

सत्यमेव जयते



Fair Competition  
for Greater Good

**COMPETITION COMMISSION OF INDIA**

**Case No: 36/ 2016**

**In Re:**

**Amar Biotech Limited,  
4<sup>th</sup> Floor, Progressive Towers,  
Khairathabad, Hyderabad - 500004.**

**Informant**

**And**

**Mahyco Monsanto Biotech (India) Limited,  
Ahura Centre, B-Wing, 5<sup>th</sup> Floor,  
96, Mahakali Caves Road,  
Andheri (East), Mumbai - 400093.**

**Opposite Party - 1**

**Monsanto Holdings Private Limited,  
Ahura Centre, 5<sup>th</sup> Floor,  
96, Mahakali Caves Road,  
Andheri (East), Mumbai - 400093.**

**Opposite Party - 2**

**Monsanto Company, USA,  
800 North Lindbergh Blvd., St. Louis,  
Missouri, U.S.A.**

**Opposite Party - 3**

**Maharashtra Hybrid Seeds Company Limited,  
Reshambhavan, 4<sup>th</sup> Floor,  
78, Veer Nariman Road,  
Mumbai - 400020.**

**Opposite Party -4**

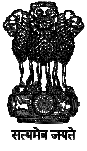
**CORAM:**

**Mr. Devender Kumar Sikri  
Chairperson**

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

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**



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

**Dr. M. S. Sahoo**  
**Member**

**Justice G. P. Mittal**  
**Member**

**Appearances during the hearing:**

***For Informants:***

Mr. Vaibhav Gaggar, Advocate  
Mr. Saksham Dhingra, Advocate  
Ms. Samdli Virma, Advocate  
Mr. D.D. Naidu, Official of the Informant

***For Opposite Parties:***

***OP-1 & OP-2***

Mr. Ramji Srinivasan, Senior Advocate  
Mr. Naval Satarawala Chopra, Advocate  
Mr. Aman Singh Sethi, Advocate  
Mr. Anandh Venkataraman, Advocate  
Ms. Nitika Dwivedi, Advocate  
Mr. Tushar, Advocate  
Mr. Sharad Kumar (Representative of OP-1)  
Ms. Smitha Murthy (Representative of OP-2)

***OP-3***

None

***OP-4***

Mr. G. R. Bhatia, Advocate  
Mr. Abdullah Hussain, Advocate  
Ms. Kanika Chowdhary Nayar, Advocate  
Mr. Rudresh Singh, Advocate  
Mr. Arjun N. Sinal, Advocate

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

1. The present information has been filed under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter, 'Act') by **Amar Biotech Limited** (hereinafter, 'Informant') against **Mahyco Monsanto Biotech (India) Limited** (hereinafter, 'OP-1'), **Monsanto Holdings Private Limited** (hereinafter, 'OP-2'), **Monsanto Company**,



सत्यमेव जयते



Fair Competition  
for Greater Good

- U.S.A.** (hereinafter, '**OP-3**') and **Maharashtra Hybrid Seeds Company Limited** (hereinafter, '**OP-4**') alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.
2. The Informant is a public limited company registered under the erstwhile Companies Act, 1956. It is engaged, *inter alia*, in the business of production, distribution and sale of genetically modified hybrid seeds for farming and harvesting cotton. It is also engaged in the research and development of seeds and has its own R&D unit. It is carrying on the business of distribution of its seeds in eight states of India and has achieved commercialisation in more than forty-seven Bt cotton hybrid varieties of seeds.
  3. **Monsanto Company, U.S.A. (OP-3)** is a company incorporated under the laws of U.S.A. It is a Fortune 500 company and global provider of agricultural products, besides being a Genetically Modified (GM) trait developer and licensor. It holds a portfolio of patents, trademarks and licenses, which it sub-licenses in various countries in lieu of consideration charged in the form of trait value/ royalty. **Monsanto Holdings Private Limited (MHPL/ OP-2)** is the subsidiary of OP-3 in India. It is engaged in the marketing of Bt cotton hybrid seeds under the trade name – '*Paras cotton*' and other field crop seeds. **Maharashtra Hybrid Seeds Company Limited (Mahyco/ OP-4)** is an Indian company engaged in research and development, production, processing and marketing of hybrid and open pollinated seeds in India. **Mahyco Monsanto Biotech (India) Limited (MMBL/ OP-1)** is a 50:50 joint venture company of OP-2 and OP-4. It has been stated in the information that OP-3 has licensed its Bt cotton technology to OP-1 for sub-licensing the same to seed manufacturers in India. The Opposite Parties, being part of the same group in terms of Explanation (b) to Section 5 of the Act, are hereinafter collectively referred to as the 'OP Group'.
  4. It has further been stated that the Informant entered into a Sub-License Agreement (hereinafter, '**SLA**') with OP-1 on 02.02.2006 to access the Bt cotton technology of OP-3. As per the terms of the SLA, the Informant had to pay a one-time down payment of Rs. 50 lacs to enter into SLA and apart from this, a pre-determined trait value on the pre-determined sale price for every 450 gm. Bt cotton seed packet sold



