



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 05 December 2023**  
**Judgment pronounced on: 09 January 2024**

+ LPA 590/2023 & CM APPL. 42282/2023

PEPSICO INDIA HOLDINGS PVT LTD ..... Appellant  
Through: Mr. Dayan Krishnan, Sr. Adv.  
with Mr. Dheeraj Nair, Ms.  
Anjali Anchayil and Ms. Aishna  
Jain, Advs.

versus

KAVITHA KURUGANTI ..... Respondent  
Through: Mr. Colin Gonsalves, Sr. Adv.  
with Ms. Hetvi Patel and Mr.  
Umesh Kumar, Advs.

+ LPA 644/2023 & CM APPL. 48893/2023

KAVITHA KURUGANTI ..... Appellant  
Through: Mr. Colin Gonsalves, Sr. Adv.  
with Ms. Hetvi Patel and Mr.  
Umesh Kumar, Advs.

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PEPSICO INDIA HOLDING PVT LTD ..... Respondent  
Through: Mr. Dayan Krishnan, Sr. Adv.  
with Mr. Dheeraj Nair, Ms.  
Anjali Anchayil and Ms. Aishna  
Jain, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE YASHWANT VARMA**  
**HON'BLE MR. JUSTICE DHARMESH SHARMA**

## **J U D G M E N T**

**YASHWANT VARMA, J.**



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## A. INTRODUCTION

1. These two appeals emanate from the judgment dated 05 July 2023 passed by the learned Single Judge dismissing the appeal preferred by **PepsiCo India Holdings Private Limited**<sup>1</sup> under Section 56 of the **Protection of Plant Varieties and Farmers' Rights Act, 2001**<sup>2</sup> and which had questioned the order of revocation dated 03

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<sup>1</sup> PepsiCo

<sup>2</sup> The Act



December 2021 passed by the Authority constituted under the Act. The order of revocation had annulled the registration accorded in favor of the appellant - PepsiCo in LPA No. 590/2023 in respect of plant variety FL 2027 dated 01 February 2016. The connected LPA being LPA No.644/2023 has been preferred by the respondent in the original appeal and questions the findings returned by the learned Single Judge as reflected in Paras 69 and 91 of the impugned judgment.

2. The appeal of the respondent-appellant, in addition to the above, also seeks an appropriate declaration that the revocation of registration was also liable to be upheld for non-compliance with the provisions of the Act and which constitutes a ground for revocation as per Section 34(f) of the Act. The respondent-appellant raises this issue in the backdrop of its allegation that PepsiCo acted in violation of farmers' rights as protected by Section 39(1)(iv) of the Act. Coupled with the above, the respondent-appellant also seeks the framing of an appropriate order restraining PepsiCo from instituting suits against farmers on the ground of infringement of their exclusive rights under S.28 of the Act and for upholding farmers' rights as recognised under S.39(1)(iv) of the Act.

3. In terms of the impugned judgment, the learned Single Judge has affirmed the order of revocation primarily on the ground of PepsiCo having furnished incorrect information relating to the date of first commercial sale as well as a purported failure on its part to proffer and present requisite documentation at the time of applying for registration as mandated in terms of the Act. In order to appreciate the challenge



which stands raised, we deem it apposite to notice the following essential facts.

## **B. BRIEF FACTUAL BACKGROUND**

4. PepsiCo applied for registration of FL 2027 in terms of an application dated 18 February 2011. From the disclosures which are made in the appeal, it would appear that the application was made describing FL 2027 as a “new” variety and the date of first commercial sale indicated as 17 December 2009. The application also proceeded on the basis of an Assignment Deed dated 26 September 2003 in terms of which Dr. Robert Hoopes, the original breeder, is stated to have assigned all rights in the subject plant variety in favor of Recot Inc., a company duly incorporated in the State of Delaware, USA.

5. On scrutiny of the application, the Registrar addressed a communication dated 09 June 2011 calling upon PepsiCo to provide the following additional information: -

“Speed post with P.O.D.  
F. No. PPV & FRA/Registrar/24-1/2011/393  
Dated: 9<sup>th</sup> June 2011

To,

Dr. Rahul Chaturvedi  
Vice-President Agro R&D  
Pepsico India Holdings Pvt. Ltd.  
(Frito-Lay Division)  
Global Business Park, Tower-A, 4<sup>th</sup> Floor  
Mehrauli – Gurgaon Road,  
Gurgaon – 122022, Haryana



**Sub: - Observation in the application form for FL 2027 of Potato (*Solanum tuberosum* L.)**

**Acknowledgement No. REG/2011/151**

Sir,

The M/s Pepsico India Holding Pvt. Ltd., Gurgaon has filed an application on **18.02.2011** to PPV&FR Authority for registration of **Potato** crop denomination **FL 2027** under **New Variety**. This application is under examination and following additional informations are required:-

1. In Column No. 1 of application: The identity of applicant will be Assigned of any of the above and not institutional. Please correct.
2. Provide PV-1 form stamped as per Indian Stamp Act.
3. Provide PV-2 duly signed by the concerned breeders whose names are mentioned in column No. 7 of the application form-1. PV-2 should be countersigned by the applicant.
4. Provide a copy of deed of assignment between the breeder and the company.
5. Provide GURT affidavit on non-judicial stamp paper and duly notarized.
6. Provide the declaration under section 18(1) of PPV & FR Act, 2001.
7. Provide the source of parental material from where these were acquired.
8. Has the candidate variety been exploited for development of hybrids/varieties. If yes, then please provide the details and provide the date of first sale of the first hybrid developed by using the candidate variety as one of the parents. Also, provide document (copy of sale invoice) indicating the date of the sale and an affidavit for the same.
9. Data of all DUS characteristics have not been provided in the application. If available provides DUS data of all characteristics as per DUS test guidelines.
10. The candidate variety is new or extant, as per the section 15 (3) (a) of the Act, 2001. Please clarify.



11. Provide good photographs of the specific distinct traits claimed for the candidate variety and others specification notified in the Plant Variety Journal of India.
12. Every page of the application form should be signed at the bottom of the page by the applicant/assignee to be made/breeder.
13. Kindly submit checklist along with application form provides detail of enclosures.
14. In Column No. 8(a) (i) of the Technical Questionnaire: Provide Grouping character according to the specific DUS test guidelines.
15. In column No. 8(b) of the Technical Questionnaire: Provide the Table of characteristic along with state and note values of candidate variety and reference variety used for comparison according to the specific DUS test guidelines.
16. In Column No. 9 of the Technical Questionnaire: Provide distinguishing characteristics of the reference variety used for comparison with candidate variety.
17. In Column No. 10 of the Technical Questionnaire: Provide statement of distinguishing characteristics of the candidate variety in tabular form comprising with reference variety along with state & note value as per the PPV & FRA specific DUS test guideline.
18. Provide two additional sets of application filed in the authority.

Accordingly, you are requested to furnish the above cited information within one month on prescribed formats as per PPV& FR Act, for further processing of your application.

Yours faithfully

(Manoj Srivastava)”

6. One of the clarifications sought was whether the candidate variety was “new” or “extant”. In response to the aforesaid letter, PepsiCo in terms of a communication dated 08 February 2012 apprised



the Registrar that the candidate variety be treated as “*extant*” and its application be deemed to have been amended and corrected accordingly.

7. On 16 February 2012, PepsiCo submitted a revised application. While providing details with respect to the identity of the applicant, it chose to describe itself as an “*ASSIGNEE OF ANY OF ABOVE*” and thus purporting to place its application under Section 16(1)(c) of the Act. However, in the column relating to the type of variety, it yet again chose to describe and place FL 2027 in the category of “*new*” rather than “*extant*” and maintained the date of first sale to be 17 December 2009. The Assignment Deed was enclosed and appended to the revised application.

8. Along with the application, PepsiCo also submitted declarations executed by its Operations Director as well as the original breeder in support of its assertion that the genetic or parental material acquired for breeding, evolving or developing the FL 2027 variety had been lawfully acquired. On a due consideration of the revised application, the Registrar in terms of its letter dated 14 June 2012 apprised PepsiCo that on an evaluation of its proposals for registration, the application for the candidate variety would be considered under the “*extant*” category for the purposes of registration. On 01 February 2016, the certificate of registration came to be granted in favor of PepsiCo.

9. On 17 June 2019, the respondent-appellant filed a revocation application alleging that the registration certificate was based on



incorrect information, had been granted to a person not eligible for protection, that there was a failure on the part of the applicant to furnish information, documents and material required for registration, a failure to comply with the provisions of the Act or Rules and Regulations made thereunder and the grant of registration not being in public interest.

