



COMPETITION COMMISSION OF INDIA

Reference Case No. 2 of 2015 & Case No. 107 of 2015

In Re:

Reference Case No. 2 of 2015

**Department of Agriculture, Cooperation & Farmers
Welfare
Ministry of Agriculture & Farmers Welfare
Government of India**

Informant

And

**M/s Mahyco Monsanto Biotech (India) Limited
(MMBL)
Ahura Centre, B-Wing, 5th floor,
96, Mahakali Caves Road,
Andheri (East), Mumbai-400093**

Opposite Party No.1

WITH

Case No. 107 of 2015

**M/s Nuziveedu Seeds Limited (NSL)
Survey No.69, Kandlakoya,
Gundla Pochampally Village,
Medchal Mandal, Ranga Reddy District,
Telangana-501401.**

Informant No. 1

**M/s Prabhat Agri Biotech Limited (PABL)
#6-3-541/B, Opposite Heritage Office,
Punjagutta Market, Punjagutta,
Hyderabad-500082.**

Informant No. 2

**Pravardhan Seeds Private Limited (PSPL)
#8-2-277/45, Ground Floor, UBI Colony,
Road No. 3, Banjara Hills,
Hyderabad-500034.**

Informant No. 3



And

**Mahyco Monsanto Biotech (India) Limited
(MMBL)
Ahura Centre, B-Wing, 5th floor,
96, Mahakali Caves Road,
Andheri (East), Mumbai-400093**

Opposite Party No.1

**Monsanto Inc, USA (MIU)
800 North Lindbergh Blvd., St. Louis, Missouri,
U.S.A.**

Opposite Party No. 2

**Maharashtra Hybrid Seeds Company (MAHYCO)
Reshambhavan. IV Floor, 78, Veer Nariman Road,
Mumbai-400020.**

Opposite Party No. 3

**Monsanto Holdings Private Limited (MHPL)
Ahura Centre, 5th Floor, 96, Mahakali Caves
Road, Andheri (East), Mumbai-400093**

Opposite Party No. 4

CORAM

**Mr. Devender Kumar Sikri
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Mr. M. S. Sahoo
Member**

**Justice G. P. Mittal
Member**



Appearances:

**For Ministry of Agriculture
and Farmers Welfare:**

Shri P.S. Narshiman, Sr. Advocate
(ASG)
Shri Ravi Prakash, Advocate (CGSC)
Ms. Rimali Batra, Advocate

For NSL:

Shri C.S. Vaidhyanathan, Sr. Advocate

For PABL:

Shri Parag Tripathi, Sr. Advocate

For PSPL:

Shri Amitabh Kumar, Advocate
Shri Vaibhav Chaukase, Advocate
Ms. Lagna Panda, Advocate

For MMBL & MHPL:

Shri Ramji Srinivasan, Sr. Advocate
Shri Harman Singh Sandhu, Advocate
Shri Abhijeet Sinha, Advocate
Shri Aman Sethi, Advocate
Shri Anandh Venkataramani, Advocate

For MAHYCO:

Shri Rajshekhar Rao, Advocate
Shri G. R. Bhatia, Advocate
Ms. Kanika Chaudhary Nayar, Advocate
Shri Rudresh Pratap Singh, Advocate
Shri Arjun Nihar Singh, Advocate

Order under Section 26(1) of the Competition Act, 2002

The present Order deals with two cases, namely, Reference Case No. 02 of 2015 and Case No. 107 of 2015 due to commonality of issues involved.

2. The information in Reference Case No. 02/2015 has been referred under Section 19(1) (b) of the Competition Act, 2002 (the 'Act') by the Department of Agriculture, Cooperation and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Government of India ('MOA&FW') against M/s Mahyco Monsanto Biotech (India) Limited ('MMBL') alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.



3. The information in Case No 107/2015 has been filed under Section 19(1) (a) of the Act by Nuziveedu Seeds Ltd. ('NSL'), Prabhat Agri Biotech Ltd. ('PABL') and Pravardhan Seeds Pvt. Ltd. ('PSPL') against Mahyco Monsanto Biotech (India) Limited ('MMBL'/'OP-1'), Monsanto Inc, U.S.A. ('MIU'/'OP-2'), Maharashtra Hybrid Seeds Company Private Ltd. ('MAHYCO'/'OP-3') and Monsanto Holdings Pvt. Ltd ('MHPL'/'OP-4') alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.
4. The MOA&FW is a Ministry of the Government of India, and is responsible for formulation and administration of the rules/regulations/ laws relating to agriculture in India. It is stated that it has received many representations/ complaints from different stakeholder groups, namely, Bharatiya Janata Party Kisan Morcha, Andhra Pradesh, Bharatiya Janatha Party Kisan Morcha, Telangana, and National Seed Association of India (NSAI), alleging abuse of dominant position by MMBL.
5. NSL is a company engaged in the business of developing, producing, processing and selling of seeds for a range of field crops and vegetables including hybrid seeds and has more than 30 years of experience in the Indian seeds industry. PABL is also engaged in the business of developing, producing, processing and selling of seeds for a range of field crops and vegetables including hybrid seeds and Bt cotton seeds. It was acquired by NSL in 2011, and is now its wholly owned subsidiary. PSPL is also engaged in the production of hybrid seeds. NSL acquired its 51% shareholding in 2009. NSL, PABL and PSPL are thus part of the same group and are collectively referred to as the 'Informants'.
6. MIU *i.e.* OP-2, according to Informants, is a Fortune 500 company, and global provider of agricultural products, besides being a Genetically Modified (GM) trait developer and licensor. It holds a portfolio of patents, trademarks and licenses which it sub-licenses in various countries for a consideration charged in the form of trait value/royalty/ cost of technology charges, from the licensees.



