

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 15th May, 2020

+ CS(OS) No.1163/2013, IA No.9631/2013 (u/O XXXIX R-1&2 CPC), IA No.9632/2013 (u/O XXVI R-9 CPC), IA No.9633/2013 (u/O XXVI R-10A CPC), IA No.10077/2013 (for direction), IA No.14827/2013 (u/O VIII R-10 CPC), IA No.1402/2014 (u/O VIII R-1 CPC) & CCP No.64/2013

SUNGRO SEEDS LTD

..... Plaintiff

Through: Mr. Sudhir Chandra, Sr. Adv. with
Mr. Subhash Bhutona & Ms. Rhyea
Malik, Advs.

Versus

DR. S.K. TRIPATHI & ORS.

..... Defendants

Through: Mr. Jayant Bhushan, Sr. Adv. with
Mr. Abhishek Saket, Ms. Vijaya
Singh & Mr. Rahul Dubey, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.10058/2013 (of the defendant no.3 under Order VII R-11 CPC).

1. The defendant no.3 Nuziveedu Seeds Private Limited seeks rejection of the plaint.

2. The plaintiff has instituted this suit, pleading (i) that the plaintiff is in the business of research, production, processing, marketing and sale of high quality hybrids and varietal seeds; (ii) that the defendant no.1 Dr. S.K. Tripathi and defendant no.2 Mr. Akhalesh Shukla are ex-employees of the plaintiff who have joined the employment of and are currently employed with the defendant no.3, a competitor of the plaintiff; (iii) that the plaintiff, to protect sensitive and confidential information relating to the product and product development know-how, varieties, hybrids, parent-lines, breeding

strategies and associated know-how and trade secrets developed by the plaintiff, requires its employees to, at the time of joining the plaintiff company, enter into an employment agreement and undertake not to disclose any such sensitive and confidential information to any third party during the course of employment and at any time thereafter; (iv) the plaintiff also mandates its employees to execute a Deed of Assignment of all rights, title and interest to any and all intellectual property developed by the employee or in the development of which the employee has contributed, during the term of the employment with the plaintiff, to the plaintiff; (v) similar contracts were executed by the defendants no.1&2 also; (vi) that the defendants no.1&2 had access to the plaintiff's intellectual property including trade secrets such as the parent lines of the plaintiff's hybrids and seeds used for cultivation of the parent lines of the plaintiff's hybrids, breeding strategies etc.; (vii) one of the hybrid varieties developed by the plaintiff is the Cauliflower Hybrid no.SCFH-130 sold in the market under the name 'Katreena', which was released for commercial sale in the year 2006; (viii) that the defendant no.1 joined the plaintiff's predecessor on 1st January, 2001 as General Manager in Research Development Department and was responsible for conducting all research and development activities in relation to vegetable seeds of the plaintiff; (ix) that the defendant no.2 joined the plaintiff's predecessor on 1st January, 2001 as a Senior Field Assistant and was further designated as Technical Officer in the R&D Department; (x) the defendant no.1 supervised research and development activities of the plaintiff's hybrid seeds including the research relating to SCFH-130; (xi) the defendant no.2 had access to the plaintiff's confidential and sensitive information, data, breeding strategies and information for Cauliflower

Hybrids including SCFH-130; (xii) that the defendant no.1 left the services of the plaintiff on 5th April, 2008; (xiii) that the defendant no.2 left the services of the plaintiff on 18th December, 2008; (xiv) that the defendants no.1&2 are currently employed with the defendant no.3; (xv) the defendants no.1&2, at the time of joining the services of the plaintiff, had entered into employment agreement whereunder they had agreed to keep confidential all matters relating to their job and employment with the plaintiff and not to give to anyone any particulars or details of any of the research, process or of administrative and/or organizational matter of confidential nature to which they would come across during the course of their employment with the plaintiff; (xvi) the defendants no.1&2 had also executed Assignment Deeds as aforesaid; (xvii) the defendants no.1&2 had also submitted representations to not disclose to any third party any information obtained by them by virtue of nature of their duty with the plaintiff; (xviii) in the last week of October, 2010, the plaintiff came across packets of hybrid cauliflower seeds in the market which carried the photographs of the plaintiff's hybrid cauliflower SCFH-130, being marketed under the name 'Riya' and claiming almost identical characteristic features as that of the plaintiff's hybrid SCFH-130; (xix) the tests got conducted by the plaintiff also disclosed that the seeds of the defendant no.3 had 100% identical characteristic features as that of the plaintiff's hybrid SCFH-130 variety; (xx) it cannot be co-incidence that defendant no.3's 'Riya' has identical morphological traits and genetic traits to the plaintiff's 'Katreena'; (xxi) had the defendant no.3 developed its own parent line and hybrid, there would have been substantial difference between the genetic as well as morphological make up; (xxii) the defendant no.3 knowingly misappropriated the trade secret parent lines of the plaintiff and

also acquired the confidential information relating to breeding strategies, soil conditions for breeding impugned hybrid, from defendants no.1&2; (xxiii) the defendants no.1&2 have violated their employment agreement and representation to the plaintiff; and, (xxiv) that the defendant no.3 has indulged in unfair competition by wrongfully exploiting the plaintiff's valuable confidential information, trade secrets, copyright and other intellectual property rights.

Accordingly, the reliefs (i) of permanent injunction restraining the defendants no.1&2 from disclosing or using any confidential information of the plaintiff including all parental materials etc., to the defendant no.3 or to any other person; (ii) of permanent injunction restraining the defendant no.3 from disclosing or using the confidential information of the plaintiff derived from the defendants no.1&2; and, (iii) of delivery directing the defendants to deliver all the confidential information, data and parental materials of the plaintiff pertaining to SCFH-130 or any other product etc. have been claimed in the suit.

3. The suit came up before this Court first on 31st May, 2013 when though no *ex parte ad interim* relief sought granted and no Court Commissioner as sought appointed but the defendants were directed to within three days of their service deposit the parental line of 'Riya' before this Court in a sealed state so that it could be tested or compared with that of the plaintiff.

