

In the High Court of Karnataka at Bangalore

W.P. No. /2012

UNDER WRIT ORIGINAL JURISDICTION

Between :

Environment Support Group and another

... Petitioners

And :

National Biodiversity Authority and others

... Respondents

LIST OF DATES

DATE	DESCRIPTION
05 June 1992	The United Nations Convention on Biological Diversity was agreed upon by the world community's growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources. India signed the Convention on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio "Earth Summit") ratified it on 18 February 1994.
05 February 2003	Biological Diversity Act, 2002 received Presidential assent and thus came into force. The main objective of the act is conservation of biological diversity, sustainable use of its

DATE	DESCRIPTION
	<p>components and fair and equitable sharing of the benefits arising out of utilisation of genetic resources. The Act gives effect to the Convention on Biological Diversity.</p> <p>The Biological diversity Act (2002) mandates implementation of the act through decentralized system with the National Biodiversity Authority focusing on advising the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources; advising the State Government in the selection of areas of biodiversity importance to be notified under sub-section (1) of section 37 as heritage sites and measures for the management of such heritage sites.</p> <p>The State Biodiversity Board (SBBs) focus on advising the State Government, subject to any guidelines issued by the Central Government, on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of the benefits arising out of the utilization of biological resources; Regulate by granting of approvals or otherwise request for commercial utilization or bio-survey and bio-utilization of any biological resource by Indians.</p> <p>Local Level Biodiversity Management committees (BMCs) are responsible for promoting conservation, sustainable use and</p>

DATE	DESCRIPTION
	documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivators, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity.
08 November 2006	Ministry of Environment and Forests, Respondent 2, issues Notification No. S.O.1911(E) Guidelines for International Collaboration of Research Project involving Transfer or Exchange of Biological Resources or Information between institutions including government sponsored institutions and such institutions in other countries.
07 January 2009	Respondent 2 issues Notification No. S.O. 120 (E) by which an officer of the rank of Range Forest Officer and above is authorised to take cognisance of any offense of the Biological Diversity Act, 2002, as provided in Section 61 (a) of the Act, and initiate appropriate legal proceedings against violators.
14 October 2009	The Genetic Engineering Approval Committee of Respondent 2 in its 97th meeting approves the commercial and environmental release of B.t.Brinjal, India's first genetically modified food, overlooking wideranging and popular concerns over its environmental and health impacts. The Committee comprehensively ignores the violations of Biological Diversity Act, 2002 by those involved in advancing B.t. Brinjal as a patented commercial product.
26 October 2009	Ministry of Environment and Forests, Respondent 2, issues a Notification No. S.O.2726(E) under Section 40 of the

DATE	DESCRIPTION
	Biological Diversity Act, 2002 declaring that the provisions of the Act shall not apply to 190 listed plants provided they are traded as commodities.
06 February 2010	Union Minister of State for Environment and Forests, Mr. Jairam Ramesh holds the last of the Public Consultations on B.t. Brinjal at Bangalore. During this consultation, the Petitioners submit to the Minister a detailed note entitled: “Enquiry into certain legal issues relating to the approval to the Bt Brinjal by the Genetic Engineering Approval Committee” of his Ministry. The note explains in thorough detail that B.t. Brinjal is a product of biopiracy, and that the Notification of the Ministry on normally traded commodities is fraught with several legal inconsistencies including that it contains threatened and critically endangered plant species.
09 February 2010	Union Minister of State for Environment and Forests, Mr. Jairam Ramesh, issues his decision ordering a Moratorium on the commercial and environmental release of B.t. Brinjal following a series of nationwide public consultations. He chooses to ignore the charges of biopiracy made by the Petitioners in the development of B.t. Brinjal in the Bangalore consultation held on 6th February 2010. In this decision he also dismisses as “a wholly unjustified controversy” concerns raised by the Petitioners that the 26 October 2009 Notification of Respondent 2 declaring certain plants as traded commodities contain endangered and threatened species, and that trade in such bioresources could potentially

DATE	DESCRIPTION
	drive them to extinction.
15 February 2010	Petitioners file a complaint with Karnataka Biodiversity Board, Respondent 3, stating that the local varieties of brinjal accessed in the development of B.t. Brinjal was in comprehensive violation of the Biological Diversity Act, 2002.
16 February 2010	Petitioners file a detailed representation with Mr. Jairam Ramesh, Union Minister of State for Environment and Forests, stating that the 26 October 2009 Notification of Respondent 2 on traded commodities is opposed to the purpose of conservation and wise use of bio-resources as intended in the Biological Diversity Act, 2002. The Petitioners demand that the Notification must be repealed as it contains at least 15 plant species that are threatened or critically endangered as per the Red List prepared by International Union of Conservation of Nature and Natural Resources, Convention on International Trade in Endangered Species of Wild Fauna and Flora, amongst others.
10 March 2010	Karnataka Biodiversity Board, Respondent 3, writes to National Biodiversity Authority, Respondent 1, forwarding the Petitioners complaint on biopiracy in B.t. Brinjal, highlights in its initial findings that there is strong evidence to support the Petitioners contention and seeks assistance and guidance of the Authority in proceeding on the matter. The Board repeats the request on 29th March 2010, 12th April 2010 and again, a year later, on 28th May 2011. However, the support and guidance sought for in advancing

DATE	DESCRIPTION
	legally on the matter is not extended by the Authority.
30 April 2010	Prime Minister of India confirms receipt of representations from Petitioners regarding violations of Biological Diversity Act as listed above.
03 May 2010	An official of Respondent 2 writes to Petitioners claiming that the concerns raised over the Ministry's Notification on normally traded commodities "are rather misplaced".
28 May 2011	Karnataka Biodiversity Board, Respondent 2, writes to Respondent 1, National Biodiversity Authority, stating that pursuant to the Board's investigation, it has found that "UAS, Dharwad has used six local varieties for development of Bt. Brinjal without prior approval from State Biodiversity Board/National Biodiversity Authority."
20 June 2011	Respondent 1 in its 20th Authority meeting resolves as follows: "A background note besides legal opinion on Bt brinjal on the alleged violation by the M/s. Mahyco/M/s Monsanto, and their collaborators for accessing and using the local brinjal varieties for development of Bt brinjal with out prior approval of the competent authorities was discussed and it was decided that the NBA may proceed legally against M/s. Mahyco/ M/s Monsanto, and all others concerned to take the issue to its logical conclusion."
06 September 2011	A Press Information Bureau communique confirms that Mrs. Jayanti Natarajan, Minister of State for Environment and Forests has stated in the Rajya Sabha that "National Biodiversity Authority (NBA) has received a complaint from M/s Environment Support Group, an NGO on the alleged

DATE	DESCRIPTION
	violation by M/s Mahyco / M/s Monsanto and their collaborators for accessing and using the local varieties for development of Bt Brinjal. NBA has decided to proceed as per law against the alleged violators on the basis of reports of the State Biodiversity Boards for accessing and using the local brinjal varieties without prior approval of the competent authority.”
14 September 2011	Respondent 3, Karnataka Biodiversity Board, in its 18th Board meeting, confirms that it is still awaiting “intimation/guidance from National Biodiversity Authority regarding initiating legal action against violators of provisions of Biological Diversity Act, 2002”. The proceedings of this meeting also state that it was “also decided in the meeting that in future for research and development and bio safety trials of any Bt crop to be conducted in Karnataka state, prior permission from the KBB is required”.
07 October 2010	The International Union of Conservation of Nature and Natural Resources in an email communication concurs with the Petitioners concerns over the Notification of Respondent 2 on normally traded commodities stating that of the 190 plants listed as exempt from purview of Biological Diversity Act, 2002, “at least 15 of these species have been categorised by the IUCN redlisting process and are in various stages of threat.”
10 November 2010	The Comptroller and Auditor General of India releases its

DATE	DESCRIPTION
	17th Report of 2010-11 which is a comprehensive audit of the Ministry of Environment and Forests (Respondent 2). This audit report unambiguously criticises the inadequate efforts of Respondents, including National Biodiversity Authority (Respondent 1), to conserve India's biological wealth, and highlights the consequences of such failures on conservation and protection of India's bio-resources and associated knowledge.
22 November 2011	Respondent 1 in its 22nd Authority meeting witnesses an unprecedented turnaround in the earlier decision to take legal action on the biopiracy case in B.t. Brinjal. The resolution this time reveals that “Two official members and one non-official member suggested no legal action be taken” against the violators. The Chairman of the Authority, however, is reported to have “informed the members that the issue on hand is purely that of possible misappropriation of local brinjal varieties”.
20 January 2012	Respondent 2, Karnataka Biodiversity Board, in a complete reversal of its earlier position to initiate legal proceedings against those engaged in biopiracy in B.t. Brinjal, now decides that “the subject comes under the purview of the National Biodiversity Authority. Therefore it was resolved that it is for the National Biodiversity Authority to take necessary action at their end against institutions/companies regarding alleged violations of provisions of Biodiversity Act 2002”.
28 February 2012	Respondent 1 in its 23rd Authority meeting takes the

DATE	DESCRIPTION
	<p>unprecedented decision to put to vote the decision relating to initiating criminal legal proceedings against those involved in biopiracy in Bt. Brinjal development. It is reported that “ 3 (three) members voted for initiating legal proceedings against the alleged violators while 2 (two) Members (Proxy) were not for such action. Taking into account the majority it was decided to initiate legal action against the alleged violators subject to completion of all other formalities.”</p> <p>(Emphasis in original)</p>
28 February 2012	<p>The failure to deliver on statutory obligations to legally proceed against those involved in biopiracy in B.t. Brinjal development causes Ministry of Environment and Forest (Respondent 2) to write to the National Biodiversity Authority (Respondent) to comply with the law and thus fulfill the assurance made in Parliament by the Minister of State for Environment and Forests that appropriate legal action would be undertaken against violators of Biological Diversity Act, 2002, in the biopiracy case. The deadline to initiate such legal proceedings is extended to 27 August 2012. Respondent 1 has not conformed with this direction until the filing of this Writ Petition.</p>
27 April 2012	<p>The Fifteenth Lok Sabha's Public Accounts Committee (2011-12) released its report on the “Performance of the Ministry of Environment and Forests”. The Committee states that it is “saddened to note the pathetic performance of National Biodiversity Authority (NBA) as even after six years of its</p>

