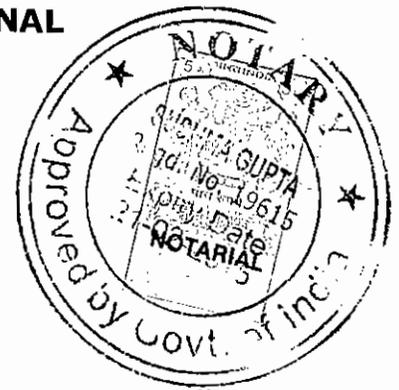


**BEFORE THE NATIONAL GREEN TRIBUNAL
(SOUTHERN ZONE) AT CHENNAI**

APPEAL NO. 62 OF 2021

IN THE MATTER OF

DCM Shriram Limited
Rep. by its Authorised Signatory
2nd Floor World Mark -1,
Aerocity, New Delhi - 110 037



...Appellant

-Vs-

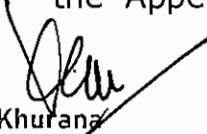
The National Biodiversity Authority
Rep. by its Member Secretary
5th Floor, TICEL Park, CSIR Road,
Taramani, Chennai - 600 113

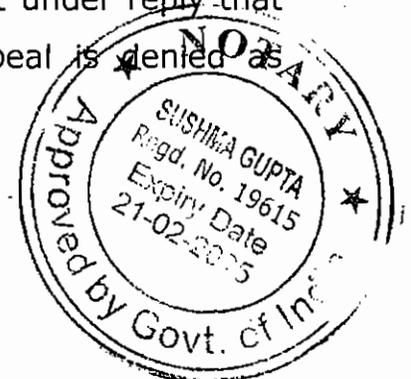
...Respondent

**REJOINDER FILED BY THE APPELLANT TO THE REPLY FILED BY
THE RESPONDENT**

The Appellant above named humbly submits as follows:

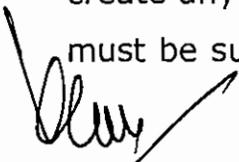
1. The present short rejoinder is being filed in reply to the counter-affidavit by the Respondent above-named in the captioned matter. It is submitted that the primary issues in the present Appeal are matters of interpretation of the Biological Diversity Act, 2002 ("BDA"), the connected Biological Diversity Rules, 2004 ("Rules") and the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 ("ABS Regulations"). Accordingly, the present short rejoinder is restricted to addressing material facts, if any. The Appellant herein fully reserves its right and craves the leave of this Hon'ble Tribunal to plead matters of law in its oral arguments and to file any additional rejoinder/affidavit, as may be required.
2. The Appellant denies all the averments made in the Counter-affidavit as untenable and without merit, insofar as they are contrary to the submissions in the present rejoinder and the Appeal. Nothing therein ought to be considered as being admitted by the Appellant unless the same has been specifically admitted herein below.
3. The averment in paragraph 6 of the counter-affidavit under reply that the Appellant has no *locus standi* to file this Appeal is denied.

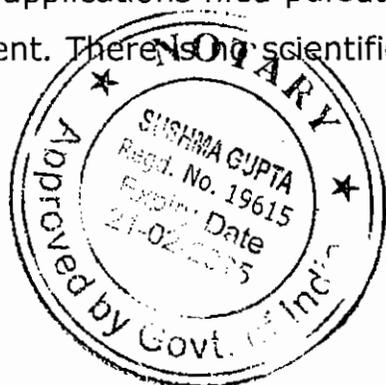

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erroneous. The Appellant is the applicant that filed the underlying applications before the Respondent, and the orders impugned are also against the Appellant. The Appellant is a "person aggrieved" and thus, entitled to file the present Appeal.