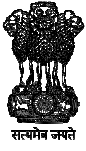
सत्यमेव जयते



Fair Competition  
for Greater Good

by it. Further, as per the Supplementary and Amendment Agreement dated 17.02.2007 entered into between the Informant and OP-1, a trait value of Rs. 150 was payable by the Informant to OP-1 on the sale price of Rs. 760 per packet for Bollgard –I (BG-I, single gene Bt cotton technology) and a trait value of Rs. 266 on a sale price of Rs. 965 per packet for Bollgard-II (BG-II, two-gene Bt cotton technology). The trait value was thereafter again revised to Rs. 225 on the sale price of Rs. 925 per packet for BG-II under the ‘Second Amendment to Sub-License Agreement’ dated 29.05.2007. On the other hand, for the period 2008-2010, the State Governments of Maharashtra and Andhra Pradesh (A.P.) had fixed the sale price for Bt cotton seeds (BG-I) at Rs. 650 per packet and Bt cotton seeds (BG-II) at Rs. 750 per packet and the corresponding trait values at Rs. 50 and Rs. 90. Subsequently, for the period 2011-2014, the State Governments of Maharashtra and A.P. revised the prices of Bt cotton seeds (BG-I) to Rs. 830 per packet and Bt cotton seeds (BG-II) to Rs. 930 per packet and the corresponding trait values were fixed at Rs. 50 and Rs. 90. The Informant hence, sent a letter dated 16.10.2015 to OP-1 stating that it has already paid a total sum of Rs. 28,83,68,794 under the SLA as trait fee to OP-1 until Kharif Season 2014 and is therefore, entitled for a refund of the sum of Rs. 3,21,48,416 as it has overpaid the said amount owing to different Government Orders issued by the State Governments of Maharashtra and A.P. from time to time since 2010. In reply dated 19.10.2015, OP-1 claimed that rather an amount of Rs. 4,67,01,441 plus interest @ 18 % is due on account of payment of trait fee payable under the SLA by the Informant. Consequently, a dispute relating to payment of trait value arose which is currently pending arbitration.

5. Furthermore, it has been stated that subsequently when the Informant *vide* letter dated 01.02.2016 requested OP-1 to renew the SLA, as the same was due to expire on 02.02.2016, stating that as the amount of trait fee payable under the SLA is *sub judice*, the same shall be subject to the outcome of the legal proceedings, OP-1 in response intimated to the Informant *vide* letter dated 23.02.2016 that the SLA has expired with efflux of time and the SLA could have been renewed only upon mutual written agreement between them which had not occurred. In the aforesaid letter, OP-1, *inter alia*, had stated that the Informant has willfully breached the SLA in collusion with certain other seed companies and despite repeated requests, the Informant had refused to pay the outstanding amount and therefore, the Informant has no rights under the



सत्यमेव जयते



Fair Competition  
for Greater Good

- expired SLA to produce, sell or store any seeds containing the technology of the OP group or use any of their trademarks. In the same letter, OP-1 had also asked the Informant to restrain from selling, storing, producing, *etc.* any seed containing the technology of the OP group with immediate effect.
6. It has been further stated in the information that in reply, the Informant wrote another letter dated 08.03.2016 to OP-1, *inter alia*, stating that in terms of Section 9.4 of the SLA, the Informant continues to have the right for a period of two years to receive, store, delint, condition or sell the existing seed inventories in its possession. Subsequently, OP-1 issued a letter dated 11.04.2016 to the Informant stating that it is willing to extend a one-time reduction in trait value amounting to Rs. 16.60 per packet to the Informant, in view of the fact that the SLA was in existence during such period and cotton seeds containing its technology had been sold in Maharashtra during Kharif 2015, but subject to the payment of all outstanding amounts due and payable by the Informant. It was further clarified in the letter that this concession being offered to the Informant does not constitute a waiver by OP-1 of any of its rights under the expired SLA.
7. In such background, the Informant has alleged that OP-1 is dominant in the market for provision of Bt cotton technology in India, as it has gained a market share of over 90 % within a decade. The Informant has, *inter alia*, also alleged that OP-1 is abusing its dominant position by imposing unfair and discriminatory conditions in SLAs through which Bt technology is sub-licensed to seed manufacturing companies in India. The Informant has claimed that OP-2 and OP-4, which are present in the downstream market of producing Bt Cotton seeds, are not subjected to similar unfair conditions by OP-1, as are imposed upon the Informant and other sub-licensees under the SLAs. In addition, the Informant has averred that OP-1, by abusing its dominant position, influenced the Genetic Engineering Appraisal Committee (GEAC) to obtain a No Objection Certificate (NOC) from the OP group, for approving any hybrid based on single gene technology, even though the OP group does not possess any patent over BG-I (*i.e.* know-how product of the OP group based on single gene technology) in India. This requirement, according to the Informant, creates an entry barrier for others to enter into the market. The OP group has been alleged to have indulged into anti-competitive conduct in contravention of Section 4 of the Act by charging unfair trait

