IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Biswaroop Chowdhury

F.M.A.T 11 of 2023
CAN 1 of 2023

Pan Seeds Pvt. Ltd.
Vs.
Ramnagar Seeds Farm Pvt. Ltd. and Ors.

For the appellant	**:-**	**Mr. Ranjan Bachawat, Sr. Adv.,** **Mr. Debnath Ghosh,** **Mr. Tin Kari Jana,** **Mr. Gautam Kumar Ray,** **Mr. Gopal Das,** **Mr. Sourav Jana,** **Mr. Biswaroop Mukherjee, Advs.**
For the respondents	**:-**	**Mr. Jishnu Saha, Sr. Adv.,** **Mr. Shuvasish Sengupta,** **Mr. Shushovit Dutt Majumdar,** **Ms. Pubali Singh Chowdhury,** **Ms. Ratnadipa Sarkar,** **Mr. Bhavesh Garodia, Advs.**
Judgment on	**:-**	**09.06.2023.**

I. P. Mukerji, J.:-

As all the relevant papers are before us, we propose to dispose of the appeal and the stay application by this common judgment and order, dispensing with all formalities.

The Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act) is a relatively new Act. Sections 2 to 13, 95, 96 and 97 came into force on 11th November, 2005 whereas Sections 1 and 14 to 94 came into force on 19th October, 2006. The preamble to the Act explains its purpose, inter alia, to protect "plant varieties, the rights of farmers and plant breeders and encourage development of new varieties of plants." Implementation of the Act would also inter alia, result in high quality seeds and "planting materials to the farmers".

This Act recognizes grant of a kind of ownership rights or patent to producers of unique and distinctive varieties of plants and seeds from which they germinate. The producer or breeder as he is described in this Act of this new variety has the exclusive right to produce and deal with it, without interference from any rival. Obviously, to identify the unique product, a name has to be given to it. In our case, the variety involved is PAN 804. The breeder who enjoys the registration generally also obtains registration of a trade mark. The use of the trademark is very secondary. What is of utmost importance is registration of the variety under the PPVFR Act. This is for the reason that suppose the respondents use the same mark PAN 804 but the variety contained in the packet bearing the mark is dissimilar to the product of the appellant and is otherwise unique and distinctive, the respondents would be allowed to produce and deal with the product, irrespective of whether they are allowed to use the mark. Conversely, even if the marks of the varieties are dissimilar but the products are similar of which the appellant has registration, the respondent would not be allowed to market it, with or without the mark.

Section 14 of the said Act, inter alia, provides for an application to be made to the Registrar for registration of any variety of genera or species as specified under sub-section 2 of Section 29. Sub-section 2 of Section 29 authorizes the Central Government by notification in the Official Gazette to specify the genera or species for the purpose of registration of varieties other than extant varieties and farmers' varieties under the Act. Section 14 also conceives of an application before the Registrar for registration of extant and farmers' varieties.

Under Section 2(c) "breeder" has been defined as one which has bred, evolved or developed any variety.

In Section 2(r) "propagating material" is defined as:

2 (r) "Propagating material" means any plant or its component or part thereof including an intended seed or seed which is capable of, or suitable for, regeneration into a plant.

'Variety' is defined in Section 2(za) of the said Act in the following manner:-

"(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."

Section 17 lays down that every application should assign a single and distinct denomination to the variety of which registration is sought.

Section 18 provides that every such application for registration under Section 14 shall be inter alia with respect to a variety accompanied by such information, documents, statements, declarations as are provided in that section.

Under Section 19 along with the application for registration, the applicant has to make available to the Registrar such quantity of seeds of a variety of which registration is sought to conduct tests "to evaluate whether seeds of such variety along with parental material" conform to the standards as may be prescribed by regulations.

Section 21 provides for advertisement of the application by the Registrar.

The procedure for registration of essentially derived variety is provided in Section 23 which is more or less the same as for registration of varieties under Sections 14 to 22.

When an application for registration is not opposed or an opposition is filed and rejected, a variety other than an essentially derived variety would be

registered under Section 23. The certificate of registration under Section 24 for a variety other than essentially derived variety and the one under Section 23 relating to essentially derived variety would be valid for nine years for trees and vines and six years in case of other crops and subject to renewal for a maximum period of 18 years for trees and vines from the date of registration of the variety and 15 years in other cases.