4. A compliance affidavit has been filed by the defendant no.3.

5. Though the defendants have filed their separate written statements but need to refer thereto is not felt as the application of the defendant no.3 under

Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) has to be considered on the basis of the averments in the plaint alone.

6. The defendant no.3, in its application under Order VII Rule 11 of the CPC has contended (i) that there is a statutory bar to the jurisdiction of the Civil Courts in matters pertaining to intellectual property rights of seeds/hybrids and parents thereof; (ii) reference in this regard is made to Sections 89, 64 and 65 of the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act); (iii) that the applications of both plaintiffs as well as defendant no.3, for registration of their respective plant variety, are pending before the Registrar under the PPVFR Act and the issue of breeder's rights are yet to be established; (iv) only the Registrar can decide the breeder's rights; (v) unless a variety is registered and the breeder's rights conferred, no action for infringement lies; vi) the suit has been filed on the premise that the plaintiff owns the intellectual property rights i.e. the breeder's rights in SCHF-130 and the parents SCF-100293 and SCF-110293; and, (vii) the relief claimed in the plaint is on the basis of infringing activities when there can be no claim for infringement under Section 28 of PPVFR Act, till the date of registration.

7. The plaintiff has filed its reply to the application, pleading (i) that the cause of action for the present suit does not arise under the PPVFR Act; (ii) that the plaintiff is not seeking to assert any statutory rights under the PPVFR Act; (iii) the plaintiff has filed the present suit for violation by the defendants of the plaintiff's common law rights such as breach of confidence, breach of trust and breach of contract, the torts of conversion and misappropriation of trade secrets; (iv) this cause of action is different

from the cause of action under the PPVFR Act; (v) Section 89 of the PPVFR Act bars jurisdiction of Civil Court only in respect of matters which the Authority or Registrar or Tribunal under the said Act is empowered by or under the said Act to determine.

8. The defendant no.3 has filed a rejoinder to the reply aforesaid, contending (i) that PPVFR Act is complete code in itself and the plaintiff cannot invoke the jurisdiction of the Civil Courts for seeking relief by invoking common law rights; (ii) the Authorities under the PPVFR Act are still in the process of examination of the applications for registrations and the procedure for establishment of the right to registration is also prescribed in the Act; any order passed by the Civil Court would amount to establishment of rights in favour of the plaintiff, without even such rights being created under the statute in favour of the plaintiff; (iii) that the plaintiff, till the date of registration, has no rights; (iv) if the plaintiff is not claiming any breeder's rights, then the varieties of SCHF-130 and the parents are already in public domain; (v) PPVFR Act having been enacted for the purposes of the rights, of breeders for protection of plant varieties, the common law rights cannot be invoked; (vi) common law rights cannot be invoked once a statute has been enacted for creation of statutory rights in a plant variety; and, (vii) that the plaintiff for invoking common law rights also is assuming that it has breeder's rights in SCHF-130 while only the application of the plaintiff for claiming such breeder's rights has been made and is still pending consideration.

9. The counsels were heard on 7th November, 2016 and 2nd December, 2016 and orders reserved. Though there has been undue delay in

pronouncing this order, but neither counsel in the interregnum has mentioned the matter and no further development if any, in facts, has been informed.

10. The sole ground for rejection sought of the plaint being of the bar of jurisdiction of this Court, contained in PPVFR Act, I proceed to examine the provisions thereof in the context of the present controversy.

11. The Act, as per preamble thereof, was enacted to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants. The same, in definition Section 2 thereof, (i) vide Clause (za) defines “variety” as a plant grouping except micro-organism within a single botanical taxon of the lowest known rank which can be defined by the expression of the characteristics resulting from a given genotype of that plant grouping and which can be distinguished from any other plant grouping by expression of at least one of the said characteristics and which is suitable to be propagated; (ii) vide Clause (c) defines “breeder” as a person who has bred, evolved or developed any variety; (iii) vide Clause (h) defines “essential characteristics” as meaning such heritable traits of a plant variety which are determined by the expression of one or more genes that contribute to the principal features, performance or value of the plant variety; (iv) vide Clause (r) defines “propagating material” as a plant or its component including an intended seed or seed which is capable of regeneration into a plant; (v) vide Clause (x) defines “seed” as a living embryo capable of regeneration and giving rise to a plant which is true to such type. Section 3 of the said Act provides for the establishment of a Protection of Plant Varieties and Farmers’ Right (PPVFR) Authority with

the functions prescribed in Section 8. Section 12 provides for establishment of a Plant Varieties Registry at the head office of PPVFR Authority, for the purpose of facilitating the registration of plant varieties and empowers the PPVFR Authority to appoint the Registrar General of Plant Varieties. Section 13 provides for maintenance of a National Register of Plant Varieties at the head office of the Plant Varieties Registry, for entering the names of all the registered plant varieties, with the names and addresses of their respective breeders. Section 14 of the PPVFR Act enables making of an application by any person claiming to be the breeder of a plant variety or to be successor or assignee of the breeder of the plant variety, to the Registrar of Plant Varieties, for registration of any plant variety. Section 15 lays down the criteria / tests to be satisfied for registration of a plant variety. Suffice it is to state that a variety which conforms to the criteria of novelty, distinctiveness, uniformity and stability is registrable. Section 21 provides for advertisement of the application for registration and consideration of objections thereto. Section 24 provides for issuance of a certificate for registration and Section 28 provides that a certificate of registration shall confer an exclusive right on the breeder or his successor or agent or licensee, to produce, sell, market, distribute, import or export the variety. Section 30 however provides that nothing contained in the Act shall prevent the use of any variety registered under the Act for conducting experiments or research or as an initial source of variety for the purpose of creating other varieties. Section 42 protects innocent infringement and Section 47 empowers PPVFR Authority to grant compulsory licence of any plant variety registered with it. Section 54 provides for the establishment of a Plant Varieties Protection Appellate Tribunal, to hear and decide appeals against the order or decision

