

# THE MONSANTO CASE: INTELLECTUAL PROPERTY AND COMPETITION LAW

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## ABSTRACT

Monsanto Co. is a company that is part of the specialized chemicals industry. It engages in the provision of agricultural products to farmers and operates its business through the Seeds & Genomics and Agricultural Productivity. This business segment produces seed brands, including Asgrow, Deltapine and Seminis amongst others and develops biotechnology attributes that assist farmers in controlling insects and weeds that impact farm activities. The Agricultural Productivity segment manufactures Roundup and Harness brand herbicides and other herbicides. It also provides other seed companies with genetic material and biotechnology traits for their seed brands.<sup>i</sup>

Monsanto Technology LLC had a registered Patent for Nucleotide Acid Sequence (NAS) containing the gene *Bacillus Thuringiensis* also known as the Bt gene. This patent was on the second generation Bt Technology. NAS kills bollworms from inside the seed once its inserted into the DNA of cottonseeds and therefore reduced the dependence of farmers on insecticides and pesticides. However, it is important to note that manufacturing cottonseeds without this technology were what Indian farmers were doing before the year 2001.<sup>ii</sup>

For a significant period of time, Monsanto has been party to legal disputes. These also include that of Indian seed companies, backed by the Indian government that have been part to disputes related to price-control legislation to not only fix Intellectual Property licensing fees but also state governments demand for the complete revocation of Monsanto's patent over its Bt technology and an ongoing investigation into Monsanto's Licensing deals.

This paper concentrates on one specific landmark case that will be used to discuss Monsanto disputes in these areas of law. This is that of Monsanto Technology LLC v Nuziveedu Seeds Ltd. However, before we delve into the specifics of the case, it may help to first understand the technology involved along with the licensing model adopted by Monsanto in India.

**Keywords:** Monsanto, Biotechnology, Nucleotide Acid Sequence (NAS), Intellectual Property, Licencing

## THE MONSANTO CASE

The technology in this case is Monsanto's well known Bt technology. To be more familiar with the science of it, this technology involves the introgression of certain genes of *Bacillus thuringiensis* (Bt), a naturally occurring bacteria, into the genome of cotton seeds in order to ensure the resulting crop's resistance to certain pests. In particular, Monsanto's technology is known to act against the Bollworm, known to attack and destroy the cotton crop. The use of this technology is to reduce or in some cases even eliminate the pesticides that are required to be used by farmers.

While the first generation of Bt technology was never patented by Monsanto in India, the second generation Bt technology, licensed under the trademark Bollguard-II variety is patented.<sup>iii</sup>

The origin of the dispute between the parties is that the plaintiffs pursuant to their patent rights had entered into an initial ten-year period sublicense agreement on February 21, 2004 with the defendants. This agreement entitled Nuziveedu to develop "Genetically Modified Hybrid Cotton Planting Seeds" with the help of the Monsanto's technology and to commercially exploit the same in the context of the limitations prescribed in the agreement.<sup>iv</sup>

This agreement also provided for the defendants paying a license fee/trait value for use of the plaintiffs' patented technology. After an extension this contract was eventually terminated by the plaintiffs on November 14, 2015 due to quarrels resulting from the payment of license fee/trait value in light of a later introduced price control regime introduced by the State. Instead of a mutual understanding, the plaintiffs favored appearing before the Single Judge of the Delhi

High Court for injunction in order to refrain the defendants from using their registered trademark in violation of the registered patent during the pendency of the suit in view of the termination of the agreement.<sup>v</sup>

### ***Issues involved***

The issue in the case revolves around the fact that whether or not the technology of ‘Methods for Transforming Plants to Express Bacillus Thuringiensis Delta endotoxins’ used by Monsanto Technology LLC is patentable under the Patents Act, 1970. This was not the issue that was started with but instead was an issue raised by the counsel of the defendants when they filed a counter-claim challenging the validity of the patent. Former to this issue, the plaintiffs were seeking permanent injunction against the defendants from using the trademark “BOLGARD” and “BOLGARD II” brand cotton technology, violating the registered patent of the plaintiffs and also were seeking to restrict the defendants from selling and using seeds/hybrid seeds bearing the patented technology and infringing the registered patent of the plaintiffs.

