sup>. An in-depth analysis of the different kinds of goods to which geographical indications have been awarded show that these products don’t just constitute agricultural products<sup>16</sup>. The scope of the sui generis legislation in India provides protection to other form of additional products under its ambit, such as manufactured goods and natural goods<sup>17</sup>.

This widened form of protection has recently been awarded to the *Banglar Rasgulla*, by the Registrar, Geographical Indications, Chennai, in Class 30, thereby according the status of

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<sup>9</sup> KARKI, *supra* note 3, at 206.

<sup>10</sup>*Id.* at 210.

<sup>11</sup> DR. B.L. WADHERA, LAW RELATING TO INTELLECTUAL PROPERTY 459 (5 ed Universal Law Publishing Co. 2011).

<sup>12</sup> CHAKRAVARTY’S INTELLECTUAL PROPERTY LAW 864 (Ashoka Law House 2010).

<sup>13</sup> Marsha A. Echols, *Geographical Indications for Foods, Trips and the Doha Development Agenda* 47 *Journal of African Law* 199 (2003); M. Lewanika, *Traditional Knowledge: Recognition and Protection*, A paper presented in Nairobi, Kenya, 30-31 July, 2001, available at <http://www.mindfully.org/GE/African-Traditional-Knowledge30jul01.htm>.

<sup>14</sup> C. NIRANJAN RAO, *Geographical Indications in Indian Context: A Case Study of Darjeeling Tea* 40 *Economic and Political Weekly* 4545 (2005).

<sup>15</sup> World Intellectual Property Organization, *Geographical Indications: An Introduction*, at [http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo\\_pub\\_952.pdf](http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf); N.R. SUBBARAM, *DEMYSTIFYING INTELLECTUAL PROPERTY RIGHTS* 943 (1 ed. LexisNexis Butterworth Wadhwa Nagpur Publications 2009); KARKI, *supra* note 3 at 207.

<sup>16</sup> AHUJA, *supra* note 4 at 787; CHAKRAVARTY, *supra* note 12 at 864.

<sup>17</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 2(1)(e).

geographical indication to the popular Indian delicacy and recognizing the place of origin to be West Bengal, excluding the district of Darjeeling<sup>18</sup>. This form of protection awarded to a recipe though seems favourable to the producers at the outset, subsequently gives rise to numerous problems and complications, which this paper aims to highlight.

The aim of the paper, on the basis of the above discussion, is to propose a mechanism of safeguarding the interests of all the entities, especially the State, without disrupting the existing market structure, which otherwise shall exist in the current scenario.

The remainder of this paper is organized as follows. Part I of the paper provides a critical analysis of the statutory conditions for awarding the registration of geographical indications and their application to popular recipes. Part II elucidates the demerits of awarding a geographical indication to popular recipes. Part III of the paper focuses on the solution to the problem faced on account of registration of geographical indication to a recipe.

### **A CRITICAL ANALYSIS OF THE STATUTORY CONDITIONS FOR AWARDING THE REGISTRATION OF GI VIS-À-VIS POPULAR RECIPES.**

#### **A. Analysis of Popular Recipes Under the Statute:**

The West Bengal State Food Processing and Horticulture Development Corporation Limited had filed for procuring a GI tag in September, 2015, describing the *rasgulla* as a sweet that is in the form of ‘ball shaped dumplings’. The two main ingredients used were described as *chenna*, ‘a form of Indian cottage cheese’ and dough, which is made in light sugar syrup, ranging between 3.7 cm to 6.2 cm in size<sup>19</sup>. This geographical indication awarded to the *Banglar Rasgulla* is analyzed on the whetstone of the statutory conditions, in the light of popular recipes.

- *Absence of traditional knowledge:*

There is no sui generis process portraying the use of traditional knowledge, particular to this form of *rasgulla*, used by producers in the State of West Bengal, as seen in the various recipes and videos<sup>20</sup>. The function of a GI tag, protecting the traditional knowledge developed and passed in the indigenous communities<sup>21</sup>, is absent in the instant case, owing

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<sup>18</sup> DENISE MIRANDAH, GI Registration for ‘Rasgulla’: Sweet News to be Taken with a Pinch of Salt? *Mirandah Connecting Asia*, (12 December 2017), <https://www.mirandah.com/pressroom/item/geographical-indication-rasgulla/>.