of PPVFR Authority or Plant Variety Registrar, relating to registration of a variety. Section 64 provides that a right established under the Act is infringed by a person, who not being a breeder of a variety registered under the Act, sells, exports, imports or produces any such variety without the permission of the breeder or uses sells, exports, imports or produces any other variety giving such variety the denomination identical with or deceptively similar to the denomination of a variety registered under the Act, in such manner as to cause confusion in the minds of general people, in identifying such variety so registered. Section 65 provides that no suit for infringement of variety registered under the Act or relating to any right in a variety registered under the Act shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit. Section 89 bars the jurisdiction of Civil Court in respect of any matter which PPVFR Authority or Plant Variety Registrar or Plant Varieties Protection Appellate Tribunal is empowered by or under the Act to determine and Section 92 gives the provisions of the Act an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

12. A reading of the PPVFR Act would show the structure thereof to be similar to that of Trade Marks Act, 1999 enacted for registration and protection of trade mark, Copyright Act, 1957 enacted for registration and protection of copyright, Patents Act, 1970 enacted to provide for registration and protection of patents and Designs Act, 2000 enacted for registration and protection of designs. Just like the said Acts provide the term for which registration is granted and during which term only rights conferred thereunder can be protected/enforced and whereafter patent and design are in public domain, so also the PPVFR Act vide Section 24(6) thereof lays down

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that the registration of a variety granted thereunder is for nine years in the case of trees and vines, extendable to a maximum of eighteen years, from the date of registration, and six years in the case of other crops, extendable for a maximum of 15 years from the date of registration. The rights conferred by the PPVFR Act, on the breeder of a plant variety, are thus a facet of intellectual property and fall in the same domain as trade marks, copyright, patents and design.

13. In the interregnum between the date when this order was reserved and today, there have been several pronouncement of this Court with respect to PPVFR Act and one of which may be mentioned. This Court in CS(COMM) No.132/2016 titled ***Mosanto Technology LLC Vs. Nuziveedu Seeds Ltd.*** was concerned with a claim for infringement of a patent in transgenic plants having insecticidal capabilities. One of the contentions of the defendant therein while opposing the application of the plaintiff therein for interim relief was that the patent was invalid as the rights claimed by the plaintiff therein could only be under the PPVFR Act and whereunder no registration had been obtained. Though the learned Single Judge while deciding the application for interim relief recorded that the said issue was purely legal and the suit itself could be decided on hearing thereon, but for the reason of the parties not coming forward to accept the said procedure, refrained from doing so. Vide judgment reported as ***Mosanto Technology LLC Vs. Nuziveedu Seeds Ltd.*** 239 (2017) DLT 599, while dismissing the application of the plaintiff therein for interim relief, giving some directions, it was observed that the invention subject matter of that suit patent was prima facie not the same as development of a variety within the meaning of PPVFR Act. The Division Bench of this Court however, vide judgment reported as CS(OS) No.1163/2013

Nuziveedu Seeds Ltd. Vs. Monsanto Technology LLC 2018 SCC OnLine Del 8326 (DB), in appeals by both the parties, held in favour of the defendant in the suit and held that since the invention was non patentable, being the subject matter of PPVFR Act and whereunder no registration existed, the suit was not maintainable and there was no need to put the same to trial; resultantly, the suit was dismissed. Supreme Court however in judgment reported as ***Monsanto Technology LLC Vs. Nuziveedu Seeds Ltd.*** (2019) 3 SCC 381 set aside the order of the Division Bench and restored the suit and the order of the Single Judge, leaving the question whether the invention subject matter of that proceeding was in the domain of the Patents Act or in the domain of PPVFR Act also to be decided post trial.

14. We here are not concerned with the controversy as had arisen in ***Mosanto Technology LLC*** supra. The plaintiff Sungro Seeds Ltd. herein is not claiming any patent and is claiming rights pending registration under the PPVFR Act. The reference hereinabove to ***Mosanto Technology LLC*** supra is only to bring the matter to context.

15. I had during the hearing enquired from the senior counsel for the plaintiff, whether 'Katreena' of the plaintiff and 'Riya' of the defendant no.3, registration of both of which was claimed to have been applied for by the respective parties and informed to be pending consideration, were permitted to be sold in the open market, even without such registration and whether any other law/rule/regulation required any permission to be obtained for selling a plant variety claimed to be new.

16. It was informed by the senior counsel for the defendant no.3 that 'Katreena' of the plaintiff and 'Riya' of the defendant no.3 are result of

hybridisation claimed by the respective party and sale of new varieties created by hybridisation does not require any permission and both plaintiff and the defendant no.3 are commercially exploiting their respective creations.

17. The senior counsel for the plaintiff did not controvert the aforesaid position. It was further informed that only if the new variety is a result of genetic modification does it require permission for sale.

18. The position which thus emerges is, that a plant variety claimed to be new and capable of registration, if not the outcome of “genetic modification”, can be sold/commercially exploited even while its registration is pending.

19. I wondered, how a breeder of a new plant variety, which in accordance with law has already been placed in public domain by marketing thereof, can be left remediless against the person who, taking advantage of the fact that registration takes time, violates the rights of the breeder.

20. As mentioned above, the statutes with respect to trade mark, copyright, patent and design, also provide for registration. The said Statutes also do not provide for rights between the time, the trade mark is coined or the work in which copyright is claimed is created or the date of the invention or the date of conception of design, on the one hand, and the date when registration applied, is granted. However the need therefor in the case of trade marks and copyright and perhaps also in the case of designs does not arise, because (a) in case of trade marks, even prior to registration, common law rights exist; (b) in case of copyright, registration is not mandatory for assertion and enforcement of rights; and, (c) in case of designs, prior to the

date of registration, rights as a trade mark or as a copyright may be claimed. However, in the case of Patents, a question may arise, whether an inventor has any remedy against a person who commences commercially exploiting an invention, between the dates of invention and the date of grant of patent. To my knowledge, there is no case law in this respect and the counsels also, in spite of the said question arising during the hearing, did not cite any judgment.

