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Farmer V. Breeder In Special Reference To Plant Varieties Protection

Authored By-Dr. Deepali Vashist

Abstract

In India, The Protection of Plant Varieties and Farmers' Rights Act (PPVFR) 2001 grants different sets of intellectual property rights including ownership, residuary and conventional rights to both, breeder as well as to farmers. One such conventional right available to farmer in section 39(1) (d) of the PPVFR Act is, right to save, use, exchange share and sell seeds or plant variety including a registered plant variety except branded plant variety. However, this right has been infringed in many instances, including PepsiCo India. In 2016, the plant variety Registrar granted certificate of registration to potatoes variety (FL 2027) of Pepsi Co India. The Company filed suit against farmer for infringement though they are immune from infringement under section 42 of the PPVFR Act.

Objective

The object of this paper is to give an account of difficulties which the farmers are facing in accessing the rights and freedom granted under the PPVFR, Act, 2001 with special reference to PepsiCo India lays' Potato case. This paper will also analyse whether the aspiration of farmers and breeders for intellectual property rights can be fulfilled simultaneously or not? If yes, then what are the measures which should be taken into consideration for effective implementation of the rights of both?

Methodology

The research methodology is doctrinal. This article reviews news, articles, legislation and cases pertaining to the balancing of rights between breeders and farmers

Key words: farmer, breeder, breeder's rights, farmers' rights, Plant variety Protection etc.

Introduction

India is one of the richest mega plant diversity country of the world. It is reported that around forty-five thousand five hundred and twenty-three plant species existed in India which is almost 11.8 percent of world flora.¹ India ranked ninth in the world in term of higher plants species. Twenty thousand species of higher plants alone occur in India and twelve thousand species of plants are well-known for their medicinal properties. The credit to maintain such rich plant biodiversity goes to the two foremost stakeholder one, who is known as breeder and another, Farmers. However, in the arena, plant and plant genetic resources, India follows the principle of common heritage from primitive days.

So, the idea of protecting the rights of both the stakeholders i.e., breeders as well as farmers along with plant variety protection is something which is completely appropriate. The idea of giving protection to plant variety under Intellectual Property Rights regime emerged in Indian legal system because of India' membership in United Nation Organisation. The World Conference held in Geneva in 1947, established the General Agreement on Tariffs and Trade (GATT) for taking care of trade. In 1995, GATT was replaced by World Trade Organisation (WTO). It put a mandate on its members that they need to protect all the invention by granting intellectual property rights. Article 27.3(b) of Trade Related Aspect of Intellectual Property gives option to member countries to protect plant varieties by any one of the following namely-

- a. Patent for Plant Varieties; or
- b. An effective sui-generis i.e., its own kind; or
- c. A combination of patent and an effective sui-generis system for protecting plant variety.²

Being a member of UN for compliance of TRIPS mandate, India has enacted the protection of Plant Varieties and Farmers' Rights (PPVFR) Act, 2001. This is the law which grants protection to both breeders vis-à-vis farmers. The PPVFR, 2001 ensures rights to both, breeder as well as to farmers. The Act also grants protection to plants by categorising them in different groups.

¹Amlesh R, *Biodiversity in India*, Biology Discussion (<https://www.biologydiscussion.com/india/biodiversity-india/biodiversity-in-india/70823> (visited on 8th December, 2021, 11:00 am).

² Pratibha Brahmi, Sanjeev Saxena and B.S. Dhillon, *The Protection of Plant Varieties and Farmers' Rights Act of India*, 86(3)Curr. Sci.,392, 392-397 (February 2004) available at <https://www.jstor.org/stable/24108733> (visited on 11th March 2022).

Plant Grouping For Protection

The PPVFR Act grants protection to plants. It classifies Plants in four different heads namely New Plant Variety, Essential Derived Variety (EDV), Extant Variety and Farmers' Variety. The new plant variety and EDV are often regarded as breeders' variety whereas extant variety and Farmers' variety are considered to be farmers' variety. In fact, the definition clause also says that extent variety includes farmers' variety, which is confusing. The question arises as to what is the purpose of categorisation if extent variety includes farmer's variety..

