

The Whistleblower Protection Act, 2011 in India : An Analysis of successful and failed cases

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Introduction

Chief Justice T S Thakur and Justice A K Sikri and R Banumathi on lack of protection for the whistle blowers stated that there was a “absolute vacuum” which was to be covered soon keeping in mind that exposing corruption is a global phenomenon and a reality of the country hence directing the center to introduce a mechanism for the whistle blowers protection as they face threats and harassments for bringing to light the illegalities in the government departments.² The Whistle blowers protection enhancement act of 2012 was signed into a law on November 2012 and it provided for the protection, implementation and enforcement of nondisclosure agreements by the department. As rightly pointed by the central vigilance minister V.K. Choudary on the existing law that there was still a need to bring some provisions in Whistle Blowers Act to protect witnesses that would provide confidence to those who expose corruption”³ there was also a need to emphasis upon making people aware of the procedure to file complains under Public Interest disclosure and protection of former also commonly known as Whistle blower resolution. To bring in those necessary changes the Whistle blowers act 2012 was amended in the year 2015 through the Whistle Blowers Protection (amendment) bill, 2015. The bill stated that it would not be disclosed in public interest if it had

- i) Information which could prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific, or economic interests of the state, relations with foreign state, or lead to incitement of an offence;
- ii) Cabinet papers including records of deliberations of the Council of Ministers, secretaries and other officers except as

provided in the Right to Information Act, 2005.

- iii) The information has been strictly forbidden to be published by a court or tribunal, or if the disclosure of information may result in contempt of court;
- iv) The information would cause a breach of privilege of Parliament or state legislature;
- v) The information relates to commercial confidence, trade secrets, intellectual property (and such disclosure would harm a competitor). Although, if such information is made available under the Right to Information Act, 2005, then it may be disclosed.
- vi) The information is available to the person making the disclosure in his fiduciary capacity. However, if such information has been made available under the Right to Information Act, 2005, then it may be disclosed.
- vii) Information is received in confidence from a foreign government;
- viii) The disclosure of the information would endanger the life or physical safety of a person, or identify the

Source of information given in confidence for law enforcement or security purposes.

- ix) The information would impede the process of investigation/apprehension/prosecution of offenders;
- x) The disclosure of personal information if it has no relationship to any public interest, or if it causes unwarranted invasion of privacy. However, if such information has been made available under the Right to Information Act, 2005, then it may be disclosed.⁴

Analysis of the legislation

According to Indian law reports, the bill has faced considerable criticism because its jurisdiction is restricted to the government sector and encompasses only those who are working for the Government of India or its agencies; it does not cover the state-government employees. However, the draft bill aimed at protecting whistleblowers is a welcome move.

The lack of public debate and consultation on the bill seems to indicate the danger of it becoming another “paper tiger”. Typically, ministries proposing draft legislation involve a process of public consultation to give the public an opportunity to carefully analyze its provisions. In this case, such an opportunity has been denied to the public, which has not gone unnoticed. The proposed law has neither provisions to encourage whistleblowing (financial incentives), nor deals with corporate whistleblowers; it does not extend its authority to the private sector (a strange omission, after the fraud at Satyam). The Directorate of Income Tax Intelligence and Criminal Investigation is one of the only agencies empowered for whistle blower protection.

The bill aims to balance the need to protect honest officials from harassment with protecting persons making a public-interest disclosure. It outlines sanctions for false complaints. However, it does not provide a penalty for attacking a complainant. The Central Vigilance Commission (CVC) was designated in 2004 to receive public-interest disclosures through government resolution; there have been a few hundred complaints every year. The provisions of the bill are like that of the resolution. Therefore, it is unlikely that the number of complaints will differ significantly. The power of the CVC is limited to making recommendations. It cannot impose penalties, in contrast to the powers of the Karnataka and Delhi Lokayuktas. The bill has a limited definition of disclosure, and does not define victimization. Other countries (such

as the United States, United Kingdom, and Canada) define disclosure more widely and define victimization.

