

CHAPTER- 5

Judicial Approach

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5.1 Introduction

Law is a matter of interpretation and Judicial decisions lends meaning to the prevailing law and at times, provides meaning by filling in the missing gaps in the existing laws. Two important decisions, one by the United States Supreme Court and the other by the Board of Patent Appeals, paved the way for patent protection for plants under 35 U.S.C. § 101. In the first of these decisions, *Diamond v. Chakrabarty*, the Supreme Court, in a 5-4 ruling, held that a live human-made microorganism was patentable under § 101 as a "manufacture" or "composition of matter."¹¹¹ Five years later and in reliance on *Chakrabarty*, the Patent Board of Appeals and Interferences held in *Ex parte Hibberd* that 35 U.S.C. § 101 authorizes utility patent protection for sexually reproduced plants, specifically, corn varieties¹¹². In this chapter the researcher has attempted to study and analyze the judicial position in USA, Canada, Europe and India in respect of Plants, Plant varieties, IPR and Rights of the farmers.

5.2 India, TRIPs Agreement and Supreme Court

Article 27 of the Agreement deals with Patents, Patentability of processes and Inventions. The patentable subject matter according to the Agreement constitutes any inventions, whether products or processes, in all fields of technology, provided that they are novel, involve an inventive/innovative step and are capable of industrial application. However, the following have been excluded from the ambit of patentability:

- Diagnostic, therapeutic and surgical methods for the treatment of humans or animals.
- Plants, animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.
- Under the provisions of the Agreement the member nations have to provide protection for plant varieties either by patents or by an effective sui generis system or by any combination thereof. The term of protection available is usually 20 years counted from the filing date of the patent application. Under provisions of

¹¹¹*Diamond v. Chakrabarty*, 447 U.S. 303,309 (1980).

¹¹²*See Ex Parte Hibberd*, 227 U.S.P.Q. (DNA) 443 (1985).

Article 21 of the Agreement, member nations may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. Further, Article 29 makes it imperative that the patent application discloses the invention in a manner which is sufficiently clear and complete for the invention to be carried out by a person skilled in the art. The same Article further provides that member nations can call upon applicants to also keep a check on the corresponding foreign applications. Article 31 of the Agreement has provisions that allow grant a compulsory license for pharmaceuticals by the government of a member nation without the consent of the patentee: subject to certain conditions. Compulsory license may be allotted only in the following conditions are fulfilled:

- Firstly, prior negotiations with the patent holder by the person/company applying for the license on reasonable terms. Only if these negotiations fail can a compulsory license be issued.
- Secondly, after the issuing of a compulsory license the owner of the patent has to be paid adequately. The Agreement says “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”, however, it does not define “adequate remuneration” or “economic value”. Therefore, compulsory licensing ought to meet certain additional requirements.

As per Article 31, the following provisions have to be respected if a license is granted without the authorization of a patent holder:

- Authorization of such use shall be considered on its individual merits;
- Such authorization shall only be considered if the proposed user has made significant efforts to obtain the authorization from the right holder on reasonable commercial terms. However, this right is subject to waiver by state in case of a national emergency;
- The scope and duration for such license shall extend only up to the time as the purpose of its granting required;
- The use is to be non-exclusive;
- The license shall be non-assignable;

- Any such use shall be authorised predominantly for the supply of the domestic market of the member authorizing such use;
- Such a license shall stand terminated once the circumstances which required adequate protection of the legitimate interests of the license holder cease to exist;
- The right holder shall be granted adequate remuneration;
- The legal issues arising to the license shall be addressed by a distinct higher authority;
- In case, a patent “second patent” cannot be exploited without infringing another patent “first patent” then certain conditions are to be applied.¹¹³

5.2.1 Vandana Shiva and Ors. v Union of India and Ors¹¹⁴

5.2.1.1 Background of the Case

India was to sign TRIPs Agreement and agree to Article 27(3)(b), this decision of India was opposed by a few Environmentalist and Activist. Their main contention was that by allowing the patenting of Microorganism government if India would be affecting the life of the citizen through a handful Multinational.

In the case of **Vandana Shiva and Ors. vs Union of India and Ors** where the fact of the case was four petitions were filed writ of mandamus for restraining the union of government from being signatory the TRIPS agreement article 27(3)(b). The petitions were filed on the 7th April, 1994 seeking a writ of mandamus restraining the Union of India from signing/ratifying the existing version of GATT Treaty or restraining restrained the Union of India from agreeing to sign and signing Art. 27(3)(b) of the TRIPs Agreement. Further they also wanted the exclusion on life-forms including plants, animals, human beings produced through biological or microbiological processes, whether natural or modified as it was against the Public morality and Order. They also demanded the direction against the Union of India from violating the fundamental rights. And also demanded the protection while signing the Treaty, the right to health and nutrition ensured by the existing Indian intellectual property regime and patent system which had ensured the exclusion of patents on life-forms and patents on products in the area of health and agriculture

¹¹³Arunima Singh, “Towards The TRIPS Agreement”, Academike
<https://www.lawctopus.com/academike/trips-agreement/>

¹¹⁴*Vandana Shiva and Ors. v Union of India and Ors* [(1995) 32 DRJ 447]

and also rights of farmers including the right to seed as owners, producers, breeders and innovators etc.

5.2.1.2 Issue

The issue was to examine the scope of Judicial Review of India's International obligations. Further the point to be decided by the Hon'ble Supreme court, under Article 226 of the COI can intervene or restrain the Union of India. From entering into Treaty obligation and whether the Hon'ble Supreme Court can go into the validity of the Treaty provision and economic policies that are at the root of the Treaty, even before a law is made by legislature.

5.2.1.3 Decision

It was held by the Supreme Court the writ petition cannot be entertained. And the petition was dismissed.

5.2.1.4 Analysis

The Indian Supreme Court examine the exercise of the scope if Judicial Review in case of International Obligations in different countries and also examined the earlier judicial decisions by Supreme Court of India and concluded that the writ petition cannot be entertained in the light off its earlier judicial decisions.

5.3 Plants, GM Crops and Patentability

The Issues relating to patentability of GM Crops and various plant varieties was discussed and decided by various courts in different cases which the Researcher shall be discussing hereforth.

5.3.1 J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc¹¹⁵

In the case of **J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc** for the first time Supreme Court of the United States held that utility patent may be issued for crops and other flowering (sexually reproducing) plants under 35 U.S.C. § 101¹¹⁶ despite distinct of protections available under Plant Variety Protection Act and the Plant Patent Act. J.E.M was the first united court decision to rule on the eligibility of the patenting under the Utility Patent Act¹¹⁷

¹¹⁵ *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534U.S. 124 (2001)

¹¹⁶Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.

¹¹⁷ Gerald J. Mossinghoff, "High Court Upholds Patents on Genetically-Enhanced Seeds", LEGAL. BACKGROUNDER, Jan. 25, 2002,

5.3.1.1 Background of the Case

The fact of the case in brief Pioneer had the patent that covered manufacture, use and sale of various hybrid corn seed products including plants and seeds. Now J.E.M. Ag Supply, Inc., doing business as Farm Advantage, Inc., purchased patented hybrid corn seeds from Pioneer in bags bearing the foregoing label license. Farm Advantage resold these bags without authorization from Pioneer. So pioneer sued the Farm advantage and other distributors alleging that they are making, using, selling, or offering for sale corn seed” covered under the patents. As pioneer sells its patented hybrid seeds under a limited label license that provides: "*License is granted solely to produce grain and/or forage*". The licensee said that it does not extend to use of seed from such crop for multiplication and also prohibits the use of such seed for seed multiplication or for production or development of a hybrid or different variety of seed. On which J.E.M. response was that Pioneer’s patents that claims to confer protection for corn plants are invalid because sexually reproducing plants are not patentable subject matter within the scope of 35 U.S.C. § 101. Where J.E.M maintained that the Plant Patent Act of 1930 (PPA) and sets forward the exclusive statutory means for the protection of complex plant life.

5.3.1.2 Issues

J.E.M was whether sexually reproducing plants, specifically hybrid and inbred corn plants are excluded from the scope of the Utility Patent Act.¹¹⁸

5.2.1.3 Decision

5.3.1.3.1 Lower Court

Pioneer brought suit before the United States District Court for the Northern District of Iowa.¹¹⁹ Both parties moved for summary judgment, and the court granted Pioneer's motion, while denying Farm Advantage's motion. The court rejected Farm Advantage's assertion that sexually reproducing plants, like the varieties of genetically engineered corn covered by the patents at issue, are not patentable subject matter under 35 U.S.C. § 101. The court determined that established interpretative practice and congressional intent supported a broad reading of the provision.