Under Section 28 the effect of registration is to confer an exclusive right on the breeder or his licensee to produce, sell, market, distribute, import or export the variety.

Now, under Section 3(1), the Central government has the power to establish an authority known as the protection of plants and farmers' varieties authority. It appears that under Section 34 and 36, both this authority and the Registrar have concurrent powers to decide whether a registration has been validly obtained. The authority has the power of withdrawing the protection the breeder enjoys out of registration.

Section 89 provides that the civil court would not have any jurisdiction over any matter which the Registrar has the power to determine.

Sections 64, 65 and 66 under Chapter X of the said Act defines 'infringement', prescribes the court in which such suit is to be filed and the reliefs including injunction, damages or share of profits which the court can grant.

FACTS

Now, I turn to the facts.

On 23rd August, 2010 the appellant made an application for registration of the seed of the plant variety PAN 804 before the Registrar under the PPVFR Act. They claim that the variety is genetically related to the RASI variety whose stigma is purple. The distinguishable feature of their variety is the white stigma.

This variety was tested by the Registrar under Section 19 and the Protection of Plant Varieties and Farmers' Rights Regulations, 2006 and the Protection of Plant Varieties and Farmers Rights (Criteria for Distinctiveness, Uniformity and Stability for Registration) Regulations, 2009 to check its "distinctiveness, uniformity and stability (DUS)". DUS testing is a way of determining whether a newly bred variety differs from existing varieties in the same species and whether those differing in characteristics, are well-known over two successive growing seasons. Thereafter, the appellant's application was advertised on 19th September, 2017 by the registry under Section 21 inviting opposition. No opposition was filed by anybody. After considering the application, the Registrar issued a registration certificate to them on 28th March, 2018. Initially, the registration was valid for 6 years till 28th March, 2023. It was renewable after expiry of that period in accordance with the provisions of the PPVFR Act. Earlier, on 2nd March, 2009 the appellant obtained registration of its trademark 'JAMUN'. They also obtained registration of the mark 'PAN 804, JAMUN' on 12th August, 2016, both under the Trade Marks Act, 1999.

The appellant says that the respondents are using, selling and producing a variety of seeds under the name JAMUN and DURONTO which is identical to theirs. The identity lies in the colour of the stigma, which is white in both cases. The respondents are thus guilty of infringement of the exclusive right of the appellant, acquired by them on registration of their variety.

On the above cause of action the appellant petitioner filed a suit in the Court of the learned District Judge, Purba Bardhaman, claiming the following reliefs:-

a) A decree of perpetual injunction restraining the Defendants, their men, servants, agents, assigns, and/or dealers and distributors, and/or anyone claiming through them, from manufacturing, selling and marketing, exporting, importing and/or otherwise dealing with seeds having same specifications or under any other variety which is

identical or deceptively similar to the registration obtained by the Plaintiff in relation to the variety "PAN 804" or any identical or deceptively similar variety, in any manner whatsoever;

b) A Decree of perpetual injunction restraining the Defendants, their men, servants, agents, assigns, and/or dealers and distributors, and/or anyone claiming through them, from infringing the Plaintiff's right, title and interest in relation to the variety "PAN 804", a new plant variety registered under the Protection of Plant Varieties and Farmers' Right Act, 2001, and from manufacturing, selling and marketing, exporting, importing and/or otherwise dealing with seeds having similar specifications or under any other variety which is identical or deceptively similar to the registration obtained by the Plaintiff in relation to the variety "PAN 804" or any identical or deceptively similar variety, in any manner whatsoever;

c) To enquire into the loss and damage suffered by the Plaintiff for the act and conduct of the Defendants and a decree for such sum be made in favour of the Plaintiff upon such enquiry being made.

d) Receiver;

e) Injunction;

f) Attachment;

g) Costs;

h) Such further or other order or orders, direction or directions."

In aid of the suit an interim application was also moved before the court. On 21st September, 2022 an ex parte ad interim order of injunction was passed by that court restraining the respondents from infringing the appellant's right, title and interest in relation to the plant variety PAN 804. From time to time this interim order was extended till 6th December, 2022.

