
INTERFACE BETWEEN TRADE SECRETS AND GMO's IN INDIA : THE WAY FORWARD

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ABSTRACT

The research paper aims at highlighting the absence of specific legislation that governs the rights of trade secret holders with the public interest. In accordance with the 37th Report of the Parliamentary Committee on Agriculture (PCA) on “Cultivation of Genetically Modified Food Crops- Prospects and Effects” and the Technical Expert Committee constituted by the Supreme Court, the said committees in their reports and recommendation expressed the need to overhaul the regulatory structure of genetically modified organisms. The paper delineates how lax regulatory structure of genetically modified organisms can be detrimental to the public interest and biosafety essentially when the giant dominant agri based enterprises are provided with trade secret protection.

INTRODUCTION

Trade secrets are widely in vogue by the business entities irrespective of the fields they are operating in. The prime function of trade secrets is to veil the requisite information that is vital for the business to run and gain a strengthened competitive edge in the market. The giant dominant agri based enterprises make sure to protect their vital commercial information pertaining to their business using intellectual property protection such as patents and trade secrets. Although, the patents and the trade secrets differ from each other intensively but both aim to secure a competitive edge of an enterprise in a relevant market. Trade secrets are highly confidential that cannot be disclosed in the public domain and the employer takes all the sensitive measures to secure it.

In India the law pertaining to trade secrets is not particularly specified. Yet, the right to enforce trade secrets is protected under contract laws, criminal laws, in the Information Technology Act, 2000 and other certain laws and the infringement of the trade secrets can be filed under these laws. The point of concern arises in a scenario where in India the GMO regulatory structure is defective. It is evident with the case of Bt Brinjal controversy wherein it was allowed for its commercialization by the regulators despite toxic contents ingrained in the crop. In addition, in accordance with the 37th Report of Parliamentary Committee on Agriculture (PCA) on “Cultivation of Genetically Modified Food Crops- Prospects and Effects” the committee rebuked the functioning of GEAC and recommended the overhaul of regulatory system with an objective of ensuring transparency and accountability in decision making.

Moreover, when the Supreme Court of India constituted a Technical Expert Committee, the Committee suggested a ten year moratorium on field trials of Bt. transgenic. They further recommended to refrain from conducting Bt. transgenic trials till necessary changes are made in the regulatory system. From the said reports and recommendations it can be inferred that risk assessment relating to GM crops lacks in scientific data and the assessments are not adequately done by the regulators owing to their defective regulatory structure. The public gets deceived by the regulators in believing that the GM crops are safe for human consumption but in actual the regulators err in adequately assessing GM crops, this can be best explained by the Bt Brinjal controversy. This can be detrimental to public interest and biosafety as well. In such circumstances, when dominant agri based enterprises exercise their right to safeguard their vital information pertaining to business with the help of trade secrets, the enterprises are vested with the power to veil the essential information such as the kind of technique, chemicals, key ingredients, device or any vital information that are in use for creating genetically modified

crops. Such concealment deprives the public the right to know the composition of GM crops and how it shall be impacting their health and environment as a whole, because the enterprises are reluctant in providing raw data relating to GM crops on grounds of confidential information. However, the public can appropriately avail their right to know under the Right to Information Act, 2005, if such confidential information comes in conflict with public interest. However, the situation does not stand to be rosy essentially in the advent bill, Biotechnology Regulatory Authority of India (BRAI), 2013. The said bill aims to keep the commercial information pertaining to research and development of genetically modified organisms and transgenic foods and products confidential that shall not under any circumstances be disclosed in the public domain. This provision in the Bill is in direct contravention to the Right to Information Act, 2005. The Bill has now lapsed and can be revived anytime before the parliament. If the said bill gets the approval the consequences can be detrimental to the public interest as the public will be deprived of their right to know the composition of GM crops, its impact on consumption and its impact on the environment under guise of confidentiality essentially in the severe picture of distorted regulatory system. On the other hand, agri based enterprises will be empowered to sustain their dominance harming the consumers. Thus, a dispute is between the right to exercise trade secrets and the right to have transparency in view of public interest.