DATE	DESCRIPTION
	<p>formation, it failed to notify important regulations like access to biodiversity, transfer of research results and intellectual property rights, recruit or hire adequate number of taxonomists, set up a regular legal cell, etc.” This having recorded its displeasure at the fact that such negligence on the part of Respondent Authority has resulted in “precious diverse bio-diversity species have been taken away by unscrupulous foreign scientists, botanists and businessmen causing an incalculable damage to India's bio-diversity and irretrievable loss to the national exchequer.”</p>
09 August 2012	<p>The Committee on Agriculture of the 15th Lok Sabha releases its report on “Cultivation of Genetically Modified Food Crops – Prospects and Effects”. The Committee is utterly unhappy with the lackadaisical approach of Respondent 1 in proceeding on the biopiracy case in B.t. Brinjal and expresses its displeasure very strongly as follows: “The Committee are not at all convinced by the dilatory response of NBA on this sensitive issue. The matter is very simple as to whether the Company in question has obtained any local biological resource for and in connection with development of Bt. brinjal without prior approval of NBA and violated Section 3 of Biological Diversity Act, 2002. Taking so long in coming to a conclusion on this simple issue shows the NBA in a very poor light. It would also be worth mentioning here that during this period Chairman, GEAC was simultaneously also holding the charge of Chairman, NBA from 11 November,</p>

DATE	DESCRIPTION
	2010 to 11 August, 2011. The Committee not only desire a thorough inquiry in the matter of continued paralysis in decision making on a case of this dimension but also recommend that the NBA should decide upon this case without any further delay.”
13 August 2012	Chairman of the National Biodiversity Authority, Respondent 1, by way of his position as first Appellate Authority, allows an appeal of the Respondents and sets aside an earlier decision of the Authority's Public Information Officer who had denied the Right to Information Act application for all material connected with the biopiracy case on B.t. Brinjal “taking into account the intricacies which involve nuances of bio-technology”. The Chairman in his order allowing the appeal claimed that the documents released included “...all documents/instructions and consequential actions initiated by this public authority and its subordinate agencies, including those supplied by defending institutions that have presented any fact or opinions pursuant to and on any matter connected with this complaint on behalf of ESG”.

In the High Court of Karnataka at Bangalore

W. P. No. /2012

UNDER WRIT ORIGINAL JURISDICTION

Between:

1. Environment Support Group,
 (Trust Registered under Indian Trust Act, 1882)
 Represented by Ms. Bhargavi S. Rao
 Aged about 43 years
 Trustee
 D/o Mr. Sathyanarayana Rao
 1572, 100 Feet Ring Road, 36th Cross
 Banashankari II Stage,
 Bangalore 560070

2. Mr. Leo F. Saldanha
 Aged about 44 years
 S/o S. J. Saldanha
 1, Pearl Gardens
 Vajarahalli
 Kanakapura Road
 Bangalore 560062
 (Appearing in Person)

.....**Petitioners**

And:

1. National Biodiversity Authority
Represented by its Chairman
5th Floor, TICEL Bio Park
Taramani, Chennai - 600 113
2. Ministry of Environment and Forests
Represented by its Secretary
Paryavaran Bhavan, CGO Complex
Lodi Road
New Delhi – 110 004
3. Karnataka State Biodiversity Board
Represented by its Member Secretary
Ground Floor, Vana Vikas
18th Cross, Malleshwaram
Bangalore 560003
4. State of Karnataka
Represented by its Chief Secretary
Vidhana Soudha
Bangalore 560001
5. Union of India
Represented by its Cabinet Secretary
Rashtrapati Bhawan
New Delhi - 110 004

.....Respondents

MEMORANDUM OF WRIT PETITION
UNDER ARTICLES 226 AND 227 OF
THE CONSTITUTION OF INDIA

The Petitioner submits as follows:

1. The Petitioner Trust is registered under the Indian Trusts Act, 1882 vide Reg. No.: Book IV 8/98-99. The Petitioner Trust is represented by its Trustee who is also specifically authorized to represent the Trust in the above said litigation. A copy of the resolution authorising the Trustee to institute the present proceedings is annexed at **Annexure A**.

2. The Petitioner Trust has been involved in a wide variety of environmental issues and campaigns. Acknowledging its competence in addressing environmental law and policy matters and technical issues pertaining to ecology and environment, the Hon'ble High Court of Karnataka and Karnataka Judicial Academy enlisted its services along with Environmental Law Institute (USA) in organizing a unique workshop on "*Judicial Enforcement of Environmental Law in Karnataka*" during August 2002. The organisation has assisted the State in a variety of public interest initiatives relating to environmental management, and is an active collaborator with a wide range of national and international research, academic and campaign organizations. Inherent to the organisation is a wide range of expertise from the areas of biodiversity conservation, forest management, ecology, public health, environmental law and policy, etc.

3. The Petitioner Trust has been actively involved in and initiated several campaigns for conservation of biodiversity in the State of Karnataka and also across India. In particular, it has raised a variety of public interest campaigns against indiscriminate deforestation, biopiracy, tree felling, encroachment of parks and public spaces, against privatisation and commercialisation of commons, etc. The Trustee representing the First Petitioner is a trained botanist who has research experience in Indian Institute of Science and has taught in various colleges. Besides she has extensive experience training various constituencies in biodiversity conservation and law, including officials of the Karnataka Forest Department and Karnataka Biodiversity Board. She is also a full time Coordinator of education initiatives of the Petitioner Trust.
4. The Second Petitioner is a full time Coordinator and Trustee of the first Petitioner Trust. In addition, he has played a creative role in many initiatives, both by the Government and wider civil society, in advancing people centred and appropriate biodiversity management. He has contributed in a variety of ways for enhancing the quality of environmental regulation in India, and has recently co-authored a critically acclaimed publication entitled "*Green Tapism: A Review of Environmental Impact Assessment Notification – 2006.*" He has extensive research and training experience in various aspects of biodiversity conservation and implementation of biodiversity protection laws. He has had the privilege of representing various public interest causes before this Hon'ble Court as party in person.

FACTS OF THE CASE

5. By way of this Writ Petition, the Petitioners respectfully draw the attention of this Hon'ble Court to very serious failures on the part of the Respondents in implementation of laws governing the conservation, protection and access to biological wealth of India. The Petitioner submits that such failures are resulting in irreversible loss of various valuable species, causing irreversible contamination of native varieties, and consequently violating a wide variety of Constitutionally protected Fundamental Rights. It is the Petitioners case that this is the direct result of weak or inadequately implemented provisions of the Biological Diversity Act, 2002 enacted in conformance with India's obligations under the United Nations Convention on Biological Diversity, 1992. The Petitioners present various instances to demonstrate that the Respondents have grossly failed to discharge their mandated and obligatory tasks to conserve and protect India's biodiversity and natural resources per Article 48 A of the Constitution; to ensure that the material gains made from accessing and usage of the bio-resources is in such manner as would satisfy the requirements of Article 39(b) and (c); and to foster respect for India's treaty obligations as required by Article 51(c). The Petitioners also submit that when citizens take initiative to protect biodiversity and associated knowledge in conformance with Article 48 A, the Respondents frustrate such initiatives by their non-action or lackadaisical responses. Such a situation has encouraged rapacious overuse of biodiversity resulting in the loss of many species and often entire habitats are destroyed. The Respondents' weak and/or casual regulation of commercial and trading access to biodiversity by national and transnational corporations, and also public institutions, has encouraged over-use of invaluable bio-resources. In addition, extensive biopiracy of bio-resources and associated traditional knowledge is encouraged by

the Respondents' laxity, causing a massive loss in realisable revenues to the public exchequer, threatening and destroying livelihoods of natural resource dependent communities, especially indigenous communities, and accentuating contamination of species or possibly their extinction. These prevailing practices are in gross variance to well established legal jurisprudence including the Doctrine of Public Trust, the Precautionary Principle, the Principle of Inter-generational Equity, the Common Heritage of Humankind Principle, the Polluter Pays Principle, the Principle of Prior and Informed Consent, etc. The Petitioners submit that such a situation has substantially compromised Fundamental Rights such as the Right to a Wholesome Environment as contained in the Right to Life, the Right to Livelihood, the Right to Equality, the Right to Dignity and such other basic human rights.

6. In the following submissions contained in this petition, the Petitioners will be providing this Hon'ble Court with categorical evidence that demonstrates: a) that the Respondents, individually and collectively, have abysmally failed to discharge their constitutional and statutory duties with regard to biodiversity protection in India – specifically with regard to setting up and evolving institutional mechanisms essential to regulate use and access of bio-resources and associated knowledge; b) that Section 40 of the Biological Diversity Act, 2002 and the Notification relating to Normally Traded Commodities (NTC's) issued by Respondent 2 on 26 October 2009 cannot be sustained in law; and c) that Respondent No. 1 has blindly ignored the egregious biopiracy of various local varieties of Indian brinjal by national and international corporations and public institutions and has consequently violated several Fundamental Rights and legal guarantees. On such submissions, the Petitioners seek the indulgence of this Hon'ble Court to grant necessary reliefs so that the biological diversity and associated traditional knowledge of

India is conserved and protected for the benefit of present and future generations.

AUDIT OF RESPONDENTS BY COMPTROLLER AND AUDITOR GENERAL OF INDIA

7. The Petitioners submit that the concerns raised by the Petitioners by way of this petition are echoed by several independent, authoritative and objective reviews by various Constitutional functionaries of the country. The Comptroller and Auditor General of India (hereinafter referred to as CAG), for instance, conducted a comprehensive assessment of the activities of the Respondents and reported the same in their 17th Report of 2010-11. This audit report unambiguously criticises the Respondents' inadequate efforts to conserve India's biological wealth, and highlights the consequences of such failures on conservation and protection of India's bio-resources and associated knowledge. Relevant extracts of this report are annexed at **Annexure B**. The Petitioners seek to draw the attention of this Hon'ble Court to certain extracts from the report which describes the invaluable and extraordinary biodiversity of India (at Ch. 3, p. 29-30 of the said report):

“India is one of the 17 identified mega biodiverse countries of the world. From about 70 per cent of the total geographical area surveyed so far, 45500 plant species and 91000 animal species representing about seven per cent of the world's flora and 6.5 per cent of the world's fauna, respectively, have been identified. From the biodiversity standpoint, India has 59353 insects species, 2546 fish species, 240 amphibian species, 460 reptile species, 1232 bird species and 397 mammal species, of which 18.4 per cent are endemic and 10.8 per cent are threatened. With only 2.4 per cent of the

total land area of the world, the known biological diversity of India contributes 8 per cent to the known global biological diversity. It has been estimated that at least 10 per cent of the country's recorded wild flora, and possibly the same percentage of its wild fauna, are on the threatened list, many of them on the verge of extinction.”

