

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Reserved on: 22.04.2016**

**Pronounced on: 02.12.2016**

+ **W.P.(C) 250/2009**

PRABHAT AGRI BIOTECH LTD. AND ANR. ....Petitioners

Versus

REGISTRAR OF PLANT VARIETIES AND ORS.....Respondents

+ **W.P.(C) 7102/2011, C.M. APPL.16215/2011 & 18367/2012**

KAVERI SEED COMPANY LTD. ....Petitioner

Versus

REGISTRAR OF PLANT VARIETIES AND ANR.....Respondents

Through: Sh. Jayant Bhushan, Sr. Advocate with  
Sh. Abhishek Saket, Ms. Vijaya Singh and Sh.  
Manish Madhukar, Advocates, for petitioners.

Sh. Pravin Anand with Ms. Geetanjali  
Viswanathan, Ms. Neeti Wilson and Ms. Asavari  
Jain, Advocates, for interveners.

Sh. Anil Dutt and Sh. Sudershan. S. Sekhawat,  
Advocates, for Maharashtra Hybrid Seed Co. Ltd.

Sh. H.S. Chandhoke and Sh. Shivi Sethi,  
Advocates, for Respondent No.3 in W.P.(C)  
250/2009.

Dr. Ashwani Bharadwaj, Advocate, for Respondent  
No.1 in W.P.(C) 250/2009.

Sh. Dev. P. Bhardwaj, CGSC with Ms. Anubha  
Bhardwaj, Advocate, for UOI, in W.P.(C)  
7102/2011.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE R.K. GAUBA**

**MR. JUSTICE S. RAVINDRA BHAT**

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1. The petitioner companies in both W.P.(C) 250/2009 and W.P.(C) 7102/2011 challenge the *vires* of Section 24(5) of the Protection of Plant Varieties & Farmers' Rights Act (hereafter "the Act"). In W.P.(C) 250/2009, the first petitioner is referred to as "Prabhat". The second petitioner, Nuziveedu Seeds (P) Ltd is the first petitioner's sister concern and recipient of DSIR (Department of Scientific and Industrial Research) award, instituted by the Central Government in 2002 for its R&D efforts. Two of its cotton hybrids varieties were notified by the Central Government under the Seeds Act, 1966. It is claimed that these two hybrids could corner an unprecedented one-third of market share and these non-Bt hybrids were found to be even superior and better than the first three Bt hybrids of Maharashtra Seeds (the third respondent) though both products were released and marketed around the same time. The two hybrids, i.e. Bunny (NCS 145) & Mallika (NCS207) by virtue of their notification under the Seeds Act, say the petitioners, fall under the extant category and are eligible for protection along with their parents under the provisions of Act for which applications were filed separately for both the hybrids. The petitioners say that Bt versions of Bunny & Mallika, due to their approval by GEAC (Genetic Engineering Approval Committee), under the Environment Protection Act, are also eligible for protection under the Act as extant varieties and applications are already filed with the Registrar of the Act. The petitioner in the other proceeding in W.P.(C) 7102/2011 is Kaveri Seed Company Ltd. It challenges the *vires* of Section 24(5) and has impleaded, for this purpose, the Registrar under the Act and the Union of India; it is not aggrieved by any specific action of any third party.

2. The petitioners in W.P.(C) 250/2009 allege that over the years, these two hybrids and/or their parents were copied and are still being copied by several seed companies. They say that they were helpless in initiating any legal action against this unethical practice to safeguard its business interest and the absence of specific law at that point of time prevented them from protecting their rights. It is stated that the second petitioner, in September, 2005 found that Maharashtra Seeds allegedly was involved in duplication of six of its hybrids by using its proprietary parent lines. Maharashtra Seeds has filed an application for 7351 under the Act, seeking registration of the variety, which was according to the petitioner, developed by using Nuziveedu's proprietary parent line. The petitioners say that they intend to challenge and oppose the application.

3. It is claimed that since in 2006 there was no legal *regime* to address the issue of copying, the petitioners approached Mr. Felipe Osorlo who was heading Monsanto's Indian arm as Managing Director, with a request for an advice from him to Maharashtra Seeds to refrain from the unfair and unethical practice of using a proprietary line of the competitor. The reason for taking up the matter with Mr. Felipe was that 26% equity shareholding in Maharashtra Seeds and was held by Monsanto and it had entered into a joint venture with Maharashtra Seeds to commercialize Monsanto's transgenic technology by way of sublicensing to Indian seed companies.

4. Cotton was notified for protection under the Act thus enabling filing of claims and applications from April 2, 2008. Nuziveedu filed applications with the PPV & FR Authority (under the Act) for protection in '*respect of its certain Cotton hybrids including Bunny and also their Bt version and Mallika Bt*'. It also intends to seek protection for the parent line of these two

hybrids and other Cotton hybrids and inbred lines. Prabhat too intends to file similar applications for the products developed by it.

5. The petitioners allege copying of their intellectual property rights by the third respondent, including that of their brand names, to sell its products; so much so that Maharashtra Seeds copied even the brand name “KANAK” (one of Nuziveedu’s Cotton hybrids) and marketed its own Cotton hybrid by the brand name of “KANAK”. This was discontinued only in October 2007, after notice on behalf of the petitioner. Nuziveedu outsources its premium proprietary products to other seed companies including its sister company Prabhat. In tune with this policy, it outsourced one of its proprietary cotton hybrids for evaluation and demonstration trials under their marketing code number 883 to Prabhat. Maharashtra Hybrids challenged this in its application under Section 24(5) of the Act. That cotton hybrid is allegedly exclusive proprietary product of the Nuziveedu Seeds and is eligible for protection under the Act. Nuziveedu, it is said would be filing an application for registration under the provisions of the Act. The petition alleges that Maharashtra Seeds, using the petitioners' proprietary parent lines, went to the market with the marketing code MRC 7351- previously used as KANAK, and claimed registration under the Act. It is alleged that Maharashtra Seeds has also filed an application under Section 24 of the Act, with a view to preempt and preclude the petitioners' legitimate registration under the Act when their application is accepted and advertised under Section 21 of the Act. Maharashtra Seeds has also *inter alia* on this pretext sought an order expediting the registration of its alleged hybrid MRC 7351, for protection under the said Act. The petitioners say that this is a blatant attempt on its part

to get protection for the hybrid, developed illegally using the petitioner's parent lines and by exploiting and subverting the due process of law. This application is an attempt to defeat the petitioners' right to secure their legitimate legal protections under the Act.