TRADE SECRETS

Trade secrets connote any information of enterprise that has commercial value, such value has the potential to run business and gives competitive edge to enterprise in a relevant market. This information is entirely not known in the public domain. In pursuance to safeguard and keep vital information confidential pertaining to business the owner of enterprises tend to take all sensitive measures. The right to safeguard undisclosed information is not only the right of business enterprise but the primary purpose for bestowing intellectual property protection of trade secrets is to sustain competition in the relevant market. As unfair competition shall be detrimental to competitors and essentially to the consumers. Thus, bestowing intellectual property protection of trade secrets becomes essential to enterprises.

Trade secret is defined in accordance with Section 1(4) of Uniform Trade Secrets Act, 1985 as, means of information, including a formula, pattern, compilation, program, device, method, technique, or process.¹ This information has commercial value and efforts are taken by the

¹Uniform Trade Secret Act, 1985, §1(4).

owner of the business to preserve its secrecy. In *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*² The court held that a trade secret is information that would cause real or significant harm to the owner if disclosed to a competitor. It can include formulae not only for the manufacture of products but also, in an appropriate case, the names of the customers and the goods which they buy.

EXISTING LEGAL FRAMEWORK CONCERNING TRADE SECRETS IN INDIA

Protection of trade secrets are recognised by Trade-Related Aspects of Intellectual Property Rights (TRIPS) and in Article 10(b) of the Paris Convention. In accordance with Article 39 of TRIPS, members are in obligation to protect information lawfully within their control from disclosure, from acquired by, from used by others without their consent provided such information should have commercial value, should not be known in public domain and reasonable steps have been taken to protect such information by the owner of enterprise. Also, Article 39 of TRIPS states members cannot protect such information when it conflicts with public interest. Thus, TRIPS has asserted to safeguard information but this right is not absolute and subject to the best interest of the public.

In India there is no legal framework specifically for trade secrets intellectual property protection. However, enterprises can protect their vital information that has commercial value and the infringement of the same can be filed under certain laws. Indian judiciary has shown their interest to safeguard the right of trade secret protection favourable to enterprises under certain laws. The trade secret can be protected under these laws stipulated below:

- **Common Law**

Under Common Law, on grounds of action of misappropriation the trade secrets can be protected. Misappropriation can be said to be committed when, breach of obligation of confidence, access of confidential information by a third party in an unauthorized manner and lastly, when information taken by cheating or theft.

Moreover, Indian judiciary have three key points wherein proceedings may arise for infringement of trade secrets, these are stated below:

² 61(1995) DLT 6.

1. When an employee gets to the possession of a secret pertaining to business in his course of employment and either carelessly or deliberately transfers such information to any authorized person.
2. When any unauthorized person incites an employee to disclose him such information
3. Under license agreement for the use of know-how, the licensee breaches any such condition of agreement, either expressly in agreement or implied from conduct in order to maintain secrecy of such know-how and omits to do so.

It is pertinent to note that, Indian judiciary avowed to protect trade secrets in absence of specific trade secret legislation. Their prime motive is to reinforce the efficient functioning of India. Their motive can be evident from judgements rendered by Indian judiciary. In the case *John Richard Brady and Ors v. Chemical Process Equipment P Ltd and Anr*³ The Delhi High Court in a scenario where unauthorized use of trade secrets is concerned concluded that in order to have justice to light the defendants must be restrained from abusing know-how, specifications, technical information with respect to plaintiff business. Upheld that, under the conditions of agreement defendants were entrusted to safeguard such information but they breached it and must be restrained.

- **Contract Law**

Indian judiciary has also rendered judgement under contract obligations and on the basis of principles of equity. Section 27 of the Indian Contract Act states to restrain trade. It explicitly states, all agreements that restrains trade are void.

- **Remedies for Infringement of Trade Secrets**

Remedies available in case of infringement are injunctions or damages. The Specific Relief Act, 1877 will be applied. It is to be noted that, a *prima facie* case and irreparable loss must

³ AIR 1987 Delhi 372.

be established. In certain cases relief of injunction was shunned because of inadequacy in prima facie cases.

- **Information Technology Act, 2000**

Under the aegis of Section 72 of IT Act, 2000 that provides for criminal remedies wherein a person can be punished for imprisonment for a term with fine in circumstance that person has secure access to any electronic record, book, register, information document or any other material without the consent of the concerned owner of such materials. In addition, such a person discloses such information.

Also, under Section 43A of IT Act, compensation is provided for failure to protect sensitive personal data. Sensitive personal data is defined in the rules promulgated under the Act that involves, password, financial data, biometric data etc.

