

**BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI**

Dated this the 20th day of December, 2023.

(Through Video Conference)

Appeal No.54 of 2022 (SZ)

&

I.A. No.170 of 2022 (SZ)

IN THE MATTER OF

Dabur India Limited

Rep. by its Authorized Representative
Himanshu Bhatia, AGM – Legal,
8/3, Asaf Ali Road,
New Delhi – 110 002.

Also at 115/18, Y Block, Main Road,
Anna Nagar, Behind Iyappan Temple,
Chennai – 600 004.

...Appellant (s)

Versus

National Biodiversity Authority

Rep. by its Secretary
5th Floor, TICEL Bio Park
CSIR Road, Taramani,
Chennai – 600 113.

...Respondent(s)

For Appellant (s): M/s. Lakshmi Kumaran, Krithika Jaganathan,
Vindhya S Mani and Bharath R Srinivas.

For Respondent(s): Mr. G.M. Syed Nurullah Sheriff.

Judgment Reserved on: 19th September, 2023.

CORAM:

HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA, JUDICIAL MEMBER

HON'BLE DR. SATYAGOPAL KORLAPATI, EXPERT MEMBER

JUDGEMENT

Delivered by Smt. Justice Pushpa Sathyanarayana, Judicial Member.

1. The doctrine of Access and Benefit Sharing (*hereinafter referred to as 'ABS'*) of genetic resources is to enable fair distribution of benefits between the users of genetic resources and the providers for opening

the doors for innovation and also create incentives for conserving biodiversity. ABS is crucial and also essential for sustainable development to secure research and resource availability and environmental sustainability.

2. The definition of ABS has shifted, changed, expanded and given new meaning over the years. This indicates that the efforts for implementing the ABS not only at the national level but also at the international level are challenging, even though the Nagoya Protocol has laid down the principle that the national level regulation and legislation define and specify the activities. Apparently, prior to the Biological Diversity Act, 2002 (*hereinafter referred to as '**BD Act**'*) there was no legislation or regulation for the conservation of biodiversity. India which is the signatory to Nagoya Protocol notified the ABS Guidelines in 2014. The said guidelines regulate various aspects of benefit sharing. The Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014 (*hereinafter referred to as '**ABS Guidelines**'*) deal with various aspects, from the payment made by the applicant in exchange of commercial use of genetic resources, how much should reach the local communities to exemptions, etc. The guidelines basically provide the manner in which financial obligations of the users of genetic resources are to be determined for each of the activities identified earlier for which biological resources are obtained and also how these benefits are to be shared.
3. Curiously, the focus of the BD Act is mainly on Access and Benefit Sharing and the other objectives of the Act like sustainability, use, conservation and biodiversity impact assessments are not given equal focus.

4. In the above backdrop, the issue that arises for consideration is the applicability of Regulations 3 and 4 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014.
5. The appellant herein is a listed public company manufacturing Ayurvedic medicines and healthcare products. The appellant claims to adopt a practice known as '*Poly-herbalism*' which involves the usage of multiple herbs in multiple formulations to arrive at a wide range of final products. Many companies use biological resources but very few of them apply to the National Biodiversity Authority (*hereinafter referred to as 'NBA'*) or the State Biodiversity Board (*hereinafter referred to as 'SBB'*). The appellant claims to have been complying with the provisions of the Act and Rules framed by making requisite applications and disclosures before the concerned State Biodiversity Board (SBBs).
6. On 31.08.2016, the appellant for the first time had taken steps to comply with the requirements as per Section 3 (2) of the BD Act which mandates prior approval from the respondent for obtaining biological resources for commercial utilization. While filing applications before the respondent, the applicant is required to propose to the respondent the mechanism and arrangements for benefit sharing as per Entry No.8 of Form – I to the Rule which includes the mode of computation of its benefit sharing obligations.
7. It is contended by the appellant that Regulation 3 is a prescribed mode of computation of benefit sharing for the appellant who purchases the biological resources from various vendors across India

and will have the benefit sharing obligation ranging between 3% and 5% of the purchase price of the biological resources as per the first proviso to Clause 1 of Regulation 3. The mode of computation in Regulation 4 is an option exercisable at the behest of the applicant seeking to compute the benefit sharing obligation on the annual gross ex-factory sale of the final product instead of choosing to propose the computation of benefit sharing under Regulation 3.

8. The appellant submitted the application on 06.12.2016 for obtaining biological resources for commercial utilization for the year 2016 - 2017 and proposed to pay the benefit sharing as per Regulation 3 i.e. on the resource value. The appellant also had filed a similar common application seeking prior approval for the years 2017 - 2020 on 18.07.2017, wherein also it proposed to pay the benefit sharing on resource value.
9. Both the applications for the years 2016 - 2017 and 2017 - 2020 were pending before the respondent for further negotiations to determine the benefit sharing. While so, there was an Office Memorandum dated 10.09.2018 issued by the MoEF&CC under Section 48 of the BD Act to provide an opportunity to all entities which were required to obtain prior approval from the respondent for the activities undertaken as specified in Sections 3, 4 and 6 of the BD Act. Meanwhile, the appellant filed another common application in Form - I for the years 2020 - 2023, where also it indicated the benefit sharing on the resource value only. There were meetings for negotiations and it was decided to levy 5% on the resource value as benefit sharing obligation on the appellant for the year 2016 - 2017. Accordingly, the appellant remitted a sum of Rs.1,50,45,050/- towards the agreed benefit sharing under Regulation 3 of the ABS

Guidelines. The appellant also executed the benefit sharing agreement proposed by the respondent for the year 2016-2017 and confirmed the benefit sharing obligations at 5% on the resource value.

