

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.07.2019

+ **W.P.(C) 6470/2013 & CM No.14085/2013**

PIONEER OVERSEAS CORPORATION Petitioner

versus

**CHAIRPERSON, PROTECTION OF PLANT VARIETIES
AND FARMERS RIGHTS AND ORS** Respondents

AND

+ **W.P.(C) 6208/2014 & CM No.15019/2014**

PIONEER OVERSEAS CORPORATION Petitioner

versus

UNION OF INDIA & ORS Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Praveen Anand, Mr Archana Shankar, Ms Geetanjali Visvanathan, Ms Neeti Nelson, Ms Asavani Jain and Mr Priyanks Dubey, Advocates.

For the Respondents: Mr Kirtiman Singh, CGSC with Mr Prateek Dhanda, Mr Waize Ali Noor, Mr Parth Semwal and Ms Shruti Dutt, Advocates for R-1 and R-3.

Mr Jayant Bhushan, Sr. Advocate with Mr Ahishek Saket, Mr Manish Madhukar, Ms Shabana Farah, Mr Rahul Duney, Mr Ketan Paul, Mr Tushar Bhushan, Ms Chitral and Mr Pranav, Advocates for R-2/Kaveri Seeds.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'Pioneer') is a wholly owned subsidiary of Pioneer Hi-Bred International Inc., company incorporated in United States of America. Pioneer claims that it is involved in the business of research, development, breeding, production and marketing of plant varieties since the year 1926. Respondent no.2 (Kaveri Seeds Limited – hereafter 'Kaveri') is also involved in the business of research, development, breeding of seeds and plant varieties.

2. The controversy involved in the present petitions relates to the acceptance of Kaveri's application for registration of a variety of maize, referred to as KMH50 under the Protection of Plant Varieties and Farmers' Rights Act, 2001 (hereafter 'the Act'). Pioneer claims that KMH50 is identical/similar to its variety of maize referred to as 30V92. Pioneer has also filed an application for registration of 30V92 under the Act. Pioneer had filed an opposition to Kaveri's application for registration of KMH50 under the Act.

3. Pioneer has also filed an application with Protection of Plant Varieties and Farmers' Rights Authority (hereafter 'the Authority') under Section 24(5) of the Act, *inter alia*, claiming that KMH50 was identical to 30V92 and the two varieties are one and the same and further

alleging that Kaveri had misappropriated the germplasm of 30V92 under the denomination KMH50. Pioneer had also filed an application for conducting special test (DNA Test) for determining the genetic profile of KMH50 and 30V92 in support of its claim that Kaveri was abusing the provisions of the Act.

4. Pioneer's application for conducting special test was rejected by the Registrar, Protection of Plant Varieties and Farmers' Rights Authority (hereafter 'Registrar') by an order dated 27.08.2013 on the sole ground that the two varieties of maize (KMH50 and 30V92) were found to conform to the criteria of distinctiveness, uniformity and stability pursuant to the tests conducted in this regard (hereafter 'DUS'). According to the Registrar, a special test as sought for by Pioneer was permissible only if DUS test had failed; that is, the test failed to establish that the plant varieties conform to the DUS criteria. Since, the Authority was of the view that the DUS test was successful, it rejected the Pioneer's application for conducting special test.

5. The said order dated 27th August, 2013 is impugned by Pioneer in W.P.(C) 6470/2013. Pioneer also impugns a letter dated 24th June, 2013 sent by the Registrar to the Government of India stating that both the varieties – Pioneer's 30V92 and Kaveri's KMH50 – are distinct and are eligible for registration under the Act.

6. Pioneer also impugns an order dated 9th September, 2014, whereby its opposition to Kaveri's application (application no. E2ZM40916 – KMH50) for registration of KMH50 was closed and

Kaveri's variety KMH50 was directed to be registered subject to satisfying other conditions. The said order is impugned in W.P.(C) 6028/2014. The orders dated 9th September, 2014 and 27th August, 2013 are hereby referred to as the 'impugned orders' and the letter dated 24th June, 2013 is referred to as the impugned letter.

Factual Background

7. On 22nd August, 2007, Pioneer filed an application or registration of variety of maize bearing denomination 30V92 as an extant variety. On 28th January, 2009, Kaveri filed an application (application no. E2ZM40916 – KMH50) for registration of a variety of maize bearing the denomination KMH50. Kaveri's application was advertised by the Authority on 3rd May, 2010. Pioneer's application was also advertised with the corrigendum on 1st April, 2011.

7.1 Pioneer claims that it was informed about the similarity between its variety and KMH50 by the Manager of PHI Seeds Limited, a wholly owned subsidiary of Pioneer Overseas Corporation and the Senior Research Associate of Pioneer Overseas Corporation who had visited the DUS Test Centre at Rajendernagar, Andhra Pradesh on 7th October, 2010 in connection with another variety bearing denomination 30B11. It is claimed that during the said visit, the said employees had observed maize plants being grown at DUS Test Centre, which were similar to Pioneer's variety 30V92. This led Pioneer to make further enquiries which revealed that KMH50 had been advertised in the official journal on 3rd May, 2010. Pioneer alleged that the pictures provided in the

journal were inadequate and insufficient for any meaningful comparison.

7.2 Thereafter, on 18th October, 2010, Pioneer had sought full passport data with regard to Kaveri's application for registration of KMH50.

7.3 On 2nd December, 2010, Pioneer sought extension of time to file opposition to grant of registration of KMH50 in favour of Kaveri. This application was allowed by the Registrar of Variety by an order dated 15th July, 2011 and the time for filing the notice of opposition was extended from 21st September, 2010 to 31st December, 2010. In the meanwhile, the Pioneer had filed its notice of opposition on 3rd December, 2010, which was forwarded by the Authority to Kaveri under the cover of its letter dated 22nd July, 2011.

7.4 Kaveri received the said notice of opposition on 29th July, 2011. Being aggrieved by the order dated 15th July, 2011 granting extension of time for filing the opposition, Kaveri filed a writ petition (being W.P.(C) 6819/2011) before this Court impugning the order dated 15th July, 2011. On 19th September, 2011, this Court passed an *ad interim* order in the aforesaid writ petition staying further proceedings before the Authority till the next date of hearing. However, this Court also directed that Kaveri would not claim registration of plant variety in its favour and shall not take advantage of its application for registration, as the proceedings in this regard had been stayed. Thus, by virtue of the said order, Kaveri was precluded from claiming that its application had

been accepted and KMH50 was deemed to be registered in its favour by efflux of time.

7.5 On 8th April 2011, Pioneer filed an application under Section 24(5) of the Act, *inter alia*, praying that appropriate directions be issued to protect the interest of Pioneer and Kaveri's application for registration of KMH50 be rejected. In its application, Pioneer claimed that in the meantime it sent the seeds of KMH50 to Pioneer generic profile lab. The test carried out had revealed that germplasm of KMH50 was similar to the germplasm of 30V92 to the extent of 99.45% to 99.80%. Pioneer claimed that the said percentage was within the margin of error and indicated that the two varieties, namely, KMH50 and 30V92 were the same. Pioneer also alleged in its application that Kaveri had abused the provision of the Act by making false declaration in its application form and had deliberately provided incorrect information. It has been alleged that Kaveri had misappropriated the germplasm of 30V92 and had deceived the public by showing different values for group characteristic.