- **Copyright (Amendment) Act, 2012**

Section 65A provides for criminal remedies to overcome technological measures for protection of works in which copyright exists, essentially such acts done with intention of violating copyright in such works. Along with it, Section 65B that imposes criminal penalty for commitment of unauthorized access and alteration of rights information pertaining to management essentially maintained through online contracts.

- **Indian Penal Code, 1860**

Infringement of trade secrets can be filed under Indian Penal Code(IPC) as well. Under Sections 405, 408, 418 and 420 of IPC, offences such as criminal breach of trust, theft, and cheating is applicable in infringing trade secrets. If a person is found to commit criminal breach of trust, if that person misappropriately with ill intention or converts such property for his own use, any property that was entrusted upon him or disposes of such property in violation of contract. Thus, infringement in disclosing trade secrets is a criminal offence under IPC.

INDIAN JUDICIARY ON INFRINGEMENT OF TRADES SECRETS

Indian judiciary has been favourable towards enterprises' right to IPR of trade secrets but the right is not absolute to enterprises. There have been certain judgements rendered by Hon'ble Courts in respect to trade secrets and any issues pertaining to it.

In case of *Niranjan Shankar Golikari v. The Century Spinning & Mfg Co*⁴ The Apex Court held, every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind is void.

In the case of *Faccenda Chicken Ltd v. Fowler*⁵ it was held by the Court that, any information in public domain cannot be protected under the aegis of confidentiality. Further, it was emphasised that when an employee gets into the possession of trade secrets during the course of his employment and such information must be protected even after such an employee leaves the service. Thus, infringement of trade secrets can be filed against the prior employee who discloses vital information pertaining to enterprise.

The prime issue relating to the nexus between breach of confidence and the fundamental right to free speech integrated with public interest was encountered before the Delhi High Court in the case, *Petronet LNG Ltd v. Indian Petro Group & Anr*⁶, wherein dispute arose when Petronet LNG Ltd (PLL) alleged that Indian Petro Group (IPG) published confidential information that conclusively deteriorated their business. PLL claimed their right to privacy and the right to protect confidential information pertaining to their business. In opposition to it, IPG claimed the right to freedom of free speech and asserted that the said publication was done in view of public interest. The Delhi High Court examined the conflict between them by stepping into three points.

Firstly, whether PLL has the right to privacy? Secondly, whether PLL allegations on grounds of confidentiality are maintainable? And thirdly, whether PLL claim on ground of breach of confidentiality is maintainable?

With respect to the first issue, the Court upheld, the right to privacy is entitled to individuals and that this right cannot be extended to juristic or artificial entities. Thus, PLL was shunned from the entitlement to right to privacy.

⁴(1967) AIR 1098.

⁵ (1986) 1 All ER 617.

⁶ (2009) 158 DLT 759.

Coming over to the second issue, the Court observed that the suit drawn to prevent breach of obligation was maintainable under Section 9 of Civil Code Procedure (CPC) read with Sections 38 and 39 of the Specific Relief Act, 1963. The Court further asserted confidential information pertaining to business is of utmost information since disclosure of it could potentially lead to commercial harm to business. Thus, PLL claim was maintainable on grounds of entitlement to protect confidential information.

Lastly, with respect to the third issue, the Court essentially relied on the case, *HRH Prince of Wales v. Associated Newspapers Ltd.*⁷ wherein the judgment of the case emphasised the need to gauge whether confidential information held by the enterprise conflicts with public interest or not. The Court based the principle set by the HRH Prince of Wales case applied to the PLL allegations. The Court observed, the activities of PLL are of utmost importance to the public. The prime issue the case was set up was, the balance between the right to protect confidential information and disclosure of such information in view of public interest. The Court held, IPG has the right to freedom of free speech and that the Apex Court has consistently reiterated the dissemination of news and free flow of ideas is of prime importance. Further, the Court meticulously examined each article published and gauged whether any information written there holds to be of commercial value for an enterprise running of business. On examination no article was found to be of commercial value neither PLL was able to substantiate its claim for right to entitlement to confidential information. In contrast, IPG substantiated the articles published by them to be of utmost public interest. Thus, the case of Petronet LNG Ltd. is an appropriate precedent when the conflict arises between the right of an enterprise to protect confidential information versus disclosure of such information in view of public interest. It is appropriately settled that in such circumstances such information cannot be kept confidential when it is inimical to public interest.