6. The petitioners elaborate on their grievance by highlighting that Prabhat is not the proprietor of the technology, but has been given the task of evaluating and marketing it; the real owner is Nuziveedu Seeds. It is further argued that the provisions of the Act enable only the respondent to defend the proceedings under Section 24(5) although the impact of the orders made under that provision is felt by a third party: in the present case, the second petitioner, Nuziveedu Seeds. The impugned provision gives scope to Maharashtra Seeds and others to subvert the due process of law by filing application against any third party's genuine products, even without establishing their IP rights on the products and even when their application for registration of the product for protection could be rejected by the authorities after due process, examination, evaluation, evidence, opposition etc. It is also urged, further, that Maharashtra Seeds' application under Section 24 (5) is an ingenious and devious way to compel Nuziveedu Seeds to disclose through its defense, its confidential information like characteristics of its products and thus expose such information to the public, leading it to compromise its rights to seek protection of its products under the Act. It submitted that Maharashtra Seeds could exercise sufficient rights under the Act when Nuziveedu Seeds files an application for registration of its product or even file an infringement action when the said respondent's product is registered.

7. Arguing that the impugned provision is unreasonable and void, the petitioners say that injunction or some kind of restraint order can be issued by the Registrar under the impugned provision despite the applicant not possessing any proprietary right and despite the eventuality of the application being ultimately rejected. Stressing that an application for registration goes through a five-step process, such as initial evaluation, leading to acceptance or rejection, then advertisement and invitation of objections, receipt and evaluation of objection, then rejection of application or its acceptance; in the event of rejection, a possible appeal against it; in the event of acceptance, grant of registration under Section 24. Learned senior counsel for the petitioner, Mr. Jayant Bhushan urges that the impugned provision contains no guideline as to the manner for grant of the interim order or direction, the conditions applicable to it, the duration of its applicability or any appellate remedy against the order. It is emphasized that an order made under the impugned provision is capable of immeasurable harm and likely injury by a competitor who can, by mere application and grant of interim measure destroy a genuinely developed plant variety whose creator or originator might be preparing a claim.

8. Mr. Bhushan argues that the provision violates principles of natural justice as it contains no guidelines for making *ex-parte* orders, or their duration. This enables an order against a third party, who is adversely affected, but deliberately kept out of the proceedings. Neither is the procedure for making such orders indicated in the enactment, nor does the provision indicate any guideline for the authority making it; what is more the civil rights of parties- even third parties are affected. Yet the authority

exercising such unlimited and uninhibited powers is not deemed a judicial institution. The petitioners contrast the impugned provision with Order 39 Civil Procedure Code to submit that making of *ex parte ad interim* orders is statutorily controlled and the discretion exercised, is tempered by prescribed principles, which makes it reasonable. It is also highlighted that unlike orders of *ex parte* injunction made by civil courts, orders of the Registrar under Section 24(5) are not appealable. Here, the petitioners point to Section 56 of the Act, to say that the right to appeal is limited to matters of registration, i.e. when registration is finally granted or rejected. Likewise, Mr. Bhushan points out that in all matters relating to enforcement of the registered protection, through infringement suits or action, the jurisdiction conferred is upon the courts, by virtue of Sections 65 and 66 of the Act. These courts cannot be of a level below the District Court, by reason of Section 66 (2).

9. Reliance is placed on *Union of India v. R. Gandhi*, (2010) 11 SCC 1, especially the following observation that where the nature of the order is judicial, there cannot be avoidance altogether of any judicial participation in a tribunal or body required to decide an issue:

*"If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals*

*are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional."*

10. Other observations to the effect that equality before law encompasses the right to access judicial fora were relied upon; particularly, the court's holding that citizens' rights "*clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum.*" In this context it was submitted that the lack of legislative provision or guidelines as to the functioning of the authorities exercising jurisdiction under Section 24 (5) invalidates such principles guaranteeing citizens their rights.

11. Mr. Bhushan next relied upon *Madras High Court Bar Association v Union of India* 2014 (10) SCC 1, where it was held as follows:

*"...where the adjudicatory process transferred to a tribunal does not involve any specialized skill, knowledge or expertise, a provision for appointment of non-Judicial Members (in addition to, or in substitution of Judicial Members), would constitute a clear case of delusion and encroachment upon the*

*“independence of judiciary”, and the “rule of law”. It is difficult to appreciate how Accountant Members and Technical Members would handle complicated questions of law relating to tax matters, and also questions of law on a variety of subjects (unconnected to tax), in exercise of the jurisdiction vested with the NTT. That in our view would be a tall order. An arduous and intimidating asking. Since the Chairperson/Members of the NTT will be required to determine “substantial questions of law”, arising out of decisions of the Appellate Tribunals, it is difficult to appreciate how an individual, well-versed only in accounts, would be able to discharge such functions. Likewise, it is also difficult for us to understand how Technical Members, who may not even possess the qualification of law, or may have no experience at all in the practice of law, would be able to deal with “substantial questions of law”, for which alone, the NTT has been constituted.”*

12. The petitioners laid stress on the unguided power conferred by the impugned provision and submitted that the only trigger for exercise is "abuse" which is *ipso facto* a vague and undefined term. Counsel submitted that what is legitimate and what is not legitimate use or would constitute abuse, can be discerned only upon hearing rival versions; yet, without hearing a party likely to be affected by the order, wide restraint orders of undefined nature can be issued, which would constitute *in rem* directions and preclude third parties from exercising legitimate commercial rights. It was argued further that the grant of unbridled power in a matter relating to exercise of discretion by a quasi judicial authority plainly violates Article 14 of the Constitution of India; for this proposition, reliance was placed on *Harakchand Ratanchand Banthia v Union of India* 1969 (2) SCC 166; *Krishna Mohan v Municipal Corporation of Delhi* 2003 (7) SCC 151 and *State of Punjab v Khan Chand* 1974 (1) SCC 549.

