IN THE HIGH COURT OF DELHI AT NEW DELHI

EXTRA ORDINARY CIVIL WRIT JURISDICTION

W.P(C) NO. 12069 OF 2015

IN THE MATTER OF:

MAHYCO MONSANTO BIOTECH
(INDIA) PRIVATE LTD. AND ANR ...PETITIONERS

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADDITIONAL AFFIDAVIT ON BEHALF OF UNION OF INDIA

I, Dinesh Swaroop Mishra, age 58 years old, S/o Late Shri B. S Mishra , currently working as Deputy Commissioner (Seeds), Government of India, Ministry of Agriculture and Farmers Welfare, Department of Agriculture , Cooperation and Farmers Welfare, New Delhi and present at New Delhi, do solemnly swear and affirm as under:

1. That I am the authorized signatory in the aforesaid matter and am well conversant with the facts of the case and as such am competent to swear this affidavit.

2. That the Respondent No.1 would like to place on record an additional affidavit in order to put forward before this Hon'ble Court the important aspect of the interplay between and operation and applicability of the relevant enactments relating to Intellectual Property Rights (IPRs) in relation to seeds and plant varieties as

petitioner made false statements that trait value is governed by Patents Act, 1970

3. That the Indian Parliament had enacted the Protection of Plant Varieties and Farmers Rights Act in 2001 ("**PPVFRA**") and had also subsequently amended the Patents Act, 1970 in 2002. This was done in accordance with India's rights and obligations under the TRIPS Agreement signed in 1994and India's submissions made to the World Trade Organization (WTO) in 1999 on Article 27(3)(b) of the TRIPS Agreement. Article 27(3)(b) reads as under:

"3. Members may also exclude from patentability:

b. plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

The submissions made by India to the WTO in 1999 on Article 27(3)(b) of the TRIPS Agreement are enclosed and the same are available at:

http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=145

A True Copy of India's submissions to the WTO are annexed hereto and marked as **Annexure R-1**.

4. That under these legislations, seeds and plant varieties had been specifically excluded from the Patents Act, 1970 in the interest of the country's food security and welfare of the farmers. [See Section 3 (j) of the Patents Act, 1970]. IPRs and protection are given in respect of seeds and plants only under the PPVFRA.To that extent, the Government of India's position is very clear that there is no conflict between the Patents Act and the PPVFRA in as much as the Patents Act expressly does not cover seeds and plants while the PPVFRA does.

5. That the policy of government is made clear through New Seed Policy, 2002 where rights given to breeders and farmers are quoted. It is abundantly clarified that transgenic varieties are protected like all other plant varieties under PPVFRA A True Copy of the Seed Policy 2002 is annexed hereto as **Annexure R-2**

6. That the national IPR Policy of the Government of India released in, May, 2016 also reiterates the same position. A True Copy of the National IPR Policy 2016 is annexed hereto as **Annexure R-3**.

7. That the protection and rights in respect of seeds and plants given under PPVFRA was done in order to encourage investments in Research and Development (R&D), both in the public and private sector for the development of new plant varieties. Though technology for developing GM traits may be patentable, after transformation of gene into a plant, the resultant transgenic plant is not patentable in India (unlike in USA where they are patentable) but the transgenic plant variety can be registered only under the PPVFRA. However, under Section 30 of PPVFRA, the researcher's rights provide for using even a protected variety for undertaking breeding so as to develop new varieties. Under Section 39, the farmers have also right to use and even sell the farm saved seeds of any protected variety including a transgenic variety. Therefore, it is clear that a GM trait can be accessed by any breeder to develop a new variety. However, to protect the interest of trait developer, the PPVFRA under Section 26 provides for an opportunity to him to claim for benefit sharing from the breeder of a new variety which is carrying the trait depending upon its contribution to the agronomic value of the variety. These legal provisions were made available in India to reward innovations and at the same time prevent monopolization of agriculture and seeds.

8. That in view of the above legal provisions, it is submitted that the Petitioners had understood and were aware that they would not be

able to license the Bt trait to any seed company as all seed companies as well as public sector breeders and State Agricultural Universities and ICAR could work with the transgenic varieties released by Monsanto (after the GM trait is approved by biosafety regulator) so as to develop their own new transgenic varieties and carry on with the multiplication and sale of seeds in compliance with PPVFRA. Similarly, farmers also would have used the varietal seeds produced in their farm as per the provisions under Section 39 of the PPVFRA. In the USA and other countries, the transgenic traits are approved for biosafety once for all after it is assessed and clears the prescribed bio-safety evaluation procedures. Once such transgenic event conferring a trait is released into the environment, there is no procedure for approving each hybrid or variety again, if it is carrying the approved transgenic event (GM trait). At present, any applicant seeking approval from the GEAC of new cotton hybrids carrying the approved event has to furnish a "No Objection Certificate" (NOC) from the trait developer. By misusing this system, Monsanto was able to force the seed companies undertaking breeding activity to sign one sided so called "technology license agreements" with onerous terms and condition, as per which the seed company has to pay a lump sum huge upfront fee of Rs. 50 Lakhs to its subsidiary Mahyco Monsanto Biotech (India) Private Limited and on top of it the seed company has to pay a huge amount of trait value as decided unilaterally by them every year on sale of each