<sup>19</sup> DENISE MIRANDAH, *supra* note 13.

<sup>20</sup> *infra* note 55.

<sup>21</sup> WADHERA, *supra* note 10; CHAKRAVARTY, *supra* note 11; Echols, *supra* note 13; Lewanika, *supra* note 13; KARKI, *supra* note 3 at 218.

to the absence of any specific process followed by the sweet shops of West Bengals, to the exclusion of other producers in the country or which portray the use of traditional knowledge, which is not in the public domain. Further, there is no traditional knowledge in obtaining readily available ingredients. The process of making the *Banglar Rasgulla* can be easily accessed and videos of the same can be very conveniently watched, across multifarious time zones, simply by one touch.

- *Recognition of Recipe Under the Statute:*

Though the statute includes any foodstuff under the ambit of ‘goods’, a scrutiny of the definition of a ‘geographical indication’ classifies the good to be recognized as either an agricultural good, a natural good, or a manufactured good. Although the Parliament has appreciated the varied nature of goods that can be subjected to a GI, the same distinction seems to become restricted after obtaining a GI, thereby changing the very nature of the good. Subsequently, a good identified as a foodstuff under Section 2(1)(f), after being awarded a GI tag, is to be identified as one of the three options of an agricultural good, a manufactured good, or a natural good. Such a definition, resultantly, weighs the good on the tests of what would amount to one of the three indicated goods, specified in the statute.

However, on obtaining a GI, the most suitable category that a recipe would fall under, accordingly, would be a manufactured good under Section 2 (1) (e). It is a commodity distinct from the characteristics of the abovementioned ingredients, in light of the observation made by the Apex Court<sup>22</sup>. However, the statutory conditions to be fulfilled to be recognized as a manufactured good by a GI tag, are not fulfilled.

The conditions for recognition by GI as manufactured good vis-à-vis recipes are defeated, as established below:

- *Condition 1: The good should be manufactured in the territory reflected in the GI*

On analysis of the conditions for awarding a GI to a product, recognizing it as a manufactured good, the first prerequisite is that it should be manufactured in the place of geographical origin. As seen above, irrespective of the physical location, one can easily make any dish, which is an outcome of a recipe, by using easily and conveniently available ingredients, be it the famous *Vada Pav* of Mumbai, the quintessential sweet of South India,

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<sup>22</sup> *M/s. Saraswati Sugar Mills*, 1992 (1) S.C.C. 41; *C.I.T.*, 248 ITR 744 (J & K); *Deputy Commissioner of Sales Tax*, [1991] 80 S.T.C. 249; A.I.R. 1991 S.C. 378; *India Cine Agencies*, (2003) 180 C.T.R. 41(Mad).

the *Mysore Pak*, the exquisite *Hyderabadi Dum Biryani*, the lip smacking Bihari delight, *Litti Chokha*, the appetizing *Falafel* from Egypt, the delectable *Couscous* from Morocco, the delicious Rajasthani specialty, *Dal Baati Choorma*, the Bengali favourite, *Mishti Doi*, the Japanese special, *Sushi* or the center of discussion, the *Banglar Rasgulla*, in the midst of a plethora of such recipes . All such recipes can easily be made by simply consulting the instructions easily accessible online and the ingredients, readily available at huge supermarkets or the roadside grocery store. Despite having origin in a particular region, the popularity and their daily production have transcended not just the length and breadth of the country but have also crossed borders, where for instance, chefs operating in restaurants in the United States of America master their cooking skills and specialize in Middle Eastern cuisines or the Indian desserts or the Chinese delicacies.

If a recipe can be easily made anywhere across the world, without there being any unique traditional knowledge being put into use for its making, then a place, where a product would have initially originated but now can be easily produced by people across the globe, does not qualify the condition of being manufactured in the initial place of origin itself. In such a scenario, awarding a GI tag to a recipe, which can be easily produced in any corner of the world (owing to factors such as increasing accessibility of the recipes online, high availability of ingredients and the simple procedure of producing the dishes, coupled with the lack of traditional knowledge subjected to the manufacture of the product, to the exclusion of the rest of the world), defeats the fulfilment of the first condition, as anybody sitting in Australia can savour the *Banglar Rasgulla* by simply following the recipe and purchasing the commonly used ingredients, without actually having it produced in West Bengal.