10. To be noted is that the applications between the years 2017 and 2021 were pending before the respondent authority and several negotiations took place between the appellant and the respondent to reach an agreement. The respondent had required the appellant to pay the benefit sharing component at 0.5% on the product value in terms of Regulation 4 of the ABS Guidelines for the year 2017- 2021. The appellant also had requested to pay the benefit sharing in terms of Regulation 3. Despite the negotiation, the respondent had passed the impugned order on 04.08.2022 in respect of the years 2020 and 2021, determining to impose the benefit sharing obligation of the appellant as per Regulation 4 of the ABS Guidelines.

11. The appellant has assailed the order impugned on various grounds:

- a.** It is contended that Section 21 of the BD Act contemplates that the benefit sharing payment obligation fastened on the appellant must be to secure equitable sharing of benefits arising out of the use of the accessed biological resources which should be based on the mutually agreed terms between the appellant and the respondent.
- b.** The ABS Guidelines framed the mechanism to determine the amount payable by the applicant based on the ABS Guidelines and the respondent has to determine the amount only based on the ABS Guidelines.
- c.** Regulation 3 deals with the mode of benefit sharing for access to biological resources for commercial utilization and prescribes the rate ranging between 3% and 5% of the purchase price of the biological resources i.e. the resource value.
- d.** Regulation 4 of the ABS Guidelines is an option provided only to the applicant to choose an alternative benefit sharing obligation computed on the product value and contended that Regulation 4 of

the ABS Guidelines seems to be interpreted as a 'right' or 'power' to choose is only vested with the applicant and not the respondent. In the instant case, the applicant did not choose the exercise of the option under Regulation 4 and went on to propose to the respondent as per Regulation 3.

- e. Respondent had passed the impugned order determining and imposing the benefit sharing obligation on product value when no such option was chosen by the appellant under Regulation 4 of the ABS Guidelines.
- f. It was contended that the respondent has no authority to impose benefit sharing under Regulation 4 on the appellant, as there is an option available solely to the applicant to choose to share the benefits under Regulation 3 or Regulation 4.
- g. The next contention was that the impugned order is ultra vires the Act and Guidelines, as the equitable sharing of benefits should be in accordance with the mutually agreed terms and conditions between the appellant and the respondent as contemplated under Section 21 of the BD Act. It is stated that the existence of mutually agreed terms and conditions between the appellant and the respondent is a *sine qua non* under the statute for imposing the benefit sharing obligations on the appellant.
- h. Finally, the impugned order is assailed as a unilateral determination, ultra vires, non-speaking and arbitrary.

12. In the counter filed by the respondent/National Biodiversity

Authority, it is stated that the entire argument of the appellant is only on one aspect i.e. benefit sharing to be computed on the 'resource value' as per Regulation 3 of the ABS Guidelines and Regulation 4 provides an option to the applicant to choose an alternative mode of computation of benefit sharing on the 'product value'. The NBA considered the request received from the applicants by granting approval or otherwise for undertaking any activity referred to in Sections 3, 4 and 6 of the BD Act. The appellant had sought for approval to access 133 biological resources from various geographical locations in India for commercial utilization. It is not in dispute that the appellant falls under the 3 (2) category of the BD Act. After the receipt of the application from the appellant, a meeting

was conducted and discussions were held regarding the benefit sharing on all the applications filed by them. After a thorough examination of the application, it was found that even before the approval was granted to the appellant, they started accessing the biological resources without obtaining prior approval by executing an agreement with the NBA. After due consideration and consultation from various SBBs, a model agreement was drafted and sent for the appellant's signature subject to terms and conditions which included the benefit sharing component as per Regulation 4 of the ABS Guidelines. The NBA had sent a draft agreement to the appellant on 30.12.2020 with ABS as per Regulation 4 i.e. 0.5% of the annual gross ex-factory sale price of the product from the date of commercialization. A clarification was sought for by the appellant on 20.01.2021 who requested the NBA to reconsider the calculation of ABS based on the '**resource value**' and insisted that the amount shall be paid on the purchase price as per Regulation 3 of the ABS Guidelines. The appellant, on 26.10.2021, had sent a communication requesting the NBA to permit them to pay ABS based on the purchase price following the 'resource centric approach' by quoting the previous instance. The Office Memorandum dated 10.09.2018 was issued by the MoEF&CC to regularize all the post activities/violations under the BD Act without resorting to legal action as stipulated under the BD Act. Accordingly, the benefit sharing is calculated and imposed uniformly on all the applications. According to the respondent, in the instant application which was placed before the Expert Committee, it was recommended to fix the benefit sharing at a higher percentage (0.5%) under Regulation 4, as biological resources were accessed without signing the agreement with the NBA and accordingly, the revised agreement was sent to the applicant.

