Reference Case No. 2 of 2015 & Case No. 107 of 2015 (against Monsanto and Ors.)

Through this monthly publication, CUTS International undertakes independent analysis of relevant competition cases in India (on-going as well as decided). The purpose is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The aim of this publication is to put forward a well-informed and unbiased perspective for the benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse/debate on the underlying pertinent competition issues in India.

Executive Summary

The development of gene insertion technology and wide adoption of Genetically Modified Organisms (GMOs) in the global agricultural market has led to the emergence of corporate behemoths in the seed industry. Notably, gene insertion and modification is dependent on innovation, investments and research and development (R&D) expenditures.[1] This naturally entails that patent protection and licencing of patents hold a uniquely vital position for stakeholders as it is a major source of revenue generation. Growing patent portfolios of a handful number of players, combined with continuous and rigorous R&D has resulted in rising consolidation in this sector.[2] This is apparent from the fact that a few biotech corporations (namely: Monsanto, Syngenta, Bayer, Dow and DuPont)[3] currently dominate the seeds market at a global level, and it is possible that the sector will get consolidated to three companies in near future.[4]

Since the 1980s, Monsanto has become the world leader in genetic modification of seeds and has won at least 674 biotechnology patents globally, more than any other company.[5] Notably, Monsanto's Bt. gene technology (which provides resistance to seeds from certain pests) has deeply penetrated the seed industry in India, *inter alia* in the form of Bt. Cotton. It is important to note that Monsanto does not deal with farmers directly, but in fact provides technology access to seed manufacturers (who licence technology from Monsanto) in return for patent royalties and trait fees.[6]

The fact that Monsanto enjoys patent induced monopoly over Bt. Technology and more than 90 percent of India's cotton cultivation depends on Monsanto's seeds, has made licencing of Bt. technology a hugely contested competition issue in India.[7]

Thus, this edition seeks to specifically cover one such major competition dispute, which was essentially initiated in 2015 against Mahyco-Monsanto Biotech India Pvt. Ltd. (MMBL, a joint venture between Mahyco Seeds Ltd. and Monsanto Co) by a group of seed companies and Department of Agriculture, Cooperation and Farmers Welfare.[8]

Competition Commission of India: Prima Facie Opinion[9]

Before delving into the detailed analysis of the order of the Commission dated October 10, 2016, it is important to first understand the market scenario of the seeds industry in India *vis-à-vis* Bt. Technology.

Background

The first (and so far the only) genetically modified (GM) crop that was approved for commercial release in India was Bt. Cotton. The approval for commercial release of Monsanto's BG-I[10] was granted by the Ministry of Environment & Forests in 2002 and for BG-II in 2006. While Monsanto did not apply for patent protection in India for BG-I,[11] its BG-II was granted patent in India in March 2009.[12]

Many Indian seed companies (around 50) entered into sub-licence agreements with Mahyco Monsanto Biotech (India) Limited (MMBL) for procuring access to its Bt. technology.[13] MMBL, which is essentially a 50:50 joint venture formed between Monsanto Holdings Private Limited (MHPL)[14] and Maharashtra Hybrid Seeds Company (MAHYCO),[15] is engaged in sub-licencing of the patented Bt. cotton technology of Monsanto Inc. in India.[16]

MMBL provides its Bt. cotton technology to seed companies (in order for them to develop hybrid variety seeds) in consideration of an upfront one time non–refundable royalty fee and recurring fee called as 'Trait Value'. The trait value is the estimated value for the trait of insect resistance conferred by the Bt. gene technology.

The Dispute

The *fixation/determination of trait value and its licencing* has been the trigger for various interventions (capping of trait value) by the Central and state governments. Moreover, the contentious issue of 'fairness' of trait value has been the focal point of almost all disputes between licensor and licensees of Bt. Technology, including the present one.

The current dispute was initiated in November 2015, when the Ministry of Agriculture and Farmers Welfare (MoA&FW), Government of India submitted a reference to the Competition Commission of India (CCI) alleging anticompetitive conduct on the part of MMBL (detailed allegations are discussed below). Following this, in December 2015, three private seed companies, whose licences were terminated by MMBL, also approached the CCI raising allegations of anticompetitive practices by MMBL. Later, few more private seed companies joined as informants.

Box 1: Allegations against MMBL and its Defence before CCI

Allegations

The Central Government in its Reference to CCI alleged the following anticompetitive practices by MMBL under the Competition Act, 2002:

- Abuse of dominant position in the relevant market of *Bt. cotton technology in India* by charging unreasonably high trait fees for Bt. cotton seeds under Section 4(2)(a) of the Act;
- Exploitation of the permissions given by the government to market Bt. cotton technology by creating a monopoly through restrictive agreements for unjust enrichment by charging high trait value from its licensees and ultimately from farmers;
- Its sub-licencing agreements with the Indian seed manufacturing companies were anti-competitive under Section 3(4) of the Act.