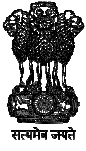


सत्यमेव जयते



Fair Competition  
for Greater Good

- value, limiting scientific development relating to Bt cotton technology as well as Bt cotton seeds, denial of market access, and leveraging the dominant position in Bt cotton technology market for expanding its presence in Bt cotton seeds market.
8. It has further been alleged by the Informant that the SLA was in the nature of an exclusive supply agreement, as it did not permit the sub-licensee, *i.e.* the Informant, to deal with the technology of competitors. Further, the OP group had also reserved the right to fix the price of Bt cotton seeds in certain circumstances, where the Informant fails to intimate the prices notified/ fixed by the State Government to it within stipulated time. The Informant has also alleged that such conduct involving exclusive supply, refusal to deal and resale price maintenance, has resulted in appreciable adverse effect on competition within India and is in contravention of Section 3 (4) read with Section 19 (3) of the Act.
  9. On the basis of the above facts and allegations, the Informant has, *inter alia*, prayed to the Commission to cause an investigation into the matter and impose penalty upon the OP group as per the provisions of the Act.
  10. The Commission observed that cases involving similar issues are pending investigation before the DG. However, the distinguishing factor in the present case is that in the earlier cases, the SLAs were renewed and later on terminated, whereas in the present case, the SLA has expired by efflux of time due to non-renewal. Therefore, the Commission decided to have a preliminary conference with the parties on 28.06.2016. In the meanwhile, OP-4 moved an application dated 28.06.2016 before the Commission requesting for striking off its name from the array of Opposite Parties on the ground that it is neither a party to the SLA, nor the Informant has raised any grievances against it or sought any relief from it.
  11. Thereafter, during the preliminary conference held on 28.06.2016, the Informant submitted that though the State Governments of Maharashtra, A.P. and Telangana have come up with notifications regarding fixing of trait value and seed price per packet, yet OP-1 insists on rates that are higher than what have been fixed by the said notifications. Further, it was submitted that the dispute relating to payment of outstanding trait value between the Informant and OP-1 is pending arbitration and OP-1 in the meanwhile has refused to renew the SLA. The Informant had hence, pleaded



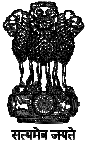
सत्यमेव जयते



Fair Competition  
for Greater Good

- that as it requires 5-7 years to switch to a new Bt cotton technology, non-extension of SLA by OP-1 would lead to wiping it off from the Bt cotton seeds market itself.
12. On the other hand, none appeared for OP-3 in the preliminary conference. The learned counsel appearing for OP-1 and OP-2 made the following arguments: (a) the SLA was for a fixed period and has expired by efflux of time and it could have been renewed only with the mutual consent of the parties and the Informant always knew that there was a possibility of non-renewal of the SLA; (b) the Commission has no jurisdiction to direct OP-1 to renew the SLA as it has no jurisdiction in a matter where the contract has come to an end; (c) whether renewal would be a matter of right can be decided only by the Arbitration Tribunal; (d) if the Informant was aggrieved by the terms of the SLA, it ought to have come to the Commission during the subsistence of the SLA and within a reasonable time from the enforcement of Sections 3 and 4 of the Act, which it didn't and thus, the present information is barred by the law of limitation; (e) the Informant has alleged unfairness in the terms and conditions of the SLA after getting enriched by the benefits of the same; (f) in case the Commission holds the OP group to be liable in the inquiries being conducted in other cases, the Informant could move an application for compensation before COMPAT, even without filing this separate information; and (g) there will be no impact owing to non-renewal of the SLA on the Bt cotton seeds market as the market share of the Informant therein is only around 2%, which can easily be supplied by other competitors/ players. Apart from the foregoing reasons, the learned counsel appearing for OP-1 and OP-2 argued that the main reason for non-renewal of SLA of the Informant was the default in payment of trait value as stipulated in the SLA.
13. The learned counsel for OP-4 impressed upon its application dated 28.06.2016 and requested the Commission to strike off its name from the array of parties as it plays no role in the dispute between the Informant and OP-1, despite it being a joint venture partner in OP-1, alongwith OP-2.
14. After hearing the parties in the preliminary conference, the Commission allowed the parties to file additional written submissions/ documents.
15. Thereafter, on 04.07.2016, the Informant has filed copies of certain documents: (a) suit filed by the Informant against OP group for declaration of non-infringement [C.S.





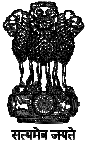
सत्यमेव जयते



Fair Competition  
for Greater Good

- (COMM.) No. 564 of 2016] under Section 105 of the Patents Act, 1970; (b) notifications dated 08.03.2016 and 18.05.2016 issued by the Ministry of Agriculture and Farmer Welfare regarding the fixation of seed value and trait value and the Guidelines for GM technology licensing agreements respectively; and (c) order dated 03.05.2016 of the Karnataka High Court vacating the stay against the aforesaid notification dated 08.03.2016.
16. OP-1 and OP-2 have filed a common reply dated 08.07.2016 reiterating the above-mentioned objections that were raised during the preliminary conference. In addition, the judgment of the Hon'ble Supreme Court in *All India Organisation of Chemists and Druggists (AIOCD) and Others vs. Director General, Investigation and Registration, New Delhi (DGIR)* [2002 CTJ 4 (Supreme Court) (MRTP)] has also been upon by Op-1 and Op-2 to buttress the submission that the Commission does not have jurisdiction over a contract that has already expired by efflux of time. Further, the judgment of the Hon'ble Competition Appellate Tribunal (hereinafter, "COMPAT") in *Competition Commission of India vs. DLF Limited* [Appeal No. 20 of 2011] has also been referred to suggest that the Act would not apply to an imposition through an agreement that was entered into prior to the enforcement of Section 4 of the Act.
17. The Commission has given a careful consideration to the information, written as well as oral submissions of the parties and the other material available on record. The Commission will first deal with the objections raised by the OP group with respect to the jurisdiction of the Commission. The gist of OP group's contention on jurisdiction of the Commission is that the Act would not apply to the impugned agreement as it was entered into prior to the enforcement of Sections 3 and 4 of the Act, particularly when the Informant did not approach the Commission during the subsistence of the said agreement or within reasonable time from the enforcement of Sections 3 and 4 of the Act.
18. First of all, in regard to the contention of the OP group that the Act would not apply to the impugned agreement as it was entered into prior to the enforcement of Sections 3 and 4 of the Act, the Commission notes that the issues raised in the present case are not limited to the validity of the clauses of the SLA alone but also relate to the