Case Studies

CASE STUDY-1

Maharashtra Irrigation Scam-

In an Economic Survey's observation it was revealed that that though Rs 70,000 crore had been spent on various projects in the time span of last 10 years, the state's irrigation potential had increased only 0.1% and then the Rs 35,000-crore irrigation scam in Maharashtra came to light. By this news the CM Prithviraj Chavan announced that the government would bring out a white paper⁵ highlighting the features and services on irrigation projects held in the state and the Chief Minister did not consult the departments concerned before announcing the same. The irrigation portfolio has been held by the NCP since 1999-2009 by Ajit Pawar and after that Sunil Tatkare take the charge. The proposal for the white paper occur at the same time with the exposé in media about Tatkare's alleged involvement in fraud and the floating of more than 140 companies by his nears and dears. NCP Chief Sharad Pawar and his party immediately countered that this increase was only in “well irrigation” and did not involve other projects; if other projects were included then the estimated increase was 12%. The scam involves 32 projects in the under-developed Vidarbha region alone while the rest are in Konkan region and north Maharashtra. Incidentally, the Comptroller and Auditor General (CAG) has already begun a probe into the decisions taken by the irrigation ministry and questioned the employees from the department on September 24. It has been alleged in the report that the scam involves inviting tenders at higher cost from the nominal cost and involves many political heads, irrigation officials and contractors. The cost of 32 irrigation projects in Vidarbha was increased by the rate of 300%

from Rs 6,672 crore to Rs 26,722 crore by the Vidarbha Irrigation Development Corporation (VIDC) and this was approved in a short span of three months between June and August 2009. The VIDC, however, argued that the costs were revised because of the change in price levels, higher quotes by contractors, increase in the cost of land acquisition, engineering changes and other reasons. Earlier, the state government was forced to scrap work on the Kondhana dam in the Konkan region in June after the project cost was increased to Rs 435 crore from Rs 80 crore without any assessment. Vijay Pandhare is the whistleblower on this fraud and recently he alleged that the BJP government had shielded contractors and politicians involved in the multi-crore irrigation scam.

CASE STUDY-2

National Highway Authority of India Scam-

Satyendra Dubey- The Man who fought with all he can. Satyendra Dubey was an Indian Engineering Service officer, he was the project director in the National Highways Authority of India NHAI. In 2002 he joined Indian Engineering Services and went on deputation to the National Highway Authority of India NHAI. He became a Project Director and responsible manager of the highway part of "Aurangabad-Barachatti" section of NH 2 (The Grand Trunk Road). This highway was a part of Golden Quadrilateral Corridor Project. When he joined in, he saw many irregularities in the financial department and these were some serious issues. He got the contractor of the project to suspend his three engineers. He exposed this scam. He even forced the contractor to such an extent that he rebuilds the Six Kilometer road. This scam getting reviled and roads getting rebuild were proving to be huge loss for the Road Contract Mafia. In his more investigation he found out the Companies are manipulating the rules for their profit. After some days he was transferred to Gaya, but he opposed. Even at Gaya he found

many irregularities and large-scale fraud and use of worst quality material. He understood that the fraud is not limited to one place and there are many big people including politicians are involved. As he dug deep he found that this whole system is behind the scam. He then thought to write a letter to Prime Minister Mr. Atal Bihari Vajpayee detailing the financial and contractual irregularities in the project. While the letter was not signed, he attached a separate bio-data so that the matter would be taken more seriously. Despite a direct request that his identity be kept secret and despite the letter's sensitive content, accusing some of Dubey's superiors, the letter along with bio-data was forwarded immediately to the Ministry of Road Transport and Highways. On 27 Nov. 2003, He was returning from a wedding in Varanasi, he called his driver to be at station at 3am in morning.

CASE STUDY-3

Vyapam (Vyavsayik Pareeksha Mandal) fraud-

The fraud of Vyapam involves allegations of widespread corruption in the Madhya Pradesh Professional Examination Board (MPPEB), which conducts admissions to various professional courses and recruitment tests for state government jobs. Its purview includes tests for medical college admissions and government employment as police constables, teachers, and banking officials.

How was the fraud revealed and who are the whistleblowers?

The investigation in the fraud commenced on 07th July 2013 on the basis of a report lodged on the information of an Indore-based civil rights activist, Dr. Anand Rai.

Forensic expert Prashant Pandey said he became a whistleblower in July last year, when he realized the Special Task Force was relying on documents that seemed to have been tampered with.

Gwalior-based social activist Ashish Chaturvedi, who disclosed the involvement of Chief Minister Shivraj Singh Chouhan's relative and seven others in the fraud.

The scam worth over Rs 10,000 crore has till date seen more than 40 deaths and affected 2.5 million-odd young people if only the recruitment and entrance tests of 2012 and 2013 are taken into account.