A 'New Plant Variety' is nowhere defined in the definition clause of the statute. However, the term 'new' has been used under section 15(3) (a) of the Act which means something which is not commercialised before filing the application for registration i.e., one year in case if it is commercialised in India and four years if it commercializes outside India and in case of trees and vines, the period would extend to six years. So, the novelty is considered not from the date of filing, rather it has been evaluated before the date of filing.

EDV is defined in section 2(i). It is that plant variety which is predominantly derived from some other variety and, that's why it retains some feature or features of initial variety. This kind of varieties can only be developed in a scientific lab, that's why, it can be tagged as breeders' variety.

Extant variety is defined in section 2(j) of the Act. The unique feature of this plant variety is that it must be subsisted i.e., found in India. It includes all the plant variety notified by central government in The Seed Act, 1966 or a farmers' variety which is developed by a farmer or any other variety which is a part of public /common knowledge.

Whereas, the farmers' variety is a variety which is being developed and cultivated by farmers in their farm. The section 2(l) defines farmers' variety. It includes wild relatives or landraces of a variety about which they possess a common knowledge.

The Act grants protection to all four forms of plant varieties subject to conformity of NDUS Test. This is the basic test which means Novelty, Distinctiveness, Uniformity and Stability.³ Novelty is one feature which is required to be established only in case of new variety, whereas, the remaining three feature i.e., DUS is required in other plant grouping like Extant Plant variety, Essential Plant Variety and Farmers' Variety. However, the extent of DUS is different in all plant varieties like in case of New variety, it is conducted in two similar crop seasons at two different locations; in case of farmers' variety, one crop season at two different

³ PPVFR Act, 2001 § 15 No. 53, Act of Parliament, 2001(India).

locations; whereas in case of extant variety, DUS conducted to check the validity of variety for registration according to the term specified by recommendation committee; and, in case of EDV, DUS test is the second stage of testing, whereas, the primitive test is field test.⁴

Period Of Protection

The period of protection provided by the statute has been categorised on the basis of plant variety type like in case of trees, vines and crops. The Act grants protection for eighteen years to trees, vines and crops and, the certificate of registration is initially valid for a term of nine years; and, in case of other crops the period of protection is fifteen years, whereas the certificate of registration is valid for only six years. Hence, the statute provides different term of protection for different plant variety.

Section 24 of the PPVFR Act provides for the total period of protection granted to a plant variety. The provision says the period of protection starts running from different stages like in case of extant variety, the period of protection starts from the date of notification of genera and species whereas for any other plant variety, it will start from the date of registration i.e. the date on which certificate has been granted.

Different Claimants/ Stakeholders In The Statute

Breeder is a person who breed new plant varieties. Section 2(c) define the word 'breeder' as a person or group of persons or farmer or group of farmers or any institution which has bred, evolved or developed any variety. So, the provision recognises farmer as a breeder. The breeder develops a variety by doing some modification i.e., alteration or deletion in a fully equipped lab, for developing a new plant variety which is actually a new/modified version of some conventional or traditional plant variety or Farmers' variety. In-fact, the demand for breeders' rights has contributed in the origination of farmers' rights. It is an established fact that the PGR and associated knowledge has been used for developing any new plant variety and this newly developed variety has been regarded as breeder's intellectual property and is deemed subject to protection in intellectual property rights in various developed countries of

⁴M. Saravana Kumar and C. Deepika, *The Protection of Plant Varieties and Farmers' Rights Act of India* available at:

<https://deliverypdf.ssrn.com/delivery.php?ID=057096091031107010076103098021016072027012061042040087126090119023082009117003110070010012060033019023016098122114127079079068006005047059076013098093068030017113095057021005071080030067070070006119020106074072025122029012099092005004093026070018103006&EXT=pdf&INDEX=TRUE> (visited on 8th March, 2022, 11:00 am).

the world.

The term 'farmer' is defined in section 2(k). He is a person who cultivates crops by cultivating the land himself or under whose supervision someone else cultivates the crops or who conserves, preserves any wild species or traditional plant variety by conventional breeding process i.e., identification and selection of useful plant variety. He is also known as a breeder of conventional plant variety so he has the right to get registration over this variety.

