



## COMPETITION COMMISSION OF INDIA

Case No. 107/ 2015

**In Re:**

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

**Informant No. 1**

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

**Informant No. 2**

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

**Informant No. 3**

**And**

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

**Opposite Party No. 1**

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

**Opposite Party No. 2**

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

**Opposite Party No. 3**

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

**Opposite Party No. 4**



**CORAM:**

**Mr. Devender Kumar Sikri**  
**Chairperson**

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

**Mr. Sudhir Mital**  
**Member**

**Mr. Augustine Peter**  
**Member**

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

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

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

**Appearances**  
**during hearing:**

*For Informants:*

Shri Pallav Shisodia, Sr. Advocate  
Shri Balbir Singh, Sr. Advocate  
Shri Amitabh Kumar, Advocate  
Shri Varghese Thomas, Advocate  
Shri Abhishek Singh Baghel, Advocate  
Shri Vaibhav Choukse, Advocate  
Ms. Lagna Panda, Advocate  
Ms. Aditi Deshpande, Advocate

*For OP-1 & OP-4:*

Shri Ramji Srinivasan, Sr. Advocate  
Shri Harman Singh Sandhu, Advocate  
Shri Chandar M. Lall, Advocate  
Shri Abhijeet Sinha, Advocate  
Shri Aman Singh, Advocate  
Shri Ashutosh Kumar, Advocate  
Shri Kapil Midha, Advocate

*For OP-3:*

Shri Amit Sibal, Sr. Advocate  
Shri G. R. Bhatia, Advocate  
Shri Abdullah Hussain, Advocate  
Ms. Kanika C. Nayar, Advocate  
Shri Rudresh Singh, Advocate  
Shri Arjun N. Singh, Advocate



### **Order under Section 33 of the Competition Act, 2002**

1. This order shall dispose of the application dated 22<sup>nd</sup> December 2015 of the Informants for interim relief filed under Section 33 of the Competition Act, 2002 (hereinafter referred to as the 'Act').
2. In the instant matter, the Commission *vide* majority order dated 10<sup>th</sup> February 2016, passed under the provisions of Section 26 (1) of the Act, held that there exists a *prima facie* case of contravention of the provisions of Section 3 (4) and Section 4 of the Act by the OPs and was a fit case for investigation by the Director General (DG). Accordingly, the DG was directed to cause investigation into the matter and complete the same within 60 days from the date of receipt of the said order.
3. After filing the information on 15<sup>th</sup> December 2015, the Informants moved an application under Section 33 of the Act on 22<sup>nd</sup> December 2015 seeking the following interim relief from the Commission:
  - (a) *Restrain MMBL from terminating the sub-license agreements entered into with the Informants on 10.03.2015 till the disposal of the present matter; and*
  - (b) *Pass any other order(s) that the Commission may deem fit.*
4. Subsequently, the Informants moved another application dated 28<sup>th</sup> December 2015 requesting the Commission to urgently consider their application for interim relief and pass an appropriate order directing maintenance of *status quo* between OP-1 and the Informants *ex-ante* as on 14<sup>th</sup> November 2015, till the disposal of the inquiry by the Commission. It was also stated therein that delay in deciding the matter would have grave consequences as the same could lead to exit of a major player from the market coupled with long gestation period for re-entry.



5. After passing the order under Section 26 (1) of the Act *vide* order dated 10<sup>th</sup> February 2016, the Commission considered the aforesaid applications in its ordinary meeting on 18<sup>th</sup> February 2016 and decided to hear the parties on 1<sup>st</sup> March 2016 in that regard.
6. Meanwhile, OP-1 and OP-3 filed Writ Petitions bearing nos. 1776/ 2016 and 1777/ 2016 before the Delhi High Court challenging the orders dated 10<sup>th</sup> February 2016 and 18<sup>th</sup> February 2016 of the Commission. These petitions came up for consideration before the Hon'ble High Court on 29<sup>th</sup> February 2016 wherein it was *inter alia* directed as follows:

*“Till the next date of hearing, the CCI [Commission] may carry on with its investigations and hearings, but no final order would be passed by the CCI.*

*Any interim order passed by the CCI under Section 33 of CCI Act, shall not be given effect to without seeking leave of this Court.”*

7. On 1<sup>st</sup> March 2016, the Commission heard the Informants, OP-1, OP-3 and OP-4 on the issue of interim relief. None appeared for OP-2 despite due service of notice dated 22<sup>nd</sup> February 2016 through speed post as well as email.
8. The submissions/ contentions of the Informants including the relevant course of events are outlined in brief as follows:
  - (a) Each of the Informants entered into a separate sub-license agreement with OP-1 in 2004 and were licensed Bt cotton technology (Bollgard and Bollgard II). The term of the sub-license agreement was for a period of ten years renewable for an additional period of five years. Later, the parties entered into fresh sub-license agreements (Bollgard II) on 10<sup>th</sup> March 2015 superseding the earlier agreements. OP-1 *vide* letters dated 14<sup>th</sup> November 2015 had informed the Informants that they had breached their payment obligations under Article 3 of the new sub-license agreements and therefore, OP-1 was terminating the



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new sub-license agreements in terms of Article 9.02 (b) (i) therein. It was further stated in the said letters that the trademark sub-license agreements co-terminus with the new sub-license agreements also stood terminated. It was further stated in the termination letters that notwithstanding the termination, OP-1 was willing to consider a one time pro-term arrangement for Kharif 2016 on terms to be agreed between the parties subject to the Informants paying the entire outstanding amount due and payable to OP-1 and withdrawing all their claims within a period of seven calendar days.

