

**Intellectual Property Rights, And Competition Law**  
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**Lecture – 37**  
**IP Licensing and Competition Law (Contd.)**

Hello all. In connection to our previous discussion on various facets of IP Licensing and the role of Indian Competition Commission, we will extend our today's discussion where we will look into how the IP licensing criteria can lead to anti-competitive behaviour? And how they are looked from the point of view of competition commission of India?

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In today's class, we would look into one of the interesting case in the Indian competition law area which is the *Monsanto case* where various clauses of the agreement lead to anti-competitive behaviour and not only private seed companies but the ministry of agriculture also got aggrieved by the behaviour and filed a complaint to the competition commission of India. So, let us discuss this case in length to understand the intricacies.

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**The Monsanto Case**  
**Reference Case No. 2 of 2015 & Case No. 107 of 2015**

- MIU was the first company in the world to develop and commercialize Bt-cotton technology, namely, Bollgard-I i.e. BG-1, also known as EVENT 531, in 1992.
- The Monsanto's famous Bt technology involves the introgression of certain genes of *Bacillus thuringiensis* (Bt), a naturally occurring bacteria, into the genome of cotton seeds in order to ensure the resulting crop's resistance to certain lepidopteran pest species.
- In specific, Monsanto's technology is known to act against the Bollworm which is the most atrocious of pests that attacks and destroys the cotton crop.






Before going into the case, let me tell you a little bit about the company as well as the technology involved herein. So, as you all might be aware of this Monsanto is one of the popular companies. Monsanto incorporation of United States was the first company in the world to develop as well as commercialise one of the Bt cotton variety. This is biotechnologically derived cotton variety which is resistant to a kind of lepidopteran pest which is popularly known as *the Bollworm*.

The Bt cotton involves a technology, it contains a gene from a particular bacterium which is known as *Bacillus thuringiensis* and this gene segment which is incorporated into the cotton seeds imparts a resistant to lepidopteran pest or the bollworm. Earlier one of the ways to prevent the plant from bollworms was to apply pesticides which is a polluting way, it may lead to environmental pollution, but the use of Bt cotton not only is a environmental friendly way, but also very much effective, it prevents the cotton crops from the attack of bollworm.

So, Monsanto developed this Bt cotton variety first in the year 1992 and this variety was known as BG-1, also known as the EVENT 531 variety. This was developed in United States. Later on, this technology has been sub-licensed or licensed to many of the company across the world.

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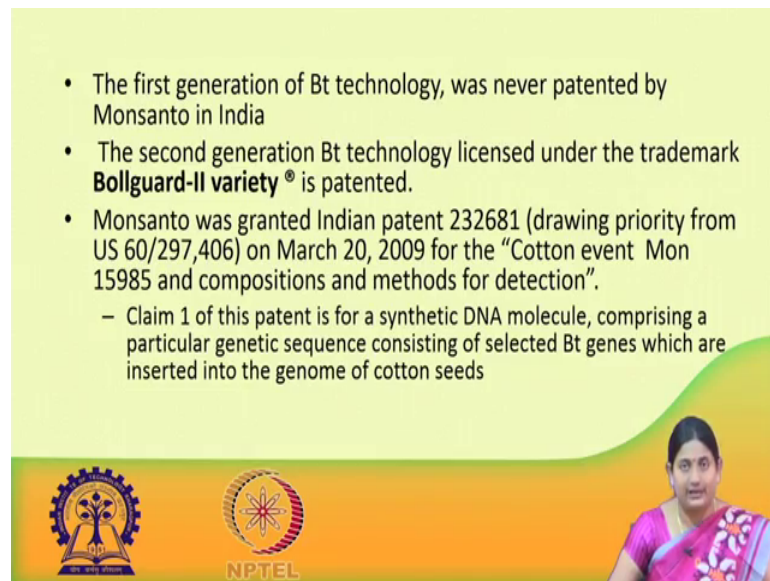
- Later on, second generation cotton technology consisting of two genes of Bt, namely, Cry1Ac and Cry2Ab, called Bollgard – II (BG-II), also known as EVENT 15985, was developed for a certain type of Bollworm, namely, ‘Pink Bollworm’, became resistant to BG-I.
- The use of this technology reduces or maybe in some cases even eliminates the pesticides that are required to be used by farmers.



BG-I was the first generation of Bt cotton variety which imparted resistant to Bollworms. Later on, a second generation Bt cotton was also developed by Monsanto which involved 2 genes Cry1Ac or Cry2Ab and the variety is known as BG-II or the Bollgard-2 variety and by the other name EVENT 15985. It protects the plant against another Bollworm which is known as the ‘Pink Bollworm’ which has gradually become resistant to BG-I variety.

So, the use of Bt cotton has resulted in the reduction as well as in some cases complete elimination of the use of pesticides by farmers and has gained quite a popularity amongst the farmers.