10. During the proceedings initiated by the Authority on the revocation application, a letter dated 12 September 2019 came to be filed by **Frito Lay North America**<sup>3</sup>, an affiliate of PepsiCo, Inc. purporting to clarify that it had allowed PepsiCo to file the application for registration.

11. The aforesaid letter is reproduced hereinbelow: -

“Date September 12, 2019

To,

The Protection of Plant Variety and Farmers Rights Authority,  
NASC Complex, DPS Marg,  
Opp. Todapur Village,  
New Delhi – 110012

Subject: Clarification in relation to the Certificate of Registration No. 59 of 2016 and Form 1 submitted by PepsiCo India Holdings Private Limited dated February 16, 2012

Sir,

We, Frito-Lay North America Inc. (“Frito-Lay”) (formerly known as Recot Inc.), are writing to you to state the following –

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<sup>3</sup> FLNA





1. PepsiCo India Holdings Private Limited (“PIH”) and Frito-Lay North America, Inc. (‘FLNA’) are affiliates of PepsiCo, Inc.
2. FLNA and its affiliates throughout the world work together to protect FLNA’s proprietary potato varieties with patents, Plant Breeders’ Rights and, in the case of India, registration under the Protection of Plant Varieties and Farmers Rights Act, 2001 (‘the PV Act’).
3. FLNA allowed PIH to file the application for registration of FL-2027 under the PV Act, for the potato variety known as FL-2027 under the PV Act in India, vide application dated February 16,2012 for which registration was granted vide Certificate of Registration No. 59 of 2016 dated February 1, 2016.

Please take note of the above-stated clarification(s) for your record and reference.

Sincerely,

Paul W. Schrier, Ph.D.

Assistant Secretary

Frito-Lay North America, Inc.”

12. Upon a consideration of the challenge which stood raised, the Authority proceeded to revoke the registration in terms of an order dated 03 December 2021 and returned the following findings. The Authority firstly held that the Assignment Deed had neither been stamped as per the provisions made in the **Indian Stamp Act, 1899**<sup>4</sup> nor did it bear the signature of witnesses as required. It further held that any assignment that may have been made by FLNA in favor of PepsiCo had also not been submitted. The Authority further came to conclude that PepsiCo had not only described the candidate variety incorrectly as

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<sup>4</sup> 1899 Act



a “*new*” variety, it had also falsely asserted that the revised application was corrected manually so as to be considered as being an application for registration of an “*extant*” variety.

13. It also found that the Registrar had incorrectly proceeded to examine the application for registration as pertaining to an “*extant*” variety without calling upon PepsiCo to amend its claim from “*new*” to “*extant*” before granting and issuing the certificate of registration. The Authority also found against PepsiCo insofar as Form PV-2 is concerned and which is referable to Rule 27(2) of the **Protection of Plant Varieties and Farmers' Rights Rules, 2003**<sup>5</sup>, noting that the said form had not been signed by the breeder and that at least till the stage of grant of registration, no evidence of assignment or authorization in favor of PepsiCo by FLNA had been produced.

14. The Authority additionally held that a case of oral assignment was one which was set up for the first time in the course of opposition to the revocation application. An additional issue which appears to have arisen in the revocation proceedings was with respect to the change of the corporate name of Recot Inc. to FLNA. The Authority noted that evidence in support of change of name was also produced for the first time only in the course of revocation proceedings. On an overall consideration of all of the above, the Authority came to conclude that the registration was liable to be revoked based on the provisions comprised in clauses (a), (b), (c) and (h) of Section 34 of the Act. It is

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<sup>5</sup> Rules



this order of the Authority which was assailed by PepsiCo before the learned Single Judge.

15. From a reading of the impugned judgment, we note that the learned Single Judge has upon due consideration of the rival submissions rendered the following salient findings. The Court has in paragraph 48 of the impugned judgment observed that there did not appear to be any dispute that FL 2027 was an “*extant*” variety. It has been further observed in paragraph 57 that PepsiCo had nothing to gain by representing FL 2027 to be a “*new*” variety. Insofar as the contentions made in this respect are concerned, the learned Judge has come to the following conclusion: -

“**60.** I am unable to accept the contention of the learned senior counsel for the respondent. The Authority, in the impugned order had found the date of first sale of FL 2027 by the appellant as 2002 in Chile. Even taking this date as the first date of sale, the appellant would not have fallen foul of the above Rule as on the date of the application.

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**64.** The appellant also filed a revised application wherein details of its registration in USA were given, however, in column 5, it again ticked against the ‘new variety’ under the column ‘type of variety’.

**65.** On 14.06.2012, the Registrar again wrote to the appellant stating that its application is being considered under the ‘*extant category*’. The relevant extracts from the letter are as under:

*“Kindly refer to your proposals for registration of Potato, denomination FL 2027 filed on 18.02.2011 as new variety and later as an extant variety. In this connection, it is stated that the candidate variety is being considered for registration under extant category. The registration fee of extant variety (VCK) is Rs. 5000/- for applicants under commercial category. You have already submitted registration fee*



*of Rs.10000/- under new category. The remaining amount of Rs. 5000/- will be adjusted in DUS test fee. DUS test fee for varieties under extant (VCK) category is Rs. 24,000/-. You are therefore requested to submit remainder DUS test fee of Rs. 19,000/- for further necessary action.”*

*(Emphasis supplied)*

**66.** It was only thereafter, that the registration was granted in favour of the appellant.

**67.** Section 20 of the Act states that on receipt of an application, the Registrar may, after making such enquiry as he thinks fit with respect to the particulars contained in such application, accept the application absolutely or subject to such conditions or limitations as he may deem fit. It further provides that in case the Registrar is satisfied that the application does not comply with the requirements of the Act or any Rules or Regulations made thereunder, he may require the applicant to amend the application to his satisfaction.

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**69.** In view of the above facts, the appellant could not have been held guilty of having obtained the registration by providing incorrect information with respect FL 2027 being a 'new variety'. The said mistake could not have provided a ground to the Authority to revoke the registration granted to the appellant by invoking Section 34(a) of the Act. This was a clerical error, which was noticed by the Registrar and the registration was granted in the correct category.”

16. The issue of the incorrect declaration made in the application by PepsiCo of “new” and “extant” thus came to be answered in its favor. Proceeding then to consider whether the order of revocation was liable to be upheld on account of the mention of an incorrect date of commercialization, the learned Single Judge rendered the following findings. As would be evident from the findings forming part of the impugned judgment, the first sale of FL 2027 was ultimately, and in the course of the revocation proceedings identified to be of the year 2002 in



Chile. However, and as had been noticed hereinabove, PepsiCo in its application had mentioned the commercialization date as 17 December 2009. This was sought to be explained by PepsiCo as being a mistake based on its assumption that the application form required it to disclose the date of first sale in India.

17. This explanation did not find favor with the learned Single Judge and who ultimately held as follows: -

“74. On the plea of there being an ambiguity in the form, I find no merit in the submission of the learned senior counsel for the appellant. The form is clear inasmuch as under the heading “Has the candidate variety been commercialised or otherwise exploited”, immediately after asking the applicant of the “date of first sale of the variety”, it seeks from the applicant the “country(ies) where protection is made”. There was, therefore, no occasion for the appellant to misconstrue the said provision in the form as seeking the date of the first sale made only in India. This information is also important as Rule 22(2A), relied upon by the learned senior counsel for the respondent, provides that the registration to ‘extant variety’ shall not be granted if on the date of the application, fifteen years have passed from the date of the first sale. The date of the first exploitation/sale was, therefore, important and material information for the application. It is not relevant if such date, otherwise, would not materially affect the eventual grant of the registration. For the purposes of Section 34 (a) of the Act, what is important is that the Certificate of Registration has been obtained on an incorrect information furnished by the applicant. The onus of providing correct information in the application is on the applicant and the applicant cannot shift this onus on the Authority or, having given incorrect information, plead that no difference would have resulted in the consideration of the application had correct information been provided by the applicant. As noted herein above, the Act confers statutory rights on the applicant which were otherwise not available to the applicant but for the Act. The applicant must therefore, be put to strict and vigilant compliance with the requirements of the Act, the Rules, and the Regulations, failing which it opens itself up to revocation of the registration granted.”



18. Insofar as the purported failure of PepsiCo to provide requisite information and to make accurate disclosures in Form PV-2 was concerned, the learned Single Judge has come to the following conclusions:-

“79. In the present case, the appellant had filed Form PV-2 in blank and without the signatures of the breeder or FLNA, the alleged assignee of the breeder. The form is reproduced herein below:

**80.** Section 34(c) of the Act states that the registration may be revoked by the Authority *inter alia* on the ground that the breeder did not provide the Registrar with such documents as required for registration under the Act. The said provision was clearly attracted and has been rightly invoked by the Authority.