- (b) In response to the aforesaid notice of OP-1, the Informants *vide* their letters dated 23<sup>rd</sup> November 2015 contested the termination notices *inter alia* stating that the issues concerning the determination of refund of excess trait fee paid by the Informants to OP-1 were pending adjudication before the Hon'ble Bombay High Court (arbitration proceedings). The Informants, hence, called upon OP-1 to withdraw the termination notices within three business days. OP-1, however, *vide* letters dated 27<sup>th</sup> November 2015 refused the requests of the Informants to withdraw its termination notices.
- (c) Subsequently, OP-1 issued further letters dated 9<sup>th</sup> December 2015 to the Informants *inter alia* reiterating that its sub-license agreements with the Informants stand terminated with effect from 14<sup>th</sup> November 2015 and called upon the Informants to confirm in writing as to what part of their sales reported for the month of November 2015 had taken place till 14<sup>th</sup> November 2015. It was further stated in the said letters that OP-1 would be at liberty to exercise any or all of its lawful rights and remedies on the basis that the Informants had breached their post-termination obligations.
- (d) Upon termination of the new sub-license agreements, in terms of Article 9.06 therein, the Informants were required to immediately cease selling/ distributing the genetically modified hybrid cotton



planting seeds and destroy such seeds then in existence and in possession of the Informants. The Informants were also required to destroy all parent lines or other cotton germplasm which had been modified to contain the technology of the Opposite Parties. The relevant provisions of the new sub-license agreements regarding termination and post-termination obligations of the Informants are reproduced below:

**“Article 9.02 Early Termination:**

(a) ...

(b) *Sub-licensor may terminate this Agreement with immediate effect-*

i) *If Sub-licensee breached its obligations under i.e. defaulted in making payment under Article 3 - including clauses 3.01 and 3.03, 3.06.*

ii) .....

**Article 9.06 Termination under Articles 9.02 (a) (i) and (ii) and 9.02 (b) (i), (iii), (iv), (vii), (ix) and (x)**

*If Sub-licensor terminates under Articles 9.02 (a) (i) and (ii) and 9.02 (b) (i), (iii), (iv), (vii), (ix) and (x), Sub-licensee shall immediately cease selling or otherwise distributing the Genetically Modified Hybrid Cotton Planting Seed under this agreement and shall immediately destroy all of such Genetically Modified Hybrid Cotton Planting Seed then in existence and its possession or which may be produced under existing seed production arrangements. Sub-licensee shall immediately destroy all parent lines or other Cotton germplasm which has been modified to contain the Monsanto technology. Sub-licensee shall certify such destruction by written notice to Sub-licensor.”*

- (e) It normally takes about 5 to 7 years for developing a hybrid Bt cotton seed and bringing it to the market. It takes 7 to 8 seasons for developing a hybrid seed (one season is of six months). After development, the seed is taken to Genetic Engineering Appraisal Committee (GEAC) for



approval. Upon approval, the seeds are given to the producer farmers for planting and obtaining flowers for getting more seeds.

- (f) The Informants own 293 varieties of cotton hybrids which have been approved by GEAC, out of which 221 varieties relate to BG-II. Apart from imbibing the technology of OPs, the hybrid seeds manufactured by the Informants have specific agronomic traits, which are unique to soil, temperature and climatic conditions prevalent in a particular area. The Informants supply seeds to around 40,000 producer farmers and the seeds grown by them are in-turn sold to around one million farmers. Thus, the destruction of parent-lines and cotton germplasm of these varieties of seeds being produced by the Informants will lead to irreparable and irretrievable loss to the Informants as well as to the farmers who are dependent on the Informants for cotton seeds peculiar to them.
- (g) If the Informants exit the market, it will take substantial time for the vacuum to be filled up by someone, on account of the long gestation period involved in developing seeds that are suitable to the unique agronomic conditions of the area where the seeds manufactured by the Informants are currently being used. Further, use of different varieties of seeds in these areas is also likely to have adverse impact on the neighboring area under cultivation. Therefore, the post-termination obligations that require the Informants to cease selling/ distributing seeds and destruction of seeds, parent-lines and germplasm which are modified to contain the technology of the Opposite Parties, need to be suspended.
- (h) OPs stand to gain if the Informants exit their business due to the above discussed stringent requirements, in a way that some of the shortfall would be met by OP-3 and OP-4, who compete with the Informants in the downstream market for Bt cotton seeds.