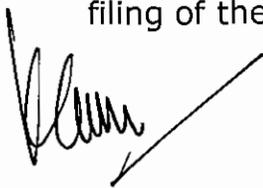
4. The averments in paragraphs 9, 13, 17, 32 of the counter-affidavit under reply that the Appellant has already violated the BDA and that its filing of the applications was a concession on liability and shows lack of *bona fides*, are denied in toto as erroneous, misconceived and misleading. It is denied that any biological resources were or are being accessed illegally by the Appellant. It is denied that there was or is any violation of the BDA, past or ongoing. On the other hand, the underlying applications were filed under the BDA on a "without prejudice" basis. In the Appeal, the Appellant had already averred on the circumstances that had led to uncertainty in the relevance of the BDA to the Appellant's activity in question, which is reiterated. The correct interpretation of the BDA exempts the Appellant from the scope of the BDA. Accordingly, no question of illegality or lack of *bona fides* arises. A further erroneous assumption on the part of the Respondent is the application of benefit sharing obligations, including upfront payment allegedly for the past fourteen (14) years, whereas the ABS Regulations were notified only in 2014 and even the apparently illegal upfront payment guidelines were issued only in 2018. This erroneous assumption is denied as incorrect. It is further noted that the Constitutional *vires* of certain provisions of the BDA, including Section 3, and the upfront payment guidelines, which directly impact the application of the BDA to the Appellant, is pending before the Hon'ble High Court of Telangana, in W.P.(C) 28517 of 2021. As of the date of this rejoinder, notice has been issued on the same.
5. It is submitted that the contents of paragraphs 11-13, 19, 25-26, 30 of the counter-affidavit under reply are denied as misleading insofar as they concern the interpretation of the office memorandum bearing F.N. C-12025/8/15-CS-III dated 10.09.2018 ("OM"). The said OM did not create any *ipso facto* rule that all applications filed pursuant to the OM must be subject to upfront payment. There is no scientific evidence of


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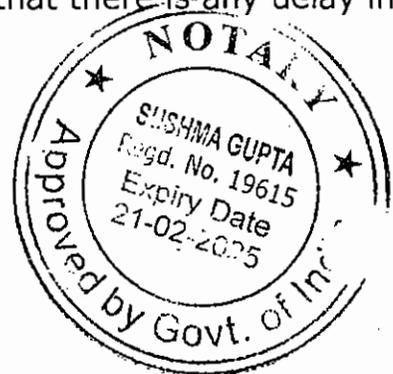


any damage to biological diversity. Further, nothing in the said OM suggested, whether expressly or impliedly, to necessarily impose a higher monetary benefit sharing arrangement for every application filed under the OM, and certainly does not suggest penalizing applicants filing under the OM.

6. The contents of paragraphs 12-14, 26-29 of the counter-affidavit under reply further suggest that the Respondent Authority had pre-decided to impose the highest monetary benefit sharing arrangements and/or upfront payment in its various meetings, i.e., 47th, 48th, 49th, 50th, 54th, 55th meeting. It is submitted that this defence is untenable for several reasons. First, none of these meetings of the Authority deals with whether the Appellant's activities are outside the purview of the BDA. In any case, if, as a matter of law, the Appellant's activities are not covered under the BDA, no decision of the Authority can override the same. Second, as the sequence of events in the Appeal demonstrates, it is only in the impugned order that a determination has been made in respect of this specific application. The decision to apply the impugned benefit sharing arrangement was specifically communicated for each application, to which the Appellant raised objections. These objections culminated in a hearing, and the final decision rejecting the Appellant's objections came only by way of the impugned order. Third, admittedly, the Appellants were not represented before the Authority at these meetings (which is not the same as the Expert Committee admittedly), and fourthly, these are also not specifically in respect of the underlying application under consideration in this Appeal. Such *carte blanche* orders are entirely outside the scheme of the BDA, which mandates a case-to-case decision. Fifth, even on the issue of "upfront payment", the reference is to "approved guidelines", which can only mean, as a matter of law, the ABS Regulations, which are the only guidelines approved under Sections 64 r/w 21(4). Sixth, no such reasoning is found in the impugned orders, and the Respondent cannot improve upon its order through the counter-affidavit. It is denied that there is any delay in the filing of the Appeal.