The private seed companies' allegations included that:

- MMBL had abused its dominant position in the Indian Bt. Cotton market by terminating licences (after parties failed to negotiate a mutually agreeable trait value for Bt. technology) and subsequently demanding other seed companies to pay excessive and extortionary trait value
- Sub-licence agreements between MMBL and the seed companies were one-sided, arbitrary, onerous as well as restrictive in nature
- Linking the trait value of the technology to the MRP of seed packets was without any economic justification and as such was unfair;
- MMBL had not entered into any sub-licence with MAHYCO and MHPL.[17]. This was contended to be exclusionary conduct. As a result of this discriminatory behaviour, seed manufacturers suffered discriminatory conduct on part of MMBL.

Defence

MMBL, on the other hand, contended that the above-mentioned allegations emerged from contractual disputes between the parties and not competition disputes. It also challenged the jurisdiction of CCI before Delhi High Court, which is pending. MMBL justified the trait value by stating that they the company was entitled to its reward for innovation and claimed that the trait value charged from Indian seed companies was lowest in the world.

On allegations of arbitrariness, it submitted that the sub-licensees were only required

to intimate MMBL regarding proposed negotiations with any of the sub-licensor's competitor and the same was neither abusive nor unreasonable. To counter the allegations regarding discriminatory treatment and leveraging of its dominant position, MMBL contended that the market share of MAHYCO and MHPL in the *cotton seed market* had reduced from 13 percent to 7 percent since 2013.

CCI's *Prima Facie* Order

The Commission heard both the parties in greater details and perused the information, on the basis of which, it held the following in its *prima facie* opinion:

1. That there is an inherent difference between Bt. cotton technology and traditional pest control methods, such as chemical sprays. In addition to this, considering its inherently unique characteristics and effectiveness, Bt. technology was held to be a distinct product *vis-à-vis* the relevant product market. Moreover, as the geographical scope of regulatory approvals and usage of Bt. cotton was limited to India, the relevant geographic market was delineated to be *'India'*.

   It was also held that considering Bt. cotton technology was used essentially to intervene as a crop protection mechanism through genetic modifications and keeping in mind the fact that all Bt. technologies might vary in terms of ability to fight pests; it had a distinct relevant upstream market as *provision of Bt. cotton technology in India*. Moreover, the fact that Bt. cotton technology cannot be directly used by farmers, but is used as an essential component by seed manufacturers to produce Bt. cotton seeds as a part of their hybrid varieties, it also had a distinct downstream relevant market i.e. *manufacture and sale of Bt. cotton seeds in India*.[18]

2. With regard to assessment of abuse of dominance in the upstream market, the Commission held in its *prima facie* analysis that MMBL has a significant presence amongst the technology providers in terms of its market share in the provision of Bt. cotton technology in India. Moreover, the Commission stated that Bt. cotton technology, which was specifically sub-licenced by MMBL was used in more than 99 percent of the area under Bt. cotton cultivation in India. This made it a product of huge consumer dependence.[19] Thus, it was evident that MMBL was dominant in the upstream relevant market. Post establishing MMBL's dominance, CCI considered the evidence on record *vis-à-vis* licensing

behaviour of Bt. technology and held that the conduct of MMBL *prima facie* appeared to be in violation of Section 4 of the Act.[20]

3. Considering allegations levied under Section 3(4) of the Act[21], it was observed by the Commission that the notification requirements coupled with the stringent termination conditions in the sub-licence agreement entered into between MMBL and the informants were in the nature of refusal to deal and exclusive supply agreements within the meaning of Section 3(4)(b) and 3(4)(d) of the Act[22]. Furthermore, the agreements had the effect of foreclosing competition in the upstream Bt. technology market.[23]

Hence, based on this, the Commission ordered an investigation into the matter by the Director General (DG). It is important to note that a dissenting opinion was put forward by one of the members of the Commission which primarily challenged the analysis of unfair pricing. The major points of his dissent are covered below.

Analysis by CUTS

The present case is an apt example of the consistent tension between the exercise of patent rights, on one the hand, and competition law principles, on the other. This tension is evident from the fact that Monsanto's prerogative to fix fees and govern licencing (including termination) of its patented property was challenged by seed companies and the MoA&FW.