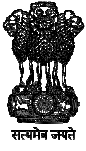
सत्यमेव जयते



Fair Competition  
for Greater Good

purported unfair conduct of the OP group during the subsistence of the SLA and post-expiration thereof as the rights and obligations of the parties under the SLA survives even after its expiry. Although the SLA was entered into prior to the enforcement of Sections 3 and 4 of the Act *i.e.* 20<sup>th</sup> May, 2009, the terms and conditions therein continued to be in force even after the enforcement of the said provisions of the Act. The case also involves aspects such as stringent post expiration obligations (Section 9.4 of the SLA) coupled with notification requirements if the Informant was to deal with any other hybrid cotton planting seed (Section 2.5(d) of the SLA). In fact, upon expiry of the SLA on 02.02.2016, OP-1, *vide* letter dated 23.02.2016, had imposed certain post-expiration obligations like immediately restrain from selling, storing, producing *etc.* any seed containing the technology of the OP group. Hence, the terms of the SLA and the conduct of OP-1 in pursuance thereof, *prima facie*, tantamount to refusal to deal and exclusive supply agreement which requires examination under Section 3 (4) of the Act. Since the SLA was in force even after 20.05.2009 *i.e.* the date from which Sections 3 and 4 of the Act came into existence, and OP-1 had sought to act upon the terms and conditions of the SLA, the Commission does not see any bar in examining the SLA under the provisions of Section 3 of the Act. Similar view has also been taken by the Hon'ble Bombay High Court in *Kingfisher Airlines vs. Competition Commission of India* (2011) 108 SCL 621 (Bom), the relevant extracts of which read as under:

*“The question here is whether this agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. The parties as on today certainly propose to act upon that agreement. All acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties want to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be*



सत्यमेव जयते



Fair Competition  
for Greater Good

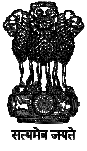
*said to be valid from the date of the coming into force of the Act. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act. Such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements. This can be explained further by quoting the following example: "A and B enter into agreement of sale of land on 2/1/2008. It is agreed between them that sale deed would be executed on or before 2/1/2009. Meanwhile, i.e. on 10/8/2008, the Government decides to impose a ban on transfer of the land and declares that any such transfer, if effected, shall be void. The question is, could the parties say that since their agreement being prior to Government putting a ban on transfer, their case is not covered by the ban? The answer has to be in the negative, as on the day the contract is sought to be completed, it is prohibited." Similar would be the result in the instant case."*

19. Further, regarding the judgment of Hon'ble COMPAT in *DLF Case (supra)*, the Commission notes that the ratio therein relates to non-applicability of Section 4 to conditions imposed under an agreement entered into prior to the enforcement of the said provision. Para 69 of the said judgment, *inter alia*, states as under:

*"... Section 4 of the Act prohibits imposition of unfair or discriminatory conditions in the sale of goods or services. Any imposition, or the act after 20<sup>th</sup> May, 2009 could be validly inquired into by the CCI, as the language of Section 4 of the Act is not retrospective, but prospective. Therefore, any tainted imposition after that date could be a subject matter of the inquiry, but it cannot be said that the entering into the agreement in the year 2006-07, as the case may be was an imposition after the Act. The continuation of the agreement after 20<sup>th</sup> May, 2009 by itself would not attract the mischief of the Competition Act, unless there was some act in pursuance of those clauses, which were not contemplated in the agreement and would, therefore, amount to an imposition of condition."* (Emphasis

supplied)

The Hon'ble COMPAT has upheld the order passed by the Commission with regard to the imposition of penalty against DLF. However, it has been observed that the Commission has no jurisdiction to rewrite the clauses of the agreements entered into between the buyers and DLF, prior to the enforcement of Sections 3 and 4 of the Act.



सत्यमेव जयते



Fair Competition  
for Greater Good

The Hon'ble COMPAT has also distinguished the matter with *Kingfisher Case* (*supra*) as the issue in that case was of Section 3 which deals with anti-competitive agreements. The said distinction suggested by the Hon'ble COMPAT is presently the subject matter of challenge before the Hon'ble Supreme Court in Civil Appeal Nos. 8014-8023/ 2014 preferred by the Commission, *inter alia*, on the ground that Section 4 of the Act would apply even to an agreement entered into prior to 20.05.2009 if the effect of the said agreement is still continuing and subsisting. Further, the Commission is of the view that the said judgment of Hon'ble COMPAT does not imply a blanket ban upon the Commission to examine the conduct of a dominant entity. Thus, the aforesaid judgement relied upon by the OP group is not relevant in the context of the present matter keeping in view the reasons stated above. The instant matter also involves allegations regarding conduct of the OP group post 20.05.2009. These include (a) demanding trait value as per SLA despite State Governments prescribing lesser rates; (b) denial of technology to the Informant by refusal to renew the SLA on account of disputes which are pending litigation which appear to be an essential input for producing Bt cotton seeds; (c) upon expiry of the SLA, asking the Informant to restrain from selling, storing, producing *etc.* any seed containing the technology of the OP group with immediate effect despite the SLA allowing the Informant to deal with such seeds for a period of two years post-expiration of the SLA; and (d) leverage of dominant position by OP group for entering and protecting its position in the Bt cotton seeds market. Nothing has been submitted by the OP group as to why the purported unfair conduct of the OP group post 20.05.2009 cannot be subjected to Section 4 of the Act. Considering these aspects, the Commission is of the view that it is well within its authority to examine such conduct of the OP group which is post 20.05.2009 under Section 4 of the Act.