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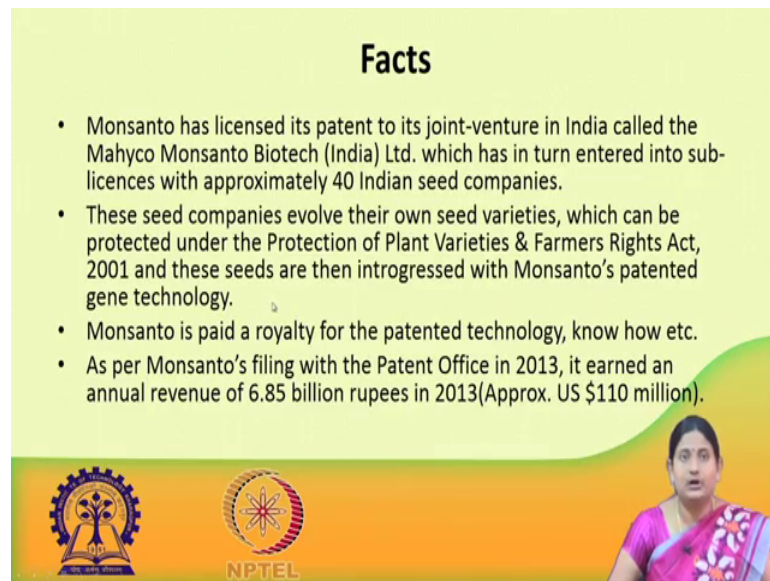
- The first generation of Bt technology, was never patented by Monsanto in India
- The second generation Bt technology licensed under the trademark **Bollguard-II variety**® is patented.
- Monsanto was granted Indian patent 232681 (drawing priority from US 60/297,406) on March 20, 2009 for the “Cotton event Mon 15985 and compositions and methods for detection”.
  - Claim 1 of this patent is for a synthetic DNA molecule, comprising a particular genetic sequence consisting of selected Bt genes which are inserted into the genome of cotton seeds

So, if you look into the technology, since it was developed in the United States, the technology for BG-I was never patented in India. However, the second generation Bt technology, which was licensed under the trademark of Bollgard-2 variety was patented in India and Monsanto was granted Indian patent number 232681. You may find this patent in the Indian patent website. It draws a priority from its US application and it was granted in the year 2009 in India.

One of the claims read as “the patent claimed for a synthetic DNA molecule comprising a particular genetic sequence consisting of a selected Bt genes which are inserted into the genome of cotton seeds”. It has claimed a genetic sequence which is isolated from the *Bacillus thuringiensis* and which is inserted into the cotton seed variety produced across the world. So, it claimed the gene sequence.

So, as you know patent gives a monopoly over a technology. So, any company who is entering into the licensing agreement with the Monsanto company and willing to insert this gene in the cotton variety to make it resistant to the Bollworms will be regulated under that terms and condition of the licensing agreement.

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**Facts**

- Monsanto has licensed its patent to its joint-venture in India called the Mahyco Monsanto Biotech (India) Ltd. which has in turn entered into sub-licences with approximately 40 Indian seed companies.
- These seed companies evolve their own seed varieties, which can be protected under the Protection of Plant Varieties & Farmers Rights Act, 2001 and these seeds are then introgressed with Monsanto's patented gene technology.
- Monsanto is paid a royalty for the patented technology, know how etc.
- As per Monsanto's filing with the Patent Office in 2013, it earned an annual revenue of 6.85 billion rupees in 2013 (Approx. US \$110 million).

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These were the basic facts about the technology, now coming back to the facts of the case, Monsanto incorporation of the United State had licensed its patent to its Indian joint venture *Mahyco Monsanto Biotech India Limited* or MMBL. Monsanto licensed its technology to its joint venture *Mahyco Monsanto Biotech Limited* and then Mahyco Monsanto Biotechnology limited entered into sub-licensing agreements with other seed companies.

So, there were nearly 40 seeds companies which were in sub-licensing with *Mahyco Monsanto Biotech Limited*. The 40 seed companies were producing their own seeds, own cotton variety, which may be protected under the plant variety protection act. In those varieties they were inserting the technology using technology patented by Monsanto, to insert the particular Bt gene which gave resistance from the pest.

So, for the use of the technology, Monsanto was paid certain amount of royalty, not only for the patented technology, but also the associated know-hows and trade secrets involved. Monsanto was getting certain amounts of royalty and in the declaration filed by Monsanto in the year 2013 it has shown an earning of annual revenue of 6.85 billion rupees in the year 2013 which comes to approximate 110 million US dollars. The technology was quite popular and many of the seed companies are using this technology, according to the data submitted by Monsanto.

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**Issues with high pricing by Monsanto**

- Cotton Seeds Price (Control) Order (CSPO), 2015- This Order derives its authority from the Essential Commodities Act, 1955 – controls fixing of maximum retail price
- The CSPO however makes it expressly clear that while the Government is fixing the maximum retail price of cotton seeds, “it shall also fix and regulate the seed value and license fee including royalty or trait value, if any, that constitute components of the Maximum Sale Price”.
- The “**Royalty (trait value)**” is defined as “the amount which the Licensor collects from the Licensee under the License Agreement for granting licence to GM Technology”.



The basic issue was the pricing of this technology. The Bt cotton technology which the Monsanto has patented and the charges for this technology were very high as per the complaint filed by various seed companies. As cotton is one of the essential crops and it is a part of the *Essential Commodity Act of 1955*, the price of the cotton seeds are controlled by *cotton seeds price control order of 2015*.


The procedure for fixing the maximum retail price is as per this order. It also makes it very clear that while the government is fixing the maximum retail price for cotton seed, it will also fix and regulate the seed value as well as the licensing fee including the royalty or the trait value. The licensing royalty or the trait value are parts of maximum retail price for any seed variety. So, now, the government has the power to fix the maximum sales value as well as the retail price as well as the royalty and the trait value.

The royalty or the trait value is defined as the amount which the licensor collects from the licensee under the licensing agreement for granting the license, for the corresponding technology. In this case it is the Bt technology or the genetic modification technology. So, the fees charged by Monsanto for this Bt technology were known as royalty or the trait value. The issue is with the pricing of this royalty or the trait value.

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### Issue before CCI

- Many Indian seed companies entered into sub-license agreement with MMBL for procuring its Bt cotton technology in consideration of an upfront one time non-refundable fee of Rs. 50 lakhs and recurring fee called as, i.e. 'Trait Value'.
- The 'Trait Value' is the estimated value for the trait of insect resistance conferred by the Bt gene technology.
- The trait value is determined by MMBL on the basis of Maximum Retail Price (MRP) of 450 gm seed packet in advance for each crop season.
- It is also stated that out of this trait value, some amount is disbursed as royalty to MIU and the royalty paid to Monsanto US by MMBL is a small portion (between 15-20%) of the Trait Value it collects.