The respondents were aggrieved by this order. They moved us. On 21st November, 2022 we made an order directing the learned court below to hear out the interim application afresh from the motion stage.

In that court, the respondents had filed an application under Order 7 Rule 11 of the Civil Procedure Code for dismissal of the suit.

The learned court below proceeded to hear out this application before the injunction application. The appellant says that the learned judge ought not to have done so as this court had only directed it to consider the injunction application. However, the said application was dismissed.

Another grievance of the appellant is that although the learned judge was asked to hear out the injunction application at the motion stage he allowed the respondents to file an affidavit of about 1,500 pages to counter their case. This affidavit was taken into account by the court without giving an opportunity to the appellant to file a rejoinder to it.

By its order dated 6th December, 2022, the learned court below dismissed the interim application of the appellant. The learned judge expressed the views or made the findings enumerated below:-

a) Prima facie, the court could go into the distinctiveness and distinguishing characteristics of the product in respect of which exclusive rights were claimed under the PPVFR Act. The appellant had the obligation of establishing these features before the court, prima facie.

b) Borrowing on the practice of the courts to compare marks, works, designs in intellectual property matters, the court could embark on the same exercise in matters under the PPVFR Act.

c) The appellant had sought an injunction restraining the respondents from producing, marketing or distributing or otherwise dealing with the seeds of PAN 804 variety. Going by the documents annexed to the amendment application submitted by the appellant on 1st April, 2013 before the Registrar including answers to a technical questionnaire attached to it, particularly Clause 10 of it containing the statement of distinctiveness of the variety, no uniqueness or distinctiveness was claimed in the seeds.

d) The certificate of registration did not indicate any distinguishing and destructive characteristics of the appellant's variety.

e) The appellant was unable to make out a prima facie case. The balance of convenience was in favour of refusal of the order of injunction prayed for by them.

The main point taken by Mr. Ranjan Bachawat, learned senior counsel for the appellant is that under Section 89 of the PPVFR Act the civil court had no authority to decide the validity of the registration, finally or even prima facie which power, vested in the authority or the Registrar specified in the Act. The court erroneously went into that question prima facie.

The appellant also contends that as long as the registration remains with the appellant in the records of the authority, they have the exclusive right to produce, sell and otherwise deal with the plant variety. If anyone has objection to the validity of the registration, he has to apply to the Registrar or the authority under Sections 34 and 36 of the PPVFR Act for rectification of the register or expunging the entry from it or for cancellation of the certificate of registration. Only this authority had the power to do so. As long as the registration remained, the appellant was entitled to exclusive use of the variety.

The appellant also contends that an application has been filed by Seed Association of Bengal for revocation of the appellant's registration before the Registrar or authority. The association said relying on a DUS report of Gubba Biotech Laboratory that the appellant and the respondents' plant varieties were identical. For this similarity, the appellants were not entitled to any relief, for lack of distinctiveness of their variety.

Furthermore, the appellant say that their application for registration under the PPVFR Act was widely advised by the authorities inviting opposition. The respondents had not filed any opposition to it nor contested the grant of registration in favour of the appellant. The Registrar in the absence of

any opposition but considering the merits of the case established after detailed testing was of the opinion that the appellant's variety was entitled to registration. Hence, the Registrar granted registration to the appellant.

The appellant says that in May, 2020 they discovered that the respondent No.2 had been distributing and selling seeds identical to the appellant's plant variety PAN 804 under the name JAMUN, having a white stigma. In May, 2022 the said respondents were selling the same goods under the name of "DURONTO".

The appellant has founded their case on infringement and passing off.

Mr. Bachawat submits that the endeavour of the learned court below to embark on an adjudication into the validity of the registration and the prima facie case of the appellant for exclusive use of the variety rendered the exercise wholly erroneous, in excess of its jurisdiction and perverse. Since registration of the appellant's mark is still undisturbed and its validity not interfered with by any competent authority, the appellant is entitled to an order of injunction restraining the respondents from dealing with the subject variety.