सत्यमेव जयते



The nomenclature of fee charged varies from country to country. MHPL *i.e.* OP-4 is a 100% subsidiary of MIU in India and it is engaged in marketing of Bt cotton hybrid seeds (trade name–Paras) and other field crop seeds. MAHYCO *i.e.* OP-3 is also an Indian company, engaged in research and development, production, processing and marketing of hybrid seeds and open pollinated seeds in India. MHPL holds 26% stake in MAHYCO. MMBL *i.e.* OP-1 is a 50:50 joint venture formed between MHPL and MAHYCO and is engaged in sub-licensing of Bt cotton technology of MIU in India. The Opposite Parties, being part of the same group in terms of Explanation (b) to Section 5 of the Act, are hereinafter collectively referred to as the OP Group.

7. As per the information, MIU was the first company in the world to develop and commercialise Bt cotton technology, namely, Bollgard-I *i.e.* BG-I, also known as EVENT 531, in 1992. This is a single gene technology, consisting of *CryIAc* gene, which targets cotton pest, Bollworm. Later on, second generation cotton technology consisting of two genes of Bt, namely, *CryIAc* and *Cry2Ab*, called Bollgard –II (BG-II), also known as EVENT 15985, was developed as a certain type of Bollworm, namely, ‘Pink Bollworm’, became resistant to BG-I. It is further stated in the information that BG-I is not patented in India, whereas BG-II was granted patent on 20th March, 2009 under Indian Patent legislation *w.e.f.* 5th June, 2002.
8. In 1998, MIU licensed its Bt cotton technology to MMBL for further sub-licensing by it to seed manufacturers in India, to incorporate this technology in the existing cotton seeds/ hybrids manufactured by Indian seed manufacturing companies. As per the facts made available, first sub-licensing took place in 1999 and it was subsequently renewed as per the terms of various agreements between MMBL and Indian seed companies. The resultant modified seeds were claimed to possess insect resistant traits termed as Bt cotton seeds. In India, substances and products which contain genetically engineered organisms can be produced, sold, imported or used only with the approval of Genetic Engineering Appraisal Committee (GEAC). It is stated that BG-I was approved for commercialisation by GEAC in 2002 whereas, BG-II was approved for commercialisation in 2006.



सत्यमेव जयते



9. As per the information and documents contained in Reference, many Indian seed companies including the Informants entered into sub-license agreement with MMBL for procuring its Bt cotton technology in consideration of an upfront one time non-refundable fee of Rs. 50 lakhs and recurring fee called as, *i.e.* 'Trait Value'. The 'Trait Value' is the estimated value for the trait of insect resistance conferred by the Bt gene technology. It forms a significant portion of the Bt cotton seed prices. It is stated that the trait value is determined by MMBL on the basis of Maximum Retail Price (MRP) of 450 gm seed packet (hereinafter 'per packet'), in advance for each crop season. It is also stated that out of this trait value, some amount is disbursed as royalty to MIU and the royalty paid to Monsanto US by MMBL is a small portion (between 15-20%) of the Trait Value it collects.
10. It transpires from the facts placed before the Commission that the fixation of trait value has been a matter of dispute/litigation since 2005. It is alleged that in the year 2005, the trait value fixed by MMBL was Rs.1250/- per packet for BG-I which led to high value of Bt cotton seeds manufactured using the said technology *i.e.* Rs.1700/- – Rs.1800/- per packet. This was allegedly very high in comparison to the price of non-Bt cotton seeds which were available for Rs.300/- per packet.
11. It is stated that, the farmers association, Ryotu Sangham, Andhra Pradesh had made a representation before the erstwhile Monopolies and Restrictive Trade Practices Commission (MRTPC) on 30th August 2005 against MMBL. Subsequently, a reference was also filed by the State of Andhra Pradesh and the Commissioner & Director of Agriculture with the erstwhile MRTPC against MMBL complaining about the high trait value charged in India which was allegedly higher in comparison to China (2.3 US dollar per kg) *i.e.* Rs.50/- per packet.
12. It is further stated that the report of the investigation wing of the MRTPC *i.e.* the Office of the Director General of Investigation and Registration, had



observed that MMBL was in a position to charge arbitrarily for the Bt cotton technology and could not offer any rational explanation for arriving at the trait value of Rs.1250/- per packet. During the pendency of the matter before the erstwhile MRTPC, MMBL allegedly reduced the trait value of BG-I to Rs.900/- per packet.

