

**BEFORE THE PLANT VARIETIES REGISTRY
AT NEW DELHI**

IN THE MATTER OF: -

- a) Maharashtra Hybrid Seeds Co., Ltd., with respect to
C 5009, C 5623, C 5622, C 5618, C 5605, C 5625, C
5624, C 5710, C 5626, C 5118, C 5610, C 5707, C 5705,
C 5713, C 5534, C 5524, C 5081, SF 4047, SF 4127, J
1119, CA 8618, CA 8602, CA 8603, CA 8646, M 3432,
M 3434, BJ 60214, BJ 60281, BJ 60205, BJ 60301, BJ
60287, BJ 60283, BJ 60282, BJ 60259, BJ 60252, BJ
60248, BJ 60223, BJ 60213, BJ 60218, BJ 60209, BJ
60210, TM 61469, TM 61455, TM 61476, TM 61478,
TM 61481, TM 61464, TM 61465, TM 61460, MOK
60027, MOK 60034, MOK 60036, MOK 60029, B 2114,
B 2124, B 2133, B 2037 and B 2038.
- b) Bayer Bioscience Pvt. Ltd., with respect to BCT 3301
- c) Rasi Seeds Pvt. Ltd., with respect to I.C 86 & RC 91
- d) Sungro Seeds Research Limited with respect to S-
EP-002, S-EP-001, S-EP-017, S-EP-023, S-EP-032, S-
EP-038, S-EP-446, S-EP-318, S-EP-041, S-EP-001, S-
EP-008, S-EP-011, S-EP-015, S-EP-022, S-EP-028, S-
EP-043, S-EP-044, S-EP-047, S-EP-054, S-EP-056, S-
EP-063, S-EP-124, S-EP-012, S-EP-040, SCF-5008, SCF-
5016, SCF-5022, SCF-5026, SCF-5029, SCF-5033, SCF-
5057, SOK- 586 and SOK- 571.
- e) Monsanto India Limited., MIM 103, MIM 111, MIM
112, MIM 203, MIM 312, MIM 303, MIM 501, MIM
502, MIM 612, MIM 603,



- f) Monsanto Holdings Pvt. Ltd., G8855424, G9053755,
G0898944, G 3782528 and G 4321920,
- g) Bharati Seeds with respect to 3944192 B and 4206336
B
- h) BioSeed Research India Pvt. Ltd., HR 411120 R, BIO
10107 I, PM 80105R, BIO 60118 IO, BIO 60102 I2, BIO
60075 IO and BIO 60102I1
- i) Syngenta India Limited., SYN-RI-NR 5056, SYN-RI-
NR 7238, SYN-CO-NP 5024, SYN-CO-NP 5063, SYN-
CO-NP 5038 and SYN-CO-NP 5088
- j) Bayer Bio Science Pvt. Ltd., BCT 3301.
- k) M/s. Devgen n.v.

For the Applicants : *Mr. R. Parthasarathy, Advocate,
M/s. Lakshmikumaran & Sridharan*

ORDER

Heard the applicants on 26.03.2012.

The applicants have filed their written submissions
which have been taken on record.

Issue involved:-

The legal issue that is involved in the instant matter is
whether parental lines should be considered as new variety
or extant variety about which there is common knowledge
more particularly when such parental lines have been
utilized for development of hybrid and such hybrid has been
applied under extant variety (common knowledge). In fact
both new and extant variety (common knowledge) are
eligible for registration and the period of registration is same
for both the categories. However, the criteria for registration
is different for both. Accordingly the issue becomes legally
important for consideration.



Contention of the applicant:-

The contention of the applicant is that the parental lines are not extant variety as per section 2(j) of PPV&FR Act, 2001. None of the parental lines under consideration is a notified variety under Seeds Act, 1966 and none of them is a farmers' variety and further none of the parental lines is a variety about which there is common knowledge since the parental lines *per se* and their characteristics are not a matter of common knowledge for breeders and farmers alike. In addition the parental lines are proprietary material of applicant and are not commercialized and are not in public domain. It was submitted that if a variety 'A' is the subject matter of registration than the words "such variety" occurring in Section 15(3)(a) of Protection of Plant Varieties and Farmers' Rights Act, 2001, refers to A only and accordingly if the propagating or harvested material of A has not been sold or otherwise disposed of for the purpose of exploitation of A then the variety A would be novel.