On the basis of stark and concerned appraisal of threats to India's biodiversity, the CAG makes a scathing attack on the Respondents' failure in stepping up to the challenge and concludes with the following evaluation of the performance of Respondent 1:

“National Biodiversity Authority (NBA) was established in 2003 by the Government of India for the regulation, conservation and sustainable use of bio-resources of India. Even six years after its formation, NBA could not notify important regulations for implementation of vital provisions for preservation of biodiversity (like access to biodiversity, transfer of results of research and intellectual property rights etc.), as required under the Act. Performance of its regulatory and advisory functions was inadequate as it failed to notify all the required guidelines for regulating access to biological resources, sharing of benefits arising out of use of accessed biological resource, advice to government on conservation of biodiversity, etc. Lists of endangered medicinal plants in India and measures for their conservation were not drawn up and guidelines to regulate the use and transfer of micro-organisms were yet to be notified. NBA's efforts to identify threatened, endangered and endemic species and to recommend regulations for their conservation were inadequate as list of endangered species was prepared for only seven out of 28 states. It also failed to get the Peoples' Biodiversity Registers and database of

biological resources prepared, both of which were vital for efforts at protection and conservation of biological resources. It had no information on grant of Intellectual Property Rights outside India on any biological resource obtained from India or knowledge associated with such biological resources which is derived from India. It failed in its efforts at documentation of biodiversity, bio-resources and associated knowledge, without which effective efforts for protection and conservation were not possible.”

8. One would hope that following such damning criticism by the CAG, there would be rigorous effort on the part of the Respondents 1 and 2 to fulfill their mandated tasks and that too with a great sense of urgency. It is also normal to expect that such criticisms from the Supreme Audit Institution of India would result in critical evaluation of the Respondents' past actions and cause them to enforce statutory compliance with biodiversity protection laws while strictly regulating access and use of biodiversity. On the contrary, it is the Petitioners case that the Respondents have carried on with a business as usual approach, and has done very little to implement the recommendations made by the CAG to fix the maladies in the systems of governance employed by the Respondents.

NORMALLY TRADED COMMODITIES

9. The Petitioners submit that one instance of failure to implement the recommendations made by high offices such as the CAG is the manner in which Respondent 2 has by way of its Notification dated 26 October 2009 shockingly allowed critically endangered and threatened species to be included in a list of 190 plants as those which are “traded as commodities”, thereby allowing their

unfettered exploitation, making them commodities for global trade and also exempting them from the protection provided under Sections 3 and 7 of the Biological Diversity Act, 2002 . A copy of this Notification is annexed at **Annexure C**. The Petitioners on thorough reviewed of this Notification have found 15 plant species which has been officially confirmed as threatened and/or critically endangered by independent monitoring and regulatory UN bodies such as International Union for Conservation of Nature (IUCN) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES Convention). Most importantly, some of these species have also been listed for protection by barring them from exports if they are sourced from wild by way of a Notification issued by Ministry of Commerce which is annexed at **Annexure D**. Plants that are found on both lists are the following: a) *Acorus species*, b) *Aloe species*, c) *Gloriosa superba*, d) *Artemisia species*, e) *Rauwolfia serpentina*. The Petitioners also submit that according to a presentation by Mr. S. Venugopal, IFS, Addl. Principal Chief Conservator of Forests and Chief Executive Officer of the Karnataka Medicinal Plants Authority, accessible at http://www.karnatakaforest.gov.in/english/research_publications/Medicinal%20Plants%20in%20Forest%20Policy.pdf, the following species of plants are considered threatened or endangered in the state of Karnataka, and are also found in the Notification adverted to at **Annexure C**: *Gloriosa superba* (Vulnerable), *Piper nigrum* (Near Threatened), *Aegle marmelos* (Vulnerable) and *Rauwolfia serperntina* (Endangered).

10. Despite the alarming rate of depletion of India's biodiversity, it appears that the Respondents have demonstrated little care or concern in stemming this tide. The Petitioners submit that when they reviewed the website of Respondent 2 for a Negative list of plant species that would help regulate trade in threatened and

critically endangered species, they were shocked to discover that it has not been kept up to date for decades now. Even the nominal restriction of trading with threatened specified that is contained in the Notification of the Ministry of Commerce is about two decades old.

11. Further, given the fact that there is no system in India guaranteeing separation of plants sourced from the wild from those that are cultivated, the Petitioners submit that it cannot be ruled out that a substantial portion of the plant material that is sourced for trade and exports as Normally Traded Commodities could be from the wild. In fact, there is no foolproof system to ensure that plants from the wild cannot be passed off as those that are cultivated. Being aware of this situation Respondents ought to have acted with abundant precaution when evolving the list of plants as indicated in **Annexure C**.
12. In the hope that the Respondents would act with precaution and protect such species from possible extinction due to trade, the Petitioners submitted their concerns to the then Union Minister of State for Environment and Forests Mr. Jairam Ramesh in a Public Consultation that he held on 6th February 2010 at Bangalore on the issue of B.t. Brinjal. The Minister, however, preferred to dismiss these concerns and even claimed that the Petitioners were causing a “wholly unjustified controversy” as is mentioned in a footnote of his 9th February 2010 decision issuing an indefinite moratorium on B.t. Brinjal, a copy of which decision is annexed at **Annexure E**.
13. Deeply troubled by such dismissive responses, the Petitioners immediately submitted a formal representation to the Minister on 16 February 2010 and a copy of this representation is annexed at **Annexure F**. In this the Petitioners highlighted various instances where unregulated trade had caused irretrievable loss of invaluable biodiversity. In particular, the attention of the Minister was drawn

to the specific case of “Miss Kerala” (*Puntius denisonii*), a very attractive fish commonly found in rivers of Kerala till a decade ago, but which has now been driven to the verge of extinction due to its unregulated trade in catering to its global demand as a collector's item. The Respondents who should have taken extraordinary care in monitoring the situation and regulating the trade in the fish species, completely failed in this task, thus bringing the entire species to the brink of extinction. An indication of the failure on the part of Respondents to act with due dispatch in protecting critically endangered species is evident in the fact that to this day *Puntius denisonii* has not been listed in Schedule I of the Wildlife Act, 1972, which could have provided the necessary administrative machinery to curtail its trade as an immediate protective measure. It was thus submitted to the Minister, in the representation annexed at **Annexure F**, that in the case of the 190 plants which had been notified as Normally Traded Commodities, there was a very high probability that some of them would be driven to extinction due to their trade.

14. In the aforesaid representation, the Petitioners also drew the Minister's attention to his own admissions in various interviews he had given to the media wherein he had stated that trade in medicinal plants was a major contributor to their loss as invaluable bio-resources of the country; that over Rs. 800 crores worth of raw medicinal plants were being exported annually without value addition in the country; that foreign companies were benefiting immensely by such exports and also from illegal extraction of economically beneficial and medicinal properties (thereby constituting a clear case of biopiracy); and that, therefore, trade in such critically endangered species must be banned till such time their populations stabilised and recovered from the brink of extinction. It was further submitted that medicines produced from these plants were imported back into the country at great cost to the

public exchequer and were clearly out of reach of most people given their very high costs. It is such a system of trade, the Petitioners argued, which encourages unsustainable exploitation of bio-resources and besides causing species extinction, also threatens the security of farming and indigenous communities whose lives and livelihoods are intricately linked to such biodiversity. Many, even most of the plants listed in the aforesaid Notification annexed at **Annexure C**, are those that are actively used and accessed by the people of Karnataka and some are species found only in the Western Ghats. The Petitioners submit **Annexures G** (series) to demonstrate that Respondent 3, for instance, seriously investigated this concern of the Petitioners and repeatedly brought it to the attention of the Respondent 1. But there no effective response or consequent action from the Respondents 1 and 2.

15. Based on such considerations, and also the fact that the Notification had been evolved secretly, the Petitioners demanded with the Minister that the subordinate law must be immediately repealed to protect India's biodiversity from over-exploitation due to trade and also because it comprehensively violated and worked against safeguards, procedures and norms that had been built into the Biological Diversity Act, 2002, Wildlife Act, 1972, CITES Convention, Convention on Biological Diversity, 1992 and other related laws to protect and conserve biodiversity and associated knowledge.
16. The Petitioners submit that similar concerns have been raised by the office of the CAG in its report. In particular it has been highlighted that "there was bound to be loss of biodiversity due to trading of species without appropriate regulations. The contention that trade has been regulated by DGFT (Director General of Foreign Trade) and hence there would be no adverse effect is to be viewed in the background of the fact that according to the Act (Biological

Diversity Act), it was the responsibility of NBA (Respondent 1 in the instant case) to prepare a list of biological materials that were normally traded as commodities and to notify the same.” On the contrary, it is the case of the Petitioners, that the aforesaid Notification has admittedly been issued in consultation with the Ministry of Commerce and certain business organisations, and with the intention of expanding trade in India's bio-resources. The Respondents have not consulted any of the State Biodiversity Boards or Biodiversity Management Committees in the formulation of the Notification, nor have any expert bodies such as the Botanical Survey of India, Zoological Survey of India, Wildlife Institute of India, etc. been consulted with the intent of evaluating the serious and irreversible environmental and social impacts of trade on biodiversity, associated knowledge and livelihoods. It is a matter of record that the entire exercise of evolving and issuing the Notification was undertaken rather secretly and it was not subjected to scrutiny of the public, State Legislatures or the Parliament. The Petitioners respectfully submit that the Notification is fraught with various inconsistencies and its impacts work at cross-purposes and in opposition to the efforts to conserve biodiversity and associated knowledge and livelihoods, as is one of the major purposes of the Biological Diversity Act, 2002.

17. Despite Petitioners raising these concerns at the highest level of governance of India's biodiversity, the Minister of Environment and Forests, there was no effective response. The Petitioners were thus constrained to petition Parliamentarians, and several of them took up the cause with the Minister and also the Prime Minister of India, as is evidenced in **Annexures H (series)**. The Prime Minister confirmed receipt of concerns raised by Parliamentarians as is evidenced in **Annexure J**. Perhaps troubled by such high levels of scrutiny, an official of Respondent 2 responded several months after the Petitioners had submitted their representation, but stating

that “most of the concerns raised are rather misplaced”. A copy of this letter from Respondent 2 is annexed at **Annexure K**.

18. The Petitioners have also raised the matter with the International Union of Conservation of Nature and Natural Resources, and the agency has echoed the Petitioners concerns, as is evidenced in an email received from this independent monitoring agency, annexed at **Annexure L**. No action whatsoever has been initiated ever since in attending to the concerns raised by the Petitioners, barring a consultation held by Respondent 1 on the issue in April 2012, and a copy of the proceedings of this meeting are annexed at **Annexure M**.