7.6 On 8th January, 2013, DUS test report of Pioneer's variety 30V92 was forwarded to Kaveri. The report indicated that 30V92 conform for the DUS criteria.

7.7 Thereafter, on 6th May, 2013, the petitioner filed an application seeking DNA test of its variety 30V92 considering KMH50 as a reference variety. On 8th April, 2011, Pioneer filed a petition under Section 24(5) of the Act (numbered as A.1/2011), *inter alia*, claiming

that germplasm of KMH50 was identical to 30V92 and the two varieties are one and the same.

7.8 The petitioner's application for conducting special test was rejected by the impugned order dated 27th August, 2013 on the ground that the DUS test reports had indicated that both the varieties conformed to the DUS criteria.

7.9 The impugned order dated 27th August, 2013 is the subject matter of challenge in W.P.(C) 6470/2013.

7.10 On 29th May, 2014, Kaveri unconditionally withdrew its writ petition – W.P.(C) 6819/2011 captioned as 'Kaveri Seed Company Ltd. v. Registrar of Plant Varieties & Anr.'

7.11 On 30th May, 2014, Kaveri sent a letter to the Registrar requesting it to proceed with the registration of KMH50.

7.12 Thereafter, on 14th July, 2014, the Registrar issued a notice for hearing of opposition, which was heard on 8th August, 2014. By the impugned order dated 9th September, 2014, the Registrar rejected the Pioneer's opposition as infructuous.

Submissions

8. Mr Sudhir Chandra, learned senior counsel appearing for Pioneer assailed the impugned order dated 09.09.2014, essentially, on three fronts. First, he submitted that Kaveri's application for registration of KMH-50 stood abandoned by virtue of Section 21(4) of the Act and, therefore, the Registrar had no jurisdiction to consider the same. He

submitted that in terms of Section 21(4) of the Act, Kaveri could file a counter-statement within a period of two months of the receipt of notice of opposition but, despite full opportunity, Kaveri had not filed any counter-statement. He further pointed out that on 08.08.2018, a statement was made on behalf of Kaveri that it did not want to file any counter statement or evidence. In the circumstances, the Registrar had no discretion but to treat the application for registration as having been abandoned by Kaveri.

9. Second, he submitted that the Registrar had erred in not considering the objections filed by the petitioner solely for the reason that both the varieties (KMH-50 and 30V92) had qualified the DUS test. He submitted that the Registrar had erred in concluding that the two varieties were required to be construed as distinct and different *inter se*, without considering Pioneer's objections. He contended that the Registrar had failed to consider that KMH-50 was similar to Pioneer's variety 30V92 and registration of the same would infringe Pioneer's Intellectual Property Rights. He submitted that Pioneer had cogent and irrefutable scientific evidence such as pedigree information, DNA Fingerprints, research records to establish that KMH-50 infringed Pioneer's rights. He submitted that the Test reports furnished by Pioneer established that KMH-50 was genetically similar to 30V92.

10. Third, he submitted that that Kaveri's application for registration of KMH-50 could be accepted only after the DUS test was conducted. The application was required to be advertised thereafter for the purposes of enabling concerned parties to object. He submitted that in this view,

objections could not be rejected only on the basis of the DUS Test as the same was not conclusive against the opponent filing an opposition.

11. Mr Pravin Anand, learned counsel appearing for Pioneer supplemented the arguments advanced by Mr Chandra. In addition, he submitted that Pioneer had right to oppose Kaveri's application by challenging the truth and veracity of its statements made in its application. He referred to Section 18 of the Act which specifies the information to be disclosed in an application for registration of variety. In terms of the said Section, an applicant is required to make declaration that genetic material or parental material acquired for breeding evolving or developing the variety has been lawfully acquired. Further, Kaveri was required to give complete passport data of the parental lines from which the variety had been derived alongwith the geographical location in India from where the genetic material has been taken. Kaveri was also required to provide information relating to contribution of other entities in breeding, evolving or developing of the variety. He submitted that Pioneer was entitled to oppose the registration on the ground that the statements made in the application were incorrect. Pioneer had, accordingly, asserted that the genetic material of KMH-50 was similar to that of 30V92 and Kaveri had misappropriated the germplasm of 30V92. These objections could not be rejected only on the ground that Kaveri's variety had qualified DUS Test.

12. Lastly, Mr Anand submitted that the results of the DUS Test, in fact, did not conclusively indicate that the two varieties were different. He referred to the impugned order dated 27.08.2013, wherein the

Registrar had held that Pioneer's variety 30V92 was found to be distinct in comparison to reference varieties for character 12 and character 23. Similarly, the Registrar had found that Kaveri's variety KMH-50 was distinct in comparison to reference varieties for character 12 and 24. He submitted that the values for character 12 and 23 were identical in case of KMH-50 and 30V92 and, therefore, they could not be considered as distinct from each-other in respect of those characters. He stated that insofar as character 24 is concerned, the values of KMH-50 as grown in New Delhi and at Hyderabad were identical to the value of Pioneer's 30V92, which was grown in New Delhi. However, they were different from the values of 30V92 as grown in Hyderabad. He submitted that character 24 related to coloration of glumes of cob and minor changes in coloration could occur due to various differences in the climatic conditions of the seasons in which such plants were grown. Therefore, the DUS tests did not conclusively establish that the two varieties in question were different.

13. Mr Jayant Bhushan, learned senior counsel appearing for Kaveri countered the aforesaid submissions. First of all, he submitted that Kaveri had no intention to abandon its application. He stated that Kaveri had withdrawn its writ petition (W.P.(C) 6819/2011) on 29.05.2013 and had immediately written to the Registrar to register its variety since it had qualified the DUS test. He submitted that this clearly indicated that Kaveri's intention was not to abandon the application for registration of KMH-50.

14. He referred to the decisions of this Court in *Telefonaktiebolaget LM Ericsson (Publ) v. Union of India and Anr.:* W.P.(C) 9126/2009, decided on 11.03.2010 and *Ferid Allani v. Union of India and Ors.:* W.P.(C) 6836/2006, decided on 25.02.2008 in support of its contention that in absence of any conscious act on part of Kaveri indicating its intention to abandon the application, the same could not be presumed. He also referred to Rule 31(4) of the Protection of Plant Varieties and Farmers' Rights Rules, 2003 (hereafter 'the 2003 Rules') and submitted that in terms of the said sub-rule, the Registrar was required to decide the opposition on merits even in cases where the applicant had not submitted a counter-statement. He contended that in view of the aforesaid sub-rule, it was not open for Pioneer to claim that Kaveri had abandoned its application and no decision on merits could be rendered by the Registrar.

15. Next, Mr Bhushan submitted that it was not necessary that the DUS Test be conducted prior to acceptance of an application. He referred to Regulation 11 of the Protection of Plant Varieties and Farmers' Rights Regulations, 2006 (hereafter 'the 2006 Regulations') and submitted that the test referred to under Section 19(1) of the Act was only for the purpose to evaluate whether the seeds, submitted alongwith the application, conform to the standards as notified under the Seeds Act, 1966. He submitted that in terms of Section 15(2) of the Act, an extant variety was required to be registered if it conforms to the DUS criteria. He submitted that since in the present case, the DUS Test had established that Kaveri's variety KMH-50 conforms to the DUS

criteria, it was required to be registered. He submitted that there was no requirement for *inter se* comparison of the two varieties.