¹¹⁸ *J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 130 (2001).

¹¹⁹ *Pioneer Hi-Bred Int'l, Inc. v. J.E.M. Ag Supply Inc.* • 49 U.S.P.Q. 2d 1813 (N.D, Iowa 1998),

On interlocutory appeal, the United States Court of Appeals for the Federal Circuit unanimously affirmed the district court's decision.¹²⁰ The court rejected Farm Advantage's argument that Chakrabarty "does not apply to plants because plants were intended to be excluded from the patent system, as evidenced by the enactment of other statutes to provide protection to plants." Accordingly, the Federal Circuit held that sexually reproduced seeds are patentable subject matter under 35 U.S.C. §101. Farm Advantage then successfully petitioned for certiorari to the United States Supreme Court.¹²¹

5.3.1.3.2 Supreme Court

On December 10, 2001, in a six to two opinion, the United States Supreme Court affirmed the Federal Circuit's decision and upheld Pioneer's seed patents.¹²² The Court examined the different rights and types of protection afforded agricultural plants under each of the three applicable intellectual property systems (PPA, PVPA, and Utility Patent Act) and concluded that the enactment of the PPA and the PVPA did not remove plants from the more general coverage of the Utility Patent Act.¹²³ Supreme Court in its decision rejected the Patent Commissioner's argument that living things could not be patented, saying: "The relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." The Court further added when Congress passed the PPA in 1930 it did so because it thought plants could not be protected under the regular patent law. Final conclusion by the court was that newly developed plant falls within the terms of Patent law and that neither the PPA nor the PVPA limits the scope.

5.3.1.4 Analysis

The decision in J.E.M is a landmark one and has an implication on Biotechnological Companies producers and agriculture society in general. Also it has clarified the position of PPA, PVPA and Utility Patent Act by holding that they

¹²⁰ *Pioneer Hi-Bred Int'l, Inc. v. J.E.M. Ag Supply, Inc.*, 200 F.3d 1374 (Fed. Cir. 2000).

¹²¹ *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int, Inc.*, 200 F.3d 1374 (2000). *cert. granted*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) (No. 99-1996),

¹²² *J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124,126 (2001). Justice Thomas was joined in the opinion by Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, David Souter and Ruth Bader Ginsberg. Justices Stephen Breyer filed a dissenting opinion in which John Paul Stevens joined. Justice Sandra Day O'Connor took no part in the consideration or decision of the case. Justice Sandra Day O'Connor recused herself because of a possible connection to DuPont. *See* Richard A. Shanks & Joseph Mendelson, *Crops or Courts?*, 17 TEX. LAW.

¹²³ *ibid*

are complimenting each other. The, issuance of utility patents has taken away the farmer's traditional right to save seed.¹²⁴ The issuance of utility patents has also resulted in the increased use of seed purchasing agreements between the farmer and the seed company.

5.3.2 Monsanto Technology LLC v Cefetra BV and Others¹²⁵

In the case of Monsanto Technology LLC v Cefetra BV and Others, the first European Court of Justice (ECJ) interpretation of the twelve-year-old European Union Biotechnology Directive (Directive 98/44/EG), which established the foundation for patenting genetic material in member countries.¹²⁶ The ECJ's decision effectively limited the scope of the directive, and consequently, European biotechnology patent protection by determining that genetic patents are only effective when the patented gene performs the function for which it is patented.¹²⁷

5.3.2.1 Background of the Case

Monsanto, the world's largest seed company, was the holder of European patent EP0546090 protecting their 'Roundup Ready' (RuR) soybeans, which express an enzyme conferring resistance to the herbicide marketed by Monsanto as ROUNDUP.

The patent included the claims to both isolated DNA sequences and specific DNA sequences encoding the enzyme. In 2005 and 2006, Monsanto sued European importers of Argentine soybean meal in Spain, the United Kingdom, Denmark, and Holland, for infringing on three of its European biotechnology patents.¹²⁸ Monsanto seized cargos of soy meal imported into Amsterdam and found their patented DNA sequences to be present in the meal thereby establishing that the meal was derived from RuR crops grown in Argentina. Monsanto subsequently brought an action in the District Court of The Hague against the Dutch importer, Cefetra, for infringement of the European Patent.

5.3.2.2 Issues

¹²⁴ *ibid*

¹²⁵ Case C-428/08, *Monsanto Tech. LLC v. Cefetra BV*, 2010 E.C.R. 7, available at http://curia.europa.eu/jcms/jcms/j_6/.

¹²⁶ Richard Van Noorden, DNA Patent Ruling Hinders Monsanto, *Nature*, July 9, 2010, *available at*:

<http://www.nature.com/news/2010/100709/full/news.2010.345.html>.

¹²⁷ Case C-428/08, *Monsanto Tech. LLC v. Cefetra BV*, 2010 E.C.R. 7.

¹²⁸ Gareth Morgan *et al.*, *Expert Analysis of Recent European Developments Cargill vs. Monsanto*, 27 *Biotechnology L. Rep.* 109,

- (1) Interpretation of the Biotech Directive
- (2) The relationship with national laws
- (3) the significance of the date on which the Biotech Directive entered into force and whether it was necessary to take into consideration the TRIPS Treaty, in particular Articles 27 and 30 relating to patentable subject-matter and the exceptions to patent-holders' rights.

5.3.2.3 Decision

On the first issue which focused on interpretation of Article 9 of the Biotech Directive and in particular, whether the DNA sequence comprising part of the imported material must 'perform its function' at the time of the alleged infringement.

ECJ concluded

*"...the protection provided for in Article 9 of the Directive is not available when the genetic information has ceased to perform the function it performed in the initial material from which the material in question is derived."*¹²⁹

Regarding these submissions, the ECJ held this analysis of the situation to be unacceptable. Instead, the court, closely following the Advocate General's Opinion on this matter, narrowly interpreted the Biotech Directive as only allowing for 'purpose-bound' protection for gene sequences. On the basis of Article 9 and the principle of 'purpose-bound' protection, the court decided on the facts of the case that the claimed 'resistance gene' was no longer performing its specific function in the dead soy meal and as such, importation of the meal did not infringe Monsanto's patent.

On the second issue addressed the issue of whether the Biotech Directive prevents national legislation offering wider protection for biotechnological inventions, for example gene sequences as products per se. On this it was held that a minimalist harmonisation approach would not allow the Directive to fulfill its intended objectives, namely the harmonisation of biotech patenting across Europe.

¹²⁹Case C-428/08, *Monsanto Tech. LLC v. Cefetra BV*, 2010 E.C.R. 7.

And in the relation to the third issue, the ECJ confirmed that new rules apply as a matter of principle immediately to the future effects of a situation which arose under the old rule. As such, the fact that the patent at issue was granted before the Biotech Directive came into force did not affect the answers to questions one and two. Secondly, the ECJ agreed with the Advocate General's that there was no inherent conflict between the current interpretation of the Biotech Directive and the provisions of the TRIPS Agreement.¹³⁰

5.3.2.3 Analysis

The judgment is binding on member states as regards interpretation of the provisions of the Biotech Directive. Thus, it has direct relevance to the proprietors of European gene patents in the Biotech industry seeking to prevent the import of harvested material derived from transgenic plants grown in territories where no patent protection is available or is difficult to enforce.

5.3.3 Sungro Seeds Ltd v. Union of India and Anr¹³¹

5.3.3.1 Background of the Case

In the case of **Sungro Seeds Ltd v. Union of India and Anr** the question was raised in this case was to be decided is whether the parent lines of extant hybrid varieties can be considered as novel plant varieties for the purposes of registration under the Act.

5.3.3.2 Issue

Whether the parent lines of extant hybrid varieties can be considered as novel plant varieties for the purposes to get registered under the Protection of Plant Varieties and Farmers Right Act, 2001.

5.3.3.3 Contentions

The hybrid seeds obtained from crossing the parental lines are distinct in traits and characteristics from the parent lines and cannot be considered as propagating or harvested material of the parental line varieties.