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- (i) the Informants/ breeders have certain rights/ obligations under the Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002 which require preservation of germplasm and parent-lines.
- (j) the dispute regarding trait value payable to OP during Kharif 2015 has already been subjected to arbitration. Further, the Central Government *vide* notification dated 7<sup>th</sup> December 2015 has formed a nine-member panel for fixing the price of seeds including their trait value. The panel is to recommend the price of seeds including the trait value for Kharif 2016 by 31<sup>st</sup> March 2016.

Further submissions of the Informants in response to the arguments of OPs are discussed later.

9. Submissions/ contentions of OP-1 and OP-4 (hereinafter collectively referred as '**OPs**') in brief are as follows:

- (a) The sub-license agreements between OP-1 and the Informants stand terminated with effect from 14<sup>th</sup> November 2015 and therefore, the prayer of the Informants for interim relief to "*Restrain MMBL from terminating the sub-license Agreements entered into with the Informants on 10.03.2015 till the disposal of the present matter*" is infructuous. In view of this development, the Informants cannot seek maintenance of *status-quo*/ restoration of the sub-license agreements on *ex ante* basis (as on 14<sup>th</sup> November 2015) as an interim relief under Section 33 of the Act. Further, the suspension of post-termination obligations cannot be granted as an interim relief as termination of the new sub-license agreements had already been effected.
- (b) The Hon'ble Delhi High Court has passed a consent order in an Infringement Suit [C. S. (COMM) No. 132 of 2016] filed by OPs.



The Informants had taken all the pleas mentioned herein before the Delhi High Court also but the Hon'ble Court was pleased to only allow the Informants to sell the seeds manufactured by them upto 30<sup>th</sup> November 2015. The relevant extracts of the order dated 19<sup>th</sup> February 2016 of the Hon'ble Delhi High Court are reproduced below:

*“After some argument, for the time being, it is agreed without prejudice to the rights and contentions of the parties, as follows:*

- (i) The defendants may sell the seeds already manufactured by the defendants, which were manufactured upto 30.11.2015 with the plaintiff's trademarks aforesaid in the packaging shown to the Court...*
  - (iii) ... Seeds which are not shown to have been manufactured by 30.11.2015, shall not be sold for the time being...*
  - (vi) The local commissioners shall also inventorise the packaged/unpackaged seeds manufactured after 30.11.2015...*
  - (viii) The defendants shall maintain the records, as well as the seeds, which are found to have been manufactured after 30.11.2015 till further orders of the Court...”*
- (c) For any modification in the relief provided by the Delhi High Court, including the issues relating to parent-lines and germplasm, the Informant ought to approach the Delhi High Court only. The Informants failed to bring to the notice of the Commission the scope and details regarding the infringement suit and the relief provided therein.
- (d) The Delhi High Court has appointed nine Local Commissioners, accompanied by two representatives of the OPs, to inventorise the



seeds manufactured by the Informants upto 30<sup>th</sup> November 2015. The Court has further directed that *“the Defendants shall pay to the Plaintiffs the royalty in respect of the seeds, which are being permitted to be sold under this order. The Defendants shall pay the amount, which according to it, is payable to the Plaintiffs. The disputed amount shall be secured by the Defendants by furnishing solvent security to the satisfaction of the Registrar General of this court within first two weeks of the month, following in which sales take place. The disputed amount shall be computed at the end of each month.”*

- (e) The Opposite Parties hold patent over the technology licensed to the Informants. In view of the provisions contained in Section 40 and Section 84 of the Patents Act, 1970, only the Controller under the said Act could grant compulsory license in respect of a patented technology. Therefore, the Informants cannot approach the Commission for the same.
10. The counsel for OP-3 submitted that no relief is sought by the Informants from it and as such, no submissions are required to be made by it.
11. In response to the arguments advanced by the OPs, the Informants submitted that though the OPs have filed W.P. Nos. 1776/ 2016 and 1777/ 2016 before the Delhi High Court challenging the orders dated 10<sup>th</sup> February 2016 and 18<sup>th</sup> February 2016 of the Commission on the ground that the Commission does not have jurisdiction in the matter, the Hon’ble High Court was not inclined to stay the proceedings before the Commission. It has rather directed that any interim order passed by the Commission under Section 33 of the Act shall not take effect without the leave of the Court. It was also submitted that the consent order of the Delhi High Court (in the Infringement Suit) relied upon by the OPs is without prejudice to other rights and obligations of the parties and there is no bar on the Commission to exercise its powers



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conferred under Section 33 of the Act and grant interim relief to the Informants.