- *Condition 2: The good should possess some form of 'quality, reputation or other characteristic', owing its allegiance to the place where it has been manufactured.*

The second condition mandates that in order for a GI tag to recognize a product as a manufactured good, the feature of the good, giving it widespread popularity, should be particularly owing to the place which is reflected in the GI tag<sup>23</sup>. This feature can be any form of quality or characteristic of the good and has wide ambit to even include reputation that it gains, with due passage of time. There has to necessarily be a nexus between the place (it is presently manufactured in, and which is also the place reflected in the GI tag)

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<sup>23</sup>AHUJA, *supra* note 4 at 787; KARKI, *supra* note 3 at 220; WIPO, *supra* note 15.

as well as the unique feature of the product<sup>24</sup>. In order for a GI tag to be applicable, it is essential that this nexus is employed by the consumers while making the decision for buying the manufactured product<sup>25</sup>. The presence of this nexus is imperative in the decision making of a consumer, as it plays an active role in reminding the consumer of the place where it is manufactured, when any reference is made to the product, which also holds true if the scenario was the other way around<sup>26</sup>.

For instance, in the case of Roquefort, the nexus between the ‘blue cheese’ and Roquefort stems from the characteristics of the milk procured from the ‘indigenous breed of sheep fed according to tradition’, the peculiarity of the natural caves where the cheese is aged for fourteen days and the application of the traditional knowledge throughout the process of making the cheese, which are the factors that give Roquefort its unique quality, thereby giving the cheese and the municipality of Roquefort, their reputation individually and in nexus with one another<sup>27</sup>.

However, in the case of the *Banglar Rasgulla* or any other famous recipe named above for that matter, this nexus is absent. The cuisine may have recognition only in terms of it originating in a particular place or a place having historic significance, as the cuisine’s place of origin. However, this does not necessarily mean that the cuisine (or the recipe or the dish), will always be made or manufactured in the place of its historic origin, such as *Falafel* having roots in Egypt, the Levantine favourite, the *Shawarma* or the popular *Sushi* having its roots in Japan. Such recipes, which use readily available ingredients (not particularly available in the place of historic significance) and made on the basis of simple instructions, can be manufactured with ease, in any corner of the world. Hence, it does not fulfil the requisite of establishing the nexus, as it is not manufactured in the place reflected in the GI tag but may be in a local shop in Kerala, as opposed to the necessary statutory requisite for a *Banglar Rasgulla* being made in West Bengal.

On the contrary, tea grown in similar conditions as that of Darjeeling tea, in Nepal following the same altitude, similar soil or grown on similar slanting hills won’t constitute Darjeeling tea<sup>28</sup>, owing to the unique nature of the factors existing in Darjeeling. These factors cannot be replicated to bring the exact same flavor of tea produced under similar

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<sup>24</sup> Echols, *supra* note 31 at 209.

<sup>25</sup> U.S. Patent and Trademark Office, *Geographical Indications*, at <http://www.uspto.gov/web/offices/dcom/olia/globalip/geographicalindication.htm>; Echols, *supra* note 31 at 209.

<sup>26</sup> AHUJA, *supra* note 4 at 787.

<sup>27</sup> WIPO, *supra* note 14 at 9.

<sup>28</sup> Rao, *supra* note 14, at 4547.

conditions but can be produced only under the same conditions. However, since the ingredients of a recipe can easily be availed, and the human factors are also not particular to the place of origin but only require some labour, which is not particular to any set of traditional knowledge or any particular community, the ‘place-quality link’<sup>29</sup> essential for a valid GI tag over a recipe, grossly fails. Hence, the rationale for using this nexus as a requisite, to grant a GI tag, to facilitate the performance of its source identifying and quality function<sup>30</sup>, can be grossly misused to the detriment of the consumers<sup>31</sup> as well as the original producer, which has been discussed in detail in Part II.