21. The Legislature however while enacting the PPVFR Act, perhaps to fill up the aforesaid lacuna in the Patents Act, empowered the Registrar of Plant Varieties vide Sub-Section (5) of Section 24 of the PPVFR Act, to issue any directions to protect the interest 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 Registrar on such application. I may also notice that per Section 24(2) of the PPVFR Act, the maximum time within which the Registrar of Plant Varieties is to decide the application for registration, from the date of filing of the application, is to be prescribed by the Rules thereunder and vide Section 24(3) of the PPVFR Act, such time is to be not later than twelve months from the date of application, if the applicant is in default and thereafter the application for registration is to be treated as abandoned. In spite of so limiting the time taken in registration, it was deemed fit by the legislature to, vide Section 24(5) of the PPVFR Act, empower the Registrar of Plant Varieties to protect rights of a breeder in the interregnum.

22. The senior counsel for the defendant no.3 contended, (i) that PPVFR Act is a complete code in itself; (ii) that there is no common law right in a

new plant variety; (iii) PPVFR Act creates rights against infringement, only on grant of registration; (iv) PPVFR Act does not vest any rights in the breeder prior to registration; (v) that it being the plea of the plaintiff that, the defendants no.1&2 had stolen the parent line of SCFH-130 and had given it to the defendant no.3, and that 'Riya' of the defendant no.3 being identical to 'Katreena', of the plaintiff, both cannot be registered and which question is pending consideration before the Registrar of Plant Varieties and against whose order provision has been made in PPVFR Act for an appeal to Plant Varieties Protection Appellate Tribunal; (vi) for the period prior to registration also, power has been vested in the Registrar of Plant Varieties, vide Section 24(5), to grant the relief as has been claimed by the plaintiff in this suit; and, (vii) the PPVFR Act expressly bars the jurisdiction of this Court in respect of any matter which the PPVFR Authority or the Registrar of Plant Varieties or the Plant Varieties Protection Appellate Tribunal is empowered by or under the Act to determine; reference is particularly made to Sections 89 and 24(5).

23. The senior counsel for the defendant no.3, during the hearing also referred to (i) ***Dhulabhai Vs. State of M.P.*** AIR 1969 SC 78, (ii) ***Emergent Genetics India Pvt. Ltd. Vs. Shailendra Shivam*** 2011 (47) PTC 494 (Del); and handed over copies of (iii) ***Mohan Lal Vs. Sona Paint*** (2013) 200 DLT 322 (FB); and, (iv) ***Maharashtra Hybrid Seeds Co. Ltd. Vs. Union of India*** (2012) 191 DLT 129.

24. Per contra the senior counsel for the plaintiff contended that the plaintiff has sued on breach of contract and confidentiality by the defendants

no.1 &2, without invoking the PPVFR Act and is in the suit not claiming or asserting any rights under the PPVFR Act.

25. The senior counsel for the defendants responded that such a claim would lie against the defendants no.1&2 only and not against the defendant no.3.

26. It was further the contention of the senior counsel for the plaintiff that neither the PPVFR Authority nor Plant Variety Registrar nor Plant Varieties Protection Appellate Tribunal have the jurisdiction to decide the issues as raised in this suit, of breach of contract. Reliance was placed on:

- (i) ***The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay*** (1976) 1 SCC 496 where it was held that (a) if a dispute is not an industrial dispute nor does it relate to enforcement of any right under the Industrial Disputes Act, 1947, the remedy lies only in the Civil Court; (b) if the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted; (c) only if the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act;
- (ii) ***Abhinav Gupta Vs. JCB India Ltd.*** 2010 (119) DRJ 397 (DB) where it was held that if a particular relief or cause of action is barred under the Information Technology Act, 2000, it would

not mean that the plaint as a whole has to be rejected inasmuch as the plaint contains various causes of action and reliefs and if on trial it emerges that certain relief can be granted only under the Information Technology Act, then such relief may be denied and the suit may be dismissed to that extent but at the preliminary stage when issues even had not been framed, the plaint could not be rejected;

- (iii) ***Dhulabhai*** supra, laying down that the jurisdiction of the Civil Court is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law and that where a liability was existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either of the two remedies;
- (iv) ***The Mumbai Kamagar Sabha Bombay VS. M/s. Abdulbhai Faizullabhai*** AIR 1976 SC 1455 where, finding that though the Payment of Bonus Act, 1965 speaks as a whole code on the subject of profit-based bonus but is silent on other distinct and different kinds of bonus such as the one oriented by custom, it was held that the Bonus Act could not annihilate by implication such different kinds of bonus;

- (v) ***Zee Telefilms Ltd. Vs. Sundial Communications Pvt. Ltd.*** 2003 (27) PTC 457 (Bom) (DB) holding that an obligation of confidence may exist where there is no contractual relationship and that it is in public interest that confidences should be respected;
- (vi) ***P. Asokan Vs. Western India Plywoods Ltd. Cannanore*** AIR 1987 Kerala 103 (FB) where a suit against the employer for compensation for injuries sustained by employer's negligence was held maintainable as the claim was not based on any provision of the Employees' State Insurance Act, 1948;
- (vii) ***Indian Express Newspapers (Bombay) Pvt. Ltd. Vs. T.M. Nagarajan*** (1988) 15 DRJ 212 holding Section 18 of the Trade Unions Act, 1926 to be not a bar to the jurisdiction of a Civil Court to grant injunction against strikes, demonstration and picketing etc. by workers;
- (viii) ***Belganda Sahakari Sakhar Karkhana Ltd. Vs. Keshav Rajaram Patil*** 1994 SCC OnLine Bom 317 holding that Section 91(1) of the Maharashtra Co-operative Societies Act, 1960 was not a bar to a jurisdiction of a Civil Court to entertain a dispute arising between society and a member about a matter which does not arise out of the provisions contained in the Act and that the Act was only intended to consolidate and amend the law relating to Co-operative Societies and not for the purpose of regulating all the transactions;