20. The Commission has also perused the judgment of the Hon'ble Supreme Court in *AIOCD Case* (*supra*). The Hon'ble Supreme Court therein has held that "*The point in issue before the Commission was with regard to the validity of an agreement between the Chemists of All India Organisation of Chemists & Druggist and M/s Cynamid India Ltd. From the order of the Commission, it appears that the said agreement had come to an end. In this view of the matter, there was no need for the Commission to have considered whether any of the clauses of the said agreement was valid or not.*" The proposition laid by the Hon'ble Supreme Court may not apply to the instant



सत्यमेव जयते



Fair Competition  
for Greater Good

matter for the following reasons. Firstly, the said judgment is in the context of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter, 'MRTP Act'). Secondly, the issue before the Hon'ble Supreme Court in that matter was limited to whether an agreement which had already come to an end be examined under the MRTP Act but the instant matter is distinct and not limited to the terms and conditions of the SLA but also relates to the purported unfair conduct of the OP group which is captured in the para above. As noted earlier, OP-1 has sought to act upon the terms of the SLA for imposing post-expiration obligations, even after the expiry of the SLA. Further, the facts on record, including the earlier cases filed against the same OPs, suggest that OP-1 has entered into such sub-license agreements with other seed manufacturers also, containing similar terms and conditions, across India. Thus, the practice carried on by the OP group has larger implication on competition all across India and is not limited to the contractual relationship between the OP group and the Informant.

21. Next, the Commission also does not find merit in the argument of the OP group that the Informant ought to have approached the Commission during the subsistence of the SLA itself. Mere expiry of the impugned agreement or failure on the part of the Informant to contest the agreement during its subsistence are not justified reasons to refrain from examining the matter since the provisions of the Act are not concerned with individual disputes but are about promoting competition and protecting consumers at large. The Commission rather finds merit in the contention put forth by the Informant that had it approached the Commission during the subsistence of the SLA, it would have adversely affected its chances of renewal of the SLA.
22. In similar matters against the same Opposite Parties, the Commission, *vide* majority order dated 10.02.2016 passed under Section 26 (1) of the Act in Reference Case No. 2 of 2015 and Case No. 107 of 2015, directed the Director General ('DG') to cause an investigation into the matter. Subsequently, taking into consideration the substantial similarity in the issues and allegations, the Commission, *vide* its order dated 18.02.2016, clubbed Case No. 03 of 2016, Case No. 10 of 2016 and Reference Case No. 01/2016 along with Reference Case No. 2 of 2015 and Case No. 107 of 2015 also.



सत्यमेव जयते



Fair Competition  
for Greater Good

23. Recently, the Commission has also considered similar information in Case No. 37 of 2016, Case No. 38 of 2016 and Case No. 39 of 2016. The Commission noted that most of the issues and allegations raised in these cases are also substantially similar to the earlier cases. The additional allegations brought out in these informations included: (a) unfairness of Clause 3.1 (a) of the SLA which required the sub-licensees to pay a one-time non-refundable technology fee of Rs. 50 lacs; (b) OP-1 adopting differential discounting/ pricing policy for its affiliates in the downstream market; (c) OP-1's requirement that the advertisement and selling expenses will be borne by the seed manufacturers/ sub-licensees *i.e.* the Informants; (d) restriction on the sub-licensees to use donor seeds such as modification of the genes therein or backcrossing with public germplasm; (e) OP-1 entering into different SLAs with its affiliates in the downstream market where the onerous requirements as imposed on the Informants were absent; and (f) OPs influencing GEAC to insist on a No Objection Certificate from the OPs for approving any hybrid based on single gene technology even though the OPs did not possess any patent over Bollgard-I (*i.e.* know how developed by OPs based on single gene technology) in India. After taking into account the substantial similarity of the core issues and allegations against the same OPs, the Commission, *vide* order dated 09.06.2016, clubbed Case No. 37 of 2016, Case No. 38 of 2016 and Case No. 39 of 2016 with the earlier cases against OPs as well.
24. The Commission notes that it has already found OP-1 to be *prima facie* dominant in the market for provision of Bt cotton technology in India for reasons stated in its earlier order dated 10.02.2016 in Case No. 107 of 2015 and Reference Case No. 2 of 2015. The Commission observes that consequent to the expiration of SLA, in terms of Section 9.4 therein, the sub-licensee can sell the existing inventories for a period of two years henceforth, subject to payment of fees on all such sales as provided in Section 3.1 of the SLA. The relevant text of Section 9.4 reads as follows:

*“Except for termination under Sections 9.2 (e) or (h), upon the expiration or early termination of this agreement, sub-licensee shall have two years to receive, store, delint, condition or sell, in the territory, any existing inventories of the Genetically modified Hybrid Cotton Planting Seed in Sub-licensee's possession or under contract for production on the date of expiration or date of notice of termination, as the case may be, subject to payment of fees on all such sales as provided in Section 3.1, but, otherwise, the sub-licensee shall not*



