Lessons from PepsiCo's Potato Case



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PepsiCo India Holdings Pvt. Ltd V/S Potato farmers of Gujarat (Years 2018 and 2019)

- The fully-owned subsidiary of a US MNC - PepsiCo India Holdings Pvt. Ltd., had sued at least 9 potato farmers for alleged infringement over its rights on potato variety FC-5 in Gujarat, India in the years 2018 and 2019 using the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001 of India.
- Compensation Sought: Rs. 20,00,000/- per case in 2018 in District court in Modasa (Dist: Aravali, Guj)
  : Rs. 1,05,00,000/ per case in 2019 in Commercial Court in Ahmedabad
  (5 times in just one year, what is the justification?)
- Commercial Court ordered to seize the stock and appointed court commissioner
- Some of the potato farmers in Gujarat were intimidated by information that a truck with PIH's protected variety of potato was intercepted by police on allegations that it was involved in illegal sale, in late 2019.
- First time farmers were sued on seed related IPR in India. It may set the path and may have impact on farmers' seed rights in future.
- The case was unconditionally withdrawn due to public pressure within less than a month of public campaign.

The plaintiff PepsiCo in its suit on farmers claims that,

"the plaintiff has the exclusive right to produce, sell, market, distribute, import and export the said Registered Variety under section 28 of the Act being the registered breeder thereof..."

it further says that,

"...unauthorised production and sale by the defendant of the Registered Variety constitutes infringement of the plaintiff's rights in the Registered Variety under section 64 of the said Act

(Ref: paragraph 6 and 7 of Suit No. 23 of 2019 in Ahmedabad Commercial Court.)

Section 28 for protection and Section 64 for infringement

- Rights given to the PVP registrant under the Act: The most relevant sections in the PPV&FR Act 2001 pertaining to the PepsiCo case are Sec. 28 ('Registration to Confer Right') and Sec. 64 ('Infringement'):

- Section 28(1) says…

✓ *Subject to the other provisions of this Act, a certificate of registration for a variety issued under this Act shall confer an exclusive right on the breeder or his successor, his agent or licensee, to produce, sell, market, distribute, import or export the variety.*

Issues with Interpretation

Scope of IPR Protection:

There are three parts of this protection:

1. Position of protection:

✓ *Subject to the other provisions of this Act*

(This is not an overarching clause)

2. Protected Activities:

✓ *to produce, sell, market, distribute, import or export*

(All other activities are NOT protected)

3. Protected Product :

✓ *the variety*

(anything which is not a "variety" is NOT protected)

Rights of registrant are rightfully restricted

Issues with Interpretation

Activities NOT protected:

Under section 28(1), activities like “sell”, “market”, “distribute”, “import” and “export” **refer to seeds and propagules only.** They do not apply to produce derived from growing the variety. Thus the rights given under the Act are for production of the propagule or seed.

Section 28 (1) does <u>not</u> give protection about following activities to registrant:

“save”
“sow”
“re-sow”
“grow”
“cultivate”
“purchase”

the seeds of a **protected variety.**

As far as farm produce from the protected variety is concerned, activities like

“harvest”,
“pack”,
“transport”,
“process”,
“store”,
“use” **the commercial (non-seed) harvest** are **<u>not</u>** included either.

Issues with Interpretation

What is "Variety"?

According to the PPV&FRA, Act;

"Variety" means a plant grouping except microorganism within a single botanical taxon of the lowest known rank, which can be

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

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

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

Definition Seed in the Act:

"Seed" means a type of living embryo or propagule capable of regeneration and giving rise to a plant which is true to its type.