The other important contention of the applicant is that novelty is lost only if the harvested or propagated material from the parental lines is sold or otherwise disposed of for the purpose of exploitation of parental lines. A hybrid is a product of cross between two plant varieties or parents of the same plant species. The first generation that results from the cross is generally referred to as F1 hybrid. 'The propagating material' has been defined in the Act. The words harvested material has not been defined. Article 14 (2)



of UPOV convention 1991 indicates that harvested material includes entire plants and parts of plants obtained through use of propagating material. The harvested material can be obtained by a process of selfing (inbreeding) of a variety or by cross two different varieties. The applicant also emphasized that the harvested material of P1 would comprise 100% genome of P1. The selfing of parental line result in obtaining propagating/harvested material of parental line itself. Hence the characteristic of propagating/harvested material of parental lines remained unchanged even after such propagation. The applicants also emphasized on production of hybrid by crossing. Hybrid variety (P1,P2) is a harvested material from P1 wherein the hybrid comprised 50% genome of P1 and P2 used. Thus crossing of two different parental lines result in obtaining propagating/harvested material comprising 50% genome of P1 and P2 each whereby the characteristic of propagating/harvested material is unstable thus it is not a harvested material of P1. The applicant also emphasized on hybrid production. There are three different types of parental line which are used in case of production of hybrid. The male sterile line is also known as A line and maintainer is known as B line and restorer line or male fertile line is known as R line. A line and B line are isogenic lines that is both lines are identical except for male sterile character. A line cannot produce seeds therefore to reproduce propagating/harvesting material of A line, it must be crossed with B line. B line upon replanting produces propagating and harvested material of B line and as such the



harvested material of B line comprises 100% genome of B line. Thus selfing of parental line result in obtaining propagating/harvested material of parental line. R line is also harvested material of R line comprising 100% genome of R line. The applicants also emphasised on production of hybrid by crossing A line and R line. It was submitted that the pollen from R is dusted on the stigma of A and hybrid AR is produced which is harvested from A line. AR upon replanting produces neither A nor R, rather it produces AR. Hybrid variety cannot be considered as harvested/propagating material of male parent since it is always harvested from female parent. The hybrid variety cannot be considered as harvested /propagating material of female parent since planting of harvested /propagating material obtained from female parent after hybridization neither produce nor is capable of producing female parent. The PPV&FR Act does not define the term exploitation. However the term appearing in the section 15 (3) can be interpreted as exploitation of candidate variety for production of candidate variety itself and not for production of any other variety. The disposal of hybrid variety does not amount to disposal of harvested /propagating material of parental line because the hybrid seed is not a harvested /propagating material of parental line.

The bone of contention of the applicants is that the propagating/ harvested material of parental line and the propagating/harvested material of a hybrid are completely different from each other in terms of the essential characteristics and the genetic constitution and accordingly



hybrid seeds obtained from the female parent line is not of the female parent line but of hybrid and interpreting it other way round would lead to contradiction with the definition of variety.

The next contention of the applicants is that the legal fiction in the US and EU laws that treat parental line as known if hybrid has been sold and otherwise disposed of supports their contention parental lines be considered as novel. In EU and US laws there are no provision for registration of extant variety. Accordingly both EU and US laws had deeming fiction to the effect that the parental lines as not novel if the hybrid was not novel. This itself shows that but for the legal fiction they could not have been so considered. Article 10 (2) of European council regulations on community plant variety rights makes a deeming fiction that if variety constitutes are repeatedly used in the production of hybrid variety then there is a disposal of the variety constituent or harvested material of hybrid variety, the original plant variety shall not be considered as novel. Section 42 of US plant variety protection Act also provides that the sale or disposition of hybrid seed shall be considered to be a sale or disposition of harvested material of parent variety from which the seed was obtained. The applicants also submitted International Seed Federation view that considering the hybrid material representing the harvested material of parental line is not correct since it is inconsistent with UPOV. Further as per the public notice published in Plant Variety Journal of India the registration of extant hybrid varieties which are in public domain for more



than 13 years is not permitted it would mean that applicants applying for registration of parental line of an extant variety which is there in public domain for more than 13 years will be at disadvantage just because the Act came into force late. Such notice is in any case is *ultra vires*. Further parental lines of hybrid varieties notified under Seeds Act will not get protection if parental lines are treated as extant. Such a consequence is totally unwarranted.