packet of cotton seeds. In addition, using the NOC system, Monsanto was effectively able to block the public sector, cooperative sector and hundreds of domestic small and medium seed companies and drive them out of the cotton seed business, as they could not afford to pay such high upfront fee to Monsanto or agree for one sided conditions to sign such agreements. Further, to sign or not to sign a license agreement was at the sole discretion of Monsanto and a seed company has to depend purely on Monsanto's discretion. It is not thus difficult to see the plight of cotton seed companies, which had to depend upon monopolistic discretionary power of Monsanto, to survive in the cotton seed business.

9. By misusing the NOC stipulation, Monsanto was ableto monopolize Bt. cotton seed technology market through the mechanism of private contracts. These private contracts are very restrictive in nature and did not allow transfer of the GM trait into public hybrids as well as varieties which could be reused by the farmers thereby denying the farmers, the rights available under Section 39 of PPVFRA. It can be seen that there is no technology exchange or transfer though the agreement is titled as "Bollgard II® Technology License Agreement". The title of the agreement itself is a misnomer and misleading. No such technology was brought to India or developed in India. Monsanto has imported 100g seeds of a transgenic variety containing Bt trait to India by obtaining permission from RCGM. The said seeds were used to

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9. By misusing the NOC stipulation, Monsanto was ableto monopolize Bt. cotton seed technology market through the mechanism of private contracts. These private contracts are very restrictive in nature and did not allow transfer of the GM trait into public hybrids as well as varieties which could be reused by the farmers thereby denying the farmers, the rights available under Section 39 of PPVFRA. It can be seen that there is no technology exchange or transfer though the agreement is titled as "Bollgard II® Technology License Agreement". The title of the agreement itself is a misnomer and misleading. No such technology was brought to India or developed in India. Monsanto has imported 100g seeds of a transgenic variety containing Bt trait to India by obtaining permission from RCGM. The said seeds were used to

develop, from the Indian germplasm, new varieties containing Bt trait, using conventional breeding methods. Such new varieties are used to develop new Bt cotton hybrids. Monsanto's agreement does not allow development, production and sale of Bt cotton varieties, a restrictive condition, which helps Monsanto make huge profits but puts huge financial burden on the poor Indian farmer, as he has to purchase seeds of Bt cotton hybrids every season. If it were to be Bt cotton varieties, there would not have been any necessity for the farmers to purchase seeds every season, as varietal seeds can be used for seeds and sowing purpose for 3-4 generations by the farmers. But in such case Monsanto could not have made such huge and recurring profits, what it made by restricting the Bt traits in hybrids only. Thereby, it is necessary to clarify that Monsanto does not license any technology to Indian seed companies but actually supplies on a one time basis only 50g of seeds (which are not patentable under the Indian Patents Act) of a transgenic variety, which are used by the Indian seed company in its breeding program for developing new varieties. There is no technology transfer or training given by Monsanto to the licensee seed company. This aspect of only "seeds" being transferred under the Sub License Agreements executed by the Petitioners with seed companies has been specifically taken into account by the Hon'ble Bombay High Court in its recent judgment dated 11.8.2016. As such there can be no Patent Rights that can be exercised by the Petitioners over those seeds so transferred to the

seed companies thereby entitling them to royalties as claimed by the Petitioners.A True copy of the Judgment dated 11.8.2016 of the Hon'ble Bombay High Court is annexed hereto and marked as **Annexure R-4**

10. That even if the agreement was not signed, under the PPVFRA a seed company was entitled to use the seeds or flowers of the transgenic variety of the Petitioner' s parent company- Monsanto to develop new varieties. But by misusing the requirement of NOC from Monsanto for processing and granting approval for Bt cotton hybrids, Monsanto was able to force the seed companies to sign illegal and anti competitive agreements and through these agreements Monsanto locked major seed companies into binding contracts and created a monopoly. As major seed companies were locked with Monsanto and were barred from accessing alternate technology, new Bt. trait development and commercialization also got severely badly hampered and resulted in creation of captive market. Due to the prohibition imposed by Monsanto, stacking of their Bt trait with other traits could not be done as a result the potential technologies developed by public sector institutes such as National Botanical Research Institute (NBRI) remained unused.