5.3.3.3.1 Contention of the petitioners

The petitioners contended that a 'variety' is defined 'by the expression of the characteristics' and as the characteristics of the hybrid variety are different from

¹³⁰ *Monsanto v Cefetra BV and Others*, C-428/08

¹³¹ *Sungro Seeds Ltd Vs. Union of India and Anr*, 2015, W.P.(C) 4366/2012

the parental line, the parent lines could not be considered the same as the hybrid variety.

The petitioners further contended that the development and sale of hybrid seeds would not amount to exploitation of the parental lines. It was also contended that the words disposed of as used in Section 15(3) of the Act, could not be read in isolation and would not include self-use and ought to be read synonymous to sale. It was submitted that the word disposal contemplates transferring of title from one party to another party and in the process of hybridization, the title of parent lines were not parted with or transferred to third parties and, therefore, the sale of hybrid seeds would not amount to disposal of parent lines.

The PPVFR Act preamble indicates that “An Act to provide for establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants”.

It was contended on behalf of the petitioners that the parent lines are the proprietary assets of breeders, which are kept secret and not placed in the public domain.

5.3.3.3.1 Contention of the Respondents

The interveners in the case contended as under:

- i. The hybrid seeds produced by crossing of the parental lines, were the propagating or harvested material of each of the parental lines and the commercial exploitation of such hybrid seeds for more than one year prior to the date of application, would make the parent line ineligible to be registered as a new variety.
- ii. The Act did not require that the harvested material of a variety should also be a variety in itself or that it should be able to reproduce the parent variety.
- iii. There is a distinction sought to be drawn between the US/ European laws and the Act was erroneous. The learned counsel for the interveners contended that the word ‘deemed’ could not, in all cases, be read to create a legal fiction and in some cases, may also be used to mean what is obvious. To support this contention, they relied upon the decision of the Supreme Court in Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore: (1980) 3 SCC 358 in support of their contention.
- iv. The discretionary power exercised by an authority under the Act should not be interfered with unless it is established that the exercise of discretion is arbitrary and capricious and in violation of law. It was contended that judicial review in technical matters was limited and warranted only if the decision of the authority was held to be arbitrary or mala fide. The interveners relied upon the following decisions of

the Supreme Court in support of this contention: Federation of Railway Officers Association and Ors. v. Union of India: (2003) 4 SCC 289, Tata Iron & Steel Co. Ltd.

5.3.3.4 Decision of the Court

Supreme Court answered in negative. It was held that that if the hybrid falls under the category of extant variety about which there is common knowledge then its parental lines cannot be treated as novel and could not be registered as “new” plant varieties under the Protection of Plant Varieties and Farmers’ Rights Act, 2001 (hereafter the ‘Act’).

5.3.4 Nuziveedu seeds ltd. and ors. vs. Monsanto Technology Llc and Ors. ¹³²

5.3.4.1 Background of the case

Monsanto is an American multinational agrochemical and agricultural biotechnology corporation, whereas Nuziveedu Seeds is an Indian agribusiness company, known to be among the largest hybrid seed companies in the country. Monsanto had licensed its patent IN214436 relating to Bt. Cotton technology to different Indian companies including Nuziveedu Seeds, for which a lifetime fee of Rs. 50 lakh was charged along with a recurring ‘trait value’ as compensation. The Indian companies utilized said patented technology to produce cotton seeds that are resistant to boll-worm attacks.

The Indian companies demanded Monsanto to reduce the trait fee as the State Governments were passing new price control orders to fix the trait fees. Monsanto refused to reduce the trait fees. Consequently, the Indian companies stopped paying royalties to Monsanto since October 2015. Subsequently, Monsanto sent a notice to Nuziveedu in November 2015 regarding the termination of their sub-license. Nuziveedu and few other Indian companies approached Competition Commission of India (CCI) against Monsanto and alleged Monsanto of anti-competitive practices including “the abuse of dominant position” and “anti-competition agreements”.

¹³²Nuziveedu seeds ltd. And ors. Vs Monsanto Technology Llc And Ors. 2018 SCC Online Del 8326

Monsanto terminated its contract and initiated arbitration proceedings for the recovery of the due amount of Rs. 400 crores from the Indian companies. Additionally, a lawsuit was initiated by Monsanto before Delhi High Court against Nuziveedu Seed Ltd., Prabhat Agri Biotech Ltd. and Pravardhan Seeds Pvt. Ltd, seeking an injunction for patent and trademark infringement. As a response to the infringement allegations, the defendants filed a counter-claim for the revocation of the plaintiff's patent. The defendant urged to revoke the patent as per the provisions of Section 8, Section 10(4) and argued that the patent is invalid, as it falls within the scope of Section 3(j) and 3(h) of Patents Act.¹³³

5.3.4.2 Issues

Whether the process that Monsanto described nucleotide sequence in its claims which was given patent results in the cry2ab gene, its synthesization and insert into the plant cell, consequential in donor transgenic seeds and plants fall **within the exceptions covered under the 3j of the Patent Act**. So, Nuziveedu filed a counter claim under section 64 of The Patent Act, 1970, relying on various grounds such as absence of novelty, absence of obviousness, complete specification not revealing any "invention", deficiency in complete specifications and claim, false suggestions or representations, non-compliance of the requirements of Section 8, non-disclosure of source or geographical origin and the invention claimed in the complete specification being not useful. Apart from the above grounds, Nuziveedu focused on Section 3 (j) of the Patent Act, 1970, which served as the main ground for the revocation of the mentioned Patent.

Following three contention were raised by the petitioners

- i) Patent cannot be granted- Section 3(j) of Patent Act, 1970 attracted
- ii) Protection of Plant Varieties and Farmers' Rights, Act
- iii) Sub licensing issues and violation of Trademark

5.3.4.1.1. Patent cannot be granted- Section 3(j) of Patent Act, 1970 attracted

¹³³<http://www.invntree.com/blogs/monsanto-vs-nuziveedu-patent-dispute-brief-analysis-of-judgement>

Nuziveedu contended that Section 3(j) clearly explains as to what are not an 'inventions', i.e. "plants and animals in whole, or any part, thereof, other than microorganisms, but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals." Thus, Nuziveedu asserted that claim 25 of the Patent relates to 'nucleic acid sequence', application of which is only in terms of "a plant cell, a seed, a transgenic plant "or a plant variety". Thus, the specification does not provide any industrial application. Since, a plant or seed, which has such a nucleic acid sequence containing the Cry2Ab gene, cannot be granted a patent in India as this (claim 25) falls directly within Section 3(j) of the Act." Further, Nuziveedu contended that Bt. Trait in Cotton Hybrid varietal plants is an essential biological process, and did not regard cross-bred plants and animals as patentable because they are better regarded as discoveries which happens naturally and therefore, it's just a discovery which has taken place in a laboratory. Where all together 27 claims were granted to the Monsanto in which Claims Nos. 25¹³⁴ to 27 related to a particular chemical product i.e. the nucleic acid sequence, Claims 1 to 24 were process claims which dealt with genetic engineering process or biotechnology methods to insert the nucleic acid sequence (claimed under claim nos. 25 to 27) into a plant cell.

Now Monsanto interpreted that the term 'Plant' under section 3(j) as a "*living organism*" and further averred that exclusion would apply to biological entities, *per se* and not to inventions, which properly fit the description of "*micro-organisms*" that are excluded specifically from the mischief of the provision. It further explained that "*DNA*" is the "*substance responsible for all the processes within a living organism*" and a 'gene' is merely a code which is used for production of a protein in a living organism, thus it is not a living thing. Therefore the patent matter subject is the Manmade DNA sequences comprising the CryAb gene which confers insect resistance to plants, when incorporated into the plant's genome. They further stressed on that no part of the DNA sequence is a living organism and thus DNA cannot be called as "part" of a plant as well, because it is not like an organ of an

¹³⁴“A nucleic acid sequence comprising a promoter operably linked to a first polynucleotide sequence encoding a plastid transit peptide, which is linked in frame to a second polynucleotide sequence encoding a Cry2Ab Bacillus thuringiensis 8-endotoxin protein, wherein expression of said nucleic acid sequence by a plant cell produces a fusion protein comprising an amino-terminal plastid transit peptide covalently linked to said 5- endotoxin protein, and wherein said fusion protein functions to localize said 5-endotoxin protein to a subcellular organelle or compartment.”

animal or the physical attribute of a plant, like flower, fruit, etc. And this method of creating transgenic varieties and micro-organisms that are new and inventive transgene and therefore, very much a Patentable subject matter under the Patents Act.