In 2015 many seed companies, those which were in the sub-licensing agreement with *Mahyco Monsanto Biotech Limited company*, filed a complaint to CCI regarding the high prices charged by Indian joint venture of Monsanto. All these seed companies which entered into the sub-licensing agreement have procured the Bt cotton from Mahyco Monsanto with an upfront payment of 50 lakhs rupees, which is non-refundable as well as recurring fees also known as trait value.

All these companies were giving upfront 50 lakhs rupees non-refundable amount as well as additional trait value and the trait value was decided per packet of the seed source. At that time, one packet contained nearly 450 grams of seeds and Monsanto fixed the trait value on the 450 grams of seed packets. The way I mentioned earlier this trait value is the value for the technology.

Out of the total amount of trait value, which Mahyco Monsanto was charging from the sub-licensees, some amount was dispersed as royalty to Monsanto incorporation of US, the parent company but royalty paid to the Monsanto was very less, nearly 15 to 20 percent of the trait value. Rest of the money was used by MMBL.

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- The fixation of trait value has been a matter of dispute/litigation since 2005.
- It is alleged that in the year 2005, the trait value fixed by MMBL was Rs.1250/- per packet for BGI which led to high value of Bt cotton seeds manufactured using the said technology i.e. Rs.1700/- – Rs.1800/- per packet. This was allegedly very high in comparison to the price of non-Bt cotton seeds which were available for Rs.300/- per packet.

The pricing of trait value was not a concern which started in the year 2015. Since 2005 there were certain concerns regarding the pricing of trait value and there were certain disputes, litigations also for the same thing. In the year 2005 the trait value was decided to be 1250/- rupees per packet for 450 grams. It was decided by Mahyco Monsanto.

This high trait value lead to, the total price of one packet of seeds which contains nearly 450 grams of Bt cotton seeds to be, nearly around 1700/- to 1800/- in Indian rupees, whereas at that time the non-Bt cotton seeds were available for 300/- rupees. You can imagine the gap from 300(non-Bt) to 1700 to 1800 rupees (for BG-I variety or Bt cotton variety) only because they charged a licensing/trait value as 1250/- rupees per packet of the seed.



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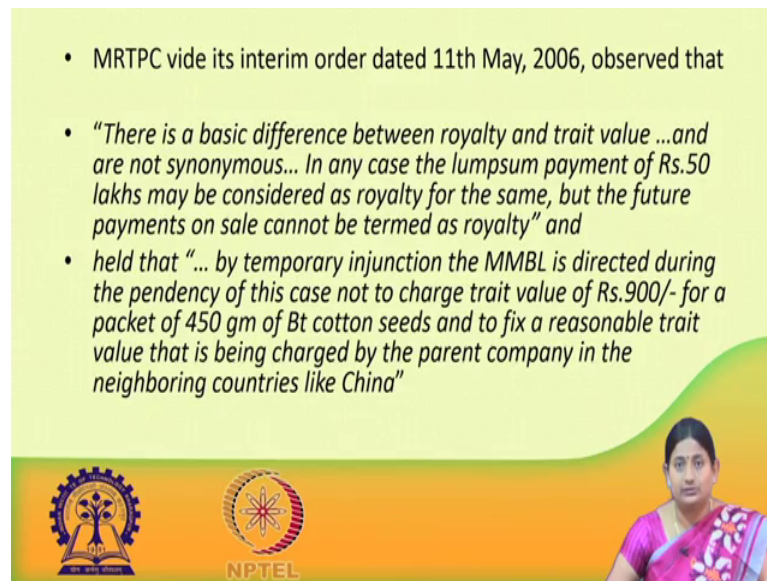
- The farmers association, Ryotu Sangham, Andhra Pradesh had made a representation before the erstwhile Monopolies and Restrictive Trade Practices Commission (MRTPC) on 30th August 2005 against MMBL.
- During the pendency of the matter before the erstwhile MRTPC, MMBL allegedly reduced the trait value of BG-I to Rs.900/- per packet.

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Aggrieved by this, the farmers association *Ryotu Sangham of Andhra Pradesh* made a representation to the Monopolies and Restrictive Trade Practices Commission, which at that time regulated the competition, there was no competition commission at that time and MRTP act was in force. The farmers association made a complaint to this commission under the MRTP Act in 2005 against Mahyco Monsanto.

The commission looked into the case and asked Mahyco Monsanto to reduce the price of BG-I from 1250/- to 900/- rupees per packet.