Accordingly it was prayed unless there has been sale or commercial exploitation of the parent variety itself one year before the date of application such a variety cannot be considered as extant for the only reason that it has been used to make hybrid which are extant as per the Act.

Reasoning :-

To decide the issue, I must analyse the contentions of the applicant in light of the provisions relating to novelty contained in section 15(3)(a) of Protection of Plant Varieties and Farmers' Rights Act, 2001 (hereinafter referred to as 'PPV&FR Act, 2001').

The provision relating to novelty which is occurring in section 15(3)(a) of PPV&FR Act, 2001 is extracted hereunder:-

"For the purpose of sub-section (1) and (2), as the case may be, a new variety shall be deemed to be-

- (a) *Novel, if, at the date of filing of the application for registration for protection, the propagating or harvested material of such variety has not been sold or otherwise disposed of by or with the consent of its*



breeder or his successor for the purpose of exploitation of such variety-

- (i) *In India, earlier than one year ; or*
- (ii) *Outside India, in the case of trees or vines earlier than six years, or in any other case, earlier than four years, before the date of filing such application:*

Provided that a trial of a new variety which has not been sold or otherwise disposed of shall not affect the right to protection:

Provided further that the fact that on the date of filing the application for registration, the propagating or harvested material of such variety has become a matter of common knowledge other than through the aforesaid manner shall not affected the criteria of novelty for such variety; "

In simple language, section 15(3) of PPV&FR Act, 2001 means if at the date of filing of the application for registration, the variety (which has been applied for registration) has not been commercialized or has been commercialized for a period of less than one year, then it is deemed to be novel and accordingly it would be eligible for registration as new variety.

"Extant Variety" has been defined in Section 2(j) of PPV&FR Act, 2001 which is as follows:-

Extant variety means a variety available in India, which is-

- (i) *Notified under section 5 of the Seeds Act, 1966 (54 of 1966) or*



- (ii) *Farmers' variety or*
- (iii) *A variety about which there is common knowledge or*
- (iv) *Any other variety which is in public domain."*

At the first instance it is essential to analyse the provisions of novelty as enshrined in Section 15(3)(a) of PPV&FR Act, 2001 to decide the issue involved in the case on the hand.

"if at the date of filing of the application for registration for protection"

These words in section 15(3)(a) of PPV&FR Act, 2001 makes it clear that novelty is determined as on the date of filing of application.

"Propagating material"

"Propagating material" has been defined in section 2(r) of PPV&FR Act, 2001 which means any plant or its component or part thereof including an intended seed or seed which is capable of, or suitable for, regeneration into a plant. This definition makes it clear that the term propagating material would cover the seeds of A line, B line, R line and includes hybrid seeds also as all would be capable of regenerating into a plant.

"harvested material"

The term "harvested material" has not been defined in PPV&FR Act, 2001 and accordingly it must be taken in its plain meaning. The words 'harvest' has been mentioned in Compact Cxford English dictionary of Current English (Third Edition) as "harvest noun 1. The process or period of



gathering in crops 2. Season's yield as or crop. Verb gather a crop as harvest.

Since, harvest has been mentioned as the process of gathering of crops the meaning of crops must also be seen.

Crop has been mentioned as 1. Noun a plant, especially a cereal, fruit, or vegetable grown for food or other use. 2. An amount of crop harvested at one time.

The word 'harvest' has been mentioned in Advanced Law Lexicon (P. Ramanatha Aiyar) as "the detachment of produce from a biological asset or the cessation of a biological asset's life processes". The meaning of harvested material makes it clear that it would mean the plant itself or its parts such as seeds, fruit, vegetable, flowers etc., would also come within the meaning of harvested material.

Now what would constitute harvested material in case of A, B and R lines have to be considered.

In case of Male Sterile line:- This is also known as A line. The A line and B line are near isogenic lines and both are identical in nature except for male sterility character. A line cannot produce seeds and must be crossed with B line to produce seeds.

In case of Male fertile line:- The male fertile line is also known as B line and maintainer line. The male sterile line cannot produce seeds and always needs to be crossed with male fertile line to produce the seeds of male sterile line.

In case of Restorer line:- The restorer line is also known as R line or male fertile line. The Restorer line is crossed with A line to develop the hybrid.