- *Condition 3: One of the following three activities should have been necessarily carried out in the same place which is claimed to be the product’s geographical origin.*

In order to achieve the fulfilment of this condition, the Legislature has provided a wide range of operations to bring a product within the ambit of a manufactured good, recognized by a GI tag. As discussed earlier, these operations can be production, preparation or processing<sup>32</sup>. Invoking the principle laid down by the Hon’ble Supreme Court<sup>33</sup> to examine whether an operation constitutes processing or not, for the fulfilment of the condition laid down in Section 2 (1)(e), the operation should be carried out on the commodity, which as a result brings about a change in the original commodity, in the place which is reflected in the GI tag. In the instant scenario of any recipe, the operation carried out on the original commodity, meaning the ingredients, (namely milk, lemon, sugar and water, as in the case of the much debated *Banglar Rasgulla*) are usually conducted in the kitchen of the local sweet shop or the restaurant where it is being prepared. It does not require its processing to be carried out specifically in West Bengal, since there is no uniqueness of technique followed by the sweet shops in West Bengal which is not capable of being followed in a sweet shop in Mumbai.

In order to examine the application of ‘production’ as required in Section 2 (1)(e), operation which causes the *Banglar Rasgulla* to be produced<sup>34</sup> should be carried out in West Bengal. This may not necessarily hold true since a recipe can be easily produced anywhere across the country, and is not necessarily confined to West Bengal, owing to factors such as easily

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<sup>29</sup> KARKI, *supra* note 3 at 220.

<sup>30</sup> U.S.P.T.O., *supra* note 61; CHAKRAVARTY, *supra* note 11 at 865.

<sup>31</sup> CHAKRAVARTY, *supra* note 11 at 865.

<sup>32</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 2(1)(e).

<sup>33</sup> *India Cine Agencies v. Commissioner of Income Tax*, (2003) 180 C.T.R. 41 (Mad).

<sup>34</sup> P. RAMANATHA AIYAR, P. RAMANATHA AIYAR’S, CONCISE LAW DICTIONARY 986 (4 ed. LexisNexis Butterworths Wadhwa Nagpur 2012).



available ingredients, absence of unique characteristics of raw materials found particularly in West Bengal, absence of traditional knowledge, absence of unique technique of producing the *Banglar Rasgulla* specially followed in West Bengal. Hence, a *Banglar Rasgulla* can be easily produced in any part of the country, within two hours, without actually having it produced in West Bengal.

Lastly, the third alternative of preparation, is an activity that encompasses the preparation of ingredients till the point where the final end product is obtained in its final form<sup>35</sup>. Invoking the same guideline in the instant case of recipes, the raw materials can be easily prepared in any part of the country owing to high availability of the ingredients (as in the case of the *Banglar Rasgulla*), since the ingredients used form part of the staple diet of most Indians, namely, milk and lemon, used to prepare the cottage cheese, sugar and water. Furthermore, the operation to obtain the final *rasgulla* can be achieved by following the readily available instructions. Hence, the requirement of actually preparing the ingredients and obtaining the end result i.e. the *Banglar Rasgulla*, from the beginning to the end, can be easily done in any corner of the country, without having any part of it prepared in West Bengal. Hence, the third condition of manufacturing the *rasgulla* or any recipe having easily available ingredients, does not qualify the third condition of procuring a GI tag in the form of a manufactured good.

## **B. Exception to Registration of GI: Generic Terms**

Section 9 of the statute elucidates the conditions for prohibition of awarding a GI tag. One of the conditions prohibits the registration of those geographical indications, the use of which have become generic in nature<sup>36</sup> and is a globally recognized exception to the registration of a GI tag<sup>37</sup>.

Explanation 1 to the Section, explains that when a name, which is intended to be a GI tag, is ordinarily the name of the product, despite the fact that it reflects the place of historic origin of the product, it shall constitute a generic name and won't be awarded a GI tag. This is on the grounds that the proposed GI tag has lost its original meaning, owing to the fact that it has been used in common parlance to an extent that it has been reduced to the common name of that product. This common name is used by the consumers to indicate a particular 'kind, nature,

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<sup>35</sup>*Union of India v. Pesticides Manufacturing & Formulators Association of India*, (2002) 8 S.C.C. 410; P. RAMANATHA AIYAR, *supra* note 39.

<sup>36</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 9 (F).