13. In the meanwhile, MRTPC *vide* its interim order dated 11th May, 2006, observed that *“There is a basic difference between royalty and trait value ...and are not synonymous... In any case the lumpsum payment of Rs.50 lakhs may be considered as royalty for the same, but the future payments on sale cannot be termed as royalty”* and held that *“... by temporary injunction the MMBL is directed during the pendency of this case not to charge trait value of Rs.900/- for a packet of 450 gm of Bt cotton seeds and to fix a reasonable trait value that is being charged by the parent company in the neighboring countries like China”*.
14. It is further submitted that the State Government of Andhra Pradesh, *vide* its order dated 29th May, 2006 fixed the Maximum Sale Price (MSP) of Bt cotton seeds (BG-I) at Rs.750/- which included trait value, in response to which MMBL immediately filed an interim application in the Supreme Court on 30th May, 2006, praying for a stay of the said order. Then the Supreme Court *vide* its order dated 5th June, 2006, disposed of the interim application stating that they were not inclined at that stage to express any opinion regarding the validity of the State of Andhra Pradesh’s order, but clarified that if the MRTPC or the Supreme Court held that MMBL was not adequately covered by the sum of Rs.750/- per packet as fixed, then the MRTPC shall decide as to from whom the balance, if any, shall be recovered.
15. While proceedings before the Supreme Court and MRTPC were pending, MMBL entered into a ‘Settlement and Release of Claims Agreement’ and consequent ‘Supplementary and Amendment Agreement’ with the Indian seed companies in 2007 and started charging Rs.148.15/- per packet on an MRP of Rs.750/- per packet as trait value.



सत्यमेव जयते



16. After dissolution of the MRTPC, the matter (RTPE 2 of 2006) was transferred to the Competition Appellate Tribunal (COMPAT). The COMPAT *vide* its order dated 8th December, 2009, took notice of the fact that the new price has been fixed at Rs.750/- per packet of Bt cotton seeds and that in view of the ‘Supplementary and Amendment Agreement’ entered into between MMBL and its sub-licensees, nothing further survived in these proceedings and hence, the reference was disposed of. However, it was categorically stated that “...*if there may be future modifications in the prices the same may give rise to further cause of action.*”
17. Further, it has been stated that thereafter, various State Governments came up with their own legislations, and fixed the MSP of cotton seeds, *inter alia*, specifying the amount of trait value. During 2008-2010, the State Government of Maharashtra and Andhra Pradesh (A.P.) fixed the prices of Bt cotton seeds (BG-I) at Rs.650/- and Bt cotton seeds (BG-II) at Rs.750/-, and the corresponding trait values as Rs.50/- and Rs.90/ per packet-. Further, during 2011-2014, Maharashtra and A.P. Governments fixed the prices of Bt cotton seeds (BG-I) at Rs.830/- and Bt cotton seeds (BG-II) at Rs.930/-, and corresponding trait values as Rs.50/- and Rs.90/- per packet. Similarly, in 2015, the State Government of Telangana fixed the prices of Bt cotton seeds (BG- I) at Rs.830/- and Bt cotton seeds (BG-II) at Rs.930/-, and corresponding trait values as Rs.10/- and Rs.50/- per packet. It is further stated that Government of Gujarat fixed the MSP of Bt cotton seeds at Rs.650/- (BG-I) / Rs.750/- (BG-II) per packet in 2008 and, later on, at Rs.830/- (BG-I) /Rs.930/- (BG-II) per packet in 2011, but it did not specify the trait value.
18. It is stated that MMBL has filed several writ petitions challenging the orders by various State Governments regarding the fixation of MSP and respective trait values. While the order passed by the State Government of Gujarat was set aside by the Hon’ble High Court of Gujarat in 2011, the Hon’ble Bombay High Court upheld the validity of the order of the Government of Maharashtra in 2013. The petition filed before Hon’ble High Courts of Telangana and A.P. are still pending for adjudication.



19. It is asserted that during the pendency of the above stated litigations, since the sub license agreement with the seed companies got expired in 2015, MMBL renewed the sub-license agreements in March 2015 for BG-II only (as BG-II replaced BG-I), *inter alia*, fixing the trait values at Rs.163.28/- to Rs.174.90/- (plus taxes) on the MRP of Rs.930/- to Rs.1100/- per packet in various states. Further, it is pointed out that the new agreements also mandated that in case the actual MRP is higher than Rs.930/- in case of Gujarat, Maharashtra, Andhra Pradesh, Karnataka, Madhya Pradesh and Tamil Nadu, and Rs.1100/- in case of Punjab, Haryana and Rajasthan per packet, 16.6% of the difference between the actual MRP and Rs.930/-/Rs.1100/-, as the case may be, plus taxes shall be payable in addition to Rs.163.28/-/ Rs.174.90/- respectively.
20. Many seed companies made representations to MMBL for settlement of payments from 2010 onwards in line with the order of the Hon'ble Bombay High Court dated 17th June, 2015 passed in W.P. No.3255 of 2015. However, MMBL allegedly invoked arbitration proceedings before the Hon'ble Bombay High Court seeking interim reliefs against the seed companies to deposit trait value for the year 2015-16 as estimated by it. The same is pending for adjudication.
21. The Informants have highlighted communications to MMBL during July—November, 2015 requesting it to charge trait value at the rates determined by the State Governments and reconciliation of accounts. However, despite various requests, MMBL refused to negotiate and arrive at a mutually agreeable trait value and rather, it initiated arbitration proceedings. On 14th November, 2015, MMBL issued notices to the Informants asking them to withdraw their claims which was followed by termination notices. During the hearing, Informants asserted that such termination notices were issued even though the Informants were willing to provide surety for the settlement of pending claims after the matter was decided. It has been further alleged that MMBL is relying on these termination notices to compel other seed companies (sub-licensees) to pay excessive and extortionary trait value.
22. In addition, the Informants have alleged that the sub-license agreements