13. It is mainly contended by the respondent that any person or entity covered under Section 3 (2) of the BD Act has to obtain prior approval from the NBA before accessing any biological resources or associated knowledge / activities pertaining to research, bio-survey, bio-utilization and commercial utilization. In the instant case, the appellant had accessed the biological resources without any approval from the NBA and therefore, had violated the provisions of the Act. Though the appellant had been accessing the biological resources of more than 125 species of herbs, it had applied for approval only in the year 2020.

14. Further, the respondent stated that the appellant had misinterpreted the BD Act to their convenience and advantage by reiterating that they have the option of benefit sharing amount on the purchase price of the biological resources and not on the selling price. Therefore, the claim of the appellant that there should be considered under Regulation 3 is unacceptable to the respondent.

15. Heard the learned counsel Mr. Lakshmi Kumaran appearing for the appellant and Mr. G.M. Syed Nurullah Sheriff appearing for the sole respondent.

16. As indicated earlier, **the question that arises for consideration is the applicability of Regulation 3 or Regulation 4 of the ABS Guidelines on the access to biological resources in the instant case.**

17. As per Section 7 of the BD Act, no person who is a citizen of India or a body corporate, association or organization shall obtain any

biological resources for commercial utilization except after giving prior intimation to the SBB concerned.

- 18.** The benefit sharing obligation on the trader shall be 1.0% to 3.0% and on the manufacturer shall be 3.0% to 5.0% of the purchase price of the biological resources. In case of direct purchase, benefit sharing obligation is not less than 3.0% and 5.0% in case the buyer is a trader or a manufacturer respectively. As per the ABS Guidelines, benefit sharing may be done in monetary and/or non-monetary modes as agreed upon by the applicant and the NBA/SBB. Determination of benefit sharing should be based on considerations such as commercial utilization of the biological resources, stages of research and development, potential market for the outcome of the research, nature of technology applied, timelines and milestones from initiation of research and development of the product, risks involved in commercialization of the product. Interestingly, the amount of benefit sharing is to remain the same whether the end product contains one or more biological resources.

"7. Prior intimation to State Biodiversity Board for obtaining biological resource for certain purposes

No person, who is a citizen of India or a body corporate, association or organization which is registered in India, shall obtain any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization except after giving prior intimation to the State Biodiversity Board concerned:

Provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaid and hakims, who have been practicing indigenous medicine.

24. Power of State Biodiversity Board to restrict certain activities violating the objectives of conservation etc.—

(1) Any citizen of India or a body corporate, organization or association registered in India intending to undertake any activity referred to in section 7 shall give prior intimation in such form as may be prescribed by the State Government to the State Biodiversity Board.

(2) On receipt of an intimation under sub-section (1), the State Biodiversity Board may, in consultation with the local bodies concerned and after making such enquiries as it may deem fit,

by order, prohibit or restrict any such activity if it is of opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity:

Provided that no such order shall be made without giving an opportunity of being heard to the person affected.

(3) Any information given in the form referred to in sub-section (1) for prior intimation shall be kept confidential and shall not be disclosed, either intentionally or unintentionally, to any person not concerned thereto."

- 19.** As per Sections 7 and 24 of the BD Act read with ABS Guidelines, prior intimation is required to be given in the prescribed format by filling up the prescribed form to the NBA. The NBA in consultation with the local bodies concerned and after making enquires, as it may deem fit by order either prohibits or restricts any such activity if it is of the opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable sharing of benefits arising out of such activity. The calculation of access and benefit sharing payable shall be done separately for each year as per Regulation 3 or 4 of the ABS Guidelines. However, the percentage of the benefit sharing obligation on the buyer shall vary from time to time which shall be decided by the SBB.
- 20.** In the present case also, the agreement on access and benefit sharing entered into by the appellant with the respondent dated 30.03.2021 specifies that the said agreement shall remain in force for a period of one year i.e. 2016 – 2017. The period of this agreement may be extended by way of an amendment under Clause 13 of this agreement. In the said agreement, in Schedule A, the benefit sharing component is prescribed which is *"benefit sharing (5%) fixed on the purchase price of raw materials from the date of the commercial utilization during the financial year 2016-2017"*.

21. Hence, it is evident from the above clause that the period of the agreement is only for one year between 2016 and 2017 and the benefit sharing was fixed at 5% of the purchase price. It is not the case of the appellant that they wanted to access the biological resources for more than one year and they applied again prior to the date of the expiry of the existing agreement for renewal as per Clause 2.3.2 read with Clause 13 of the agreement. Therefore, the argument that the approval was sought for the subsequent years and proposed to pay the benefit sharing on resource value should be given to the subsequent years has no merit and the said contention is rejected.

22. Now the question arises as to on what terms and conditions the equitable benefit sharing has to be done.

23. To be noted is that neither the Convention on Biological Diversity (CBD) nor the Nagoya protocol defines "access to genetic resources". The BD Act also does not define "access to genetic resources". Hence, the access can be understood as a permit or notification required when the access happens within the geographical borders of a provider State or Country.