Although the majority opinion of the Commission stated that MMBL possibly acted in contravention of Section 4 and 3 of the Competition Act, one of the members disagreed and provided a dissenting opinion in the matter. The basis of his dissent was grounded in the rationale that market forces and freedom of trade are essential components of economic development and the same need to be protected in the absence of substantial evidence pointing to abuse.

This entails that the analysis of whether prices are 'unfair' (as well as predatory) should be informed through comparison with competitive prices (and not those set by legislative price control mechanisms) in a different geographic market for the same product or prices charged by other competitors in the same product market.[24] As such evidence was lacking in the present case, the dissenting member stated that investigation is not required in the present case.

In the presence of two diverging opinions (*prima facie* order and the dissent opinion, which is discussed below in detail) *vis-à-vis* unfair and discriminatory trait value of Bt. technology, there emerges a case to analyse at the broader picture of price regulation and competition in this sector.

Is FRAND a Possible Solution?

Fair, Reasonable and Non-Discriminatory (FRAND) generally denotes a voluntary licencing commitment made by the patent holder to a standard setting organisation to licence essential patents (patents which have become part of a standard) on FRAND terms.[25] This doctrine has been used in the context of Bt. technology by the MoA&FW, which issued a Notification on May 18 2016 comprising 'Licensing and Formats for GM Technology Agreement Guidelines, 2016.'[26] But due to opposition and viewing its wide implications, the notification was rescinded on May 24, 2016, and had been put as draft for comments by the Ministry.

The central philosophy, encompassing the issuance of the Guidelines & Formats, was that the protection and management IP of new plant varieties, including a transgenic plant variety *per se* is governed by the Plant Variety and Farmers' Rights Act, 2001 (PPVFR Act) and not the Patents Act, even though biotechnology inventions are patentable. Based on this interpretation, all seed companies can have access to GM traits on *Fair, Reasonable, and Non-Discriminatory* terms.

But applying such an approach to the context of GM traits has its own pros and cons. It might seem that FRAND could help pave a possible middle ground between the two extremes of the dispute i.e. to ensure reasonableness of trait fees and royalties *vis-à-vis* licensing of Bt. technology on the one hand and safeguarding returns to investment and innovation of the licensor on the other hand.

Although it is also important to acknowledge governmental efforts and price control mechanisms (such as making licencing subject to FRAND terms) to provide access to transgenic plant variety through the PPVFR Act might have adverse effects on R&D in the Bt. technology (as it will undermine the proprietary right of the patent holder to licence competitively and gain returns to his investment).[27]

A more worrisome consequence of such a move could be that Bt. seeds could be easily available to the farmer and would result in greater adoption of Bt. technology, rendering it as the *standard* for cotton cultivation in India.[28] This can, in turn, affect

the diversity of cotton seeds in the country and can have negative effects on the R&D related to indigenous cotton varieties and grassroots technology development (which imbibes localised solutions for pest control and increased production without relying on Bt. technology).[29]

While there appears to be some theoretical merit in applying the FRAND doctrine to solve disputes related to unfair pricing of Bt. technology (which is the foundational issue underlying the abuse of dominance argument), but its practical implications on indigenousness of the Indian seed industry and broader environmental impact have to be recognised.

Conclusion

From the above-mentioned facts and brief analysis, it seems that the underlying issues related to licencing Bt. technology in India lie at the intersection of three laws i.e. Competition Act, Patent Act and PPVFR Act. Though it might appear that Bt. cotton seeds present a special case because of the fact that the 'Bt cotton technology' (BG-II) is patented in India, while the new varieties in which Bt gene has been inserted are provided with Plant Breeders' Rights (PBRs) under the PPVFR Act.

This indicates towards a possible inherent tension between the objectives of the patent act and PPVFR Act, the application of which could further complicate licencing matters in the market (through levy of price control measures by the government).

Hence, the competition analysis of what is a non-abusive trait value or royalty fee is governed by the various governmental and regulatory interjections in the matter. This unfortunately lends obscurity to the analysis of abuse of dominance, which is rightly pointed out by the dissent opinion, wherein M S Sahoo states the following:

> "A price can be considered unfair only if it is higher than the competitive prices, namely, prices in a different geographical market for the same product or prices charged by competitors in the same product market….if an enterprise is not complying with the trait fee fixed by a competent authority, it is for the authority to enforce it. **Non-compliance with a direction of an authority cannot *per se* be considered unfair under the Act. In any case, now that the Central Government has decided to fix price of seeds as well as trait fee under the Essential Commodities Act, 1955, the trait fee ceases to be a variable to be determined by the market forces and, therefore, nothing survives**".