Variety is represented by seed or propagule matching DUS Criteria

Distinctness, Uniformity, Stability and True to Type

Difference between "Producing the Variety" and "Production from Variety"

A	B	C
Parameter	**Produce the Variety** **(Production of a particular variety)**	**Production from Variety** **(Cultivation of a particular variety for produce)**
Nature/Type of sowing material	Parental male-female pure lines (for hybrids), Parental pure lines (for pure line varieties), Selected or introduced material, Parental GM line or irradiated line.	Seeds/propagules of genetically true-to-type variety.
Technical types of harvest / produce	Nucleus, Breeder, Foundation, Certified, Notified, Truthful seeds having specific denomination.	Certified, notified or truthful seeds or farm saved seeds are sown to produce non-propagule material.
Need for production protocol	Such seeds are produced with specific production procedure/protocols to ensure higher degree of authentic and true-to-type genome to adhere to DUS.	No production protocols required because there is no need to rigorously or faithfully produce true-to-type and maintain DUS.
Special care/ knowledge/ skills/ infrastructure	Required. (See Annex. I for example) Like isolation, rouging, emasculation, controlled pollination, selection skills, tissue culture lab, grafting skills, nursery etc.	Not required. Only general agronomic practices are followed to produce non-propagule material.
Purpose of efforts	Harvest is meant for sowing or planting. In case of pure line and vegetative propagation, it is multiplication/ copying of genome. In case of hybrids, to generate heterosis to exploit hybrid vigour.	Harvest is meant for home consumption, processing and grocery market, it is not meant for sowing/planting.
Description/ Examples	A. Seed Production Plot Eg. Hybrid seed using artificial emasculation/male sterility and pollination. Seeds of Pure lines. B. Tissue Culture Propagation, using tissues of somatic cells. Eg. Banana plants/Potato tubers as produced through tissue culture and hardening. C. Multiplication of propagules through normal vegetative propagation like cutting, layering, grafting using tissues of somatic cells. Eg. Mango grafts as done in nurseries, sugarcane eyes, chrysanthemum cuttings raised in nurseries for propagation.	Growing a crop from particular variety. Eg. Growing mango for table purpose. Growing potato for processing purpose. Growing hybrid cotton for fibre purpose. Growing wheat for Chapati. Growing sugarcane for making jaggery. Growing chrysanthemum for cut flowers. The above activities do not produce a "variety".

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Technical names used to describe the harvested/ produced material	Hybrid, pure line, introduced variety, straight line, selected variety, GM variety etc. with specific denomination. Eg. Hy- 4 cotton seed or Kesar mango graft	No such names are given. It is called "produce of the particular variety". Sometimes a name can be linked to the produce, for example Kesar mango or lint of Hy 4 cotton Eg: lint of Hy-4 cotton or Kesar Mango
Ability to germinate in the harvested produce	Germination ability and viability is an essential feature in (seeds of) a variety.	Germination ability is not required in the harvested produce. (Eg. Flower of chrysanthemum or raw mango will not have germinating ability).
Risk for commercial competition for IPR owner in Seed Business	Exists.	Does not exist.
Compliance of genetic purity and DUS in the harvested produce	Yes. Very much needed.	Neither expected nor needed.
Type of seller	Seed supplier.	Grocery shop.
Selling Price of the produce	High, being seeds.	Low, being non-seed.
Purpose and type of descriptions on packets for end consumer, if packed	To comply with seed quality regulations to satisfy the farmer.	To provide the consumer with information or comply with food regulations like FSSAI.
Type of end consumer	Always farmer/ grower/ researcher.	Ordinary people and consumers incl. industries of various kinds

Issues with Interpretation

Did farmers "produce a Variety"?

No

Farmers have
sowed,
cultivated,
grew
and
harvested
commercial harvest for wafer purpose.
It was **not a production of a variety but…**

production of commercial / edible product for non-seed purpose.

Farmers did not infringe the protection given to registrant under section 28.

While there was no infringement, why case was admitted?