**81.** In the course of the revocation proceedings, the appellant produced and relied upon the following letter issued by FLNA:

“To,

The Protection of Plant Variety and Farmers Rights  
Authority,  
NASC Complex, DPS Marg,  
Opp. Todapur Village,  
New Delhi – 110012

Subject: Clarification in relation to the Certificate of Registration No. 59 of 2016 and Form 1 submitted by PepsiCo India Holdings Private Limited dated February 16, 2012

Sir,

We, Frito-Lay North America Inc. (“Frito-Lay”) (formerly known as Recot Inc.), are writing to you to state the following –

1. PepsiCo India Holdings Private Limited (“PIH”) and Frito-Lay North America, Inc. (‘FLNA’) are affiliates of PepsiCo. Inc.
2. FLNA and its affiliates throughout the world work together to protect FLNA’s proprietary potato varieties with



patents, Plant Breeders' Rights and, in the case of India, registration under the Protection of Plant Varieties and Farmers Rights Act, 2001 ('the PV Act').

3. FLNA allowed PIH to file the application for registration of FL-2027 under the PV Act, for the potato variety known as FL-2027 under the PV Act in India, vide application dated February 16, 2012 for which registration was granted vide Certificate of Registration No. 59 of 2016 dated February 1, 2016.

Please take note of the above-stated clarification(s) for your record and reference.

Sincerely,

Paul W. Schrier, Ph.D.  
Assistant Secretary  
Frito-Lay North America, Inc."

**82. The above letter is not in compliance with Form PV-2 and is post the grant of the registration. Therefore, the same has rightly not relied upon by the Authority. It cannot act to absolve the appellant of a lacuna in its application.**"

19. While the issue of the Assignment Deed being insufficiently stamped was answered in favor of PepsiCo, insofar as the merits of the challenge is concerned, the learned Judge has held as under:-

**"89. A reading of the above provision would show that where the Registrar finds that the application seeking registration does not comply with the requirements of the Act or any Rules or Regulations made thereunder, he may either require the applicant to amend the application to his satisfaction, or reject the same. However, no application shall be rejected unless the applicant has been given a reasonable opportunity of presenting his case. As it is evident from the above narration of facts, the Registrar, on the initial application filed by the appellant, had raised queries and granted opportunity to the appellant to rectify the mistakes/deficiencies. The appellant filed an amended application, however, again with the deficiencies as have been found by the Authority. The Registrar, however, proceeded to grant registration in favour of the appellant. The fact, remains that in spite of opportunity granted, the application filed by**



the appellant was not in conformity with the Act, the Rules, and the Regulations. The appellant is now suffering for its own mistakes and for its casual manner of making application seeking the registration. The appellant cannot pass this blame on the Registrar or claim equity for its own folly. The grant of registration is an act of importance and has wide ramifications as it confers valuable rights on the applicant. The application seeking such registration cannot be made in a casual manner without adherence to the form or the procedure, as was being sought to be done by the appellant. When the Act and the Rules provide for the manner of doing a particular thing, it must be done in that manner or the applicant must be ready to face the consequences thereof. In the present case, the Registrar in the first instance had complied with the Proviso to Section 20(2) of the Act by providing the appellant with an opportunity to rectify the deficiencies in its application. The appellant did not fully take benefit of this opportunity and, therefore, cannot now be heard to complain of the consequences of its own failure.”

20. The respondent-appellant appears to have additionally urged before the learned Single Judge that since PepsiCo had instituted various suits against innocent farmers, the revocation was liable to be upheld even under clause (h) of Section 34. However, this issue has been answered against the respondent-appellant, as would be evident from the following conclusion: -

“91. Coming to the ground of Section 34(h) of the Act, in my opinion, the same was clearly not made out. Mere filing of the litigations by the appellant against the farmers, even presuming the same to be completely frivolous, cannot be construed as satisfying the test of grant of registration itself not being in public interest. The Authority has, therefore, erred in revoking the registration granted in favour of the appellant.”

It is in the aforesaid backdrop that these two appeals came to be presented before this Court.

21. Before proceeding to notice the rival submissions which were addressed, we may only note that while PepsiCo had also questioned





the maintainability of the appeal preferred by the respondent-appellant and opposed the condonation of delay, Mr. Dayan Krishnan, learned senior counsel appearing on its behalf, had at the stage of final hearing submitted that the two appeals may be heard on merits and that PepsiCo was not proposing to pursue its attack on the locus standi of the respondent-appellant.

### **C. SUBMISSIONS OF PEPSICO**

22. Questioning the correctness of the view taken by the learned Single Judge who had proceeded to dismiss the original appeal, Mr. Krishnan addressed the following submissions. Learned senior counsel at the outset submitted that the Court must appreciate that Section 34 of the Act is not intended to act as a “*trip wire*” which is liable to be invoked at the slightest of infractions. According to Mr. Krishnan, the Section 34 power would be liable to be invoked only if the deficiencies pointed out go to the very root of the registration and cloud the eligibility of the applicant itself. It was his submission that revocation of registration under Section 34 of the Act is not automatic but one that is discretionary and which would have to be founded on errors which are fundamental, deliberate or intentional as opposed to mere bona fide clerical mistakes. Mr. Krishnan submitted that the errors which beset the application for registration could by no stretch of imagination be placed in the category of fundamental or deliberate, and in any case would not strike at the root of the eligibility of PepsiCo to seek registration.



23. According to learned senior counsel, undisputedly the Registrar itself had proceeded to evaluate the application as being one made in relation to an “*extant*” variety. It was submitted that irrespective of whether the date of first sale is taken as 17 December 2009 (being the date of commercial exploitation in India) or 28 October 2002 (the date of commercialization of the candidate variety in Chile), FL 2027 variety would be capable of registration as an “*extant*” variety under Rule 22(2A) of the Rules. It was submitted that the aforesaid mistake occurred only on account of PepsiCo proceeding on the assumption that the application form required it to disclose the date when the candidate variety was first sold in India and thus resulted in it declaring that date to be 17 December 2009. According to Mr. Krishnan, this mistake was founded on the language employed in Section 2(j) of the Act, which while defining an “*extant variety*” defines it with reference to the variety being “*available in India*”. According to Mr. Krishnan, it is this which led to the date of first sale being mentioned as 17 December 2009. It was in this context that Mr. Krishnan submitted that the application of PepsiCo as originally filed in 2011 or in its revised form in 2012 would not be in violation of the statutory time frame as constructed by virtue of Rule 22 (2A) of the Rules.

24. It was further submitted that the date of first sale in any case has no impact on registration since the protection accorded by the Act is not from the date of first sale but from the date of registration. This, according to Mr. Krishnan is clearly manifest from a reading of Section 24(6)(iii) of the Act. Mr. Krishnan submitted that PepsiCo could have



thus gained no advantage from providing an incorrect date of first sale. It was in this regard further contended that the application format as prescribed under the Act and where it requires an applicant to provide the date of first sale remains ambiguous as to the country where the first sale was carried out. This, according to Mr. Krishnan, must be read along with Section 2(j) of the Act which defines an “*extant variety*” with reference to its availability in India.

25. Further, Mr. Krishnan submitted that the fact that Dr. Robert Hoopes was the original breeder of the plant variety has neither been doubted nor questioned by the respondent-appellant at any stage. It was pointed out that the assignment in favor of Recot Inc. was also never assailed by the respondent-appellant. Mr. Krishnan further highlighted the fact that the aforesaid position was accepted even by the Authority, while drawing up the order of revocation and noting that there did not appear to be any dispute with respect to the identity of the original breeder and the assignment in favor of Recot Inc. Mr. Krishnan further laid stress on the letter of FLNA dated 12 September 2019, and which too had confirmed the conferral of right on PepsiCo to apply for registration.

26. Mr. Krishnan submitted that PepsiCo was entitled to apply for registration by virtue of clause (c) of Section 16. This, since according to Mr. Krishnan, PepsiCo would be clearly liable to be recognized as being an assignee of the breeder in respect of the right to make an application for the FL 2027 variety. It was further submitted that the letter of FLNA dated 12 September 2019 would clearly fall within the



ambit of Section 18(3) of the Act and which speaks of an assignment of the right to apply for registration. It was his submission that although the original assignment had been made in favor of Recot Inc., the said entity, acting under its amended corporate name, had duly empowered and authorized PepsiCo to apply for registration, and thus the same establishing its right to pursue the application for registration.

27. It was further submitted by Mr. Krishnan that documents evidencing the change of the corporate name of Recot. Inc had also been duly placed before the Authority and thus allaying any doubts which could have legitimately weighed in the mind of the Authority. Mr. Krishnan then submitted that the impugned judgment is in essence clearly self contradictory, since once the learned Single Judge had found that the FL 2027 variety fell within the ambit of an “*extant*” variety as defined under the Act and the Registrar had committed no error in evaluating its application as relating to such a variety, there would exist no justification to fault PepsiCo on the basis of the declarations made with respect to the date of first sale.

