

Revocation of PepsiCo India's rights over Lay's potato variety

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Kavitha Kuruganti v PepsiCo India Holdings Private Limited, before the Protection of Plant Varieties and Farmers' Rights Authority, New Delhi, 03 Dec 2021

In this case, the chairperson of the Protection of Plant Varieties and Farmers' Rights Authority revoked the registration of PepsiCo India's potato variety FL 2027. The decision was based on three major grounds. First, PepsiCo India had furnished incorrect information to acquire the certificate of registration; second, PepsiCo India was ineligible to hold the certificate; and third, there was a violation of public interest by PepsiCo India suing farmers on the basis of the certificate.

Legal Context

Pursuant to its obligations under Article 27(3)(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), India enacted a *sui generis* form of plant variety protection (PVP) legislation, the Protection of Plant Varieties and Farmers' Rights Act 2001 (hereinafter 'the Act'). The Act confers an exclusive right to breeders of new plant varieties to produce, sell, market, distribute, import or export the variety (Sec. 28). The uniqueness of this Indian law is that it allows farmers to save, exchange or sell seeds of a PVP protected variety, with only restriction on selling seeds of a protected variety in branded fashion (Sec. 39(iv)). Moreover, unlike in other countries, the Act also allows protection of the already existing varieties under the category of "extant varieties".

Facts

In 2019, PepsiCo India sued four farmers in Gujarat, claiming that they had been illegally growing, producing, and selling its registered potato variety FL 2027 (PepsiCo India Holdings Pvt Ltd v Bipin Patel – CTSN 23/2019, Commercial Court, Ahmedabad). It demanded a permanent injunction restraining the farmers from producing the variety and sought estimated damages worth Rs.10,500,000 (around 140,000 USD) from each farmer. However, after public backlash, it withdrew the cases. It stated that the cases were withdrawn, "relying on its discussion with the government to find a long term and an amicable solution of issues around its seed production." Concerned about the impacts of the registered plant variety on farmers' livelihoods, Kuruganti (the applicant) filed the revocation application before the Protection of Plant Varieties and Farmers' Rights Authority. The Authority accepted the plea for revocation of the PVP certificate granted to PepsiCo India on multiple grounds under Section 34 (a), (b), (c), (h) of the Act.

Analysis

It was found that PepsiCo India had submitted the application to register the variety in question, FL 2027, under the category of "new variety", although the variety had been first commercialised (outside India) more than five years before the application was filed. PepsiCo India argued that it was an inadvertent error, and upon identifying the error, its representatives

rectified the error and made changes in the application by hand. However, it could not be corroborated as no such visible correction of the typographical error was seen on the application form. Interestingly, despite receiving the application for “new variety”, the registrar had followed the procedures required for the registration of “extant variety” and issued the certificate of registration as an “extant variety” to PepsiCo India. For this incident, the chairperson interpreted that PepsiCo India had knowingly filed the variety under the category of new variety although it would only qualify for extant variety, and “the registrar seemed to have assumed *suo motu* [without any request by parties involves] for the category to be extant variety”. PepsiCo India had also provided a contradictory date of first sale of the variety in the application. Hence, the chairperson held that PepsiCo India has obtained the registration of FL 2027 based on incorrect information, and it had not provided the registrar with other information and documents required for registration. Therefore, the certificate was deemed revocable as per clauses (a) and (c) of Section 34.

Secondly, the chairperson held that PepsiCo India had obtained the certificate of registration despite not being eligible for protection under the Act. The potato variety FL 2027 was developed by a plant breeder, Dr Robert W Hoopes, who had assigned the rights over the variety to Recot Inc. (subsequently name changed to Frito Lays North America (FLNA), a group company of PepsiCo Inc). PepsiCo India claimed that FLNA had orally assigned it the right to register FL 2027 in India. The chairperson held this oral assignment invalid. The subsequent letter by FLNA in 2019 stating that it had allowed PepsiCo India to apply for registration was deemed an afterthought to legitimise the absence of the document, and hence, not taken into account. As PepsiCo India was not the “assignee” of FL 2027 at the time of making the application, it was held that it had obtained the certificate of registration despite being ineligible. Accordingly, the certificate was also revokable under Section 34(b) of the Act.

Along with the abovementioned grounds, the applicant had also argued for revocation on the ground of non-compliance with the provisions of the Act (Sec.34 (f)). She argued that the legalese in both Section 28 (conferment of breeders’ right) and Section 64 (infringement) begin with “subject to the (other) provisions of this Act”, but Section 39 (farmers’ rights) begins with “Notwithstanding anything contained in this Act”, therefore, the farmers’ rights supersede the breeders’ rights. As farmers have over-arching rights to save, exchange, share or sell their seeds, including the seed of a PVP protected variety, she claimed that suing farmers, and consequently creating panic amongst them, threatening their livelihood, taking secret video footage and unauthorised samples of farmers’ potatoes, was unethical and non-compliance to the provisions of farmers’ rights in the Act. Such non-compliance, the applicant contended, was a ground for revocation as per Section 34(f) of the Act. She further argued that since farmers were being harassed and intimidated using the PVP certificate, the grant and continuation of the certificate was not in public interest, therefore, it was revocable (Sec. 34(h)). While the decision is silent on the argument of non-compliance, it accepted the argument of violation of public interest, albeit with a modification. In the decision, the chairperson held that “without being a legitimate owner”, PepsiCo India sued farmers and put them to hardship, including the possibility of having to pay a huge penalty on the purported infringement, and this violated public interest under Section 34(h) of the Act. It would have been interesting to see how the chairperson would have interpreted this ground had a legitimate owner of a PVP certificate brought cases against farmers.

Practical Significance

This case demonstrates discrepancies in the process of granting PVP certificates. The chairperson opined that the case of revocation would possibly not have existed had the registrar

processed the application in conformity with the Act. He directed the registrar to develop a standardised sheet for evaluation of applications for registration of plant varieties in accordance with the relevant laws.

Some farmers' rights activists have welcomed the decision as a "historic victory of farmers rights." While the chairperson held PepsiCo India's action against farmers in Gujarat as a violation of public interest, it is pertinent to point out that, to reach this conclusion, the chairperson reasoned that PepsiCo India sued farmers "without being a legitimate owner" of the PVP certificate. Hence, it is unclear whether the outcome of the case would have been the same had PepsiCo India been a legitimate owner. In other words, it is uncertain whether bringing PVP suit against farmers by legitimate certificate holders would still qualify as being against public interest and serve as a ground for certificate revocation. Nevertheless, the decision stands as a warning to other seed companies from bringing suits against farmers in India.

Another issue is that the variety FL 2027 was registered as an "extant variety", meaning an already existing variety. Indian farmers had access to this variety around seven years before the PVP right was granted. Unlike the "new" plant varieties, the "extant" varieties do not need to fulfil the criteria of novelty. While the rationale for intellectual property rights is based on protecting new inventions to boost innovation, the rationale for granting the same level of protection to extant variety is unclear. Some scholars suggest that such retrospective protection is a result of intense lobbying of the public sector breeding to derive benefit from their past efforts in plant breeding. However, this provision has been deployed by private seed companies to register their already existing varieties. For instance, 9 out of 31 registered varieties of Monsanto India are registered as extant varieties as of 2018. Therefore, it can be argued that this provision has been facilitating the enclosure of the otherwise publicly available varieties hitherto freely used by farmers.