13. It is next argued on behalf of the petitioners that the lack of any qualification on the part of the Registrar and furthermore the absence of the appeal aggravates the possibility of arbitrary orders under the impugned provision. In this context it is submitted that the existing provisions of appeal relate only to issues that concern with final orders on the main subject matter of registration of a claim. Given the wide and serious nature of the impact of an order under the impugned provision, the denial of appeal or even the obligation to spell out reasons for an *ex parte* order – compounded further by the omission of a compelling provision requiring disclosure of reasons for the order (having regard to its duration), renders it invalid. In other words, according to the submission of the petitioner's counsel, the impugned provision confers naked and unguided power uncontrolled by any statutory guideline. Contrasting the impugned provision with other enactments that deal with intellectual property rights, learned counsel urged that in the realm of patent law, pending the question of registration or grant of patent or for that matter even of designs, there is no question of the claimant securing in the interim an order anticipating an uncertain event, i.e. the registration or grant. Learned counsel stressed that there is a sound public policy consideration involved in the absence of interim protection namely that till the claim for protection is processed and a finality is attached to the official scrutiny, the rights claimed are essentially incoherent. It was urged that since the right itself is suspect and is a mere claim, elevating the applicant's claim to the level of a protection and for an indefinite period (in the event of an interim measure) coinciding with the pendency of the application itself, lends the impugned provision susceptible to arbitrary use. It is submitted that there is no compelling necessity on the part of the State to confer such wide

powers on an authority untrained and inexperienced in judicial matters. Contrasting this provision with other provisions in taxing statutes as well as in the realm of public law, counsel urged that judicial power itself is subject to discretion. He relied on the well-established and known model, i.e. Order 39 CPC with respect to temporary injunctions. In such cases interim *ex parte* orders can be made provided the court is satisfied that a *prima facie* claim exists on the merits and irreparable hardship would ensue if the interim order is not made. Unlike such existing and established principles, section 24 (5), is vague as to its contents and is capable of abuse. The process of examining registration applications can be time-consuming and may take years. Yet the life of the interim order may get prolonged causing economic hardship and even destruction of a potential rival's business. This, it is argued, is contrary to Articles 14 and 21 the Constitution of India.

14. The Union of India resists the petition and urges that the impugned provision is *intra vires* and necessary in public interest. It is submitted that Article 13 of the International Convention for the Protection of New Varieties of Plants, 1991 (UPOV) necessitated provisions for the Protection of new varieties of Plants, as revised on 19 March 1991. Reliance was placed on the said provision of the UPOV, which obliges states parties to take suitable steps to safeguard applicant's rights for the duration their claims are under evaluation: "*Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any*

*person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application."*

15. Explaining that the *rationale* and justification for the impugned provision is not only the terms of an international convention, the learned Additional Solicitor General submitted that Section 24 (5) is based on sound public policy. He argued that if the measure of protection given is not factored through legislation, invaluable and painstaking research would no longer be rewarded effectively in the field of plant varieties. This would be to the detriment of breeders and agriculturists in the ultimate analysis. The Additional Solicitor General also argued that by reason of the Convention, *sui generis* protection to plant varieties had to be given. Since Article 13 required a measure of interim protection, Section 24 (5) was enacted. The Union contended that mere silence of any guidance in the statute would not *per se* invalidate the impugned provision; he stated that it is well settled that where the statute is silent, guidance should be found from its objective and the overall scheme. If the nature of the power, which is incidental to the main provision of considering and evaluating an application for registration of a new variety is considered, *ipso facto* that consideration is sufficient guidance to the Registrar, who exercises the power of granting or refusing interim orders.

16. It was argued that though the provision is silent as to the manner of grant of *ex parte* interim relief, it must be so interpreted as to mean that such relief

is confined to extremely urgent cases where its denial would lead to failure of justice. Counsel submitted that the requirement of hearing would be satisfied in all other cases and even in the case of *ex parte* orders, the Registrar would be obliged to hear the party concerned before confirming them. Reliance was placed on the decision of the Supreme Court reported as *Swadeshi Cotton Mills v Union of India* AIR 1981 SC 818.

17. Apart from resisting the petitioners' argument that the impugned provision confers arbitrary power, the Union further urges that other intellectual property law concerning trademark, copyright and patents deal with protecting intellectual property in business and industrial processes whereas the act deals with intellectual property rights primarily in agricultural matters. Underlining that agriculture is dependent on nature unlike industry which is not so dependent and in fact is a product of man made effort, and requires examination of the process at an intellectual level, the Union emphasizes that Rule 29 (1) (c) of the Protection of Plant Varieties and Farmers' Right Rules ("the Rules" hereafter) requires multi location field test for 2 crop seasons for every variety that claims protection. The time-span in obtaining plant breeder's rights under the Act is longer than that required for obtaining any other intellectual property right. A distinction is also made between rights under the Act and other intellectual property rights to emphasize that unlike those other rights which relate to industrial processes, creativity or commercial distinctiveness, the rights of farmers and indigenous people are involved in the intellectual property *regime* in agriculture. The Union highlights that provisions similar to Section 24, i.e. the impugned provision, can be found in other municipal laws that deal with plant

varieties' protection.

18. Reliance is placed upon an old Calcutta High Court judgment in *Re National Carbon Inc.* AIR 1934 Cal 725 to argue that though the provisions of the Civil Procedure Code(CPC) are not applicable *per se*, the principles underlying the said Code, as far as they embody rules of natural justice are to be followed. It is, therefore, stressed that if there is a procedural vacuum in legislation, the powers of the Civil Court and the principles applicable to them essentially would always apply and fill the gap. It was submitted that in this case the Registrar did not choose to make any *ex-parte* interim order but rather issued notice and heard submissions of the parties. Therefore, there is no question of lack of understanding that a party or concern likely to be affected prejudicially by an order should necessarily be heard.