Mr. Jishnu Saha, learned senior counsel, appearing for the respondents makes the following submissions:-

The learned judge of the court below did consider the application of the appellant prima facie at the motion stage. Even at the motion stage a respondent is entitled to produce documents and rely on them for the purpose of resisting an interim order. These documents, which the respondents wanted to rely upon were embodied in an affidavit which was served on the appellant on 30th November, 2022 and subsequently used before the learned judge. Mr. Saha submits that the impugned order was made at the motion stage after considering those documents which the appellant had the opportunity of perusing and dealing with, in their argument.

The registration document does not describe the variety and is not indicative of its distinctiveness or characteristics.

If one compares the variety of the appellant with that of the respondents, the only distinctive characteristic of the appellant's variety as claimed by them is that its spikelet or stigma is white. If one peruses the DUS reports obtained by the respondents, this distinctive feature is absent. (Item No. 27, page 1107, also pages 406, 407 and 411). The stigmas of both are white.

On 9th May, 2016 the Registrar General of the Protection of Plant Varieties and Farmers' Rights Authority wrote to the appellant stating that as per the DUS report, the only distinct essential character of the appellant's variety appeared to be the white colour of the stigma. In the circumstances, the appellant was directed to amend Column X of the application so as to incorporate this distinctiveness.

This is contrary to the DUS reports which declared the spikelet of the three varieties, PAN 804, BHU11 and JAMUN (SONALI FOSAL) to be white, learned counsel argued.

The respondents claim that PAN 804 was not distinctive or distinguishable. It is the existing variety BB 11 presented with a different denomination PAN 804 and ought not to have been registered.

Learned counsel placed Section 76 of the PPVFR Act which is in the following terms:-

> *"76. Procedure where invalidity of registration is pleaded by the accused.—*
> *(1) Where the offence charged under this Act is in relation to a variety or its propagating material or essentially derived variety or its propagating material registered under this Act and the accused pleads that the registration of such variety or its propagating material or essentially derived variety or its propagating material, as the case may be, is invalid and the court is satisfied that such offence is prima facie not tenable, it shall not proceed with the charge but shall adjourn the proceedings for three months from the date on which the plea of the accused is recorded*

to enable the accused to file an application before the Registrar under this Act for the rectification of the Register on the ground that the registration is invalid.

(2) If the accused proves to the court that he has made such application within the time so limited or within such further time as the court for sufficient cause allow, the further proceedings in the prosecution shall stand stayed till the disposal of such application for rectification.

(3) If within a period of three months or within such extended time as may be allowed by the court, the accused fails to apply the Registrar for rectification of the Register, the court shall proceed with the case as if the registration were invalid.

(4) Where before institution of a complaint of an offence referred to in sub-section (1), any application for the rectification of the Register concerning the registration of the variety or its propagating material or essentially derived variety or its propagating material, as the case may be, in question on the ground of invalidity of such registration has already been properly made to and is pending before the Registrar, the court shall stay the further proceedings in the prosecution pending the disposal of the application aforesaid and shall determine the charge against the accused in conformity with the result of the application for rectification."

He argued that since in a criminal proceeding the point of prima facie invalidity of registration can be raised, it may equally be raised in a civil proceeding.

VIEWS

The appellant is the breeder of the plant variety PAN 804. On 23rd August, 2010 they made an application for registration of this variety under the PPVFR Act, 2001. The variety was tested which included the DUS testing (Distinctiveness, Uniformity and Stability) under Section 19 by the registry read with the PPVFR Regulations, 2006 and PPVFR (Criteria for Distinctiveness, Uniformity and Stability for Registration) Regulations, 2009. These tests are carried out by the registering authority to ascertain the distinctiveness, uniformity and stability of the variety, which are the essential requirements to be fulfilled by an applicant to claim registration. On prima facie satisfaction with the above characteristics of

the appellant's PAN 804 variety, the registry advertised this application in the journal to invite any opposition to its registration. No opposition forthcoming, on 28th May, 2008 PAN 804 variety was registered under Section 24.

Now, Section 28 of the said Act confers on the breeder of a registered variety an exclusive right to sell, market, distribute, import or export etc. the variety.

