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## Supreme Court restores PIL highlighting regulatory failures causing biopiracy and biodiversity losses

*PIL raises grave concerns on prevailing weaknesses in Biodiversity Act that is contributing to biodiversity loss and associated traditional rights*

The Hon'ble Supreme Court of India by its [order dated 22nd November 2022](#) allowed a Special Leave Petition filed by Environment Support Group [SLP(C) 7951/2014]. Thereby setting aside the 2nd December 2013 decision of the Karnataka High Court transferring the Public Interest Litigation ([WP 41532/2012](#)<sup>1</sup>) to the National Green Tribunal.

The PIL, thus restored, challenges the lack of action by India's environment and biodiversity regulatory authorities against M/s Monsanto *et al* committing biopiracy in promoting B.t. Brinjal (India's first GMO food)<sup>2</sup> and also highlights the regulatory failures of the authorities in conserving biodiversity and associated traditional knowledge and rights.

### **Background:**

In 2012, Environment Support Group ("ESG") filed a Public Interest Litigation (WP No. 41532/2012) before the Hon'ble High Court of Karnataka drawing attention to serious criminal acts of biopiracy committed by M/s Mahyco, M/s Monsanto (now owned by M/s Bayer) and various Indian and American public agricultural universities (viz. University of Agricultural Sciences - Dharwad, Tamil Nadu Agricultural University - Coimbatore, Indian Institute of Vegetable Research - Varanasi, Cornell University - New York/USA) in promoting B.t. Brinjal. The PIL had drawn attention to the fact that the biodiversity regulatory system of the country, constituted by the [National Biodiversity Authority](#), State Biodiversity Boards (for eg. [Karnataka Biodiversity Board](#)), as also [Genetic Engineering Appraisal Committee](#) of the Indian Ministry of Environment, Forests and Climate Change (MoEF&CC) and [Protection of Plant Varieties and Farmers' Rights Authority](#), amongst others, had comprehensively failed in their statutory and constitutional duty to ensure strict compliance with applicable laws and safeguards relating to access, use and conservation of sovereign bioresources of India.



**Regulatory failure in tackling Biopiracy by Monsanto et al in Bt Brinjal:** Based on verifiable documentary evidence submitted by ESG to various authorities, which had not been duly attended to or even dismissed, the PIL made a case of continuing failure of the regulatory system to initiate action against the egregious act of biopiracy. In particular, attention was drawn to the fact that 16 local farmer varieties of brinjal (which are indigenous to India, including Udupi Gulla <sup>3</sup>variety which has a GI tag), and which also constitute sovereign bioresources of local farmers and communities, had been accessed illegally to produce Bt. Brinjal as a proprietary and profitable product of the transnational and Indian corporations. The petition noted with grave concern that despite the 6th September 2011 statement of the Indian Environment Minister in Parliament assuring action on ESG's complaints of biopiracy in the Bt Brinjal case, and related recommendations in the [37th Report of the Parliamentary Committee on Agriculture \(2011-12\)](#)<sup>4</sup>, no action

<sup>1</sup><http://esgindia.org/sites/default/files/campaigns/biodiversity/legal/esg-pil-biopiracy-hc-kar-oct-2012-final.pdf>

<sup>2</sup> The environmental release of GMO Brinjal was halted by a [9th February 2010 moratorium decision](#) of then India's Environment Minister Jairam Ramesh.

<sup>3</sup> GI Tagged Udupi Gulla <https://search.ipindia.gov.in/GIRPublic/Application/Details/199>

<sup>4</sup> [https://eparlib.nic.in/bitstream/123456789/63724/1/15\\_Agriculture\\_37.pdf](https://eparlib.nic.in/bitstream/123456789/63724/1/15_Agriculture_37.pdf)



whatsoever had followed.<sup>5</sup>

The Petition further highlighted that the lack of care on the part of the regulatory system to protect bioresources and associated traditional rights and knowledge would be exploited by corporates for unprecedented profit, as was already the case with Bt. Cotton. It also pointed out numerous defects and



lacunae in the prevailing biodiversity conservation laws which directly contributed to potential irreversible loss of India's biodiversity and associated traditional knowledge. It was argued that all of this would directly threaten the livelihoods of farmers, fisherfolk, pastoralists, artisans, AYUSH practitioners, tribal and indigenous communities and other such natural resources dependent people whose existence is directed and intricately dependent on sustainable access to such natural resources. Moreover, it was pointed out that conservation of such bioresources is critical to securing India's biodiversity, and towards ensuring medicinal properties of the bioresources is made accessible to the country's massive population, most of whom rely on Indian systems of medicine.