- (ix) ***Raja Ram Kumar Bhargava Vs. Union of India*** (1988) 1 SCC 681 holding that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality having been intended to the result of the statutory proceeding, in the absence of an exclusionary provision, the civil courts' jurisdiction is impliedly barred; however if a right pre-existing in common-law is recognised by the statute and a new statutory remedy for its enforcement, without express exclusion of the civil courts' jurisdiction does not bar the civil court from entertaining the dispute; and,
- (x) ***Dwarka Prasad Agarwal Vs. Ramesh Chandra Agarwala*** AIR 2003 SC 2696 to contend that bar of jurisdiction of Civil Court is not to be readily inferred.

27. During the hearing, it was felt that the relief seeking which the suit had been filed was within the domain of Registrar of Plant Varieties in exercise of powers under Section 24(5) of the PPVFR Act and the jurisdiction of this Court thus was barred under Section 89 thereof. It was also felt that since registration as a plant variety has been sought by the defendant no. 3 and because commercial exploitation of the seed in which the plaintiff claims exclusive right is also, by the defendant no.3, the effective relief of injunction claimed in the suit is against defendant no.3 only and on the basis of claim of the plaintiff of breach of contract and breach of trust and confidentiality against the defendants no.1 and 2, would

still not entitle the plaintiff to relief against defendant no.3. It was thus felt that the suit was not entertainable by this Court and the plaintiff liable to be rejected, at least insofar as against defendant no.3, reliefs sought whereagainst could be obtained by the plaintiff before Registrar of Plant Varieties.

28. However the Division Bench of this Court in ***Prabhat Agri Biotech Ltd. Vs. Registrar of Plant Varieties*** 2016 SCC OnLine Del 6236 was concerned with a challenge to the vires of the said Section 24(5) of the PPVFR Act *inter alia* on the ground that the same empowered the Registrar to injunct another, even before the applicant for registration had acquired any proprietary rights in the plant variety of which registration was sought. It was the contention therein that it was well nigh possible that the application for registration is ultimately rejected; however the third party would stand restrained in the meanwhile. It was further the contention that Section 24(5) of the PPVFR Act was capable of immeasurable harm and likely injury by a competitor, who by making a mere application for registration and grant of interim measure under Section 24(5), may succeed in destroying a genuinely developed plant variety whose creator or originator might be preparing a claim. Several other arguments were also raised. The Division Bench, vide the judgment aforesaid, found merit in the challenge and has struck down Section 24(5) of the PPVFR Act, so empowering the Registrar of Plant Varieties, *inter alia* reasoning (i) that the process of registration begins with the submission of an application but the grant of registration or dismissal of the application for registration is after enquiry, as prescribed in the Act; (ii) however the power under Section 24(5) of the PPVFR Act is exercisable at any stage and even at the moment the application is filed, regardless of its

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merits i.e. whether the applicant has any right or not; (iii) “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 the Rules”; (iv) “infringement is a matter to be determined by regular Courts”; and, (v) “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 variety”.

29. Though an appeal to the Supreme Court against ***Prabhat Agri Biotech Ltd.*** supra is pending and there is interim stay of operation of the judgement but with the striking down of Section 24(5) of the PPVFR Act, it appeared that the fulcrum of the argument of the senior counsel for the defendant no.3 to the jurisdiction of this Court to entertain the suit had disappeared and there being no other provision in the PPVFR Act empowering any of the authorities created thereunder to grant relief at the pre-registration stage, this Court would have jurisdiction. With respect to the contention of the senior counsel for defendant no.3, of the exclusive jurisdiction to determine similarity between the seeds of plaintiff and defendant no.3 being of the authorities under the Act, it appeared that this Court may have jurisdiction till the said authorities decided the applications for registration.

30. However, even if it were to be so, the question which still arises for consideration herein is, whether there can be any rights as a breeder as are

conferred by the PPVFR Act on grant of registration as a variety thereunder, before such registration is granted. While the plaintiff herein claims such rights as common law rights, the defendant no.3 herein controverts the existence of any such rights under the common law.

31. Though during the hearing what perturbed me was, the commercial exploitation of a plant variety by a person who is not the breeder thereof but who may have come across such variety, before the breeder thereof has obtained registration of the same under the PPVFR Act, and the breeder being remediless till then, but on further consideration find that it is not as if the breeder would be remediless. The breeder, once has been granted registration, in an action for infringement can always claim profits earned by such infringer for the pre-registration period as well.

32. Else, the position with respect to plant variety and the rights as a breeder is the same as with respect to copyright, designs and patents i.e. the said rights are statutory rights pure and simple, created for the first time vide and under the legislation with respect to each, and which did not exist under the common law. Reference in this respect, in relation to (i) Copyright, may be made to ***Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd.*** (2008) 13 SCC 30, ***Time Warner Entertainment Company, L.P. Vs. RPG Netcom*** 140 (2007) DLT 758 (DB), ***The Gramophone Company of India Ltd. Vs. Super Cassette Industries Ltd.*** 1998 SCC OnLine Del 929, ***Super Cassettes Industries Ltd. Vs. Chintamani Rao*** 2011 SCC OnLine Del 4712, ***Akuate Internet Services Pvt. Ltd. Vs. Star India Pvt. Ltd.*** 2013 SCC OnLine Del 3344, ***Navigators Logistics Ltd. Vs. Kashif Qureshi*** 254 (2018) DLT 307 and ***Satish Kumar Vs. Khushboo Singh***

MANU/DE/3411/2019; (ii) Designs, may be made to ***Smithkline Beecham Consumer Healthcare GMBH Vs. G.D. Rathore*** 2002 SCC OnLine Del 52 and ***CROCS Inc. USA Vs. Aqualite India Ltd.*** 2019 SCC OnLine Del 7409; and, (iii) Patents, may be made to ***Novartis AG Vs. Union of India*** (2013) 6 SCC 1, ***Claudio De Simone Vs. Actial Farmaceutica SRL*** 2020 SCC OnLine Del 476, and ***Bristol-Myers Squibb Holdings Ireland Unlimited Company Vs. Natco Pharma*** (2020) 266 DLT 724.