It is set out below:-

> *"28. Registration to confer right.—*
> *(1) Subject to the other provisions of this Act, a certificate of registration for a variety issued under this Act shall confer an exclusive right on the breeder or his successor, his agent or licensee, to produce, sell, market, distribute, import or export the variety: Provided that in the case of an extant variety, unless a breeder or his successor establishes his right, the Central Government, and in cases where such extant variety is notified for a State or for any area thereof under section 5 of the Seeds Act, 1966 (54 of 1966) the State Government, shall be deemed to be the owner of such right.*
> *(2) A breeder may authorise any person to produce, sell, market or otherwise deal with the variety registered under this Act subject to such limitations and conditions as may be specified in the regulations.*
> *(3) Every authorisation under this section shall be in such form as may be specified by regulations.*
> *(4) Where an agent or a licensee referred to in sub-section (1) becomes entitled to produce, sell, market, distribute, import or export a variety, he shall apply in the prescribed manner and with the prescribed fee to the Registrar to register his title and the Registrar shall, on receipt of application and on proof of title to his satisfaction, register him as an agent or a licensee, as the case may be, in respect of the variety for which he is entitled for such right, and shall cause particulars of such entitlement and conditions or restrictions, if any, subject to which such entitlement is made, to be entered in the register: Provided that when the validity of such entitlement is in dispute between the parties, the Registrar may refuse to register the entitlement and refer the matter in the prescribed manner to the Authority and withhold the registration of such entitlement until the right of the parties in dispute so referred to has been determined by the Authority.*

(5) The Registrar shall issue a certificate of registration under sub-section (4) to the applicant after such registration and shall enter in the certificate the brief conditions of entitlement, if any, in the prescribed manner, and such certificate shall be the conclusive proof of such entitlement and the conditions or restrictions thereof, if any.

(6) Subject to any agreement subsisting between the parties, an agent or licensee of a right to a variety registered under sub-section (4) shall be entitled to call upon the breeder or his successor thereof to take proceedings to prevent infringement thereof, and if the breeder or his successor refuses or neglects to do so within three months after being so called upon, such registered agent or licensee may institute proceedings for infringement in his own name as if he were the breeder, making the breeder or his successor a defendant.

(7) Notwithstanding anything contained in any other law, a breeder or his successor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

(8) Nothing in this section shall confer on a registered agent or registered licensee of a variety any right to transfer such right further thereof.

(9) Without prejudice to the registration under sub-section (4), the terms of registration—

(a) may be varied by the Registrar as regards the variety in respect of which, or any condition or restriction subject to which, it has effect on receipt of an application in the prescribed manner of the registered breeder of such variety or his successor;

(b) may be cancelled by the Registrar on the application in the prescribed manner of the registered breeder of such variety or his successor or of the registered agent or registered licensee of such variety;

(c) may be cancelled by the Registrar on the application in the prescribed manner of any person other than the breeder, his successor, the registered agent or the registered licensee on any of the following grounds, namely:—

(i) that the breeder of a variety or his successor or the registered agent or registered licensee of such variety, misrepresented, or failed to disclose, some fact material to the application for registration under sub-section (4) which if accurately represented or disclosed would have justified the refusal of the application for registration of the registered agent or registered licensee;

(ii) that the registration ought not to have been effected having regard to the right vested in the applicant by virtue of a contract in the performance of which he is interested;

(d) may be cancelled by the Registrar on the application in the prescribed manner of the breeder of a registered variety, or his successor on the ground that any stipulation in the agreement between the registered agent or the registered licensee, as the case may be, and such breeder or his successor regarding the variety for which such agent or licensee is registered is not being enforced or is not being complied with;

(e) may be cancelled by the Registrar on the application of any person in the prescribed manner on the ground that the variety relating to the registration is no longer existing.

(10) The Registrar shall issue notice in the prescribed manner of every application under this section to the registered breeder of a variety or his successor and to each registered agent or registered licensee (not being the applicant) of such variety.

(11) The Registrar shall, before making any order under sub-section (9), forward the application made in that behalf along with any objection received by any party after notice under sub-section (10) for the consideration of the Authority, and the Authority may, after making such inquiry as it thinks fit, issue such directions to the Registrar as it thinks fit and the Registrar shall dispose of the application in accordance with such directions."