In the process of production, the farmer conserves conventional plant varieties which have actually become the source/basis for developing new/breeders' plant varieties. They are the reservoir of the skill and knowledge related to conventional plant breeding. In-Fact, the modern breeders use the convention plant varieties, genetic resources and associated knowledge without recognizing and rewarding farmers and their communities. So, farmers are entitled for group intellectual property rights or community rights also. They claim these rights in lieu of the contribution they made in conserving plant genetic resources.

Farmers conserved and transferred traditional knowledge to their next generation without any expectation. They are the one who never claim any intellectual property right. It is a fact that "farmers' Rights" emerged in India to contravene the intellectual property rights of breeders. The rights are acclaimed by farmers to secure their control over traditional plant varieties and plant genetic resources. They are under the fear that in the absence of farmers' rights over traditional plant variety, breeder may exploit farmers' plant variety without any hitch and after doing some minor changes with the help of biotechnology and claim intellectual property rights on the same. To overcome farmers' fear, the legislature placed farmers' rights under the same statute in the country which protects breeders' rights.

Apart from breeders and farmers, there is one more group of people who enjoy freedom to use a registered plant variety i.e., Researchers. They have the right to use any protected/ registered plant variety for research and experimental purpose under section 30. So, they are not liable for any infringement, however, if they use a registered plant variety or plant genetic resources repeatedly for commercial production of a new plant variety, then they have to take the consent of the owner of the registered plant variety.

The central government and in certain cases the state governments will be deemed to be the owner of extant variety unless a breeder does not establish his rights within three years of the date of notification in the gazette.

Rights Of Farmers And Breeders

The Act grants certain rights to breeders of registered plant variety. The rights of breeder can further be transferred to breeders' successor, agent or licensee. The breeder of a registered plant variety is entitled to produce, sell, market, distribute, import and export the registered plant variety. They are the one who actually control the production and commercialization of plant varieties, so they are the owner of a registered plant variety. They have the right to prosecute an infringer i.e. a user who uses a plant variety without the consent of breeder or; who is not a breeder of a variety registered under this Act or a registered agent or a registered licensee of that variety, sells, exports, imports or produces such variety without the permission of its breeder or registered licensee, as the case may be.⁵

Farmers are claiming rights in this statute for the investment they made in the name of labour, time and energy in maintaining and conserving traditional plant varieties and for preserving plant genetic resources (PGR), whereas, breeder claim protection for innovating new plant variety by using PGR.⁶ So, they both have their justification for claiming rights/protection. However, since the very inception of use and application of biotechnology, farmers were overstepped by the tech-savvy breeders because of the inability of the farmers in accessing technology and information. For protecting the right and interest of farmers, the statute grants certain rights and freedoms to farmers.

The Intellectual Property Rights of farmers are specified in chapter 6 of the PPVFR Act from section 39 to 47. Section 39 (1) (i) to (iv) provides mainly four rights to farmer namely:

- (i) A farmer has a right to register his "new plant" variety as a breeder if he has bred or developed a new plant variety;

The intent behind granting this right to the farmer is to get and enjoy benefit of intellectual property on their innovation in the form of a plant variety.⁷

- (ii) enables farmers to register his conventional/ traditional plant variety as a farmers' variety if he is able to prove that the genetic material or parental material used in developing plant variety has been acquired lawfully.

⁵ PPVFR Act, 2001 §64 No. 53, Act of Parliament, 2001(India).

⁶ Anitha Ramanna, *Background Study 4 Farmers' Rights in India: A Case Study* available at <https://www.fni.no/getfile.php/131801-1469869136/Filer/Publikasjoner/FNI-R0606.pdf> (visited on 4th March, 2022, 4:00 pm).

⁷ R. C Agarwal, *Protection of Farmers' and Community Rights on Indigenous Genetic Resources* available at http://www.nbgr.ernet.in/Training_Management_PGR/Compendium/06_Protection_of_Farmers_and_Community_Rights_RC_Agarwal.pdf (visited on 11th March, 2022, 9:00 am).

- (iii) Right to be recognised and rewarded for conserving genetic resources and land relatives of plants.
- (iv) farmer has the right to save, use, exchange, share and sell his farm produce including seed of a protected variety. This is the conventional right which is available to the farmer. However, he shall not be entitled to sell branded seed of a variety protected under the Act.