12. The Informants further submitted that the order dated 19<sup>th</sup> February 2016 of the Hon'ble Delhi High Court in the Infringement Suit filed by the OPs protects their interest over the seeds manufactured upto 30<sup>th</sup> November 2015 and as such no relief is prayed by them before the Commission in that regard. However, it was argued that the said order does not deal with the aspects of parent-lines and germ plasm.
13. On the issue of balance of convenience, the Informants submitted that the dispute between the Informants and OPs relate to the trait value payable to the latter and if interim relief is allowed and no contravention by OPs is found at the end of the proceedings, then what would be left for the parties is mere monetary claims which could be computed and settled. However, on the other hand, if the interim relief is denied, the Informants and the farmers who are dependent on the Informants will suffer irretrievable losses which cannot be later made good by monetary compensation. The Informants also submitted that they are willing to furnish bank guarantee, as may be directed, to secure the financial interests of the OPs.
14. Subsequent to the oral hearing, OPs also filed their written submissions dated 8<sup>th</sup> March 2016 primarily reiterating their arguments before the Commission. In their written submissions, they have *inter alia* contended that:
  - (a) The central issue in the present case is the trait value payable by the Informants to OP-1, which is a contractual matter arising out of exercise of intellectual property rights and therefore, the Commission does not have the jurisdiction to entertain the dispute at hand. Further, it was requested that the Commission maintain the present case in abeyance until the final determination of the Writ Petitions by the Hon'ble Delhi High Court.



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- (b) Granting relief sought by the Informants would amount to mandatory injunction which is not envisaged under Section 33 of the Act. Such relief would also be contrary to Section 14 of the Specific Relief Act, 1963 which provides that a determinable contract cannot be ordered to be specifically performed.
- (c) The new relief regarding parent-lines and germplasm sought by the Informants during the hearing is an after-thought. Allowing the same means staying the mutually agreed post-termination obligations and the same, in effect, would amount to reinstating the new sub-license agreements.
- (d) The Commission has not *prima facie* found the termination of the new sub-license agreements to be anti-competitive in itself. Accordingly, there is no *prima facie* case to the satisfaction of the Commission that the termination was anti-competitive.
- (e) Granting interim relief will cause irreparable harm to OP-1 because it would have the effect of legitimising the non-payment of contractual trait fee and infringing intellectual property rights of OP-1 by all sub-licensees. It has also been submitted that if the Informants at a later stage succeed before the Commission/ COMPAT/ Supreme Court, then they have the option to seek compensation. Therefore, it has been contended that the balance of convenience is in the favour of the OPs.
15. The OPs filed another submission on 30<sup>th</sup> March 2016 regarding the counter-claims of the Informants in the infringement suit instituted by OPs before the Hon'ble Delhi High Court. It has been, *inter-alia*, alleged that the Informants have moved two forums for the same relief, concealed/suppressed material information and misled the Commission as well as the Hon'ble Delhi High Court. However, from a perusal of the copy of the counter-claim made by the Informants, it is noted that the Informants have disclosed details of the matter



pending before the Commission including the order dated 10<sup>th</sup> February 2016 of the Commission passed under Section 26(1) of the Act. It has been further pointed out by the OPs that the Informants have submitted before the Delhi High Court that they have no alternative and/or equally efficacious remedy and the dispute must necessarily be adjudicated by a civil court. According to the OPs, such submission of the Informant before the Delhi High Court amounts to forum shopping. The Commission notes that these claims have been made in relation to the contractual and IPR disputes between the parties and the same would not affect the proceedings before Commission in any manner.

16. The Commission has given careful consideration to the application of the Informants, oral & written arguments/ submissions of the parties and other materials available on record.
17. The Hon'ble Supreme Court in *Competition Commission of India Vs SAIL [(2010) 10 SCC 744]* has laid down the factors and circumstances to be considered while granting interim relief under Section 33 of the Act. The relevant extracts of the above-mentioned judgment are as follows:

*“During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, inter alia, should: (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the*



*record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.”*

The Commission notes that the OPs have filed Writ Petitions No. 1776/ 2016 and 1777/ 2016 before the Hon’ble Delhi High Court challenging the order passed by the Commission under Section 26 (1) of the Act on the ground of lack of jurisdiction in which the Hon’ble Court *vide* order dated 29<sup>th</sup> February 2016 has directed that the Commission may carry on with its investigation and hearing but no final order can be passed by the Commission. It was further directed that any interim order passed by the Commission under Section 33 of the Act shall not be given effect to without the leave of the court. Hence, it is clear that there is no bar on the Commission to proceed with the present application except that the interim relief sought, if granted, shall not take effect without the leave of the Hon’ble High Court.