16. Next, he submitted that the DUS Test reports clearly established that Kaveri's variety KMH-50 was distinct from Pioneer's 30V92. He referred to the comparative chart of the DUS test and submitted that Kaveri had achieved the characteristics as claimed by it in respect of Characters 21, 22 and 24 in both the centres where the test was carried out. He submitted that Pioneer was unable to achieve uniformity in respect of those characteristics at both the centres and, therefore, Pioneer could not claim that its variety was identical to KMH-50 in respect of characteristics 21, 22 and 24. He submitted that wherever an applicant's variety achieves the character as claimed and is consistent across the centres, the said character is considered to be uniform and stable. He submitted that the comparison between two varieties can only be made in respect of such characteristics which are claimed and consistently established. He submitted that on the basis of the DUS criteria, the petitioner's variety could not be considered as same as KMH-50.

17. Lastly, he submitted that Pioneer had no right to insist on conducting a DNA Test. He referred to Rule 29 of the 2003 Rules and submitted that such test could be conducted only in case where the DUS test had fail to establish the requirement of distinctiveness. And, it could be done only at the instance of the applicant and not any third party.

Reasoning and Conclusion

18. It would be apposite to examine the scheme of the relevant provisions of the Act at the outset.

19. The Act was enacted to establish “*the effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants*” as indicated by the Preamble of the Act. The Preamble also indicates that the Act was enacted pursuant to India’s ratification on the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). In terms of Paragraph 3(b) of Article 27 of the TRIPS Agreement “*all members were required to provide for protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof*”.

20. As explained in ***Emergent Genetics India Pvt. Ltd. v. Shailendra Shivam and Ors. 2011(125) DRJ 173***, Plant variety rights are species of intellectual property protection conferred upon breeders of new plant varieties. These rights are a result of Convention for the Protection of New Varieties of Plants of 1961 adopted in Paris (and revised in 1972, 1978 and 1991) as well as the TRIPS Agreement.

21. The word “Variety” is defined under Clause (za) of Section 2 of the Act in the following terms:

“(za) “variety”, means a plant grouping except micro-organism 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.

and includes propagating material of such variety , extant variety, transgenic variety, farmers' variety and essentially derived variety.”

22. Concededly, both the varieties (KMH-50 and 30V92) are Extant Varieties within the meaning of Clause (j) of Section 2 of the Act which is set out below:-

“(j) “extant variety” means a variety available in India which is—

- (i) notified under section 5 of the Seeds Act, 1966 (54 of 1966); or
- (ii) farmers' variety; or
- (iii) a variety about which there is common knowledge; or
- (iv) any other variety which is in public domain;”

23. Section 13 of the Act provides for maintenance of a Register called the National Register of Plant Variety. It is further enacted that the names of all registered plant varieties with the names and addresses of the respective breeders, the rights of such breeders in respect of the registered varieties, the particulars of the denomination of each registered variety, its seeds or other propagating material along with

specification of salient features thereof and such other matters as may be prescribed, shall be entered in the National Register of Plant Varieties. The said Register would be kept under the control and management of the Authority.

24. Chapter III of the Act (containing Section 14 to 23) provides for provisions for registration of the plant varieties. Any person specified under Section 16 of the Act – namely (a) any person claiming to be breeder of the variety; or (b) any successor of the breeder of the variety; or (c) assignee of the breeder of the variety in respect of the right to make such application; or (d) any farmer or group of farmers or community of farmers claiming to be the breeder of the variety; or (e) any person authorised by any such person(s) to make application on his behalf; or (f) any university or publicly funded agricultural institution claiming to be the breeder of the variety – is entitled to make an application to the Registrar for registration of any variety.

25. Section 15 of the Act sets out the criteria for registration of varieties. Section 15 of the Act is set out below:

“15. Registrable varieties.—(1) A new variety shall be registered under this Act if it conforms to the criteria of novelty, distinctiveness, uniformity and stability.

(2) Notwithstanding anything contained in subsection (1), an extant variety shall be registered under this Act within a specified period if it conforms to such criteria of distinctiveness, uniformity and stability as shall be specified under the regulations.

(3) For the purposes of sub-sections (1) and (2), as the case may be, a new variety shall be deemed to be—

(a) novel, if, at the date of filing of the application for registration for protection, the propagating or harvested material of such variety has not been sold or otherwise disposed of by or with the consent of its breeder or his successor for the purposes of exploitation of such variety—

(i) in India, earlier than one year; or

(ii) outside India, in the case of trees or vines earlier than six years, or in any other case, earlier than four years, before the date of filing such application:

Provided that a trial of a new variety which has not been sold or otherwise disposed of shall not affect the right to protection:

Provided further that the fact that on the date of filing the application for registration, the propagating or harvested material of such variety has become a matter of common knowledge other than through the aforesaid manner shall not affect the criteria of novelty for such variety;

(b) distinct, if it is clearly distinguishable by at least one essential characteristic from any another variety whose existence is a matter of common knowledge in any country at the time of filing of the application.

Explanation.—For the removal of doubts, it is hereby declared that the filing of an application for the granting of a breeder's right to a new variety or for entering such variety in the official register of varieties in any convention country shall be deemed to render that variety a matter of common knowledge from the date of the application in case the application leads to the granting of

the breeder's right or to the entry of such variety in such official register, as the case may be;

(c) uniform, if subject to the variation that may be expected from the particular features of its propagation it is sufficiently uniform in its essential characteristics;

(d) stable, if its essential characteristics remain unchanged after repeated propagation or, in the case a particular cycle of propagation, at the end of each such cycle.

(4) A new variety shall not be registered under this Act if the denomination given to such variety—

(i) is not capable of identifying such variety; or

(ii) consists solely of figures; or

(iii) is liable to mislead or to cause confusion concerning the characteristics, value identity of such variety or the identity of breeder of such variety; or

(iv) is not different from every denomination which designates a variety of the same botanical species or of a closely related species registered under this Act; or

(v) is likely to deceive the public or cause confusion in the public regarding the identity of such variety; or

(vi) is likely to hurt the religious sentiments respectively of any class or section of the citizens of India; or

(vii) is prohibited for use as a name or emblem for any of the purposes mentioned in section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950); or

(viii) is comprised of solely or partly of geographical name:

Provided that the registrar may register a variety, the denomination of which comprises solely or partly of a geographical name, if he considers that the use of such denomination in respect of such variety is an honest use under the circumstances of the case.”

26. As is apparent from Sub-section (1) of Section 15 of the Act, a new variety can be registered only if it conforms to the criteria of novelty, distinctiveness, uniformity and stability. However, an extant variety does not require to conform to the criteria of novelty; it can be registered provided it conforms to the criteria of distinctiveness, uniformity and stability (DUS).

27. In terms of Section 15(3)(b) of the Act, a variety would be distinct if its distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge.