NATIONAL INNOVATION ACT, 2008

The National Innovation Act, 2008 implemented by the Department of Science and Technology, was the real effort for safeguarding protection of confidential information, trade secrets and innovation. It is based on three cornerstones. Firstly, it endeavours to uplift

⁷ (2007) 2 All ER 139.

innovation by private-public partnerships. Secondly, it aims to develop a National Report on addressing Trade Secret provisions in India. And thirdly, it aims to codify a law relating to confidentiality in pursuance to protect trade secrets. Essentially Chapter VI of the Act delineates the confidentiality of information. It vividly addresses three important points:

1. Confidentiality
2. Misappropriation
3. Damages and injunctions

In accordance with the bill, confidentiality can take place through contractual obligation and non contractual obligations. It is pertinent to note that under the aegis of contractual obligation the information can be disclosed provided there exists any kind of obligation by way of equity. Whereas under the aegis of non-contractual obligations, the information cannot be disclosed by the third party unless consent for the same is obtained. With respect to misappropriation the Act goes on to prescribe three exceptions stated as follows:

1. No misappropriation is said to have occurred when the information already exists in the public domain.
2. No misappropriation if parties come into a conclusion to disclose such information.
3. There shall be no misappropriation if, in view of public interest, such information is disclosed.

In case of apparent misappropriation, an injunction can be granted. Further, damages will only be awarded when the information is being misused and unless a contract exists between parties for the amount, the Government is at liberty to decide the amount by virtue of Section 15(c) of the Act. It is also pertinent to note, if the intent of the person is discerned for misappropriating then damages will be thrice the prescribed amount in the Act. The Act also goes on to give immunity to persons who acted in good faith.

However, at present the Act has remained in form of bill and the status with regard to the proposed bill is unclear.

NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY

The National IPR Policy was released by former Finance Minister, Arun Jaitely. The National IPR Policy document aims to bring all kinds of IPRs to a single platform. The policy consistently adheres with the World Trade Organisation (WTO) agreement on TRIPS. The document primarily aims to create and exploit synergies between all kinds of intellectual property, relevant statutes and agencies. It aims to function for implementation, review and monitor. Further it aims to imbibe global best practices to the Indian scenarios. The Union Cabinet approved the National IPR Policy on 12th May, 2016 that aims to open a pathway for future IPRs in india. The policy is set to reinforce creativity and innovation conclusively aiming at promoting entrepreneurship and development in areas of socio-economic and culture. The policy has seven objectives. The third objective states to incorporate strong and effective IPR laws that efficiently balance interest of right holders with larger public interest. The reasoning behind this objective is to bring necessary changes to existing laws of IP in consonance with national needs and priorities. The objective is to review existing IP laws in order to update them with recent times and eradicate any anomalies after consultation with stakeholders. To consistently indulge deliberations at several international forums to create legally binding instruments to safeguard Traditional Knowledge, Genetic resources and Traditional Cultural and Expressions. And the objective essentially aims at providing protection of Trade Secrets.

GENETICALLY MODIFIED ORGANISMS (GMOs)

Genetically modified organisms are those organisms whose genetic material has been artificially modified in a laboratory through the process of genetic engineering. The first genetically modified organism seen in the 1980s. There are myriad ways to produce genetically modified organisms. The gene that is inserted into the cell of a microorganism, plant or animals is known as transgene. The transgene are inserted through different ways stated below:

1. Transduction with the use of bacteriophages
2. Transgene injection using pronuclear microinjection
3. Transfer using modified viruses and plasmids
4. Electroporation method by which permeability of cell membrane is achieved

The primary reasons for promotion of GM crops are to provide food to the public at large. They are produced in such a way that could resist drought, kill weeds while sustaining the crop that