सत्यमेव जयते



between MMBL and the seed companies are one-sided, arbitrary and onerous. Specifically, it has been submitted that Article 2.05 (c) of conditions of sub-license and Article 9.04 regarding disposition of inventory are unfair and restrict the ability of the Informants to deal with a new technology provider even if it is available at a lower cost. Further, it has been contended that the trait value as provided in Article 3.01 is unfair as it is being unilaterally fixed by MMBL at rates higher than those determined by the State Governments. It has been mentioned that a hybrid is a combination of agronomic traits which represent its duration, pest and disease reaction, quality of the fibre etc. and Indian seed companies carry out the breeding activity to bring these agronomic traits into the hybrid. The yield of the crop not only depends on the quality of seeds, but also other factors like weather, timely irrigation, proper maintenance etc. Hence, incremental profits/additional benefits obtained by farmers from Bt cotton cultivation cannot be attributed to Bt cotton technology alone. Moreover, they asserted that linkage of the trait value to the MRP of seed packets is without any economic justification and as such is unfair. It was also argued that the amount recovered by MMBL from seed companies over the years on account of royalty charges and trait value is much more than the expenses it had incurred in developing the said technology and thus, there is no justification to charge such high trait values at increased rates.

23. Placing reliance on the list of seed companies which have signed sub-license agreements with MMBL, as available on the website of Controller General of Patents, Designs and Trademarks (CGPDT), it has been pointed out that MMBL has not entered into any sub-license agreement with MAHYCO and MHPL as their names do not appear in the said list. This allegedly amounts to discriminatory conduct on part of MMBL as its group companies are not being subjected to the unfair conditions as imposed upon the Informants and they are not required to pay such trait value to MMBL.
24. The Informants also submitted that if their sub-license agreements are terminated, there will be an adverse impact on the farmers in the impending Kharif Season 2016 due to shortage of Bt cotton seeds in India.



सत्यमेव जयते



25. Citing the aforesaid facts and allegations, the Informants have prayed before the Commission to initiate an inquiry into the matter. The Informants have also prayed that MMBL be directed to amend the restrictive and abusive clauses in the sub-license agreements. Further, an interim relief has also been sought by the Informants that pending inquiry, MMBL be directed not to terminate the sub-license agreements entered into with them in March 2015.
26. Similarly, the MOA&FW, in Reference Case No. 2 of 2015, has made a reference to the Commission against MMBL, highlighting the following concerns raised by the farmers:
- a. Abuse of dominant position by charging unreasonably high trait fees for Bt cotton seeds under Section 4(2)(a) of the Act;
 - b. Exploitation of the permissions given by the Government to market Bt cotton technology by creating a monopoly through restrictive agreements for unjust enrichment by charging high trait value from its licensees and ultimately from farmers;
 - c. Its sub-licensing agreements with the Indian seed manufacturing companies are anti-competitive under Section 3(4) of the Act.
27. Based on the foregoing concerns, MOA&FW has, *inter alia*, sought a direction to the Director General of the Commission ('DG') to conduct a detailed investigation into the matter and prevent abuse of dominant position in Bt cotton technology by MMBL.
28. The Commission heard the respective counsels appearing for MOA&FW, Informants and Opposite Parties in its ordinary meeting dated 14.01.2016. The counsel for the Informants reiterated the submissions made in the information. They also reiterated the allegations mentioned in the reference and highlighted the gravity of the issues involved in the present case. The counsel for MOA&FW further submitted that a Committee has been constituted by the Central Government in accordance with the Gazette Notification dated 07.12.2015 for regulating *inter alia* the trait fees.



सत्यमेव जयते



29. The counsel for MMBL made detailed submissions and also provided a compilation of documents relied upon by them during the oral hearing. It was, *inter alia*, submitted that the allegations raised in the present information/reference are purely emerging from contractual dispute between the parties and has no competition issue involved therein. They submitted that the allegations of the Informants with regard to unfairness of the sub-license agreement are misplaced as the agreements were entered into between the parties after negotiations. It was also argued that the Informants have grown manifold in terms of their turnover and made huge profits by using the licensed technology of MMBL and, thus, should not allege unfairness. They claimed that the trait value charged from Indian seed companies is lowest in the world. In addition, it was contended that the trait fees for Bollgard II has declined overtime both in absolute as well as percentage terms of cotton seed MRP in India. Further, the counsel of MMBL justified the trait value by stating that they are entitled to reward for innovation. While responding to the allegation of arbitrariness in clause 2.05 (c), it was submitted the sub-licensees are only required to intimate MMBL regarding proposed negotiations with any of the sub-licensor's competitor and the same is not abusive or unreasonable. It was further submitted that MMBL is bound by GEAC to report and obtain approval as per their requirements. To counter the allegation regarding leveraging under Section 4 (2) (e) of the Act, it was contended that the market share of MAHYCO and MHPL in the cotton seed market has reduced from 13% to 7% since 2013.
30. MAHYCO (OP-3) and MHPL (OP-4) adopted the submissions made by MMBL. They also requested for deletion of their name from the array of opposite parties in Case No. 107 of 2015 stating that none of the allegations pertain to them. In this regard, applications dated 14.01.2016 and 03.02.2016 have also been filed by OP-3 and OP-4, respectively.
31. The Commission has considered the information/reference, additional submissions, documents filed by MMBL, oral submissions made by the parties and other material available on record. The Informants are primarily aggrieved by the alleged abusive conduct of MMBL on account of imposition of unfair



सत्यमेव जयते



conditions in the sub-license agreements, charging of unfair price, discriminatory treatment, limiting and restriction of technical and scientific development relating to Bt cotton technology and cotton seeds market, denial of market access and leveraging of dominant position in the Bt cotton technology market to protect cotton seeds market in violation of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b), 4(2)(c) and 4(2)(e) of the Act. Further, it has been stated that sub-license agreements between the Informants and MMBL contravene Section 3(1) and 3(4) of the Act.