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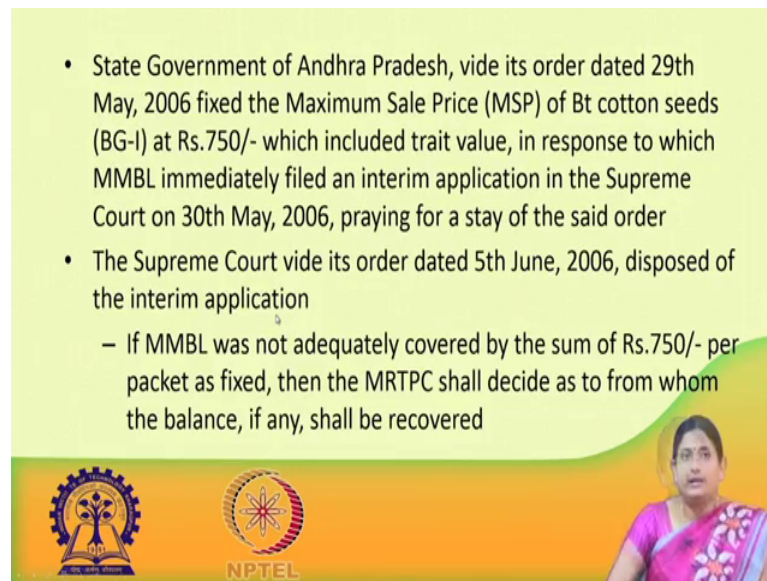
- MRTPC vide its interim order dated 11th May, 2006, observed that
- *“There is a basic difference between royalty and trait value ...and are not synonymous... In any case the lumpsum payment of Rs.50 lakhs may be considered as royalty for the same, but the future payments on sale cannot be termed as royalty” and*
- *held that “... by temporary injunction the MMBL is directed during the pendency of this case not to charge trait value of Rs.900/- for a packet of 450 gm of Bt cotton seeds and to fix a reasonable trait value that is being charged by the parent company in the neighboring countries like China”*

Through this order, MRTPC, in 2006, granted an order and it observed that “there is a basic difference between royalty and trait value and they are not synonymous, royalty and the trait values are different. In any case the lump sum payment of 50 lakh rupees may be considered as a royalty for the same, but the future payments on the sales cannot be termed as royalty.

As I said all these 40 company, gave upfront 50 lakhs rupees, and were giving every time certain royalty value as the number of seeds were sown or as the seeds were harvested. The Commission, by temporary injunction on Mahyco Monsanto Biotech Limited, directed them during the pendency of this case to not to charge the trait value more than 900 rupees for a packet of 450 grams of Bt cotton seeds and that they should fix a reasonable trait value, that is being charged by the parent company in other parts of the world like in China.

The Indian seed companies were arguing that Monsanto was charging very high trait value in comparison to our neighbouring countries like China. Prominent seed companies like *Nuziveeduseeds* and others were party to it and they complained about the high charges of Monsanto.

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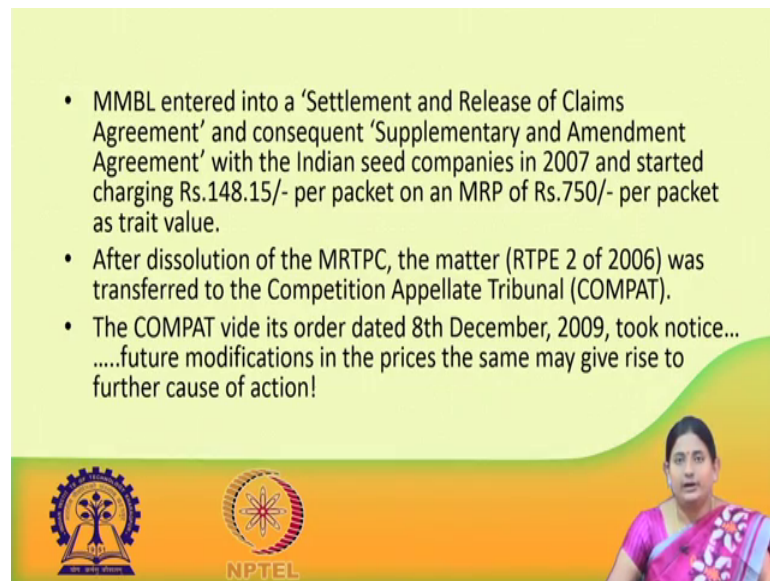
- State Government of Andhra Pradesh, vide its order dated 29th May, 2006 fixed the Maximum Sale Price (MSP) of Bt cotton seeds (BG-I) at Rs.750/- which included trait value, in response to which MMBL immediately filed an interim application in the Supreme Court on 30th May, 2006, praying for a stay of the said order
- The Supreme Court vide its order dated 5th June, 2006, disposed of the interim application
  - If MMBL was not adequately covered by the sum of Rs.750/- per packet as fixed, then the MRTPC shall decide as to from whom the balance, if any, shall be recovered

During that time, all the state governments were in power of fixing the retail prices or the trait value prices. The State government of Andhra Pradesh also fixed the trait values. The state government of Andhra Pradesh, through its order in 2006, fixed the maximum sales price of Bt cotton seeds to 750/- rupees which included the trait value. This was too low than the price which MMBL had fixed.

MMPL filed an interim injunction and gave an interim application to supreme court of India and it prayed for a stay on this order of the state government of Andhra Pradesh. Supreme court heard the prayer, but supreme court said that if MMBL was not adequately covered by the sum of the 750 rupees per packet as fixed then MRTPC shall decide from whom the balance (if any) shall be recovered.

It is not that MMBL will be in power to fix whatever amount it wants to fix, MRTPC will come into picture and it will fix the amount and it will decide from where it will adjust the amounts or recover the amount.

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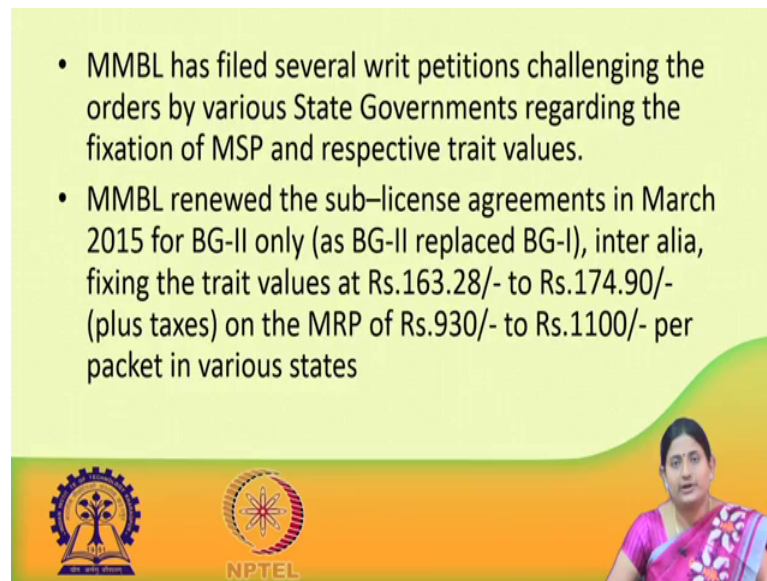