Sub-section (2) of section 39 empowers farmers to claim compensation in case he suffers any loss because of the poor quality of seeds supplied by a breeder.

Section 40 of the Act puts a mandate upon the breeder to disclose the use of genetic material of some traditional plant variety which he used in developing any plant variety, which is conserved by a farmer or by any tribal community.⁸ Farmers can also claim this right as a collective or as a Communities' rights provided under section 41. This provision also states that if a breeder knowingly conceals such information, then on this ground, registration can be rejected.

Section 42 provides immunity to farmer from infringement. This provision says-

“The right established under this Act shall not be deemed to be infringed by a farmer”

It connotes that the court will not take any court proceeding against farmer for infringement under section 64 by virtue of protection given to the farmer in section 42 if he is able to prove that he is not aware about the registration and existence of breeder's rights over that plant variety. So, the burden lies upon the farmer to prove the fact that he is not aware about such right.

The provision also says in sub-section (ii) of section 42 that the court would not grant any relief against farmer if he is charged for infringement in section 64. In-fact, the provision also states the court would not take cognizance under section 65 against farmer for committing infringement. Therefore, the court would not grant any relief to the farmers. So, if a complaint is filed against a farmer for breaching breeder's rights under the Act, then he would not get any relief. The object of giving this right to farmer is to enable the farmer to maintain unrestricted access of farmer over seed.

⁸ S.P Bala Ravi, *Farmers' Rights their Scope and Legal Protection in India* available at https://www.biodiversityinternational.org/fileadmin/user_upload/online_library/publications/pdfs/Community_biodiversity_management/6.3.farmers_rights_protection_India.pdf (visited on 11th March, 2022 9:00 am).

Section 43 says about Prior Authorisation of farmers in case if farmers' variety use as a parent variety in the development of an Essential Derived Variety. It says if a breeder of an Essential Derived Variety which is a derived variety of some farmers' variety, cannot be used /exploit by any breeder for any of the purposes given in section 28 i.e. for producing, selling, marketing, distributing, importing and exporting such variety.

Section 44 gives immunity to farmer or village community from paying any fee in any proceeding, be it before a judicial authority or an administrative agency. The explanation of section 44 describes the 'fees' as any payment made for inspection of any document or for obtaining a copy of any decision or order, payment that are required to be made for variety registration, test fee of NDUS, and any other fees required to be paid for services rendered by PPVFR Authority specified in the provision.⁹

Section 45 provides for establishment of "National Gene Fund" by the Central Government. Section 45 is divided in two sub-sections. Sub-section (1) gives an account of all measures which can contribute in NGF. The Gene Fund shall be credited by the following amount, namely, amount of benefit sharing received, amount of annual fees payable to the authority under section 35 and compensation claimed under section 41.

Sub-section (2) of section 45 states that the Gene Fund can be used for paying benefit sharing, expenditure made in conservation of genetic resources.

Judicial Pronouncement

Recently, in PepsiCo. India v. Potatoes Farmers, the rights of farmers were attacked. In April 2019, PepsiCo filed patent infringement suit against nine farmers of Gujarat for cultivating their potato varieties FL 2027. The Company accused farmers for infringing its statutory right given in section 64 and 65 under PPVFR Act and, claimed Rs. 1.05 crore from each farmer. The company contended that they had been illegally producing and selling the potato variety (FL 2027). The City Civil Court at Ahmedabad granted ex-parte ad-interim injunction for restraining farmers from producing and selling the potatoes variety without considering the fact that seeds of said potato variety can be found with farmers because of conventional farming

⁹ Available at <https://vikaspedia.in/agriculture/policies-and-schemes/crops-related/protection-of-plant-varieties-and-rights-of-farmers/farmers2019-rights-in-the-ppv-fr-act-2001>(visited on 11th March 2022, 9:00 am).

practice i.e., exchange and share of seeds.¹⁰ In-fact, section 39(1) (iv) recognises this conventional right of farmer. It says farmers have the right to save, use, exchange, share and sell seeds or PGR of a plant variety including a registered plant variety except branded plant variety under this Act, in the same manner as he was entitled before coming into force of this Act. Apart from this, section 42 provides protection to the farmers from infringement. It grants immunities to the farmer from infringement if he proves ignorance of the existence of the right at the time of infringement.