5.3.4.1.2. Protection of Plant Varieties and Farmers' Rights Act, 2001

The second argument was since the Micro-organism' has not been defined by Plant Variety Act, Nuziveedu provided a Cambridge Dictionary definition of 'Micro-organism' as "*A living thing that on its own is too small to be seen without a microscope, such as bacteria, germs, viruses.* Thus, to contradict to the Monsanto's contention that their Patent claim is inanimate and Patentable. Nuziveedu further argued on the India's ratification on the TRIPS Agreement and also about the objective with which the PPVFR, to protect plant varieties and the rights of the breeders, to encourage the development of new varieties of plants which should be rather protected.

But, Monsanto rebutted by maintain that the patented 'trait' or DNA is beyond the scope of the expression "plant variety" as defined as 'plant variety' with a commentary note which comprehensibly excludes '*such a plant or part(s) of the plant could be used to propagate the variety*), a trait (e.g. disease resistance, flower color), a chemical or other substance (e.g. oil, DNA), a plant breeding technology (e.g. tissue culture)" by International Convention for the Protection of New Varieties of Plants UPOV. And further also explained the amendments in the Patent Act 2002 and 2005 and disused about the Section 3(j) and Section 2(1) (j). Therefore it is clear that the patentee is entitled to Patent protection for the invention resulting from innovations and skill and the subject claims being products or processes of biotechnology. They further observed that when the patented invention is injected into the cotton seeds which provides a hybrid variety, then that hybrid variety can be protected under Plant Variety Act and the invention will be protected under Patent Act.

5.3.4.1.3. Sub licensing issues and violation of Trade Mark

The termination of the Sub license was perfectly legal was alleged for Nuziveedu Seeds as they failed to provide the required trait value to Monsanto for using their technology. So they injuncted Nuziveedu from using their Patented technology and abbreviation of their trademarks BG I and BG II. To which Nuziveedu claimed that

by virtue of seeds included under the Essential commodity Act, 1955, the Central Government was empowered to fix the trait value of the seeds exceeding to which one cannot terminate the agreement on the grounds of non-payment of licensee fee. Further, Nuziveedu said that technology was only capable to be protected under Plant Variety Act, which was actually neglected by the Monsanto through avoiding the provisions of Benefit Sharing arrangements with the seed companies who had actually developed New Bt. Cotton plant varieties expressing Bt trait the subject which is patented. To which Monsanto referred the judgment of Percy *Schmeiser* case¹³⁵the "purposive construction" was applied to the similar facts Where Monsanto's gene patent was infringed by the use of an unauthorized person. The person developed and commercialized seeds containing the patented gene, since the gene was present throughout the seed, conferring the advantageous trait to the plant and this amounted to taking advantage of the technical contribution of the patentee. Same way Monsanto claimed that Nuziveedu has also taken full advantage of the functionality of insect tolerance arising solely from the use of the patented DNA sequences in their cotton hybrid, thereby infringing their subject Patent. Thus, Nuziveedu was infringing Monsanto's Patent, as it was using their invention to bring out the ultimate product.

To all this above argument the Delhi High Court upheld Nuziveedu's Contention and observed that protection under Plant Variety Act and Patent Act are not complimentary but are exclusive of each other and Monsanto Patent protection was incorrect as it should have been protected under the Plants Variety Act, looking at the nature of invention.

Further the reasons stated above by Monsanto had failed to disclose the details as well as source of its invention. Court held that the subject patent falls comes under the ambit of Section 3 (j) of the Patents Act i.e. the said inventions are not patentable. Therefore, Counter claim filed by Nuziveedu is consequently allowed and gave Monsanto an opportunity to restore its right in there subject Patent, by allowing them to seek for registration of the same within three month from the date of this judgment.

¹³⁵*Percy Schmeiser v Monsanto*, 2004 1 SCR 902

With regard to Trade mark infringement, the Court observed that the defendants do not have any malafide intention to use the Plaintiff's marks "*BOLLGARD*" or "*BOLLGARD-II*" rather, Nuziveedu is only using the abbreviation of the name which is permitted under the Act. Further court directed Monsanto to continue on the issue of Sub licensing.

5.3.4.3 Supreme Court Decision

On 8th of January 2019, Supreme Court set aside the judgment of a Division Bench of the Delhi High Court which had revoked Monsanto's patent and remanded the matter to the trial court. The issue of patent validity remains open and has not been decided by the court.

The relevant extract from the SC's judgment is reproduced below:

The plaintiffs had never consented to a summary adjudication regarding the validity of its patent. The consent referred to by the Division Bench, had been given only to decide whether the plaintiffs' patent had been infringed or not, as also the scope of the patent, so as to allow or disallow the relief of injunction. It is incomprehensible that the plaintiffs holding a valid registered patent under the Act nonetheless would have agreed to a summary consideration and validation/invalidation of the patent.

Simply put, the Supreme Court refused to believe that Monsanto could have taken the "incomprehensible" decision to waive its right to a trial in a patent invalidity proceeding. The issue of patent validity remains open and has not been decided by the court, as has been wrongly reported by the media.

5.3.4.4 Analysis

The case mainly focused on the issue of Patent which was granted to the Monsanto has wrongly granted under Indian Patent Act.

In this case, the Delhi High Court has given three months' time to Monsanto to get it registered under PPVFR, because, the Division Bench of the Delhi High Court has upheld the decision of the Single Bench of High Court.

“The conclusion that the court draws therefore, is that transgenic plants with the integrated Bt. Trait, produced by hybridization (that qualifies as an “essentially biological process” as concluded above) are excluded from patentability within the purview of section 3(j), and Monsanto cannot assert patent rights over the gene that has thus been integrated into the generations of transgenic plants.”

Hence, Delhi High Court has rejected the grant of patent and has held that S. 3 (j) is attracted. And has rightly invalidated Monsanto’s patent on Bt Gene.

This judgment is landmark in itself and evoked mixed response. There are a few whoopine that the Delhi High Court decision is erroneous. They are of the opinion that the Court has failed to appreciate the Patent claim construction. Further after coming of the Supreme Court judgment, all three judgments rendered in this case so far by the trial court, the Division Bench and the Supreme Court have been of contradicting opinions.

However, the researcher agrees with the decision of the Delhi High Court. The Researcher opines that the Delhi High Court has rightly directed Monsanto to approach and register under PPVFR as it has rightly held that, it is a Plant variety and not invention

5.3.5 Maharashtra Hybrid Seeds Co Ltd Vs. UOI and ors¹³⁶

In the Case of **Maharashtra Hybrid Seeds Co Ltd vs. UOI and ors.** This is the case dealing with matters related to PPVFR Act, 2001

5.3.5.1 Background of the case

The petitioner filed an application for registration of a novel variety of cotton that it had developed. The said application was published in the Plant Variety Journal. The respondent filed an opposition to the application; however, the opposition over-shot the stipulated period of 3 months. The Registrar accepted the delayed opposition thereby condoning the delay.

¹³⁶*Maharashtra Hybrid Seeds Co Ltd Vs. Uoi and ors, 2013, W.P.(C) 4527/2010*

5.3.5.2 Issues

The main question before the court was whether the Registrar had the power to condone a delay in matters regarding filing of opposition.

5.3.5.3 Decision

It was held that Rule 32 should be read as directory and not mandatory. In this regard, the court also held that the Central Govt. has the power to make such a rule and this rule is not liable to be struck down.

5.4 Patent Exhaustion

Once an unrestricted sale of the patented invention is made, the rights of the patent holder with respect to the product are exhausted and this is called as the Doctrine of Exhaustion or First Sale Doctrine. The rationale underlying the Doctrine of exhaustion is that a patent holder, who has already been rewarded through the first sale must not be allowed to profit repeatedly on the same good by controlling its use, resale or distribution.

Patent exhaustion may be classified into International, National and Regional based on the extent of exhaustion. International exhaustion is a scenario where the patent holder loses his patent rights over the product, when the product is sold anywhere in the world. For example: If Neo has a patent in India and if the patented product is sold in USA with his authorization, his patent rights over the product in India will be exhausted. India and Japan are two examples that follow International exhaustion of patent rights.

Regional exhaustion is a scenario where the patent holder exhausts his rights over the product when the patented product is sold in a particular region. Countries in the European Union follow the principle of regional exhaustion. For example, if Neo sells his patented product in France, his patent rights over the product will be exhausted in Italy as well because both France and Italy are members of the European Union.