24. Section 21 of the BD Act deals with the determination of equitable benefit sharing by National Biodiversity Authority which is as follows:-

"21. Determination of equitable benefit sharing by National Biodiversity Authority.—

(1) The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions

between the person applying for such approval, local bodies concerned and the benefit claimers.

(2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:—

- (a) grant of joint ownership of intellectual property rights to the National Biodiversity Authority, or where benefit claimers are identified, to such benefit claimers;
- (b) transfer of technology;
- (c) location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;
- (d) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation;
- (e) setting up of venture capital fund for aiding the cause of benefit claimers;
- (f) payment of monetary compensation and other non-monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit.

(3) Where any amount of money is ordered by way of benefit sharing, the National Biodiversity Authority may direct the amount to be deposited in the National Biodiversity Fund: Provided that where biological resource or knowledge was a result of access from specific individual or group of individuals or organisations, the National Biodiversity Authority may direct that the amount shall be paid directly to such individual or group of individuals or organizations in accordance with the terms of any agreement and in such manner as it deems fit.

(4) For the purposes of this section, the National Biodiversity Authority shall, in consultation with the Central Government, by regulations, frame guidelines.

25. So, from the above, it is clear that the National Biodiversity Authority while granting approvals under Section 19 or 20 shall ensure that such approvals are granted with terms and conditions to secure equitable sharing of benefits arising out of the use of (1) accessed biological resources, (2) their by-products, (3) innovations and practices associated with their use and (4) applications and knowledge relating thereto in accordance with the mutually agreed terms and conditions between the person applying for such approval, the local bodies concerned and the benefit claimers.

26. Now the question as to when the access is triggered:

i. Access for sampling: In this case, the obligations come into place at the moment the user obtains the ability to perform research and development activities on the genetic resource. The access requirements are triggered even prior to performing these activities.

ii. Access for utilization: In this case, the access requirements are triggered after the user obtains the ability to perform the research and development activities. It is not the physical access, but the utilization of the activity itself. In other words, it is not triggered on the access but on the utilization.

iii. Access to previously utilized genetic resources for a new purpose: Here the access is triggered when a new utilization activity occurs to a genetic resource that was previously made available to the user. In this case, the trigger for access does not necessarily mean all the genetic resources accessed prior to the enactment of the laws are within the scope of the ABS obligations.

27. Now considering the question of benefit sharing agreement, the statutory mandate is to be signed between the provider and user prior to the access. The non-mandatory benefit sharing agreement means that there is no obligation to enter into a benefit sharing agreement prior to the access. However, this obligation may arise during the different stages of research and development. So far as the BD Act is concerned, the users who want to access a genetic resource must apply for access and wait for authorization prior to proceeding with their activities. Almost all countries have this regulatory mechanism for access.

28. Rule 20 of the Biological Diversity Rules, 2004 (*hereinafter referred to as 'BD Rules'*) prescribes the criteria for equitable benefit sharing.

"20. Criteria for equitable benefit sharing :-

(1) The Authority shall by notification in the Official Gazette formulate the guidelines and describe the benefit sharing formula.

(2) The guidelines shall provide for monetary and other benefits such as royalty; joint ventures; technology transfer; product development; education

and awareness raising activities; institutional capacity building and venture capital fund.

(3) The formula for benefit sharing shall be determined on a case-by case basis.

(4) The Authority while granting approval to any person for access or for transfer of results of research or applying for patent and IPR or for third party transfer of the accessed biological resource and associated knowledge may impose terms and conditions for ensuring equitable sharing of the benefits arising out of the use of accessed biological material and associated knowledge.

(5) The quantum of benefits shall be mutually agreed upon between the persons applying for such approval and the Authority in consultation with the local bodies and benefit claimers and may be decided in due regard to the defined parameters of access, the extent of use, the sustainability aspect, impact and expected outcome levels, including measures ensuring conservation and sustainable use of biological diversity.

(6) Depending upon each case, the Authority shall stipulate the time frame for assessing benefit sharing on short, medium and long term benefits.

(7) The Authority shall stipulate that benefits shall ensure conservation and sustainable use of biological diversity.

(8) Where biological resources or knowledge is accessed from a specific individual or a group of individuals or organizations, the Authority may take steps to ensure that the agreed amount is paid directly to them through the district administration. Where such individuals or group of individuals or organizations cannot be identified, the monetary benefits shall be deposited in the National Biodiversity Fund.

(9) Five percent of the assessed benefits shall be earmarked for the Authority or Board as the case may be, towards administrative and service charges.

(10) The Authority shall monitor the flow of benefits as determined under sub rule (4) in a manner determined by it."

29. Rule 20 (1) empowers the biodiversity authority to notify the formulated guidelines and describe the benefit sharing formula. Rule 20 (2) stipulates the guideline that the guideline shall provide for monetary and other benefits such as royalty, joint ventures, technology transfer, etc. Rule 20 (3) provides that the formula for benefit sharing shall be determined on a case-by-case basis.