CRITICISM OF RESPONDENTS BY PUBLIC ACCOUNTS COMMITTEE OF PARLIAMENT OF INDIA

19. The Petitioners submit that a decade after Respondent 1 has been established as a critical and autonomous regulatory institution to safeguard India's sovereign control over its biological resources, there is not a single case wherein the authority has investigated and punished violators per Section 61 A and the Notification made thereunder per the Biological Diversity Act, 2002. Encouraged by such inaction, hundreds of companies, public institutions and traders are rapaciously exploiting the biological wealth of India, and thus compromising the very basis of India's food and ecological security, and thereby its socio-economic security. Such inaction has cost the country very dearly in the past; a poor country can ill afford such laxity on the part of its key regulatory institutions.
20. Such a situation has come under intense scrutiny of the Public Accounts Committee (2011-12) of the Parliament which in its 57th report auditing the “Performance of the Ministry of Environment

and Forests” records with very serious concern that laxity on the part of the Respondents 1 and 2 in regulating access, use and export of biological wealth of India is resulting in a precipitous loss of biological wealth of the country and exposes the utter unpreparedness of these Respondents in attending to the Constitutionally mandated tasks. Relevant extracts of this report are annexed at **Annexure N**. The following is an extract from the report and is highly indicative of the displeasure expressed by the Parliament's Committee on the state of affairs within these Respondent organisations:

“23. According to Audit, though the NBA appointed a legal consultant in November, 2005, it did not take effective action to contest questionable IPRs but the NBA claimed in April 2009 that they were in the process of establishing a legal cell. When the Committee queried further, the representatives of the Ministry of Environment and Forests, stated:

"They still do not have a full-fledged legal cell but are using advocates for the purpose".

24. In addition, various biodiversity species worth thousands of millions of rupees have been taken away by foreign scientists, botanists and businessmen from this country causing an incalculable loss to the national exchequer. Asked whether the lost/plundered biodiversity which originally belonged to India based on various sources of literature, tradition or geographical appellations has been traced in the last 15 years of the post-globalization era, the representative of the Ministry stated:

"The Botanical Survey of India was able to identify only 46,000 floral species and 81,000 faunal

species in our country, which is no where near the total, which is in millions".

The witness admitted that:

"... we do not have enough taxonomists. We are not getting the right people; people are not coming here."

Elaborating further, the representative stated:

"In collaboration with the Department of Science and Technology, India established Traditional Knowledge Digital Library (TKDL) in 1999 and it is in the public domain and is being used by the research bodies. However, much needs to be done in this field".

25. In January 2008, the NBA constituted an Expert Committee for medicinal plants. This Committee came into being after 4 years of the establishment of NBA. The job of the Committee inter-alia was to provide a list of medicinal plants in India, suggest ways of safeguarding traditional knowledge relating to medicinal plants, suggest a list of endangered medicinal plants and develop guidelines for their conservation, etc. However, Audit pointed out that the said Committee met only once in April 2008 and until March 2009, the regulations had not been finalized. In April, 2009, the NBA stated that they proposed to reconstitute the Expert Committee. In March 2010, the Ministry of Environment and Forests replied to an Audit query that Botanical Survey of India was asked to prepare a State wise list of threatened list of plants. Audit found that only 07 States notified the list."

BIOPIRACY

21. The petitioners wish to respectfully draw the attention of this Hon'ble Court to the fact that some of the most expensive legal struggles of India have been to overturn patents that were secured abroad by individuals and transnational corporations over widely held traditional knowledge and commonly found plants endemic to India. It is only as a consequence of such protracted and expensive legal action, that India could secure its bioresources and traditional knowledge associated with them. These include commonly used medicinal properties of plants and trees such as neem, brinjal, bitter gourd, turmeric, ginger, etc. which various foreign individuals and companies had illegally and criminally patented as their private property. Such legal actions have only been partially successful in some cases, such as when legally challenging US corporation Ricetec's claim over the much valued flavoured rice Basmati, which the company had patented and traded as Texmati. Such costly expeditions to international courts or Courts in other countries are activities that Government agencies, domestic regulatory agencies or communities can ill afford, or should even resort to. This given the fact that Constitutional guarantees and effective sovereign laws exist to protect India's bio-resources, knowledge associated with them and traditional livelihoods that are dependent on them. But it is such failure on the part of the Respondents that is repeatedly exposing the country and its future to a variety of clearly unnecessary and avoidable political, socio-economic and ecological risks. The Petitioners submit that curtailing biopiracy of sovereign bio-resources and knowledge associated with it, is one of the fundamental reasons for ratifying the Convention on Biological

Diversity, 1992 and enactment of Biological Diversity Act in 2002. It is in compliance with these international and national laws that Respondent 1 has been established and provided with supportive regulatory institutions at the State and local government levels.

22. In this context, the Petitioners submit that an egregious act of biopiracy was committed by national and international public institutions and transnational corporations in the promotion of B.t. Brinjal, India's first genetically modified food. This act of biopiracy was committed in accessing at least 16 local varieties of brinjal (endemic to India) without any prior permissions as required under the Biological Diversity Act, 2002. The Petitioners submit that 6 local varieties were accessed in Karnataka. This criminal action was condoned by Respondent 2 willfully when its subordinate agency, Genetic Engineering Approval Committee (hereinafter referred to as GEAC), approved B.t. Brinjal for environmental and commercial release, *vide* its decision dated 14 October 2009, a copy of which is annexed at **Annexure P**. Thanks to widespread nationwide public protests, then Union Minister of State for Environment and Forests Shri. Jairam Ramesh was forced to hold a series of Public Consultations in different parts of the country. As a result, previously confidential documents were made available to the public during this Consultation process. These were accessed by the Petitioners and on perusal of the same the Petitioners were shocked to realise that the B.t. Brinjal product had reached such an advanced stage of commercial clearance and with active support, involvement and approval of various Central Ministries, but without in any manner complying with the provisions of Biological Diversity Act, 2002 that governs access to bio-resources of India. Further, there was no evaluation of the environmental impact of genetic modification on local biodiversity, and also of the social and economic implications of promoting them as patented commercial products.

23. These concerns were brought to the attention of the Minister by the Petitioners in the Bangalore Consultation that he held on 6th February 2010 on B.t. Brinjal, by way of a detailed representation entitled “An enquiry into certain legal issues relating to the approval of Bt Brinjal by the Genetic Engineering Approval Committee of the Union Ministry of Environment and Forests”, a copy of which is annexed at **Annexure Q**. On 9th February 2010 the Minister issued a moratorium on B.t. Brinjal's commercial release on the basis of the Precautionary Principle and pending independent verification of the product's public acceptability and environmental and public health safety. A copy of this decision is annexed at **Annexure E**. However, in the Minister's decision there was no mention whatsoever of the fact that the Petitioners had formally raised concerns that the development of B.t. Brinjal as a commercial and patented GMO was *violative* of Biological Diversity Act, 2002, that the clearance accorded by GEAC to the said research activity pursuant to a contractual arrangement is opposed to public policy per Sec. 23 of the Indian Contract Act, 1872 and that the resultant product of the entire exercise, B.t. Brinjal, is a product of biopiracy. Thus, the Petitioners contended, the entire project to develop B.t. Brinjal constitutes theft of genetic wealth of India per the Biological Diversity Act, 2002 read with the Convention on Biological Diversity, 1992.
24. As a result, the Petitioners were constrained to file a formal complaint with the Karnataka Biodiversity Board (Respondent 3) with copies marked to the other Respondents and various connected agencies. The Petitioners' key contentions in the aforesaid complaint were that the whole process relating to the commercial/environmental release of B. t. brinjal developed by M/s Mahyco (Indian registered company with 26% controlling equity stake by M/s Monsanto - US transnational corporation) in collaboration with M/s Sathguru, United States Agency for

International Development (USAID), Cornell University, University of Agricultural Sciences (Dharwad) and others, such as Tamilnadu Agricultural University and Indian Institute of Vegetable Research, was blatantly violative of the provisions of the Biological Diversity Act, 2002 and constituted an act of theft of India's genetic wealth - biopiracy. In particular, the attention of the regulatory agency was drawn to public statements made by officials of the University of Agricultural Sciences (Dharwar) who claimed that the University was exempt from compliance with the Biological Diversity Act, 2002 and that "all necessary permissions ha(d) been secure(d) by the University prior to initiation of the research." A copy of this complaint dated 15 February 2010 received under acknowledgment is annexed at **Annexure R**.

25. Consequent to the filing of the aforesaid complaint, the Respondent 3 initiated investigations as is evidenced by a selection of documents produced at **Annexures S (series)**. A significant finding of this investigation, as evidenced in the letter of Respondent 3 dated 10 March 2010, annexed at **Annexure S-1**, is that:

- “1. There is a foreign element in this project, as one of the shareholders is US Company in collaboration with M/s Sathguru an Indian company.
2. The research result will lead to the commercialisation of the product i.e., Bt. Brinjal.
3. Once the Bt. Brinjal is commercialised the local varieties will be adversely affected.”

26. On this basis, the Respondent 3 requested Respondent 1 to provide guidance in taking forward the investigation for possible prosecution of violators. This request was repeatedly submitted to

Respondent 1, as is evidenced by the aforesaid appeals annexed at **Annexures S (series)**. However, Respondent 1 does not seem to have taken up the issue with the seriousness that such sensitive matter deserved, evidenced by the fact that the Board was constrained to write on 29 March 2011 (**Annexure S-3**) to Respondent 1 stating as follows:

“You had informed Karnataka Biodiversity Board vide your office letter No. NBA/TECH/13/4/2010/09-10/939, dt. 19.04.10, that NBA would respond to these queries appropriately in due course of time. But, till date we have not received the clarifications.

In the 16th Board meeting of Karnataka Biodiversity Board held on 03.02.2010 the same subject was discussed and it was resolved to refer the matter again to National Biodiversity Authority.

Hence, I request you to kindly furnish the clarification at the earliest to enlighten the board members.”

27. Subsequently, in reaction to Respondent 1 requesting the Board for more information in response to the Petitioners' complaint, the Board conducted a thorough investigation and submitted documents to Respondent 1 stating in its letter dated 28th May 2011, annexed at **Annexure S-4**, the following finding:

“Mahyco has stated that UAS, Dharwad approached Mahyco in the light of their expertise and research and development facilities for Development of insect tolerant Bt. Egg plant, under ABSP II. Further, Mahyco mentioned that Transfer of Technology, namely EE I event incorporating .. CRY 1 AC gene, was done by conventional breeding methods. The crossing activity involving six varieties was carried out by

staff of UAS, Dharwad at Mahyco's research facility. Resultant seed carrying the technology was provided back to the UAS Dharwad..... UAS, Dharwad has used six local varieties for development of Bt. Brinjal without prior approval from State Biodiversity Board/National Biodiversity Authority.”

The Petitioners wish to submit that this finding of the Board indicates a thorough investigation was undertaken and reasonably confirms that the entire project has been based on egregious acts of biopiracy.

28. But despite such thorough investigation on the part of the Board, Respondent 1 did not provide Respondent 3, the state regulatory agency, the necessary guidance that it sought for, as is evidenced by the minutes of the Board's 18th meeting held on 14 September 2011, relevant extracts of which are annexed at **Annexure T**. It is recorded here as follows:

“It was decided to wait for further intimation/guidance from National Biodiversity Authority regarding initiating legal action against violators of provisions of Biological Diversity Act 2002. It was also decided in the meeting that in future for research & development and bio safety trials of any Bt. Crop to be conducted in Karnataka state, prior permission from the KBB is required and this may be communicated to Central Government.”

