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

Application No. 2 of 2008

IN THE MATTER OF: Application under section 24
(5) of PPV&FR Act, 2001 filed by MAHYCO against
Prabhat Agribiotech Limited and others

IN THE MATTER OF:-

MAHARASHTRA HYBRID SEEDS CO. LTD.

APPLICANT

VERSUS

1. PRABHAT AGRIBIOTECH LTD.
 - 1A. NUZIVEEDU SEEDS (P) LTD.
 2. LIST OF FARMERS WHO HAVE PLANTED
DEMONSTRATION PLOTS IN JALNA,
MAHARASHTRA
(Annexure - C to the application)
- RESPONDENTS

**For the applicant: - Mr.H.S. Chandoke, Advocate,
M/s Luthra & Luthra.**

**For the Respondent No.1 and 1A: - Mr.Abhishek
Saket, Advocate, M/s Infini Juridique.**

ORDER

The applicant has filed an application under
section 14 of the Protection of Plant Varieties and
Farmers' Rights Act, 2001 (hereinafter referred to as
"Act") for registration of their cotton hybrid having
denomination MRC 7351 on 2.4.2008.



Subsequently, the applicant filed an application under section 24(5) of the PPV&FR Act, 2001 seeking to protect the interest of the applicant and also praying for several ex-parte ad-interim orders against respondent No.1 and 1A alleging that hybrid 883 owned by respondent No.1A and product demonstration conducted by respondent No.1 is in fact the applicant's hybrid MRC 7351. The respondent No.1 and 1A have filed their reply. The applicants have filed rejoinder to the reply filed by the respondent No.1 and 1A. The respondent No.1 and 1A have also filed an application for dismissal of the application under section 24(5) of the Act. The applicants have filed their reply to the said application and the respondent No.1 and 1A have filed their rejoinder to the said reply. These documents have already been taken on record and form pleadings in the instant matter.

The parties in their pleadings have repeated several issues. Hence, to avoid repetition the gist of the pleadings of the applicant and the respondent No.1 and 1A in this regard is furnished hereunder.

The applicant in their pleadings have stated that the Appl. No. 2 of 2008 is maintainable. It has further been stated that sec 24 (5) of the Act is in consonance with 1978 UPOV convention. It has further been stated that there is nothing wrong in section 24 (5) and in factum of filing of the



application. It has further been stated that doctrine of implied powers are applicable and further as per section 87 of the Act proceedings before Registrar shall be deemed to be a judicial proceeding and as per section 11 of the Act the Registrar shall have powers of the civil court. It has further been stated the section 24(5) of the Act has been adopted by the legislature to protect an applicant who applied for registration of an variety and which is pending for registration and that respondent no. 1 and 1A have not applied for any registration of hybrid 883 nor its parent. It was further stated that protection should be afforded from date of filing of application till decision of such application. Since in the instant case the applicant has filed an application under sec 14, the applicant is entitled for protection under sec 14 of the Act. It has further been stated that all the prayer sought by the applicant in Appl. No. 2 of 2008 are well within the powers of the Registrar. It was further submitted that section 30 is not applicable in the instant case. It was further stated the application seeking determination of maintainability of Appl. No. 2 of 2008 as a preliminary issue is not maintainable. It has been further stated by the applicant that the application filed under section 14 is not based on GEAC approval but on the basis of PPV&FR Act, 2001. It has further been submitted that action by the Registrar under sec



24 (5) is not in the manner of destroying any right but it is merely protecting the breeder against the abusive act. It has further been submitted that in Plant Variety Journal (Volume 1 No. 2) dated 2.4.2007 the application charge had been declared to Rs. 200 and that the said journal has been deemed to be a Gazette. It has further been stated that as per the said journal after submission of the application it will be processed as per rule 29 (2) of Protection of Plant Varieties and Farmers' Rights Rules, 2003 (hereinafter referred to as 'Rules') and consequently applicant has paid the entire fee for the application at the time of filing of the same. It has further been stated that a filing date and time has been assigned to the applicant's application under section 14 and that the said filing date is 2.4.2008 and the time 3:33:36 and consequently applicant is eligible for protection under section 24 (5) of the Act. It has further been stated that date of filing establishes the priority date. It has further been stated that proceeding under section 24 (5) is not an opposition proceeding and therefore do not pre-empt any party from filing opposition. It has further been stated that for proceeding under section 24 (5) no right need to be established in favour of the applicant. It has further been stated that the Learned Registrar is well within his rights to direct other regulatory bodies to keep in abeyances of all approval, permissions and registration sought in



respect of hybrid 883. It has further been stated the application for parental lines for MRC 7351 are pending with the Authority. It was prayed that the reliefs as sought in Appln. No.2 of 2008 must be granted.