**Challenging Constitutional Validity of Sec. 40 of Biological Diversity Act:** The Petition pointed out that biodiversity, bioresources and associated traditional knowledge was being forfeited as Section 40 of the Biological Diversity Act, 2002 (BDA) was phrased to facilitate bio-extraction against the principles of Sustainable Development. As a result any bioresource listed as a Normally Traded Commodity (NTC) would lose protections guaranteed under the Act. It was pointed out that MoEFCC by way of its [Notification dated 26th November 2009](#) under Section 40 of the BDA, had already notified 190 plants as NTC without conducting any due diligence. As a consequence of such laxity, at least 15 plant species that were either threatened or critically endangered in the wild, had found their way into the NTC list.

It was highlighted that this is a serious concern given that several of these plants, or their extracts, were established as critical to treating various chronic diseases. The petition contended that Section 40 also empowers the Central Government to arbitrarily label biological resources as NTC, thus allowing unfettered trade in India's biological wealth, and thus paving the way for rampant biopiracy, bioextraction, bioloot, etc.

#### 190 plants declared Normally Traded Commodities

- In 2010, MoEF and NBA notified 190 plants as Normally Traded Commodities per Sec. 40 of BD Act, without any compliance with the Principle of Prior and Informed Consent
- On review, we discovered at least 15 plants were critically endangered, or threatened, a fact confirmed by IUCN.
- Trade is a major cause for extinction of species.
- The NTC list is thus comprehensively violative of various national and international regulations.



On the basis of such evidence, the petition sought directions to statutory and regulatory authorities to diligently and verifiably conduct environment, social and bio-diversity impact assessments, guided by the Principle of Free, Prior and Informed Consent, before formulating any and all decisions impacting biodiversity, associated traditional knowledge and livelihoods. This was argued as particularly important in cases relating to introduction of genetically modified organisms or import of genetically modified foods.

**Karnataka High Court decision transferring the PIL to NGT challenged before SC in 2014:** The Principal Bench of the Hon'ble High Court of Karnataka first heard this PIL on 16th October 2012, at which point the then Chief Justice Mr. Vikramjit Sen had pointedly [observed](#) that dharnas must be organised against the United States of America for its continued intransigence in complying with global biodiversity norms, in addition to drawing attention of the court by way of the PIL. Thus highlighting the urgency of action required in tackling challenges to global biodiversity conservation. The remark was made even as the 11th Conference of Parties on the Convention on Biological Diversity was held at Hyderabad. Subsequently, the matter was heard frequently and various directions were issued.

<sup>5</sup> Consequent to the filing of the PIL, National Biodiversity Authority was compelled to file a criminal charge sheet against the key representatives of M/s Monsanto, M/s Mahyco, various Vice Chancellors of Indian agriculture universities, etc. before the JMFC Court, Dharwad in Criminal Complaint No. 579/2012. The accused sought to quash the criminal proceedings by filing CRL P 10002/2013 and CRL P 10003/2013 before the Karnataka High Court, which were subsequently dismissed by order dated 11th October 2013. This order of dismissal was stayed by the Hon'ble Supreme Court, and the stay has not been vacated so far.



However, on 2nd December 2013, the Principal Bench of the High Court, then headed by Chief Justice Mr. D H Waghela, transferred the petition to the National Green Tribunal (“NGT”) on the ground that the “National Green Tribunal has the jurisdiction to decide all substantial questions relating to enforcement of any legal right arising out of implementation of the (Biological Diversity) Act and settle such disputes and pass orders thereon”. This direction was issued overlooking ESG’s strident arguments that since the matter involved a challenge to the constitutional validity of a provision of the Biological Diversity Act, the Tribunal does not have the authority to adjudicate the matter and as a result, the PIL would be rendered infructuous. ESG was thus constrained to file SLP (C) No. 7951/2014 before the Hon’ble Supreme Court challenging the order of the Karnataka High Court.

**Supreme Court decision:** This SLP was heard by several Benches of the Supreme Court from time to time. However, the matter remained unresolved for almost nine years. The case was finally heard on 22nd November 2022 by a Bench composed of Hon’ble Mr. Justice Krishna Murari and Hon’ble Mr. Justice S. Ravindra Bhat, who passed an order allowing the appeal. ESG was represented in the proceedings by Mr. Nikhil Nayyar, Senior Advocate and Ms. Pritha Srikumar, Advocate on Record.

The Hon’ble Supreme Court relied on an earlier judgement in *Tamil Nadu Pollution Control Board vs. Sterile India Limited* [(2019) 19 SCC 479] and held as follows: “we set aside the impugned order passed by the High Court and restore the writ petition back to its original number requesting the High Court to consider and decide writ petition itself on merits. The question of maintainability of writ petition is left open to be raised and decided in case any challenge is made to the final order passed by High Court.”

The Supreme Court’s order also validates the position taken by the Nagpur Bench of the Hon’ble High Court of Bombay, in a petition (WP No. 6360/2015) challenging the vires of Sections 23 and 24 of the BD Act. In this case, the Bombay High Court thoroughly examined the NGT Act and held, vide order dated 28th September 2016, that the NGT does not have the jurisdiction to “decide upon the vires of any of the enactments which confer appellate or other jurisdiction upon it and finds mention in Schedule -I of the NGT Act. It also does not empower it to examine the validity of any Rules or Regulations made under these enactments.” This order was also challenged before the Hon’ble Supreme Court in SLP (C) No. 8137/2018, and heard as a connected matter and disposed of by a common order.