33. If as per the legislations with respect to intellectual property of patent and design, there is no right till the grant of registration, the question of the plaintiff herein, till the grant of registration under the PPVFR Act having any right, upon violation whereof any cause of action would accrue to the plaintiff, does not arise. Seen in this light, this suit filed prior to registration under the PPVFR Act is without any cause of action.

34. It is perhaps for this reason only that the senior counsel for the plaintiff pegged his case on breach of agreement/undertaking and confidentiality code by the defendants no.1 and 2 to the plaintiff by virtue of employment.

35. I have however wondered that if the plaintiff, till the date the defendants no.1 and 2 were in employment of the plaintiff, had no rights in any work / development of variety carried out, whether confidentiality with respect thereto can be claimed. In my view, confidentiality and secrecy obligations can only be with respect to a right which the person is entitled to protect. What the plaintiff did not have any right in, the plaintiff could not have protected by entering into agreements with the defendants no.1 and 2 with respect thereto.

36. I have, since reserving this order, had an occasion to deal with the said aspects also in *Navigators Logistics Ltd.* and *Claudio De Simone* supra.

37. In *Navigators Logistics Ltd.* supra, finding that confidentiality and secrecy was claimed in the same works in which copyright was claimed, it was held that once the claim for copyright stood negated, there could be no claim for the same right by pleading confidentiality and secrecy and the same would amount to creating a new right. It was *inter alia* held:

“40..... Copyright was also claimed in the same list and which has not been found. What troubled me was that the law having not protected such a list as a copyright, what could be right in law of the plaintiff to enforce confidentiality thereof. I then came across the article titled “The ‘Other IP Right’: Is It Time to Codify the Indian Law on Protection of Confidential Information” authored by Mr. Prashant Reddy T, Assistant Professor, NALSAR, Hyderabad published in Journal of National Law University, Delhi 5(1)1-21, analysing the law with respect to confidential information and authoring (i) Article 39 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement signed by India imposed an obligation on contracting states to provide means to protect secret information that has commercial value from disclosure without the consent of the persons who have maintained the secrecy of such information; (ii) however India did not enact any new laws on the issue of trade secret protection meaning that Indian government considered its existing laws sufficient to comply with the requirements of Article 39;

(iii) confidential information under English law is protected under both common law and equity with remedies of injunction and damages; (iv) however English law does not equate information to property unlike some other jurisdictions, such as the United States where trade secrets are treated as property; (v) India's approach to confidential information has been the same as that of English Courts; (vi) Indian Courts, even in the absence of a contract have protected information received under a duty of confidence; reference is made to **John Richard Brady Vs. Chemical Process Equipments Pvt. Ltd.** AIR 1987 Del. 372; and, (vii) English Courts have implied a duty of fidelity into the arrangement between an employer and employee."

In the same judgment with respect to the claim under the head of "breach of employment contract", referring to Section 27 of the Contract Act, 1872, it was held:

"53. A two Judge Bench of the Supreme Court, as far back as in **Niranjan Shankar Golikari Vs. Century Spinning & Manufacturing Co. Ltd.** AIR 1967 SC 1098 was concerned with a suit for injunction to restrain the employee, who had agreed to serve the employer for a fixed period, from during the said period, even after ceasing to be the employee of the plaintiff, joining employment of a competitor of the plaintiff. It was unanimously held that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract, than those in cases where it is to

operate during the period of contract of employment. In the facts of that case, it was found that the employee was privy to the special process invented / adopted by the plaintiff and of which the employee was trained and had acquired knowledge. The employee who had left employment prior to the contracted period was thus restrained from joining employment of a competitor for the remaining period for which he had contracted with the plaintiff in that case.

54. A three Judge Bench of the Supreme Court in ***Superintendence Company of India (P) Ltd. Vs. Krishan Murgai*** 1981 2 SCC 246 was concerned with a claim for injunction post cessation of employment. It was held by two of the Judges on an interpretation of the restrictive clause in the Employment Contract, that the same was to apply only when the employee on his / her volition left the employment and not when the employer terminated the employment. The third Hon'ble Judge held that even if the restrictive covenant was to include cessation of employment at the volition of the employee, there could be no post-employment restriction under Section 27 of the Act.

55. A subsequent two Judge Bench of the Supreme Court in ***Percept D'Mark (India) (P) Ltd. Vs. Zaheer Khan*** (2006) 4 SCC 227 refused enforcement of a post-employment restriction on the ground of same being barred by Section 27 of the Act.

56. *Applying the aforesaid law to the facts of the present case, it is found that as per the plaintiff also, there was no fixed term for which either of the defendants no.1 to 8 had agreed to serve the plaintiff. The clause in the Employment Contract claimed by the plaintiff also is to the effect that defendants no.1 to 8, for a period of one year after ceasing to be the employee of the plaintiff, to not compete with the plaintiff. Such a clause in the Employment Contract, as per the judgments aforesaid of the Supreme Court, is void under Section 27 of the Contract Act. Once the clause is void, there can be no injunction or damages in lieu of injunction on the basis thereof.*

57. *The permanent injunction and in the alternative damages claimed on the premise of non-compete clause thus discloses no cause of action and is not required to be put to trial.”*