29. The Petitioners submit that documents pertaining to the consequent action initiated by Respondent 1 following the filing of the complaint of biopiracy by the Petitioners was sought under the Right to Information Act, 2005. The application was initially denied

on various specious grounds and subsequently allowed on appeal by the Chairman of Respondent 1 who in his decision dated 13 August 2012, annexed at **Annexure U** , held that the documents provided included:

“...all documents/instructions and consequential actions initiated by this public authority and its subordinate agencies, including those supplied by defending institutions that have presented any fact or opinions pursuant to and on any matter connected with this complaint on behalf of ESG”.

30.A perusal of the documents secured under the Right to Information Act, 2005 reveals that on 20 April 2010, Respondent 1 wrote to Respondent 2 stating that:

“National Biodiversity Authority (NBA) being an autonomous and statutory body has already initiated steps to look into the representation made by Environment Support Group (ESG) referred to in your letter. The NBA placed the matter before the Authority in its meeting held on 19th March 2010 at Chennai wherein a decision was taken to constitute a committee to enquire into the matter. The representation has also been referred to the Legal Consultant of NBA for its opinion.”

It also appears from this correspondence that the independence of Respondent 1 to investigate the case seems to have been trammled upon by Respondent 2, as is evidenced in the concluding paragraph of this letter between the two Respondents which is as follows:

“The NBA being a statutory regulatory body would also like to draw your attention to Section 48 of the Act and would therefore expect you to avoid giving explicit directions to

preserve the sanctity of the Act. The Government will be informed in due course of time about the findings of the preliminary enquiry in the form of an interim report. Based on the preliminary findings, the NBA would take further action on the matter in accordance with the Act.”

A copy of the aforesaid correspondence is annexed at **Annexure V**.

31. More than a year after the Petitioners had filed the aforesaid biopiracy complaint, the Board of Respondent 1 met in its 20th meeting held on 20 June 2011, relevant extract of which is annexed at **Annexure W**, and passed the following resolution:

“20.5: Consider the action to be taken by NBA and SBBs on violaters of the provisions of the BD Act 2002

A background note besides legal opinion on Bt brinjal on the alleged violation by the M/s. Mahyco/M/s Monsanto, and their collaborators for accessing and using the local brinjal varieties for development of Bt brinjal with out prior approval of the competent authorities was discussed and it was decided that the NBA may proceed legally against M/s. Mahyco/ M/s Monsanto, and all others concerned to take the issue to its logical conclusion. Further, it was decided to proceed legally against the violaters in the case of export of embryos of Gir breed of cattle and Ongole breed bull and its semen to Brazil.”

32. In the subsequent months, various questions were raised by Members of Parliament on the status of the investigation on the biopiracy case. In response, on 6th September 2011, Smt. Jayanti Natarajan who had then taken over as the Minister of State for Environment and Forests, made the following statement:

“National Biodiversity Authority (NBA) has received a complaint from M/s Environment Support Group, an NGO on the

alleged violation by M/s Mahyco / M/s Monsanto and their collaborators for accessing and using the local varieties for development of Bt Brinjal. NBA has decided to proceed as per law against the alleged violators on the basis of reports of the State Biodiversity Boards for accessing and using the local brinjal varieties without prior approval of the competent authority.”

A confirmation of this decision, as reported by Press Information Bureau on 6th September 2011, is annexed at **Annexure X.**

33. Despite such categorical admission on the part of the Minister that *prima facie* there appears to be a case of biopiracy in the advancement of the B.t. Brinjal product, which effectively implies the need for Respondent 1 to initiate prosecution against the violators, no action at all was undertaken subsequently. On the contrary, Respondent 1 seems to have become a victim of inter-ministerial pressure campaigns and bureaucratic manoeuvres, which is perceived by the Petitioners to be an action intended at protecting the powerful perpetrators of this major, cognisable and non-bailable offense. What followed, as a matter of fact, was a shocking act demonstrating contempt for the Parliament, for in absolute breach of the assurance made by the Minister that legal action would follow on the complaint, thus making the decision subordinate to Parliamentary privilege, Board members of Respondent 1 passed the following resolution in their 22nd meeting held on 22 November 2011:

“22.10 (g) Case on Bt brinjal

The Secretary, NBA presented the status of action being taken on the issue of responding to a complaint of misappropriation of brinjal by M/s Mahyco. Two official

members and one non-official member suggested no legal action be taken since the issue was merely a research collaboration that was exempted under the purview of the Act. The Chairman then provided the current legal interpretation of the case. Based on this, the members authorised the Chairman to seek necessary legal opinion in the matter and decide accordingly. The Chairman has informed the members that the issue on hand is purely that of possible misappropriation of local brinjal varieties and has nothing to do with biotechnology per se and/or its application.”

A relevant extract of the minutes of this meeting is annexed at **Annexure Y**.

34. Perhaps emboldened by such specious reasoning, the Karnataka Biodiversity Board, Respondent 3, which had until then categorically and consistently confirmed its intent to initiate legal process against the violators, stepped back from this decision, and adopted a controversial resolution in its 19th Board meeting held on 20 January 2012 wherein it abdicated its regulatory responsibilities to proceed against the violators. Relevant extracts of this resolution is enclosed at **Annexure Z** and an abstract of the same is as follows:

“The subject was deliberated and it was clarified that the subject comes under the purview of the National Biodiversity Authority. Therefore it was resolved that it is for the National Biodiversity Authority to take necessary action at their end against institutions/companies regarding alleged violations of provisions under Biodiversity Act 2002.”

The Petitioners submit that such an instance of abdication of regulatory authority on the part of the Board is clearly violative of its mandatory

obligations per the Biological Diversity Act, 2002, in particular the Notification dated 7th January 2009 issued by Respondent 2 which clearly empowers the Board and any officer of the rank of Range Forest Officer and above to initiate prosecution against the violators. A copy of the said Notification is annexed at **Annexure AA**.

35. In the meantime, following up on the resolution of its earlier meeting, the Board of Respondent 1 decided to subject to a vote the decision to initiate legal proceedings against alleged violators of the Biological Diversity Act on grounds of biopiracy. This is evident from the minutes of the 23rd meeting of the Authority held on 28 February 2012, relevant extracts of which are annexed at **Annexure AB**, and the following is a relevant excerpt:

“It was announced that **3** (three) members voted **for initiating legal proceedings against the alleged violators** while **2** (two) Members (Proxy) were **not for such action**. Taking into account the majority it was decided to initiate legal action against the alleged violators subject to completion of all other formalities.” (Emphasis in original)

36. The Petitioners submit that such scandalous decision making processes concerning prosecutions of cognisable and non-bailable offenses on the part of the Respondents and their subordinate agencies grossly undermines the very purpose of enacting the Biological Diversity Act. This unprecedented act of voting on the need to initiate criminal proceedings against violators shockingly expose the utter lack of seriousness in attending to biopiracy and undermines the independence of an autonomous regulatory authority and its mandate to operate per procedures contained in the Code of Criminal Procedure, 1973 read with the Biological Diversity Act, 2002. Such actions has all the aspects of a colourable exercise of power, is clearly untenable per law and demonstrates a great unwillingness on the part of Respondent 1 to initiate action

against the violators as is their mandatory responsibility. This also demonstrates contempt for the Minister for Environment and Forests who assured Parliament that the decision was “to proceed as per law against the alleged violators”. The Petitioners respectfully submit that there is no provision in the Biological Diversity Act providing Respondent 1 the power or privilege to vote on matters involving criminal investigation and prosecution.

PARLIAMENTARY COMMITTEE CRITICAL OF INACTION ON BIOPIRACY

37. This very matter of biopiracy was comprehensively investigated by the Parliamentary Committee on Agriculture (2011-2012) and its findings are recorded in its Thirty Seventh Report on “Cultivation of Genetically Modified Food Crops – Prospects and Effects” released in August 2012. An excerpt of the findings of this Committee reveals the consternation of this august body over the manner in which the Respondents have dealt with this sensitive matter and relevant portions of the observations in this report are annexed at **Annexure AC**. The following is a relevant extract from this report:

“7.76 The Committee are not at all convinced by the dilatory response of NBA on this sensitive issue. The matter is very simple as to whether the Company in question has obtained any local biological resource for and in connection with development of Bt. brinjal without prior approval of NBA and violated Section 3 of Biological Diversity Act, 2002. Taking so long in coming to a conclusion on this simple issue shows the NBA in a very poor light. It would also be worth mentioning here that during this period Chairman, GEAC was

simultaneously also holding the charge of Chairman, NBA from 11 November, 2010 to 11 August, 2011. The Committee not only desire a thorough inquiry in the matter of continued paralysis in decision making on a case of this dimension but also recommend that the NBA should decide upon this case without any further delay.”

The report also contains a table that reveals the extent of efforts invested by Respondent 1 in tackling biopiracy in India, and the same is enclosed herewith:

Year	Reported	Violation	Issue Action taken
2006	1	Clandestine transfer of jatropha germplasm from Indira Gandhi Agricultural University, Raipur to a multinational company	Sub judice
2010	1	Alleged misappropriation of local brinjal varieties by M/s. Mahyco and others.	Under investigation
2011	3	1. Alleged illegal transportation of Ongole Bull to Brazil. 2. Alleged export of Rabbit & Rat antigen by M/s. Imgenex India, Orissa to Foreign nations. 3. Alleged export of embryos of Gir breed Cows from Bhavnagar, Gujarat.	Under investigation

38. It is humbly submitted by the Petitioners that even when complaints on biopiracy and on non-compliance with the Biological Diversity Act, 2002 have been brought to the notice of the Respondents, they have shied away from initiating appropriate actions and thus there is no prosecutions of violators since its establishment in October 2003. This failure to deliver on statutory

obligations has continued even after Respondent 2 has instructed Respondent 1 by way of letter dated 28 February 2012, annexed at **Annexure AD**, to fulfill the assurance made in Parliament by the Minister of State for Environment and Forests that appropriate legal action would be undertaken against violators of Biological Diversity Act, 2002, in the biopiracy case. As is evident from this letter, a deadline of 27 August 2012 was instituted to initiate necessary legal action, which Respondent 1 has not conformed with until the filing of this Writ Petition.