28. The expression “essential characteristics” is defined under Clause (h) of Section 2 of the Act, which reads as under:-

“2(h) “essential characteristics” means such heritable traits of a plant variety which are determined by the expression of one or more genes of other heritable determinants that contribute to the principle features, performance or value of the plant variety;”

29. Thus, in order for a variety to be distinct, it must have a heritable trait, which is distinct from other varieties.

30. Before proceedings further, it is necessary to refer to Section 18, 19, 20, 21 and 22 and 24 of the Act, which are set out below:-

“18. Form of application.—(1) Every application for registration under section 14 shall—

(a) be with respect to a variety;

(b) state the denomination assigned to such variety by the applicant;

(c) be accompanied by an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology;

(d) be in such form as may be specified by regulations;

(e) contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organisation in breeding, evolving or developing the variety;

(f) be accompanied by a statement containing a brief description of the variety bringing out its characteristics of novelty, distinctiveness, uniformity and stability as required for registration;

(g) be accompanied by such fees as may be prescribed;

(h) contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired; and

(i) be accompanied by such other particulars as may be prescribed:

Provided that in case where the application is for the registration of farmers' variety, nothing contained in clauses (b) to (i) shall apply in respect of the application

and the application shall be in such form as may be prescribed.

(2) Every application referred to in sub-section (1) shall be filed in the office of the Registrar.

(3) Where such application is made by virtue of a succession or an assignment of the right to apply for registration, there shall be furnished at the time of making the application, or within such period after making the application as may be prescribed, a proof of the right to make the application.

19. Test to be conducted.—(1) Every applicant shall, along with the application for registration made under this Act, make available to the Registrar such quantity of seed of a variety for registration of which such application is made, for the purpose of conducting tests to evaluate whether seed of such variety along with parental material conform to the standards as may be specified by regulations:

Provided that the Registrar or any person or test centre to whom such seed has been sent for conducting test shall keep such seed during his or its possession in such manner and in such condition that its viability and quality shall remain unaltered.

(2) The applicant shall deposit such fees as may be prescribed for conducting tests referred to in sub-section (1).

(3) The tests referred to in sub-section (1) shall be conducted in such manner and by such method as may be prescribed.

20. Acceptance of application or amendment thereof.—(1) On receipt of an application under section 14, the Registrar may, after making such inquiry as he thinks fit with respect to the particulars contained in such

application, accept the application absolutely or subject to such conditions or limitations as he deems fit.

(2) Where the Registrar is satisfied that the application does not comply with the requirements of this Act or any rules or regulations made thereunder, he may, either—

(a) require the applicant to amend the application to his satisfaction; or

(b) reject the application:

Provided that no application shall be rejected unless the applicant has been given a reasonable opportunity of presenting his case.

21. Advertisement of application.—(1) Where an application for registration of a variety has been accepted absolutely or subject to conditions or limitations under sub-section (1) of section 20, the Registrar shall, as soon as after its acceptance, cause such application together with the conditions or limitations, if any, subject to which it has been accepted and the specifications of the variety for registration of which such application is made including its photographs or drawings, to be advertised in the prescribed manner calling objections from the persons interested in the matter.

(2) Any person may, within three months from the date of the advertisement of an application for registration on payment of the prescribed fees, give notice in writing in the prescribed manner, to the Registrar of his opposition to the registration.

(3) Opposition to the registration under sub-section (2) may be made on any of the following grounds, namely:—

(a) that the person opposing the application is entitled to the breeder's right as against the applicant; or

(b) that the variety is not registrable under this Act; or

(c) that the grant of certificate of registration may not be in public interest; or

(d) that the variety may have adverse effect on the environment.

(4) The Registrar shall serve a copy of the notice of opposition on the applicant for registration and, within two months from the receipt by the applicant of such copy of the notice of opposition, the applicant shall send to the Registrar in the prescribed manner a counter-statement of the grounds on which he relies for his application, and if he does not do so, he shall be deemed to have abandoned his application.

(5) If the applicant sends such counter-statement, the Registrar shall serve a copy thereof on the person giving notice of opposition.

(6) Any evidence upon which the opponent and the applicant may rely shall be submitted, in the manner prescribed and within the time prescribed, to the Registrar and the Registrar shall give an opportunity to them to be heard, if so desired.

(7) The Registrar shall, after hearing the parties, if so required, and considering the evidence, decide whether and subject to what conditions or limitations, if any, the registration is to be permitted and may take into account a ground of objection whether relied upon by the opponent or not.

(8) Where a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice neither resides nor carries on

business in India, the Registrar may require him to give security for the cost of proceedings before him and in default of such security being duly given may treat the opposition or application, as the case may be, as abandoned.

(9) The Registrar may, on request, permit correction of any error in, or any amendment of, a notice of opposition or a counter-statement on such terms as he may think fit.

22. Registrar to consider grounds for opposition.—The Registrar shall consider all the grounds on which the application has been opposed and after giving reasons for his decision, by order, uphold or reject the opposition.

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24. Issue of certificate of registration.—(1) When an application for registration of a variety (other than an essentially derived variety) has been accepted and either—

(a) the application has not been opposed and the time of notice of opposition has expired; or

(b) the application has been opposed and opposition has been rejected, the Registrar shall register the variety.

(2) On the registration of the variety (other than an essentially derived variety), the Registrar shall issue to the applicant a certificate of registration in the prescribed form and sealed with the seal of the Registry and send a copy to the Authority for determination of benefit sharing and to such other authority, as may be prescribed, for information. The maximum time required by the Registrar for issuing the certificate of registration from the date of filing of the application for registration of a variety shall be such as may be prescribed.

(3) Where registration of a variety (other than an essentially derived variety), is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

(4) The Registrar may amend the register or a certificate of registration for the purpose of correcting a clerical error or an obvious mistake.

(5) The Registrar shall have power to issue such directions to protect the interests of a breeder against any abusive act committed by any third party during the period between filing of application for registration and decision taken by the Authority on such application.

(6) The certificate of registration issued under this section or sub-section (8) of section 23 shall be valid for nine years in the case of trees and vines and six years in the case of other crops and may be reviewed and renewed for remaining period on payment of such fees as may be fixed by the rules made in this behalf subject to the condition that the total period of validity shall not exceed,—

(i) in the case of trees and vines, eighteen years from the date of registration of the variety;

(ii) in the case of extant variety, fifteen years from the date of the notification of that variety by the Central Government under section 5 of the Seeds Act, 1966 (54 of 1966); and

(iii) in other cases, fifteen years from the date of registration of the variety.”

31. It is apparent from the Scheme of Chapter III of the Act that on receipt of an application under Section 18 of the Act, the Registrar is required to make an enquiry as it thinks fit in respect of the particulars contained in such application and, thereafter, either accept the application absolutely or subject to certain conditions or limits as he deems fit. In terms of Section 19(1) of the Act, every applicant is required to make available to the Registrar such quantity of seeds of the variety for the purposes of conducting tests to evaluate whether the seeds of such variety conform to the standards, as may be specified by Regulations. It, plainly, follows that on receipt of an application, the Registrar is required to conduct the test as referred to under Section 19 of the Act.

32. One of the principal controversy raised in the present petition is whether Section 19 of the Act refers to a DUS test or a limited test for evaluating whether the seeds and the parental material conform to the standards as specified. It is Pioneer's case that the test to be conducted in terms of Section 19 of the Act is a DUS test and an application for registration cannot be accepted unless such test has been conducted.

33. A plain reading of Section 19(1) of the Act indicates that every applicant is required to make available such quantity of seeds for the purposes of conducting tests "*to evaluate whether the seeds of such variety along with parental material conform to the standards as may be specified by regulations*". The Authority has notified the 2006 Regulations (the Protection of Plant Varieties and Farmers' Rights

Regulations, 2006) in exercise of powers conferred under the Act. Regulation 11 of the 2006 Regulations is relevant and is set out below:-

“11. Standards for evaluating seeds or variety during tests.