19. Emphasizing that the Act deals with a unique nature of protection, the learned Additional Solicitor General stated that this distinction is important and should be kept in mind while examining the validity of the impugned provision. He stated that the impugned provision does not in any way derogate the fundamental rights of any individual or citizen and on the other hand, in fact, protects the interests of the breeder against abusive acts of third parties and furthers his fundamental right to carry on business. It is stated that there is no question of impugned provision violating Article 20 (3) since there is no compulsion by it that someone accused of an offence should incriminate himself or herself. It is argued that Article 20(3) deals with self-incriminatory statements in the course of a trial, which can result in forfeiture of personal liberty and cannot be extended to civil matters where intellectual property protection is sought. Explaining that under the Act, and

the Rules especially Rule 29, a distinct test known as the DUST (Distinctiveness, Uniformity and Stability Test) is obligatory, the learned Additional Solicitor General urged that this requires a three-step process. If protection were not to be extended, the breeder of an original or new strain of plant variety, would lose substantially if not entirely the fruits of his effort as the abusive acts of others who might merely be dishonestly “piggybacking” from his efforts would be rewarded and he would be left without a remedy.

20. It was stated that essentially the impugned provision is not only in line with international conventions to which India is a party but is also in consonance with justice as it protects an agriculturist or a breeder of a new variety from the possibility of infringement. It is more in the nature of a preventive remedy, which can be tailored to suit the peculiar circumstances and facts of each case. It is stated that the contention with respect to absence of appeal is fallacious because Section 56 (i) (f) of the Act provides for appeal against orders of the Registrar. Once it is conceded that an interim measure though made *ex parte* cannot be extended beyond a reasonable period without a hearing and that the order should contain the bare minimum reasons, the so-called infirmities pointed out by the petitioners, disappear. The Union thus concludes its submission by stating that for these reasons the impugned provision is *intra vires* and does not violate provisions of the Constitution of India.

21. It was argued on behalf of Maharashtra Seeds (third respondents), that there is no arbitrariness in the impugned provision. Counsel stressed – in addition to the Union’s submission that Sections 11 and 87 of the Act clearly show that the Authority and the Registrar have powers of a civil court, in

matters relating to registration of the variety or essentially derived variety, which are in the nature of judicial proceedings. The omission to prescribe the procedure, it is, therefore, highlighted, is not fatal to the validity of the impugned provision. Reliance is placed on the judgment reported as *Dhanjibhai v State of Gujarat* 1985 (2) SCC 5 in this regard. The third respondent relies on the doctrine of implied powers according to which statutory powers carry with them all powers which are incidental to or consequential upon its exercise. Counsel for the said respondent also submits that the impugned provision is akin to provisions of Order 39 CPC. Learned counsel submitted that though the term “abusive” act, which empowers the Registrar to issue an interim order, is undefined, yet it is a clear and specific concept. Reliance is placed in this regard, upon the observations of the Supreme Court in *State of Rajasthan v Babu Ram* 2007 (6) SCC 55, which had stressed upon the need to construe words according to their plain and grammatical meaning and further that the initial burden of establishing abuse is always on the applicant alleging it.

22. It is urged by Maharashtra Seeds that the provisions of the Act and rules framed under it mandate that each applicant share benefits of his or its registered variety. The breeder is under threat of losing exclusivity without a provision that protects the claim during the period when it is under examination, which is sound *rationale* for the impugned provision. Unlike pure administrative discretion, which might be unguided, quasi judicial discretion to a statutory authority asked to discharge the functions akin to a court, should be viewed differently. It is submitted that the nature of information called for at the time of application (laid out by provisions of Section 18 and Regulation 10, read with the requirement of advertisement-

of the application – under Rule 21 and the information sharing in the form of accessibility of documents to the public, under Section 84) renders it vulnerable to illegitimate exploitation. Without the impugned provision, which provides some measure of protection, there would be no incentive to the breeder because confidential information relating to the new variety (which is the subject matter of protection) would be laid bare and open to commercial exploitation. Learned counsel also argued that both under the UPOV and the Act, provisional protection of intellectual property is given from the date of filing claim, even though the grant of registration confers the exclusive right.

23. It is stated that the efficacy of the intellectual property protection is from the date of grant and not the date of its claim or filing of application. This is used as an argument by the respondents to urge the insubstantiality of the petitioner's position that provisional or interim protection would in essence extend the exclusivity beyond the permissible 15 year limit under the Act.

24. An application for intervention was made by Pioneer Overseas Corporation in these proceedings. Mr. Pravin Anand, learned counsel, appearing on behalf of the intervener, supported the submissions of the Union and the third respondent. He urged that this court should desist from interfering with a policy decision, i.e. to clothe the authorities under the Act with the power of issuing interim directions pending an application for registration. It was submitted that having regard to the wide nature of knowledge and novelty that had to be shared with the Registrar, as a condition for applications to be processed and granted, there was a real threat that such information would be misused. The legislature, in its wisdom,

therefore, enabled interim protection under the Act. This cannot be held arbitrary merely because the statute is inexplicit about the conditions of such power. The nature of power is to be seen; clearly it is quasi judicial, which means that the authority exercising it should act fairly and also follow basic principles of natural justice, such as notice and hearing. The authority's power to prevent abuse, by issuing *ex parte* orders is not restricted in any manner whatsoever; in fact its reason for exercising such power is abusive action by a third party.

### ***Analysis and conclusions***

25. The Act was brought into force on 11.11.2005; its Statement of Objects and Reasons explains its *rationale* to be the creation of an effective system for protection of plant varieties, the rights of farmers and plant breeders and the encouragement of development of new varieties of plants. The statement also cites that such protection would facilitate growth of the seed industry in the country and ensure availability of high quality seeds and planting material to the farmers and furthermore that it is essential to protect plant breeders' rights for accelerated agricultural development in the country. Section 2(i) defines "*essentially derived variety*" as variety (of plant varieties etc.) derived from an initial variety or in respect of a variety, predominantly derived from such initial variety or retaining characteristics or essential characteristics resulting from the genotype or combination of genotype of the initial variety. Furthermore, the essentially derived varieties should be clearly distinguishable from the initial variety and at the same time conform to such initial variety in "*the expression of essential characteristics that result*". Section 2(j) defines "*extant variety*" as one notified under the

Seeds Act, 1966 or the farmers' variety; variety about which there is common knowledge or any other variety that is in the public domain. Section 2(k) defines "*farmer*"; Section 2(l) defines "*farmers' variety*" as including traditionally cultivated and evolved by the farmers in their fields or is a wild relative or land race of a variety about which the farmers possess the common knowledge. A "*Registrar*" under Section 2(t) is one appointed under Section 12(4). Section 2 (x) defines "*seed*" and Section 2(za) defines "*variety*" as follows:

*(za) "variety", means a plant grouping except micro-organism within a single botanical taxon of the lowest known rank, which can be—*

*(i) defined by the expression of the characteristics resulting from a given genotype of that plant grouping;*

*(ii) distinguished from any other plant grouping by expression of at least one of the said characteristics; and*

*(iii) considered as a unit with regard to its suitability for being propagated, which remains unchanged after such propagation, and includes propagating material of such variety, extant variety, transgenic variety, farmers' variety and essentially derived variety."*

26. *Protection of Plant Varieties and Farmers' Rights Authority and Registry* is established under Section 3; its general functions are outlined in Section 8. Section 11 enacts as follows:

***"11. Power of Authority.—In all proceedings under this Act before the Authority or the Registrar,—***

*(a) the Authority or the Registrar, as the case may be, shall have all the powers of a civil court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of*

*documents and issuing commissions for the examination of witnesses;*

*(b) the Authority or the Registrar may, subject to any rules made in this behalf under this Act, make such orders as to cost as it considers reasonable and any such order shall be executable as a decree of a civil court.”*

Section 12(4) empowers the “Authority” to appoint Registrars and also make regulations with respect to their duties and jurisdiction. Section 13 speaks of a *National Register of Plant Varieties*. Sections 14 and 15 deal with registration; what can be registered is provided in Section 14, i.e. those specified in Section 29(2); extant variety or farmers’ variety. Section 15(1) mandates that any new variety can be registered if it conforms to the criteria of novelty, distinctiveness, uniformity and stability. Section 15(4) spells out what categories of new varieties cannot be registered.

Under Section 16, three broad types of persons can apply for registration:

- i. (i) breeders or those succeeding them or those instead of successors or assignees;
- ii. (ii) farmers or group of farmers or a community of farmers claiming to be breeders and a university or publicly funded agricultural institution.

27. Section 16(1)(e) also enables the person authorized by breeders or their successors or assignees or by farmers or group of farmers or community of farmers to apply on their behalf. Section 18 prescribes what ought to be contained in the applications for registration – these include under Section 18(1)(e), complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where

the genetic material has been taken and all such information relating to contribution of any farmer, village community, institution or organization in breeding, evolving or developing that variety. Other particulars bringing out the characteristics of novelty, distinctiveness and stability are also to be disclosed. Likewise, Section 23 provides for registration of “*essentially derived variety*” specified by Section 29(2) by the Central Government. Section 39 which contains a *non-obstante* clause overriding all other provisions of the Act, concerns special rights of farmers to breed or develop new varieties for the purpose of registration.

28. Sections 20 to 23 of the Act provide for various steps towards processing and evaluation of registration applications. In the first instance, after inquiry by the Registrar, the application can be accepted or rejected subject to conditions or limitations. In case certain limitations are made while accepting the application, the applicant has to amend the application. Thereafter, the consideration moves to the second stage where the Registrar advertises the application; this enables “*any person*” to oppose it under Section 21(2). Notice of the opposition and the reply of the applicant is to be given. The evidence and materials in support of the opposition have to be exchanged and the Registrar has to rule on the objections and make a final order under Section 22. In the event of rejection of the opposition, the application can be registered. Section 24(1) reads as follows:

***“24. Issue of certificate of registration.—(1) When an application for registration of a variety (other than an essentially derived variety) has been accepted and either—***

***(a) the application has not been opposed and the time of***

*notice of opposition has expired; or*

*(b) the application has been opposed and opposition has been rejected, the Registrar shall register the variety.*

Section 24(5) is placed as a power of the Registrar to issue “*such directions to protect the interests of a breeder against any abusive act*” during the period between filing of application for registration and decision taken by the Authority on such application. The said impugned provision reads as follows:

*“(5) The Registrar shall have power to issue such directions to protect the interests of a breeder against any abusive act committed by any third party during the period between filing of application for registration and decision taken by the Authority on such application.”*

29. Section 54 of the Act establishes a Tribunal composed of judicial members and technical members. The definition of judicial member in Section 55(2) is one who has for at least ten years held a judicial office or has been a member of the Indian Legal Service and held any Grade-II post of that service for at least three years or is an Advocate for at least 12 years. The jurisdiction of the Tribunal is spelt out in Section 56, which reads as follows:

**“56. Appeals to Tribunal.—**(1) *An appeal shall be preferred to the Tribunal within the prescribed period from any—*

*(a) order or decision of the Authority or Registrar, relating to registration of a variety; or*

*(b) order or decision of the Registrar relating to registration as an agent or a licensee of a variety; or*

*(c) order or decision of the Authority relating to claim for benefit sharing; or*

*(d) order or decision of the Authority regarding revocation of compulsory licence or modification of compulsory licence; or*

*(e) order or decision of the Authority regarding payment of compensation, made under this Act or rules made thereunder.”*

Since parties had relied upon other provisions, it would be useful to reproduce them. Section 64 provides for the remedy of infringement in the event of sale, export, import or production of a variety, which is registered under the Act without the license, or authorization of the breeder or registered licensee. Section 65 states that the suit for infringement shall be instituted in a District Court having jurisdiction to try the suit. The expression “*District Court having jurisdiction*” by Section 65(2) means that the District Court within the legal limits of whose jurisdiction the cause of action arises. Section 87 reads as follows:

**“87. Proceedings before Authority or Registrar.—***All proceedings before the Authority or the Registrar, as the case may be, relating to registration of variety or essentially derived variety, registration of agent, registration of licence or registration of compulsory licensing under this Act shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code (45 of 1860) and the Authority or the Registrar, as the case may be, shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).”*