19. With respect to the present application, the OPs have *inter alia* raised objections in view of the provisions contained in Section 14 of the Specific Relief Act, 1963. The allegations and proceedings before the Commission in the instant matter relate to anti-competitive agreement and abuse of dominant position. The Commission thus notes that apart from contractual issues, the impugned conduct also gives rise to competition concerns covered under the Act. Accordingly, the Commission does not find merit in the objections of the OPs that the present dispute is only regarding a determinable contract which cannot be specifically enforced under Section 14 of the Specific Relief Act, 1963.
20. It is observed that Opposite Parties hold patent over two gene Bt cotton technology (Bollgard-II) and the Bt cotton technology sub-licensed by OP-1 to the Informants is used in more than 99% of the area under Bt cotton cultivation in India. In view of this and for the reasons discussed in the order dated 10<sup>th</sup> February 2016 passed under Section 26 (1) of the Act, the



Commission was of the *prima facie* view that the Opposite Parties hold a dominant position in the relevant market for *provision of Bt cotton technology in India*. The Commission was also satisfied that the terms and conditions of the sub-license agreements, termination of the said agreements by the Opposite Parties and the stringent consequences flowing therefrom were *prima facie* in contravention of the provisions of Section 3(4) and Section 4 of the Act. Accordingly, it directed the DG to cause investigation into the matter. During the hearing of the present application for interim relief, the OPs insisted that upon termination of the new sub-license agreements, as per Article 9 therein, the Informants have to destroy the seeds, parent lines and germplasm that were genetically modified to contain the technology of the Opposite Parties. The Commission notes that OPs wish to enforce the post-termination obligations while the termination and the consequences thereof itself have been considered stringent, and *prima facie* in contravention of Section 3(4) and Section 4 of the Act and therefore, has been referred for investigation by DG. Thus, the Commission is of the view that the facts and circumstances of the present case satisfy the higher standard required for granting interim relief under Section 33 of the Act.

21. OP-1 has already terminated the new sub-license agreements with effect from 14<sup>th</sup> November 2015. Hence, according to OPs no case exists for restraining OP-1 from terminating the said agreements. The Informants also agreed that they would not press for restoration of the new sub-license agreements. However, it was contended by the Informants that there is a strong case for suspending the enforcement of post-termination obligations. The Commission notes that in terms of Article 9 of the new sub-license agreements, upon termination of the said agreements, the Informants have to immediately: (a) cease selling/ distributing the seeds; (b) destroy all the seeds and (c) destroy the parent lines or other cotton germ plasm, which were modified to contain the technology of the Opposite Parties.
22. The Commission notes that the order dated 19<sup>th</sup> February 2016 of the Hon'ble Delhi High Court has already taken care of the obligation with



respect to selling/ distributing the seeds. Accordingly, the same is not being dealt with by the Commission. However, the issues brought before the Commission in the instant matter are not limited to this aspect alone. The Informants are key players in the downstream market for Bt cotton seeds, claiming to supply seeds to around one million farmers per year and this constitutes about twenty percent of the Bt cotton seeds market in India. During the hearing, the Informants submitted that there is a long gestation period of 5 to 7 years for development of the seeds, including the unique varieties of hybrids. Therefore, if the existing parent-lines and germplasm are destroyed as per the stipulations contained in Article 9 of the new sub-license agreements, restoration of the same at a later point of time, in case the Commission finds that OPs have contravened the provisions of Section 3 or 4 of the Act, may not be possible or may take considerable time spanning over several years. This according to the Informants would cause irreparable and irretrievable harm to the Informants, dependent farmers and the entire ecosystem.

23. While the OPs have raised objections on the maintainability of the application, nothing has been argued or brought on record to controvert the submissions of the Informants regarding the serious injury which would be caused to them, the cotton plantation in the areas where they supply seeds and also the farmers therein. The Commission observes that the process of development of the Bt cotton seeds entails various stages and spans over 5 to 7 years. Therefore, if the seeds, parent-lines and germplasm, containing the technology of OPs are destroyed as per the post termination obligations, it may not be possible for the Informants to restore the same at a later point of time. Thus, such destruction would cause irreparable and irretrievable harm to the Informants and needs to be prevented. Apart from seriously prejudicing the Informants, such destruction would also adversely affect the dependent farmers and subject the entire ecosystem of Bt cotton cultivation in the areas where Informants are supplying/selling the seeds, to risk. Given the significant presence of the Informants in the BT cotton seeds market, it is



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further apprehended that destruction of the seeds, parent-lines and germplasm is likely to cause adverse effect on competition.