28. It was submitted that whether the date of first sale in Chile were taken into consideration or that of India, the facts would unerringly point towards PepsiCo being eligible to apply for registration and thus the mistake being neither fundamental nor fatal to its claim for registration. Mr. Krishnan reiterated his submission that in any case, PepsiCo had proffered a plausible explanation for mentioning the date of commercialization with reference to the primary sale in India, bearing in mind the language employed in Section 2(j) of the Act, and



thus submitting that the learned Single Judge clearly committed a manifest error in holding against it on this score. It was his submission that the date of first sale of FL 2027 was clearly rendered inconsequential in the facts of the present case when tested on the anvil of Rule 22(2A) of the Rules.

29. Mr. Krishnan also assailed the conclusions as rendered by the learned Single Judge insofar as it upheld the revocation based on Section 34 (b) and (c) of the Act. It was contended by Mr. Krishnan that PepsiCo had placed before the authorities the Assignment Deed, the certificate showing the change of the corporate name of Recot. Inc to FLNA, as well as the letter of the latter conferring a right on PepsiCo to move for registration. All of the above, according to Mr. Krishnan, reiterated and reaffirmed the right of PepsiCo to seek registration under the Act.

30. Proceeding then to the issue of the right of PepsiCo to apply for registration, Mr. Krishnan submitted that a conjoint reading of Section 16(1)(c) along with Section 18(3) would indicate that an applicant is only required to furnish proof of the right to make an application and not proof of assignment of the substantive right. It was submitted that the Act and the Rules, as well as the underlying scheme thereof, would establish that assignment is not required to be established in any particular format and that the inquiry is restricted to ascertaining whether the entity making an application had been assigned the right to do so. It was submitted that PepsiCo had substantively complied with



the requirement of Sections 16(1)(c), read along with Section 18(3), while producing the Assignment Deed and the letter of the FLNA.

31. Proceeding further to question the correctness of the findings returned by the learned Single Judge and pertaining to the alleged deficiencies in Form PV-2, it was submitted that Form PV-2 is merely a procedural requirement traceable to Rule 27(2) and that the substantive criteria for registration had in any case been met by PepsiCo. Therefore, it was submitted that the clerical errors in Form PV-2 cannot be construed as either striking at the very root of the registration itself or impacting the issue of the variety being capable and eligible for registration.

32. Mr. Krishnan also questioned the factual inaccuracies as appearing in the impugned judgment when it proceeded to record the submission of PepsiCo as being that it had not submitted the Assignment Deed before the Registrar. On this, it was contended by Mr. Krishnan that the aforesaid observation is clearly incorrect since undisputedly the Assignment Deed was placed before the Registrar along with the revised application dated 16 February 2012.

33. Mr. Krishnan further argued that once the order of revocation itself conceded to there being no dispute with regard to Dr. Robert Hoopes being the original breeder and the subject variety having been duly assigned by him in favor of Recot Inc., no further obligation was placed upon PepsiCo. In fact, according to Mr. Krishnan, this itself merited the order of revocation being set aside.



34. Turning then to the letter of FLNA dated 12 September 2019, it was contended that the aforesaid letter is essentially a recordal of an oral assignment from FLNA to PepsiCo, both of which are undisputedly affiliate companies of PepsiCo, Inc. It was submitted that PepsiCo was constrained to place that document on record since the respondent-appellant had raised questions regarding the oral assignment. Mr. Krishnan submitted that the transfer of rights in any case occurred between two group companies and was a matter, if at all, pertaining to their indoor management and which the respondent-appellant would have no locus to contest or challenge.

35. It was further submitted that the record would reflect that the Registrar had proceeded to grant registration upon being duly satisfied with respect to the right of PepsiCo to obtain registration of FL 2027. Mr. Krishnan drew our attention to Section 20 and which empowers the Registrar to seek further particulars during the course of consideration of an application. It was submitted that the Registrar had at no stage called upon PepsiCo to furnish additional information or material in respect of either its right to apply or it being adequately authorized to pursue the application for registration. According to Mr. Krishnan, had such an issue been raised by the Registrar, the additional documents which were placed during the course of the revocation proceedings would have been provided to the Registrar during the registration process itself. In any case, according to Mr. Krishnan, a consideration of the material ultimately placed by PepsiCo clearly established its right as well as eligibility to initiate proceedings for registration of FL 2027.



In view of the above, Mr. Krishnan would submit that both the impugned judgment as well as the order of revocation are liable to be set aside.

36. Contesting the respondent-appellant's appeal pertaining to the findings in the impugned judgment, Mr. Krishnan contended that the grant of certificate of registration cannot be said to be contrary to public interest as provided under S.34(h) of the Act merely because PepsiCo chose to assert its statutory rights as provided under the Act. According to learned senior counsel, the mere filing of suits against farmers cannot by any stretch be considered to be contrary to public interest. Mr. Krishnan further submitted that the learned Single Judge was clearly justified in holding that revocation under Section 34(a) of the Act on the mere basis that the type of variety was incorrectly mentioned was not valid and legal. Mr. Krishnan contended that the mistake on the part of PepsiCo was inadvertent and that PepsiCo vide its letter dated 08 February 2012 had itself sought for changing the category to the "*extant*" variety which was acceded to by the Registrar. In this backdrop, and in light of the aforesaid submissions, Mr. Krishnan submitted that PepsiCo complied with the provisions of the Act and the Rules and Regulations made thereunder and that there was no ground for revocation under S.34(f) of the Act.

#### **D. SUBMISSIONS OF THE RESPONDENT-APPELLANT**

37. Appearing for the respondent-appellant, Mr. Gonsalves submitted that the cause for filing of a revocation application





arose when PepsiCo sued farmers in the State of Gujarat citing intellectual property right infringement. The initiation of revocation proceedings, according to Mr. Gonsalves, was necessitated in order to safeguard the legitimate entitlement of farmers as flowing from Section 39(1)(iv) of the Act. Mr. Gonsalves submitted that the institution of those vexatious proceedings was aimed at intimidating and harassing farmers and preventing them from exercising their rights. This, according to learned senior counsel, would clearly amount to PepsiCo acting contrary to public interest and thus warranting the revocation under Section 34(h) itself. Further, Mr. Gonsalves argued that the mere fact that PepsiCo possessed a valid certificate of registration at the time when those suits were filed can be no defense since the Act proscribes farmers being sued, whether with or without a certificate for registration.

38. Our attention was drawn to S.39(1)(iv) of the Act which enables a farmer to save, use, sow, resow, sell his farm produce, including seeds of a variety protected under the Act, as long as those seeds are not sold as a “*branded seed*”.

39. To buttress his submissions, Mr. Gonsalves also relied upon the Joint Committee’s report on the Protection of Plant Varieties and Farmers’ Rights Bill, 1999 to contend that the Committee had advocated for a broader protection of the farmers’ right which was accepted and stands reflected in the present version of the Act. Mr. Gonsalves also drew our attention to the language in which Section 28 of the Act stands couched and which while conferring certain exclusive



rights upon a registrant begins with the phrase “*Subject to the other provisions of this Act...*”. Mr. Gonsalves sought to underline the distinction which the statute creates between the aforesaid provision and Section 39, which deals with farmers’ rights under the Act and commences with the words “*Notwithstanding anything contained in this Act...*”. The submission essentially was that the statute protects and accords primacy to rights of farmers and thus the public interest element of Section 34 (h) being liable to be understood in the aforesaid light. It was therefore contended that the filing of suits against the farmers was against public interest and the certificate of registration granted to PepsiCo ought to be revoked under Section 34(h) of the Act.

40. Learned senior counsel further submitted that PepsiCo deliberately proffered incorrect information both in respect of eligibility of variety as well as with respect to its right to apply. It was highlighted that it firstly chose to describe FL 2027 as a “*new*” variety and which mistake continued even when the revised application came to be submitted. According to learned senior counsel, it also furnished incorrect information with respect to the date of first sale. It was submitted by Mr. Gonsalves that PepsiCo made repeated claims that FL 2027 was a “*new*” variety and thus contrary to what it had itself expressed in its letter dated 08 February 2012, where it had requested the Registrar to treat FL 2027 as an “*extant*” variety. According to Mr. Gonsalves, it was only during the revocation proceedings that PepsiCo claimed that the application was corrected manually and by hand. It was pointed out by learned senior counsel that the Authority had



ultimately found that no manual corrections appeared on its records. It was in the aforesaid backdrop that Mr. Gonsalves submitted that the mistaken typology of FL 2027 can neither be described as inadvertent nor are such repeated mistakes liable to be condoned. The aforesaid submissions were addressed without prejudice to the grounds taken in the respondent-appellant's appeal against the impugned judgment.