CASE STUDY-4

Garcetti v. Ceballos

The U.S. Supreme Court, in the case of *Garcetti v. Ceballos*, 04-473, ruled in 2006 that government employees do not have protection from retaliation by their employers under the First Amendment of the Constitution when they speak pursuant to their official job duties. The U.S. Merit Systems Protection Board (MSPB) uses agency lawyers in the place of administrative law judges to decide federal employees' whistleblower appeals. These lawyers, dubbed "attorney examiners," deny 98% of whistleblower appeals; the Board and the Federal Circuit Court of Appeals give great deference to their initial decisions, resulting in affirmance rates of 97% and 98%, respectively. [4] The most common characteristics for a court claim that are encompassed within the protection of the Act include: that the plaintiff is an employee or person covered under the specific statutory or common law relied upon for action, that the defendant is an employer or person covered under the specific statutory or common law relied upon for the action, that the plaintiff engaged in protected whistleblower activity, that the defendant knew or had knowledge that the plaintiff engaged in such activity, that there was retaliatory action taken against the one doing the whistleblowing and that the unfair treatment would not have occurred if the plaintiff hadn't brought to attention the activities.[5] Robert MacLean blew the whistle on the fact that the TSA

and its cuts in funding for more air marshals. In 2009 Maclean, represented by the Government Accountability Project, challenged his dismissal at the Merit Systems Protection Board, on the grounds that "his disclosure of the text message was protected under the Whistleblower Protection Act of 1989, because he 'reasonably believe[d]' that the leaked information disclosed 'a substantial and specific danger to public health or safety'." McClean won the case in a ruling of 7-2 in the Supreme Court in January 2015

Protection Of Whistleblowers Across The World :-

On 21 July 2010 President Obama signed a legislature permitting whistle-blower's also including the foreign nationalists, to receive monetary awards for reporting bribery which was prohibited under the Foreign Corrupt Practices Act (FCPA). The Dodd-Frank Wall Street Reform and the consumer Protection act states that the U.S securities Exchange Commission pay the monetary award to the whistle-blower's if they provide correct information to the U.S government leading to successful enforcement of FCPA.⁶ The United Nations Convention devotes Article 33, for this subject and protection of reporting person is a boost for people to come up and speak against corruption, crime and other matters of public concern. In Australia whistle-blower protection is offered for certain disclosures under a patchwork of laws at both federal and state level. Eligibility for protection depends on the requirements of the applicable law and the subject matter of the disclosure. Not all disclosures are protected by law in Australia. Section 42 of the Australian Border Force Act 2015 (Cth) imposes a penalty of two years imprisonment for a whistle-blower who makes a disclosure in relation to an Australian immigration detention facility.⁷ In Canada the Public Servants Disclosure Protection Act has protects whistle-blowers'in the federal public sector since April 15, 2007. The Alberta's

whistle blower protection law came into force on June 1, 2013, with the enactment of The Public Interest Disclosure (whistle blower Protection) Act (section 1 and Part 6 of the Public Interest Disclosure (Whistle blower Protection) Act and it came into force on April 24, 2013.

In Texas the general rule is that most employees may be fired at any time for any reason or for no reason at all under the at-will employment doctrine. However, in the past half-century, exceptions to this general rule have emerged. Exceptions to this general rule came from two sources:

(1) courts, which modify and make “common law protections”

(2) the legislature, which enacts “statutory protections.”

Even though many countries have strict laws to protect whistle-blower’s a few countries still lack behind in this area countries like Nigeria have the Freedom of Information Act to protect whistle-

10 Dos and Don’ts for today’s corporate whistle blower, created just for Forbes:

Do obtain good independent legal advice. Make sure your lawyer has a complete dossier of all the evidence you assemble.

Don’t lose sight of your own moral compass. You’re going to receive a lot of opinions, but you should ultimately trust your own judgement. Because — in the end — most of know what is right and wrong.

Do take your time to collect as many facts as you can. Be detailed and as forensic as you can be in the process. Remember that in making any allegations, the key issue for getting the truth out will be the strength of evidence.

Don’t drink. It’s important that you maintain your mental agility to deal with all that’s going to come up. “There were times when I didn’t follow my own advice and drank too much in desperation to try and switch off my mind and

get some sleep,” says Woodford.

Do formally report any suspected wrongdoing. This action will ensure that — at least in the United States and the United Kingdom — statutory whistleblower protection protects you.

Don’t expect too much of others. Becoming a whistleblower is not like Noah’s Ark where you go around in two’s. It inevitably means you will be on your own, and you need to prepare yourself psychologically for that initial disturbing sense of isolation.

Do find a journalist or two whom you can trust. It is a basic rule that, if requested, journalists will protect their sources. The investigative ability of media organizations is not to be dismissed. Many times, it compares with — and in some circumstances, is superior to — that displayed by law-enforcement or regulatory agencies.