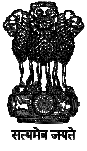
सत्यमेव जयते



Fair Competition  
for Greater Good

*produce or sell Genetically Modified Hybrid Cotton Planting Seed or allow anyone else to produce or sell Genetically Modified Hybrid Cotton Planting Seed on its behalf....”*

25. The Commission also observes that in the previous cases filed against the same OPs, the SLA was renewed and subsequently, either terminated/ or posed a threat for termination, whereas in the present case the SLA was not extended/ renewed by OP-1 after efflux of time. However, the Commission notes that the reason for termination/ threat for termination in the previous cases was non-payment of trait value as stipulated in the SLA, which is also the major cause for non-renewal of the SLA in the present matter. The other common allegations include charging of unfair trait value, limiting of scientific development relating to Bt cotton technology as well as Bt cotton seeds, denial of market access and leveraging of the dominant position by the OP group in Bt cotton technology market for expanding their presence in the Bt cotton seeds market.
26. Hence, the Commission observes that the direction given to the DG in Reference Case No. 2 of 2015 and Case No. 107 of 2015 to cause an investigation into the matters is broad enough to cover the issues brought out by the Informant in the instant matter also. Considering the substantial similarity of the core allegations in the instant information and the earlier cases against the group OP, the Commission finds it appropriate to club the instant information with Reference Case No. 2 of 2015, Case No. 107 of 2015, Case No. 3 of 2016, Case No. 10 of 2016, Reference Case No. 01 of 2016, Case No. 37 of 2016, Case No. 38 of 2016 and Case No. 39 of 2016. It is ordered accordingly.
27. The DG is directed to cause an investigation into the present matter and submit a consolidated report to the Commission in respect of all the clubbed matters discussed above. During the course of investigation, if the involvement of any other party is found, the DG shall investigate the conduct of such other party as well who may have indulged in the said contravention.
28. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.



*Fair Competition  
for Greater Good*

29. As regards the application dated 28.06.2016 of OP-4 requesting to delete its name from the array of Opposite Parties, the Commission observes that OP-1 against which most of the allegations have been put forth in the information, is a joint venture between OP-2 and OP-4. It is further observed that OP-2 and OP-4 are present in the downstream market, where the allegations of leveraging by the OPs under Section 4 (2) (e) of the Act have been made. Hence, the Commission notes that the role of OP-4 also needs to be investigated and there is no merit in the said request. Accordingly, the aforesaid application is rejected.
30. The Secretary is directed to communicate this order to the DG alongwith copies of the information and submissions of the parties. The parties shall also be provided with a copy of this order.

**Sd/-  
(Devender Kumar Sikri)  
Chairperson**

**Sd/-  
(S. L. Bunker)  
Member**

**Sd/-  
(Sudhir Mital)  
Member**

**Sd/-  
(Augustine Peter)  
Member**

**Sd/-  
(U. C. Nahta)  
Member**

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

**New Delhi  
Dated: 21.09.2016**





## DISSENT NOTE

**Per: Dr. M. S. Sahoo, Member**

I have gone through this majority order of the learned Commission. I have also gone through the material available on record, including the information dated 18<sup>th</sup> April 2016 filed by the Informant, the oral submissions of the parties at the preliminary conference on 28<sup>th</sup> June 2016 and the written submissions of the parties filed subsequently. I do not find existence of a prima facie case warranting an investigation into the matter under section 26(1) of the Act.

2. It has been alleged that the OPs have, by virtue of the alleged anti-competitive terms in a sub-license agreement dated 2<sup>nd</sup> February 2006 with the Informant (hereafter, SLA), violated the provisions of sections 3 and 4 of the Act. I note, as also noted in Para 10 of this majority order, that a few matters with the similar alleged anti-competitive terms in sub-license agreements with other parties are under investigation. I further note that the investigation into those matters (Ref Case No. 2 of 2015 and Case No. 107 of 2015) has been ordered by a majority order dated 10<sup>th</sup> February 2016 of the Commission. For the reasons recorded by me in the dissent note appended to the said majority order, I do not find any merit in the instant information warranting an investigation into this matter.

3. Para 10 of this majority order states that the distinguishing factor in this matter is that the SLA, which contained alleged anti-competitive terms, has expired by efflux of time. The submissions of the parties as well the determination in the majority order mostly centres around the issue whether the terms in the SLA, which was entered into prior to the commencement of the Act and which the parties continued to honour even after the commencement of the Act, can be enquired into for being anti-competitive. I briefly dealt with this issue in my dissent note to the majority order dated 10<sup>th</sup> February 2016 at Para 4 which is reproduced hereunder:

*“It is futile to examine the licensing agreements entered into between the parties in relation to BG-I at this stage as these were entered into prior to the commencement of the Act, and the disputes there under were fairly settled under SRCA with which nothing survived, as observed by the Hon’ble COMPAT. Moreover, neither BG-I is in use nor the licensing agreement in respect of BG-I is in force.”*

4. A brief recapitulation of the facts of the matter is in order. The terms in the SLA, including the consideration, that is, trait value, were agreed upon between the parties on 2<sup>nd</sup> February 2006, much before the Act came into force on 20<sup>th</sup> May 2009. Clause 9.1 of the SLA stated that the SLA shall be effective for ten years unless terminated by operation of law and can be renewed for additional five years by mutual agreement of the parties. Clause 11.3 of the SLA obliged the parties to notify the other party if at any time during the term of the SLA, any of the terms in the SLA is in conflict with laws, measures, court judgements or regulations of the country so that the SLA could be modified appropriately to avoid such conflict and to ensure lawful performance of the SLA. Given that the SLA was to be effective for a long period during which laws of the land could change making the SLA or any of its terms unlawful, clauses 9.1 and 11.3 of the SLA provided for its modification and / or termination.