The test to be conducted for evaluation of a variety to be referred under the Act shall conform to the criteria of distinctness, uniformity and stability test guidelines published by the Authority in the Journal of Protection of Plant Varieties and Farmers’ Rights Authority and shall be revised and updated from time to time with the prior information to the Central Government. The Standards for evaluating seeds during tests under sub-section (1) of section 19 shall be such as notified under Seeds Act, 1966 or further amendments to that effect.”

34. It is clear from the above that the test to be conducted for evaluation of the variety is required to conform to the test guidelines as published by the Authority for evaluating whether the variety conforms the criteria of distinctiveness, uniformity and stability (DUS). Regulation 11 further specifies that the standards for evaluating the seeds during tests shall be such as notified under the Seeds Act, 1966.

35. In view of the above, the contention that the tests referred to under Section 19(1) of the Act only pertains to evaluating whether the seeds conformed to the standards as notified under the Seeds Act, 1966, is erroneous. The tests referred to under Section 19(1) of the Act also include tests for determining whether the variety conforms to the DUS criteria. In terms of Regulation 11 of the said 2006 Regulations, such tests are required to be conducted in conformity with the guidelines as published by the Authority.

36. At this stage, it is also relevant to refer to Protection of Plant Varieties and Farmers Rights (Criteria for Distinctiveness, Uniformity and Stability for Registration) Regulations, 2009 (hereafter “2009 Regulations”). Regulation 4 of the 2009 Regulations provides that the DUS criteria shall be determined by conducting field test for one season at two locations. The said Regulation 4 is set out below:-

“4. Criteria of Distinctiveness, Uniformity and Stability for registration of variety about which there is Common Knowledge.–(1) The criteria for distinctiveness, uniformity and stability for registration of a variety about which there is a common knowledge shall be determined by conducting a field test for one season at two locations for the purpose of confirming the distinctiveness, uniformity and stability following the descriptors and plot size as may be specified in the Journal.

(2) Any person who applies for registration under clause (b) of Section 14 of the Act shall submit half the quantity of seeds as divided into five equal numbers of packets for the purpose of field test and also for storing in the National Gene Bank and the seed supply procedures shall be such as may be specified in the Journal.”

37. Any doubt as to the test to be conducted under Section 19 of the Act is put to rest by a plain reading of Rule 29 of the 2003 Rules, which is set out below:-

“29. Manner and method for conducting tests under section 19.–(1) (a) The Authority shall charge separate fees for conducting DUS test and special test on each variety.

(b) The special tests shall be conducted only when DUS testing fails to establish the requirement of distinctiveness.

(c) The DUS testing shall be field and multi-location based for at least two crop seasons and special tests be laboratory based.

(d) The fee for DUS and special tests shall be such as provided in column (3) of the Second Schedule for the purpose.

(2) If the Registrar, after initial scrutiny of the application for registration, is satisfied that the application is in order, he shall notify the applicant to deposit the requisite fee, as specified in column (3) of the Second Schedule, within a period of two months for conducting the DUS test.

(3) On receipt of the fee, demanded under sub-rule (1), the Registrar shall consider the application for further processing.

(4) The DUS test shall be necessary for all new varieties except essentially derived variety.

(5) The manner of testing essentially derived varieties shall be decided by the Authority on a case-to-case basis.

(6) The DUS test shall be conducted on a minimum of two locations.

(7) The Authority may recognise and empanel institutions having adequate facilities for conducting DUS or special tests in the country for conducting such tests.

(8) The Authority shall notify the adopted methods of conducting the DUS and special tests.

(9) The Authority shall develop and publish in its journal guidelines for the DUS test for each crop.

(10) The samples of seeds or propagules in respect of which an application for registration has been made and parental lines under registration submitted for the DUS and special tests and deposited at the National Gene Bank shall present the maintainable standards of generic purity, and uniformity and germination, sanitary and phytosanitary standards.”

38. Sub-rule (2) of Rule 29 of the 2003 Rules makes it clear that after initial scrutiny, if the Registrar is satisfied that the application is in order, he shall call upon the applicant to deposit the requisite fee within a period of two months for conducting the DUS Test.

39. In view of the above, there can be little doubt that on receipt of the application, if the same is found to be in order then the next stage is to conduct the tests under Section 19 of the Act, which is the test to ascertain whether the Authority conforms to the DUS criteria.

40. The next question to be examined is whether the DUS test have to be conducted prior to acceptance of the application as contemplated under Section 20 of the Act.

41. It is Pioneer’s case that an application can be accepted only once a DUS test has been conducted. This is disputed by Kaveri and it is contended on its behalf that the DUS test could be conducted at any time and the same is not necessary for acceptance of an application.

42. As observed above, the first stage after receipt of the application for registration under Section 14 of the Act is to examine whether the same is in order. If the application is complete and in order, the

Registrar is required to notify the applicant to deposit the fees for conducting the DUS Test. In terms of Sub-rule (3) of Rule 29 of the 2003 Rules, the application can be considered for further processing by the Registrar only after the fee demanded for conducting the DUS Test is deposited. Thus, plainly, the application cannot be accepted unless the fee for the DUS Test is deposited.

43. In terms of Section 20 of the Act, the Registrar is required to accept the application filed after making such enquiry as it thinks fit with respect to the particulars contained in such application. It is open for the Registrar to accept the applications absolutely, or subject to such conditions as may deem fit. At this stage, the Registrar can also reject the application if he finds that it does not comply with the requirements of the Act or the Rules and Regulations made thereunder.

44. The language of Section 20 of the Act is wide. Although, it does not expressly mandate that the Registrar is required to await the result of the DUS Test before accepting the application, however, it does require the Registrar to make an enquiry in respect of the particulars contained in the application in order to make an informed decision whether to accept the application or reject the same. If on making an enquiry, the Registrar is of the view that the application does not comply with the requirements of the Act, Rules or Regulations made thereunder, he may either call upon the applicant to amend the application or reject the same. It is not necessary for the Registrar to await the results of the DUS Test if he is otherwise satisfied that the application does not comply with the requirements of the Act. However,

if he is otherwise finds no reason to reject the application outright, it would be necessary for him to await the DUS Test as the said test would confirm whether the variety conforms to the DUS criteria. Concededly, conformity with the DUS Criteria is essential for any variety to be registered. Therefore, it would not be possible for the Registrar to accept an application if he is not satisfied that the variety conforms to the DUS criteria.

45. The contention that the Registrar can accept the application results awaiting the DUS Test, is erroneous. The Scheme of the Act is unambiguous. Once the Registrar accepts an application, he is bound to register the variety unless an opposition is filed under Section 21(3) of the Act and the Registrar finds merit in such opposition. This is clear from the provisions of Section 24(1) of the Act, which expressly provides that the Registrar shall register the variety and issue a certificate of registration in cases where an application for registration of a variety (other than an essentially derived variety) has been accepted and either (a) the application has not been opposed and the time of notice of opposition has expired; or (b) the application has been opposed and opposition has been rejected.