- MMBL entered into a 'Settlement and Release of Claims Agreement' and consequent 'Supplementary and Amendment Agreement' with the Indian seed companies in 2007 and started charging Rs.148.15/- per packet on an MRP of Rs.750/- per packet as trait value.
- After dissolution of the MRTPC, the matter (RTPE 2 of 2006) was transferred to the Competition Appellate Tribunal (COMPAT).
- The COMPAT vide its order dated 8th December, 2009, took notice...  
.....future modifications in the prices the same may give rise to further cause of action!

After this MMBL entered into number of settlement and release of claim agreements and consequently entered into supplementary and amendment agreement with the seed companies in 2007 and started charging nearly 148/- rupees per packet and MRP of 750/- per packet as trait value. The conditions were modified a little bit and in 2007 they modified the agreement and charged trait value of 148.15/- rupees on a packet of 750/- rupees.

During this time, competition act was passed and the case was transferred to competition appellate tribunal or COMPAT. Now the competition appellate tribunal through its order in 2009 gave a notice allowing one time change in the pricing of the trait value, however, it said that any further modification in the prices may give rise to further cause of action. So, basically it cautioned MMBL for further modification in the prices and if there are any necessary modification they should inform the competition appellate tribunal.

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- MMBL has filed several writ petitions challenging the orders by various State Governments regarding the fixation of MSP and respective trait values.
- MMBL renewed the sub–license agreements in March 2015 for BG-II only (as BG-II replaced BG-I), inter alia, fixing the trait values at Rs.163.28/- to Rs.174.90/- (plus taxes) on the MRP of Rs.930/- to Rs.1100/- per packet in various states

Those were the series of events which were happening at the backdrop of this latest complaint of 2015. The problem had started in 2005 itself. So, during this time Mahyco Monsanto Biotech Limited has filed a number of writ petitions challenging the orders by various state governments that fixed the price of the trait value and MRP for example Gujarat, Andhra Pradesh, Uttar Pradesh, all the state governments had fixed the MRP, MSP at different level.

MMBL filed writ petition challenging the fixation of those values and respective trait values. During that time, it renewed the sub-licensing agreements in march 2015 for the BG-II variety. For the BG-II, the trait value prices were a little higher. The trait value was increased to 274/- on the MRP of 1100/- per packet because during 2015 BG-1 became a little bit obsolete. BG-II substituted BG-I variety and for the BG-II variety they were charging a little bit higher price.

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**Cases in Delhi and Mumbai High Court**

- Monsanto India's joint venture MMBL has filed an arbitration petition against 8 domestic seed companies, which account for 65% of cotton seed produced in India, for the alleged breach of contracts resulting in around Rs 400 crore payment dues.
- In response, the seed companies have filed a counter affidavit, arguing among other things, that they have paid more than Rs 1,300 crore to MMBL over and above the government stipulated trait value since the year 2010 and they want that money back.

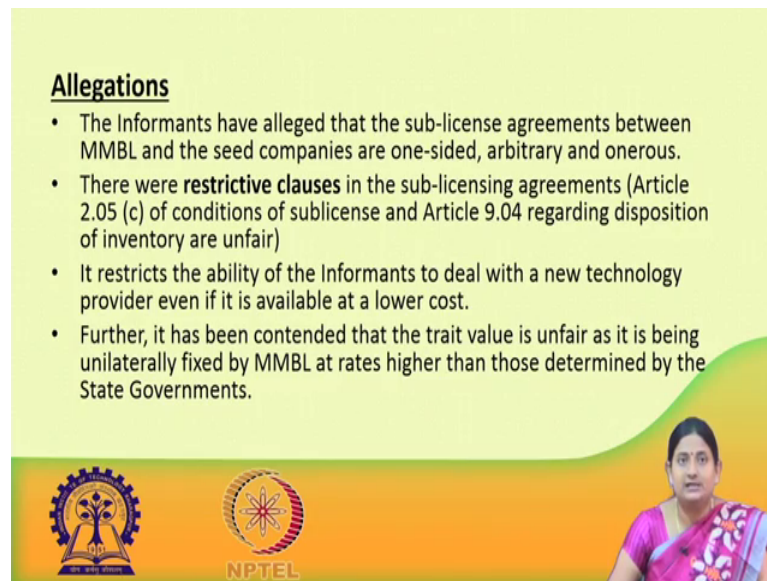
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Since the seed companies wanted to sell those Bt cotton varieties to the farmers, they had entered into the sub-licensing agreement with Mahyco Monsanto, but since many disputes were going on, Mahyco Monsanto also filed for arbitration petition against 8 domestic seed companies whose market were nearly 65 percent of the total cotton seed market in India.

And it is alleged nearly 400/- crores rupees were due from these companies for the Bt cotton technology which they have taken from Mahyco Monsanto.

In response, the Indian companies also filed a counter affidavit arguing that they have already paid more than 1300/- crore rupees to MMBL over which they have also given the trait value which was higher than the fixed trait value by various state governments. From 2010 onwards, they want their money back instead of paying additional 400/- crores to MMBL. You may understand the nature of litigation going on between these parties.