Potato: A vegetatively propagated crop

Propagule and Commercial Product is same

- **All vegetative propagation (tissue culture, grafting, layering, using eye, cuttings, tuber, root, leaf, stem of the plant, etc.) is natural multiplication of the genome of parent material**, where DNA gets copied by mitotic multiplication. The type of propagule can vary in vegetatively propagated crops.
- **The propagules may or may not be used as final economic harvest in all cases.**
- For example, in chrysanthemum, the 'cutting' is the propagule and flower is the economic harvest; in banana, sucker is the propagule and fruit is the economic harvest. Economic harvest is easily distinguishable from propagules wherever they are different.
- **In potato, the economic harvest and propagule are the same** i.e. stem tuber. However, **"producing the economic part of the plant for edible purpose" cannot be equated with "producing propagules".**

In the present case, where the cultivation of a PVP-protected potato variety was meant for edible use/processing, application of Sections 28 and 64 of PPV&FR Act to allege infringements is a **gross misinterpretation of the Act.**

Section: 39 (i)iv: Issues with Interpretation

Scope of Rights (not exemptions) to Farmers:

1.Position: *Notwithstanding anything contained in this Act… (Overarching clause)*

2. Activities:

a farmer shall be deemed to be entitled to

save,

use,

sow,

re-sow,

exchange,

share or

sell

3. Products:

*his farm produce **including seed** of a variety protected under this Act in the same manner as…*

4. Mention about tradition/custom:

he was entitled before the coming into force of this Act:

5. Restriction:

*Provided that the farmer shall **not be entitled to sell branded seed** of a variety protected under this Act.*

*Explanation: For the purposes of clause (iv), "branded seed" means any seed put in a **package** or any other container **and labelled** in a manner indicating that such seed is of a variety protected under this Act.*

These rights are given irrespective of following…

1. Registration Date of the variety
2. Type of crop
3. Type of propagation (Seed or vegetative part)
4. Place of breeding
5. Generation of the seed
6. Type of sell and point of sell of seed
7. Source of seed
8. Type of seller, who sold the seeds to farmers
9. Time, place of sell of harvest
10. Type of buyer of harvest

Questions still remain

- PepsiCo India Holdings Pvt. Ltd mentioned the following in its official submission to the court while withdrawing the cases 'unconditionally'.

✓ **"Relying on its discussion with the Government to find long term and an amicable solution of issue around its seed protection"**

Questions…

1. What has been discussed with Govt? What is there to rely upon? Where is the proof?

2. On what basis Government gave any assurance and how will this assurance be implemented now?

3. Does it point to some modifications in the law and its implementation?

4. Should India allow such modification?

Lessons Learnt from PepsiCo Case

- **Ignorance is a curse,** mass awareness is necessary. Ignorance is exploitable.
  - Farmers, Farmers' organization and their leaders
  - Lawyers: None of the Gujarat Lawyer ever dealt with this Act
  - Govt officers: State officers were caught unaware
  - Judiciary: IPR on plant variety is not listed in types of cases to be entered at commercial court, court ordered to cease the stock and appointed court commissioner without hearing the farmers.
- **Farmers' Innocence/ temptation can be misused:** False assurance to buy, false hopes of higher price, evidence building through sampling and audio/ video recording.
- **Role of people in power** is difficult to understand. They generally back the companies, are they trustworthy?
  - Even after repeated request, GoG did not give appointment to farmers, but company representative met representatives of Govt of Gujarat gave a kind of assurance to PepsiCo to make farmer understand not to make such mistake in future, while there was no mistake committed by farmer.
  - PPV& FR authority waited for court direction to speak out, never responded.

Lessons Learnt from PepsiCo Case

- **Ample scope from misinterpretation:**
  - PPV&FR authority can misinterpret the law: FAQ booklet withdrawn, admitted in new FAQ booklet. Many things are yet unclear.
  - Registrants may misinterpret the Acts and its regulations
- **There are lacunae in present regulations and mechanisms:**
  1) Role of State Govt is missing
  2) Tribunal yet to be set up
  3) No proactive vigilance from authority
  4) Not enough provision to punish registrants
  5) Support system for farmer at state level needed
  6) Registration certificate should carry special mention of section 39 (i) iv
  7) Registrant need to advertise provision of section 39 (i) iv
- **Intent of the Law is important to interpret the law**
- **Role of media and consumers is important**
- **Power of People with Power of Truth together wins**
- **Role of civil society organization is inevitable in democratic society.**

What is happening on the ground now?





- Farmers are enjoying their rights over seeds
- Company is happy with their claims to serve farmers!!!

Thanks