is useful for farmers and these crops can efficiently sustain cold temperatures. In addition to this, it is pertinent to note that GM crops have health hazards and environmental hazards as well. GMOs are inherently unsafe and there are several reasons for it. The first is that the process of genetic engineering itself creates unpredicted alterations, irrespective of which gene is transferred this creates mutations in and around the insertion site and elsewhere.⁸ The agri enterprises assert that gene transfer from GM foods is not possible but it has taken place. The genetic material in soybeans that make them herbicide tolerant transferred into the DNA of human gut bacteria and continued to function.⁹ This implies that when we stop consuming GM food, its foreign GM protein may be detected inside our bodies. GM food also has the potential to depict toxin reactions in the digestive tract. When the first crop was submitted to the Food and Drug Administration FlavrSavr tomato was detected with ingrained toxins in it. Out of 20 female rats fed the GM tomato, 7 developed stomach lesions. The type of stomach lesions linked to tomatoes could lead to life-endangering hemorrhage, particularly in the elderly who use aspirin to prevent blood clots.¹⁰ Dr. Pusztai has a strong belief that the digestive tract being the first and foremost site of contact with food can veil several reactions to toxins and must be the first target for GM food assessment. Mice fed potatoes engineered to produce the Bt-toxin developed abnormal and damaged cells, as well as proliferative cell growth in the lower part of their small intestine (ileum).¹¹ It is possible that GM food causes distortions to the immune system of human beings resultantly causes allergies. This possibly occurs when the immune system interprets foreign and thus acts in accordance with it. GM foods ingrained with foreign genes. Myriad studies have shown to cause allergies. GM potatoes caused the immune system of rats to respond more slowly.¹² And GM peas provoked an inflammatory response in mice, suggesting that it might cause deadly allergic reactions in people.¹³ In addition to the herbicide tolerant protein, GM soybeans contain a unique, unexpected protein, which likely came about

⁸ Wilson A et al., *Transformation-Induced Mutations in Transgenic Plants: Analysis and Biosafety Implications*, 23 BIOTECHNOL GENET ENG, 105-109 (2006).

⁹ Netherwood T et al., *Assessing the Survival of Transgenic Plant DNA in Human Gastrointestinal Tract*. 22 NAT BIOTECHNOL, 204-9 (2004).

¹⁰ Pusztai A, *Genetically Modified Foods: Are They a Risk to Human/Animal Health?* ACTION BIOSCIENCE (2001). www.Actionbioscience.org/biotech/pusztai.html.

¹¹ Nagui H. Fares, Adel K. El-Sayed, *Fine Structural Changes in the Ileum of Mice Fed on Endotoxin-Treated Potatoes And Transgenic Potatoes*. 6 NATURAL TOXINS, 219-233 (1998).

¹² R. Tudisco, P. Lombardi et al., *Genetically Modified Soya bean in Rabbit Feeding: Detection of DNA Fragments and Evaluation of Metabolic Effects by Enzymatic Analysis*. 82 ANIMAL SCIENCE, 193-199 (2006).

¹³ A.Dutton, H. Klein et al., *Uptake of Bt-toxin by Herbivores Feeding on Transgenic Maize and Consequences for the Predator Chrysoperla Carnea*. 27 ECOLOGICAL ENTOMOLOGY, 441-447(2002).

from the changes incurred during the genetic engineering process.¹⁴ Scientists found that this new protein was able to bind with IgE antibodies, suggesting that it may provoke dangerous allergic reactions.¹⁵

Thus, GM foods are inimical to the health of human beings and meticulous rigour assessment must be done by the regulators before releasing it for commercialisation.

INTERFACE BETWEEN TRADE SECRETS AND GMO's IN INDIA

Agri based enterprises protect their vital information pertaining to business with the help of trade secrets. Primarily, trade secrets encompasses technical know-how, secret formulas, essential information such as details of suppliers and customers, manufacturing policies, time schedule for product launch or methods of business for any enterprises. In addition, trade secrets can extensively comprise technical information such as manufacturing processes in a business, commercial information consisting advertisement strategies of business or information relating to finance such as formulas and source codes. All of these are protected under the aegis of trade secrets and are essential for an enterprise to gain competitive edge in a relevant market.

The concerning point arises when these agri based enterprises go on to safeguard trade secrets at the expense of public interest. As food has become more complicated, the balance between trade secrets and public disclosure has become more complicated. On one hand, manufacturers must maintain trade secrets to protect their investments. On the other hand, consumers want to know what ingredients are in food products, as well as how those ingredients are made.¹⁶

The Environment (Protection) Act, 1986 (EPA) is the legislation by the Ministry of Environment, Forest, & Climate Change that provides for environmental protection. Sections 6, 8 and 25 of the EPA integrated with an aim to protect environment and health in relation with gene technology and microorganisms, the Rules for the Manufacture / Use / Import / Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells (Rules, 1989) notified under EPA act, 1986. Moreover, there are other Acts and Policies as well that regulate these organisms.