30. Rule 14 of the BD Rules prescribes procedures for access to biological resources and associated traditional knowledge. This explains how

the benefit sharing has to be determined. Rule 14 which is usefully extracted below explains in detail the options for such benefit sharing which are provided in Annexure – I.

“14. Procedure for access to biological resources and associated traditional knowledge.—

(1) Any person seeking approval of the Authority for access to biological resources and associated knowledge for research or for commercial utilization shall make an application in Form I.

(2) Every application under sub-rule (1) shall be accompanied by a fee of ten thousand rupees in the form of a cheque or demand draft drawn in favour of the Authority.

(3) The Authority shall after consultation with the concerned local bodies and collecting such additional information from the applicant and other sources, as it may deem necessary, dispose of the application, as far as possible, within a period of six months from the date of its receipts.

(4) On being satisfied with the merit of the application, the Authority may grant the approval for access to biological resources and associated knowledge subject to such term and conditions as it may deem fit to impose.

(5) The approval to access shall be in the form of a written agreement duly signed by an authorized officer of the Authority and the applicant.

(6) The form of the agreement referred to in sub-rule (5), shall be laid down by the Authority and shall include the following, namely:—

- (i) general objectives and purpose of the application for seeking approval;
- (ii) description of the biological resources and traditional knowledge including accompanying information;
- (iii) intended uses of the biological resources (research, breeding, commercial utilization etc.);
- (iv) conditions under which the applicant may seek intellectual property rights;
- (v) quantum of monetary and other incidental benefits. If need be, a commitment to enter into a fresh agreement particularly in case if the biological material is taken for research purposes and later on sought to be used for commercial purposes, and also in case of any other change in use thereof subsequently.
- (vi) restriction to transfer the accessed biological resources and the traditional knowledge to any third party without prior approval of Authority;
- (vii) to adhere to a limit set by the Authority on the quantity and specification of the quality of the biological resources for which the applicant is seeking access;
- (viii) guarantee to deposit a reference sample of the biological material sought to be accessed with the repositories identified in section 39;
- (ix) submitting to the Authority a regular status report of research and other developments;
- (x) commitment to abide with the provisions of Act and rules and other related legislations in force in the country;
- (xi) commitment to facilitate measures for conservation and sustainable use of biological resources accessed;
- (xii) commitment to minimize environmental impacts of collecting activities;
- (xiii) legal provisions such as duration of the agreement, notice to terminate the agreement, independent enforceability of individual

clauses, provision to the extent the obligations in benefit sharing clauses survive the termination of the agreement, events limiting liability (natural calamities), arbitration, any confidentiality clause.

(7) The conditions for access may specifically provide measures for conservation and protection of biological resources to which the access is being granted.

(8) The Authority may for reasons to be recorded in writing reject an application if it considers that the request cannot be acceded to

(9) No application shall be rejected unless the applicant is given a reasonable opportunity of being heard.

(10) The Authority shall take steps to widely publicize the approvals granted, through print or electronic media and shall periodically monitor compliance of conditions on which the approval was accorded."

31. Rule 14 of the BD Rules is explicit about the responsibility of the authority to ensure that the agreement secures equitable sharing of benefits, for which, the following aspects will have to be considered:

- (i) Use of accessed biological resources
- (ii) Use of their by-products
- (iii) Innovations and practices associated with their use and
- (iv) Applications and knowledge relating thereto

which implies that while considering the agreement on a case-to-case basis, the above aspects will have to be taken into account for arriving at whether the benefit sharing should be on a '*resource value basis*' or on a '*product value basis*'.

3. Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization.—

(1) Where the applicant/ trader/ manufacturer has not entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the trader shall be in the range of 1.0 to 3.0% of the purchase price of the biological resources and the benefit sharing obligations on the manufacturer shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources:

Provided that where the trader sells the biological resource purchased by him to another trader or manufacturer, the benefit sharing obligation on the buyer, if he is a trader, shall range between 1.0 to 3.0% of the purchase price and between 3.0 to 5.0%, if he is a manufacturer:

Provided further that where a buyer submits proof of benefit sharing by the immediate seller in the supply chain, the benefit sharing obligation on the buyer shall be applicable only on that

portion of the purchase price for which the benefit has not been shared in the supply chain.

(2) Where the applicant/ trader/ manufacturer has entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/ Forest dweller/ Tribal cultivator/ Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the applicant shall be not less than 3.0% of the purchase price of the biological resources in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer.

(3) In cases of biological resources having high economic value such as sandalwood, red sanders, etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB, as the case may be, and the successful bidder or the purchaser shall pay the amount to the designated fund, before accessing the biological resource.

4. Option of benefit sharing on sale price of the biological resources accessed for commercial utilization under regulation 2.—

When the biological resources are accessed for commercial utilization or the bio-survey and bio-utilization leads to commercial utilization, the applicant shall have the option to pay the benefit sharing ranging from 0.1 to 0.5 % at the following graded percentages of the annual gross ex-factory sale of the product which shall be worked out based on the annual gross ex-factory sale minus government taxes as given below:-

Annual Gross ex-factory sale of product	Benefit sharing component
Up to Rupees 1,00,00,000	0.1%
Rupees 1,00,00,001 up to 3,00,00,000	0.2%
Above Rupees 3,00,00,000	0.5%

32. Regulation 3 and 4 of the ABS Guidelines empowers the authority to determine whether the benefit sharing on resource value will suffice or Regulation 4 has to be invoked to ensure that the benefit sharing arrived is equitable, taking into account all the benefits the applicant is likely to gain by use of accessed biological resources, use of their by-products, innovations and practices associated with their use and applications and knowledge relating thereto.