11. That it is submitted that along with Bt hybrid cotton crop in the vicinity, it is not possible to grow non Bt. cotton crop as the pests, which cannot eat the Bt. crop, migrate to the crop without the Bt. trait and damage the crop completely. Hence, with 95% of

the cotton area covered with Bt cotton, the farmers have no choice but to go for Bt cotton only. Without the scope of accessing Bt trait, due to the NOC restriction,the relevance of the research output of the public sector research system in cotton crop became redundant. The choice to the farmers became limited and they had to depend on private sector bred hybrids. It is necessary to mention that there is no single Bt cotton hybrid or variety developed by public sector research system. It is a worrisome situation that one Multinational company was allowed to manipulate its way around the system and single handedly obstruct public sector research in cotton crop. The small seed companies dependent on public sector research output were deprived of their business. Similarly, seed companies under public and cooperative sector, dependant on public sector research, also suffered hugely and went out of cotton seed business. This would have cascading effect in years to come. The net result is, Monsanto could monopolize the cotton seed market using a few licensee seed companies with whom it signed license agreements and simultaneously eliminating hundreds of public, cooperative and private seed companies from market. It can be seen from the license agreements, as already mentioned above, that what Monsanto provided is not a technology but a few grams of seeds of a transgenic variety which cannot be patented. The patent, they brandish, is for a technology to create a transgenic variety, which cannot be extended under the Indian law to the transgenic varieties

or the seeds. Patent claims granted to Monsanto can be examined, which confirm the above stated position.

12. That it is important to mention that under the Patents Act, 1970, plants, animals and any parts thereof, seeds, varieties and essential biological processes are excluded from the Act. Section 3(h) of the Patent Act excludes method of agriculture or horticulture from the provision of the Act. Similarly, Section 3(j) excludes from patentability plants and animal in whole or any part thereof other than microorganism but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals. The Patent Act and its operation are different on several aspects compared to other foreign nations. India excludes Intellectual Property (IP) protection for plants and parts thereof, seeds, varieties (including transgenic varieties) and essential biological processes from Patent Act, while countries such as US gives IP protection for new varieties of plants, transgenic plants and seeds. However, the genetic modification process of creating of transgenic plants using biotechnology in laboratory is patentable in India. However, once the transgene is in the plant, such transgenic plant and the transfer of gene by seed companies into their proprietary varieties through breeding process cannot be protected under Patents Act. It is humbly submitted that the 2002 Amendment of the Indian Patents Act

and the PPVFRA are both in compliance with the TRIPS Agreement.

13. That in the light of the abovementioned background, it is evident that the Petitioners knowingly and wantonly are misleading the Hon'ble High Court and misusing legal process besides cheating farmers for unjust enrichment based on contracts which are also based on such misrepresentations. On this ground alone this petition ought to be dismissed.

14. That the Government of India had to step in to remove monopoly, which led to severe difficulties to millions of farmers due to unscrupulous practices adopted in name of non existent IPR under the Patents Act ,by promulgating the Cotton Seeds Price (Control) Order, 2015. It is pertinent to note that Monsanto and its associates, including MMBL have overcharged the farmers under Section 3 of the essential Commodities Act, 1955 to the tune of more than 5000 crores, significantly, when there can be no patent on plants, seeds, varieties, species and essentially biological processes.

15. That it is pertinent to highlight the fact that Monsanto and its subsidiaries in 1998 offered to sell its technology to the Government of India for a lump sum amount of Rs.18 crores. This figure was rejected by the Government of India at that time. Over the years through their manipulation and the operation of their

illegal agreements, they have managed to collect more than 6000 crores.

16. That as far as the interplay between the Patents Act and the PPVFRA, with respect to seeds and plants, is concerned, there is no conflict as of now as the Patents Act excludes seeds and plants whereas the PPVFRA provides certain IP rights to them with desirable checks and balances as explained above. The PPVFRA is a specialized enactment and a complete code only to cover seeds and plant varieties and was formulated with the help of experts in plant breeding and agriculture sciences. It is a well balanced enactment taking care of the interest of all the stakeholders: The GM traits or any other innovative traits in plant varieties developed using modern breeding tools can be encouraged and rewarded through the benefit sharing provisions under Section 26. Thereby Section 26 of PPVFRA alone protects the interest of the trait developer, if he approaches the PPVFR Authority claiming benefit sharing. But the law does not provide for requirement of a license agreement with the trait developer or even an NOC from him to access Bt trait from a transgenic plant as per section 30 of the PPVFRA. This has been so in the interest of all stakeholders as the trait can reach to maximum number of farmers through multiple breeders in the interest of Indian agriculture and national food and nutritional security. For the same reason, the developer of a trait is rewarded by benefit share in the sale of all seeds of varieties carrying such a trait. This is a

win-win proposition for the breeders as they have right to access any GM trait as well as the trait developer, who is rewarded under the benefit sharing mechanism. The farmers would benefit from combination of superior genetics with innovative traits in a competitive market. Under such a competitive environment, perhaps the Government of India would not have to intervene with price controls but intervene only in a case of a necessity.

DEPONENT

दिनेश स्वरुप मिश्रा/DINESH SWAROOP MISHRA
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कृषि भवन, नई दिल्ली/Krishi Bhawan, New Delhi-110001

VERIFICATION

I, the above named deponent, do hereby verify that the contents of the above noted affidavit are true and correct and state that nothing material has been concealed there from nor any part of it is false.

Verified at New Delhi on this day of August, 2016.

DEPONENT

दिनेश स्वरुप मिश्रा/DINESH SWAROOP MISHRA
उपायुक्त (बीज)/Dy. Commissioner (Seeds),
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