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**Allegations**

- The Informants have alleged that the sub-license agreements between MMBL and the seed companies are one-sided, arbitrary and onerous.
- There were **restrictive clauses** in the sub-licensing agreements (Article 2.05 (c) of conditions of sublicense and Article 9.04 regarding disposition of inventory are unfair)
- It restricts the ability of the Informants to deal with a new technology provider even if it is available at a lower cost.
- Further, it has been contended that the trait value is unfair as it is being unilaterally fixed by MMBL at rates higher than those determined by the State Governments.

In a counter affidavit, the seed companies alleged that the sub-licensing agreements between MMBL and the seed companies are one sided, arbitrary and onerous, and they had to abide by their condition because MMBL was threatening to terminate the license and not give seeds to the company. The Indian seed companies alleged that there were restrictive clauses in the licensing agreement and it restricts the ability of the Indian seed companies or the informants to deal with new technology even if it is available on a lower cost.

So, there were certain restrictive conditions in the licensing agreement which did not allow the Indian seed companies to get any new technology even though it was available at a lower price than Monsanto. They also contended that the trait value is very much unfair and it is being unilaterally fixed by MMBL which is higher than those determined by various state governments.

They alleged Mahyco Monsanto is charging high prices, putting restrictive clauses. Among restrictive clauses: they were not allowed to take any new technology even if it is available at lower prices. Further if they were taking any seeds from any competitor they have to inform Mahyco Monsanto within 25 days or nearly 1 month and if they were found in breach of the contract then they have to destroy all the seeds within 2 years of time.

So, the conditions were very much restrictive, not suitable for them and they were not allowed to take any new technology. So, as per the competition act, as we have already discussed, anything which is contrary to or which stops further innovation like higher price setting practices are in general considered anti-competitive. However, let us see how the competition commission had looked into this matter.

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### Concerns from Ministry of Agriculture

- a. Abuse of dominant position by charging unreasonably high trait fees for Bt cotton seeds under Section 4(2)(a) of the Act;
- b. Exploitation of the permissions given by the Government to market Bt cotton technology by creating a monopoly through restrictive agreements for unjust enrichment by charging high trait value from its licensees and ultimately from farmers;
- c. Its sub-licensing agreements with the Indian seed manufacturing companies are anti-competitive under Section 3(4) of the Act.

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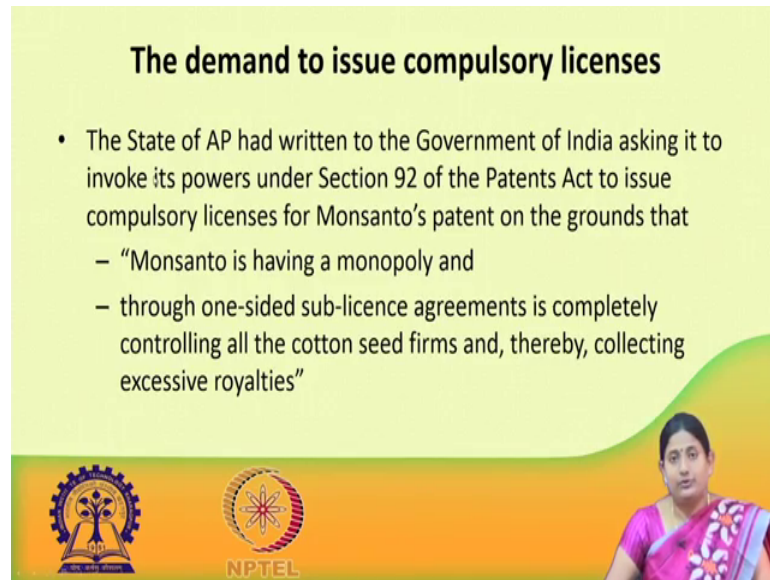
The seed companies were one party, at the same time many of the private farmer association, NGOs had shown their concern to the ministry of agriculture. The ministry of agriculture showed its concern in three points. First: the abuse of dominant position of Mahyco Monsanto by charging unreasonably high fees for Bt cotton seeds as per Section 4 point sub section (2) of the act is an abuse of dominant position.

Second: it is exploitation of the permissions given by the government to market Bt cotton technology by creating monopoly through restrictive agreements for unjust enrichment by charging high trait value from its licensee and ultimately from the farmers. Any permission given by a state body or a central body is to improve the societal conditions so that farmers can get variety at cheaper price and new varieties can be introduced, so that it will be helpful for the farmers as well as the society, but Monsanto was showing a monopolistic attitude and it was charging high prices from the farmers involved.



Third concern was regarding its sub-licensing agreements with the Indian seed manufacturing companies which were considered to be anti-competitive as per the provision of subsection (4) of Section 3 of this act.

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**The demand to issue compulsory licenses**

- The State of AP had written to the Government of India asking it to invoke its powers under Section 92 of the Patents Act to issue compulsory licenses for Monsanto's patent on the grounds that
  - "Monsanto is having a monopoly and
  - through one-sided sub-licence agreements is completely controlling all the cotton seed firms and, thereby, collecting excessive royalties"

