The anomaly in the policies regarding the pricing of cotton seeds in India

Khushbu Kumari
Research Fellow, CIIPC · 14 May 2019

The Government of India promulgated the Cotton Seeds Price (Control) Order (CSPCO) in the year 2015 under Section 3 of Essential Commodities Act, 1955, with the avowed object of providing "for uniform regulation across India of the sale price of cotton seeds with the existing and future Genetic Modification (GM) technologies". This was the first formal intervention on the subject of regulation of prices of cotton seeds by the Central Government. Previously, the major cotton producing State Governments like Andhra Pradesh, Gujarat and Maharashtra came up with the orders on price regulation of cotton seeds. So, as per the objective of the CSPCO, it has to have the overriding effect over the state orders on the subject matter.

In exercise of the powers conferred by sub-clause (1) of clause 5 of CSPCO, 2015, the Central Government, after consultation with the Committee constituted thereunder, has recommended the maximum sale price of cotton seeds in year 2016, 2017 and 2018 respectively. The Delhi High Court has upheld the power of Central Government to determine the maximum selling price of cotton seeds under the Essential Commodities Act, 1955 by giving effect to the CSPCO 2015.

But the confusion began January 2019 when the PPV&FR Authority came up with the "Notice Plant Breeders' Rights" stipulating that the power to determine the maximum selling price of a registered variety lies with itself and no other authority can do so. Let us have a look at the relevant legislations on the subject matter.

Relevant Legislations

The Entry 33 of the Concurrent List deals with "Trade and Commerce in, and the production, supply and distribution of" amongst others, cotton seed whereas, the Entry 34 deals with the 'price control'. The Parliament of India, in exercise of its power under the Entry 33 and Entry 34 of the Concurrent List enacted the Essential Commodities Act, 1955 and the Seeds Act, 1966.

The Essential Commodities Act, 1955 has an objective "to provide, in the interest of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities". The Central Government has the power to add or remove any commodity under the Act. 'Cotton seed' was permanently added as an essential commodity under the Act in the year 2010 after being removed in 2007. Whereas, the Seeds Act, 1966 was enacted "to provide for regulating the quality of certain seeds for sale, and for matters connected therewith".

Additionally, India has adopted a *sui generis* system for the protection of plant variety under the Protection to Plant Variety and Farmer's Rights Act, 2001 (PPV&FR Act). The Indian Patent Act, 1970 excludes 'plant and animals in whole or any part thereof other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals' from patentability. Hence, India enacted PPV&FR Act as a *sui generis* system as per the mandates of Article 27.3(b) of TRIPS to *give "effective" protection to the plant varieties, rights of farmers*

and plant breeders and to encourage the development of new varieties. A large percentage of hybrid varieties incorporating the BT cotton technology registered as varieties under the PPV&FR Act.

Uncertainty regarding the Power to Regulate the Prices of Bt cotton seeds in India

Interestingly, the Protection of Plant Varieties and Farmer's Rights Authority constituted under the Protection to Plant Variety and Farmer's Rights Act, 2001 (PPV&FR Act) also quite recently issued a "Notice on Plant Breeders' Right" (hereafter 'notice'). The notice says that the provisions under Seeds Act, 1966 and Essential Commodities Act, 1955 relating to seed production and regulation including the sale price fixation of seeds and trait value fixation per variety, should not apply to the varieties registered under the PPV&FR Act. Also, it called for immediate implementation and compulsory adoption. This implies that the Central Government orders made under the Essential Commodities Act should not govern the maximum sale of cotton seed rather the determination is to be made under the PPV&FR Act for the registered varieties. Therefore, this means that the sale price fixation of any registered variety shall be henceforth be taken under the provisions of the PPV&FR Act. The said notice raises questions on the validity of the previous order made under the CSPCO, 2015 for fixing the sale price value for the Bt cotton seeds.

To further add to the confusion, the Central Government has issued notification according to the powers conferred by sub-clause (1) of clause 5 of the CSPCO, 2015 stipulating the maximum sale price for Bt cotton seeds for the year 2019-20 on 8th March 2019. To specify this notification was issued after the PPV&FR Authority's notice was made. This shows lack of coherent policy in place regarding the regulation of seed prices in India. This will create a situation of confusion and scepticism among the stakeholders as the State Governments have started imposing the notification for the year 2019-20 issued by the Central Government.