<sup>37</sup> WIPO, *supra* note 15 at 18 & 23; KARKI, *supra* note 3 at 211; AHUJA, *supra* note 4 at 796; V. S. R. AVADHANI, V. SOUBHAGYA VALLI, *LAW OF INTELLECTUAL PROPERTY RIGHTS* 352 (1 ed. Asia Law House 2014).

type or other property or characteristic’ of those products<sup>38</sup> and not the place of origin<sup>39</sup> nor the ‘distinct geographical characteristics or features of the product’ as a means to differentiate the product solely on the basis of its historic place of origin<sup>40</sup>.

In such an event, the term which would otherwise qualify as a geographical indication, will grossly fail the test, as in the case of Dijon Mustard<sup>41</sup>, owing to the loss of distinctiveness of the term<sup>42</sup>. In the case of Dijon Mustard, instead of being used as a GI tag, it is now used in the markets, by the consumers and the producers alike, to mean a particular kind of mustard and not to indicate its place of historic origin, which was the French town of Dijon. Initially, Dijon Mustard was made in Dijon but slowly its production shifted and was no longer restricted to Dijon. Only for the convenience of indicating the kind of mustard, the term Dijon Mustard is used and not to refer to the place of historic origin, thereby rendering the term generic and has not been granted GI registration<sup>43</sup> or as in the case of cheese, such as Camembert, which is used to refer to a particular kind of cheese<sup>44</sup> that can be made anywhere across the world and not just in Camembert, located in North West France<sup>45</sup>.

In the instant case of the famous *Banglar Rasgulla*, though the term is reflective of the place of historic origin, the manufacture of the good is not per se restricted to West Bengal but can be easily made anywhere in the country (for reasons that have been established above), as seen above in the case of the Dijon Mustard and Camembert cheese. It can be safely said that the use of the term *Banglar Rasgulla* merely serves the purpose of designating a particular kind of *rasgulla*, since the sweet shops are now flooded with multiple variants of the original *Banglar Rasgulla*, such as the jaggery flavoured *rasgulla* or the saffron flavoured *rasgulla*<sup>46</sup>. The term *Banglar Rasgulla* no longer is used to indicate the source of origin. Rather it is used to refer to the particular kind of *rasgulla*, which is white in colour, for which the GI has been falsely given protection. The presence of the word ‘*Banglar*’ does not denote the place of origin anymore as

<sup>38</sup>THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 9 (F) EXPLANATION 1.

<sup>39</sup> KARKI, *supra* note 3, at 209; WIPO, *supra* note 15 at 24.

<sup>40</sup> WIPO, *supra* note 15 at 24.

<sup>41</sup> *Id.*; CHAKRAVARTY, *supra* note 11 at 865.

<sup>42</sup> KARKI, *supra* note 3, at 211.

<sup>43</sup> *Id.* at 209; CHAKRAVARTY, *supra* note 11 at 865.

<sup>44</sup>Oana C. Deselnicu, et al., *A Meta-Analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin-Based Labels?* 38 *Journal of Agricultural and Resource Economics* 204 (2013).

<sup>45</sup> WIPO, *supra* note 15 at 24.

<sup>46</sup> Srishti Dasgupta, Meet The Woman Who Makes Rosogollas In 200 Flavours, *The Times of India*, (28 February 2017), [http://timesofindia.indiatimes.com/articleshow/57393316.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/57393316.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst); [Santana Fell](#), Churning out 170 Varieties of Rosogollas From Her Kitchen, Here’s The Story of ‘The Rosogolla Woman’ of Kolkata, Beacon Kolkata, (19 February, 2017), <http://www.thebeaconkolkata.co.in/the-rosogolla-woman-of-kolkata/>.

it in part of common knowledge that *rasgulla* originated in West Bengal and can be easily made anywhere across the world, as in the case of *Dijon Mustard* and *Camembert*.

Furthermore, in absence of any particular kind of technique used or unique characteristics of ingredients used to make *rasgulla* or any geographical factors that contribute to or enhance the reputation of the delicacy, it is safe to state that the use of the term *Banglar Rasgulla* has become generic in nature, thereby serving the purpose of differentiating the original white kind of *rasgulla* from its new variants. Hence, the registration of geographical indication is flawed, under Section 9 (f).