46. It is clear from the above that the Registrar had no discretion to reject an application once he has accepted the same and no opposition has been filed by any person on advertisement of such application. It follows from the above that the Registrar must be fully satisfied that the candidate variety conforms to the DUS criteria before accepting the application for registration of the variety. He is, thereafter, required to

advertise the said application and his examination is confined to the opposition that may be filed pursuant to such advertisement.

47. If Kaveri's contention is accepted that it is not necessary for the Registrar to await the results of the DUS Test before accepting an application, it would lead to an unacceptable situation in a case where no opposition is filed and the DUS test are negative. In such cases, by virtue of Section 24(1)(a) of the Act, the Registrar would be required to register the variety even though it is not registrable on account of failing the DUS Test. The Scheme of Chapter III of the Act regarding registration of the varieties makes it clear that qualifying the DUS test is an essential criterion for acceptance of an application under Section 20 of the Act.

48. The next question to be examined is whether Pioneer's opposition was required to be rejected only on the ground that Kaveri's variety KMH-50 had qualified the DUS Test. The answer to this question is clearly in the negative. As discussed above, an application can be accepted only once the DUS test is satisfied. The application is, thereafter, required to be advertised. Such advertisement is to be made in the manner as prescribed under Rule 30 of the 2003 Rules. The said Rule is set out below:-

“30. Advertising of application for registration under section 21.- (1) Every application for registration of a variety which has been accepted and the details thereof including specifications shall, upon such acceptance under sub-section (1) of section 20, be advertised by the Registrar in the

manner specified in Form 01 of the Third Schedule.

(2) In every such advertisement under sub-rule (1), the Registrar shall mention that place or places where a specimen of the variety may be inspected.

(3) The contents of such advertisement shall include-

(a) name, passport data and source of parental line or initial variety used to develop the variety in respect of which an application for registration has been made;

(b) description of the variety bringing out its character profile as specified under the DUS test Schedule;

(c) essential characteristics conferring distinctiveness to the variety; (d) important agronomic and commercial attributes of the variety;

(e) photographs or drawings, if any, of the variety submitted by the applicant; and

(f) claim, if any, on the variety.”

49. The details of the variety including photographs and drawings are required to be advertised in order to enable a person interested in the matter to object to the registration in a meaningful manner. As is apparent from Rule 30(3)(b) of the 2003 Rules, the advertisement is also required to describe the variety to bring out its character profile as specified under the DUS Test Schedule.

50. The opposition to registration can be made only on limited grounds as are specified in Section 21(3) of the Act. A person can object to registration on the ground that (a) he is entitled to breeders right against the applicant; and/or (b) that the variety is not registrable under this Act; and/or (c) that the grant of certificate of registration may not be in public interest; and/or (d) that the variety may have adverse effect on the environment. Thus, an objector may accept that the candidate variety conforms to the DUS criteria and yet object to its registration on the ground that he has a breeders rights against the applicant and/or that grant of registration would not be in public interest and/or would have an adverse effect on the environment.

51. In terms of Clause (b) of Section 21(3) of the Act, a person may also raise an objection on the ground that the variety is not registrable including that it does not qualify the DUS criteria. The DUS Test report is not binding on the objector and he is at liberty to contest the DUS Test on any grounds as available.

52. In the aforesaid view, the contention that since Kaveri's variety has qualified the DUS Test and therefore it was required to be registered notwithstanding the opposition, is plainly erroneous and cannot be accepted.

53. The next question to the examined is whether the Registrar is required to consider all grounds on which an application has been opposed even though the applicant has failed and neglected to file any counter statement to the same.

54. After an application has been advertised and a notice of opposition is received, the same is required to be served on the applicant. In terms of sub-section (4) of Section 21 of the Act, the applicant is required to send to the Registrar a counter statement on the grounds on which he relies for his application and if he does not do so, he is deemed to have abandoned his application. The legislative intent is unambiguous; if the applicant does not counter the opposition to establish his grounds for registration, the application is to be treated as abandoned. It is obvious that in such cases, there would be no requirement for the Registrar to proceed with the same. It was also not disputed on behalf of Kaveri that if an application has been abandoned, the Registrar is not required to proceed with the same. However, it was contended that in the present case, Kaveri had not abandoned its application. The implication of an applicant abandoning his application is clearly that the said application is not required to be proceeded with any further. Thus, in cases where an applicant is abandoned, it would not be necessary for the Registrar to proceed with the same.

55. Mr Bhushan has referred to Rule 31(4) of the 2003 Rules and contended that even in cases where a counter statement has not been filed, the Registrar is required to decide the opposition on merits. Rule 31(4) of the 2003 is set out below for ready reference:-

“(4) An applicant shall be entitled to submit point-wise counter statement to the opposition not later than two months from the date of service of the copy of the notice of opposition, failing which the Registrar shall decide the merits of the

opposition and notify his decision by giving reasons therefor.”

56. This Court is unable to accept that the Registrar would be required to examine the opposition on merits even though the applicant has failed and neglected to file a counter statement.

57. There is no ambiguity in the language of Sub-Section 21 (4) of the Act that if an applicant fails to file a counter statement on the grounds on which he relies on for his application, he would by legal fiction deemed to have abandoned his application. And, in such cases it would not be necessary for the Registrar to consider the opposition on merits.

58. The provisions of Rule 31(4) of the 2003 Rules cannot be read in a manner which is repugnant to Section 21(4) of the Act. The 2003 Rules are a piece of the subordinate legislation and cannot override the provisions of the parent enactment (see: *Novva Ads v. Secretary, Department of Municipal Administration and Water Supply and Anr.:* (2008) 8 SCC 42; *St. Johns Teachers Training Institute v. National Council for Teacher Education* (2003) 3 SCC 1; *Kalpataru Agroforest Enterprises v. Union of India:* (2002) 3 SCC 612). This Court is of the view that provisions of Rule 31(4) of the 2003 Rules must be read in a harmonious manner with the provisions of Section 21(4) of the Act.

59. Rule 31 (4) of the 2003 Rules expressly provide that an applicant is entitled to submit “*point wise counter statement to the opposition*”, failing which the Registrar shall decide the merits of the opposition and

notify his decisions. Thus, in a case where the applicant does not submit a point wise statement – which he is entitled to in terms of Rule 31(4) of the 2003 Rules – the Registrar shall decide the opposition on merits and give reasons for its decision. The Registrar is not required to provide a further opportunity to the applicant to file a point wise counter statement. But, in cases where the applicant fails to file a counter statement to the opposition, he would be deemed to have abandoned the application and, in such cases, there would be no requirement for the Registrar to proceed further with the same. The requirement of the Registrar to decide the merits of the opposition must be confined to cases where counter statement has been filed, however, the same is either not in conformity with the Rules or is not “point wise”.

60. This Court may now proceed to examine the Pioneer’s challenge to the impugned orders and the impugned letter bearing the aforesaid discussions in mind.

61. The first and foremost question to be examined is whether Kaveri is deemed to have abandoned his application for registration as it had failed to file its response to the objections filed by Pioneer. Pioneer had filed its objections, *inter alia*, alleging that the candidate variety (KMH-50) was essentially identical/highly similar to Pioneer’s variety 30V92. It is Pioneer’s case that it had developed the said variety from “*Pioneer’s proprietary genetics through many years of research and breeding effort and significant expenditure*”. Pioneer had claimed that its variety 30V92 was being commercially sold by Pioneer since 2003 and its approximate annual sales was ₹125-130 crores.