33. Moreover, the Act, Rules and Guidelines clearly spell out what are the options available for the applicant with reference to the manner in which the benefit determined is shared.

34. With reference to the options that are available for benefit sharing, the contention of the appellant that the options available for the applicant to choose between Regulation 3 and 4 is not sustainable since the Act, Rules and Guidelines clearly denote what are the options available for the applicant.

35. The NBA, while granting approvals under Section 19 or 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources. As per the ABS Guidelines, the BDA will determine the benefit sharing.

"14. Determination of benefit sharing.—

(1) Benefit sharing may be done in monetary and/ or non-monetary modes, as agreed upon by the applicant and the NBA/ SBB concerned in consultation with the BMC/ Benefit claimer, etc. Options for such benefit sharing are provided in Annexure-1.

(2) Determination of benefit sharing shall be based on considerations such as commercial utilization of the biological resource, stages of research and development, potential market for the outcome of research, amount of investment already made for research and development, nature of technology applied, timelines and milestones from initiation of research to development of the product and risks involved in commercialization of the product: Provided that special consideration may be given to cases where technologies/products are developed for controlling epidemics/diseases and for mitigating environmental pollution affecting human/ animal/plant health.

(3) The amount of benefit sharing shall remain the same whether the end product contains one or more biological resources.

(4) Where the biological resources of a product are sourced from the jurisdiction of two or more SBBs, the total amount of the accrued benefits shall be shared among them in proportion as decided by the NBA / SBBs concerned, as the case may be."

36. The above guideline provides for determination of benefit sharing based on consideration of various aspects which includes commercial utilization of the biological source and the procedure for such access is as per the BD Rules, 2004.

37. The fair and equitable benefit sharing options have been detailed in Annexure – I in the ABS Guidelines stated supra

“FAIR AND EQUITABLE BENEFIT SHARING OPTIONS

The following options, either one or more, may be applied in accordance with mutually agreed terms between the applicant and the NBA, on a case by case basis, in accordance with the provisions of sub-rule (3) of rule 20 of the Biological Diversity Rules, 2004. These options are indicative in nature and other options, as approved by the NBA in consultation with the Central Government, may also be adopted:

(a) Monetary benefits options:

- (i). Up-front payment;
- (ii). One-time payment;
- (iii). Milestone payments;
- (iv). Share of the royalties and benefits accrued;
- (v). Share of the license fees;
- (vi). Contribution to National, State or Local Biodiversity Funds;
- (vii). Funding for research and development in India;
- (viii). Joint ventures with Indian institutions and companies;
- (ix). Joint ownership of relevant intellectual property rights.

(b) Non-monetary benefits options:

- (i). Providing institutional capacity building, including training on sustainable use practices, creating infrastructure and undertaking development of work related to conservation and sustainable use of biological resources;
- (ii). Transfer of technology or sharing of research and development results with Indian institutions/ individuals/entities;
- (iii). Strengthening of capacities for developing technologies and transfer of technology to India and/or collaborative research and development programmes with Indian institutions/ individuals/entities;
- (iv). Contribution/ collaboration related to education and training in India on conservation and sustainable use of biological resources;
- (v). Location of production, research, and development units and measures for conservation and protection of species in the area from where biological resource has been accessed, contributions to the local economy and income generation for the local communities;
- (vi). Sharing of scientific information relevant to conservation and sustainable use of biological diversity including biological inventories and taxonomic studies;
- (vii). Conducting research directed towards priority needs in India including food, health and livelihood security focusing on biological resources;
- (viii). Providing scholarships, bursaries and financial aid to Indian institutions/ individuals preferably to regions, tribes/ sects contributing to the delivery of biological resources and subsequent profitability if any;
- (ix). Setting up of venture capital fund for aiding the cause of benefit claimers;
- (x). Payment of monetary compensation and other non-monetary benefits to the benefit claimers as the NBA may deem fit.”

38. These are the options as approved by the NBA available to the appellant. These options are indicated in Regulation No.4. The monetary and non-monetary benefit options are available to the appellant. Therefore, the argument of the appellant that the options

available with it are between Regulation 3 and 4 is fallacious and liable to be rejected.

39. Coming back to the impugned order passed by the respondent, it is alleged by the appellant that it is a non-speaking order that suffers from the vice of arbitrariness and also in violation of the principles of natural justice.