¹⁴ Charu Verma, Surabhi Nanda et al., *A Review on Impacts of Genetically Modified Food on Human Health*. 4 THE OPEN NUTRACEUTICALS J. 3-11 (2011).

¹⁵ Ibid.

¹⁶ Kelly Damewood, *Food Ingredients: Trade Secrets vs. Public Disclosure*, FOOD SAFETY NEWS (Mar. 17, 2014), [Food Ingredients: Trade Secrets vs. Public Disclosure | Food Safety News](#)

Under Rules, 1989 six competent authorities were established, these are regulatory bodies for GMOs.

1. rDNA Advisory Committee (RDAC)
2. Institutional Biosafety Committee (IBSC)
3. Review Committee on Genetic Manipulation (RCGM)
4. Genetic Engineering Appraisal Committee (GEAC)
5. State Biotechnology Coordination Committee (SBCC)
6. District Level Committee (DLC)

Amongst these regulatory bodies, GEAC is the apex body, constituted by the Ministry of Environment and Forest. Its primary purpose is to grant approvals for activities or procedures that includes large scale commercial use and dissemination of hazardous microorganisms inclusive of any such import including GMOs. The committee is solely authorized to prohibit the production, sale, shipment or use of GMOs if the committee finds such purpose to be a threat to the environment.

In the 37th Report of Parliamentary Committee on Agriculture (PCA) on “Cultivation of Genetically Modified Food Crops- Prospects and Effects” the committee rebuked the functioning of GEAC and recommended revamp of the regulatory system with an objective of ensuring transparency and accountability in decision making. This report by the Committee is of paramount importance since it marked the existing loopholes in the regulatory structure of GMOs impacting the assessment of GMOs in an efficient manner. Inadequate and inefficient assessment of GMOs potentially threatens the environment and health of human beings.

Most importantly, the Committee with respect to Bt brinjal found regulators guilty of approving it for environmental release despite the crop being ingrained with toxic content. The Committee asserted, the environmental risk assessment done was flawed. The regulators omitted by not abiding to all relevant tests and rules. Further, the Committee reprimanded regulators for their loose assessment considering the vital health and environmental risks GMOs carry.

The Committee pointed out several loopholes in the existing regulatory structure. These are stated below:

1. Due to lack of statutory backing to regulatory structure the presence of ambiguity can be manifested on part of authorities responsible for laxity of GMOs.
2. Lack of organizational set-up and infrastructure for GEAC and RCGM adversely impact on their functioning as regulators.
3. Dearth of biotechnology scientists, the same scientists are developing technologies, assessing, evaluating and approving them. The Committee pointed out, GEAC approved Bt brinjal on the basis of its own assessment. Further, after approval of the crop, it evaluated its own decision in order to approve the crop.
4. Essentially, the Committee pointed out the usage of antibiotic resistant marker genes in the development of GMOs. They asserted transfer of such genes to the human body or to bacteria in the gastrointestinal tract potentially be inimical.

Also, in the case of *Aruna Rodrigues & Ors. vs Union of India & Ors*¹⁷ The Supreme Court of India constituted a “Technical Expert Committee” (TEC) to assess current regulatory structure and efficiency of ongoing field trials. The TEC recommendations are stated as follow:

1. Suggested 10 year moratorium on field trials of Bt transgenic.
2. Underlined the loopholes in regulatory structure of GMO

Thus, from the reports of the Parliamentary Committee and Technical Expert Committee (TEC) the inference can be drawn of distorted regulatory structure for GMOs in India.

In such a scenario where the regulation and assessment of GMOs are inefficient and inadequate the field trials of transgenic crops are not plausible. Also, it seemingly questions the validity of assessment risks relating to already approved transgenic crops. The TEC noted the case of Bt cotton, and assessed the risk assessment procedure done by the regulators, they observed the

¹⁷ (2012) 5 SCC 331.

number of samples were lower than minimum prescribed, impacting intensively the quality and sensitivity of tests. TEC recommended for review of Bt cotton trials.

The question alarmingly surfaces the manner in which approvals for field trials have been confirmed, when they are confirmed and the manner in which they are conducted, dearth of comprehensive risk assessment, wrong sequencing of biosafety assessment and lack in incorporation of unscientific regulatory regime are inimical to the health of human beings and biosafety. Because the end consumers of these transgenic crops are human and environment.