32. Before analysing the conduct of an entity under Section 4 of the Act, it is imperative to define the relevant market with due regard to the relevant product market and the relevant geographic market under Section 2(r), (s) and (t) of the Act.
33. The relevant product market shall comprise of the products which are substitutable by way of their characteristics, price or intended use. The allegations in the present case are with respect to the sub-licensing of the Bt cotton technology which is used for manufacturing Bt cotton seeds, which have the inherent ability of fighting the cotton pest, Bollworm. The Commission observes that the said technology is different from traditional methods of pest control used in cultivation of cotton such as the use of chemical sprays. It is noted that the use of chemical sprays is relatively less effective method to control pests in comparison to Bt cotton technology. Further, the traditional method also contributes to pollution. Therefore, the Commission is of the view that the Bt cotton technology, by virtue of its effectiveness and characteristics, appears to be a distinct product. Bt cotton technology is provided by different technology providers and varies from one provider to the other. One of the differentiating factors amongst the different Bt cotton technologies is the gene constituents, due to which ability to fight the pest Bollworm, varies across different technologies. However, since the ultimate aim of choosing Bt cotton technology is to protect the cotton crop from the pests (Bollworm) in an effective, non-polluting manner through genetic intervention, all the Bt cotton



सत्यमेव जयते



technologies, irrespective of the gene constituents, are considered as substitutable. Thus, the relevant upstream product market in the present case appears to be market for *'provision of Bt cotton technology.'*

34. As regards the delineation of the relevant geographic market, the Commission notes that GEAC approvals are required for commercialisation of genetic technology in India. Only those suppliers who have approvals from GEAC can provide Bt cotton technologies in India which shows that conditions of competition for supply of services are distinctly homogenous in India and can be distinguished from conditions of supply prevailing in other countries. Further, as per MMBL's website, BG-I and BG-II cotton technologies have been approved for commercialization in India from 2002 and 2006 respectively. Therefore, the Commission observes that the conditions of competition throughout India for the aforesaid relevant product market are homogenous and thus, the relevant geographic market in the present case would be 'India'. Accordingly, the relevant upstream market would be market for *'provision of Bt cotton technology in India'*.

35. The Commission notes that the Bt cotton technology cannot be sold directly to the farmers. The technology needs to be added to the hybrid by seed manufacturers to produce Bt cotton seeds which have an inbuilt resistance mechanism to deal with harmful pests like bollworm. Typically a hybrid is a combination of 20-25 important agronomic traits which denote its duration, boll size, quality of fibre, pest and disease reaction, suitability to a particular agro climatic zone etc. This breeding activity is carried out by seed companies to bring as many useful agronomic traits as possible into a hybrid. The performance of Bt cotton hybrid is a combination of the hybrid's genetic composition and the insect resistance imparted by Bt cotton technology. Therefore, the technology provider needs to partner with seed companies through technology licensing agreements so as to integrate the technology into cotton hybrids. Thus, the Commission is of the view that there also exists a downstream relevant market *i.e.* market for *'manufacture and sale of Bt cotton'*



seeds in India’ connected with the upstream relevant market *i.e.* market for *‘provision of Bt cotton technology in India.’* It is further observed that the relevant geographic market for the downstream product market appears to be India as the conditions of competition faced by the Indian seed manufacturing companies are distinctly homogenous throughout the country.

36. As regards the assessment of the dominance of MMBL in the upstream market, there are different Bt cotton technology providers, including MMBL. As per the information available on record in the Commission, there are two types of Bt cotton technology: single gene and two gene. The companies offering single gene Bt cotton technology other than MMBL are JK Agri Genetics, Nath Seeds, Central Institute of Cotton Research (CICR) and Metahelix Life Sciences. MMBL used to sub-license single gene technology under the name of Bollgard-I (BG-I), also known as MON531. It has been submitted by the Informant that MMBL is the only player in the two gene Bt cotton technology. While CICR has withdrawn its Bt technology in 2010, the other competitors, namely, JK Agri Genetics, Nath Seeds, and Metahelix Life Sciences have entered into sub-licensing agreements with MMBL. Out of 1128 Bt cotton hybrids approved by the GEAC till May 2012, 986 hybrids were incorporated with Bt technology sub-licensed by MMBL. Therefore, it appears that MMBL is having significant presence amongst the technology providers in terms of its market share in the upstream relevant market of provision of Bt cotton technology in India.
37. Further, as per the information submitted by the Informant, the Bt cotton technology sub-licensed by MMBL is used in more than 99% of the area under Bt cotton cultivation in India. The competitors of MMBL do not seem to pose effective competitive constraints on MMBL and there is huge consumer dependence.
38. Any Genetically Modified (GM) technology in the market has to first go through rigorous research, development and testing and then seek GEAC approvals, which is a long process and takes around 5-7 years. Further, developing such technology involves huge cost implications. As such, the entry of a new



technology is subject to regulatory approvals and huge investments which create significant entry barriers.