38. In ***Claudio De Simone*** supra, dealing with a case of passing off and unjust enrichment without claiming any patent rights, it was held (i) unlike the intellectual property of trade mark, where the common law tort was statutorily recognized vide Section 27(2) of the Trademarks Act, there is no common law right in an invention as the plaintiffs therein claimed De Simone Formulation to be; it is only by statute i.e. the Patents Act, that to give impetus to research and innovation, rights in an invention are conferred but again unlike trade mark, for a limited period of time; (ii) it is only when a patent has been obtained with respect to an invention, in accordance with the Patents Act, that the inventor or the patentee is entitled to prevent others from making using or selling the patented product; there is no right in

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common law in any inventor to restrain others from commercially exploiting the invention; (iii) Placing reliance on **Akute Internet Services Pvt. Ltd.** supra, where in the context of a claim for injunction restraining the defendants from disseminating contemporaneous match information in the form of ball by ball account or minute to minute score updates/match alerts, for a premium and without obtaining licence from plaintiff and dealing with the argument of the defendant therein unfairly competing with the plaintiff, it was held:

“10. The plaint, in my view, does not disclose any cause of action against any of the defendants on the ground of passing off their goods as that of the plaintiffs. My reasons therefor are as follows:

A.

B.

C.

D. *In Akute Internet Services supra, in the context of a claim for injunction restraining the defendants from disseminating contemporaneous match information in the form of ball by ball account or minute to minute score updates/match alerts, for a premium and without obtaining licence from plaintiff, the argument of defendants unfairly competing with the plaintiffs was rejected holding (i) that in doing so, the Courts would be granting protection to certain intangibles not covered by the specific statutory regimes; (ii) the basic economic rule is that competition is not only lawful but a mainspring of the*

economy; (iii) the legislature has recognized that there should be exceptions-it has laid down the rules for these; the laws of patents, trademarks, copyrights and designs have all been fashioned for the purpose; each of them have rules for their existence... each has their own justification; (iv) it is not for the judges to step in and legislate into existence new categories of intellectual property; (v) it is not open for the Courts to create such judicial remedies to remedy what the Courts consider unfair; it is not open to the Court to legislate in this way; (vi) recognition of a general action for "unfair competition" involves not more than recognition of the fact that the existence of such an action is inconsistent with the established limits of the traditional and statutory causes of action which are available to a trader in respect of damage caused or threatened by a competitor; those limits, which define the boundary between the area of legal or equitable restraint and protection and the area of untrammelled competition, increasingly reflect what the Parliament has determined to be the appropriate balance between competing claims and policies; (vii) neither legal principle nor social utility requires or warrants the obliteration of that boundary by the importation of cause of action whose main characteristic is the scope it allows, under high-sounding generalizations for judicial indulgence of idiosyncratic notions of what is fair in the market place; (viii) the recent trend internationally to accord protection to rights in information in varying degrees or to accept the doctrine of unfair competition, especially in the European Union,

is pursuant to legislative action by the European Council, and not as a judicial extension; (ix) once we recognize that mere information cannot be the subject matter of protection under common law, it becomes apparent that other means continue to remain available to protect such information: by way of an action for breach of the common law duty of confidence, which is a right in personam against an individual who has come across such information under confidence, and crucially, is distinct from a propriety right in such information itself, opposable in rem; (x) there exists another cogent reason for denying the existence of any general misappropriation or unfair competition theory - i.e. that it would create a non-existent distinction between copying which is actionable under the Copyright Act and appropriation or misappropriation which is actionable under the doctrine of unfair competition; (xi) under the Copyright Act, the copying or reproduction of match information is permitted; to say that the doctrine of unfair competition prohibits the misappropriation of match information would either mean that misappropriation under common law can supplant the Copyright Act or that copying and misappropriation refer to two distinct acts, which would be a distinction without a difference; (xii) claims based on alternate common law remedies in respect of what is in the domain of a statute cannot be permitted; and, (xiii) claim on the basis of unjust enrichment is the same as a claim on basis of the doctrine of unfair competition.”

It was further held:

“G. The question thus, of the plaintiffs having any rights with respect to De Simone Formulation or right of preventing the defendants from claiming their product to be the same as De Simone Formulation in which the plaintiffs have no right, does not arise.

H. The counsel for the plaintiffs, being well conscious of the aforesaid legal position has cleverly contended that though the defendants, if had discovered invention in De Simone Formulation on their own or by way of reverse engineering, could not have been restrained by the plaintiffs from marketing and selling De Simone Formulation, but because entered into an agreement with the plaintiffs for the plaintiffs to provide Know-How of De Simone Formulation, after knowing the Know-How from the plaintiffs cannot indulge in making and marketing the product as De Simone Formulation.

*I. The aforesaid argument overlooks that the De Simone Formulation has no patent in India and the plaintiff no.1, even as inventor thereof under the Patents Act, has no right to restrain the defendants from making or selling De Simone Formulation. The question which thus emerges is, whether an invention which does not qualify as patented product and has no property right therein, can acquire property rights by the third person entering into an agreement of exchange of Know-How and thus claiming confidentiality. In my opinion, no. Reference in this regard may be made to **Navigators Logistics** supra wherein I have held that*

confidential information and trade secrets are not equated to property in India.

J. The said Know-How, without patent being applied for with respect thereto, was in public domain and by conduct of the defendants the status thereof cannot be changed and the same cannot be conferred rights as are permitted to be conferred under the statute i.e. Patents Act, only in accordance with the provisions thereof. The plaintiffs' case is not of enforcement of contractual rights.