41. It was then submitted by Mr. Gonsalves that the asserted inadvertent mistake cannot possibly be viewed as being innocent bearing in mind the distinct advantages which the Act confers on “*new*” and “*extant*” varieties. According to Mr. Gonsalves, one of the principal distinguishing features between the two is the aspect of novelty which must be proven in the case of “*new*” varieties. It was submitted that “*extant*” varieties have two distinct disadvantages when contrasted with “*new*” varieties since in certain situations as prescribed under S. 8(2)(a), S.15(2) and Rule 22(2A) of the Rules, the former become ineligible for registration and also by virtue of the Proviso placed in Section 28(1) of the Act where the Government becomes the deemed owner thereof. It was his submission that PepsiCo made false assertions with the sole objective of overcoming the aforesaid disadvantages.

42. Mr. Gonsalves also questioned the correctness of the submissions addressed on the date of first sale and submitted that Section 2(j) must be read alongside Section 15 and which would clearly establish that the declarations with respect to “*new*” or “*extant*” variety are required to be made not just in relation to the situation prevailing in India but foreign jurisdictions as well. It was submitted that Section 15(3)(a) while



dealing with the subject of novelty clearly requires the same to be examined both in the context of India as well as other countries. It was then submitted that a reading of Section 18 and Form 1 placed in the Protection of Plant Varieties and Farmers' Rights Regulations, 2006 would also indicate that disclosures with respect to first sale are not liable to be made with reference to India alone. In any case, Mr. Gonsalves submitted that PepsiCo being a global corporation endowed with financial and legal resources cannot possibly be permitted to urge such a misunderstanding. According to Mr. Gonsalves, the errors referred to above cannot thus be said to be inadvertent. According to the learned senior counsel, those were mistakes deliberately made with a mala fide intent to subserve self-interest and were fatal in character.

43. Mr. Gonsalves also supported the findings as rendered by the learned Single Judge and who had found that disclosures relating to the date of first sale were of significance and import and incorrect information if furnished in that respect would result in the application being liable to be rejected on the ground of suffering from fundamental flaws. The provisions of the Act, according to Mr. Gonsalves, require accurate information being tendered and the facts clearly evidencing that PepsiCo had adopted a wholly flippant attitude while pursuing its application.

44. Proceeding then to Form PV- 2 which was submitted, Mr. Gonsalves highlighted the fact that the same was neither signed by the breeder nor did it bear the signatures of witnesses. Far from the witnesses having not signed that form, it was pointed out by Mr.



Gonsalves that PepsiCo had also failed to disclose the names and addresses of witnesses. It was further contended that PepsiCo chose not to place any evidence in support of a purported name change of the corporate entity concerned from Recot Inc. to FLNA, even though the same reportedly occurred as far back as in 2004. In any case, and according to Mr. Gonsalves, in the absence of a formal assignment by FLNA in favor of PepsiCo, the application was liable to be outrightly rejected. Mr. Gonsalves also questioned the contention of an oral assignment between FLNA and PepsiCo asserting that the Act mandates documentary proof of assignment being tendered along with Form PV-2 format and the statute therefore not contemplating oral assignments at all. The order of revocation, according to learned senior counsel, thus remedies the lapses committed by the Registrar.

45. Further, Mr. Gonsalves contended that Form PV-2 serves as evidence of a substantial assignment of intellectual property rights and is not merely an authorization to apply and therefore, it was imperative for PepsiCo to have furnished a copy of the Deed of Assignment between the breeder and PepsiCo. These non-compliances by PepsiCo, according to Mr. Gonsalves clearly warranted the registration being revoked.

46. Without prejudice to the aforesaid submissions, Mr. Gonsalves also contended that S. 24(6) of the Act mandates that a certificate of registration shall be valid for a period of six years for “*other crops*” and the same may be reviewed and renewed thereafter for a maximum period of 15 years from the date of registration of the variety. In this



backdrop, he contended that PepsiCo was obliged to renew its registration by 31 January 2022, i.e., six years from the date of registration which was 01 February 2016. It was contended that since in the present case PepsiCo’s renewal application dated 28 January 2022 was rejected by the Authority, it cannot seek renewal of the registration of the FL 2027 plant variety. It was thus submitted that no effective relief can be granted to PepsiCo and its appeal is therefore liable to be dismissed on this ground alone.

47. For the completeness of the record, we may note that while Mr. Gonsalves had also addressed certain submissions turning upon Section 16(1)(c) and Section 16(1)(e) and which are encapsulated in paras 37 and 38 of his written submissions, we do not propose to rule upon the same since Mr. Krishnan categorically stated that PepsiCo places its case solely under clause (c) and not clause (e) of Section 16.

## **E. THE STATUTORY REGIME**

48. Having noticed the rival submissions, we, at the outset, deem it apposite to extract some of the relevant provisions of the Act and the Rules and which would have a bearing on the questions which stand raised.

### **Provisions of the Act, as relevant to the present dispute**

“2. Definitions – In this Act, unless the context otherwise requires,-

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



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

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“**14. Application for registration.**—Any person specified in Section 16 may make an application to the Registrar for registration of any variety—

- (a) of such genera and species as specified under sub-section (2) of Section 29; or
- (b) which is an extant variety; or
- (c) which is a farmers' variety.”

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

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

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

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

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

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

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

(b) distinct, if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence



is a matter of common knowledge in any country at the time of filing of the application.

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

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

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

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

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

(ii) consists solely of figures; or

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

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

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

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

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

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

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

**“16. Persons who may make application.—**(1) An application for registration under Section 14 shall be made by—

(a) any person claiming to be the breeder of the variety; or

(b) any successor of the breeder of the variety; or





- (c) any person being the assignee of the breeder of the variety in respect of the right to make such application; or
- (d) any farmer or group of farmers or community of farmers claiming to be the breeder of the variety; or
- (e) any person authorised in the prescribed manner by a person specified under clauses (a) to (d) to make application on his behalf; or
- (f) any university or publicly funded agricultural institution claiming to be the breeder of the variety.
- (2) An application under sub-section (1) may be made by any of the persons referred to therein individually or jointly with any other person.”

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

- (a) be with respect to a variety;
- (b) state the denomination assigned to such variety by the applicant;
- (c) be accompanied by an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology;
- (d) be in such form as may be specified by regulations;
- (e) contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organisation in breeding, evolving or developing the variety;
- (f) be accompanied by a statement containing a brief description of the variety bringing out its characteristics of novelty, distinctiveness, uniformity and stability as required for registration;
- (g) be accompanied by such fees as may be prescribed;
- (h) contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired; and
- (i) be accompanied by such other particulars as may be prescribed: Provided that in case where the application is for the registration of farmers' variety, nothing contained in clauses (b) to (i) shall apply in respect of the application and the application shall be in such form as may be prescribed.
- (2) Every application referred to in sub-section (1) shall be filed in the office of the Registrar.



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

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**“20. Acceptance of application or amendment thereof.—**(1) On receipt of an application under Section 14, the Registrar may, after making such inquiry as he thinks fit with respect to the particulars contained in such application, accept the application absolutely or subject to such conditions or limitations as he deems fit.

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

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

(b) reject the application:

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

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

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

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

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

(3) Where registration of a variety (other than an essentially derived variety), is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in



the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

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

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

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

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

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

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

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**“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 by 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 fees 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.”

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**“34 Revocation of protection on certain grounds:** —Subject to the provisions contained in this Act, the protection granted to a breeder in respect of a variety may, on the application in the prescribed manner of any person interested, be revoked by the Authority on any of the following grounds, namely: —



- (a) that the grant of the certificate of registration has been based on incorrect information furnished by the applicant;  
(b) that the certificate of registration has been granted to a person who is not eligible for protection under this Act;  
(c) that the breeder did not provide the Registrar with such information, documents or material as required for registration under this Act;  
(d) that the breeder has failed to provide an alternative denomination of the variety which is the subject matter of the registration to the Registrar in case where the earlier denomination of such variety provided to the Registrar is not permissible for registration under this Act;  
(e) that the breeder did not provide the necessary seeds or propagating material to the person to whom compulsory licence has been issued under Section 47 regarding the variety in respect of which registration certificate has been issued to such breeder;  
(f) that the breeder has not complied with the provisions of this Act or rules or regulations made thereunder;  
(g) that the breeder has failed to comply with the directions of the Authority issued under this Act;  
(h) that the grant of the certificate of registration is not in the public interest: Provided that no such protection shall be revoked unless the breeder is given a reasonable opportunity to file objection and of being heard in the matter.”