According to the author, the PPV&FR Act should prevail over the Essential Commodities Act and Seeds Act as it is a special Act. The PPV&FR Act aims "to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants." So, by the application of "*generalia specialibus non derogant*", the special act should prevail over the general laws. Additionally, the PPV&FR Act has section 92 which provides for an overriding effect. But only once the notice issued by the PPV&FR Authority is questioned in the court of law, we would have an answer.

Having said that, the notice on the regulation of prices of the registered variety is beyond the power conferred under Section 28 of the PPV&FR Act. Section 28 of the Act has been worded as a positive right and does nowhere explicitly provides for regulation of prices of a registered variety. Moreover, the objective of the Act is not in terms of regulating the sale or sale price of the registered variety. But rather the scheme of the Act is in term of regulating the IP aspect and the resultant outcomes. This is evident from the provisions on compulsory licensing under Section 47 of the PPV&FR Act. The application of Section 47 is contingent upon the condition that the reasonable requirements of the public with respect to the variety has not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price. Therefore, there cannot be two competing pricing provisions under the Act. Also, it is significant to mention that the compulsory licensing provision requires assessment on case by case basis and is contrary to the blanket application provided under the Act.

Nevertheless, a closer look at the notice further raises relevant issues regarding its scope and application. The point (a) of the notice says, "*The procedures of receiving/compiling/directing the indents for seed production by various Central and State Government Organizations or Undertakings, and Private Sector on contract or otherwise shall be restricted only to those plant varieties which are not registered under PPV&FR Act or those whose period of protection under the registration has expired on the date.*" This seems

quite ambiguous in nature. There is less clarity on from when would the application of the PPV&FR Act would begin. Whether the genetically modified technology such as Bt technology would also be included within the meaning of 'indents'? Whether the power to fix the sale price of a registered variety would also include the power to fix the trait value too? The Karnataka High Court has upheld the power of the Central Government to fix the trait value contending that the trait value is a key component of the price of cotton seeds. But if the notice issued by the PPFVR Authority prevails over the CSPCO orders then who would be eligible to decide the trait value is a real question. Therefore, unless these points are made absolute clear the extent of application of the notice cannot be fully determined.

Section 3(2)(c) of the Essential Commodities Act confers power on the Central Government to make suitable orders, inter alia, "for controlling the price at which essential commodity may be bought or sold".

https://seednet.gov.in/cms/home/readyreckoner/Seed_4/19_Cotton_Seeds_Price_Control_Order_2015.PDF

Therefore, it will be evident that the Parliament intended to lay down an exhaustive code in respect of the seeds including 'cotton seeds' and for that reasons, the State legislature thought it fit not to enact such enactment till the Central enactment was holding the filed of 'cotton seed'. From the aforesaid provisions, we find that law made by the Central Government like the Essential Commodities Act, 1955, the Seeds Act, 1966, Seeds (Control) Order, 1983 and the Environment (Protection) Act, 1986 are holding the field of 'cotton seed' including appointment, the power and function of the Seed Controller, establishment of Seed Testing Laboratory, Analysts of seeds and pricing of cotton seed, and thereby the Gujarat Cotton Seeds (Regulation of Supply, Distribution, Sale and Fixation of Sale Price) Act, 2008, since 22.12.2009, has come in direct conflict with the provisions of the Central enactments as referred to above, so far as it relates to 'cotton seeds'. Thereby the enactment of the State legislatures – The Gujarat Cotton Seeds (Regulation of Supply, Distribution, Sale and Fixation of Sale Price) Act, 2008, since 22.12.2009 became void to the extent of repugnancy, as stated above, in view of Article 254 of the Constitution of India. In view of such declaration, the notification dated 11.6.2008 issued pursuant to The Gujarat Cotton Seeds (Regulation of Supply, Distribution, Sale and Fixation of Sale Price) Act, 2008, and impugned in the present case, cannot be upheld and is accordingly set aside. The writ petition is allowed, but there shall be no order as to costs. (National Seeds Association of India and Ors. Vs. State of Gujarat through Secretary and 5 Ors.)