30. It is quite apparent that in consonance with its objectives, the Act made numerous provisions elaborately spelling out and protecting breeders and farmers’ rights in respect of new varieties and even extant varieties and plant species, seeds etc. The *regime* for scrutiny of applications for registration (registration being the mode for production) requires the

applicants seeking registration to demonstrate that the new or derived variety fulfills the characteristics claimed and also conforms to the standard objective test, i.e. that of novelty, distinctiveness, uniqueness and stability. To that end, appropriate materials are to be shown proving the time when the applicants claim to have developed the varieties, under Sections 14 and 23 of the Act. In the case of the latter, it is only the essentially derived variety or *genera* or species specified under Section 29(2) that can be registered. As to what are farmers' rights are spelt-out in Section 39. The processing, evaluation and receipt of objection and determination thereof in respect of applications for registration is contained in the provisions between Sections 20 to 22. Section 24(5), i.e. the impugned provision contains a unique power, in this context. Its location is somewhat paradoxical with respect to the powers of the Registrar at the time of issue of registration certificate. Though it is in Section 24, which concerns with the issue of registration certificate (after scrutiny and scrutiny of the claims, consideration of objections, recording of reasons partly accepting or accepting conditionally, the application and the claims and permitting amendments to the application, culminating in a final order) the power conferred is to make an interim order anytime during the pendency of an application, from its filing to its disposal. The provision is broad and sweeping; its exercise is not in any manner conditioned upon consideration of any objective material: the solitary guidance given is that such order can be made if someone is indulging in an "abusive act". Significantly *abusive act* is undefined; its breadth can comprehend a range of behavior ranging from suspicion of infringement or using someone's material, to genuine use of material legitimately developed by a rival: the latter might be alleged to be "abusive" by the applicant,

merely because it affects its business. The only enactment which uses the term “abusive” is Section 4 (2) of the Competition Act, 2002, which employs it while defining what constitutes “abuse of dominant position” by a business or corporate entity, taking or attempting to take advantage of its pre-eminent position in the market place, vis-à-vis its competitors, in regard to the goods or services it trades or deals in. The expression is broadly defined in that act to mean imposition of unfair or discriminatory conditions: in purchase or sale of goods or services; or price in purchase or sale of goods or services. It further goes on to include any limits/restrictions on production of goods or provision of services or market therefore; or limiting/restricting technical or scientific development to the prejudice of customers. “Abuse of dominant position” also goes on to include indulging in practice(s) which result in denial of market access and conclusion of contracts subject to supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

31. There can be no two opinions about the Parliament’s wisdom in creating new rights for breeders, farmers and those who by their effort developed new varieties or later claim to have developed extant varieties. That such unique protection is *sui generis* and is also distinguishable from other known kinds of intellectual property, patent designs, copyrights and trademarks is also inarguable. But this uniqueness is irrelevant for the consideration of the challenge by the petitioners to the impugned provisions. The Union, the interveners and the third respondent speak in unison about India evolving her true obligations under Article 13 of the UPOV and also the public policy underlying the main provision, i.e. as enabling the authority to make interim orders in the applications which are pending. To examine

these, it would be essential first to closely analyze the provision and thereafter consider whether indeed it confers unguided or uncanalized power and if it does, can it be ever in the manner suggested.

32. Principles governing statutory interpretation do not permit use of terms defined in one enactment, to construe identical, but undefined terms in another enactment; therefore, the term “abuse” and its broad (if not entirely vague) import in the Act as contrasted with the detailed definition under the Competition Act which locates the expression in a context, i.e. abuse of dominant position in the marketplace at the centerpiece of the definition. In other words, “abuse” is not only wide and vague in its import, but “abuse” by which entity – a specified third party, or generically all other parties (considered third parties) in the subject-object verb relationship sharpens the concern that the power (to issue interim orders) is overbroad and without any guidance. To illustrate, an abuse could be a case of theft of variety and its exploitation by sale; if demonstrable, that it is an abuse might be capable of injunctive relief. However, at the other end of the scale, if there is no theft or allegation of theft but rather claim by the applicant that it has developed the variety first and is, therefore, entitled to protection as opposed to the assertion of a rival that such a position is incorrect and that the variety is an extant one, or a farmers’ variety, a possible view can be that use by such rival of the variety is an abusive act. Therefore, the basis for grant of an order under the impugned provision is existence of a vague and undefined state of affairs. The dictionary meaning of the expression “abuse” is, according to the *Merriman Webster’s Dictionary* a “*corrupt practice or custom; improper or excessive use or treatment; or ....physical*

*maltreatment*” The Cambridge Dictionary says it is “to use something for the wrong purpose in a way that is harmful or morally wrong”.

33. The term “abusive” is an adjective of the expression “abuse”. This term, in the opinion of the court, is wide and susceptible of equally varied interpretation. The imprecision of such a term, that conditions a wide power would be facially suspect, unless the discretion conferred, in respect of a quasi judicial power is capable of use by settled principles. *Harakchand Banthia (supra)* is a useful precedent in this regard; the Constitution Bench of the Supreme Court examined the validity of various provisions of the Gold Control Act. Concluding that several provisions conferring wide powers were unsustainable, the court reasoned as follows:

*“It is manifest upon a review of all -these provisions that the power conferred upon the Administrator under s. 5 (2)(b) is legislative in character and extremely wide. A parallel power of subordinate legislation is conferred to the Central Government under Section 114( 1 ) and (2) of the Act. But Section 114 (3) however makes it incumbent upon the Central Government to place the rules before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions. It is clear that the substantive provisions of the Act namely ss. 8, 11, 21, 31 (3), 34 (3) confer powers on the Administrator similar to those contemplated by s. 5 (2) (b) of the Act. In these circumstances we are of opinion that the power of regulation granted to the Administrator under s. 5 (2) (b) of the Act suffers from excessive delegation of legislative power and must be held to be constitutionally invalid. We now come to s.27<https://indiankanoon.org/doc/867788/> of the Act which relates to licensing. of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-s. (6) of s. 27<https://indiankanoon.org/doc/867788/> for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon*

*the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well-founded and must be accepted as correct. Section 27 (6) (a) states that in the matter of issue, or renewal of licences the Administrator shall have regard to "the number of dealers existing in the region in which the applicant intends to carry on business as a dealer". But the word "region" is nowhere defined in the Act. Similarly s. 27 (6) (b) requires the Administrator to have regard to "the anticipated demand, as estimated by him, for ornaments in that region". The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27 (6) (e) and "public interest" in Section 27 (6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses(a), (d), (e) and (g) of Section 27 (6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of s.26<https://indiankanoon.org/doc/916076/> of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of Section and form part of a single scheme. The result is that clauses (a), (b), (c),(e) and (g) are not severable and the entire Section 27 (6) of the Act must be held invalid. Section 27 (2) (d) of the Act states that a valid licence issued by the Administrator may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers." On the face of it, this sub- section confers such wide and vague power upon the Administrator that it is difficult*