The legislative intent behind these provisions is to protect the conventional right of farmers in respect of seeds. These rights have been given to the farmers to safeguard the position of farmer as a conserver of plant biodiversity. They have been subjected to lot of exploitation from time immemorial because of their poor economic and educational backgrounds. They are ill-informed and untrained. So, these two rights safeguarded the farmers in this case also.

Later, on 10th May 2019, the PepsiCo. India Withdrew the suit against farmers. Thereafter, in June 2019, an application for revocation of registration certificate was filed by Kavitha Kuruganti, Convenor of the Alliance for sustainable and Holistic Agriculture on several grounds like the adverse impact of registered variety on the livelihood of farmers, incorrect information provided by PepsiCo. and alleging that the grant of certificate is not in public interest. This triggered a reaction from farmers, NGO's and political parties. In this case, the company's registration has been revoked by the Protection of Plant Varieties and Farmers Rights' Authority on the ground specified in section 34 i.e., the certificate of registration had been issued on incorrect information, the certificate had been granted to a person not eligible for protection, that the breeder did not provide sufficient material as required for registration and, the grant of certificate of registration was not in the public interest as several farmers have been put to hardship including the looming possibility of paying hefty amount in the form of compensation.¹¹

Apart from PepsiCo., in M/s International Flower Auction Bangalore Ltd. v. M/s. Moerheim Roses & Trading India Pvt. Ltd., the PPVFR Authority passed an order for revocation of

¹⁰Apoorva Mandhani, *Case against farmers, poor documentation — why PepsiCo India lost Lay's variety potato rights* posted on 4th December, 2021 available at <https://theprint.in/theprint-essential/case-against-farmers-poor-documentation-why-pepsico-india-lost-lays-variety-potato-rights/776644/> (visited on 4th March, 2022, 10:00 am).

¹¹Shagun Kapil, *Down To Earth* (available at: <https://www.downtoearth.org.in/news/agriculture/historic-win-for-farmer-seed-rights-pepsico-s-ipr-on-potato-variety-revoked-80526> India: Historic win for farmer seed rights (gmwatch.org) (visited on 2nd February,2022 10:00 am).

registration certificate.

Conclusion & Suggestions

It can be said that the PPVFR Act is an attempt to protect the Intellectual Property rights of farmers. However, there is still need to do lot in this regard, like need to make aware farmers about the existence of this law and the rights available to them and how they can access technology vis-à-vis genetically modified seeds and other resources etc. There is a need to sensitize breeders turned companies that they are able to develop new plant varieties only because of the farmers' efforts in conserving plant genetic resources. So, farmers are their companions which have to be supported by them.

In Pepsi Co India, the PPVFR Authority has passed an order for revocation of registration Certificate. On December 3, 2021, the Protection of Plant Varieties and Farmers' Rights Authority revoked the registration certificate of PepsiCo India for protecting the interest and rights of farmers. This order has been taken as a historical victory for ensuring rights to the farmers provided under the Protection of Plant Varieties and Farmers' Rights Act (PPVFR) 2001. The PPVFR Authority revoked the certificate of registration on the ground that certificate of registration had been based on incorrect information, the certificate had been granted to a person not eligible for protection, that the breeder did not provide sufficient material as required for registration and, the grant of certificate of registration was not in the public interest specified under section 34. The said decision of the authority sets an example that the freedom and rights given to the farmers under the statute are actually backed by law. The judgment of the PPVFR Authority in PepsiCo India case is significant and turns to be a milestone in the history of Plant variety protection and Farmers' rights provided under the PPVFR Act.

One another step which can be adopted to curb such an issue between the farmers and breeder is by bringing a legislative change in the PPVFR Act i.e., there should be an amendment which should establish a proper relationship between patent law and PPVFR Act.¹²

¹²Yogender Singh and Rahul Yadav, *TRIPS and Plant Variety Protection: The Indian Prospective* posted on 25th October, 2020 available at: https://www.researchgate.net/publication/346486224_TRIPS_AND_PLANT_VARIETY_PROTECTION_THE_INDIAN_PROSPECTIVE (visited on 4th March, 2022, 10:00 am).