The petitioners challenged the validity of the Maharashtra Cotton Seed (Regulation of Supply, Distribution, Sale and Fixation of Sale Price) Ordinance, 2008 (the Ordinance) (published in the official Gazette on 23.05.2008) and Notification dated 23.05.2008 (the notification) fixing the Maximum Retail Price (MRP) of Bt. cotton seeds. The High Court of Judicature of Bombay held that iit is recognized and permissible to have respective enactment/laws even by the State though power to enact laws is also with the Central Government. The State Act in question as recorded is dealing with cotton price control aspect and related aspect of compensation, misbranding which is certainly different and as admitted there is no specific provision under the Central Act. National Seed Association of India, Rasi Seeds Ltd. v. the State of Maharashtra

http://egazette.nic.in/WriteReadData/2016/168441.pdf

http://egazette.nic.in/WriteReadData/2017/174701.pdf

http://egazette.nic.in/WriteReadData/2018/183683.pdf

http://lobis.nic.in/ddir/dhc/RKG/judgement/28-03-2017/RKG28032017IA24062016.pdf

http://plantauthority.gov.in/pdf/noticeonPlant-BR-29-01-2019.pdf

Schedule 7, https://www.mea.gov.in/Images/pdf1/S7.pdf

Section 3 of the Patents Act, 1970.

The number of registered *Bt* cotton hybrids till 2014 was 1167. Choudhary B & Gaur K. Biotech Cotton in India, 2002 to 2014 Adoption, Impact, Progress & Future ISAAA 2015.

Notice on Plant Breeders' Rights dated 23rd January 2019 http://plantauthority.gov.in/pdf/noticeonPlant-BR-29-01-2019.pdf

http://egazette.nic.in/WriteReadData/2019/199500.pdf

Sharat Babu Digumarti vs Government of NCT Of Delhi, S.L.P. (Criminal) No. 7675 of 2015

Section 92 – Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 28. Registration to confer right.—(1) 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: Provided that in the case of an extant variety, unless a breeder or his successor establishes his right, the Central Government, and in cases where such extant variety is notified for a State or for any area thereof under section 5 of the Seeds Act, 1966 (54 of 1966), the State Government, shall be deemed to be the owner of such right. (2) A breeder may authorise any person to produce, sell, market or otherwise deal with the variety registered under this Act subject to such limitations and conditions as may be specified by regulations. (3) Every authorisation under this section shall be in such form as may be specified by regulations. (4) Where an agent or a licensee referred to in sub-section (1) becomes entitled to produce, sell, market, distribute, import or export a variety, he shall apply in the prescribed manner and with the prescribed fees to the Registrar to register his title and the registrar shall, on receipt of application and on proof of title to his satisfaction, register him as an agent or a licensee, as the case may be, in respect of the variety for which he is entitled for such right, and shall cause particulars of such entitlement and conditions or restrictions, if any, subject to which such entitlement is made, to be entered in the Register: Provided that when the validity of such entitlement is in dispute between the parties, the Registrar may refuse to register the entitlement and refer the matter in the prescribed manner to the Authority and withhold the registration of such entitlement until the right of the parties in dispute so referred to has been determined by the Authority. (5) The Registrar shall issue a certificate of registration under sub-section (4) to the application after such registration and shall enter in the certificate the brief conditions of entitlement, if any, in the prescribed manner, and such certificate shall be the conclusive proof of such entitlement and the conditions or restriction thereof, if any. (6) Subject to any agreement subsisting between the parties, an agent or licensee of a right to a variety registered under sub-section (4) shall be entitled to call upon the breeder or his successor thereof to take proceedings to prevent infringement thereof, and if the breeder or his successor refuses or neglects to do so within three months after being so called upon, such registered agent or licensee may institute proceedings for infringement in his own name as if he were the breeder, making the breeder or his successor a defendant. (7) Notwithstanding anything contained in any other law, a breeder or his successor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings. (8) Nothing in this section shall confer on a registered agent or registered licensee of a variety any right to transfer such right further thereof. (9) Without prejudice to the registration under sub-section (4), the terms of registration— (a) may be varied by the Registrar as regards the variety in respect of which, or any condition or restriction subject to which, it has effect on receipt of an application in the prescribed manner of the registered breeder of such variety or his successor; (b) may be cancelled by the Registrar