*to limit its scope. In our opinion Section 27 (2) (d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27 (2) (d) and Section 27 (6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose, in exercise of its rulemaking power under s. 114<https://indiankanoon.org/doc/1489134/> of the Act.”*

34. In another decision, *Himmatlal K. Shah v Commissioner of Police* AIR 1973 SC 87 it was held that a provision of the impugned rules (Rule 7) gave unguided power to the Police Commissioner to grant or refuse permission to hold a meeting and was not saved by the provisions of the Act. In the present case too, the provisions of the Act spell out what are the conditions that an applicant has to fulfill, to secure registration of a new variety, etc. However, what are the considerations which the Registrar has to keep in mind, whilst scrutinizing applications for interim relief, the conditions for the grant of such order, its duration, nature of the order itself, are left vague; these orders can be in force for over half a decade. In *State of Madhya Pradesh v Baldeo Prasad* 1961 (1) SCR 970 the Supreme Court held that the inclusive definition of "goonda" was vague and the offence created by Section 4A of the Goondas Act was, unconstitutional. The court held that:

*"Incidentally it would also be relevant to point out that the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word*

*would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right under Art. 19 (1) (d) (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Art. 19 (5) care must always be taken in passing such acts that they provide sufficient safeguards against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word "goonda" should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out Section 4-A suffers from the same infirmities as Section 4."*

The provisions of the Act *per se* do not furnish guidance in this regard, both as to what power is conferred and at the same time, is incapable of control, having regard to its amplitude. Plainly the lack of guidance clothes the authority with arbitrary power.

35. The main provision leaves it to the Registrar to issue "*such directions*" – a wide term for the protection of interests of the breeders against an abusive act committed by a third party during the period between the filing of application for registration and decision taken by the Authority on such application. The term "*abusive act*" is not defined; likewise, the question of decision taken by the authority on such application. More importantly the decision – final – taken upon an application for registration according to the provision is "*by the Authority*". The Authority obviously is a reference to the

protection of plant varieties and farmers' rights authority. This is under Section 3(1). The entire section 3 and its sub-sections (2), (3) and (4) etc. clearly are premised upon the authority being the one constituted under Section 3(1). On the other hand, the application for registration by person specified under Section 16 can be made to the Registrar by reason of Section 14 and Section 23. The decision on an application for registration – after the completion of the process outlined in Sections 20 and 21 is by the Registrar and not the Authority. The only reference to the Authority or its power is when after registration, under Section 25, it is obliged to publish the list of varieties, which have been registered. Therefore, it does not have any role in the decision-making on an application – that role is entirely of the Registrar. Quite evidently, the reference to “the Authority” before whom an application might be pending is a mistake; perhaps, the lawmakers intended a decision by the Registrar instead. Now this important aspect has to be kept in mind in interpreting Section 24(5).

36. The process of registration begins with the submission of an application. The acceptance of an application or its conditional acceptance or even rejection is after the Registrar makes “such enquiry” as it thinks fit with reference to the particulars contained in such application under Section 20. By Rule 29(2), the Registrar has to scrutinize the application for registration and if satisfied inform the party concerned who shall then deposit the fee within two months for carrying on the DUS test. Rule 29(6) is to be conducted on a minimum of two locations. The consideration of the application as part of the enquiry after the DUS test leads to its advertisement, which in turn can result in consideration thereof and orders.

Therefore, the power of the impugned provision is exercisable at any stage and moment the application is filed regardless of its merits, i.e. whether the applicant claims to be breeder or farmer or a variety that is entitled to protection. Unlike in the case of all other species of property rights, real or intellectual, the protection granted is not only wide but in respect of an entirely inchoate claim. In a sense, the assertion by the application is at least inchoate till it was ruled or was a mere claim based upon unverified and unsubstantiated particulars in terms of the Act and Rules. This is a very significant departure in as much as in the case of consideration for interim orders, in all other matters, at least, the Court or quasi-judicial authority possessing jurisdiction would have a fair idea of the property rights itself based upon its existence. For instance, in the case of a real property, the total claim or in the case of money claim the document based entitlement or claim and its soundness can be considered for discerning the correctness of the claim. In case of intellectual property such as patents, designs or even registered trademarks, the final ground itself, the documentary evidence to substantiate unregistered trademark or the documentary evidence or material to substantiate claim or originality or distinctiveness can be used to decipher the infringement; copyright infringement can be established using its own unique tools like the evidence/suggesting originality of the work, documentary evidence which could suggest infringement in copyright work etc. However, in the case of applications under the Act, the claims are entirely inchoate and can at any stage of the proceedings be rejected or substantially modified.

37. This nature of the right or claims sets it apart from other species of

property based claims. Neither the Act nor the rules spell out the qualifications that an individual ought to possess for appointment as Registrar [a term or office which includes the Registrar-General of Plant Varieties under Section 12(3) as expanded by Rule 2(j)]. However, the *Protection of Plant Varieties and Farmers' Rights Regulations, 2006* prescribes who can be a Registrar. The said regulation reads as follows:

***“5. The term of office and the conditions of service of the Registrars-***

*(1) A person having adequate practical knowledge of Plant Variety Protection System and Post-graduation in Agricultural Science (with specialization in Plant Breeding and Genetics, Biotechnology, Agriculture Botany etc.) or Forestry or allied subject shall be eligible to hold the Office of Registrar in the Authority. The Registrar can be taken on deputation and absorption basis from other Departments or Organization.*

*(2) The Authority shall follow Fundamental Rules, Central Civil Services (Leave) Rules, 1972 and Central Civil Services (Pension) Rules, 1972 while fixing salary and other allowances including pension, leave, traveling and daily allowances of the Registrar. The Authority shall have the flexibility to make the special policy or rules or regulations or guidelines for career advancement or promotion of Registrar and other staff of the Authority.*

*(3) A person holding the office of the Registrar may relinquish the office by giving in writing to the Authority notice of not less than three months.*

*(4) The other conditions of the Registrar shall be regulated by orders made in that behalf by the Authority from time to time.”*