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**“39. Farmers' rights.** - (1) Notwithstanding anything contained in this Act,—

- (i) a farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act;  
(ii) the farmers' variety shall be entitled for registration if the application contains declaration as specified in clause (h) of sub-section (1) of Section 18;  
(iii) a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund:  
Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act;  
(iv) a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed



of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act:

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.

Explanation.—For the purposes of clause (iv), “branded seed” means any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act.

(2) Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers or any organisation of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organisation of farmers, as the case may be, the expected performance under given conditions, and if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organisation of farmers, as the case may be, may claim compensation in the prescribed manner before the Authority and the Authority, after giving notice to the breeder of the variety and after providing him an opportunity to file opposition in the prescribed manner and after hearing the parties, may direct the breeder of the variety to pay such compensation as it deems fit, to the farmer or the group of farmers or the organisation of farmers, as the case may be.”

### **Provisions of the Rules as relevant to the present dispute**

#### **“22. General functions of the Authority.**

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(2A) The Authority shall register extant varieties (other than farmers variety), if at the date of filing of the application for registration, such variety has not been sold or otherwise disposed of for the purposes of exploitation of such variety for a period of eighteen years in case of trees and vines and fifteen years in other cases.”

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**“27. Proof of the right of making application under sub-section (3) of section 18.** – (1) Where an application for registration is made by the successor or assignee of the breeder under sub-section (3) of section 18, he shall furnish documentary proof, at the time of making such application or within six months of making such an application, as to the right to make such an application for registration.



(2) The documentary proof, in case of an assignment, shall be furnished in the manner specified in Form PV-2, given in the First Schedule and in case of succession, or a succession certificate or any other document in support of succession proving the applicant to be the successor shall be furnished.”

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FORM PV2

[See rule 27(2)]

THE PROTECTION OF PLANT VARIETIES AND FARMERS’ RIGHTS ACT, 2001

**PROOF OF RIGHT TO MAKE APPLICATION**

I/We<sup>1</sup> ..... referred to in this application as claiming to be the breeder or plant variety right holder hereby declare that the applicant(s) who has/have signed this application is/are my/our assignee(s) or successor(s).

I/We hereby enclose herewith the following documents as required under rule 27(2): -

- 1. ....
- 2. ....
- 3. ....

I/We hereby declare that the information given above is true and correct to the best of my/our knowledge and belief.

Dated ..... this ..... day of ..... 20.....

Signature<sup>2</sup>.....

Signatures of two witnesses along with their names and address:

- 1.
- 2.

I/We also hereby declare that the information given above are true to the best of my/our knowledge and belief.

Dated..... this..... day of.....20.....

Signature.....

**Note.** – Strike out whichever is inapplicable.

To  
The Registrar  
The Plant Varieties Registry  
At .....

- 1. \_\_\_\_\_  
Insert (in full) name, address and nationality.





2. To be signed by the Breeder or true Plant Variety Right holder(s).”

## **F. SECTION 34 OF THE ACT AND ITS UNDERLYING OBJECTIVE**

49. It must at the outset be noted that there does not appear to be any dispute with regard to FL 2027 falling in the “*extant*” variety and thus entitled to be registered in that category under the Act. These appear to be the conceded facts even before the learned Single Judge. The dispute essentially stems from the correctness and accuracy of the information provided in the application form and the right of PepsiCo to apply for registration. Insofar as the first issue is concerned, the learned Single Judge has come to conclude that the inaccurate description of FL 2027 in the application could not be viewed as a fatal mistake especially when the Registrar had itself processed FL 2027 as an “*extant*” variety. The record would further evidence that the date of first sale of FL 2027 as 2002 in Chile also did not constitute an issue of contestation. However, insofar as this aspect is concerned, the learned Single Judge has come to the conclusion that the fact that an incorrect disclosure of that date would not “*materially affect*” the grant would be irrelevant. The principal issue which thus merits consideration is the scope and intent underlying Section 34 and identifying the circumstances which would warrant the power of revocation being invoked.

50. A reading of the provisions placed in Chapter III of the Act would establish that an application for registration is placed through a rigorous process of examination, evaluation and testing before a grant



comes to be made under the Act. The said Chapter also envisages every application being duly advertised and objections that may be received being considered and disposed of before the grant of registration. While it is unclear from the record placed before us as to whether any objections to PepsiCo's application had been received, we presume that such a process was indeed followed. Section 21 enables a person to object to an application for registration made under the Act on grounds stipulated therein including on the basis of the applicant not being entitled to registration, the variety not being registerable or the grant being opposed to public interest itself.

51. Section 34 prescribes and lists out the various contingencies in which a certificate may be revoked. A close reading of clauses (a) to (e) would establish that they are concerned with inherent invalidity of the grant. The grounds of revocation embodied in those clauses clearly lead one to conclude that they deal with situations where the original grant would itself be rendered fundamentally flawed. The power of revocation as conferred in terms of those clauses clearly appears to be directed towards situations where a certificate may have come to be granted even though a variety was not entitled to be registered or a protection to the applicant not liable to be accorded. These clauses thus specify grounds which would have a material and foundational impact on the validity of the grant. Clauses (f) and (g) would appear to operate principally in a post grant scenario since they deal with contingencies where a breeder has failed to comply with the provisions of the Act or refused to abide by a direction of the Authority. However, even if



clause (f) were construed as being applicable to a pre grant stage, it would have to be construed and interpreted bearing in mind the underlying scheme of Section 34 and which appears to envisage revocation being hinged to issues of fundamental invalidity and entitlement. To the aforesaid extent, we concur with the submission of Mr. Krishnan that the Section 34 power is neither intended to be exercised nor would it be attracted at the slightest infraction.

52. Both clauses (a) and (b) of Section 34 as worded would lead one to the irresistible conclusion that revocation would be merited only when the Authority finds that circumstances and facts evidence that registration could not have been granted at all. Similarly, when clause (c) speaks of the breeder having failed to provide information and documentation, it would necessarily have to be construed as pertaining to information and documentation which if furnished or provided would have had a material bearing on the grant itself. Similar is the position which comes to the fore when one views clauses (d) and (e). All of the aforementioned clauses thus clearly shed light on the nature and extent of the revocation power and the same thus not being attracted when the grant is not found to suffer from patent invalidity or ineligibility. The power of revocation would thus be confined only to situations where it is found that the grant has come to be made in favour of a person or variety which was ineligible or where a variety which was otherwise not entitled to be registered has been accorded protection. Insofar as the remainder clauses are concerned, they clearly appear to be relating to the working and conduct of the registrant and thus really of lesser



import insofar as the present case is concerned. The arguments of the respondent-appellant insofar as clauses (f) and (h) are considered in the latter parts of this decision. The challenge to revocation is thus liable to be examined in the aforesaid light.

53. While closing this chapter, we note that Section 34 uses the expression “*may, on the application in the prescribed manner of any person interested, be revoked.....*”. The provision, viewed in that light, is *pari materia* to Section 64 of the Patents Act, 1970. Dealing with the issue whether the power to revoke as comprised in that provision would be warranted in situations where a failure to furnish information was neither intentional nor deliberate, a Division Bench of our Court in **Maj (Retd.) Sukesh Behl & Anr. Vs Koninklijke Phillips Electronics**<sup>6</sup> made the following pertinent observations: -

“28. Coming to the question whether the failure to comply with the requirement of Section 8 of the Patents Act would invariably lead to the revocation of the suit patent under Section 64(1)(m) of the Patents Act, we may at the outset point out that the word ‘may’ employed in Section 64(1) indicates that the provision is directory and raises a presumption that the power of revocation of patents conferred under Section 64(1) is discretionary. Ordinarily, the word ‘may’ is not a word of compulsion. It is an enabling word and it confers capacity, power or authority and implies discretion.

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36. Thus, it is clear that ordinarily it is not proper for the Court to depart from the literal rule as that would really be amending the law in the garb of interpretation which is impermissible under law. However, in case of ambiguity while determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve.

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<sup>6</sup> 2014 SCC OnLine Del 2313



37. In the present case, it is no doubt true that it is mandatory to comply with the requirements under Section 8(1) of the Patents Act and non-compliance of the same is one of the grounds for revocation of the patents under Section 64(1)(m). However, the fact that the word “may” is used in Section 64(1) itself indicates the intention of the legislature that the power conferred thereunder is discretionary. The mere fact that the requirement of furnishing information about the corresponding foreign applications under Section 8(1) is mandatory, in our opinion, is not the determinative factor of the legislative intent of Section 64(1). We found that the language of Section 64(1) is plain and unambiguous and it clearly confers a discretion upon the authority/Court while exercising the power of revocation. The interpretation of the provisions of Section 64(1) as discretionary, in our considered opinion, does not result in absurdity nor in any way effect the rigour of the mandatory requirements under Section 8 of the Act.