40. Reliance was placed on **Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496**

"47. Summarizing the above discussion, this Court holds:

- a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- b. A quasi-judicial authority must record reasons in support of its conclusions.
- c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- g. Reasons facilitate the process of judicial review by superior Courts.
- h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.
- i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- j. Insistence on reason is a requirement for both judicial accountability and transparency.
- k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija Vs. Spain (1994) 19 EHRR 553, at 562 para 29 and Anya Vs. University of Oxford, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

41. The respondent which is the NBA has produced all the documents and minutes of the meetings where deliberations between the appellant and the respondent had happened and also the recommendations from various SBBs. The Expert Committee meeting was held on 24.01.2022 on the access and benefit sharing for processing of applications. A perusal of the proceedings of the meeting shows that the remarks by the NBA were recorded which are as follows:-

"Remarks by NBA:

1. The applicant M/s. Dabur India Ltd., had filed this Form I application on 15.09.2020 seeking prior approval of NBA to access a list of 133 biological resources for Commercial Utilization. The application was approved by the Competent Authority and clearance letter along with draft agreement was communicated to the applicant on 30.12.2020, and thereby the applicant mandates to pay ABS in accordance with Reg.4 of the ABS Guidelines, 2014 (i.e. based on the annual gross ex-factory sale of the product).
2. Thereafter, two virtual hearings were held on 16.09.2020 and 08.12.2020 wherein the Applicant had discussed the ABS modalities in this application along with other Application Nos.1472, 1708 and 3077. In this Application (4197), it was decided by the Competent Authority in the meeting, held on 08.12.2020 that upon receipt of the consent from SBBs, the application shall be processed further.
3. Later, the applicant vide letter dated 20.01.2021 has raised certain queries regarding the fixation of benefit sharing amount, and requested to consider the ABS calculation based on 'resource centric approach'. The benefit sharing amount for commercial utilization is calculated as per regulation No.4 of the ABS Guidelines, 2014, which mandates that the benefit sharing amount shall be fixed on annual gross ex-factory sale of the product.
4. Now, the Applicant has vide letter dated 23.09.2021 (received on 27.09.2021) submitted Form A towards the information to be furnished for use of biological resources (as per Regulation 2(1) of

the ABS Guidelines, 2014) wherein the applicant has submitted a detailed list on the Annual Volume of herbs procured during Financial Year 2020 – 2021. Further, the Applicant has also requested to finalize further course towards fulfillment of ABS Guidelines.

5. Further, on 26.10.2021, the applicant has again sent a communication requesting NBA to let Dabur pay the ABS based on the purchase price following the "resource centric approach". They have also quoted the instance wherein NBA has let Dabur pay the ABS component of Rs.1.5 Cr. for the year 2016-2017 based on the resource centric approach in Appl. No.1472. The referred communication has been placed as Annexure.
6. In light of the above, the applicant has already accessed 144 biological resources (125 species of herbs) from traders/ cultivate sources/ organized sources (List enclosed as Annexure) without the prior approval of NBA as required under Section 3 of the BD Act. Therefore, the applicant has contravened the provisions of the BD Act.
7. Hence, this application is placed before the EC for evaluation."

42. After the application was placed before the Expert Committee on ABS, the recommendations of the Expert Committee are as follows:-

"Recommendation of the Expert Committee on ABS (to be incorporated in the prescribed agreement format once approved by the Authority):

Expert Committee observed that the applicant M/s. Dabur India Limited, being Section 3 (2) person, had filed this Form – I application for seeking prior approval of NBA to access 133 biological resources for Commercial Utilization. The application was approved by the Competent Authority and draft agreement was sent to the applicant subject to the benefits sharing component as per Regulation 4 of the ABS Guidelines, 2014 (i.e. based on the annual gross ex-factory sale of the product).

The EC also examined the request made by the Applicant for ABS calculation based on 'resource centric approach', wherein the applicant had quoted the instance where NBA let them pay Rs.1.5 Cr. for the year 2016-2017 under Appl. No.1472 based on the resource centric approach. EC noted that the Applicant has now accessed 144 biological resources (125 species of herbs) from traders/ cultivate sources/ organized sources without the approval of NBA as per the detailed list of the annual volume of herbs procured during 2020-2021.

Upon scrutinizing the request of the Applicant to follow resource centric approach for calculation of ABS, EC noted that the ABS may be applicable for those who purchasing from the JFMC/ Forest dweller/ Gram Sabha as per Regulation 2 of the ABS Guidelines, 2014. However, in the past, Authority has imposed benefit sharing based on the purchase of biological resources as one-time concession to the applicant in a similar case. Considering this view, EC opined that it may not be applicable to the instant case as biological resources had already been accessed which violated the provisions of the BD Act, 2002. Thus, EC did not agree to the submission made by the applicant. The Expert Committee, taking note of the OM of MoEF&CC, recommended for approval with higher benefit sharing, under Regulation 4 of the ABS Guidelines, 2014 (0.5%), from the date of commercial utilization. Also, applicant to conduct awareness programs in consultation with respective SBBs, within a period of three months from the date of execution of agreement and submit a compliance report."