K. The counsel for the plaintiffs, as recorded in the order dated 2nd December, 2019, has also sought to contend that a patent is different from Know-How. However, Section 7 of the Patents Act titled "Form of Application" requires every patent application to be accompanied with a provisional or complete specification and Section 10 of the Act titled "Contents of Specifications" requires the specification to describe the invention sufficiently indicate in the title the subject matter to which the invention relates and to fully and particularly describe the invention and its operation or use and the method by which it is to be performed, the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection, to define the scope of the invention for which the protection is claimed, and provide technical information on the invention in the abstract. The position becomes clear from Section 25 of the Patents Act, which permits the grant of patent to be opposed on the ground of the complete specification

furnished not sufficiently and clearly describing the invention or the method by which it is to be performed. Section 84 of the Act titled “Compulsory Licences”, empowering the Controller of Patents to grant compulsory licence of patent enabling a person other than a patentee or others whom patentee has permitted to work the patent, is also indicative of patent, particularly the specifications therein, being self-sufficient to enable such person to work the patent even without the consent of the patentee. If the Know-How for manufacture of a product for which the patent has been obtained and which patent has lapsed was not proved in the specifications required to be furnished for obtaining a patent, no compulsory licence with respect to the said patent could have been granted inasmuch as compulsory licence would have been unable to work the patent without also knowing the other knowhow which the plaintiff no.1 claims to have kept to himself.

*L. In any case, information claimed to be confidential can be protected as trade secret only if such information is not available in the public domain and is hence unknown to others. Reference in this regard may again be made to **Navigator Logistics supra**, **Ambience India Vs. Naveen Jain** 122 (2005) DLT 421, **Emergent Genetics Vs. Shailendra Shivam** 2011 (125) DRJ 173, **Tech Plus Media Pvt. Ltd. Vs. Jyoti Janda** MANU/DE/2438/2014 and **Satish Kumar supra**. Since the plaintiffs have no subsisting patent protection in India, and since the patent based in US has expired, the innovation, as noted above, is in public domain. Hence, the claim for trade secret*

protection falls and the defendants cannot be restrained from manufacturing the product, in spite of the Know-How Agreement, as otherwise it would amount to judicial creation of an extra-statutory monopoly for perpetuity in the invention, in contrast to the scheme of Patent Act, 1970 that seeks to bring an invention to public domain after the expiry of the term of the patent, and which is opposed to public interest as well as to judicial discipline.”

39. Mention may also be made of my recent judgment in **Modicare Ltd. Vs. Gautam Bali** 2019 SCC OnLine Del 10511 holding that (i) Section 27 of the Contract Act makes void i.e. unenforceable, every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind; (ii) it is incongruous that the law, on the one hand would disable a plaintiff from enforcing a contract where the defendant had voluntarily agreed not to do something, by going to the extent of declaring such contract void, but on the other hand, enable the same plaintiff to the same relief under the law of tort; to hold so, would make the law look like an ass; (iii) Section 27 has been held to have been enacted as a matter of public policy of India, and does not create any personal right, which can be waived; if it is the public policy of India that there can be no restraint on any one exercising a lawful profession, trade or business, not even when such person has voluntarily agreed not to, it belies logic that such public policy would not apply when the mischief sought to be prevented is sought to be practiced invoking law of torts; (iv) what is not contractually enforceable is also not enforceable invoking law of torts; (v) while under the common law in

England, restraints of trade, whether general or partial, may be good if they are reasonable or reasonably necessary with reference to public policy or for protection of interest of covenantee, in India, agreements in restraint of trade are governed by Section 27 and the question of reasonableness of restraint is outside the purview of Section 27—this explains, the law of tort of unlawful interference in business, in UK; (vi) however the same has no place in India; (vii) principles of English Law cannot be imported once the Parliament has codified the said principles in the Contract Act; it is the language of the statute which alone has to be considered to ascertain its true meaning and scope; (viii) Section 27, on promulgation of the Constitution of India, conferring the right to practice any profession or to carry on any occupation, trade or business, the status of a Fundamental Right, under Article 19(1)(g) thereof, today has a different connotation; (ix) Article 19(6) only clarifies that nothing contained in Clause (g) shall affect the operation of any existing law or prevent the State from making any law, imposing in the interest of general public, reasonable restrictions on the exercise of right conferred by the said clause; (x) thus, restrictions, in the interest of general public and if reasonable, to the Fundamental Right to practice any profession or to carry on any occupation, trade or business, can be imposed only by law; (xi) the law of tort of unreasonable interference in carrying on business, in view of Section 27 of the Contract Act, was not the existing law within the meaning of Article 19 (6) of the Constitution; (xii) the right saved by Section 27 is a facet of Article 21 of the Constitution of India.

40. In view of having dealt with the subject recently in judgments aforesaid, the need to say anything more is not felt; however though

Emergent Genetics India Pvt. Ltd. supra has already been dealt with in my
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earlier judgment but the senior counsel for the defendants also drew attention to certain passages which have relevance particularly to this dispute. It was held therein that the Courts are enjoined to interpret the law and the Constitution, keeping in view the Directive Principle of State Policy embodied in Part-IV of the Constitution of India; if the Courts were to accept, without any statutory regime, the plaintiffs' blanket assumption that it is possessed of confidential information in something, which plainly, is part of the material resource of the community, the Court would overstep the mandate of the Constitution, in its anxiety to protect such a perceived right.

41. What follows is that the plaintiff, prior to obtaining registration under the PPVFR Act, cannot maintain a suit to restrain the defendants from infringing the rights which are yet to be conferred on the plaintiff on grant of registration. The matter in my view is also covered by the dicta of the Division bench of this Court in ***Prabhat Agri Biotech Ltd.*** supra though I must reiterate that appeal thereagainst is pending in the Supreme Court. Just like therein it was held that the rights of the applicant for registration as a plant variety are inchoate and not crystallized till grant of registration and the Registrar of Plant Varieties is not entitled to, pending registration, restrain another from commercially exploiting the plant variety, registration of which is sought, so will this Court as the Civil Court be not entitled to protect the claimed rights till crystallized by way of registration. The other reasoning given in the said judgment of, the same if permitted resulting in another being restrained though the application for registration may be ultimately dismissed, also holds good here.

42. Resultantly, the plaintiff is not found to be having any rights, asserting which the suit was filed and the suit is dismissed.

43. However, the subject being at a nascent stage, I refrain from imposing costs.

Decree sheet be prepared.

MAY 15, 2020
'pp/gsr'..

RAJIV SAHAI ENDLAW, J.



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