If you consider the definition of 'variety' under Section 2(za) and "propagating material" under Section 2(r), you will find that plant variety includes the propagating material which in turn includes the seeds. In other words, registration of a variety would confer exclusive right on the breeder over the plant as well as the seeds.

Note the difference between this section and section 28 of The Trade Marks Act, 1999, which is inserted hereinunder:-

"28. Rights conferred by registration.—

(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor."

Under this section of the Trade Marks Act, 1999, the registration of a trademark gives the proprietor the exclusive right to use it, provided the registration is valid.

Section 31 of the said Act provides that registration of a mark would only be prima facie evidence of its validity. It is inserted below:-

"31. Special provisions relating to application for registration from citizens of convention countries.—
(1) With a view to the fulfilment of a treaty, convention or arrangement with any country outside India which affords to citizens of India similar privileges as granted to its own citizens, the Central Government may, by notification in the Official Gazette, declare such country to be a convention country for the purposes of this Act.
(2) Where a person has made an application for the granting of a breeder's right to a variety or for entering such variety in the official register of varieties in a convention country and that person, or any person entitled to make application on his behalf under section 14 or section 23, makes an application for the registration of such variety in India within twelve months after the date on which the application was made in the convention country, such variety shall, if registered under this Act, be registered as of the date on which the application was made in the convention country and that date shall be deemed for the purposes of this Act to be the date of registration.
(3) Where applications have been made for granting of a breeder's right to a variety or for entering such variety in the official register of varieties in two or more convention countries, the period of twelve months referred to in sub-section (2) shall be reckoned from the date on which the earlier or earliest of those applications were made.

(4) Nothing in this Act shall entitle the breeder of a registered variety for infringement of rights other than protected under this Act which took place prior to the date of application of registration under this Act."

There is no such condition in the PPVFR Act. Therefore, registration by itself gave the appellant the exclusive right to produce and deal with the variety, not subject to fulfilling the validity test.

If the civil courts had the power to adjudge the validity of registration of a variety, it could have only gone into the question prima facie at the motion stage. The final adjudication, would determine the ultimate validity. The intention of the legislature is otherwise. Section 89 of PPVFR Act like its corresponding Section 93 in the Trade Marks Act, 1999 imposes a bar on the civil courts to determine any matter over which the authority or the Registrar has jurisdiction.

Once a plant variety is registered under Section 24, it is not subject to the test of validity by the civil courts. If it is not so subject, even prima facie it could not have gone into that question.

Only the Registrar or the authority under the Act has the power to rectify the register or cancel the registration on the ground that a variety's registration is invalid. No such order from any authority declaring the registration invalid or even prima facie invalid is on record. On a combined interpretation of Section 28 chapter 5 and Section 89 of the said Act, the learned court below had no jurisdiction to go into the question of validity of the registration. The learned court below ought to have proceeded on the footing that the registration was valid and on that basis, proceeded to adjudicate upon the interim application.

It was said by Mr. Jishnu Saha that the application of the appellant for registration before the Registrar or before the learned court below was wanting for absence of a detailed description of the appellant's variety. Unless such details were disclosed, it was not possible for any person to

come to any kind of conclusion as to whether the variety of which registration was sought, was unique or distinctive in characteristics. If the exact detailed specification of the plant variety was not disclosed, the appellant could not have claimed novelty of its product.

In my opinion, the appellant's application before the Registrar was in no way deficient. It had the necessary details. The Registrar on the basis of the information supplied, had come to a prima facie conclusion that the appellant's variety was unique and distinctive. Thereafter, the variety was advertised. No opposition was forthcoming. Thereafter, the application was considered by the authority and registered.

More fundamentally, it was not required of the appellant to disclose in the application for interim relief more details of the variety because the civil court, as I have discussed above, had no jurisdiction to go into the question of validity of registration. It had only the obligation to disclose the registration in its favour and to show that the respondents' variety was similar to theirs to obtain an order of injunction. It is quite plain that the appellant was able to show such similarity.