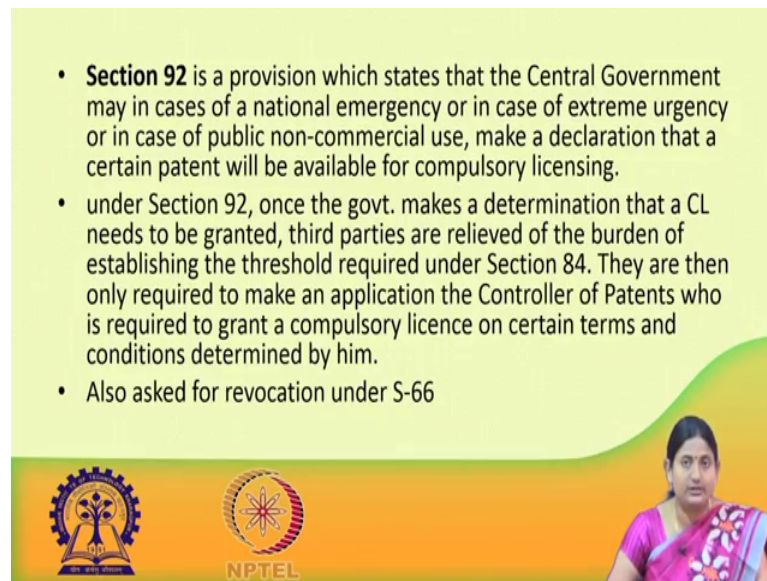
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This was one side of the story wherein objections and complaints were being placed before the competition commission of India. The other way round, there is the state of Andhra Pradesh which is the home to big seed companies as well as a major seed producing market.

So, the state of Andhra Pradesh had written to the government of India asking its power to invoke section 92 of the patents act. Section 92 of the patent act is for issuing compulsory licenses. The state of Andhra Pradesh asked the government of India to issue a compulsory license for Monsanto's patents on the ground that Monsanto is showing a monopolistic behaviour and through one sided sub-licensing agreement is completely controlling the cotton seed firms and thereby collecting excessive royalties.

Under this provision the state government asked Indian government to issue compulsory license for the patented technology of Monsanto.

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- **Section 92** is a provision which states that the Central Government may in cases of a national emergency or in case of extreme urgency or in case of public non-commercial use, make a declaration that a certain patent will be available for compulsory licensing.
- under Section 92, once the govt. makes a determination that a CL needs to be granted, third parties are relieved of the burden of establishing the threshold required under Section 84. They are then only required to make an application the Controller of Patents who is required to grant a compulsory licence on certain terms and conditions determined by him.
- Also asked for revocation under S-66

As you know section 84 is the provision for compulsory licensing in case of non-working of a patent or certain other grounds. In those cases, any person can ask for compulsory licensing, but the burden of proof is on the person, who is asking for it, to prove the substantial grounds that the patent is not worked in India or its not available at reasonable prices or other conditions.

But Section 92 of the patent act is a provision which states that the central government in case of national emergencies or in case of extreme urgencies or in case of public non-commercial use can make a declaration that a certain patent will be available for compulsory licensing. So, the benefit of this section is that the burden of proof is not on the applicant.

The parties are relieved from the burden of establishing that the threshold required under Section 84 is not met and they are only required to make an application to the controller of the patents who is required to grant the compulsory license on certain terms and condition. So since for the technology the trait value was very high and Monsanto was showing monopolistic behaviour the state government of Andhra Pradesh asked to invoke Section 92.

They further requested, if possible, to revoke the patent under Section 66. These were the plea to the controller general of patents, but we are more concerned here about the competition commission of India.

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**Abusive conduct of MMBL**

- The Informants are primarily aggrieved by the alleged abusive conduct of MMBL on account of
  - imposition of unfair conditions in the sub-license agreements,
  - charging of unfair price,
  - discriminatory treatment,
  - limiting and restriction of technical and scientific development relating to Bt cotton technology and cotton seeds market,
  - denial of market access and leveraging of dominant position in the Bt cotton technology market to protect cotton seeds market
  - violation of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b), 4(2)(c) and 4(2)(e) of the Act.
  - Further, it has been stated that sub-license agreements between the Informants and MMBL contravene Section 3(1) and 3(4) of the Act.

The slide features the logos of the Department of Biotechnology (DBT) and NPTEL (National Programme on Technology Enhanced Learning) at the bottom left, and a small inset image of a woman in a pink and white sari on the right side.

All these complaints from seed companies were regarding the abusive conduct of *Mahyco Monsanto Biotech Limited*. The abusive conduct were on the accounts of imposition of unfair conditions in the sub-licensing agreements, we discussed about the restrictive condition that they cannot take any new technology, cannot interact with other competitive companies etcetera, these were restrictive conditions.

Second: charging unfair prices, third: discriminatory treatment such as the different pricing of trait value in different countries. Fourth one is limiting and restriction of the technical and scientific development related to Bt cotton technology and the cotton seed markets. Next denial of market access and leveraging of the dominant position in Bt cotton technology market to protect the cotton seed which are in violation of Section 4 of the act and it was further stated that the sub-licensing agreements between the seed companies and Mahyco Monsanto Biotech Limited were in contravention of Section 3 subsection (1) and subsection (4) of the act. So, these were the basic allegations of seed companies against Mahyco Monsanto.

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**Relevant Product Market**

- The Commission is of the view that the Bt cotton technology, by virtue of its effectiveness and characteristics, appears to be a distinct product
- Since the ultimate aim of choosing Bt cotton technology is to protect the cotton crop from the pests (Bollworm) in an effective, non-polluting manner through genetic intervention, all the Bt cotton technologies, irrespective of the gene constituents, are considered as substitutable.
- Thus, the relevant upstream product market in the present case appears to be market for 'provision of Bt cotton technology.'





So, what is the relevant product market in this case? The commission found that the Bt cotton technology by virtue of its effectiveness and characteristics is a distinct product, because by the use of this technology people are not using harmful chemicals or pollutants or pesticides.

The aim of choosing Bt cotton technology is to protect the cotton crops from pest i.e. the Bollworm and in an effective and non-polluting manner by using the genetic variants. The upstream product market in this case was considered to be the provision for Bt cotton technology.