62. Pioneer claimed that certain officials of its group had, on a visit to a test centre, observed that a similar variety of Maize (KMH-50) was being grown for DUS Testing. According to Pioneer, since the said variety was identical or highly similar to its variety, the registration of the said variety was adverse to Pioneer's interest. Pioneer also claimed that it was a prior applicant for registration under the Act and it was first to commercialize "*the variety*". A plain reading of the opposition clearly indicates that Pioneer had founded its opposition on the basis that KMH-50 was identical to its own variety.

63. In addition to the above, Pioneer had also filed an application under Section 24(5) of the Act stating that it had caused the test to be conducted to determine the genetic similarities/dissimilarities between KMH-50 and 30V92. It had obtained samples of the seeds of KMH-50 from the market and the test conducted on the said seeds indicated that KMH-50 has a similarity range with 30V92 between 99.45% to 99.8%. Pioneer also claimed that the variation in the genetic profile was within the limits of error which was +/- 1 to 2%. Pioneer alleged that *almost 100% similarity between KMH-50 and 30V92 based on evidence filed by the petitioner, clearly suggests that respondent [Pioneer] has misappropriated the germplasm of 30V92 under the denomination of KMH-50*. The said allegations remained uncontroverted. Kaveri did not file any counter statement or produce any evidence to establish that it had developed KMH-50 from lawfully procured parental lines or other material. Thus, by virtue of Section 21(4) of the Act, Kaveri's application was deemed to have been abandoned.

64. Mr Bhushan had earnestly contended that the sequence of events and the conduct of Kaveri clearly establishes that it had no intention of abandoning its application and, therefore, could not be presumed to have been abandoned its application. The said contention is unpersuasive. Section 21(4) of the Act contains all legal fiction by virtue of which failure to file a counter statement has to be construed as abandoning of the application. In *St. Aubyn v. Attorney-General* : (1951) 2 All ER 473, Lord Radcliffe had observed as under:-

“The word ‘deemed’ is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

65. In *Consolidated Coffee Limited and Anr. v. Coffee Board, Bangalore* : (1980) 3 SCC 358, the Supreme Court had referred to the above passage and held as under:-

“A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision.”

66. The deeming provision under Section 21(4) of the Act must be read in a purposive manner. Plainly, the legislative intent in including the deeming provision is to provide for consequences of not filing a counter statement to controvert the opposition. The Parliament in its wisdom has enacted that if the grounds for opposition as set out are not countered by filing a counter statement, the same must be read as the applicant abandoning his application. This imposes an artificial construction on the act of not filing a counter statement, which may not otherwise be readily inferred. In the present case, Kaveri steadfastly avoided countering the allegations made by Pioneer and by virtue of the deeming provision, this conduct has to be construed as Kaveri abandoning its application. It was clearly not open for Kaveri to avoid meeting the objections and yet pursue its application.

67. The decisions of this Court in *Ferid Allani v. Union of India & Ors.* (*supra*) and *Telefonaktiebolaget LM Ericsson (PUBL) v. Union of India an Ors.* (*supra*) are of little assistance to Kaveri. In *Ferid Allani's* case, this Court had considered the question whether the petitioner's application for grant of patent was to be construed as abandoned on failure of the petitioner to respond to the examination report within the prescribed time. In that case, the petitioner had made a request for examination within the prescribed time. He had also submitted its response to the first examination report within the prescribed time, however, a second set out of objections were raised and it was the petitioner's case that it had received the same subsequent to the time provided for filing his response. It is in the aforesaid context

that the Court had examined whether the time prescribed under Rule 24(B)(4)(ii) of the Patents Rules was mandatory. After examining the scheme of the statutory provisions, the Court concluded that the time period of three months, as provided under Rule 24(B)(4)(ii) of the Patents Rules was directory and not mandatory. The Court also took note that the Controller was also empowered under Rule 138 of the said Rules to extend the time prescribed under Rule 24(B) of the said Rules. In the present case, the issue is not whether the time for two months as prescribed for filing a counter affidavit is mandatory or directory. Admittedly, Kaveri has declined to file any counter statement to the opposition and it has not sought any extension of time. Thus, even if it is held that the time period of two months as specified under Section 21(4) of the Act is directory, it would be of no benefit to Kaveri. The decision in *Ferid Allani's* case cannot be read as an authority for the proposition that even if an applicant for a patent declines to respond to objections, he would nonetheless be entitled to sustain his application for a patent.

68. Similarly, the decision of this Court in *Telefonaktiebolaget LM Ericsson (PUBL) (supra)* is also of no assistance to Kaveri. The decision in the said case was rendered following the earlier decision of the Court in *Ferid Allani*. Further, in the facts of that case, the Court found that the basic factual condition for attracting the deemed fiction of abandonment was non-existent. In that case, the petitioner had responded to the objections raised within the prescribed time. It is also

relevant to refer to paragraph 14 of the said decision, which reads as under:-

“14. Where in response to an examination report, an applicant does nothing by way of meeting the objections raised therein within the time stipulated, and does not seek extension of time for that purpose only then it can be said that such application should be “deemed to have been abandoned”. If he has replied but such reply is not found satisfactory, even after a further opportunity if any is given, then the Controller should proceed to take a decision in terms of Section 15, after complying with Section 14 of the Act.”

69. It is clear from the above quoted passage that the Court had clarified that if the applicant has done nothing by way of meeting the objection raised within the time stipulated and does not seek extension of time for that purpose, then his application would be deemed to have been abandoned. In the present case, Kaveri had unequivocally stated it did not wish to file any counter affidavit or any evidence. Thus, it had expressed its intention, in unambiguous terms, to not to meet the allegations made by Pioneer in its opposition.

70. In view of the above, the impugned order dated 09.09.2014 is liable to be set aside and it is not necessary to examine other questions in this regard. Nonetheless, for the sake of completeness, this Court considers it apposite to consider the other issues raised by the parties as well.

71. The next question to be decided is whether the Registrar erred in rejecting Pioneer's opposition solely on the ground that the Kaveri's variety KMH-50 had qualified the DUS criteria. The Registrar did not decide the question whether Kaveri had abandoned its application but proceeded to hold that the Kaveri's opposition had become infructuous in view of the DUS test reports. The Registry simply followed the impugned order dated 27.08.2013, which is subject matter of challenge in W.P. (C) 6470/2013 and proceeded to hold that since both the varieties had been found to qualify the DUS Test, Pioneer's opposition was infructuous. He also proceeded on the basis that the DUS Test had not been contested.

72. This Court is also of the view that the said decision is erroneous for several reasons. First of all, the Registrar should not have proceeded on the basis that the DUS Test was final and binding on Pioneer. As observed earlier, the entire procedure adopted by the Registrar/Authority was contrary to the scheme of the Act. The Registrar could not have accepted Kaveri's application for registration of KMH-50 without the said variety qualifying the DUS Test. The question of accepting the application and inviting objections would only arise after KMH-50 had qualified the DUS Test. As stated hereinbefore, the DUS Test report is not final and binding on the opponent and it was open for Pioneer to raise any objections regarding the restorability of the said variety in terms of Section 21(3)(b) of the Act. This would, obviously, include objections to the DUS Test. Kaveri would be well within its right to contend that the DUS Test was not conclusive to

establish that KMH-50 was not distinct from 30V92. However, since the application was advertised prior to the DUS Test report being made available, such objections could not be included in the opposition.