39. Considering all these factors, the Commission is of the view that MMBL holds a dominant position in the relevant upstream market for '*provision for Bt cotton technology in India*'.
40. Having observed that MMBL holds a dominant position in the relevant upstream market, the Commission will deal with the allegations pertaining to the conduct of MMBL which is stated to be abusive in nature. On perusal of the submissions of the Informants, it is noted that the Informants initially entered into sub-license agreements with MMBL in 2004 which was renewed from time to time. The Informants also entered into Settlement and Supplementary Agreement in 2007, Settlement and Amendment Agreement in 2011 and new sub-license agreement in 2015.
41. The Informants have stated that certain terms and conditions in the sub-license agreements are highly abusive and restrictive in nature. The purported clause 2.05(c), *inter alia*, requires the sub-licensee to intimate MMBL within thirty days from date of undertaking development of hybrid cotton planting seeds developed based on a trait obtained from a competitor of MMBL. Breach of this clause may trigger termination of the Agreement with immediate effect as per clause 9.02(b) (iii). The Commission notes that the consequences of such termination, which are entailed in clause 9.06, require the sub-licensee to immediately cease selling or otherwise distributing the Genetically Modified Hybrid Cotton Planting Seed under the agreement and immediately destroy all such Genetically Modified Hybrid Cotton Planting Seeds as then in existence and its possession or which may be further produced under the existing seed production arrangements. Further, it states that sub-licensee shall immediately destroy all parent lines or other cotton germplasm which has been modified to contain the Monsanto technology. It is further noted that as per clause 9.02(b) (vii), the sub-licensor is empowered to terminate the sub-license agreement with immediate effect if at any time, any laws in the territory restrict the sub-



सत्यमेव जयते



license fees (trait value) specified in Article 3 payable by the sub-licensee to the sub-licensor. The Commission observes that such conditions appear to be stringent and unfair, particularly in the light of the ongoing litigations and legislations passed by the Central and State Governments from time to time. The termination of license agreement as in the case of the Informants, would have the effect of denial of market access to the seed manufacturers, given their dependence on MMBL for Bt cotton technology. The Commission notes that imposition of such conditions for notification coupled with stringent termination conditions not only discourages the sub-licensees from dealing with the competitors, but also amounts to restriction of development of alternate Bt cotton technologies. Further, charging of trait value payable on the basis of MRP of the seed packet apparently has no economic justification in light of the fact that performance of the Bt cotton crop depends not only on the BT cotton technology but also on other factors like genetic composition, climatic conditions etc. and appears to be unfair. Based on comparison of fees equalized to per acre basis across countries, MMBL has contended that the trait value charged in India is lowest in the world. However, the same does not appear to be a valid comparison as per acre cost/price would vary, *inter-alia*, based on the type of soil and weather conditions.

42. The Informants have further alleged that the termination of their sub-license agreements was done with an ulterior objective of strengthening OP Group's position in the downstream market. The Commission observes that the associated companies of MMBL *i.e.* MAHYCO (OP-3) and MHPL (OP-4) are in the business of manufacturing of Bt cotton seed. As brought out earlier, MMBL is dominant in the upstream relevant market. By terminating the sub-license agreements with the Informants on account of disputes related to trait value, while the matter is *sub-judice* and invoking stringent termination conditions which would lead to ouster of the informants from the downstream market, MMBL appears to be using its dominance in the upstream market to protect its presence in the downstream market through its group entities *i.e.* MAHYCO (OP-3) and MHPL (OP-4). As regards allegations of discriminatory conduct, although during the hearing it has been asserted by MMBL that they



सत्यमेव जयते



have entered into sublicense agreement with these group companies and both are paying the same fees, no evidence has been adduced in support of the same. Moreover, their names are not appearing in the list of sub-licensees provided by the Informants accessed from the website of “CGPDT”. Thus, based on the available documents, it is not clear whether the group entities are being subject to similar pricing and stringent sub-license agreements. Any discrimination on this account has the potential to distort the level playing field in the downstream Bt cotton seeds market and needs to be examined.

43. Based on the foregoing, the Commission holds that the conduct of MMBL *prima facie* appears to be in violation of Section 4 of the Act.
44. As regards the allegations under Section 3(4) of the Act, it is observed that the notification requirements coupled with the stringent termination conditions in the sub license agreement entered into between MMBL and the Informants are in the nature of refusal to deal and exclusive supply agreements within the meaning of Section 3(4)(b) and 3(4)(d) of the Act. 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. The agreements thus, have the effect of foreclosing competition in the upstream Bt Technology market which is characterised by high entry barriers. In view of these aspects, the agreements entered by MMBL with sub-licensees appear to be causing appreciable adverse effect on competition in Bt cotton technology market in India, in terms of Section 3(4) r/w Section 19(3) of the Act.
45. As regards the applications dated 14.01.2016 and 03.02.2016 of MAHYCO (OP-3) and MHPL (OP-4) *seeking deletion of their names from the array of Opposite parties*, the Commission observes that MMBL, against which most of the allegations are made in the information, is a joint venture of MAHYCO (OP-3) and MHPL (OP-4). It is further observed that OP-3 and OP-4 are present in the downstream market where allegations of leveraging by the OP Group under



सत्यमेव जयते



Section 4(2) (e) of the Act have been made. Hence, the Commission notes that their role needs to be investigated and there is no merit in their request. Accordingly, both the aforesaid applications are rejected.