on the application in the prescribed manner of the registered breeder of such variety or his successor or of the registered agent or registered licensee of such variety; (c) may be cancelled by the Registrar on the application in the prescribed manner of any person other than the breeder, his successor, the registered agent or the registered licensee on any of the following grounds, namely:— (i) that the breeder of a variety or his successor or the registered agent or registered licensee of such variety, misrepresented, or failed to disclose, some fact material to the application for registration under sub-section (4) which if accurately represented or disclosed would have justified the refusal of the application for registration of the registered agent or registered licensee; (ii) that the registration ought not to have effected having regard to the right vested in the applicant by virtue of a contract in the performance of which he is interested; (d) may be cancelled by the Registrar on the application in the prescribed manner of the breeder of a registered variety or his successor on the ground that any stipulation in the agreement between the registered agent or the registered licensee, as the case may be, and such breeder or his successor regarding the variety for which such agent or licensee is registered is not being enforced or is not being complied with; (e) may be cancelled by the registrar on the application of any person in the prescribed manner on the ground that the variety relating to the registration is no longer existing. (10) The registrar shall issue notice in the prescribed manner of' every application under this section to the registered breeder of a variety or his successor and to each registered agent or registered licensee (not being the applicant) of such variety. (11) The Registrar shall, before making any order under sub-section (9) forward the application made in that behalf along with any objection received by any party after notice under sub-section (10) for the consideration of the Authority, and the Authority may, after making such inquiry as it thinks fit, issue such directions to the Registrar as it thinks fit and the Registrar shall dispose of the application in accordance with such directions.

Kochupillai M, The Indian PPV &FR Act, 2001: Historical and Implementation Perspective, Journal of Intellectual Property Rights Vol 16, March 2011, pp 88-101.

47. Power of Authority to make order for compulsory licence in certain circumstances.—(1) At any time, after the expiry of three years from the date of issue of a certificate of registration of a variety, any person interested may make an application to the Authority alleging that the reasonable requirements of the public for seed or other propagating material of the variety have not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price and pray for the grant of a compulsory licence to undertake production, distribution and sale of the seed or other propagating material of that variety. (2) Every application under sub-section (1) shall contain a statement of the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based. (3) The Authority, after consultation with Central Government, and if satisfied after giving an opportunity to the breeder of such variety, to file opposition and after hearing the parties, on the issue that the reasonable requirements of the public with respect to the variety have not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price, may order such breeder to grant a licence to the applicant upon such terms and conditions as it may deem fit and send a copy of such order to the Registrar to register the title of such applicant as licensee under sub-section (4) of section 28 on payment of such fees by the applicant as is referred to in that sub-section.

Association of Biotechnology Led Enterprises & others v. Union of India, W.P.Nos.15173-15174/2016

Pic Courtesy: Wikimedia Commons

Cite as (OSCOLA, 5th ed.): Khushbu Kumari, 'The anomaly in the policies regarding the pricing of cotton seeds in India' (*The Innovation Brief*, 14 May 2019) <https://innovationbrief.nludelhi.ac.in/essays/the-anomaly-in-the-policies-regarding-the-pricing-of-cotton-seeds-in> accessed 18 November 2026.

The views expressed are personal. The author would like to thank Mr. Yogesh Pai, co-director, CIIPC, for his valuable comments.

The opinions expressed in the Blog are personal to the author/writer. The University does not subscribe to the views expressed in the article / blog and does not take any responsibility for the same.

Published by the Centre for Innovation, Intellectual Property and Competition, National Law University Delhi. Read online at https://innovationbrief.nludelhi.ac.in/essays/the-anomaly-in-the-policies-regarding-the-pricing-of-cotton-seeds-in.