Therefore, in light of growing legal tension in such matters which are governed by IP and Competition Law, harmonious construction and cross-learning ought to be the way forward for the authorities. The National Intellectual Property Rights Policy, 2016 clearly visualise such situations when it states:

> "Intellectual property in India is regulated by several laws, rules and regulations under the jurisdiction of different Ministries/Departments. A number of authorities and offices administer the laws. The legal provisions need to be implemented harmoniously so as to avoid conflict, overlap or inconsistencies among them. It is necessary that the authorities concerned administer the laws in coordination with each other in the interest of efficient administration and user satisfaction. Legal, technological, economic and socio-cultural issues arise in different fields of IP, which intersect with each other and need to be addressed and resolved by consensus in the best public interest".[30]

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1 For instance, see Monsanto's R&D expenditure at https://www.statista.com/statistics/273312/monsanto-research-and-development-expenditure-since-2008/

2 Gian Carlo Moschini, *Competition Issues in the Seed Industry and the Role of Intellectual Property*, Agriculture and Applied Economic Association, 1 (2010), available at http://www.farmdoc.illinois.edu/policy/choices/20102/2010203/2010203.pdf

3 To see the detailed graphics of the seed industry structure, see https://msu.edu/~howardp/seedindustry.html

4 Dow-Dupont and Bayer-Monsanto have filed merger applications

5 http://articles.mercola.com/sites/articles/archive/2010/11/11/how-monsanto-controls-the-future-of-food.aspx

6 https://spicyip.com/2015/10/guest-post-the-rs-400-crore-war-between-monsanto-and-indian-seed-companies-with-threats-of-price-control-and-compulsory-licencing-of-patents.html

7 *India's Competition Authorities Investigate Monsanto,* (2016), available at http://www.lexology.com/library/detail.aspx?g=ba5235c4-6bd8-4b44-b070-1262e8ec8748

8 Department of Agriculture, Cooperation & Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Government of India (MoA&FW) made a reference while the seed companies filed information with the Competition Commission of India. Both cases were clubbed and heard collectively.

9 Reference Case No. 2 of 2015 & Case No. 107 of 2015, available at: http://www.cci.gov.in/sites/default/files/Ref%2002-2015%20and%20107-2015%20-26%281%29%20order_10.02.2015.pdf

10 Bollgard is the brand owned by Monsanto Inc. BG-I contain one Bt. gene stacked with the base cotton variety and BG-II contains two Bt. genes.

11 Reasons for not getting it patented are unknown. Monsanto officials mentioned that the company had proprietary rights in its regulatory data as well as its biological materials, trade secrets and know-how, which were also protected under Indian law. The patent vis-à-vis BG-II was thus, acc. to them subject to such rights.

See: http://timesofindia.indiatimes.com/india/Seeds-of-doubt-Monsanto-never-had-Bt-cotton-patent/articleshow/47578304.cms

12 Patent No. 232681, with effect from June 05, 2002

[13] Supra 9.

[14] MHPL is Monsanto Inc., U.S.A's 100 percent Indian subsidiary

[15] MAHYCO is an Indian company, engaged in R&D, production, processing and marketing of seeds. At the time of the dispute, MHPL held 26 percent stake in MAHYCO.

[16] Supra 9.

[17] Probably because being members of the joint venture they did not deem it necessary.

[18] Supra 9, p.13

[19] Supra 9, p.15

[20] To view the entire section, visit: https://indiankanoon.org/doc/1780194/

[21] To view the entire section, visit: https://indiankanoon.org/doc/251194/

[22] Id.

[23] Supra 9, p.18

[24] Supra 9, p.24

[25] FRAND is generally used in context of the Information and Communication Technology (ICT) sector which relies on standards set voluntarily through standard setting bodies

[26] http://egazette.nic.in/WriteReadData/2016/169713.pdf

[27] However, a counter argument is that there is lack of evidence which could justify such a direct causal relationship. For details on the argument in the main text, see Ashok Gulati & Shreya Sarkar, *Heading Backwards,* 14.03.16 (accessed on 28.05.17), available at http://indianexpress.com/article/opinion/columns/gm-crops-cotton-heading-backwards/.

[28] Dr. Mrinalini Kochupillai, *On Bt Cotton, FRAND Licensing and Recent Governmental Initiatives: Putting Things in Context – II*, (2016) available at https://spicyip.com/2016/09/on-bt-cotton-frand-licensing-and-recent-governmental-initiatives-putting-things-in-context-ii.html

[29] Id.

[30] *National Intellectual Rights Policy*, available at:

http://dipp. nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf

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