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## Monsanto case - a debate over Private rights and Public interest

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On May 18<sup>th</sup>, 2016; Ministry of Agriculture issued a notification with detailed guidelines regulating the maximum sale price of cotton seeds and the royalty fees to be paid to bio-tech companies in the context of Monsanto's genetically modified Bt cotton. In less than one week, on May 24<sup>th</sup>, 2016, the government took an about turn and recalled its earlier notification and instead put the "Licensing and Formats for GM Technology Agreements Guidelines, 2016" in the public domain for 90 days.

The subject has become debatable and raised concerns on a) India's strategy for strengthening Innovation b) extent of Government's interference in technology licensing fees between two private parties c) the extent of overlap between Intellectual Property Rights (IPR) and Competition law and last but not the least d) should IP rights take precedence over public interest.

### FACTS

Monsanto produced genetically modified cotton plant (Bt Cotton) by introducing relevant genes (imparting the pesticidal property) to the plant for imparting resistance property against pests like bollworm. Monsanto obtained a patent grant on this technology of gene modification which involves incorporation of *Bacillus thuringiensis* gene (Bt gene), in a plant cell to render them free of disease/infection like Bollworm etc. Monsanto licensed its Patent rights to its joint-venture company in India trading as Mahyco Monsanto Biotech (India) Ltd (MMBL). MMBL further sub-licensed the technology to various Indian seed companies-which eventually developed seed varieties by using the licensed Bt Technology. Thus, finally these genetically modified seeds resistant to the Bollworm infection (made with the help of Monsanto's patented technology) were supplied to the end customer i.e. farmers. One of constant tussle between seed companies (sub-license) and MMBL has been the technology fees or licensing fees charged by them. This had become a major concern for the seed companies as the various State governments were reducing the retail price of seed and Monsanto refused to reduce the "licensing fee" citing the existing contractual terms mandating a minimum price. The National Seeds Association of India had also been complaining that Monsanto's technology licensing fees for Indian seed companies is too high. It demanded that the Government take robust action to bring the "trait value" i.e. licensing fees under control.

### The war over Price control and Technology licensing

- a) In December 2015 Ministry of Agriculture passed an order not only regulating the maximum sale price of cotton seeds but also the possibility of government interference for

controlling royalty fees in licensing arrangements and private agreements. The order derived its authority from the Essential Commodities Act, 1955 (this has generally been used to control price of generic drugs). The Agricultural Ministry decided to cut royalty fees by 70 percent on cotton seeds and also put a cap on seed prices across all states. This decision came under criticism for it was the first time that government was using its powers to control the royalty fees of a patented technology.

- b) At the same time a complaints to the Competition Commission of India was made by agriculture ministry on November 15, 2015 and separately by (the erstwhile licensees of MMBL) Nuziveedu Seeds Ltd. (NSL), Prabhat Agri Biotech Ltd. ('PABL') and Pravardhan Seeds Pvt. Ltd. ('PSPL') over pricing of Monsanto's pest-resistant cotton genes. The commission considered it a fit case for further enquiry by Director General. The Commission came to the conclusion that MMBL holds a dominant position in the seed market and its role needs to be investigated. Further the contracts entered with PABL, PSPL and NSL were *prima facie* found to contain stringent conditions.
- c) A number of seed companies (the erstwhile licensee of MMBL) refused to pay outstanding royalties to MMBL and as a result MMBL ended the license agreement with the seed companies and commenced the arbitration proceedings before the Bombay High Court. Further it brought trademark and Patent infringement proceedings before the Delhi High Court (against Nuziveedu Seeds Ltd).
- d) Monsanto challenged the Agriculture Ministry notification of March 8<sup>th</sup>, 2016 before the Delhi High Court to quash provisions pertaining to the price control order fixing Maximum Retail price of Bt cotton seeds and lowering the 'trait value' that licence providers (MMBL) would charge.
- e) Another petition to challenge the notification of March 8<sup>th</sup>, 2016 was filed by Association of Biotechnology Led Enterprises Agriculture Group (ABLE-AG), of which MMBL is a member, against the Centre's price control order before the Karnataka High. The Karnataka High Court in an interim order stated that the Centre cannot regulate the 'trait value' (licence fee) for seed technology as it is based on mutual agreement entered between two parties imparting relief to some extent to Monsanto. However, the court did not interfere with that part of the government's price control order, which fixed a uniform maximum retail price for all genetically modified (Bt) cotton seeds.

### **To Sum up:**

The controversy has brought forth macro and micro IP issues as outlined below. It will be interesting to see the direction government take while balancing the domestic compulsions and at the same time maintaining investor friendly regime.

- a) Whether government should have a role to play in the private contract between parties (particularly regulating technology licensing fees) or it should be case specific and government should interfere under special circumstances (which should be defined).
- b) The balancing of Intellectual Property protection Vs public interest and scope of Competition law in regulating monopolies permitted by the Patent law.
- c) The impact of capping royalty for new genetically modified (GM) traits under “Licensing and Formats for GM Technology Agreements Guidelines, 2016”. The Guidelines aim to provide a system for fixation of maximum sale price of cotton seeds to ensure their availability to the cotton farmers at a uniform as well as fair, reasonable and affordable price.

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