5. The term relating to trait value in the SLA has been the bone of contention and has been subject matter of several rounds of negotiations / modifications (example: supplementary and amendment agreement dated 17<sup>th</sup> February 2007, second amendment to the sub-license agreement 29<sup>th</sup> May 2007). Further, the SLA was terminated by the OP1 on 9<sup>th</sup> April 2009 for non-payment of trait value by the Informant and the termination was revoked by a supplementary agreement on 24<sup>th</sup> November 2011. The Informant, along with five other seed



Fair Competition  
for Greater Good

companies, requested the OP1, vide a joint letter dated 23<sup>rd</sup> July 2015, after 9 ½ years of the SLA in operation, to charge a trait value from 2010, at the rates prescribed by the State Governments on the ground that the trait value specified in the SLA runs contrary to the same prescribed by the State Governments. (I observe from the records that various State Governments have prescribed trait values at different points of time. Since the Informant has asked for trait values at the rates prescribed by State Governments from 2010, I assume for the purposes of this order that the trait values were prescribed by State Governments in 2010). The OP1 did not accede to the request. Then followed claims and counter claims by the parties and arbitration proceedings. The Informant requested the OP1 on 1<sup>st</sup> February 2016, that is, on the last day of the ten-year term of the SLA, to renew the same under clause 9.1, for additional five years. The OP1 did not agree and accordingly the SLA expired on its maturity on 1<sup>st</sup> February 2016 after serving the parties its full term of ten years. Thereafter, the Informant filed this information on 18<sup>th</sup> April 2016 alleging that several terms in the SLA were anti-competitive. It has claimed that even though the SLA predates the Act coming into force, its effect continued even after the Act came into force and hence “*have to be subjected to the rigors of the Competition Act, 2002 - Judgement in the matter of “Kingfisher Airlines v. Competition Commission of India and Ors.” (2011)108 SCL 621(Bom)*”.

6. I observe that four case laws have mostly been cited / used in this matter for determination of the issue:

**i. Case Law 1:** Classic Motors Vs. Maruti Udyog Limited (1997) 40 DRJ 462: In this matter, the Hon’ble High Court of Delhi held as under:

*“the plaintiff by electing to reap the benefits of the agreement and having enjoyed the same from the year 1983 could not have challenged clause 21 after a lapse of about ten years.”*

**ii. Case Law 2:** All India Organisation of Chemists and Druggists & Ors. Vs. Director General, Investigation and Registration, New Delhi [2002 CTJ 4 SC (MRTP)]: In this matter, the Hon’ble Supreme Court held as under:

*“The point in issue before the Commission was with regard to the validity of an agreement between the Chemists of All India Organisation of Chemists & Druggists and M/s. Cynamid India Ltd. From the order of the Commission, it appears that the said agreement had come to an end. In this view of the matter, there was no need for the Commission to have considered whether any of the clauses of the said agreement was valid or not.”*

**iii. Case Law 3:** Kingfisher Airlines Vs. Competition Commission of India and Ors. [(2011) 108 SCL 621 (Bom)]: In this matter, the Hon’ble High Court of Bombay held as under:

*“If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be said to be valid from the date of the coming into force of the Act.*

**iv. Case Law 4:** DLF Ltd. Vs. CCI and Ors [Appeal No. 20 of 2011, COMPAT]: In this matter, the Hon’ble Competition Appellate Tribunal held as under:

*“The continuation of the agreement after 20<sup>th</sup> May, 2009 by itself would not attract the mischief of the Competition Act, unless there was some act in pursuance of those clauses, which were not contemplated in the agreement and would, therefore, amount to an imposition of condition.”*

7. It is useful to examine if the term relating to trait value and other terms in the SLA were violative of the provisions of sections 3 and 4 of the Act over six relevant time periods:

**i. Period A:** 02.02.2006-19.05.2009, i.e., from the commencement of the SLA but before the commencement of the Act. During this period, the terms in the SLA cannot be anti-competitive as the Act was not in force.



सत्यमेव जयते



Fair Competition  
for Greater Good

ii. **Period B:** 20.05.2009-2010, i.e., after the commencement of Act but before State Governments prescribed trait values. During this period, neither of the parties to the SLA brought up, despite an obligation on them to that effect under clauses 9.1 or 11.3 of the SLA, that any of the terms in the SLA had become illegal in view of the commencement of the Act. Further, neither a new term was introduced in the SLA nor was an existing term in the SLA modified. Nor was there an act in pursuance of the terms in the SLA, which were not contemplated in the SLA.

iii. **Period C:** 2010-23.07.2015, i.e., after the State Governments prescribed trait values till the Informant sought the same from OP1. During this period, there was no change in situation either in the SLA or in the Act. Rather, the parties reinstated the SLA, which was revoked in 2009, by a supplementary agreement dated 24<sup>th</sup> November 2011. This confirmed the intention of the parties to go ahead with the SLA even though the Act had come into force and they had obligation under clauses 9.1 and 11.3 of the SLA to modify or terminate it if any of its terms had become inconsistent with any law. However, a few State Governments issued notifications prescribing trait values. The Informant requested OP1, vide its letter dated 23<sup>rd</sup> July 2015, to charge trait values from 2010 at the rates prescribed by State Governments on the ground that the term relating to trait value in the SLA runs contrary to the same prescribed by the State Governments. It did not request on the ground that the term had become anti-competitive by virtue of the Act. Nor did it ask for the trait value at the rates prescribed by the State Governments from the commencement of the Act or from the date of revocation of termination of the SLA. This obviously meant that no term in the SLA was inconsistent with any provision in the Act or any other law and the only one term in the SLA relating to trait value became inconsistent with the public policy, as reflected in trait values prescribed by the State Governments.