The respondent No. 1 and 1A in their pleadings have stated that no right has been created in favour of the applicant and hence the application under section 24(5) of the Act is not maintainable. It has further been pleaded that a right will be created in favour of the applicant on the date of expiry of period of opposition or when the opposition if filed any is rejected in favour of the applicant. It has further been stated that the said application under section 14 filed by the applicant can be rejected at the most preliminary stage and hence, no action should have been initiated by the Learned Registrar on an application under section 24(5). It has been further stated that proceeding under section 24(5) is a counter opposition proceeding. It has further been stated that application under section 24(5) is being initiated to pre-empt others from filing opposition to their application filed under section 14 of the Act. It has further been stated that the applicant has failed to prove the abusive act on the part of respondents and abusive act shall arise only after applicant is able to establish that a right has been created in its favour. It has further been stated that the evidence gathered by



the applicant during these proceedings will be used by them in the opposition proceedings filed by others against application under section 14. It has further been stated that mere filing of an application under section 14 will not grant any superior right and hence the right claimed by the applicant under section 24(5) is meaningless. It has further been stated that the Act does not confer any right from retrospective date and therefore even on this ground the application under section 24(5) is not maintainable. It has further been stated that the Registrar has no power to appoint a commissioner and further in the absence of any right under section 28 the applicant cannot claim any superior right. It has further been stated that the authority has no power to pass any order against any other authority or statutory body and the prayer of the applicant in this regard is not maintainable. It has further been stated that the prayer of the applicant to expedite the process of the registration is also not maintainable. It has further been stated that the relief sought in para 14 (c) (i) and 14 (c) (ii) of the Appl. No. 2 of 2008 is also not maintainable as a right has not been created in the favour of the applicant. It has further been stated that if order is passed against the respondent in Appl. No. 2 of 2008 and application under section 14 is rejected the respondents will be put to great hardship. Further it has been stated relief



sought by the applicant is in conflict with section 30 of the Act. It has further been stated that the issue of maintainability of Appl. No. 2 of 2008 must be decided first. It has further been stated that the date of filing of application under section 14 is immaterial as no benefits can be derived by the applicant from such date. It has further been stated no filing date has been assigned to application under section 14 and that in view of absence of fee mere submission of an application for registration has no legal value. It has further been stated under rule 8 (2) (d) the date of filing of the application shall be the date when the entire fee is paid and that second schedule of PPV&FR Rules, 2003 does not provide for fee for extant variety and that date when application is tendered has no relevance as date of filing is the date when the entire fee is paid. It has further been stated that the applicant has quoted the old UPOV convention and not the latest and that India is not a member of UPOV convention. It has further been submitted that without conceding to the constitutional validity of the section 24 (5) of the Act which is pending before the Hon'ble Delhi High Court and that the respondents has shown that even under the existing frame work the Appl. No. 2 of 2008 is not maintainable. It has been stated that the applicants have filed their application under section 14 of the Act on April 2, 2008 and since the fee is yet



