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ORDER
28.04.2010

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1. These three petitions involve similar questions and are accordingly being disposed of by this common judgment. The Petitioner Maharashtra Hybrid Seeds Company Ltd. ('MHSCL') is engaged in the research and development of seeds and plants and their commercialization. The Petitioner sought to register three new varieties of bread wheat designated as the W 6301, W 6001 and MRW 7070 under the Protection of Plant Varieties & Farmers' Rights Act 2001 ('PPV&FR Act') by filing an application under Section 14 of the Act. The said applications were filed on 21st May 2007. In terms of Section 18 (1) (g) PPV&FR Act an application for registration under Section 14 "shall be accompanied by the said fees as may be prescribed". The admitted position is that as on 21st May 2007 when the applications were made by the Petitioner, no fees had been prescribed for filing any such application.

2. Under Section 15 (1) PPV&FR Act a new variety can be registered only if it conforms to the criteria of novelty, distinctiveness, uniformity and stability. In other words, the variety for which registration is sought has to pass the test of novelty, distinctiveness, uniformity and stability (also known as the DUS test). A further requirement for the purposes of demonstrating novelty in terms of Section 15 (3) of the PPV&FR Act is that a new variety shall be deemed to be novel if it "has not been sold or otherwise disposed of in India, earlier than one year, before the date of filing of such application". Therefore, the inventor or developer of a new variety will have to show that the said variety

Whenever the registration is granted it is with reference to the date of the application which is known as the priority date.

3. Nearly two years after the above applications were filed, the Second Schedule to the Protection of Plant Varieties & Farmers Rights Rules, 2003 (Rules) was amended by a notification dated 11th May 2009. By the said notification the 2009 Amendment Rules were published. After Entry 4 (a) in the Second Schedule two new entries were inserted. Entry 4 (b) set out the fees for registration for any variety of the genera and species other than the extant varieties and farmers' varieties as specified in Section 14 (a) read with Section 29 (2) of the PPV&FR Act. Where the purpose was commercial the fee prescribed was Rs.10,000/-. Likewise Entry 4 (c) set out the fees for registration of a variety about which there was common knowledge in terms of Section 2 (j) (iii) of the PPV & FR Act.

4. The Petitioner's applications were found to be in order and by letters dated 28th October 2009 and 17th November 2009, the Petitioner was asked by the Registrar of the Protection of Plant Varieties & Farmers Rights Authority ('Authority') to submit "registration fees of Rs.10,000/-" in the form of a bank draft/demand draft payable at New Delhi in each of the three applications. The Petitioner paid the above amounts under protest in order to expedite the grant of registration. The Petitioner thereafter filed the present three writ petitions, inter alia, challenging the demands raised by the letters dated 28th October 2009 and 17th November 2009.

5. This Court has heard the submissions of Mr. R. Parthasarathy, learned counsel for the Petitioner and Ms. Sonia Sharma, learned Senior Standing Counsel for the Union of India.

6. Mr. Parthasarathy submits that Clause 1 (2) of the 2009 Amendment Rules clearly states that the amended rules "shall come into force on the date of their publication in the official gazette". This indicated that the amendments were prospective. Referring to the decisions in *Vice Chancellor, M.D. University, Rohtak v. Jahan Singh (2007) 5 SCC 77* and *Panchi Devi v. State of Rajasthan (2008) 2 SCC 589* it is submitted that a delegated legislation cannot have retrospective effect especially when the notification publishing the said legislation itself specifies the date on which it is to come into effect. It is submitted that as per Rule 8 (2) (d) of the Rules, the date of the application would be the date on which the payment of the registration fee is made which would be later than 17th November 2009 whereas the Petitioner's applications carried a priority date of 21st May 2007. It is further submitted that if by a subsequent amendment to the Rules the priority date was shifted, it would affect the substantive rights of the Petitioner under Section 18 (1) (g) of the PPV&FR Act. This was impermissible. Therefore, the amendment was only prospective.