24. The Commission is conscious of the fact that it should exercise the powers conferred under Section 33 of the Act very sparingly. However, the facts and circumstances of the case in hand as discussed in the preceding paras are found to be exceptional in nature which merit intervention by the Commission. The Commission notes that the investigation in the present matter is likely to take some time. The Commission thus finds it appropriate and necessary to intervene at this stage to safeguard against the irreparable and irretrievable consequences apprehended on account of the destruction of seeds, parent-lines and germplasm, which are modified to contain the technology of the Opposite Parties.
25. Another question which also needs to be answered while granting interim relief is what will be the impact of the relief on the parties. As noted earlier, the absence of a mechanism to protect the parent-lines and germplasm is likely to have enduring consequences including irreparable harm to the Informants, shortage in supply of seeds due to their exclusion and adverse impact on the ecosystem of cotton cultivation in the areas where Informants are supplying/selling seeds. On the other hand, if the relief sought is provided to the Informants and at the end of the proceedings, the Commission does not find any contravention by the OPs, at the most the same could result in financial implications upon the OPs. OPs have their stake mainly in the form of trait values to be recovered from Informants on account of use of their technology which can very well be computed as well as secured. The Commission further observes that the liability of the Informants to pay the trait value arises only upon sale of seeds. However, considering that substantial time is required for the existing parent-lines and germplasm to be developed into seeds that could be successfully commercialized, the liability of Informants is not likely to arise in near future. The Commission is of the view that the interest of the OPs in this regard can be protected through appropriate directions. Whereas, in absence of intervention by the Commission at this stage, neither can the extant



position be restored *ex ante* at a later stage nor the likely damage to the Informants be compensated. Thus, in the given facts and circumstances, the Commission finds that the balance of convenience lies in granting the interim relief sought. It is no longer *res integra* that interim relief in mandatory form is permissible in appropriate cases. It has been held in *Dorab Cawasji Warden Vs. Coomi Sorab Warden and Ors.* [(1990) 2 SCC 117] that:

*“16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guideline. Generally stated these guidelines are:*

*(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*

*(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.*

*(3) The balance of convenience is in favour of the one seeking such relief.*

*17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.”*

26. In view of the foregoing, the Commission restrains the OPs, till the final disposal of the proceedings before the Commission, from enforcing the post-termination obligations on the Informants as envisaged under the new sub-license agreements that require them to destroy the seeds, parent-lines and



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germplasm, which are modified to contain the technology of the Opposite Parties. The Commission observes that sufficient protection is available to the OPs *vide* the Hon'ble Delhi High Court order dated 19<sup>th</sup> February 2016 as per which, no seeds manufactured by the Informants after 30<sup>th</sup> November 2015 can be sold without Court orders; local Commissioners appointed by the Court would inventorise the packaged/ unpackaged seeds manufactured by the Informants after 30<sup>th</sup> November 2015; and the Informants would maintain the records of seeds which are manufactured after 30<sup>th</sup> November 2015. However, in the light of the interim relief granted through this order restraining destruction of seeds, parent-lines and germplasm, which are modified containing the technology of the Opposite Parties, the Commission further directs that the seeds manufactured by the Informants, if any, which are not covered under the directions of Hon'ble Delhi High Court shall not be sold by the Informants without the leave of the Commission. Furthermore, the Commission holds that in order to safeguard the interest of the OPs, the Informants will adhere to the requirements of maintenance of record, inspection, reporting, audit *etc.* as were stipulated in the sub-license agreements. The Informants are also directed to extend their full cooperation to the OPs to protect the Intellectual Property Rights of the OPs. The Informants are further directed to furnish undertakings in this regard within fifteen (15) days of receipt of this order. Sale of seeds being not allowed as a relief herein, the Commission does not see any financial implication upon OPs. However, appropriate order would be passed by the Commission as and when the same arises.

27. Considering the nature of the proceedings and the urgency involved, the Commission directs the DG to expedite its investigation and submit the investigation report at the earliest.
28. The Secretary is also directed to transmit copies of this order to the parties and DG forthwith.
29. In view of the order of the Hon'ble High Court of Delhi in W.P. Nos. 1776/ 2016 and 1777/ 2016, this order shall not be given effect to without



the leave of the Hon'ble Delhi High Court. A copy of this order be sent to the Delhi High Court through Registrar General for information.

**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**  
**Date: 13/04/2016**



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## Dissent Note

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

30. I have gone through:
- (a) the majority order dated 10.02.2016 of the learned Commission wherein it held the view that there exists a prima facie case of contravention of the provisions of section 3(4) and section 4 of the Competition Act, 2002 (hereafter, Act) by the OPs and directed the DG to cause an investigation into the matter in Reference Case No. 2 of 2015 and Information Case No. 107/2015; and
  - (b) this majority order of the learned Commission in Case No. 107/2015 restraining the OPs, till the final disposal of the proceedings before the Commission, from enforcing one of the post-termination obligations that requires the informants to destroy the seeds, parent-lines and germplasm.
31. I have considered the following documents in Case No. 107/2015 for disposing of the requests of the informants for an interim order under section 33 of the Act:
- a. the information dated 15.12.2015 filed by the informants;
  - b. the applications dated 22.12.2015 and 28.12.2015 filed by the informants under section 33 of the Act;
  - c. the oral submissions of the parties at the hearing on 01.03.2016;
  - d. the joint written submissions dated 08.03.2016 and dated 30.03.2016 filed by OP1 [(Mahyco Monsanto Biotech (India) Limited) (MMBL)] and OP4 [Monsanto Holdings Private Limited] in Case No. 107/2015; and
  - e. other material available on record.