### ***Laws Applicable in this case***

Nuziveedu Ltd. filed a counterclaim seeking revocation of the patent. The initial argument was regarding Monsanto’s patent claims violated Section 3(j) of the Patents Act. This section includes “plants and animals in whole or any part thereof, other than microorganisms but inclusive of seeds, varieties and other essentially biological processes for production or propagation of plants and animals.”<sup>vi</sup> This argument brought the Division Bench of the Delhi High Court to the decision that Monsanto’s patent was invalid.<sup>vii</sup>

### ***Courts Findings***

The Single Judge Bench refused to grant the injunction and observed the issues arising in the suit necessarily needed to be subject to expert opinion and that the patent claim could only be examined after the completion of the trial. The parties were ordered to remain bound by the sub-license agreement in the view of the already existing patent registered under section 48 of the Patents Act.

When the respective parties appealed before the Division Bench of the High Court, the bench dismissed the appeal of the Plaintiffs i.e. Monsanto LLC and held that the suit patent falls under

the exclusion provided in section 3(j) of the Patents Act, 1970 and therefore the suit patent is not patentable. However, they were granted the liberty to claim registration under the Protection of Plant Varieties and Farmers Rights Act, 2001.<sup>viii</sup>

The plaintiffs then wished to appeal to the Supreme Court. The Court at this point was of the opinion that the Division Bench should not to have examined the counterclaim itself, appropriating the jurisdiction of a Single Judge. The order of the division judge was set aside after the Supreme Court observed that the patentability could only be examined after all the evidence was presented from trial. Accordingly, the Single Judge bench order was restored and it was remanded to the same.<sup>ix</sup>

## **THE COMPETITION LAW PERSPECTIVE**

In addition to all of the above, the Competition Commission of India (CCI) had ordered an investigation into MMBL's licensing deals. MMBL is Monsanto India's Joint Venture which licences the patent in question from Monsanto Technology LLC, situated in the USA and then in turn, sub-licences the technology to over 40 Indian seed companies. This investigation was ordered after the CCI received a reference from the Ministry of Agriculture and a separate complaint from Nuziveedu Seeds Ltd as well.<sup>x</sup>

The procedure that the CCI conducts, includes the determination of whether there exists a prima facie case of violation of the Competition Act and if it does, this will result in an investigation by the Director General's office, after which a hearing is conducted on the merits and a ruling is delivered. It is important to note, however, that a detection of a prima facie violation is mandatory in order for the case to proceed.

In respect to this case, the CCI had found that MMBL is prima facie in a dominant position in the relevant product market i.e. the provision of Bt cotton technology in the upstream and manufacture and sale of Bt cotton seeds in India in the downstream and the relevant geographical area which is India.

Monsanto had been called hostile in its ways of prosecuting farmers for alleged patent infringement, spurring changes in the traditional seed saving practice and buying and merging

its way into obtaining the maximum market share.<sup>xi</sup>

As stated earlier in this paper, it is completely possible to manufacture cotton seeds without Bt technology. The only difference being that the farmers planting these seeds will have to use pesticides to fight the Boll Worm. This method was exactly what Indian farmers were doing before the year 2001. Therefore, it is safe to say that MMBL's technology is substitutable. Further, even with regard to Bt technology, MMBL has been licensed a patent for only one particular gene sequence and while the old Bt technology is not patented or innovated to create new GM hybrids, competitors could readily use this as it wasn't novelty.

The abuse of MMBLs dominant position was seen in their agreements.