With such distorted regulatory structure for GMOs, agri based enterprises protecting their vital information of business can prove to be detrimental for the public. Trade secrets protect every aspect such as techniques, secret formulas that can include usage of key ingredients in a crop and manufacturing processes. This vital information can be of commercial value and detrimental to public health and biosafety. To the prime point that trade secrets cannot be disclosed in public domain, the public shall be deprived to know the composition of raw data constructing GM crops as they will not have any relevant information relating to what they are consuming and how consumption will have impact on their health and environment. Agri based enterprises are reluctant to disclose on grounds of confidentiality that often conflicts with public interest. Essentially, the concern heightened in issues of GM food due to health hazards it possess and in addition to the lax regulatory structure for GMOs in India. In absence of specific trade secrets laws the agri based enterprises are empowered to not to disclose any information pertaining to GM foods on grounds of confidentiality. Whereas, considering the fundamental rights enshrined in Article 21 of Indian Constitution that explicitly states, the right to health and clean environment is safeguarded under right to life. In keeping the fundamental rights as utmost value

The Right to Information Act, 2005 empowers every citizen the right to know in cases they wish to gather information about certain working of public authorities in pursuance to promote transparency and accountability. The Act works wonders in preserving the principle of democracy. Under the aegis of Right to Information Act, 2005 (RTI), the Section 8(1) of the Act provides for exemption from disclosure of information. The Section 8(1)(d) of the Act explicitly states, no obligation rests to give any citizen information that encompasses commercial confidence, trade secrets or intellectual property whereby disclosure of it shall result in harm to the competitive edge of enterprises. However, if the competent authority is satisfied that larger public interest outweighs confidentiality rights of enterprises then such

information needs to be disclosed in the best interest of the public. Thus, agri based enterprises wield no absolute right over their trade secrets. The transparency and accountability is safeguarded by the RTI Act.

The said right has been exercised in case of *Kavitha Kuruganti v. Ministry of Environment & Forests*¹⁸. The plaintiff disputed the contention of public authority keeping essential safety issues of GM mustard under the ambit of confidential information. Wherein, the respondent replied their willingness to provide entire information to the public after the clinical trials proved to be correct. The plaintiff persistently claimed, the public has the right to know irrespective of the trials being processed and even if the trials concluded to be negative the public has the right to know. Plaintiff claimed the right to know with respect to the decision making process, whether such a process is adopted, minutes of meetings, result of clinical trials and complete information about GM mustard. Further, the point of dispute centred around whether toxicity and allergenicity data comes under confidential information. The Central Information Commission (CIC) after examining the case asserted, Rules 7, 3 and 14 of Rules for the Manufacture / Use / Import / Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells (Rules, 1989) are explicit with regard to genetically engineered organisms or cells are recognized by the government as items hazardous to public health. Thus, in consonance with these rules it can be seemingly inferred that any issues relating to GMOs are of utmost public interest. In addition to Section 8(1)(d) of RTI Act, the public authority is in obligation to disclose any such confidential information when it conflicts with public interest. Moreover, the CIC pointed out the Article 21 (6) of Cartagena Protocol on Biosafety that provides for what is not considered as confidential information, when examining under the said provision the safety issues of GM Mustard does not come under the confidential information. Thus, CIC after relying on all these relevant provisions came to the conclusion that the Ministry of Environment & Forests have no right to safeguard safety issues of GM Mustard and should have already disclosed it under Section 4 of RTI.

Thus, case is an appropriate precedent that protects public interest in case of conflict with trade secrets, seemingly depriving enterprises from keeping information confidential.

From the above mentioned case, relevant points with regard to trade secrets of agri based enterprises and public interest come to light, these are stated below:

¹⁸(2015) CIC 901798.

- Rules 7, 13 and 14 of Rules for the Manufacture / Use /Import / Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells are explicit that genetically engineered organisms or cells are recognized by the government as items posing hazardous to public health. Thus, recognizing the safety issues pertaining to GMOs are of utmost public interest.
- Section 8(1)(d) of the Right to Information Act, 2005 states to disclose any confidential information protected under trade secrets if the competent authority is satisfied that such disclosure shall be of public interest.
- Article 21(6) of the Cartagena Protocol on Biosafety states what information should be considered as confidential and what should not. It is pertinent to note that, India has ratified the protocol hence agri based enterprises are in obligation to act in consonance with it.