From the analysis of the various provisions of the statute and the regulations, what is apparent is that even while the Parliament painstakingly spelt out the rights and obligations of the applicants, the qualifications that are to be

fulfilled and conditions that are to be made, as well as the various steps that see the grant or refusal of an application, no endeavor was made to specify who can hold the office of Registrar. The respondents' endeavor to say that proceedings before the Registrar are judicial proceedings and that this is borne out by Section 87, is in this court's opinion, only partially correct. That provision merely deems proceedings before the Board and the Registrar to be akin to judicial proceedings "*in relating to registration of variety or essentially derived variety, registration of agent, registration of licence or registration of compulsory licensing under this Act*" "within the meaning of Sections 193 and 228 of the Criminal Procedure Code and for the purpose of Section 196 of the Indian Penal Code. These are not judicial proceedings, but are only so for the specific purpose, to prevent perjury and render those who suborn themselves criminally responsible. Section 11 too does not help the respondents, or the intervener because it confers limited powers of a civil court, upon the Registrar, i.e, (a) "*for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses* and (b) to "*make such orders as to cost as it considers reasonable and any such order shall be executable as a decree of a civil court.*" The powers of a civil court to make or modify orders, or act in furtherance of its inherent powers, or direct discovery, etc. are not conferred; nor can they be conferred or read into the Act. The complete lack of any judicial or quasi judicial expertise on the part of the Registrar is highlighted if one sees that the Tribunal, which is to decide appeals from decisions of the Registrar is to comprise of judicially trained officers or judicial officers, with at least 10 years' experience or lawyers with 12 years' practice, and, what is

more, matters of infringement are to be dealt with by a District Court.

38. Given that issues relating to registration rights are adjudicable in appeals by a tribunal (comprised of judicially trained personnel), that infringement is a matter to be determined by regular courts, and having regard to the fact that the nature of orders made under the impugned provision can have lasting adverse consequences, the singular lack of any statutory provision ensuring that Registrars have minimum experience as quasi judicial officials, obliged to follow the discipline of established procedures such as notice, fair hearing and reasoned orders, renders it arbitrary. Parliament's intention that disputes relating to registration are serious enough to warrant attention of legally trained personnel, with not less than 10 years' judicial experience or experience of 12 years as lawyers, is apparent from the qualification mandated for members of the tribunal. In fact, even the Constitution of India prescribes just 7 years' practice as the minimum qualification for an Advocate to be appointed as District Judge. In these circumstances, the omission to factor in *any qualification* with legal experience for Registrars, who can issue wide interim orders that can sound a death knell to businesses of breeders, or even farmers, is a fatal omission. *R. Gandhi (supra)*, *Madras Bar Association (supra)* and *L. Chandra Kumar v Union of India* 1997 (3) SCC 261 explained in great detail the necessity of ensuring that if any mechanisms instead of courts are created, their functioning should be of no less a caliber than the courts. The corollary is that the constitutional archetype of courts as the prime dispensers of justice can only be departed from if there is an equally efficacious mechanism that delivers *justice, manned by judicially trained personnel or those with legal*

*experience.* Whilst the qualifications of Registrars as technical experts, capable of deciding whether the DUS test is satisfied and other issues of detail, is undoubted, whether all or some of them are sufficiently versed to handle matters of moment- which is what in many cases the issues concerning interim measures boil down to, given that there is no appellate remedy against such orders- is definitely doubtful. This makes the outcome fraught, undermining the rule of law and injecting arbitrariness to the entire exercise.

39. As far as the theory of “reading down” the impugned provision is concerned, this court recollects the holding of the US Supreme Court in *Moore Ice Cream Co. v. Rose*, 289 US 373:

*“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.” ... But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.....If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide, whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional.”*

Equally forthright was our Supreme Court in *Minerva Mills v Union of India* 1981 (1) SCR 206:

*"the device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment ..... If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature."*

Even less does the court act within its legitimate power when it "reads into" a clear provision words or ideas that plainly were absent from the enacting legislature's mind. To do so, would be importing words on the supposition that Parliament would have intended them to be enacted, had it known that the provision suffered from some infirmity.

40. India consists of peoples of diverse cultures and ethnicities in differing geographical locales with varied ecologies, who have practiced agriculture since antiquity. From terrace farming to plantations, developing new strains of grains to harvesting forest produce on a systematic basis to introducing newer practical and cost effective methods of agriculture, Indian farmers have innovated in the agricultural field, from time immemorial. These indigenous "innovators" have bred seeds, hybridized and used them to better yields and improve efficiencies. Indigenous use of plants and varieties for insecticides, herbs and traditional knowledge of uses of locally available breeds with collective memory and sharing of these resources are the hallmark of Indian culture. The Traditional Knowledge Repository, known as the Traditional Knowledge Digital Library (TKDL) consists of 34 million pages in the public domain and includes 80000 formulations of *Ayurveda*, 1,00,000 formulations of *Unani* and 12,000 formulations of *Siddha* schools of

medicines. Given the importance of the Act, there is enormous danger in empowering authorities with unguided and uncanalized power through provisions that can implicate livelihoods and limit or impair food access to tens of thousands- potentially hundreds of thousands of farmers and users of plant varieties. The existence of a large section of farmers unschooled in provisions of the Act and unaware of their rights renders unethical bio-prospecting practices and spurious claims to development of new or other registrable varieties, entitled to registration, a real possibility. Section 24 (5) of the Protection of Plant Varieties & Farmers' Rights Act as cast at present may undoubtedly be an adequate remedy to prevent abusive practices (assuming that what is abusive can be defined over a period of time); yet the danger of abuse of the provision itself and the attendant (likely) long term injury to innocent breeders, farmers and those in the business of development of hybrids and plant varieties far outweighs its benefits, in view of the unguided nature of the power, which is destructive of the rule of law and contrary to Article 14 of the Constitution of India. Section 24(5) of the Protection of Plant Varieties and Farmers' Rights Act, 2001, is, therefore, declared void. The writ petitions are allowed in these terms; however, there shall be no order as to costs.

**S. RAVINDRA BHAT**  
**(JUDGE)**

**R.K. GAUBA**  
**(JUDGE)**

**DECEMBER 2, 2016**