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### Relevant Geographic Market

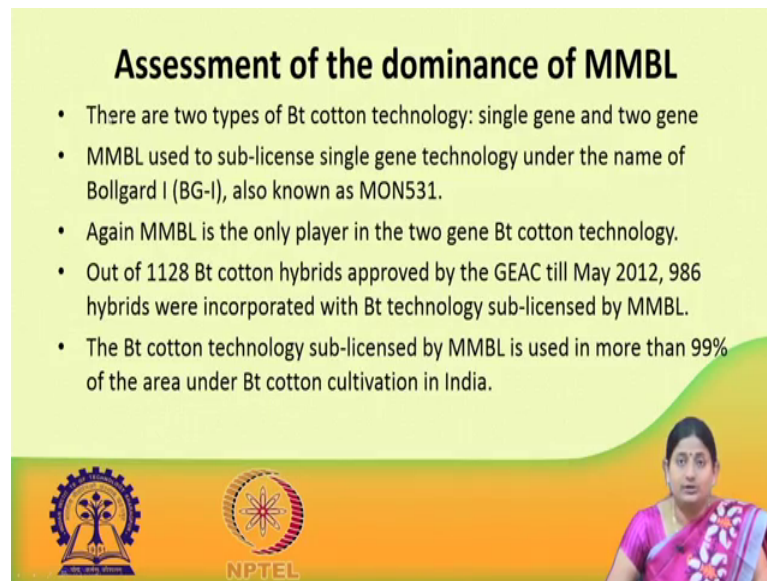
- As per MMBL's website, BG-I and BG-II cotton technologies have been approved for commercialization in India from 2002 and 2006 respectively.
- Therefore, the Commission observes that the conditions of competition throughout India for the aforesaid relevant product market are homogenous and thus, the relevant geographic market in the present case would be 'India'.
- The Commission is of the view that there also exists a downstream relevant market i.e. market for 'manufacture and sale of Bt cotton seeds in India' connected with the upstream relevant market i.e. market for 'provision of Bt cotton technology in India'



And the relevant geographical market was considered to be India because in India any genetically modified plant is approved by GEAC committee, *Genetic Engineering Approval Committee* which basically looks into all the field trial data, whether it is harmful or not, what kind of results is it giving and this process takes a long period of about 5 to 7 years.

So, only after GEAC's approval any plant, seed variety, genetically modified seed can be cropped in India. On the Mahyco Monsanto's website, they have said that they got approval for BG-I and BG-II variety from GEAC in the year 2002 and 2006 respectively. Therefore the relevant market is India, because the market started from 2002 itself. So, relevant product market was the upstream market for Bt cotton technology.

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**Assessment of the dominance of MMBL**

- There are two types of Bt cotton technology: single gene and two gene
- MMBL used to sub-license single gene technology under the name of Bollgard I (BG-I), also known as MON531.
- Again MMBL is the only player in the two gene Bt cotton technology.
- Out of 1128 Bt cotton hybrids approved by the GEAC till May 2012, 986 hybrids were incorporated with Bt technology sub-licensed by MMBL.
- The Bt cotton technology sub-licensed by MMBL is used in more than 99% of the area under Bt cotton cultivation in India.

The slide features a green and yellow background. At the bottom, there are logos for IIT Bombay and NPTEL, along with a small image of a woman in a pink and white sari.

Now coming to dominance and abuse of dominance. First they have to establish whether Monsanto is the dominant player or not because the relevant product market is the upstream genetically modified Bt cotton technology. There were two types of cotton technology, BG-I and BG-II, BG-I involved 1 gene modification and 1 gene and BG-II involved 2 genes.


After a detailed analysis, it showed that Mahyco Monsanto was the only player in 2 gene Bt cotton technology. In 1 gene Bt cotton technology there were some other research institute and companies involved, but Mahyco Monsanto had a high market share, but for 2 gene technology Mahyco Monsanto was the only company. Out of the 1128 Bt cotton hybrids approved by GEAC in the year 2012, 986 hybrids were incorporated with Bt technologies sub-license given by the Mahyco Monsanto.

Nearly 99 percent of the market was under Mahyco Monsanto's control. So, from this it was ascertained that Mahyco Monsanto Biotech Limited holds a dominant position and the relevant product market was decided, relevant geographical market was also decided and it was held that Mahyco Monsanto is a dominant player.

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### Commissions View

- Commission holds that the conduct of MMBL prima facie appears to be in violation of Section 4 of the Act.
- The agreements entered by MMBL with sub-licensees appear to be causing appreciable adverse effect on competition in Bt cotton technology market in India, in terms of Section 3(4) r/w Section 19(3) of the Act
- Commission held that there exists a **prima facie case of contravention of the provisions of Section 3(4) and Section 4** of the Act and it is a fit case for investigation by the DG.



Now coming to the abusive practices. The commission held that the conduct of Mahyco Monsanto prima facie appeared to be in violation of Section 4 and the agreements entered by Mahyco Monsanto as well as sub-licensing during this agreement were found to have appreciable adverse effect in the competition in India, because they were the only company who were selling Bt cotton-II varieties.

So, if somebody was not abiding by the royalty rates or the restrictive conditions then Mahyco Monsanto was not going to give the seeds any further and they would have to destroy all the seeds which they have produced so far which is anti-competitive, it would not be easy for a farmer to destroy the seeds or the crops and they cannot do any research and development on the Bt cotton technology.

So, prima facie with all these investigations, Competition Commission of India established that there is a contravention of the provision of the Section 3 subsection (4) as well as section 4 of the act and it is a fit case for investigation by the Director General.

So, this is one of the important case where we can see that restrictive condition in a licensing agreement and abusive behaviour by a dominant player may lead to anti-competitive effect. So, we will continue our discussion further on the various IP licensing and Indian competition act in the next classes. Stay tuned. Thank you so much.