## REPERCUSSIONS OF AWARDING FLAWED GI TO RECIPES

### A. Curtailment of Promotion of State Culture

India is a blend of multifarious ethnic groups, each having its unique language, music, art and dance forms, different styles of handicrafts and most importantly, different kinds of cuisines, contributing to a State's specialty. These include myriad recipes which have over the course of time, travelled across the length and breadth of the country. These recipes, when prepared and sold outside the territorial limits of the State, do not simply add to the profit-making motive of the businessman but also speak volumes for the promotion of the State's rich heritage and culture. However, by awarding registration of a GI tag to a recipe, the conditions under Section 2 (1)(e), coupled with the rights awarded to an authorized user under the statute<sup>47</sup> would have the necessary implication that, only an authorized user, carrying out any one of the operations of manufacture (production, preparation or processing) within the territorial limits of the State shall have the right to use the GI tag over the recipe. All other persons are prevented from using the tag in relation to that product, irrespective of the place of manufacture.

In such a scenario, a person hailing from West Bengal and wanting to promote his State's culture and rich heritage, despite being fully aware of the procedure to make a *Banglar Rasgulla* will not be able to sell the *Banglar Rasgulla*, thereby not just curtailing his right to sell a particular kind of product but also acting as a restraint on what would have otherwise led to a successful mechanism of promoting his State's culture and heritage or in the case of a producer setting up his shop in the foreign lands, would prevent him from promoting the sweet, which is an integral part of the culture of not just his State but also his country.

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<sup>47</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 21 (1)(B).

By awarding the registration of GI tag to the *Banglar Rasgulla*, all those who are not authorized users and make and sell the sweet (since following a recipe which uses readily available ingredients can be easily done in any part of the world), ultimately contributing to the State's promotion of culture, would instead be prevented under the statute<sup>48</sup> as the name of a recipe, which should be ideally used to designate a particular kind of dish, is rather being used as a flawed GI tag, with the legal implications of restricting those who are supplying the same to a consumer, who is unable to have access to a producer (who is an authorized user under the statute) due to problems stemming from huge distances between the authorized user and the consumer.

Instead of protecting the interests of the State or a particular group of producers, the registration rather leads to a situation that facilitates the violation of the right to use a geographical indication<sup>49</sup> (since a recipe can be put to use with ease by anybody, as long as the instructions to make them and the ingredients for the same are easily available), especially when recipes, like the *Hyderabadi Dum Biryani* or the *Banglar Rasgulla*, is one of the country's favourite delicacies, having a high demand but low supply due to lesser number of producers, in the form of authorized users, as compared to a scenario, when there is no restriction on who can make a readily available recipe. What was otherwise working on a demand supply model, would now bring an honest activity under the ambit of 'act of unfair competition'<sup>50</sup>, as it would not in reality be produced in the place reflected in the GI tag and restrict the same from being freely available outside the State, owing to its nature as a perishable good and not having a considerable shelf life.

Such a registration, therefore, restricts not just people from outside the State from using the GI tag but also those from within their very State, who may not be authorized users, but who may be prevented from making the cuisine, ultimately causing harm to the State's ethnicity. What was done to protect the State's culture and ethnicity, would ultimately curtail the final goal of applying for the registration.

## **B. Advent of Counterfeit GI Bearing Goods into the Market**

Owing to reasons of high popularity leading to high demand worldwide and low supply, as only a few producers in the geographical place of origin, also called the authorized users, can

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<sup>48</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 21 (1)(B).

<sup>49</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 21 (1)(B) § 22(1).

<sup>50</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT, 1999, § 22(1)(B), EXPLANATION 2(III).

produce the desired good, there is a high probability of fake goods bearing the same GI tag entering the market, thereby acting as a detriment to the producers as well as the consumers. In the case of Darjeeling tea, although the statute provides ample mechanism to prevent the sale of counterfeit Darjeeling tea, the same has entered the market and is being sold in triple the quantity of the original Darjeeling tea produced<sup>51</sup>. This counterfeit Darjeeling Tea is produced not just within the country's territorial limits but also in countries like Kenya and Sri Lanka that have similar geographical conditions, making it easy to grow and sell such tea worldwide, under the garb of Darjeeling tea<sup>52</sup>.