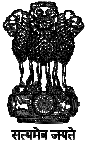
iv. **Period D:** 24.07.2015-01.02.2016, i.e., after the Informant sought trait values prescribed by the State Governments till it sought renewal of the SLA. The OP1 did not agree to the request of the Informant to charge trait values at the rates prescribed by the State Governments. Nevertheless, the Informant sought renewal of the very same SLA, on the last day of the 10-year SLA, in pursuance to clause 9.1 of the SLA, only with a caveat that the trait fee shall be subject to the outcome of legal proceedings. Thus it is clear that the trait fee was not anti-competitive even on 1<sup>st</sup> February 2016, though it was subject matter of certain legal proceedings (not under the Act). This also meant that no other term in the SLA was anti-competitive.

v. **Period E:** 02.02.2016-10.02.2016, i.e. after the Informant sought renewal of the SLA till the issue of the majority order dated 10.02.2016 of the Commission ordering investigation. The SLA expired by efflux of time and the OP1 declined to renew the same. In the meantime, the Commission received information alleging anti-competitive terms in sub-licensing agreements by the OP1 with a few other parties and ordered investigations into the matter vide its order dated 10<sup>th</sup> February 2016.

vi. **Period F:** 11.02.2016-18.04.2016, i.e., after the Commission passed the majority order dated 10.02.2016 till this information was filed. The Informant, who did not ever allege anything anti-competitive in the SLA, filed this information on 18<sup>th</sup> April 2016, after expiry of the ten-year SLA on 1<sup>st</sup> February 2016.

8. It is important to note that -

a. The Informant had obligation under clauses 9.1 and 11.3 of the SLA to bring up if at any time any of the terms in the SLA had become illegal. It never did so. The Informant would not have enjoyed the benefits of the SLA for ten years if it had become illegal or anti-competitive with the Act coming into force.



सत्यमेव जयते



Fair Competition  
for Greater Good

b. Even after the Act came into force in May 2009 and the State Governments prescribed the trait values from 2010 onwards, the Informant wanted the SLA, which was terminated by OP1 in 2009, to be reinstated. Accordingly, the termination was revoked in 2011. Further, the Informant wanted renewal of the same SLA in 2016, after it expired serving the parties for its intended term of ten years. The Informant would not have asked for revocation of the termination of the SLA in 2011 and renewal of the SLA in 2016, if it were illegal or anti-competitive.

c. The Informant never indicated, till this information was filed, that any term in the SLA had become anti-competitive. After 9 ½ years of the SLA in operation, six years of the Act coming into force, five years of the prescription of trait fees by the State Governments, and four years of the revocation of the termination of the SLA, the Informant wanted the OP1 to charge trait value at the rates prescribed by State Governments. It never said that the trait value specified in the SLA had become anti-competitive. It merely wanted the trait value to be re-set from 2010. It did not ask it from the commencement of the Act. In fact, it could not have done so, because variance of a price determined by the parties from a regulated price cannot be considered anti-competitive.

d. The Informant has alluded that it did not bring it up earlier that the terms in the SLA were anti-competitive and consequently illegal as that would have prompted the OP1 to deny it market access. It is difficult to believe this, particularly because the Informant brought up that the trait value in the SLA was contrary to the rates prescribed by the State Governments. It is also difficult to believe that the Informant knowingly reaped the benefits of an illegal SLA for about seven years, that is, from the commencement of the Act till the expiry of the SLA, despite an explicit obligation under clauses 9.1 and 11.3 of the SLA not to do so.

e. The Informant never said that any term in the SLA was anti-competitive till it filed this information. It said so only after the OP1 refused to renew the very same SLA and the Commission ordered investigations into similar terms in SLAs in other matters.

9. In view of the above, I find that it is not open for the Informant to raise the issue of illegality of the SLA after it has enjoyed it for its full term of ten years keeping in view the ratio in Case Law 1. Further, it is not open for a party to an agreement to raise the issue of illegality in the said agreement at any time in future. There must be an end to a matter. It is also not open for enquiry in view of the ratio in Case Law 2. Assuming that the Informant is right in its allegations, the SLA became illegal in view of the ratio in Case Law 3 and both the parties colluded to continue an illegal SLA. The Informant did not withdraw from an illegal SLA despite an obligation to do so. It is, therefore, doubtful if it has come to the Commission with clean hands. Further, there has been no imposition of any new term or modification of an existing term in the SLA since the Act came into force and hence it cannot be anti-competitive in view of the ratio in Case Law 4. Therefore, I do not find any merit in the information warranting an investigation under section 26(1) of the Act.

Sd/-  
**(Dr. M. S. Sahoo)**  
Member