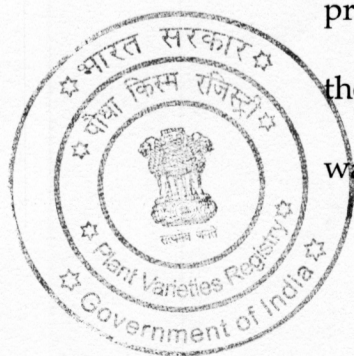
to be decided on such application and is payable the applicant cannot claim any right on the basis of date of tendering of the application. In this regard respondent relied on section 18 (1) (g) of Act and Rule 8 (1) and 8 (2) (d) of the Rules. It has also been stated that the order of the Authority to accept the application on the basis of Rs. 200 is illegal as rule is ought to be framed by Central Govt. under section 96 of the Act. It has further been stated that section 14 application itself is not maintainable as date of filing cannot be claimed in view of section 18 (1) (g) of the Act and rule 8 (1) and 8 (2) (d) of the Rules and consequently the Appl. No. 2 of 2008 [appln. Under section 24 (5)] is also not maintainable. It has further been stated that when an application under section 14 has not been accepted then no action could be initiated by an application under section 24 (5) of the Act. It has further been stated that every person has a right to file an application for a period of three years from April 2, 2008. Hence any person within the expiry of three years and even beyond the condonation of the limitation granted under the Act can file an application. Hence the right claimed by the applicant under section 24 (5) is meaningless.

Heard the matter on 21.5.2009 and 22.5.2009

The counsel for the applicant reiterated the grounds raised in their pleadings and argued that at no point the respondents have stated that their



product (hybrid 883) is different from the product of the applicant (MRC 7351) and on this admission alone the applicant merits the grant of relief. It was also argued that the respondents are inordinately delaying the matter. It was further argued that section 24 (5) of the Act follows the language of Article 7 (3) of 1978 UPOV convention and Act is within the framework of constitution of India. It was further argued that the provision of the Act have an overriding effect on all other laws which is clear from section 92 of the Act. The counsel of the applicant relied on section 24 (5) of the Act. It was further argued that the acts of the respondents are abusive act within the ambit of section 24 (5) of the Act. It was further argued that the applicants have been assigned the filing date and time for their application under section 14 of the Act. It has further been argued that even if no rules have been framed the same does not render the Act or its operations otiose. Reliance was placed on Dhanjibhai Vs. State of Gujarat AIR 1985 SC 603 in this regard. It was further submitted that respondents themselves have filed more than 130 applications majority of which are for extant varieties not notified under the Seeds Act and further submitted that the respondents are estopped from raising an argument of the non promulgation of Rules/regulations when they themselves have acted on the basis of Act itself. It was further pointed out that the entire fees as was



applicable/ prescribed at the time of filing of application has been paid by the applicant. It was further argued that clause 1(2) of notification dated 11.05.2009 issued by Ministry of agriculture fixing the fees for registration of extant varieties states that the said fees shall come into force on the date of the publication in the official gazette and hence it is evident that the provisions of the Act have been operational so far, irrespective of the fact that no fee was prescribed. Reliance was placed on the decision of the Hon'ble Supreme Court in Orissa State P&C Pollution Board -Vs- Orient paper Mills wherein it was held that "as may be prescribed" means "if any" prescribed. It was argued that the Hon'ble Apex Court has held in that case that the power which vests in an Authority should not cease to exist simply for the reason that the rules have not been framed or the manner of exercise of the power has not been prescribed. It was further argued that the filing date and time has been assigned to the application under section 14 of the Act and hence the application is eligible for protection under section 24(5) from the said date. It was further argued that an application for an extant variety of cotton can be made for a period of three years from the date of notification of cotton, the filing date and time is important as any application for a similar or identical product made after the initial application for a variety will need to



be distinct from such initial variety as of the filing date. It was further argued that the respondents have admitted that the hybrid 883 is the same as the hybrid MRC 7351. It was argued that DUS in respect of hybrid is not required as the Respondents have admitted that it is the same as the product of the applicant. It was further argued that the reliefs sought are maintainable. It was also argued that any application to other regulatory authorities in connection with hybrid 883 while the instant matter is pending and that selling, propagating, reproducing of the impugned seeds amounts to an abusive under section 24(5). It was argued that the farmers impleaded in the matter must be made a party and that no pecuniary compensation will be sought and any pecuniary loss suffered by the farmers in this regard will be compensated by the applicant. It was finally prayed that the appln. No.2 of 2008 must be allowed as prayed for.