Mr. Saha proceeded on a different note. He tried to show that because the respondents' variety was similar, the appellant was not entitled to registration, its registration was invalid and therefore, not entitled to an order of injunction. That is the roundabout way. Once the appellant had been able to show registration in its favour, the court had no other option but to restrain the respondents from dealing with the same variety.

The division bench judgment of the Delhi High Court in **F. Hoffmann-LA Roche Ltd. & Anr. Vs. Cipla Ltd.** reported in **2009 (40) PTC 125 (Del.) (DB)** cited by Mr. Saha was with regard to a suit where the court was adjudicating upon the issue whether the defendant's patent infringed the appellant/plaintiff's patent. In those circumstances, the court had remarked:-

> *"(iii) In an application seeking ad interim injunction in a suit for infringement of patent, it would be incumbent on the plaintiffs to make a full disclosure of the complete specification of the product whose patent is claimed to have been infringed. The plaintiffs will also have to disclose to Court the x-ray diffraction data of the product, particularly if it is a pharmaceutical drug. The plaintiffs have to make an unequivocal disclosure that the patent they hold covers the drug in question; whether there are any other pending applications seeking the grant of patent in respect of any derivatives or forms of the product for which they already hold a patent and the effect of such applications on the suit patent."*

Since the civil court had no jurisdiction to determine the validity of the registration, such an obligation to furnish the minute details of the variety did not rest with the appellant. Even assuming that the application before the court had to contain the necessary details, I am convinced that the necessary details were contained in the application of the appellant.

Mr. Saha has made extremely formidable arguments. He argued that in the DUS test report dated 6th December, 2020 obtained by the appellant, their variety PAN 804 was compared with other varieties, BHU 11 and JAMUN. There was no distinctiveness at all in the appellant's variety. Their claim to distinctiveness based on the white colour of the spikelet was demolished by the report which stated that all the spikelets were white. According to the Gubba Biotech laboratory, the spikelets of nine varieties tested were white.

That the appellant's variety is a common variety devoid of distinctiveness, may be a very substantial ground in a proceeding to annul the registration before the Registrar or the authority. As long as the appellant's registration of the variety is subsisting, this point cannot be urged in a civil court for the reasons given above.

The argument of Mr. Saha that since under Section 76 of the said Act the criminal court can go into the validity of registration of a variety prima facie, a civil court has similar power, is without merit. Section 89 imposes bar on the courts exercising civil jurisdiction to determine the validity of

the mark. If one has to establish the validity or invalidity of a mark, one has to do so only in a civil court. The bar only applies to a civil court. The criminal court cannot make any declaration or pass any injunction in civil matters. Now, if in a criminal case the validity or invalidity of registration would determine conviction, the court cannot held two trials to try one alleged offence. If the variety is registered and on that basis the plea of invalidity is rejected and the accused convicted and thereafter in a civil proceeding, the registration is held to be invalid, the case cannot be reopened to set aside the conviction. That is why the criminal court has been given the power to prima facie adjudge the question of validity and if on that basis it finds prima facie that the offence is not sustainable, it may adjourn the criminal proceedings to enable the accused to obtain an order of rectification of the register or annulment of registration from the Registrar.

The other two cases cited by Mr. Saha **Shree Ganesh Besan Mill and Ors. Vs. Ganesh Grains Limited and Ors.** reported in **AIR 2022 Cal 171 = (2022) 89 PTC 233** and **Lupin vs. Johnson and Johnson** reported in **AIR 2015 Bom 50** were under the Trade Marks Act, 1999 (the 1999 Act).

When the Lupin judgment was pronounced, Section 93 of the 1999 Act was in force barring the jurisdiction of the civil courts over matters inter alia regarding validity of the mark. This power was vested in the tribunal. Now, if the final determination of the validity of the mark was with the tribunal and registration was only prima facie proof of validity, while considering the interim application for infringement of a mark where the question of validity was raised, the court was entitled to prima facie scrutinise the validity of registration of the mark as held in that case and followed in **Shree Ganesh Besan Mill and Ors. Vs. Ganesh Grains Limited and Ors.** reported in **(2022) 89 PTC 233**. But the PPVFR Act is completely different. Section 28 confers on the breeder exclusive right without any condition and this right cannot be adjudged and the validity of this registration cannot be

tested in any civil court. It can only be adjudged by the authority or the Registrar under the PPVFR Act. Till the time the registration is declared to be invalid by the forum under the PPVFR Act, the breeder is entitled to prevent any other breeder from dealing with the variety. Hence, the above cases do not have any application to the facts of this case.