Thus, even in absence of a specified law relating to trade secrets the citizen has the right to know any relevant issue pertaining to public interest. However, the picture for trade secrets in India is still does not stand to be rosy because in 2013 the government of India in consonance with the provisions of Cartagena Protocol has proposed a bill- The Biotechnology Regulatory Authority of India Bill, 2013 (BRAI) that aims to establish a National Biotechnology Authority of India that shall be the supreme authority on regulating and policies relating to the genetically modified organisms in India. The bill is yet to be passed by the parliament and currently it is lapsed. The bill has faced vehement criticisms from farmers and Greenpeace India because the bill predominantly affects the legal rights of farmers and consumers. The bill in relation with trade secrets and public interest is egregious. Under the Section 27(1) of BRAI bill states that any information pertaining to research and development of genetically modified organisms and transgenic food and products shall be kept confidential and shall not be disclosed in the public domain. The said provision is direct contravention to the RTI Act, 2005.

The RTI Act, 2005 was passed with the prime intention to bring transparency and accountability by bringing information to the public. The objective of the Act has seen to be deteriorated by the bill. Moreover, the bill stands to be in contravention to the fundamental rights of citizens rightly, Article 19 and Article 21 of the Indian Constitution. The bill aims to sustain the dominance of big agri based enterprises thereby protecting their trade secrets in an efficient manner and adversely impacting the rights of the public. It is pertinent to note that,

the end consumer of such GM crops developed by these agri based enterprises are the public and the environment as a whole. The public appropriately has the right to know the composition of GM crops, its manufacturing process and entire key information that has the potential to harm their health and environment. Any such information encompassing safety issues of public and environment cannot be justified to be kept as confidential information.

THE WAY FORWARD

It is appropriate that trade secrets are an essential component for an enterprise to gain competitive edge in the relevant market and to sustain competition in the market. An enterprise when deprived of trade secrets can adversely bring unfair competition. There can be the possibility of cartelization, less choices to the consumers and elimination of innovation. A fair competition is indispensable for the consumers and competitors. Thus, trade secrets in such points play an essential role. In absence of specified law relating to trade secrets, a myriad of issues arise posing detrimental impacts on the public interest since we have come to know that trade secrets are safeguarded under certain laws in India. However, the judiciary has identified the interest of the public over trade secrets.

Yet , in cases relating to agri based enterprises, where the regulatory structure is distorted and laxed, trade secret protection can be detrimental to public interest. It is because the safety assessment of GMOs done by the regulators are inefficient and inadequate, conclusively questioning the safety of GM crops for human consumption and biosafety. In such scenarios trade secrets protection to agri based enterprises should be considered meticulously as the disclosure pertaining to safety issues of GM crops should be made available to the public.

However, this can be done under RTI Act, 2005 but the advent of BRAI bill, 2013 has posed serious risks pertaining to trade secret protection and public interest. Thus, it is the need of the hour for India to incorporate a specific law relating to trade secrets balancing the said rights of holders with the public interest. Also, India is signatory to Cartagena Protocol on Biosafety and TRIPS that mandates the protection of trade secrets with appropriately balancing with the public interest. India should abide by it and in consonance must legislate a specific law for trade secrets.

Thus, three aggravating elements should be obliterated in pursuance to balance between the right of trade secret holder and the public interest:

1. To revamp the regulatory structure of GMOs to ensure the risk assessment done are adequate and backed with authentic scientific data, that clearly manifests the consumption of GM crops have no safety concerns
2. The non enforcement of Biotechnology Regulatory Authority of India Bill 2013 (BRAI), as it is unconstitutional.
3. To have legislation that governs the rights of trade secrets holders with an efficient balance with public interest.

CONCLUSION

Trade secrets are essential for enterprises to gain a competitive edge and it is beneficial for efficient running of competition in the market as well. As we have seen, the regulatory structure for GMOs is distorted and needs an immediate revamp. In such distorted regulatory structure, the safety assessment of GM crops done are inadequate and inefficient, which validly questions if the GM crops are safe for human consumption and biosafety. Trade secret protection protects every aspect of business, it can protect these harmful aspects of GM crops as well as conclusively depriving citizens of the safety issues of GM crops. That conflicts with the public interest. At present, a citizen can avail his right to know under the Right to Information Act, 2005 in view of public interest. But, in the advent of BRAI Bill, 2013 this right shall not be available to the public. Thus, it is required to revamp the regulatory structure for GMOs and legislate a specific law relating to trade secrets that balances the trade secrets holder rights with public interest.

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