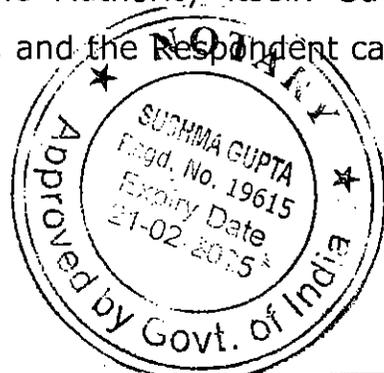


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7. It is submitted that the contents of paragraph 15 of the counter-affidavit under reply are denied as misconceived since the Appeal is not limited to only the application of upfront payment for research. In fact, the principal legal question is the inapplicability of the BDA to the Appellant's activity *per se*. It is only as subsidiary grounds of Appeal, raised on a without prejudice basis, that the Appellant has challenged benefit sharing determination in the present case. The Appeal is reiterated in this respect.
8. The allegation in para 32 of the counter-affidavit under reply that the Appellant has suppressed material facts is denied. While it is true that the Appellant has made payments of upfront payments in some cases, there can be no estoppel against the law. The fact that Appellants made upfront payments in the past on other applications cannot influence or affect the interpretation of BDA.
9. It is denied that the exemption of '*conventional breeding or traditional practices in use in any agriculture*' is not limited to only farmers. The issue of commercial motive is irrelevant when interpreting this exemption. The Respondent itself admits in paragraph 34 that conventional breeding is not "research", but only contests that the activities of the Appellant's division of developing hybrids etc., does not come within the purview of 'conventional breeding'. The contention in paragraph 35 of the counter-affidavit under reply relating to 'normally traded commodities' is entirely irrelevant to the present Appeal. Said contention relates to Section 40 of the BDA, and as per the notification issued thereunder, 'normally traded commodities' are exempt only for trading activities on specified items. Section 40 does not limit the scope of the exemption for '*conventional breeding or traditional practices in use in any agriculture*'.
10. In respect of paragraphs 41-44, the Appellant notes that the Respondent does not deny that the impugned orders were passed by the Secretary, NBA, who has no power to pass such orders. However, the defence raised appears to be that the impugned orders are a mere reiteration of the earlier decisions of the Authority itself. Such a defence is not part of the impugned order, and the Respondent cannot


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improve upon its order through the counter-affidavit. Further, the response to paragraphs 26-29 of the counter-affidavit under reply are reiterated herein. The other defence that such an argument was not raised before is also misconceived since there is not estoppel against the law. Inherent lack of jurisdiction to pass orders cannot be excused merely on the technical point that it was not raised before the trial court/lower court.

11. In respect of paragraph 46 of the counter-affidavit under reply, it is reiterated that the underlying application was filed on a without prejudice basis. In any case, the filing of the application or the fact of participation in the proceedings does not preclude the Appellant from raising legal issues on the non-applicability of the BDA itself. Further, the submissions made during the course of the proceedings on the calculation of benefit sharing are also grounds of Appeal raised in the present Appeal on a without prejudice basis, assuming but not conceding the BDA applies.
12. It is prayed that this Hon'ble Tribunal may be pleased to take the above rejoinder on file and allow the appeal as prayed for with costs and pass such further or other orders and thus render justice.

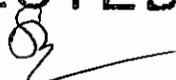
Dated at Delhi on this the 14th day of December, 2021


B. K. Khurana
Appellant
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VERIFICATION

I, B.K. Khurana, the Authorised representative of the Appellant hereby declare and verify that the facts and contents of the above paras are true to my knowledge based on records of the company and legal advise received and believed to be correct and that I have not suppressed any material facts.

Verified at Delhi on this the 14th day of December, 2021

ATTESTED

NOTARY PUBLIC
NCT DELHI




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Appellant
Vice President & Constituted Attorney
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14 DEC 2021