UNBRIDLED ACCESS TO BIORESOURCES

39. The Petitioners respectfully submit that even after nine years of its establishment, the Respondent 1 has not made any guidelines mandated by Sec.18(1) of the Act. This has resulted in no specific criteria being made available to accept or reject applications of Access to bio-resources. The website of the Respondent 1 shows the process for filing of applications, but the acceptance or rejection seems to be entirely within the discretion of the Expert Committee which has unfettered powers and which have been used indiscriminately, granting easy access to India's bio-resources to transnational seed companies.
40. The Petitioners also submit that the Expert Committee constituted by Respondent 1 has allowed transfer of Biological Resources under Sec.4 whereas this Section deals only with transfer of research results and not transfer of bio-resources. The Petitioners submit that such practices make these decisions a colourable exercise of power. A copy of the extract from Respondent 1's website providing an overview of the number of clearance that have been granted over the years, as has been accessed on their website on 06 October 2012, is annexed at **Annexure AE**.

41. The Petitioners respectfully submit that Respondent 1 is allowing access to bio-resources without any rigorous appraisal of its social, environmental and economic impacts, as mandated under the Biological Diversity Act, 2002. Such clearances are being accorded with very little transparency and without complying with the relevant provisions of the Environment Protection Act, 1986. In addition, due to laxity of Respondent 1, the revenue to be realised per access and benefit sharing has by and large not been recovered, resulting in a major loss of revenue to the public exchequer and to natural resource dependent communities who have protected these bio-resources for millenia, as has been indicated in the report of the CAG annexed at **Annexure B** and also that of Parliamentary Public Accounts Committee annexed at **Annexure N**.
42. It is respectfully submitted that the aforementioned facts are representative of the ineffective implementation of the Biological Diversity Act, 2002 and related laws, treaties and norms on the part of the Respondents. Such a situation is resulting in gross injustice to the public at large, seriously compromising India's ecological and economic security, and potentially causing the irreversible loss of species. As the Public Accounts Committee of the Parliament has noted with concern, the relevant extract of which has been annexed at **Annexure N**, this has resulted in a situation wherein “precious diverse bio-diversity species have been taken away by unscrupulous foreign scientists, botanists and businessmen causing an incalculable damage to India's bio-diversity and irretrievable loss to the national exchequer.” The Committee has also observed that it is “saddened to note the pathetic performance of National Biodiversity Authority (NBA) as even after six years of its formation, it failed to notify important regulations like access to biodiversity, transfer of research results and intellectual property rights, recruit or hire adequate number of taxonomists, set up a regular legal cell, etc.”

43. It is respectfully submitted that the Respondents, individually and collectively, have abysmally failed to discharge their constitutional and statutory duties with regard to biodiversity protection in India – specifically in failing to set up and evolve institutional mechanisms essential to regulate access to, and use of, bio-resources and associated knowledge. This unfortunate situation has been further exacerbated by the laxity on the part of the Respondents in not taking action against violations of the Biological Diversity Act, 2002, indicated by the delay in acting on the Petitioners complaints alleging biopiracy in the advancement of B.t. Brinjal, annexed at **Annexure R**, and in not taking effective and appropriate action to repeal a Notification listing threatened and critically endangered species as Normally Traded Commodities, Notification annexed at **Annexure C**. This has resulted in, and continues to perpetuate, a gross miscarriage of justice and the violation of a number of Fundamental Rights and other legally protected interests. Such apathetic administration, non-existent or non-functional institutional frameworks, vague legislative provisions resulting in arbitrary and downright dangerous executive orders, egregious and unchecked cases of biopiracy, and the overall enablement of over-exploitation of invaluable bioresources due to trade, raise concerns about food security, the accessibility and adequacy of food, and the exclusion of natural and original suppliers and their indigenous modes of life. Even more, such a situation deleteriously affects traditional farming practices in indigenous communities, compromises the sovereign control over the nations's bountiful but fast dwindling bio-resources, erodes social, economic and ecological autonomy of communities in growing their own food and in determining their bio-physical environment, and threatens the world's biodiversity.
44. Having exhausted all remedies to ensure appropriate implementation of the provisions of the Biological Diversity Act,

2002 and other applicable laws, the Petitioners have now approached this Hon'ble Court espousing public interest and seeking justice for this and future generations. The Petitioners state that they have challenged the Constitutional validity of Section 40 of the Biological Diversity Act, 2002, and sought other reliefs, which being inseparable, the present Petition can be taken cognisance of by this Court, dispensing the necessity to approach other forums. Hence this Public Interest Litigation.

45. The Petitioners state that no other petition has been filed under the same cause of action nor is any such petition pending.

46. This petition is filed on the following and other grounds.

GROUND

THE CURRENT INSTITUTIONAL REGIME AND PRACTICES RELATING TO BIODIVERSITY CONSERVATION AND PROTECTION ARE INSUFFICIENT, INCOMPLETE AND THUS VIOLATIVE OF LAW

47. The Preamble to the Constitution of India commits the people of India towards assuring the dignity of the individual and the integrity of the Nation. Article 48A of the Constitution obligates the State to protect and improve the environment and to safeguard the forests and wildlife of the country. The exercise of power by the Respondents as evidenced in this instant Writ Petition is not in keeping with the spirit of Article 48 (A).

48. Article 51A (g) of the Constitution of India makes it a fundamental duty for all citizens to protect and improve the natural environment and to have compassion for all living creatures. Article 51A (c) also makes it a fundamental duty for all citizens to uphold and protect the sovereignty, unity and integrity of India. In the instant case, while citizens have acted in discharging their obligatory duties in protecting and conserving the environment, natural resources, traditional livelihoods, biological sovereignty, and biodiversity, the Respondents representative of the State have grossly failed to discharge their obligatory functions, despite being repeatedly reminded of this task by the Petitioners through their representations, annexed at **Annexure F, Q and R**.
49. In the instant case, the arbitrary and unreasonable actions of the Respondents have exposed farming and other natural resource dependent communities to a variety of risks, as the bio-resources that they depend on for their livelihoods, which they have protected for millenia, are being diverted for commercial use without the communities' Prior and Informed Consent as required per law (Convention on Biological Diversity, 1992: Biological Diversity Act, 2002; Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002, etc.). This situation has resulted due to the gross failure on the part of the Respondents to regulate access to and use of bio-resources, as they are Constitutionally and legally mandated to do, and also in fulfilling their statutory responsibilities contained in the provisions listed under Chapter II, Chapter V and Chapter IX of the Biological Diversity Act, 2002.
50. The Hon'ble Supreme Court has recognized the principles of public trust and sustainable development as a basis for balancing ecological imperatives with developmental goals, as held in *Vellore Citizens' Welfare Forum v. Union of India*, AIR 1996 SC 2715; *MC*

Mehta v Kamal Nath, AIR 2000 SC 3751; *Intellectuals Forum, Tirupathi v State of Andhra Pradesh*, AIR 2006 SC 1350; *MI Builders v Radhey Shyam Sahu*, AIR 1999 SC 2468. Therefore, duty was cast upon the Respondents as statutory custodians of biodiversity of India to spare no effort in ensuring that the biological wealth of India is not compromised in any manner. On the contrary, the Respondents have not only shied away from discharging their Constitutional responsibilities to protect and conserve bioresources, as is evidenced by their inaction or lethargic responses to the Petitioners complaints, but also proceeded to pave the way for the over-exploitation of highly threatened and critically endangered species by way of trade. *De hors* the statutory restrictions on exploitation of biological resources, the Principle of Public Trust enjoins the State with an obligation that the State will allow an encroachment of the duty of Public Trust only when the action of the State would be such so as to convince the Courts that they are in public interest and necessary and bonafide as per the test enunciated in *MC Mehta v Kamal Nath*, AIR 2000 SC 3751.

**SECTION 40 OF THE BIOLOGICAL DIVERSITY ACT, 2002
AND THE NOTIFICATION RELATING TO NORMALLY TRADED
COMMODITIES (NTC'S) ISSUED ON 26 OCTOBER 2009
ARE AGAINST PUBLIC INTEREST AND UNSUSTAINABLE IN
LAW**

51. It is humbly submitted that Section 40 of the Biological Diversity Act, 2002 confers excessive and unguided discretion on the Executive with regard to the notification of Normally Traded Commodities. The uncanalised and arbitrary discretion that such a

provision encourages has already resulted in a number of endangered species becoming trade-able commodities *vide* the Notification issued on 26 October 2009, annexed at **Annexure C**. The Petitioners submit that Section 40 of the Biological Diversity Act, 2002 that empowered Respondent 2 to unilaterally issue the impugned Notification is violative of the constitutional guarantee against arbitrariness contained in Articles 14 (read with Articles 21, 39, 48A, 51, 51A and the provisions of a number of applicable national environmental laws and international treaty obligations) of the Constitution of India.

52. The Petitioners state that Section 40 of the Biological Diversity Act, 2002 should be struck down as being *ultra vires* Article 14 of the Constitution in so far as Section 40 being a *non obstante* clause renders nugatory the protection provided by Sections 3, 4 and 7, in particular, and the rest of the Act, in general.

a) The power conferred under Section 40 is inconsistent with the scheme of the Act and is in fact repugnant to the protection sought to be conferred on biological resources by the state.

c) There is no rationale nexus between the conferment of power and the object sought to be achieved and on this ground also Section 40 is liable to be struck down as being unreasonable and arbitrary.

53. Without prejudice to the contention that Section 40 is *ultra vires* to the Constitution, the Petitioners state that the Notification by the Central Government under the aforementioned Section, annexed at **Annexure C**, is liable to be set aside as it exempts certain plants from the rigorous protection that they deserve in view of the fact that they have been declared as threatened and/or critically endangered under the CITES Convention, which has been ratified

by the Union of India on 20 July 1976 and Treaty obligations have come into effect on 18 October 1976. The ratification of a Treaty being an exercise of Executive power, when the Central Government was seeking to exercise power conferred under Section 40, the same ought to have been exercised keeping in mind the Treaty obligations in the light of mandate under Article 51 of the Constitution of India. Article 51 (c) mandates that the State shall endeavor to foster respect for international law and treaty obligations. Relevant treaties in the instant case include the Convention on Biological Diversity, 1992 (signed by India on 5th June, 1992 and ratified on 18th February 1994); the Convention on Conservation of Migratory Species of Wild Animals, 1979 (signed by India on 23rd June, 1979 and ratified on 4th May, 1982); the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1975 (signed by India on 9th July, 1974 and ratified on 20th July, 1976); Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 (signed by India on 16 November, 1972); Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, 1971 (signed by India on 21st December, 1975 and acceded to on 1st October 1981); International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (signed and ratified by India on 10th June, 2002), etc.