7. It is next submitted that under Section 15 (3) of the PPV&FR Act, novelty has to be determined with reference to the date of the filing of the application. That scheme would be disturbed to the applicant's disadvantage if the amendment to the Rules was made retrospective. It is further submitted that as long as no fee was prescribed as on the date of the filing of the application, W.P.(C)852, 1370 & 1373 of 2010

an application made without depositing any fee was complete in all respects. He refers to the decisions in *Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills (2003) 10 SCC 421* and *Larsen and Toubro Ltd. vs. State of Bihar and Ors. 2003 (3) BLJR 2228*. It is submitted that the demand for payment of registration fee on the basis of the gazette notification dated 11th May 2009 by the Registrar under Section 18 (2) (g) of the PPV&FR Act was ultra vires the powers of the Registrar under Section 20 of the said Act.

8. Appearing for the Respondents, Ms. Sonia Sharma learned Senior Standing counsel lays stress on the words “every application for **registration**.....” in Section 18 and submits that the fees being collected were for registration. Therefore, as long as the demand for the fee was made at any time prior to grant of registration it could not be said to be bad in law. It is submitted that in the instant cases the applications for registration filed on 21st May 2007 became complete only when the Petitioner was found entitled to be granted registration and as on that date the Rules required the deposit of the registration fee. It is submitted that the Central Government was well within its rights to demand registration fee for pending applications for registration as long as registration had not yet been granted. It is pointed out that in one of the Petitioner’s other applications for registration of their cotton crop an order was passed by the Registrar, PPV&FR Authority, preserving the priority date but nevertheless requiring the applicant to deposit the registration fees in terms of the 2009 amendment. It is pointed out that the said order dated 17th November 2009 was not challenged by the Petitioner. It is submitted that “the fee under Section 18 (1) (g) of the PPV&FR Act 2001 is in pith and substance W.P.(C)852, 1370 & 1373 of 2010

a fee for registration". As long as the fees as prescribed by the 2009 amendment was being collected only for prospective registrations, it could not be said that the Amended Rules were being given effect to retrospectively. It is submitted that issuance of the certificates of registration to the Petitioner was after the coming into effect of the 2009 Amendment Rules and therefore the Petitioner was required to pay the registration fees as prescribed thereunder. Reference is made to certain decisions of the Supreme Court drawing a distinction between a tax and a fee. It is pointed out that that the fee, which is in pith and substance a fee for registration under Section 18 (1) (g), is to meet the expenses of the Authority.

9. The above submissions have been considered. At the outset it must be noted that the Petitioner is not challenging the constitutional validity of any of the provisions of the PPV&FR Act or the Rules. The Petitioner is also not challenging the validity of the 2009 Amendment Rules. The short question is whether the registration fee prescribed for the first time by the 2009 Amendment Rules is payable even by those applicants whose applications for registration were pending as of the date of coming into force of the 2009 Amendment Rules i.e. 11th May 2009. In other words, whether the attempt by the Respondents to apply the requirement of payment of registration fees retrospectively is legally valid? Given the question that arises for consideration this Court finds that there is no need to examine whether "in pith and substance" the fee is for registration. The decisions on the distinction between a 'tax' and a 'fee' are also not relevant in the context of the present petitions.

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10. There is a fallacy in contending that since the fee prescribed is for registration, it is payable at the time of registration. It is in fact a fee payable at the time of application. Section 18 (1) (g) of the PPV & FR Act mandates that every application for registration under Section 14 “shall be accompanied by such fees as may be prescribed”. If on the date of the filing of the application there were no fees prescribed, the application would be complete if it was filed without any payment of fees. The words ‘may be prescribed’ indicates that the application does not become incomplete when it is not accompanied by fees if in fact on the date of submission of such application no fee has been prescribed. In *Orissa State (Prevention & Control of Pollution) Board vs. Orient Paper Mills* the Supreme Court was interpreting the expression “as may be prescribed” occurring in Section 19 (1) of the Air (Prevention and Control of Pollution) Act, 1981. In that context, it was observed that “it would not be correct to say simply because the Rules have not been framed prescribing the manner it would render the Act inoperative”. In arriving at the above conclusions, the Supreme Court referred to the following observations in an earlier judgment in *Surinder Singh v. Central Govt. (1986) 4 SCC 667*:

“Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression ‘subject to the rules’ only means, in accordance with the rules, if any. If rules are framed, the powers so conferred

on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute”.