In such a scenario, the sale of counterfeit tea, to some extent, can be checked in the Indian States but cannot be checked with the same accuracy abroad<sup>53</sup>. If this difficulty can be faced with respect to crops which can be grown only in a few places with the requisite climatic conditions, a recipe, that can be easily made in a couple of minutes due to easy access to the instructions and easily available ingredients, has a higher chance of being replicated and sold outside the territorial limits of the State, in the country as well as abroad.

The market will now be filled with such 'fake' producers and owing to the low threshold of consumer observation and knowledge that has been followed in India's IP laws<sup>54</sup>, such consumers won't be able to distinguish between an authentic *Banglar Rasgulla* and a *rasgulla*, sold as a *Banglar Rasgulla* but not originally being manufactured anywhere in West Bengal. Hence, by reducing the supply of an easy to make and a highly popular product having a high demand, the State is rather inviting trouble for the consumers and original producers by forcing the other producers to undertake acts which would result in producing and supplying fake GI bearing products globally, which cannot be guarded against by it as seen in the case of the Darjeeling tea.

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<sup>51</sup> Rao, *supra* note 14 at 4547.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4548.

<sup>54</sup> *Mahendra & Mahendra Paper Mills Ltd. v. Mahindra and Mahindra*, (2003) 6 P.T.C. 434; *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, A.I.R. 1960 S.C. 142; *Hiralal Prabhu Das v. Ganesh Trading Corporation*, A.I.R. 1984 Bom. 218; *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd.*, (2001) 5 S.C.C. 73; *Zee Telefilms Ltd. v. Sundial Communication (P) Ltd.*, (2013) 27 P.T.C. 457 (Bom.).

**RECOMMENDATIONS FOR PREVENTION OF HARM CAUSED BY REGISTRATION OF A FLAWED  
GI**

Indian heritage is a blend of myriad languages, regional cultures and traditions, distinct art and dance forms and most importantly, the different kinds of ethnic delicacies. With due passage of time, these recipes have transcended across and throughout the country and are now possible to be relished anywhere, irrespective of the geographical location, provided the recipe can be easily accessed and put to use, and the ingredients are available. In such a scenario, by awarding a GI tag, the short-term effects would be giving the legal recognition to the State where the cuisine originated but the long-term effects are disastrous to the market and to the State itself.

In such a scenario, there should be another legal status accorded to such cuisines, other than a geographical indication. This can be in the form of awarding a status of Place of Historic Origin (P.H.O), to a State on application. The Applicant State shall make an application to the concerned authorities, as in the case of trademarks<sup>55</sup>, copyrights<sup>56</sup> and geographical indications<sup>57</sup>. The Applicant State, in order to be granted the status of a P.H.O. with respect to a cuisine, should have to satisfy an evaluating authority in this regard. The authority, while considering an application for awarding a PHO status over a cuisine to any State, shall evaluate the applicant's claim. Only on the fulfillment of the following conditions, shall the authority grant the PHO tag to the applicant State:

- i. **Origin:** The Applicant State shall produce ample evidence to show that the cuisine applied for originated within the territorial limits of the Applicant State. This evidence shall include documentations, having historic significance, establishing the origin of the cuisine in that particular State. Furthermore, evidence should be given regarding the possible channels via which and the approximate time frame during which the cuisine was being produced in the different States.
- ii. **Duration:** The Applicant shall show that the cuisine, ever since its time of origin, has been in continuous supply by the producers, operating in the State, to consumers. This duration should be for a minimum period of ten years. It shall be important for the authority to evaluate the same to be in continuous existence and not having abrupt discontinuity in between.

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<sup>55</sup> THE TRADE MARKS ACT 1999 § 18.

<sup>56</sup> THE COPYRIGHT RULES 2013 R. 70.

<sup>57</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 11.