The counsel for respondent No.1 and 1A argued that Hon'ble Delhi High Court is already seized with the matter of constitutional validity of section 24(5) and therefore the Appln. No.2 of 2008 must be stayed until a final order is passed in the writ petition. The counsel for respondent No.1 and 1A reiterated the grounds raised in the pleadings filed by them and argued that under extant variety every person has a right to file their application within a



period of three years from the date of notification of the crop. It was argued that until the date of final argument and when the order was reserved no fee for application under section 14 had been paid by the applicant and hence the date of application shall be the date when the full fee as prescribed under the Act has been paid. It was argued that as on date no criteria is laid down under the regulations for registration of an extant variety of common knowledge. It was argued that date of payment of fee is mandatory to reckon the date of filing. It was argued that the judgements relied upon by the applicant have no relevance to the present matter. It was argued that only application of new varieties or extant varieties notified under Seeds Act, 1966 were advertised under section 21 of the Act in the PVJ published every month as on date and that not a single application of the extant variety under common knowledge has been advertised under section 21. It was further argued that the case cited by the applicant is not relevant in the present matter as it relates to a situation where there is a power given to the government to do a particular act under the provisions of the Act and the manner of doing was not prescribed in the rules wherein it was held that when rules were not prescribed the Government had power to do the particular act. The instant case is one of omission in the statute of which the applicant



cannot take advantage and omission in a statute cannot be supplied by interpretation. It was further argued that under Rule 26 of Rules, the amount of Rs. 200/- cannot be considered as registration fee. It was further argued that PPV&FR Journal has been identified as Gazette only for limited purpose. It was further argued that the acts of the applicant and its agents require proper investigation.

After meticulously perusing the pleadings, documents and hearing the arguments of both the parties, I have to state that an application under section 24(5) of the Act arises only from the application under section 14 of the Act and accordingly I am of the view that the issue of maintainability of application under section 14 has to be decided first before deciding the maintainability of application under section 24(5). This is essential as the respondent No.1 and 1A have argued that in the instant matter the application for registration of cotton hybrid, MRC 7351 under section 14 itself is not maintainable in view of section 18 (1) (g) of the Act and rule 8 (1) and 8 (2) (d) of the Rules. It is true that the date (2.4.2008) on which the applicant filed his application under section 14, no fees was prescribed in the Rules. Similarly, Rs.200/- paid by the applicant along with the application was application charges and not fees under section 18(1)(g). Subsequently,



vide Gazette Notification No.275 dated 13th May, 2009 fees were prescribed by the Central Government for filing of the application for registration of an extant variety about which there is common knowledge. Further there is no dispute that the subject matter of the proceeding MRC 7351 is an extant variety about which there is common knowledge.

The core thing that has to be examined is to determine the date of filing of application for registration of extant varieties. I do not agree with the counsel for respondent No.1 and 1A that the applicant has not complied with mandatory section 18(1)(g) of the Act. Section 18(1)(g) states that every application for registration under section 14 shall be accompanied by such fees as may be prescribed. Under section 96(2)(xii) of the Act the fees under section 18(1)(g) has to be prescribed by the Central Government. At the time of filing of application for registration of MRC 7351 under section 14 no fees was prescribed in the Rules. I agree with the contention of the applicant placing reliance on the decision of the Hon'ble Supreme Court in Orissa State P&C Pollution Board-Vs-M/s. Orient Paper Mills (AIR 2003SC1966) that the words 'as may be prescribed' means 'if any prescribed'. Accordingly prior to the Gazette Notification No.275 dated 13.5.2009, the words 'as may be prescribed' occurring in section 18(1)(g) has to be interpreted as 'if any prescribed'. I am of the view



that if Rules are not prescribed at relevant point of time it cannot take away the substantive right granted by the Act. My view is that Rule 8(2)(d) which states that the date on which the entire fee is paid shall be the date of filing of application cannot be applicable at a point of time when fees were not prescribed as the substantive right granted by the Act under section 14 takes priority over procedural rules. A section or rule must be interpreted only when it serves a purpose. Accordingly, I have to hold that the date (2.4.2008) on which the application for registration of MRC 7351 was filed is the date of filing and consequently application under section 14 for registration of MRC 7351 is maintainable. But however it is needless to say that the applicant must comply with section 18(1)(g) and must deposit the fees forthwith (if not deposited earlier) as notified in Gazette No.275 dated 13th May 2009. However, the date of filing of application under section 14 in the instant matter shall relate back to date on which the application for registration under section 14 was filed under Rules 6(5) of the Rules. It is however clarified that in respect of application filed for registration of new varieties or an extant varieties about which there is a common knowledge on or after 13th May, 2009, the date on which the entire fee is paid as per the said notification will be the date of filing of the application. I have to declare 13th May, 2009 as