The conditions included the following:

- One of the termination conditions imposed a requirement to inform MMBL within 30 days if the licensee was developing hybrid cotton seeds with technology derived from MMBL's competitors.
- Other conditions required that once a termination notice was served, the licensee immediately stop selling the seeds in question and completely destroy the existing seeds as well as all the parent lines.
- An additional condition allowed MMBL to terminate the sub-licence if any law was enacted to restrict the technology licensing fee.<sup>xii</sup>

The CCI also accepted the allegation that MMBL may have terminated the licenses with the informant in order to protect its presence in the downstream market i.e. the seed markets in which its group companies were involved. The imposition of such restrictive conditions along with the suspicion that MMBL was influencing the downstream market through its group companies led to a preliminary, prima facie finding of abuse of Monsanto's dominant position.<sup>xiii</sup>

### ***Anti-competitive Tendency of Monsanto***

Anti-Competitive has been defined as not allowing competition between companies, in a way that is not fair or breaks the law.<sup>xiv</sup> Complaints against Monsanto alleged that Monsanto misused its patents on transgenic seed to achieve dominance and maintain an anticompetitive benefit and show innovation, and as a result, markets have seen a dramatic rise in seed prices.<sup>xv</sup>



This anti-competitive tendency of Monsanto was witnessed through its licensing agreements as well.<sup>xvi</sup>

In addition to the initial pattern of the abuse of dominant position, the CCI also made the finding that the licensing agreements were themselves anti-competitive in nature because of the stringent termination conditions discussed in the above-mentioned ones. In the Commission's words "The termination conditions are found to be excessively harsh and do not appear to be reasonable as may be necessary for protecting any of the IPR rights, as envisaged under Section 3(5) of the Act. Such agreements discourage and serve as a major deterrent for the sub licensee from exploring dealing with competitors." This reasoning is simply not convincing because such conditions are part and parcel of any tech-transfer deal. Hopefully the investigation by the Director General will do a better job.

Notwithstanding that the CCI's findings are only preliminary – MMBL's stock tanked 4% after the announcement of the investigation. The manner in which the Indian judiciary handles the issues raised in this case is going to be highly influential when looking at which technology is transferred to Indian companies in the future.

### ***Analysis of the Intellectual Property Law***

As mentioned in the previous chapters, despite the Government reducing the retail prices, added pressure was only built up on farmers, as the royalty fees they were paying remained the same. The question of whether the Essential Commodities Act can be used to control the royalty fees payable in patented technology is to be thought of. Essential Commodities Act<sup>xvii</sup> gives wide powers to the government. It is an Act to provide, in the interest of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities. Also, the Act gives powers to regulate or prohibit any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are, or, if unregulated, are likely to be, detrimental to the public interest.

The Patents Act, 1970 doesn't 'eclipse' the provisions of Essential Commodities Act, 1955 vis-à-vis patented products. Going by the canons of interpretation, the enactments should be read together unless there is an express provision to the contrary. The enabling provisions of

Essential Commodities Act, 1955 cannot be made simply futile. It is evident that higher license fees are, in fact, leading to higher seed prices. If the government can prove its stand using verifiable data, its stand is tenable.

While there may be some amalgamation when viewed from the perspective of consequentialism, it does not make it a non-TRIPS compliant provision or a provision which equivalent to issue of compulsory license through the backdoor.<sup>xviii</sup>

## CONCLUSION

While the case is pending before the High Court of Delhi, Monsanto's patent has already expired, leaving Monsanto's claim for injunction obsolete. Now the remedy that remains available is that of damages. Whether NAS is held to be patentable is the subject matter and the judgment would be a landmark precedent cited for future applications involving NAS-like inventions. It is important to note that there have been a number of criticisms of the view of the Competition Commission of India in Monsanto's case that the researcher did not cover in this paper. However, the tendency of Monsanto being an Anti-competitive company in the researchers opinion has been established, as there has been clear abuse of their dominant power set its "trait fees", or royalties, to extract maximum profits from captive customers and India's farm ministry has slashed royalties that local seed companies pay to Monsanto. After a series of unfavorable government orders and a struggle over royalty payments, Monsanto withdrew an application seeking approval for its next generation of GM cottonseeds in India in the year of 2016.<sup>xix</sup>

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