Don’t be surprised when colleagues you considered friends distance themselves from you. And when they do, don’t allow this to affect your resolve. If you believe you are in the right and you have the evidence, you’re doing absolutely nothing wrong – in fact, it’s quite the reverse.

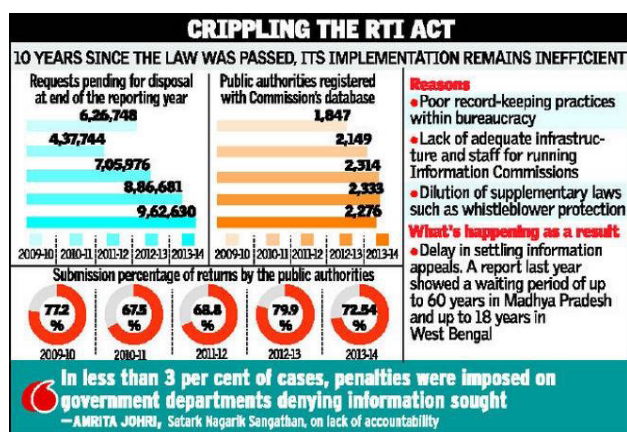
Do remain focused and determined. Your family is going to be put under extreme emotional strain and this is painful to witness. But bear in mind that if you know of wrongdoing and then don’t report it, you not only have to live with that knowledge, but you might become complicit and put yourself and your family at risk.

Don’t give up!

CONCLUSION

On one hand the new Whistleblowers Protection Act has wonderful provisions to protect whistleblowers but at the same time the suspension on its success rate continues due to its silence at some points. Firstly, it lacks one of the major concerns i.e., criminal penalties for physical attacks on whistleblowers keeping in mind the past attacks on complainants. Secondly,

it doesn't have any proper provision for civil penalties for workplace retaliation and hence, still doesn't ensure proper protection for the whistleblowers. Moreover, whereas other countries like the United States, the United Kingdom and Canada define "disclosure" and "victimization" broadly for purposes of their respective whistleblower protection laws, India's law does not define "victimization" and has a relatively narrow definition for "disclosure."⁸



But above all there is the major challenge to this act is implementation and its proper enforcement. Enforcement—and rebuilding public trust in the government—will be critical to the new law's success. Given the history of scandals, the government needs to regain the people's confidence and help them believe that the whistleblower law will really provide the type of protection it promises⁹. Otherwise, silence of the individuals regarding the abuse of power will continue in future as well. Moreover, this will exacerbate the problem of corruption and make the protection purpose of the act ineffective

The success rate of this Act can be illustrated by the chart given below which shows how successful and competing in India.

What is the Next Step?

Though whistleblowers Act is good piece of legislature but it has many challenges in front of it. An ideal whistleblowing Act should be:

Established with a simple procedure for

disclosure. It shouldn't disturb the normal life of the whistleblower.

Protecting the whistleblowers from physical attacks and retaliation. Their identity should also not be revealed similar to Article 33 of FCPA of U.S. government.

Motivating the whistleblowers. The whistleblower should be awarded some cash to encourage his/her active participation to dispose the corruption and malfeasance just like the provisions of FCPA of U.S. government.

Ensuring a fair method of investigation.

Providing a special body to enforce the Act.

Addressing both concerns raised internally and externally.

There is a need of independent agency to speedily investigate and resolve complaints because several times it happens that government insiders blowing off the whistle suffer a lot by way of suspension, physical threats and administrative harassment. Moreover, the Central Vigilance Committees should also be well equipped with adequate staffs to probe complaints coming to them.

Moreover, when question arises regarding the private companies, some special steps need to be taken. At preliminary stage of investigation, informal channel should be entertained because the purpose of whistleblower policy is not only to eradicate malpractices and corruption but also to ease the bitter pill of extra burden of preliminary inquiry into frivolous complaints. Moreover, there policy at this level must deliver a strong message to the employees that frivolous accusation is not to be used as a tool to harass senior management. Hence, assumption of innocence can't be made until¹⁰ the revelation is proven sufficiently. Moreover, the policy should treat employees fairly¹¹. A two-way communication channels should also be initiated which will generate trust and eliminate doubts¹².

One of the ideal Act to deal with corporate

frauds is The Sarbanes-Oxley Act. The Act provides for enhanced financial disclosures and auditor independence of publicly held corporations¹³. Section 301 of the Act requires that audit committees of the boards of public corporations establish procedures for ‘the confidential, anonymous submission by employees’ of complaints regarding internal accounting controls or auditing matters¹⁴.

Cases Cited

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on 9 April, 2013

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on 13 January, 2009

3 National Highway Authority of India Scam

(Endnotes)

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