The issue of application of Doctrine of Patent Exhaustion had arisen in the landmark Judgment of *Vernon Hugh Bowman v. Monsanto Co.* which is popularly known as Bowman Case.

5.4.1 Vernon Hugh Bowman v. Monsanto Company, et al.¹³⁷

The case began against the Indiana Farmer Vernon Hugh Bowman in 2007 when the Monsanto Company sued him for infringing the patent.

5.4.2 Background of the case

In this case *Vernon Hugh Bowman v. Monsanto Company, et al.*¹³⁸ Infringement of the patent came into the notice of Monsanto Company in 2013. Bowman in 1999 bought seed for his second planting from a grain elevator. The elevator sold the soybeans as commodities, not as seeds for planting. Where the facts were as follows Monsanto Company developed a type of seed which was resistant to the herbicides. Company genetically modified a seed which was able to survive the exposure to herbicides. The main component in the herbicide was glyphosate. The Monsanto Company markets the soybeans seeds as Roundup Ready Seed. For the same two patents were given to Monsanto. The company sold the seeds only to those purchasers who agreed to a licensing agreement. According to the licensing agreement the purchasers were allowed to grow the crop in only one season. The purchaser can consume or sell the crop to grain elevator or agricultural processor. The trait of the Roundup Ready seed passed from the planted seed to harvested seed. This means that a single Roundup ready seed could grow a plant which contained dozens of genetically identical beans. If these beans were replanted they could also give rise to a similar plant.

He purchased these patented seeds from the Monsanto Company each season. Bowman tested the new seeds, and found that, as he had expected, some were resistant to glyphosate. He intentionally replanted his harvest of GM seeds in subsequent years, supplementing them with more soybeans he bought at the elevator. He used to grow the crop and after harvesting the crop he used to sell it to the grain elevator. The grain elevator was a place where the grains were stored and

¹³⁷ *Vernon Hugh Bowman v. Monsanto Company, et al.* U.S. 278 (2013)

¹³⁸ *ibid*

were sold only for consumption. Bowman thought that this late season planting was risky; he did not want to pay the premium price of the seed to Monsanto. So he purchased the seeds from the grain elevator. On purchasing the seeds from the grain elevator, Bowman used those seeds to grow and harvest around eight crops. He went beyond some restrictions and Monsanto discovered this practice of his and so filed the litigation. Monsanto sued Bowman for infringing his patents in the lower court.

5.4.3 Issue under Challenge in District Court

Monsanto sued Bowman in district court for the infringement in the patents rights.

5.4.3.1 Contention of Respondent

Bowman raised the defense of ‘patent exhaustion’. According to this, the purchaser may resell or reuse the product but cannot make new copies of it.

5.4.3.2 Decision of Lower Court

The court did not consider the defense because here Bowman created a new article which was previously patented. The district court entered the judgment in favor of Monsanto and asked Bowman to pay a compensation of \$84,456.

5.4.4 Appeal to Federal Court

But after the judgment the Bowman was not satisfied so he went to the Federal court for appeal.

5.4.4.1 Contention of Appellant

There he argued that the Monsanto license agreement allowed the sale of second-generation soybeans to the grain elevators and even the buyer. Now the second generation soybeans are those seeds which are obtained as a secondary product from the primary plantation of the soybeans. Also he stated that this allowance was the cause of exhaustion of the patent rights as per the ruling of Federal Courts in *Quanta Computer, Inc. v. LG Electronics, Inc.* In the above case the United States Supreme Court held that because the doctrine of patent exhaustion applies to method patents and because the License Agreement authorizes the sale of components that substantially embody the patents in suit, the exhaustion doctrine prevents the patent holder from further asserting its patent rights with respect to the patents substantially embodied by those products.

5.4.4.2 Contention of Respondents

Monsanto on the other hand argued that the sole purpose of the licensing agreement was to prohibit the use of second-generation soybeans seeds for planting.

5.4.4.3 Decision of Federal Court

The Federal court upheld the lower court's decision in favor of Monsanto stating that Bowman created a newly infringing article. The right to use a patented article does not give the right to construct new copies of it. This right remains with the patent holder.

5.4.5 Second Appeal to Supreme Court

Being not satisfied with the Federal court decision Bowmen further went to the Supreme Court where argued that the seeds which he brought from the grain storage were legitimately purchased and he used those seeds for the harvesting.

5.4.5.1 Argument of the Appellant

Bowman did not challenge the validity of Monsanto Company's patents because that had been clearly established in prior judicial decisions. Bowman argued that the patent exhaustion doctrine protected his actions because he had purchased the seeds from an elevator after the original purchaser (a farmer) had harvested a crop and sold that crop to the elevator for food or feed. He argued that the patent became exhausted with the sale to the elevator, allowing him to purchase the soybean seeds free and clear of any patent rights by Monsanto.

Bowman further argued that seeds are meant to be planted and that he did not "make" new seeds. Bowman stated that he only planted seeds that reproduce themselves into multiple copies of a bountiful harvest.

5.4.5.2 Decision of Supreme Court

The Supreme Court rejected Bowman's argument because the patent exhaustion applies to the original item (the initial seed purchased by farmers). The patent exhaustion doctrine does not allow the making of additional copies of the original item except as allowed by the patent holder's license. Under the Monsanto license, the farmer can reproduce the seeds to produce a bountiful harvest so long as that bountiful harvest is used solely for food or feed. The Monsanto license does not allow saving of seed for planting to produce a new crop. Moreover, the Supreme Court said that patent law affirms the Monsanto license restriction because failure to affirm the restriction would mean effectively that Monsanto would receive compensation from only one sale of the seed—the first sale.

The Supreme Court rejected this argument by noting that Bowman was not a passive observer of soybean growth. He took active steps to buy the commodity seeds, condition the commodity seeds, plant the seeds, tend the seeds prior to

harvest, and save seeds for a coming crop year. As the Supreme Court wrote, “In all this the bean surely figured. But it was Bowman, and not the bean, which controlled the reproduction (unto the eighth generation) of Monsanto’s patented invention.”¹³⁹

On May 13, 2013, Justice Elena Kagan delivered the court’s decision in favor of Monsanto Company. The court held that though an authorized sale of a patented product terminates all the patent rights, it still does not allow the purchasers to reproduce patented articles, in this case the seeds by harvesting and planting without the patent holder’s permission. According to the court, Bowman planted the seeds in order to make second-generation seeds which amounted to direct infringement of the patent rights of Monsanto. Court concluded saying that Bowman can resell the planted seeds he obtained from the elevator or could use them as feed but cannot produce new second-generation seeds.

5.4.6 Analysis

Thus in this case highlighting the legal issue that the Supreme Court decided and the ruling that the Supreme Court rendered are best achieved by quoting directly from the Court’s opinion:

*Under the doctrine of patent exhaustion, the authorized sale of a patented article gives the purchaser, or any subsequent owner, a right to use or resell that article. Such a sale, however, does not allow the purchaser to make new copies of the patented invention. The question in this case is whether a farmer who buys patented seeds may reproduce them through planting and harvesting without the patent holder’s permission. We hold that he may not.*¹⁴⁰

In the *Bowman* case, the Supreme Court faced the issue of the reach of the doctrine of patent exhaustion. Courts have long held that patent exhaustion means that if a patent owner sells its patented article, the purchaser of that article acquires rights of ownership in the item. With those rights of ownership, the purchaser may sell the item to another person, discard the item or give it to another person. Replanting of the seeds would amount to unauthorized making of the patented seeds and it would violate the section 271(a) of the patent code. Which is except as otherwise

¹³⁹ibid
¹⁴⁰ibid

provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent.¹⁴¹

However, at the same time, the courts have held that patent exhaustion does not give the purchaser any of the intellectual property rights (e.g., patents in this instance) in the purchased item. Consequently, the purchaser cannot make a second copy of the purchased item because doing so would use the intellectual property rights of the patent owner and would undermine the strength of the patent owner's patent monopoly that exists for 20 years.

This was the case which brought new dimensions were the difference was made between use of patent and the patent exhaustion. Reproduction of the patent product cannot be allowed for known purpose the product.

This means that according to Bowman the doctrine should be applied here as the purpose of the seeds is to replant it again and grow crops. Also he says that by planting the seeds he is merely practicing his right as the farmers do. He also said that the Federal Circuit's decision created an exception to the patent exhaustion doctrine. Monsanto argued that the second-generation seeds were not bound by the patent exhaustion as there were not even existing until Bowman created it. Even when the exhaustion applied, it did not allow one to create new copies of the patented article, which the second-generation soybean seeds were.