11. In this context reference should also be made to Rules 8 and 26 which read as under:

“8. Fees – (1) The amount of fess payable in respect of the registration of plant varieties and grant of any right under the Act or any application or notice of opposition or reply or counter reply required to be filed under the Act and other matters shall be as per the rates specified in the Second Schedule.

(2) (a)

(d) Where a fee is payable in respect of the filing of a document or application or representation, the date on which the entire fee is paid shall be the date of filing the document or the representation.

26. The fee payable under clause (g) of sub-section (1) of section 18 for making application for registration of plant variety.- The fee for making application for registration of a plant variety under section 14 shall be such as specified in column (3) of the Second Schedule for the purpose”.

13. In view of the law as explained by the Supreme Court and the express wording of the Rules it is not possible to accept the contention that when Section 18 (2) (g) talks of the application having to be accompanied by fees as may be prescribed, that fee can be collected even at the time of registration and it is only then that the application is complete. On the date of filing of the

applications by the Petitioner i.e. on 21st May 2007, since there was no fees prescribed for registration in terms of Section 18 (1) (g) of the PPV&FR Act, those applications were complete even without being accompanied by any fees. Those fees could not be collected at a later point in time for reasons which will be presently discussed.

14. A registration under the PPV & FR Act may or may not be granted on an application. Where a registration fee has been prescribed an application for registration will not be complete unless it is accompanied by a fee. The mere payment of a fee does not ensure registration. The fee is collected upfront for the services rendered after the application is filed. The processing of the application commences soon after it is filed and includes examination and testing. In the instant case, since on the date of the filing of the application, no fee was prescribed, the applications filed were nevertheless complete and triggered off all the processes that led to the grant of registration. Therefore, the grant of registration cannot be determinative of whether a fee should be asked to be paid. Where registration is not granted, the fee collected at the time of submission of the application is not refunded. The fee is basically for all the steps taken up to the grant or refusal of registration.

15. Secondly, in the context of intellectual property laws, the date of filing an application for grant of registration, whether it is for a trademark, or a patent, or a copyright, is critical. There is usually a time lag between the filing of such application and the grant of registration. The grant of registration relates back to the date of filing of the application. Much therefore depends on the date of the application. In effect that is the 'priority date' for that applicant

and is therefore immutable. If the submission of the learned counsel for the Respondents that the application is complete only upon the payment of the registration fee at the later date is accepted it would have the effect of postponing the priority date. That cannot be permitted as it runs counter to the scheme of the PPV&FR Act.

16. Thirdly, for determining novelty of a variety in terms of Section 15 (3) of the PPV&FR Act one factor is whether the variety for which registration is sought has not been sold for at least one year earlier to the date of filing of the application. If the date of filing of the application gets shifted by a subsequent amendment to the Rules, it will adversely impact the chances of the applicant demonstrating novelty vis-à-vis such filing date. For no fault of an applicant the “no sale” period could get shortened and therefore fail the novelty test of Section 15 (3). In the context of Section 15 (3), in order to demonstrate novelty, the relevant date has to be a fixed one and cannot keep changing with reference to an uncertain future event like the prescribing of a fee for registration. Such interpretation will distort the scheme of the PPV&FR Act.

17. Fourthly, Clause 1 (2) of the Amendment Rules 2009 clearly states that they shall come into force on the date of their publication in the Official Gazette. In other words, the registration fees prescribed thereunder could be demanded only of those applications under the PPV&FR Act filed on or after 11th May 2009. In other words, in respect of the three applications filed by the Petitioner prior to the date of the notification dated 11th May 2009, no registration fee was payable in terms of the Amendment Rules 2009 as published by the said notification.

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18. For all of the above reasons, the Court has no hesitation in holding that the demand for registration of fees from the Petitioner raised by letters dated 28th October 2009 and 17th November 2009 is unsustainable in law. They are hereby quashed.

19. The Respondents will within a period of two weeks from today refund to the Petitioner the fees paid by the Petitioner under protest in each of the three applications. As far as other similarly placed applicants who have not yet approached this court are concerned, the Respondents should on their own, in terms of the law explained in this judgment refund the registration fees collected preferably within a period of eight weeks from today.

20. The petitions are accordingly allowed with no orders as to costs.



S. MURALIDHAR, J

APRIL 28, 2010

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