38. Therefore, we are of the view that though any violation of the requirement under Section 8 may attract Section 64(1)(m) for revocation of the patent, such revocation is not automatic.

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48. In the instant case, it is no doubt true that the Patent Attorney of the plaintiff himself in his affidavit filed before the COP stated that certain information in relation to corresponding foreign applications was omitted while filing the information as required under Section 8 of the Patents Act. However, it is not as if there was total failure on the part of the plaintiff to disclose the information in terms of the undertaking filed under Section 8(1)(b). The omission was only to furnish a part of the information for the reasons stated therein. It is also the specific case of the plaintiff that the information so omitted is not material to the grant of the patent in question.

49. Under the circumstances, as rightly held by the learned Single Judge revocation is not automatic under Section 64(1)(m), but it is always open to the Court to examine the question whether the omission to furnish the information was deliberate or intentional. The revocation would follow only if the Court is of the view that the omission to furnish the information was deliberate. Therefore, it cannot be held that there is any unequivocal admission by the plaintiff and consequently, it is not a matter for granting a decree even before the evidence is let in by the parties as provided under Order XII Rule 6 of CPC.”

## **G. THE NEW AND EXTANT DISPUTE**



54. We note that although PepsiCo had repeatedly and while submitting its applications for registration ticked the box meant for “*new*” variety, it is pertinent to note that while responding to the communication of the Registrar dated 09 June 2011 and in terms of its own letter of 08 February 2012, it had clearly apprised the Authority that it was seeking registration of FL 2027 under the “*extant*” category. The record would further establish that while applying for registration PepsiCo had never claimed FL 2027 to be novel and which as Section 15(3) of the Act would bear out is the principal distinctive feature which accompanies “*new*” varieties. We thus concur with the ultimate conclusion as rendered by the learned Single Judge that the registration was not liable to be revoked on this score.

#### **H. DISPUTE REGARDING THE DATE OF FIRST SALE**

55. We are also of the firm opinion that PepsiCo would have derived no benefit or advantage in making a deliberate or conscious declaration of the date of first sale as 17 December 2009. We take note of the following chart which has been placed for our consideration by PepsiCo along with the rejoinder note:

<b>“Date of First Sale</b>	<b>Late date for application (Rule 22(2A))</b>	<b>Date of Application</b>
October 28, 2022 (Chile)	October 27, 2017	February 16, 2012
December 17, 2009 (India)	December 16, 2025	February 16, 2012”



56. As would be manifest from the above, the mentioning of the date of first sale whether computed with reference to commercialization in Chile or in India did not adversely impact the right of the applicant to apply under the Act either on the date when the application was originally moved or even when it was filed in its revised form. We note that in terms of the provisions made in Rule 22(2A) of the Rules, PepsiCo had the right to apply for registration under the “*extant*” variety within 15 years from the date of first sale. The application as ultimately made would thus be within the 15-year time period, be it computed from 28 October 2002 or 17 December 2009.

57. We also find merit in the submission of Mr. Krishnan, when learned senior counsel had contended that the protection under the Act flows from the date of registration and not from the date of first sale. Consequently, even if the date of first sale were declared to be 17 December 2009, PepsiCo did not derive any added or additional benefit.

58. We further note that while Section 2(j) of the Act refers to a variety “*available in India*”, the disclosures which are required in the form do not appear to provide any indication of the first commercialization being global or India specific. While Mr. Gonsalves had sought to urge that no doubt can possibly be harboured by virtue of Section 15(3)(a)(ii) of the Act, we note that the aforesaid clause pertains only to a “*new*” variety since exploitation outside India is concerned with novelty. The phrase “*outside India*” does not appear in either clauses (b), (c) or (d) of Section 15(3) and which aspects alone



are relevant to “*extant*” varieties. We would be proceeding to take an extremely narrow and pedantic view if we were to completely discount the possibility of PepsiCo having made declarations with respect to first sale bearing in mind the language in which Section 2(j) of the Act stands couched.

### **I. SECTION 16(1)(c) OF THE ACT AND ITS IMPORT**

59. The principal question which appears to arise for consideration thus revolves upon the submissions addressed on the rights claimed by PepsiCo and the extent of disclosures and declarations that were made in its application. PepsiCo has consistently taken the position that the application for registration is founded on Section 16(1)(c) and not Section 16(1)(e) of the Act. This was contended by Mr. Krishnan, since in case an application was placed in clause (e) of Section 16(1), the certificate of registration would be granted not in favour of the person authorized but in favour of the one at whose behest the application may itself have been made.

60. Undisputedly, the application as submitted before the Registrar sought the grant of a certificate of registration in favour of PepsiCo and not FLNA. It was not disputed before us that Dr. Robert Hoopes was the original breeder and who had in turn assigned all rights in the concerned plant variety in favour of Recot Inc. The respondent-appellant has also been unable to cast any doubt on the certificate evidencing the change of the corporate name of Recot Inc. to FLNA. Both FLNA as well as PepsiCo are stated to be affiliates and group





entities of PepsiCo Inc. The letter of FLNA dated 12 September 2019 also alludes to the affiliates of PepsiCo Inc. acting together and in concert to protect FLNA's proprietary potato varieties with patents, plant breeders' rights and registration under the Act in the case of India. The authorization by FLNA in favour of PepsiCo is thus liable to be construed in the aforesaid light. There does not appear to be any doubt with respect to PepsiCo having been accorded the right to make the application. However, and what is contented by and on behalf of the respondent-appellant is that Section 16(1)(c) can only confer a right upon an assignee of the breeder to apply for registration. It was in the aforesaid backdrop that Mr. Gonsalves had contended that the absence of a formal assignment by FLNA in favour of PepsiCo was fatal to the application. We, however, find ourselves unable to countenance that submission for the following reasons.

61. As is manifest from a reading of Section 16(1)(c), the said clause enables a person being the assignee of the breeder to apply for registration. However, clause (c) also employs the expression "*in respect of the right to make such application*". Thus, the said provision enables not only the assignee of the breeder but even one who may have been empowered by the assignee to make such an application. The distinction between clauses (c) and (e) of Section 16(1) is evident when one bears in mind the fact that the Section 16(1)(e) applicant is merely enabled by virtue of an authorization to act as an agent of any of the category of persons who may fall within clauses (a) to (d) to prosecute and pursue an application before the Registrar. That person does not



claim or seek a registration in favour of itself. All that clause (e) of Section 16(1) does is to enable any of the persons falling in clauses (a) to (d) to authorize and empower a person to pursue an application for registration before the Registrar. This position is further fortified from a reading of Section 18(3), which again speaks of assignment of the right to apply for registration. This would again expand the field of persons who are rendered eligible to apply for registration beyond a mere assignee of the breeder to even one who has been assigned the right to apply for and seek registration in its own name.

62. That then takes us to consider the import of the FLNA authorisation. As we view the letter of 12 September 2019, it clearly embodies the intent of FLNA to enable and authorize PepsiCo to seek registration of FL 2027 under the Act. The said communication embodies the permission accorded by FLNA to PepsiCo to apply and seek registration of FL 2027 under the Act. We fail to discern any ambiguity in the extent of authorisation and conferral of rights as embodied in this letter.

63. It is pertinent to note that Rule 27 and which purports to regulate and make appropriate provisions referable to Section 18(3) of the Act, speaks of appropriate disclosures being made in the manner specified in Form PV-2. However, Form PV-2 clearly appears to be restrictive to a situation where the original breeder may become a party along with its assignee to apply for registration. Form PV-2 does not make adequate provisions to cater to the myriad contingencies and situations including those which we have spoken of hereinabove and which may extend to



the assignee empowering an entity to make an application by virtue of Section 16(1)(c) read along with Section 18(3). It is this restrictive structure of Form PV-2 which appears to have constrained PepsiCo to mention the name of the original breeder in the application form. However, and as would be evident from the material placed on the record, PepsiCo was seeking registration of FL 2027 based on the authorization made in its favour by FLNA and as ratified by the latter in terms of its letter dated 12 September 2019. The aforesaid communication does clearly fall within the ambit of Section 16(1)(c) and consequently obviating the requirement of the original breeder signing the application.

## **J. INHERENT CONTRADICTION**

64. We further find merit in the contention of PepsiCo that the findings ultimately returned by the learned Single Judge with respect to “*new*” and “*extant*” variety on the one hand and those with respect to first sale of the FL 2027 variety are clearly contradictory or at least irreconcilable. In our considered opinion, once the learned Single Judge had recognized and found the admitted position to be that the application was being pursued for an “*extant*” variety, the issues emanating from declarations of first sale had to be necessarily answered on the anvil of eligibility to seek registration. The aforesaid aspect was also liable to be considered, bearing in mind the admitted fact that PepsiCo’s application would not fall foul of the statutory time frames as constructed by Rule 22(2)(a), irrespective of whether the 15-year period were to be computed from the date of first sale in Chile or in India.