To my mind, when a suit is filed alleging infringement under the PPVFR Act and a plea is made by the defendant that the registration relied upon is invalid, the court is left with no option but to take the registration as valid and deal with the suit accordingly. However, if it is shown to the court that steps have been taken by the defendant diligently before the Registrar or the authority under the PPVFR Act to obtain cancellation of the registration on the ground of invalidity, the court would have a discretion to adjourn hearing of the suit to give a chance to the defendant to prove his point. This procedure was provided in the Trade Marks Act, 1999 before its amendment in 2021 when a suit was filed, the defence of invalidity taken and the issue pending before the Board/tribunal. The principle may be followed in cases arising out of the PPVFR Act. I hasten to add that only the suit may be adjourned and not any interim application which has to be determined on the basis of the status of the registration on the date the interim order is made.

The learned court below completely failed to appreciate that registration of a variety included “propagating material” which included seed, under Section 2(r) and 2(za) of the PPVFR Act. Hence, registration of the plant variety protected its seeds also.

The learned judge of the court below has wrongly exercised his jurisdiction by going into the prima facie case on the question of validity of the appellant’s registration. While doing so, the learned judge has unnecessarily made an investigation into the characteristics, distinctiveness and stability of the appellant’s variety. He also exceeded his jurisdiction by making a comparative analysis of the diverse varieties.

In my opinion, once the appellant has been able to register its variety, it is entitled to protect it by restraining others from growing, selling, marketing or otherwise dealing with the said variety. The court could only go into the question whether the appellant and the respondents' varieties were similar, for the purpose of consideration whether injunction should be granted. In my opinion, it is an admitted fact that the two varieties are similar and an injunction ought to have been granted.

One more point needs to be answered. Where a court is concerned with an application for grant of an interim order, the respondent does not have a chance to use an affidavit, at that point of time, to resist the order. The courts do permit and rightly so, the respondent to rely upon whatever documents he has in his possession to resist the interim order. In this case the court permitted the respondents to use a voluminous compilation of papers running into 1500 pages to oppose the grant of an interim order. However, if on the basis of such documents, the appellant's prima facie case was demolished, in the eyes of the court and the interim application liable to be dismissed, which the court ultimately did, the learned judge ought to have given an opportunity to the appellant to deal with those documents or the affidavit containing those documents and to consider passing an order of injunction or refusing it on the basis of the appellant's disclosure and arguments based on it. In my opinion, solely relying on the documents produced by the respondents without an opportunity to the appellant to deal with them, was violation of the principles of natural justice and fairness.

For all those reasons, a very gross error has been committed by the learned court below. It is certainly not a type of case where the appellate court would respect the discretion of the learned trial court and exercise restraint in interfering with it. The order of the learned court below can be called perverse.

We allow this appeal (FMAT 11 of 2023). The stay/injunction application (CAN 1 of 2023) is also disposed of. The judgment and order under appeal is set aside. An order of injunction is issued restraining the respondents from breeding, growing, selling, marketing or otherwise dealing with the plant variety PAN 804 including the seeds till the disposal of the suit.

Nothing remains of the interim application before the learned court below. It is disposed of by this order. Let this order be formally incorporated in the records of that court.

We direct that the suit be expedited and for this purpose either party may make an appropriate application before the learned trial judge to pass the necessary directions for expediting the suit.

Any observation or finding of fact made by us on the merits of the case is to be taken to be prima facie.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(BISWAROOP CHOWDHURY, J.) **(I. P. MUKERJI, J.)**

F.M.A.T 11 of 2023
CAN 1 of 2023

Pan Seeds Pvt. Ltd.
Vs.
Ramnagar Seeds Farm Pvt. Ltd. and Ors.

LATER:

Learned Counsel for the respondents prays for stay of operation of this judgment and order which is considered and refused.

(BISWAROOP CHOWDHURY, J.) **(I. P. MUKERJI, J.)**