### **Biodiversity Loss during 2012-2022:**



During the time ESG’s PIL has been pending adjudication, the status of biodiversity in India, and across the world, has significantly worsened. As per the International Union for Conservation of Nature and Natural Resources (IUCN) Red List for India, the number of threatened plant species, particularly those

that have gone extinct, or are critically endangered and vulnerable, has shockingly increased from [325 in 2013](#) to [583 in 2022](#). Globally, of the 147,500 species assessed for the Red List, IUCN has shockingly discovered that 41,000 species are already threatened with extinction<sup>6</sup>.

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has recorded in its recent [Global Assessment Report on Biodiversity and Ecosystem Services Report](#) that “Human actions threaten more species with global extinction now than ever before. An average of around 25% of species in assessed animal and plant groups are threatened, suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss. Without such action, there will be a further acceleration in the global rate of species extinction, which is already



<sup>6</sup> <https://www.iucnredlist.org/>



at least tens to hundreds of times higher than it has averaged over the past 10 million years.” Further the report notes with grave concern that “By 2016, 559 of the 6,190 domesticated breeds of mammals used for food and agriculture (over 9 per cent) had become extinct and at least 1,000 more are threatened. In addition, many crop wild relatives that are important for long-term food security lack effective protection, and the conservation status of wild relatives of domesticated mammals and birds is worsening”. On the basis of such assessments, the global scientific study issued a dire warning: “Reductions in the diversity of cultivated crops, crop wild relatives and domesticated breeds mean that agroecosystems are less resilient against future climate change, pests and pathogens”.

### **A decade of worsening biodiversity protection in India:**

Notwithstanding such alarming reports emerging over the grave threat to biodiversity, MoEF&CC has continued over the past years to include hundreds of more plants in the NTC list. By way of Notifications issued in [2016](#) and [2017](#), 421 plants have been notified by MoEF&CC as NTC.

The 15 plant species that ESG had found in the NTC list of 2009 as being threatened or critically endangered, and which were brought to the attention of the Karnataka High Court in the PIL, continue to be on recent NTC lists. The Botanical Survey of India (BSI) has recently notified that the conservation status of two plants of the 15 plants noted in the NTC list, has worsened.<sup>7</sup> ***Garcini imberti* Bourd<sup>8</sup> which was listed as threatened in 2012 is now critically endangered. Similarly, the status of *Chlorophytum borivilianum* Santapau & R.R.Fern<sup>9</sup>, has moved from near threatened to critically endangered. Only a closer examination of the status of all plants (along with their varieties) in the NTC lists will reveal the true status.**



*Chlorophytum borivilianum*



*Garcini imberti*

Considering this grave situation, ESG will now present to the Hon’ble High Court of Karnataka such and more such evidence to demonstrate the urgency required in ramping up India’s biodiversity regulatory system. ESG will further aim to ensure that the regulatory system is based on transparent and accountable administration with the direct involvement of local communities in advancing conservation, such as through the Biodiversity Management Committees as mandated by the Biodiversity Act, Forest Rights Committees as mandated in the Forest Rights Act, Panchayats and Nagarpalikas, through effective functioning of State Biodiversity Boards and National Biodiversity Authority, etc.

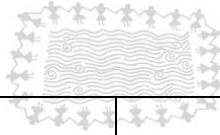
The Supreme Court order comes at a time when the world is preparing to address grave biodiversity losses, especially through climate change, as part of the [15th Conference of Parties of the Convention on Biological Diversity](#) to be held in Montreal during 7th to 19th December 2022. Meanwhile, MoEF&CC has proposed massive dilutions to the Biodiversity protection regime, and environmental jurisprudence of the country evolved over four decades, by proposing the country’s environmental regulatory systems almost entirely rely on civil jurisprudence. As has already been widely noted, this would grossly weaken biodiversity and environmental regulators in tackling widespread ecological and human rights damage underway.<sup>10</sup>

<sup>7</sup> <https://bsi.gov.in/uploads/documents/research-program/Threatened-plants-of%20India.pdf>

<sup>8</sup> [Garcinia commonly known as Kokum and used in culinary and industrial applications extensively.](#)

<sup>9</sup> [Chlorophytum is known as Safed musli and referred to as ‘white gold’ or ‘divya aushad’ in Indian systems of medicine](#)

<sup>10</sup> For a detailed analysis of the dilutions being proposed, see the report of the *National Consultation On Proposed Amendments To Environmental Laws In India* organised by Environment Support Group and National Law School of India University, here: <https://esgindia.org/new/advocacy/national-consultation-on-proposed-amendments-to-environmental-laws-in-india/>



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