73. The Registrar's view that the objections regarding DUS test ought to be made by making a representation on inspection of the variety while the DUS test is being conducted, is erroneous. As discussed earlier, the question of raising objections arises only after the application has been accepted, which is post the variety being found to conform to the DUS criteria. In terms of Rule 30(2) of the 2003 Rules, such advertisement would also include information as to the place where the candidate variety can be inspected. It is at that stage that an opponent has the opportunity to inspect the variety and, if necessary, point out errors in the DUS Test report by filing an opposition.

74. Secondly, the Registrar would also be required to consider whether the statements made by Kaveri in its application were correct. Pioneer had alleged in its application under Section 24(5) of the Act that Kaveri had misappropriated the Germplasm in its submissions before the Registrar, however, the Registrar had not considered the same only on the ground that KMH-50 had qualified the DUS Test. Kaveri had filed an application claiming to be the Breeder/successor of the Breeder of KMH-50 and Pioneer had, in effect, claimed Breeder's right in opposition to such registration. However, the same was also not considered by the Registrar.

75. The impugned order dated 9th September 2014 is liable to be set aside on the aforesaid grounds as well.

76. The next issue to be examined is with regard to the Pioneer's challenge to the impugned order dated 27.08.2013 rejecting its application for conducting a special test. The Registrar has rejected the Pioneer's application, essentially, for three reasons. First, that in terms of Rule 29(1) of the Act, a special test could be conducted only if the DUS test had failed. He concluded that since the DUS Test had not failed, a special test could not be conducted. Second, that the registration was required to be granted on the basis of DUS Test which is used for determining expression of an essential characteristic. He proceeded on the basis that since the DUS test had established that KMH-50 was distinct as being distinguishable in respect of one essential characteristic, a special test was not required. The Registrar also noted that if Pioneer had any objections regarding the variety, it could have inspected the variety and made a representation in this regard. Thirdly, he held that a special test would be of no relevance because both the varieties had qualified for registration based on the DUS test.

77. This Court is of the view that the reliance placed by the Registrar to Rule 29(1) of the 2003 Rules is misplaced. Rule 29 only refers to the test to be conducted under Section 19 of the Act. As discussed above, the said test relates to the tests to be conducted or acceptance of an application for registration of a variety. A provision for special test is made at the instance of the applicant in cases where the DUS test fails.

In other words, if the DUS test result does not indicate that the candidate variety is distinguishable in one essential characteristic from the reference varieties, it is open for the applicant to request for a special test to establish that the candidate variety is distinct. Rule 29 has no application in a case where an opponent request for a special test to establish its allegation that germplasm of the candidate variety is identical to another variety over which the opponent claims a breeder's right. Rule 29 does not preclude any person opposing the registration of a variety or contesting the registration of a variety to seek a special test to establish that the candidate variety is not registrable or that the claims made in the application for such registration are false. In the present case, Pioneer had filed the application for a DNA test in support of its petition under Section 24(5) of the Act, wherein it was asserted that Kaveri had misappropriated the germplasm of 30V92. Plainly, the said application could not have been rejected on account of the provision of Section 19 of the Act or Rule 29 of the 2003 Rules.

78. The contention that an application for DNA testing could not be maintainable in cases where the DUS test was successful, is also erroneous. The genetic structure of the seed determines its physical manifestation. The genotype is manifested by the physical traits (phenotype) of the organism. It is difficult to accept that two seeds with the identical genotype would have stable different characteristics. The physical characteristics of an organism is an expression of its genome. It is also necessary to note that the expression "essential characteristics", as defined under Section 2(h) of the Act, also means

heritable traits of a plant variety which is determined by the expression of one or more genes or other heritable determinants. It necessarily follows that if a variety is distinct within the meaning of Section 15(3)(b) of the Act –that is, it is distinguishable by at least one essential characteristic from any other variety – it would necessarily follow that its genotype is also different particularly in respect of the gene, that is, manifested by that essential characteristic. Thus, the importance of examining the genotype of a plant in order to determine whether it is distinct cannot be brushed aside when one party seeks to contest the same, merely on the ground that DUS test conducted under Section 19 of the Act is successful. This Court is also unable to concur with the view that conduct of a DNA testing would be futile in cases where there is a serious dispute as to the IPR rights regarding the variety.

79. Having stated the above, this Court is also of the view that it is not necessary that in every case a DNA test be conducted by the Registrar. It is open for a party asserting IPR rights to establish that genetic structure of the candidate variety is identical to the variety developed by it. Thus, Pioneer was not precluded from establishing the genotype of KMH50 on the basis of the test conducted by it.

80. It is also contended on behalf of Pioneer that DUS test did not establish that KMH-50 was distinct from 30V92. The Registrar had analysed the DUS test of both the varieties and found that Pioneer's 30V92 was distinct with reference to other varieties, namely, HM-4, HQPM-1, PRAKASH, Seed Tech 2324, Vivek 9 and African Tall. Similarly, DUS test of KMH-50 was also conducted with reference to

HM-4, HQPM-1, PRAKASH, Seed Tech 2324, Vivek 9 and African Tall. According to the Registrar, Pioneer's variety 30V92 was found distinct in comparison to reference varieties for character 12 (Ear: Anthocyanin colouration of silks on day of emergency); Character 23 (Ear: Colour of tope of grain) and KMH-50 was found distinct from other reference varieties for Character (Ear: Anthocyanin colouration of silks on the day of emergency) and character 24 (Ear: Anthocyanin colouration of glumes of cobs). It is contended on behalf of Pioneer that the said test reports did not established that KMH-50 and 30V92 were distinct in respect of the aforesaid characteristics. A tabular statement indicating the values ascribed to those characteristics in respect of two varieties grown in New Delhi and Hyderabad is set out below:

Sr. No.	Characteristic	KM H 50	KMH50 2010 New Delhi			KMH 50 2010-11 Hyderabad			30v 92	30v92 2011 New Delhi			30v92 2011 Hyderabad	
12	Ear: Anthocyanin colouration of silks (on day of emergency)	1	1	1	1	1	1	1	1	1	1	1	1	1
23	Ear: Colour of top of grain	4	4	4	4	4	4	4	4	4	4	4	4	4
24	Ear: Anthocyanin colouration of glumes of cobs	2	2	2	2	2	2	2	2	2	2	2	3	3

81. *Prima facie*, the aforesaid table indicates that those characteristics, in respect of which the two varieties were found to have qualified the DUS test, are more or less identical when compared *inter*

se. However, this Court is not inclined to examine the said controversy any further as the same has not been considered in any of the impugned orders. However, it is obvious that if the question whether the variety 30V92 and KMH-50 are different and distinct from each other is required to be determined, a meaningful examination of their essential characteristics would be relevant.

82. In view of the above, the impugned orders dated 09.09.2014 and 27.08.2018 are set aside. The impugned letter dated 24.06.2013, to the extent that it confirms that Kaveri's KMH-50 is eligible for registration under the Act, is set aside. Pioneer's application for conducting the special test in the nature of DNA profiling of the variety 30V92 and KMH-50 is restored to the file of the Registrar for considering it afresh, if necessary.

83. The petitions are disposed of in the aforesaid terms. All pending applications also stand disposed of.

84. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 01, 2019
MK/RK/pkv