5.5 Definition of Seed

What is a Seed? Seed the first link for the production. The point in dispute is whether Seed and Grain are the same or there is the difference between the two. This was the point in contention in the case discussed below.

5.5.1 Satyapal Anand vs. State of M.P.¹⁴²

5.5.1.1 Background of the Case

¹⁴¹35 U.S. Code § 271 - Infringement of patent, available at: <https://www.law.cornell.edu/uscode/text/35/271#a> (Visited on January, 2018)

¹⁴²Satyapal Anand vs. State of M.P , AIR 1979 M.P 6 = 1978 MPLJ 727

The facts of the case were the petitioner, who was basically wheat seed producer. Petitioner who was basically a wheat seed producer filed a case against the State of MP.

5.5.1.2 Under Challenge

M. P. Wheat Procurement (Levy) Order, 1973 dated 20-4-1973" (hereinafter referred to as 'the Levy Order 1973'), imposing a levy with immediate effect on agriculturists as defined therein. This order was issued for the purpose of obtaining adequate quantities of wheat for public distribution.

5.5.1.3 Issue

The Issue was whether Section 3 of Essential Commodities Act is applicable to the petitioner who claims himself to be producing Wheat Seed and not wheat.

5.5.1.4 Contention of the Parties.

5.5.1.4.1 Contention of the Petitioner

But according to the petitioner the order was only applicable to those agriculturists who grow wheat for human consumption and is not applicable to him as he was not the wheat producer for consumption but for selling as the seed for production. The State Government was empowered under the Levy Order 1973 to exempt certain persons from the levy Order but government impugned order effused order without licensing to him.

iii) the State Government did not act fairly while granting exemption discriminated and in support of this contention the petitioner wanted the State Government to produce certain documents about which the State Government has raised a plea of privilege.

It was also contended that while granting exemption the State Government did not act fairly and the petitioner was discriminated and in support of this contention the petitioner wanted the State Government to produce certain documents about which the State Government has raised a plea of privilege.

It was contended by the petitioner that the privilege is only claimed because the production of those documents will disclose that exemption has been granted to some persons not on rational basis but of favoritism and in order to conceal this the Government has claimed privilege and is not producing the documents connected with the exemption.

It was also contended by the petitioner that the action taken by the Government in refusing the exemption to the petitioner in spite of a certificate from the Agriculture Department certifying that the petitioner is a bona fide seed producer, was mala fide.

It was also contended that the Levy Order, 1973 has been issued by the Government while exercising powers under Section 3 of the Essential Commodities Act and under this section orders could only be passed pertaining to food stuffs which are meant for human consumption and in order to provide for distribution of those food stuffs to the general public. The Levy Order, 1973 could not be enacted in exercise of powers under Section 3 of the Essential Commodities Act to cover wheat-seed which is neither food stuff nor is meant for distribution to the general public.

5.5.1.4.2 Contention of the Respondents

In the return filed by the State Government it is not disputed that the petitioner is producing seed but what is alleged is that the Levy Order applies to the petitioner as he is an agriculturist within the meaning of the term under S. 2 of the Levy Order 1973. The allegations made by the petitioner about his having been recognised as the wheat-seed producer by the Government of India is denied for want of knowledge. As regards the contention advanced by the petitioner in his petition that the Agriculture Department certified him to be a bona fide seed producer is also admitted by the respondent-State in their return. As regards exemption it is contended in the return that it is not necessary for the State Government to exempt any one. It is also contended that it is not necessary for them to hear anyone to grant exemption. Apparently therefore the facts alleged in the petition are not in dispute; but the only contention raised in the Return appears to be that the Levy Order 1973 applies to the petitioner as he falls within the definition of the term 'an agriculturist' under S, 2 of the Levy Order 1973,

5.5.1.5 Decision

It was held by the Madhya Pradesh High Court in the judgment provide for regulating the quality of seeds and the sale thereof an Act has been passed which is the Seeds Act 1966 (Act No. 54 of 1966).

Wheat as is commonly known is food-stuff which is used generally and Encyclopedia Britannica Vol. 23 at p. 558 described wheat as--

"WHEAT. Wheat (*Triticum*) is the food cereal used more than any other for baking raised bread of prized color and texture. In that form or as flat breads or alimentary pastes it is a preferred food consumed by most of the world's people. Its several varieties are adapted to production under a wide range of natural and cultural conditions, and about two-fifths of the world's small grain lands are regularly sown to wheat. It gives the largest total weight of easily grown, storable, easily prepared, concentrated and palatable human nutrition. In international trade wheat and its products exceed other items in tonnage, and sometimes it is the leading agricultural product in value."

Whereas the seed has been described in Encyclopedia Britannica Vol. 20 at p. 275 as-

"SEED. The seed consists of an embryo enclosed by an integumentary covering, the seed coat or seed coats. In addition, nucellar tissue or endosperm containing reserve foods may be present within the seed coats; but when one or both of these storage tissues are lacking, the food reserves are located in the cotyledons of the embryo. The seed develops from the ovule, the embryo resulting from the union of the megagamete (egg) and microgamete (sperm), the act of fertilization. The resultant zygote (fertilized egg) undergoes nuclear and cellular divisions and develops as the embryo sporophyte. The details of embryogeny and seed development vary with different groups of seed plants (spermatophytes)."

In the Compact Edition of the Oxford English Dictionary the seed has been explained at p. 2708, as under--

"Seed. 1. a. That which is or may be sown (often as cognate obj, to sow v.); the ovules of a plant or plants (chiefly, when in the form of 'grains' or small roundish bodies) esp. as collected for the purpose of being sown. Also in Agriculture and Horticulture applied by extension to other parts of plants (e. g. tubers, bulbs) when preserved for the purpose of propagating a new crop. In plural, kinds of seed. Phr. to run to seed (See RUN v. 69 e); also to grow seed (obs) to be in seed."

The discussions in these volumes of Encyclopedia Britannica reveal that wheat seed is not meant for consumption as for preservation it is processed by insecticide and other chemicals. In fact these allegations of fact are not even disputed by the

State Government nor were disputed at the time of hearing by learned counsel appearing for the State. It, therefore, cannot be disputed that wheat-seed cannot be said to be wheat which is cultivated by agriculturists for human consumption. Wheat seed produced by the petitioner is only meant for distribution to the agriculturists for sowing so that they may grow varieties of wheat in greater quantities.

In Section 2 of the Levy Order, 1973 'agriculturist' has been defined as under:

"2. (a) "Agriculturist" means a person who raises wheat alone or mixed with any other crop on land in his possession which he holds as a tenure-holder or a tenant or a.....lessee or a mortgagee in possession or in any other capacity or in more than one such capacity."

This definition clearly indicates that for the purpose of this order an agriculturist means a person who raises wheat crop alone or with other crops. Section 3 of the Essential Commodities Act, 1955 provides:--

"3. Powers to control production, supply distribution etc. of essential commodities.-- (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodities or for securing their equitable distribution and availability at fair prices, (or for securing any essential commodity for the defense of India or the efficient conduct of military operations) it may by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein."

In this Act 'seed' has been denned in Sub-clause (11) of S, 2 of the Seeds Act, 1966 which is as under:

"(11) 'seeds' means any of the following classes of seeds used for sowing or planting:--

- (i) seeds of food crops including edible oil-seeds and seeds of fruits and vegetables;
- (ii) cotton seeds,
- (iii) seeds of cattle fodder,
- (iv) [jute seeds] and includes seedlings, and tubers, bulbs, rhizomes, roots, cuttings, all types of grafts and other vegetatively propagated material, of food crops or cattle fodder;"

So the definition clearly deals with term 'seeds' as used for sowing or planting and not for the human consumption. In view of this that the Levy Order, 1973 does not

apply to the petitioner at all, in our opinion, it is not necessary for the petitioner to seek an exemption under Section 5 of the Levy Order 1973 and therefore it is not necessary for us to go into the question whether the State Government was right in refusing the exemption to the petitioner or not. As the order itself did not apply to the petitioner, he automatically falls outside the purview of this order and an order for exemption under Section 5 of the Levy Order, 1973 was not at all necessary and in that view of the matter we do not think it necessary to go into the question raised by the petitioner with regard to the refusal of the exemption to the petitioner and the manner in which the exemption was refused. So, the order could only be enforced against the agriculturists who produce wheat which is for human consumption. So the petition was allowed and the order issued against the petitioner for collection of the wheat levy under the order is quashed.