65. We are of the considered opinion that the power of revocation which stands comprised in Section 34 of the Act cannot possibly be construed as being intended to be invoked in any eventuality or in situations which may have no impact on the applicant being otherwise eligible to be accorded protection or the registration being otherwise valid and in conformity with the provisions of the Act. We thus find ourselves unable to concur with the view expressed by the learned Single Judge when it is observed that the incorrect mention of the date of first sale was a determinative factor even though it may not “*materially affect*” the grant. In fact, Section 34 mandates that very test to be employed while examining whether the power of revocation should be exercised. It would be wholly arbitrary and illogical to accord a judicial imprimatur to an order of revocation which is founded on a factor which has no material bearing on the ultimate grant or which fails to meet the tests of fundamental ineligibility and invalidity. The acceptance of such a view would amount to sanctioning a power to revoke being available to be invoked on wholly illogical and whimsical considerations.

66. Undisputedly, and which is a fact noticed even by the learned Single Judge, FL 2027 was entitled to be placed in the category of an “*extant*” variety. The application for registration came to be made within the time frame prescribed under Rule 22(2)(a) of the Rules. The assignment by Dr. Robert Hoopes in favour of Recot Inc. was not questioned. While the Authority had doubted the admissibility of the Assignment Deed in the revocation proceedings on the basis of the



provisions contained in the 1899 Act, the learned Single Judge has rightly held that the same could have clearly been remedied upon the Authority impounding the Assignment Deed and proceeding further in accordance with Section 35 of the 1899 Act. There was thus on the records of the Authority, the assignment deed as well as the letter of authorization by FLNA in favour of PepsiCo. Neither the application nor the ultimate grant thus suffered from a fundamental misdeclaration or a failure to provide information as required by the provisions of the Act, read along with the Rules.

67. In any case, a revocation based on Section 34(a) would sustain only if it is established that the registration was obtained on the basis of submission of incorrect information. Even Section 34(b) proceeds in the same vein and contemplates revocation of registration when granted to a person who is not eligible for protection. As held by us hereinabove, even clauses (c) and (f) of Section 34 would have to draw colour and meaning from the preceding clauses and all of which tend to extend to situations where an ineligible applicant has been accorded a certificate of registration or where registration of a plant variety may have been incorrectly obtained or granted. The power of revocation as comprised in Section 34 would be liable to be invoked only in situations where a certificate of registration is found to be inconsistent with the protection accorded by the Act or where a plant variety which is otherwise ineligible to be accorded protection is conferred registration. The expressions “*incorrect information*” or “*non*



*compliance with the provisions of the Act” would have to be construed in the aforesaid light.*

### **K. SECTION 39(1)(iv) OF THE ACT AND PUBLIC INTEREST**

68. That then leaves us to deal with the principal ground which was pressed on behalf of the respondent-appellant in the connected appeal. Mr. Gonsalves had vehemently contended that the filing of various suits by PepsiCo was violative of the rights conferred upon farmers by virtue of Section 39(1)(iv) of the Act. According to learned senior counsel, the institution of those suits was clearly representative of PepsiCo acting contrary to public interest and thus the registration being liable to be revoked under Section 34(h) as well.

69. We note that apart from a mere reference to various suits alleging infringement which are stated to have been filed by PepsiCo, the respondent-appellant failed to establish or prove that those suits were vexatious or that they had been instituted as part of predatory tactics of PepsiCo. It was incumbent upon the respondent-appellant to establish on the basis of material forming part of those suit proceedings that PepsiCo had commenced those actions merely to pressurize and intimidate farmers and that they were based on allegations totally frivolous or unsubstantiated.

70. However, that material has neither been placed on the record nor has the respondent-appellant drawn our attention to any material placed before the learned Single Judge which may have lent credence to this



allegation. Even the Authority, while passing the order of revocation has merely referred to the filing of those suits and the fact that they were ultimately withdrawn. It has solely on that basis proceeded to observe that several farmers had been put to hardship and compelled to factor in the possibility of paying huge penalties.

71. In our considered opinion, the aforesaid conclusions are not based on any tangible facts relating to the merits underlying those suits nor are they based on the Authority having upon an independent examination of the plaint and the allegations levelled therein having found that the actions were intimidatory and vexatious.

72. We may note that the institution of a suit for the purposes of protection of rights conferred by Section 28 of the Act cannot per se be said to be intimidatory or vexatious. Such an allegation would ultimately have to be established and proven in accordance with law. Since the respondent-appellant has clearly failed to discharge that burden, we find ourselves unable to sustain the submissions addressed in the backdrop of Section 34(h) of the Act.

#### **L. ANCILLARY ISSUES**

73. Before closing, we consider it expedient to also deal with the argument of Mr. Gonsalves resting on Section 24(6) of the Act and the fact that the prayer of PepsiCo for renewal came to be rejected by the Registrar on 11 February 2022. Admittedly, the said order was founded on the registration itself having been revoked in terms of the order of revocation dated 03 December 2021. It was submitted by Mr.



Gonsalves that Rule 39(1)(b) requires an application for renewal being made six months before the expiry of the original period of registration. According to learned senior counsel, when computed from the date when the certificate was originally granted, PepsiCo would not be entitled to seek renewal today.

74. We find ourselves unable to concur with the said argument since undisputedly the prayer for renewal came to be turned down solely on account of the registration itself having been revoked by the Authority. Once we have come to conclude, for reasons assigned hereinabove, that the revocation would not sustain and is liable to be quashed, the same would be deemed to have never existed in the eyes of law. The application for renewal which was made on 28 January 2022, and admittedly within the time prescribed under Rule 39(1)(b), would consequently have to be considered afresh.

75. While parting, we deem it expedient to observe that the Registrar while considering the application for registration did not require or call upon PepsiCo to furnish any additional information. Such a power does stand conferred upon the Registrar in terms of Section 20 of the Act. Had these issues been flagged at that stage, perhaps the present controversy may not have arisen at all. We take note of the undisputed fact that neither the Act nor the Rules prescribe a particular format in evidence of assignment. We further find that while the learned Single Judge has held that the FLNA communication was not in accordance with Form PV-2, the same ignores the fact that the said statutory form does not make appropriate provisions for authorisations by an assignee





in favour of another person and on the basis of which registration under the Act may be sought. As noticed in the preceding parts of this decision, Form PV-2 does not make adequate provisions so as to capture all eventualities which may flow from Section 16(1)(c). While the above observations are not liable to be viewed as the Court suggesting that an applicant need not be vigilant and ensure compliance with the Act, the aspect of omission and non-compliance would ultimately have to be tested on the anvil of fundamental invalidity or ineligibility, the tests propounded by us above.

76. While it is true that the FLNA letter came to be placed before the Authority only during the course of the revocation proceedings, it clearly amounted to a ratification of the application that had been moved by PepsiCo. There was thus no justification to revoke the registration once that letter had come to be produced and filed. These factors additionally convince us to hold in favour of PepsiCo.

## **M. CONCLUSIONS**

77. We accordingly come to the conclusion that the learned Single Judge rightly came to the conclusion that the mistake of styling the candidate variety as “*new*” was remediable and in any case not fatal to the cause especially since the Registrar itself had decided to process the same as relating to the “*extant*” category. We also affirm the impugned judgment insofar as it negated the challenge based on Section 34 (h). We, for reasons aforementioned find no merit in the challenge raised by the respondent-appellant to paragraphs 69 and 91 of the impugned



judgment. We however find ourselves unable to uphold the view taken by the learned Single Judge insofar as it holds against PepsiCo and pertaining to an incorrect mentioning of the date of first sale as well as the conclusions ultimately rendered in the context of the eligibility of PepsiCo to apply for registration and non-submission of relevant documentation.

#### **N. DIRECTIONS OF THE COURT**

78. The appeal of PepsiCo, LPA 590/2023 is allowed. The impugned judgment and order dated 05 July 2023 shall consequently stand set aside to the extent indicated above. We consequently also set aside the order of the Authority dated 03 December 2021 and the letter issued by the Authority dated 11 February 2022. The renewal application as made by PepsiCo shall stand restored on the file of the Registrar who shall dispose of the same in accordance with law and in light of the findings recorded hereinabove.

79. For reasons set out above, we dismiss LPA 644/2023 being the cross appeal of the respondent-appellant.

**YASHWANT VARMA, J.**

**DHARMESH SHARMA, J.**

**JANUARY 09, 2024/Neha/RW**