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32. I note that the informants and the OPs entered into a sub-license agreement on 10.03.2015 (hereafter, agreement). Article 3.01 of the agreement provided for payment of trait value by the informants to the OPs and its rate. The informants subsequently requested the OPs to charge a different trait value. Since they could not agree on the trait value despite several correspondences between them, the OPs terminated the agreement on 14.11.2015 for breach of payment obligations under Article 3.01 of the agreement. Vide their letter dated 27.11.2015, they insisted on discharge of post-termination obligations by the informants, as provided in Article 9.06 of the agreement. Article 9.06 provided that if the agreement is terminated under certain circumstances, the informants shall have two obligations: (a) Obligation 1: they shall immediately cease selling or otherwise distributing the genetically modified hybrid cotton planting seeds, and (b) Obligation 2: they shall destroy all seeds, parent-lines, or other cotton germplasm which have been modified to contain the OPs' technology. Thereafter, the informants filed the information dated 15.12.2015 with the Commission under section 19 (1) (a) of the Act seeking *inter alia* an inquiry against OPs for their anti-competitive conduct and a direction to MMBL not to terminate the agreement. The Paras 9.24 to 9.68 of the information alleged that the Articles 3.01, 2.05(c) and 9.06, which provide for trait value, termination of agreement in certain circumstances, and obligations of the informants on termination of the agreement respectively, are in contravention of section 3 and 4 of the Act. After hearing the parties on 14.01.2016 on the information, the learned Commission, by a majority order dated 10.02.2016, held that there exists a prima facie case of contravention of section 3(4) and 4 of the Act by the OP group and, therefore, ordered an investigation into the matter.
33. Vide application dated 22.12.2015, the informants prayed to the Commission to restrain MMBL, by way of interim order, from terminating the agreement till the disposal of the case No.107/2015. Vide another application dated 28.12.2015, the informants urged the Commission to pass an appropriate order maintaining the status quo between MMBL and informants ex ante as on 14.11.2015, that is, restoration of the agreement. While these applications were pending before the Commission, the Hon'ble High Court of Delhi, vide



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consent order dated 19.02.2016, granted interim relief in respect of obligation 1, whereby the informants were allowed to sell the seeds already manufactured by them before 30.11.2015 using the trademarks of the OP. They were restrained from sale of the seeds manufactured after 30.11.2015 till further orders. The consent order does not cover obligation 2. When the applications came up for hearing before the Commission on 01.03.2016, the informants did not press for restraint on OPs from terminating the agreement. As stated in Para 21 above, they did not press for restoration of agreement either. Instead, they sought suspension of enforcement of obligation 2 under Article 9.06 of the agreement. Therefore, the applications dated 22.12.2015 and dated 28.12.2015 of the informants became infructuous and do not require consideration and disposal. However, in their counter claim dated 29.03.2016, the informants have prayed to the Hon'ble High Court of Delhi to declare that the agreement is valid, binding and in force.

34. The OPs have submitted that since the matter relates to patent which is exclusively dealt in a special law, namely, the Patent Act, 1970, it is outside the jurisdiction of the Commission to grant any interim order under the Act. I do not find any merit in this submission. Since the Commission has already issued an order under section 26(1) of the Act in the matter, issue of an interim order under section 33 cannot be outside its jurisdiction. Further, what is being considered by the Commission in the matter is alleged abuse of economic dominance which is squarely covered under the Act. I do not wish to labour on this in view the order dated 30.03.2016 of the Hon'ble High Court of Delhi in the matter Telefonaktiebolaget LM Ericsson (Publ) vs CCI and Another [W.P.(C) Nos. 464/2014 & 1006/2014], which has settled the jurisdiction of the Commission in matters involving patents. Similarly, I do not find any merit in the submission of the informants that they have certain rights under various other laws which require preservation of germplasm and parent-lines. They are at liberty to avail or exercise the rights they have under any other law, but that cannot be a ground for seeking interim order under the Act.



35. It is interesting to note that –
- a. The informants initially prayed to the Commission to issue an interim order to restore the agreement. They do not want this relief now from the Commission. They have, however, sought practically the very same relief (declaring the agreement to be in force) from the Hon'ble High Court of Delhi.
  - b. The informants have got interim relief in respect obligation 1 (for seeds manufactured up to 30.11.2015) from the Hon'ble High Court of Delhi. They are now seeking interim relief in respect of the obligation 2 from the Commission.
  - c. The agreement is terminated. Both the informants and the OPs do not want it to be restored. Yet the informants would like to hold on to seeds, parent-lines and germplasm in their possession under the agreement.
  - d. The informants do not want restoration of the agreement or restraint on termination of the agreement from the Commission. If the agreement is not to be restored, suspension of post termination obligations would not serve any useful purpose.
  - e. If the informants get the relief (declaring the agreement to be in force) they have prayed to the Hon'ble High Court of Delhi, the interim relief (suspension of post-termination obligation) they have sought from the Commission would be superfluous.
36. Nevertheless, I proceed to examine if the relief prayed at the hearing, that is, suspension of post-termination obligation 2, is permissible under the provisions of section 33 of the Act. Section 33 read with the observations of the Hon'ble Supreme Court in CCI vs. SAIL [(2010) 10 SCC 744], as extracted in Para 17 above, envisages that during an inquiry, when the Commission is satisfied that an act in contravention of section 3(1), 4(1) or 6 has been committed and continues to be committed, it may restrain any party