46. Considering in totality the information, reference, oral submissions by the parties and all other material available on record, the Commission is of the view that there exists a *prima facie* case of contravention of the provisions of Section 3(4) and Section 4 of the Act by the OP Group and it is a fit case for investigation by the DG. Accordingly, under the provisions of Section 26(1) of the Act, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from date of receipt of this order. In case the DG finds that the OPs have acted in contravention of the provisions of Act, the DG shall also investigate the role of the officials/ persons who at the time of such contravention were in-charge of and responsible for the conduct of their business.
47. Before, parting with the order, the Commission will also like to direct the DG to take into account the submissions made by any other stakeholder in the matter, including NSAI, for the purposes of investigation. The application filed by NSAI dated 07.01.2016 requesting it to be admitted as a party to Reference Case No. 02 of 2015 is accordingly disposed of.
48. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in the said contravention. In case of contravention, DG shall also investigate the role of the persons who at the time of such contravention were in-charge of and responsible for the conduct of the business of the contravening entity/entities.
49. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.



सत्यमेव जयते



50. The Secretary is directed to send a copy of this order along with the information and all relevant material available on record to the Office of the DG forthwith.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi

Dated: 10/02/2016



DISSENT NOTE

Per: Mr. M. S. Sahoo, Member

1. I have gone through the majority order of the learned Commission. I have also gone through the material available on record, including the information filed by informants, the reference made by Central Government, and the compilation filed by the opposite parties, and the oral submissions made by the parties at the preliminary conference on 14th January 2016. I do not find existence of a *prima facie* case warranting an investigation into the matter under Section 26(1) of the Act.
2. I observe that informants have been in a contractual relationship with OP-1 since 21st February 2004. Under the contract, OP1 initially sub-licensed BG-I Bt cotton technology (hereinafter, BG-I) and subsequently BG-II Bt cotton technology (hereinafter, BG-II) to informants, who pay a trait fee (a value for the trait of insect resistance) to OP-1 for use of the said technology in producing cotton seeds. The contracts have been negotiated and renegotiated a few times. Over the years, there have been several rounds of disputes relating to the terms of the contract, particularly the term relating to trait fee; there have been several State interventions (legislations and orders) to fix prices of cotton seeds as well as trait fee, and there have been several petitions before various High Courts and other authorities. It is important to note three important chronological developments in this context:
 - a. While proceedings before the Hon'ble Supreme Court and MRTPC were pending, the parties entered into a 'Settlement and Release of Claims Agreement' in 2007 / Supplementary and Amendment Agreement, 2007 (hereinafter, SRCA), which allowed trait fee to be determined on the basis of MRP of the seeds. It fixed a trait fee of Rs.150 on an MRP up to Rs.760 per packet of seeds with a provision for additional fee linked to MRP in excess of Rs.760. This was in relation to BG-I, which is no more in use, and trait fee then constituted about 19.75% of MRP. The Hon'ble



COMPAT, which took over the matter from MRTPC, *vide* its order dated 8th December 2009, disposed it of by observing that nothing survived in view of SRCA.

- b. Subsequently, various State Governments issued orders fixing prices of seeds as well as trait fee over 2008-2015. These were challenged before different courts. The Hon'ble Gujarat High Court set aside the order of Government of Gujarat, while the Hon'ble Bombay High Court upheld the order of Government of Maharashtra. Petitions are pending for disposal in few other High Courts. However, the parties entered into a fresh contract in March 2015 in respect of BG-II, which had been approved for commercialisation in 2006 and patented in March 2009 with effect from 5th June 2002. This contract adopted the same method of computation of trait fee as in SRCA. This resulted in a trait fee at Rs.163.28 / Rs.174.90 on MRP upto Rs.930 / Rs.1100 per packet of seeds. If price of a packet exceeds Rs.930 / Rs.1100, there will be an additional trait fee @16.6% of the excess MRP.
- c. Informants requested OP-1 on 19th July 2015 to consider charging trait fee at rates determined by State Governments. There have been several communications between the parties since then in this regard. In the meantime, Central Government made a reference dated 27th November 2015 under section 19(1) of the Act bringing up alleged anti-competitive practices by OP-1. It issued an order dated 7th December 2015 under Section 3 of the Essential Commodities Act, 1955. This order, which came into force with immediate effect, empowers the Central Government to fix maximum sale price of cotton seeds, and while doing so, it shall also fix and regulate the seed value and license fee, including royalty or trait fee. It also empowers the Central Government to prescribe licensing guidelines and the format of licensing agreement. Subsequently, this information was filed by informants on 15th December 2015.