- iii. **Characteristics:** Since Indian food, although are particular to each State, has a tendency of having similarity in its characteristics with other foods, such as the Sambar made in the South Indian states. Although the sambar made seems to be the same, every State has a unique flavour, as in the case of Sambar made in Karnataka. It is a little sweet as compared to the Sambar served in the other South Indian States. Similarly, in the case of the *Banglar Rasgulla*, the characteristics are different from its Odiya counterpart, the *Pahala Rasgulla*, which is brownish in colour since it is baked for a longer period of time<sup>58</sup>. While evaluating, the authority shall ensure that the characteristics of the cuisine at the time of its origin is mostly similar to the characteristics of the cuisine served in the present day, for which the application is made.
- iv. **Ingredients:** The Applicant State shall specify the basic ingredients used to make the cuisine and should further specify the nature of those ingredients. The Applicant State shall further state if those ingredients are a result of processing of some primary product or are the primary product themselves. Caution has to be maintained by the evaluating authority to see whether the ingredients are a result of a process that is particular to that State or due to unique climatic conditions of that region. In such a case, if the ingredients are not easily accessible to the public at large and are accessible to mostly those residing in the Applicant State, the application shall be rejected.
- v. **Production:** The Applicant State shall specify the process of production that was followed at its approximate time of origin and in the present day. This should be strictly evaluated by the authority and the condition shall be deemed to be fulfilled only when the same are closely similar. The standard to be followed by the authority should be high.

**Duty of the Authority:** It shall be imperative for the authority to ensure that there is no presence of unique traditional knowledge, particular to the Applicant State, for obtaining the cuisine, either in the form of production of the cuisine or the availability of ingredients. Otherwise, the application for PHO, shall be rejected.

**Procedure for Registration:** Just as for other intellectual property rights<sup>59</sup>, the application for PHO, after receiving the scrutiny, objections and acceptance with or without the limitations or

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<sup>58</sup> Sanchari Pal, *TBI Food Secrets: The Fascinating History of Rasgulla and the 'Sweet' Battle Over its Origin*, The Better India, (18 January, 2017), <https://www.thebetterindia.com/82618/history-rasgulla-origin-odisha-west-bengal/>.

<sup>59</sup> THE GEOGRAPHICAL INDICATIONS (REGISTRATION AND PROTECTION) ACT 1999 § 11-16; THE PATENTS ACT 1970 § 7 § 11 A § 11 B § 12; THE TRADE MARKS ACT 1999 § 18-23; THE COPYRIGHT RULES, 2013 RULES 69-74.

conditions, shall be advertised by the authority both in online as well as offline media. Opportunity shall be given to other States after advertisement to file opposition to the application for a prescribed time period, after which all States shall lose their claim to file opposition and the Applicant State shall be awarded the registration of PHO over the cuisine. However, in the event of an opposition, the Applicant State shall be given an opportunity to file rebuttals. As per the discretion, a hearing for both the parties may be conducted by the concerned evaluating authority, after which the authority may or may not grant the Applicant State the registration of PHO.

**Advantages:** The only advantage that can be gained from the grant of registration of a GI tag to such a recipe is the recognition given to the State. However, this unleashes harmful effects on the consumer, the authorized user, the other innocent producers not necessarily domiciled in the geographical place, and introduces anticompetitive behavior in the market, as in the case of counterfeit manufactured goods.

To counter these ill effects, the use of a PHO status awards the recognition to the State and does not disturb the existing market, without affecting the consumers or the different kinds of producers, differentiated above.

### CONCLUSION

The registration of GI tag has brought to light, how a flawed GI tag can bring widespread damage to every entity in the market. The Utilitarian theory of protection of intellectual property rights get grossly defeated and the only entity gaining out of this registration is the State. However, this too is limited as a short-term gain, since in the long run, the State, benefiting from the production by the authorized users shall be largely competing against unidentified and unaccounted producers of such recipes, which may not necessarily be produced in the State.

Moreover, such a registration shall now lead to a long queue for procuring a GI tag over most sweets, such as Karnataka for the *Dharwad Peda* or for the *Mysore Pak*, or other recipes, such as Rajasthan over *Dal Baati Choorma* or Gujarat over its snacks like the *khakras* and the *fafdas*. Such registrations will slowly shrink the traditional desserts market, accounting for Rs. 40,000-



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Rs. 45,000 crores<sup>60</sup>, and eventually other food related industries, by restricting the rights to produce the same to only a few authorized users.

Hence, the GI tag should be replaced with the registration of a Place of Historic Origin (PHO) tag that shall not deter the routine business in the market and will award the desired status to the Applicant State, thereby following the lines of Utilitarian justification of protection of intellectual property rights.

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<sup>60</sup> SOHINI DAS, *Amul Packs a Sweet Punch*, Rediff.com, (23 June, 2016), <http://www.rediff.com/business/report/amul-packs-a-sweet-punch/20160623.htm>.