5.5.1.6 Analysis

So in this case a distinction is made between Wheat and Wheat Seed. This case clearly distinguishes between Wheat and wheat seed i.e. between Grain and Seed so this is a case of interpretation of definition of Seed. Section 2 (11) defines seed which is meant for growing the crop and not for the consumption purpose.

The other case where also the definition of seed was discussed was **Seeds Man Association, Hyderabad and ors. v. Principal Secretary to Govt., A.P. and ors.**¹⁴³, **Raghu Seeds & Farms & Ors v. Union of India & Ors** [1993] INSC 474¹⁴⁴.

5.6 Liability of failure of Seeds: Is the Consumer Court Competent Redressal Authority?

National Seed Corporation Ltd (NSCL), issued on February 2011, an internal circular on the procedure for Redressal of Quality Complaints of consumers regarding the quality complaints received from the distributors, dealers, farmers/ seed purchasers or public institutions seeking for the compensation for the losses incurred by them on account of the poor seed quality. The reason behind all this

¹⁴³*Seeds Man Association, Hyderabad and ors. v. Principal Secretary to Govt., A.P. and ors*, Appeal (civil) 904 of 2004

¹⁴⁴*Raghu Seeds & Farms & Ors v. Union of India & Ors* 1994, AIR 533 1994 SCC (1) 278 JT 1993 (6) 385 1993 SCALE (4)300

was the number of the complaints about the seeds failure and poor quality seed in Consumer forums and also to minimize the cases. But the question arises in as are the farmers considered to be the consumers of the seed and is the consumer forum a proper place for them to seek the relief.

5.6.1 National Seeds Corporation. Ltd. v. M. Madhusudhan Reddy and anr.¹⁴⁵

5.6.1.1 Background of the Case

National Seeds Corporation Ltd. (NSCL) is a Government of India company whose functions were to arrange for production of quality seeds of different varieties in the farms of registered growers and supply the same to the farmers. And the respondent own lands in different districts of Andhra Pradesh and was engaged in agriculture i.e. seed production.

They filed an allegation that they suffered loss due to crop failure because of the fewer yields as the seeds sold to them were of defective quality.

5.6.1.2 Issue

Does the farmer/grower of crops fall within the ambit of S2(d)(i) of Consumer Protection Act 1986 in case of failure of Seeds?

5.6.1.3 Law Suit

5.6.1.3.1 Decision of District Forum

District forum allowed the complaints and awarded compensation to the respondents of which appeals and revisions filed by the appellant were dismissed by the State Commission of Andhra Pradesh and the National Consumer Disputes Redressal Commission.

5.6.1.3.2 Appeal to National Commission

5.6.1.3.2.1 Contention of Appellants

the District Forums did not have the jurisdiction to entertain complaints filed by the respondents because the issues relating to the quality of seeds are governed by the provisions contained in the Seeds Act, 1966 and any complaint about the sale

¹⁴⁵*National Seeds Corporation. Ltd. v. M. Madhusudhan Reddy and anr* 7543 of 2004.

or supply of defective seeds can be filed only under the Seeds Act and not under the Consumer Protection Act, 1986.

5.6.1.3.2.2 Contention of Respondents

the Seeds Act is a special legislation enacted for regulating the quality of seeds and if any grievance was therefore the quality of seeds by the respondent than the application should be filled in under section 10 of the Seeds Act or to approach the concerned Seed Inspectors for taking action under Section 19 read with Section 21 of that Act.

The respondent argued that the growers of seeds are covered by the definition of consumer because they had agreed to undertake cultivation of seeds on behalf of the appellant for earning livelihood.

Moreover the counsel gave importance to putting aside the appellant's objections to the maintainability of the complaints on the grounds of jurisdiction.

5.6.1.3.2.3 Decision of National Commission

The National Commission rejected the appellant's plea that the only remedy available to the respondents was to file a complaint under the Seeds Act not by the Consumer Act by observing the fact that there is no provision in that Act for compensating a farmer whose crop may be adversely affected due to use of defective seeds sold.

5.6.1.4 Appeal to Supreme Court

Being aggrieved by the decision of the National Commission, NSCL appealed in the Supreme Court. The Contention of the appellants was that consumer forum is not the competent authority to adjudged and affix the liability in case of failure of seeds to yield good crop. They contended that the remedy for / incase of failure of seeds to yield good quality crops is under the Seed Act, as it is a special legislation to deal with the quality of seeds. They further contended that the respondent could have approached the seed inspector under section19 read with 21 or by filing an application under section 10 of the Seed Act.

The contention of the respondent had been that he is a consumer within the definition of section 2 (d) (i) of Consumer Protection Act.

5.6.1.5 Decision of the Supreme Court

The Hon'ble Supreme Court dismissed the appeal.

5.6.1.6 Analysis

Though, the Seeds Act is a special legislation enacted for ensuring that there is no compromise with the quality of seeds sold to the farmers and others and provisions have been made for imposition of substantive punishment on a person found guilty of violating the provisions relating the quality of the seeds, the legislature has not put in place any adjudicatory mechanism for compensating the farmers/growers of seeds and other similarly situated persons who may suffer loss of crop or who may get insufficient yield due to use of defective seeds sold/supplied by the appellant or any other authorised person. No one can dispute that the agriculturists and horticulturists are the largest consumers of seeds. They suffer loss of crop due to various reasons, one of which is the use of defective/sub- standard seeds.

The Seeds Act is totally silent on the issue of payment of compensation for the loss of crop on account of use of defective seeds supplied by the appellant and others who may obtain certificate under Section 9 of the Seeds Act. A farmer who may suffer loss of crop due to defective seeds can approach the Seed Inspector and make a request for prosecution of the person from whom he purchased the seeds. If found guilty, such person can be imprisoned, but this cannot redeem the loss suffered by the farmer. Thus it can be observed that in the context of farmers and other consumer of seeds, the Seeds Act is a special legislation in so far as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act should be punished.

However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Act are **not available** to the farmers who are otherwise covered by the wide definition of 'consumer' under Section 2(d) of the Consumer Act 1986.

As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the

provisions of the Consumer Act should be so interpreted. Since the farmers who purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of Section 2(d) (i) of the Consumer Act and there is no reason to deny them the remedies which are available to other consumers of goods and services.

The consideration of this issue needs to be prefaced with an observation that the grievance of a farmer who has suffered financially due to loss or failure of crop on account of use of defective seeds sold or supplied by the supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer does not get anything. **Therefore, the so- called remedy available to an aggrieved farmer to lodge a complaint with the concerned Seed Inspector for prosecution of the seller of the seed cannot but be treated as illusory and he cannot be denied relief under the Consumer Act on the ground of availability of an alternative remedy.**

Further this view was upheld by the National Commission in other cases namely **National Seed Company v. Guruswamy**¹⁴⁶, **E.I.D. Parry (I) Ltd. v. Gourishankar**¹⁴⁷ and **India Seed House v. Ramjilal Sharma**¹⁴⁸.

The issue in all the three cases was relating to non-compliance of **Section 13(1)(c) of consumer protection Act, 1986**. It states:

“Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum”.

¹⁴⁶*N.S.C. Ltd. v. Guruswamy* [(2002) CPJ 13]

¹⁴⁷*E.I.D. Parry (I) Ltd. v. Gourishankar* (2006) CPJ 178 and *India Seed House v. Ramjilal Sharma*[(2008) 3 CPJ 96]

¹⁴⁸*India Seed House v. Ramjilal Sharma* [(2008) 3 CPJ 96]

5.7 Sale of GM Seeds

5.7.1 Monsanto Co. v. Geertson

5.7.1.1 Background of the Case

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, is a United States Supreme Court case decided 7-1 in favor of Monsanto. The decision allowed Monsanto to sell genetically modified alfalfa seeds to farmers, and allowed farmers to plant them, grow crops, harvest them, and sell the crop into the food supply.

5.7.1.2 Issues

1. Whether the Ninth Circuit blundered in holding that National Environmental Policy Act (NEPA) plaintiffs are especially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.
2. Whether the Ninth Circuit blundered in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.
3. Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court's decision in *Winter v. NRDC*, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.