सत्यमेव जयते



3. It has been alleged in the information and the reference that the OP-1 is dominant and it is abusing its dominance by (a) imposing an excessive trait fee in violation of Section 4(2)(a)(ii) of the Act; (b) imposing unfair conditions in violation of Section 4(2)(a)(i) of the Act; and (c) imposing discriminatory conditions in violation of Section 4(2)(a)(i) of the Act.
4. It is futile to examine the licensing agreements entered between the parties in relation to BG-I at this stage as these were entered into prior to commencement of the Act, and the disputes there under were fairly settled under SRCA with which nothing survived, as observed by the Hon'ble COMPAT. Moreover, neither BG-I is in use nor the licensing agreement in respect of BG-I is in force.
5. As regards BG-II, I broadly agree that OP1 is dominant in the relevant market, that is, market for licensing BG-II. The relevant agreement is dated 10th March 2015. I proceed to examine the allegations stated in Para 3 above in relation to this agreement.
 - 5.1 It has been alleged that OP1 is charging an excessive trait fee as it is higher than that is determined by State Governments, it is higher in comparison to competitive prices, and it is higher in relation to the investments or economic value. It has also been alleged that the trait fee is unfair as it is linked to MRP of the seeds. I observe that the Act has been enacted keeping in view the economic development of the country, which, inter alia, aims to ensure freedom of trade. It allows the market forces to determine mainly two market outcomes, namely, price and quantity. The Act proscribes only predatory price and 'unfair price' in contrast to its predecessor, the Monopolies and Restrictive Trade Practices Act, 1969 which proscribed monopolistic trade practices which had the effect of maintaining prices at 'unreasonable levels'. The term 'unreasonable level' clearly covers excessive price, while the term 'unfair price' may not always cover excessive price, besides the fact that it is difficult to determine what is excessive. A price can be considered unfair only if it is higher than the competitive prices, namely, prices in a different



geographical market for the same product or prices charged by competitors in the same product market. Neither the information nor the reference provides either of these. The information provides price of BG-I, which is not a comparable to/substitute of BG-II and which is no more in market. Even if one considers the price of BG-I, SRCA, which settled the disputes in 2007, provided for a MRP linked trait fee, which was about 19.75% of the MRP. The same basis of determination of trait fee, as was settled in 2007, is adopted in 2015 agreement where the trait fee is 16-18% of the MRP. Neither the rate is higher than that was under SRCA nor is it an imposition in 2015. Hence, I do not consider the trait fee, as envisaged in the 2015 agreement, to be unfair under Section 4(2)(a)(ii) of the Act. Further, if an enterprise is not complying with the trait fee fixed by a competent authority, it is for the authority to enforce it. Non-compliance with a direction of an authority cannot per se be considered unfair under the Act. In any case, now that the Central Government has decided to fix price of seeds as well as trait fee under the Essential Commodities Act, 1955, the trait fee ceases to be a variable to be determined by the market forces and, therefore, nothing survives.

- 5.2 It has been alleged that OP-1 is imposing unfair conditions through clause 2.05(c) read with clause 9.02(b)(iii) of the agreement, which prohibit informants from obtaining similar technology from competitors. I observe that these clauses require informants to notify to OP-1, if they wish to develop seeds on a trait available with competitors, within 30 days of the commencement of development work and if they do not, the agreement would be terminated and, in terms of clause 9.06 of the agreement, informants have to cease selling or distributing seeds under the agreement and destroy the same immediately. I do not find these to be unfair. These do not prohibit informants or restrict their ability to engage with competitors; these merely require a notification to OPs, that too, after starting development work using a trait obtained from competitors. More importantly, the last Para of clause 2.05(c) provides that nothing in the agreement would prohibit informants from developing any seed provided



it does not infringe Monsanto's property rights. As regards consequences, the letters exchanged between parties indicate that informants would have reasonable time to comply with clause 9.06 of the agreement. It is important to note that these clauses existed in earlier agreements and have been retained in 2015 agreement after negotiation between the parties. It is also important to note that in view of decision of the Central Government to prescribe licensing guidelines as well as the format of licensing agreement, the alleged unfair terms in the agreement become infructuous.

5.3 It has been alleged that OP-1 is extending favourable treatment to two of its group enterprises. It has stated, "*Assuming that MMBL (OP-1) is discriminating between its affiliate companies - Mahyco (OP-3) and MHPL (OP-4), and other seed manufacturers, such a conduct is discriminatory...*". An authority cannot initiate investigation based on 'Assuming'. In any case, the OPs have emphatically clarified at the preliminary conference that they have signed exactly similar agreements with group enterprises as with other seed manufacturers. A declining combined market share of the two group enterprises, which reduced from 18% in 2010 to 7% in 2015, is no indication of favourable treatment to them.

6. It has been further alleged that by imposing excessive price and unfair and discriminatory conditions, OP-1 is (a) limiting technical or scientific development in violation of Section 4(2)(b)(ii) of the Act; (b) denying access to market in violation of Section 4(2)(c) of the Act; (c) using its dominant position in licensing market to protect position of its group enterprise in seeds market in violation of Section 4(2)(e) of the Act; and (d) causing appreciable adverse effect on competition through its agreements with informants in violation of Section 3(4) and Section 3(1) of the Act. Some of these allegations are sweeping. Further, instead of specifying which particular provision of Section 3(4) of the Act is violated, it states, "*.. if the Hon'ble Commission is of the opinion that the agreements ... do not fall within the ambit of section 3(4) of the*



Act, the Hon'ble Commission may examine the sub-license agreements under Section 3(1) of the Act.” In any case, since the impositions are not borne out by the facts as explained in Para 5 above, the allegations of violation of other provisions of the Act need not be examined.

7. I, however, observe that there is a problem which is nagging for more than a decade and a solution is eluding the parties, the Central Government, State Governments, other authorities and stakeholders. However, it is not a violation of any provision of the Act, though it may have competition concerns. The remedy lies elsewhere. The decision of the Central Government to fix trait fee and prescribe terms of licensing under the Essential Commodities Act, 1955 could be one.
8. In view of the above, I do not find any merit in the information and in the reference warranting an investigation under section 26(1) of the Act.

Sd/-
(M. S. Sahoo)
Member