decisive date for determining the date of filing of application for registration of extant varieties about which there is a common knowledge or new varieties as it is the date on which the Protection of Plant Varieties and Farmers' Rights (Amendment) Rules, 2009 fixing fees for registration of a variety about which there is common knowledge or new varieties came into force. Thus the date of filing before 13th May, 2009 in respect of applications for registration of extant varieties about which there is common knowledge would be the actual date of filing under Rule 6(5) of the Rules and all applications for registration of extant varieties about which there is common knowledge filed on or after 13th May, 2009 the date of filing of applications for registration under section 14 would be the date on which the entire fee is paid. In the instant case the application under section 14 has been filed before 13th May, 2009 and accordingly the factual date of filing of application under Rule 6(5) of the Rules would be the date of filing and hence the Appl. No.2 of 2008 is maintainable.

Having held that in the instant matter the application for registration of MRC 7351 under section 14 is maintainable. The next issue that arises is whether the applicant has to establish his right to file an application under section 24(5) of the Act. The respondent No.1 and 1A has argued that an applicant



has to establish his right to file an application under section 24(5). I do not agree with the contention of respondent No.1 and 1A for the simple reason that it is only the interest of the applicant that is protected under section 24(5). A simple reading of section 24(5) makes it clear that it is only the interest of the applicant that is protected.

The next issue is regarding the maintainability of reliefs sought in Appln. No. 2 of 2008 filed under section 24(5). I am of the view that the maintainability of reliefs sought (except para 14(f) of Appln. No.2 of 2008) under section 24(5) and the issue of maintainability of appln. No.2 of 2008 against respondent farmers could be decided along with other issues during the course of trial. The reasoning behind my view is that the 'abusive act' referred in section 24(5) can be determined only in the trial as the facts have to be proved by evidence. The relief sought in para 14(f) is that all approval/ permission/ registration by the relevant regulatory bodies in respect of hybrid no. 883 and its parents and other hybrids derived using these parents may be kept in abeyance till the disposal of the matter. The counsel for applicant has argued that any application to other regulatory authorities in connection with hybrid 883 while the instant matter is pending and that selling, propagating, reproducing of the impugned seed amounts to an abusive act under section 24(5). I do



not agree with this contention. The subject matter of this application is MRC 7351 and not its parental materials. Further seeking approval/ permission/ registration from regulatory bodies cannot amount to abusive act by any stretch of imagination. Accordingly, I have no hesitation to hold that the relief sought to keep in abeyance the approval/ permission/ registration by relevant regulatory bodies with respect of hybrid no. 883 is not tenable.

The counsel for respondent No.1 and 1A has argued that there is no regulation for registration of an extant variety about which there is common knowledge. I had to point out that the Protection of Plant Varieties and Farmers' Rights (Criteria for Distinctiveness, Uniformity and Stability for Registration) Regulations, 2009 has come into force on 30th June, 2009 which prescribes the DUS criteria for registration of an extant variety about which there is common knowledge.

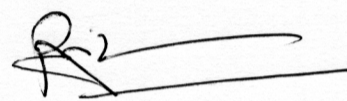
The other arguments and issues raised by the counsels are out of the issue and hence the same is not considered.

Consequently, the application filed by respondent No.1 and 1A to reject the application No.2 of 2008 is closed. The pleadings are complete in the main application. Accordingly, I direct the parties to file their evidence by way of affidavit in non-judicial stamp paper in accordance with law on or before



4.01.2010. The main Application No. 2 of 2008 (under section 24 (5) is posted for hearing on 8.01.2010 at 11:00 a.m. The Respondent No. 1A has filed an interim application for stay of proceedings as well as process of registration of the candidate variety involved in the proceedings. The said application is posted for hearing on 18.12.2009 at 11:00 a.m.

Given under my hand and seal on this the 12th day of November, 2009.



(R.K. Trivedi)
REGISTRAR