43. Even after the recommendation of the Expert Committee in its 65th Meeting dated 24.01.2022, there were correspondences and negotiations between the parties. There was yet another meeting dated 21.03.2022 held with the representative of the appellant company with the NBA. Thereafter, on 27.04.2022, the 66th Meeting of the Expert Committee on access and benefit sharing for processing the application was held and the recommendations of the Expert Committee on ABS were made which are as follows:-

“Recommendation of the Expert Committee on ABS (to be incorporated in the prescribed agreement format once approved by the Authority):

Expert Committee observed that the applicant being Section 3 (2) entity, had filed this Form – I application for seeking prior approval of NBA to access 133 biological resources for Commercial Utilization. The application was approved by the Competent Authority and draft agreement was forwarded to the applicant subject to the benefits sharing component as per Regulation 4 of the ABS Guidelines, 2014 (i.e. based on the annual gross ex-factory sale of the product).

EC also observed that this application was kept before 65th EC on ABS and therein it was noted that the Applicant had accessed 144 biological resources (belonging to 125 species of herbs) from traders/ cultivate sources/ organized sources without the approval of NBA as per the detailed list of the annual volume of herbs procured during 2020-2021. EC recommended for approval with higher benefit sharing, under Regulation 4 of the ABS Guidelines, 2014 (0.5%), from the date of commercial utilization.

The EC has now noticed that, the applicant is repeatedly requesting to follow a resource centric approach, even after the draft agreement was sent again for execution. The same request was also made in their meeting with the NBA held on 21.03.2022 and in their letter dated 21.03.2022.

Now, after considering the above events, the EC affirms the decision of the 65th EC on ABS i.e., the application may be recommended for approval with higher benefit sharing, under Regulation 4 of the ABS Guidelines, 2014 (0.5%), from the date of commercial utilization.

Also, applicant to conduct awareness programs in consultation with respective SBBs, within a period of three months from the date of execution of agreement and submit a compliance report.”

44. From the above proceedings of the meetings and the consequential remarks of the NBA and the Expert Committee, it is clear that the decision which is now impugned in the order dated 04.08.2022 is made only based on the above recommendations. The impugned

order is only conveying the decision of the 66th Meeting of the Expert Committee on ABS without giving out the reasons.

45. The order of the respondent is usefully extracted below:

"Sub: Execution of ABS Agreement under Application Form-I (4197)-
Conveying the decision of 66th EC on ABS- reg.
Ref: Your letter dated 21.03.2022 received on 11.04.2022.

This has reference to your letter cited above, wherein you have requested this office to consider the Access and Benefit sharing under Regulation 2 of the ABS Guidelines (Resource-Centric Approach). You have also claimed that the choice of paying the benefit sharing between Regulation 2 or 4 is vested with the applicant.

2. It is to inform that your application along your claims were examined by the Expert Committee on ABS (EC on ABS) in its 66th meeting held on 27th April, 2022. The EC observed that the applicant, being a Section 3(2) entity, had accessed the biological resources without obtaining the prior approval of NBA and thereby contravened the provisions of Biological Diversity Act, 2002. Hence, EC on ABS has not agreed to the claims made by you.

3. Accordingly, you are requested to pay the higher benefit component under Regulation 4 of the ABS guidelines 2014 (0.5% of annual gross ex-factory sale price of the product) from the date of commercial utilisation and submit the duly certified audited statement for the same.

4. You are requested to submit the duly signed stamp paper agreement, as instructed by this office vide email dated 16.03.2022, within 15 days from the receipt of this communication."

46. The reasons recorded by the authority for arriving at the conclusions are not based on the remarks by NBA or by the recommendations of the Expert Committee. The impugned order referring to the access to biological resources by the appellant without obtaining the prior approval of NBA cannot be the reason to pay the higher benefit under Regulation 4 of the ABS Guidelines, 2014. Such non-speaking unreasoned or cryptic order passed without taking into account the relevant facts, evidence available are judicially de-recognised by the Courts normally. Mere mention of the provision of law without relevant facts and evidence cannot withstand the test of judicial scrutiny. The opinion expressed or conclusion arrived at in an order without recording the reasons is unjustifiable and such practice is deprecated by the Courts. There are catena of decisions which reiterate that non-speaking orders deserve to be quashed. The NBA

in exercise of its quasi-judicial function must record reasons in support of the order. The order should have considered objections/submissions made by the appellant and recorded the reasons. The failure on the part of the respondent to pass a speaking order vitiates the proceedings.

47. In the result, the Appeal is allowed and the impugned order is set aside. The matter is remitted back to the respondent for fresh consideration of its order. Needless to say that the principle of natural justice shall be followed. Consequently, the Appeal is disposed of.

48. In view of the disposal of the Appeal, I.A. No. 170 of 2022 is also disposed of.

Smt. Justice Pushpa Sathyanarayana, JM

Dr. Satyagopal Korlapati, EM

Internet – Yes/No
All India NGT Reporter – Yes/No

**Appeal No.54/2022 (SZ)&
I.A. No. 170/2022(SZ)
20th December 2023. AM & MN.**

**Before the National Green
Tribunal
Southern Zone (Chennai)**

**Appeal No. 54 of 2022 (SZ)
&
I.A. No. 170 of 2022(SZ)**

Dabour India Limited
Vs.

National Biodiversity Authority & Anr.



Appeal No. 54/2022(SZ)&
I.A. No. 170/2022(SZ)
20th December, 2023. (AM)