54. The Supreme Court in *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, held that the words "*or any other disease or condition which may be specified in the rules made under this Act*" conferred uncanalised and uncontrolled power to the Executive and were therefore *ultra vires*. The court's view was that the words impugned were vague and that "*Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be*

taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in S. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down.” The court also observed: “.....when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy.” Section 40 provides that “[n]otwithstanding anything contained in the Act, the Central Government may, in consultation with the National Biodiversity Act, by notification in the Official Gazette, declare that the provisions of this Act shall not apply to any items, including biological resources normally traded as commodities.” The provisions of Section 40 of the Biological Diversity Act, 2002, does not establish any criteria or standards and does not prescribe any principles on the basis of which an item can be excluded from the purview of the Act. It does not define or lay down any criteria, standards or principles to determine what constitutes a normally traded commodity. The provision also fails to provide any hint of what facts or circumstances are to be taken into account in deciding what constitutes a normally traded commodity and in deciding when or why a particular item (including a biological resource) is to be taken out of the protective ambit of the Biological Diversity Act, 2002. Therefore, it is respectfully submitted that Section 40 of the Biological Diversity Act, 2002 is *ultra vires*, unreasonable and

violative of the Article 14 guarantee against arbitrariness. As a result, it is humbly submitted that the impugned Notification issued on 26 October 2009 is also void.

In *Kishan Prakash Sharma v. Union of India* (2001) 5 SCC 212, the Constitution Bench summed up the principle of delegated legislation in the following words: *“The legislatures in India have been held to possess wide power of legislation subject, however, to certain limitations such as the legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature cannot delegate uncanalised and uncontrolled power. The legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature. The legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. When the Constitution entrusts the duty of law-making to Parliament and the legislatures of States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. An area of compromise is struck that Parliament cannot work in detail the various requirements of giving effect to the enactment and, therefore, that area will be left to be filled in by the delegatee. Thus, the question is whether any particular legislation suffers from excessive delegation and in ascertaining the same, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute*

is enacted, the history of the legislation, the complexity of the problems which a modern State has to face, will have to be taken note of and if, on a liberal construction given to a statute, a legislative policy and guidelines for its execution are brought out, the statute, even if skeletal, will be upheld to be valid but this rule of liberal construction should not be carried by the court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive.”

In the instant case, Section 40 of the Biological Diversity Act, 2002 delegates an uncontrolled and uncanalized power without stipulating the limits of the power or the standards of guidance for those who will execute the law. As detailed earlier, the legislative policy and guidelines pertaining to normally traded commodities and to items to be excluded from the protection of the Biodiversity Act, 2002 are far from clear. In the instant case, as detailed earlier in this petition, Respondent 2 has issued the impugned Notification without application of mind, without a deep democratic debate, and without the consent of State Biodiversity Boards and local governments. Shockingly, as detailed earlier, some of the very species that are most in need of the protection of the Biological Diversity Act, 2002 have been excluded from its scope. Seen in this context, Section 40 of the Biological Diversity Act, 2002 and the impugned Notification are clearly against the spirit and object of India’s environmental laws (including the Biological Diversity Act, 2002, the Environment Protection Act, 1986 and the other national laws realizing India’s environmental treaty obligations) and militate against the constitutional guarantee against arbitrariness, the Precautionary Principle, and related constitutional norms.

THE NON PROSECUTION OF THE BRINJAL BIOPIRACY IS AGAINST PUBLIC INTEREST AND VIOLATIVE OF LAW

55. The Respondents failure to affirmatively protect biodiversity and check biopiracy, and their actions in evolving subordinate legislation that threaten the biological wealth of India, seriously compromises the interest of not only the present generations but also that of those who will inherit our choices into the future. It is settled law that any action of the present must be so conducted that it does not undermine, compromise and diminish the interests of future generations. In *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149, at 163, the Supreme Court recognized the significance of inter-generational equity and held a government department's approval to establish forest-based industry to be invalid because '*it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.*'
56. Environmental enforcement agencies are under an obligation to strictly enforce environmental laws as has been held in *Indian Council for Enviro-Legal Action v. Union of India (CRZ Notification Case)*, 1996 (5) SCC 281, 294, 301. The Hon'ble Supreme Court has clarified time and again that government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws, as held in *Dr. BL Wadehra v. Union of India (Delhi Garbage Case)*, AIR 1996 SC 2969, at 2976. In *Pravinbhai J. Patel v. State of Gujarat*, 1995 (2) Guj. L. R. 1210, 1253, the Gujarat High Court held that: "*Where, however there is complete abdication of authority by the government and*

the court comes to the conclusion, like in the present case, that the government has failed to discharge its statutory duty, and which failure has resulted in the violation of the fundamental rights of the petitioners and lacs of other people guaranteed under Article 21 of the Constitution, the court is left with no option but to issue appropriate directions to the government to pass the necessary orders under Section 5 of the Environment Act.” In *MC Mehta v. Union of India*, (2007) 1 SCC 110, the Supreme Court observed: “... *we find that the efficacy and ethics of the governmental authorities are progressively coming under challenge before this Court by way of PIL for failure to perform their statutory duties. If this continues, a day might come when the rule of law will stand reduced to "a rope of sand".*” In the light of what is stated above and the duties that are cast on the State, the Petitioners submit that the Respondents have not made any serious effort to identify, notify and de-notify rare, threatened, endangered and endemic species and disseminate action plans for conservation and protection of biodiversity; the primary objective of the Biodiversity Act, 2002, therefore, remains frustrated by the Respondents failure to issue guidelines for access to biological resources and for fair and equitable benefit sharing; the efforts to create, guide and nurture State Biodiversity Boards, Biodiversity Management Committees, and People Biodiversity Registers have been highly inadequate and negligent and consequently there is a huge structural failure at the state and local level across the country; there has been no genuine effort to build up the requisite expertise and wherewithal to promote knowledge of, and compliance with, applicable laws; and finally, the Respondents have blindly condoned irreversible acts of biopiracy with potentially disastrous national consequences. In *toto*, it is respectfully submitted that the Respondents have completely abdicated their authority and failed to discharge statutory duties under the Biodiversity Act, 2002 and other relevant

national and international laws.

57. The uninformed and inadequate regulation resulting in the commodification of plant resources either by trade or genetic modification is contrary to Constitutional norms as articulated through the Precautionary Principle and the Polluter Pays Principle. The Hon'ble Supreme Court in *AP Pollution Control Board v. MV Nayudu*, AIR 1999 SC 812 has observed: “[t]he principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake; precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential.”
58. In so far as the Respondents are permitting projects involving transgenic modification, the same is being done without assessing their environmental and social impacts, and the long term irreversible impacts on biological diversity of India. The same is in violation of the Precautionary Principle and the entities involved in such projects ought to be made accountable under the Polluter Pays Principle. In *Indian Council for Enviro-Legal Action v. Union of India (Bichhri Case)*, AIR 1996 SC 1446, the Supreme Court recognized that the ‘polluter pays’ principle has been recognized as a ‘universal’ rule to be applied to domestic polluters, and this rule applies in the instant case as well.
59. It is well established that stringent action ought to be taken against contumacious defaulters and persons who carry on industrial or development activity for profit without regard to environmental laws, as has been held in *Indian Council for Enviro-Legal Action v. Union of India (Bichhri Case)*, AIR 1996 SC 1446, 1468; *Pratibha*

Co-operative Housing Society Ltd. v. State of Maharashtra, AIR 1991 SC 1453, 1456; *Pleasant Stay Hotel v. Palani Hills Conservation Council*, 1995 (6) SCC 127, 139; and *MI Builders v. Radhey Shyam Sahu*, AIR 1999 SC 2468, 2505. In *Vineet Narain v. Union of India*, (1996) 2 SCC 199, the court noted that “*the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer.*” It further observed that in view of the fact that “*merely issuance of a mandamus directing the agencies to perform their task would be futile*” the court was compelled to “*issue directions from time to time and keep the matter pending requiring the agencies to report the progress of the investigation...so that the court retained seisen of the matter till the investigation was completed and the charge sheets were filed in the competent court for being dealt with thereafter, in accordance with law.*” The inordinate delay in initiating legal proceedings against violators of the Biological Diversity Act, 2002, on grounds of biopiracy, despite a statement to the effect being made in the Parliament by the Hon'ble Minister of State for Environment and Forests, as evidenced in **Annexure X**, clearly evidences the continuing inertia of the Respondents and therefore requires judicial oversight to prevent the continued violation of legal rights and to ensure the constitutionally and legally mandated protection of biodiversity and associated knowledge.

60. The failure on the part of the Respondents to perform their statutory duties in conserving biodiversity and curtailing biopiracy by acting with a sense of urgency on complaints, such as those raised by the Petitioners, as mentioned before, has resulted in a situation that could possibly lead to the potential and irreversible loss of a varieties of species, or their legitimate control under the sovereign powers of the State, their use by the peoples of the nation and also their conservation for the benefit of humanity in the

present and the future as well. In *Samaj Parivartan Samudaya v. State of Karnataka*, (2012) 7 SCC 407, the Supreme Court has attacked such failure on the part of the State observing (at paragraph 44) that: “*Wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that Rule of Law prevails over the abuse of process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes. This Court expressed its concern about the rampant pilferage and illegal extraction of natural wealth and resources, particularly.....as also the environmental degradation and disaster that may result from unchecked intrusion into the forest areas. This Court, vide its order dated 29th July, 2011 invoked the precautionary principle, which is the essence of Article 21 of the Constitution of India as per the dictum of this Court in the case of M.C. Mehta v. Union of India: (2009) 6 SCC 142..... The Court also directed Relief and Rehabilitation Programmes to be carried out in contiguous stages to promote inter-generational equity and the regeneration of the forest reserves. This is the ethos of the approach consistently taken by this Court, but this aspect primarily deals with the future concerns. In respect of the past actions, the only option is to examine in depth the huge monetary transactions which were effected at the cost of national wealth, natural resources, and to punish the offenders for their illegal, irregular activities. The protection of these resources was, and is the constitutional duty of the State and its instrumentalities and thus, the Court should adopt a holistic approach and direct comprehensive and specialized investigation into such events of the past.*” In the instant case, the lackadaisical response on the part of the Respondents to the Petitioners' concerns over expropriation of common resources has the potential of compromising the purity

and accessibility of commonly found varieties of brinjal thereby possibly eroding their genetic purity and also commodifying sovereign bio-resources at great loss to the country. When viewed with the Respondents' shocking inefficiency and apathy with regard to the creation of legally mandated institutional frameworks, procedures and information registers pertaining to biodiversity in India as have been detailed earlier in this petition, we respectfully submit that there has been a blatant violation of relevant law that needs to be urgently remedied in the public interest.

FAILURE IN SETTING UP AND EVOLVING INSTITUTIONAL MECHANISMS ESSENTIAL TO REGULATE USE AND ACCESS OF BIO-RESOURCES AND ASSOCIATED KNOWLEDGE

61. The Respondent 1 by allowing an expert committee to decide on the access applications without any set criteria for acceptance or rejection, as provided under Section 18 (1) of the Biological Diversity Act, 2002, has allowed arbitrariness in procedure and thereby hitting the core of Article 14 of the Constitution. Further, Respondent 1 by failing to bring out the guidelines as provided in Sec.18(1) defeated the very statute under which it was established and undermined the Authority of the Parliament.