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from carrying on such act, till conclusion of such inquiry. Thus, an act can be restrained by way of interim order under section 33 of the Act, only if that act (a) has been committed, (b) continues to be committed, (c) is subject matter of inquiry by the Commission, and (d) is in contravention of the section 3(1), 4(1) or 6 of the Act to the satisfaction of the Commission.

37. Is the Commission satisfied of the contravention of section 3(1), 4(1) or 6 of the Act? It has been stated in Para 20 above, "... while the termination and the consequences thereof have been considered stringent, and prima facie in contravention of Section 3(4) and Section 4 of the Act and therefore, has been referred for investigation by DG. Thus, the Commission is of the view that the facts and circumstances of the present case satisfy the higher standard required for granting interim relief under Section 33 of the Act". I am unable to agree with this view. The reference of a matter to the DG for investigation *ipso facto* does not constitute the 'satisfaction' of the Commission required under section 33, which has to be recorded in clear terms and which has to be of much higher degree than that is required for formation of a prima facie view under section 26(1) of the Act. I do not find any material on record, other than those in the information, to provide 'satisfaction' required under section 33 of the Act.
38. What act is alleged to be in contravention of the provisions of the Act? I find that the Commission has initiated an inquiry, by a majority order, to find out if Article 9.06 read with Article 2.05(c) of the agreement is in contravention of section 3 or 4 of the Act. The inquiry is not to find out whether enforcement of post-termination obligations provided for in Article 9.06 of the agreement is in contravention of any provision of the Act. Further, the alleged anti-competitive act under the inquiry is not continuing, as the agreement has been terminated with effect from 14.11.2015. What is sought to be restrained is enforcement of post-termination obligation 2, not even the termination of agreement. The act sought to be restrained (suspension of post-termination obligation) is neither an act alleged to be anti-competitive, nor an act under inquiry by the Commission, and there is no 'satisfaction'



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that it is in contravention of the provisions of the Act. Hence the relief sought is not admissible.

39. Looked at from another perspective, in cases of alleged contraventions of section 3 or 4 of the Act, section 33 cannot grant something through an interim order that cannot ultimately be granted under section 27 on final disposal of the proceeding in the given facts and circumstances of the case. The difference between these two sections is that in the former the Commission is satisfied of the contravention while in the latter the Commission arrives at the finding of contravention on completion of inquiry. This gets credence from several judicial pronouncements. For example, it has been held by the Hon'ble Rajasthan High Court in Prem Chand vs Manak Chand And Ors [AIR 1997 Raj 198]: "The Court has no jurisdiction to grant by way of interim relief what could never be granted in the main suit itself. Thus an interim injunction granted during the pendency of a suit should not be of greater scope than what could be granted in the suit". Since section 27 does not envisage restoration of a terminated agreement or cessation of obligations under a terminated agreement, particularly when both the informants and the OPs are not interested in restoration of the agreement, as stated in Para 21 above, suspension of obligation 2 can't be granted under section 33. Further, an interim relief could be considered if it is useful or in aid of the final relief. It has been observed by the Hon'ble Supreme Court in the case of Km. Hema Mishra vs. State of U. P. and Ors [2014 (10 ACR 1112 (SC)]: "An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding". In this case, the suspension of one of the post-termination obligations has no nexus with the final relief envisaged under section 27 of the Act. In fact, interim relief sought does not serve any useful purpose if the agreement is not to be restored. It has been observed by the Hon'ble Supreme Court in Dorab Cawasji Warden vs. Coomi Sorab Warden and Ors [(1990) 2 SCC 117], as extracted in Para 25 above, that interim relief is granted to preserve or restore the status quo of the last non-contested status. In this case, neither the informant wants the status-quo, nor the status quo is un-contested.



40. The informants have submitted, as stated in Para 13 above, that the dispute between the informants and OPs relate to the trait value payable to the latter. The OPs have submitted, as stated in Para 14(a) above, that the central issue is the trait value payable by the informants to the OPs. Admittedly, the core issue is trait value and the interim relief sought in no way addresses the same. I note that the Central Government has, vide its order dated 08.03.2016 under the Essential Commodities Act, 1955, fixed a trait value of Rs.49 per packet of BG II cotton seeds for the financial year 2016-17. Probably this may address the core issue, at least partially.
41. Thus, I find that the interim order sought by the informants is neither admissible nor required under the circumstances.

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