5.7.1.3 Decision

The Supreme Court held that a district court did not have the authority to issue an injunction to stop the deregulation of particular alfalfa seeds. The Supreme Court ruled that the district court failed to consider a less drastic alternative, such as a partial or temporary deregulation, and also noted that an injunction is a drastic remedy that should not be granted as a matter of course.

5.8 Farmers Rights

5.8.1 Monsanto Canada Inc. v. Schmeiser¹⁴⁹

5.8.1.1 Background of the Case

¹⁴⁹*Percy Schmeiser and Schmeiser Enterprises Limited v Monsanto Canada Incorporated and Monsanto Company*, [2004] 1 S.C.R. 902, 2004 SCC 34, 239 D.L.R. (4th) 271, 31 C.P.R. (4th) 161

Percy Schmeiser, a farmer of Canada who claimed to have discovered that some canola growing on his farm in 1997 was Roundup resistant. Monsanto licensed farmers to use the Round-Up Ready canola seeds. Schmeiser harvested the seed from the Roundup resistant plants, and planted the seed in 1998. Monsanto sued Schmeiser for patent infringement for the 1998 planting.¹⁵⁰

5.8.1.2 Issues

Monsanto sued Canadian canola farmer Percy Schmeiser for patent violation after unlicensed Roundup-tolerant canola was found growing on his farm.

5.8.1.3 Federal Court Decision

The initial Canadian Federal Court rejected Schmeiser's defense and held for Monsanto, finding that in 1998 Schmeiser had intentionally planted the seeds he had harvested from the wind-seeded crops in 1997, and so patent infringement had indeed occurred.¹⁵¹

5.8.1.4 Supreme Court Decision

Schmeiser appealed to the Supreme Court which took the case and held for Monsanto by a 5 - 4 vote in late May 2004. Schmeiser won a partial victory, as the Supreme Court reversed on damages, finding that because Schmeiser did not gain any profit from the infringement, he did not owe Monsanto any damages nor did he have to pay Monsanto's substantial legal bills.

5.8.1.5 Analysis

The case caused Monsanto's enforcement tactics to be highlighted in the media over the years it took to play out.¹⁵² The case is widely cited or referenced by the anti-GM community in the context of a fear of a company claiming ownership of a farmer's crop based on the inadvertent presence of GM pollen grain or seed.¹⁵³ The open question which remained open was whether there was the Patent Infringement or not

¹⁵⁰ibid

¹⁵¹Federal Court of Appeal of Canada. *Monsanto Canada Inc. v. Schmeiser* (C.A.) [2003] 2 F.C. 165

¹⁵²Gar Smith, "Percy Schmeiser vs. Monsanto" *EIJ* (2001).

¹⁵³CT NOFA is the Connecticut Chapter of the Northeast Organic Farming Association Suing Monsanto: Intellectual Property, Genetic Contamination, and Farmers' Rights – Notice of 2011 talk being given

5.8.2 Organic Seed Growers and Trade Association (OSGATA) et al v. Monsanto

OSGATA is a coalition of farmers, seed growers' associations, seed distributors, agricultural organizations, and public advocacy groups headquartered in Washington, Maine. According to OSGATA, they represented about 300,000 individuals and 4,500 farms or growers who had no interest in genetically modified seeds and do not use or wish to possess or sell any genetically modified seeds, including those covered by Monsanto's patents.

5.8.2.1 Background of the Case

The historic lawsuit was filed on 2011 in Federal District Court in Manhattan. The large plaintiff group numbers 83 individual American and Canadian family farmers, independent seed companies and agricultural organizations whose combined membership's total over 1 million citizens, including many non-GMO farmers and North America's certified organic farmer filed the plaintiffs sought a declaratory judgment against Monsanto Company that Monsanto's patents were unenforceable and invalid.

5.8.2.2 Issues

- i) Monsanto's alleged pattern of litigating against non-OSGATA farmers over patent rights.
- ii) an implicit threat in Monsanto's statement to not enforce their patent rights against farmers whose crops inadvertently acquired trace amounts of patented seeds or traits.
- iii) Monsanto's refusal of OSGATA's request to provide a written promise not to sue them.

5.8.2.3 Contention of Petitioner

- i) Crops could become contaminated by genetically modified varieties.
- ii) Inadvertent contamination may occur through seed drift or scatter, crosspollination, and during harvest or postharvest activities such as transportation, and storage.
- iii) Monsanto could sue for patent infringement should Monsanto's genetically modified seeds contaminate farms.

- iv) Transgenic contamination would cause farmers to lose their organic certification from the US Department of Agriculture.
- v) Monsanto's genetically modified seeds were not safe for societal use, and were invalid under the Patent Act, which says that only technology with beneficial societal use may be patented.
- vi) Monsanto's genetically modified seeds worsen people's health.
- vii) OSGATA claimed that the constant threat of genetically modified seed contamination could destroy their market.

5.8.2.4 Contention of Respondent

- i) the case should be dismissed because the OSGATA plaintiffs failed to prove that their pleadings showed a justifiable case or controversy.
- ii) Courts lacks jurisdiction to decide hypothetical, abstract, or intellectually interesting legal issues;
- iii) there must be a justifiable case or controversy between the plaintiff bringing the lawsuit and the defendant defending in the lawsuit.

5.8.2.5 Decision District court

The United States District Court for the Southern District of New York called an oral hearing on January 2012 to hear both parties' cases. Then on February 2012 judge Buchwald dismissed OSGATA's petition against Monsanto.

5.8.2.6 Appeal in Federal Court

In March 2012, OSGATA filed an appeal with the United States Court of Appeals for the Federal Circuit in Washington, D.C., to reverse the lower court's decision. They concluded that there was no case or controversy because Monsanto had made binding assurances that it would not take legal action against farmers whose crops might inadvertently contain traces of genetically modified traits, which the court defined as less than one percent. Monsanto had agreed "not to take legal action against growers whose crops might inadvertently contain traces of Monsanto biotech genes.

5.8.2.7 Decision of Federal Court

It was held that OSGATA's concerns about the environmental and health effects of genetically modified seeds were outside the scope of this case, which focused on patent rights. The court ruled that, the plaintiff's avoidance combined with Monsanto's pledge meant that the OSGATA plaintiffs did not face any substantial risk of a patent infringement lawsuit. While the court acknowledged that subjective fears existed, they ruled that these fears were not sufficient to establish a justifiable case or controversy. As the court wrote, OSGATA plaintiffs '*cannot manufacture a justifiable case or controversy merely by inflicting harm on themselves based on their fears of hypothetical future harm.*'¹⁵⁴

5.8.2.7 Analysis

In the OSGATA case, the federal appellate court set a standard for patent infringement through the doctrine of judicial estoppel. At the same time, however, the federal appellate court protected biotechnology companies from lawsuits whose arguments and tactics the lower federal district court had labeled as "baseless," "groundless," "not to be tolerated," and "unacceptable."

5.9 Analysis of the above cases

From the above cases the inferences which can be drawn there landmark judgments which is divide in the seven parts India, TRIPs Agreement and Supreme Court, Plants, GM Crops and Patentability, Patent Exhaustion, Definition of Seed, Liability of failure of Seeds: Is the Consumer Court Competent Redressal Authority, Sale of GM Seeds and Farmers Rights. As farmer in India still needs his rights to be focused more when it comes to the compensation whether it's on the issue of failure of seed, patent exhaustion or even on the contamination through the use of GM seed.

India is the first country which has included farmers' rights in its protection of plant varieties. The 2001 Act provides that a farmer who has bred a new variety is entitled for registration and protection as a breeder of a new variety. The definition of breeder also clarifies this position by including within the fold of breeder, farmer

¹⁵⁴ 568 U.S. at 1151, OSGATA at 718 F.3d 1360, quoting from the U.S. Supreme Court opinion in *Clapper v. Amnesty Int'l USA*

or group of farmers. But then also conflict and overlapping can be between the Seed Act, PPVFR Act and the Patent 3(j) can be witnessed.

To sum up, this chapter with the help of some important and landmark judgements has highlighted the gaps such as uncertainties, ambiguities, limitation of remedies and absence of proper adjudicating authorities along with a well comprehensive legislation in deciding cases relating to the farmers rights and seed in India. In the concluding chapter, the researcher has made an attempt to examine the chances of getting better remedy if there would have been the proper law or the proper channel mechanism available for the farmers when it comes to seed as their ownership right.