62. Respondent 1 by allowing the transfer of biological resources under Sec 4, when such a provision specifically authorises transfer of results of research alone, have facilitated the plundering of the wealth of our Nation and thereby made such a process of according

clearances a 'colourable exercise of power'. Clearances accorded by Respondent 1 allowing access to bio-resources by various commercial entities, but sheltering them under Section 4 of the Biological Diversity Act, is in blatant violation of the principles of Article 39 (c), in so far as profit making entrepreneurs are beneficiaries of the decision of the present regulatory machinery which enables them to profit at the expense of the wider public interest, in particular those of present and future generations.

63. Articles 39(a), 39(b) and 39(c) of the Constitution of India mandates that the State shall direct its policy towards securing an adequate means of livelihood for all citizens, and enabling equity, fairness and justice in the ownership and control of the material resources of the community. In the instant case, the exercise of power by Respondent 1 in granting access to bio-resources, without carefully considering the lawfully entitled returns of the natural resource dependent communities, is in brazen violation of Article 39 as reiterated in the reports of the Comptroller and Auditor General of India and the Parliament's Public Accounts Committee.

GROUNDNS FOR INTERIM PRAYER

64. The petitioner states that by virtue of the impugned notification there is a threat that persons and entities who are interested in the commercial exploitation of India's bioresources would take advantage of the exemption so provided and would obtain clearances for the trade in plants listed in the notification, including threatened and critically endangered species, and that such a situation could cause irreparable and irreversible harm to biodiversity and associated knowledge of the Country. This necessitates the immediate granting of an interim order of stay on the operation of the notification.
65. The petitioner states that the loss to the biological diversity of the country may be one which cannot be recuperated necessitating the grant of an interim relief.

PRAYER

Wherefore it is prayed, in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to:

- a) Issue a *writ* or appropriate order in the nature of *writ* declaring Section 40 of the Biological Diversity Act, 2002, to be illegal and contrary to the Principle enshrined in Article 14 of the Constitution of India.
- b) Issue a *writ* in the nature of *certiorari* to quash the Notification issued by Respondent 2 under Section 40 of the Biological Diversity Act, 2002, dated 26 October 2008, annexed as **Annexure C**.

c) Issue a *writ of mandamus* directing Respondent 1 to frame regulations and issue guidelines regulating access to and use of biological resources and associated knowledge to be based on fair and equitable benefit sharing as provided for in Sec. 3, 4 and 6 and 21 as mandated under sec 18 (1).

d) Issue a *writ of mandamus* directing the Central Government, viz. Respondents 2 and 4, to make mandatory environment, biodiversity and social impacts assessments based on the Principle of Prior and Informed Consent prior to and as a basis for decision-making relating to grant of access to any project which is likely to have an adverse effect on biological diversity and associated knowledge, as provided for in Section 36 (4) (i) of the Biological Diversity Act, 2002.

e) Issue a *writ of mandamus* directing Respondent 1 to institute a mechanism for public consultation and consent based on the Principle of Prior and Informed Consent before granting any clearances per the Biological Diversity Act, 2002.

e) Issue a *writ of mandamus* to ensure that the Respondents perform their statutory duties under the Biological Diversity Act, 2002 with regard to existing cases of biopiracy and direct Respondent 1 to regularly report progress of the investigations and prosecutions made to this Hon'ble Court from time to time.

f) Issue a *writ of mandamus* to the Respondents to establish appropriate institutional structures, procedures, and norms in conformance with the Panchayat Raj Act, 1992, Nagarpalika Act, 1992 and Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 for access, benefit sharing and use of bio-resources and associated knowledge, and also in advancing biodiversity conservation and protection.

g) Pass any other order in the nature of *writ* as this Hon'ble

Court deems fit to grant in the interest of equity and justice.

INTERIM PRAYER

(i) Pending disposal of the aforesaid Writ Petition, the Petitioners pray that this Hon'ble Court be pleased to stay the operation of the Notification issued by Respondent 2 on 26 October 2009, annexed at **Annexure C**.

(ii) Further, the Petitioners pray this Hon'ble Court to direct the Respondents not to accord any clearances per the Biological Diversity Act, 2002 to any individual or party who has allegedly violated the provisions of the said Act, during the pendency of the case.

And pass any other order, direction, or relief that it may deem fit in the best interests of justice, fairness, equity and good conscience.

Address for service:

Advocate for Petitioner

Petitioner 2

Date:

(Appearing in Person)

Bangalore

In the High Court of Karnataka at Bangalore

W.P. No. /2012

UNDER WRIT ORIGINAL JURISDICTION

Between :

Environment Support Group and another

... Petitioners

And :

National Biodiversity Authority and others

... Respondents

INDEX

Sl. No.	Description	Page No.
1.	List of Dates	
2.	Memorandum of Writ Petition under Article 226 & 227 of the Constitution of India	
3.	Verifying Affidavit of Petitioner 1	
4.	Verifying Affidavit of Petitioner – 2, Party in Person	
5.	ANNEXURE A : Copy of the Resolution authorizing Petitioner– 1 to institute legal proceedings	
6.	ANNEXURE B : Relevant Extracts of the 17 th Report of 2010-11 of the Comptroller and Auditor General of India	
7.	ANNEXURE C : Notification of the Respondent 2, No. S.O.2726(E), dated 26 October 2009, regarding normally traded commodities	
8.	ANNEXURE D : Public notice No. 47 (PN)/92-97 of Ministry of Commerce, Government of India, dated 30th march, 1994	
9.	ANNEXURE E : Decison dated 9 th February	

Sl. No.	Description	Page No.
	2010 of the Union Minister of State for Environment and Forests issuing a moratorium on the release of B.t. Brinjal	
10.	ANNEXURE F: Representation of the Petitioners, dated 16 February 2010, to the Union Minister of State for Environment and Forests challenging the Normally Traded Commodities Notification issued by Respondent 2	
11.	ANNEXURE G-1: Letter dated 27 th April 2010 of Respondent 3 to Petitioners regarding discussion on IUCN list	
12.	ANNEXURE G-2: Letter dated 18 th June 2010 of Respondent 3 to Karnataka State Department of Forests, Ecology and Environment regarding list of threatened and critically endangered species	
13.	ANNEXURE G-3: Letter dated 21 July 2010 of Respondent 3 to the Petitioners regarding reference of complaint to Botanical Survey of India	
14.	ANNEXURE H-1: Letter dated 10 September 2010 of Mr. Prakash Javadekar, MP and Spokesperson BJP to Union Minister of State for Environment and Forests regarding Petitioners representation on normally traded commodities	
15.	ANNEXURE H-2: Letter dated 15 April 2010 of Mr. Hansraj Gangaram Ahir, MP to Prime Minister of India regarding Petitioners representation on normally traded commodities	
16.	ANNEXURE H-2: Letter dated 07 April 2010 of Mr. V. R. Natarajan, MP to Union Minister of State for Environment and Forests regarding Petitioners representation on normally traded commodities	
17.	ANNEXURE J: Letter dated 30 April 2010 of Prime Minister of India to Mr. Hansraj Gangaram Ahir, MP regarding Petitioners representation on Biological Diversity Act	
18.	ANNEXURE K: Letter dated 03 May 2010 of Respondent 2 to Petitioners regarding normally traded commodities	
19.	ANNEXURE J: Email dated 07 October 2010 of Mr. J. S. Rawat of IUCN to Petitioners	

Sl. No.	Description	Page No.
	regarding threatened plants	
20.	ANNEXURE M: Report of Respondent 1 on Brainstorming Session and National Consultation on issues related to Normally Traded Commodities held on 13-14 April 2012	
21.	ANNEXURE N: Relevant extracts of 57 th Report of Public Accounts Committee (2011-12) of 15 th Lok Sabha on Performance of the Ministry of Environment and Forests	
22.	ANNEXURE P: Decisions taken in the 97 th Meeting of the Genetic Engineering Approval Committee held on 14 October 2009	
23.	ANNEXURE Q: Representation of Petitioners to Union Minister of State for Environment and Forests entitled "Enquiry into certain legal issues relating to the approval of Bt Brinjal by the GEAC	
24.	ANNEXURE R: Petitioners Complaint dated 15 February 2010 to Respondent 3 regarding Biopiracy in B.t. Brinjal	
25.	ANNEXURE S-1: Letter dated 10 March 2010 of Respondent 3 to Respondent 1 regarding biopiracy in B.t. Brinjal	
26.	ANNEXURE S-2: Letter dated 29 March 2010 of Respondent 3 to Respondent 1 regarding biopiracy in B.t. Brinjal	
27.	ANNEXURE S-3: Letter dated 12 April 2010 of Respondent 3 to Respondent 1 regarding biopiracy in B.t. Brinjal	
28.	ANNEXURE S-4: Letter dated 28 May 2011 of Respondent 3 to Respondent 1 regarding biopiracy in B.t. Brinjal	
29.	ANNEXURE T: Relevant extracts of the 18 th Board meeting of Respondent 3 held on 14 September 2011	
30.	ANNEXURE U: Decision dated 13 August 2012 of Respondent 1 to Petitioners appeal under RTI Act, 2005	
31.	ANNEXURE V: Letter dated 20 April 2010 of Respondent 1 to Respondent 2 regarding applicability of Biodiversity Act, 2002	
32.	ANNEXURE W: Relevant extracts of the proceeding of the 20 th Board meeting of Respondent 1 held on 20 June 2011	
33.	ANNEXURE X: Press Release dated 06 September 2011 of Press Information Bureau of	

Sl. No.	Description	Page No.
	Government of India regarding Parliamentary statement of Union Minister of State for Environment and Forests on biopiracy in Bt. Brinjal	
34.	ANNEXURE Y: Relevant extracts of the proceedings of the 22 nd Board meeting of Respondent 1 held on 22 November 2011	
35.	ANNEXURE Z: Relevant extracts of the 19 th Board meeting of Respondent 3 held on 20 January 2012	
36.	ANNEXURE AA: Notification of the Respondent 2, No. S.O.120(E), dated 07 January 2009, regarding empowerment of Range Forests and above to take cognisance of violations of Biological Diversity Act, 2002	
37.	ANNEXURE AB: Relevant extracts of the proceedings of the 23 rd Board meeting of Respondent 1 held on 28 February 2012	
38.	ANNEXURE AC: Relevant extracts of Parliamentary Committee on Agriculture (2011-12) regarding “Cultivation of Genetically Modified Food Crops – Prospects and Effects”	
39.	ANNEXURE AD: Letter dated 28 th February 2012 of Respondent 2 to Respondent 1 regarding initiation of legal proceedings on biopiracy in Bt Brinjal	
40.	ANNEXURE AE: Status of applications processed by Respondent 1 as extracted from their website	
41.	Vakalath	

Date:
Bangalore

Advocate for Petitioner 1

Petitioner 2
(Party in person)