(2002) 04 NCDRC CK 0062

In the National Consumer Disputes Redressal Commission

A.S.Narayana APPELLANT

Vs

CATERPILLAR INC. RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Citation : 2002 3 CPJ 60

Hon'ble Judges : C.M.Nayar , Moksh Mahajan J.

Final Decision : N.O.E. discharged

Judgement

1. THIS complaint has been filed under Sections 36A, 36B(a), 10(a)(i), 36D and 37 of the Monopolies and Restrictive Trade Practices Act, 1969 for enquiring into the alleged monopolistic and restrictive trade practice being carried on by the respondents for prosecution and penalty and anti-trust laws of U.S.A. The complainant is stated to be engaged in import of spare parts, especially for Caterpillar engines and functions as Indenting Agent for few foreign companies and shippers. The complainant used to obtain spare parts for Caterpillar engines from his American Shippers, both for his own account and for account of individual customers. These Caterpillar engine parts are sold to fishing vessels engaged in fishing operations. Respondent Nos. 1 and 2 are wholly owned subsidiaries and/or trust companies of Caterpillar Americas Co. engaged in multinational manufacturing and trading operations. Respondent Nos. 3, 4, 5 and 6 are Indian Agents and business partners of Caterpillar. Respondents 3 and 4 are sole agents for India and respondents 5 and 6 are business partners of Caterpillar. The complainant next submits that import of Caterpillar spare parts into India is exclusively channelled through their sole agents, respondents 3 and 4 and as Caterpillar policies do not embrace direct dealings with customers except through the intermediary or their exclusive agents or dealer net-work who in turn are tacitly prevailed upon not to deal with persons outside their territorial jurisdictions. These actions impose restraints which has the effect of preventing, distorting and restricting competition which tends to bring about manipulation of prices or conditions of delivery or effect the flow of supplies so as to impose on the consumers unjustified costs which constitute restrictive trade practice as

defined in Section 2(o)(ii) of the Act.

2. THE modus operandi of the respondent is reiterated in paragraph 6 of the complaint which may be referred to as below : "(i) Respondent No 1 makes all policy decisions to be adopted by all affiliates and subsidiaries and also determines the net dealer prices, suggested consumer prices and terms of trading which are Restrictive Trade Practices as contemplated under Sections 33(1)(a) and 33(1)(d) of the Act. (ii) Respondent No. 1 determines the territories in which their respective dealers should operate and also tacitly prevails upon them not to deal with users outside their territories or sell at prices lower than those determined by it. This is a restrictive and monopolistic trade practice as contemplated under Sections 33(1)(f) and 33(1)(g) of the MRTP Act as well as under the anti-trust laws of U.S.A. (iii) Respondent Nos. 2, 3 and 4 by virtue of totally channelling supply of parts to end-users only through them, refusing to supply to any one else whether sought to be procured for and on behalf of end-users or for resale trade purposes, selling them only at prices suggested by respondent Nos. 1 and 2, have indulged in restrictive trade practices as contemplated in Section 33(1)(j) and 33(1)(ja) of the MRTP Act. (iv) Whilst respondent No. 3 asserts and claims that their Principals prices are (respondent No. 2 as well as respondent No. 1) applicable world-wide, the petitioner submits that this is not true as will be evidenced from the differences in basic net dealer prices and suggested consumer prices as between the price lists published by respondent Nos. 1 and No. 2 from U.S.A. base and the Far-East base. THE respondent Nos. 1 and 2 thereby misled the consumers to believe that their prices are of universal application as is usually the case with all global companies of repute and yet charging Indian customers 7.5% more than what was being charged to customers in other parts of the world and have thus indulged in unfair trade practices as contemplated under Section 33(1)(d) read with Section 2(o) of the MRTP Act as well as under the anti-trust laws of U.S.A. (v) Respondent Nos. 2 and 3 have misled the public by publishing a separate price-list from Far-East base whose published prices are increased by 7.5% over the published prices of respondent No. 1, since it is believed and taken for granted that prices of respondent Nos. 1 and 2 are uniform throughout the world. As such, respondent Nos. 1 and 2 have indulged in prohibited unfair trade practices as contemplated in Section 36A(ix) of the MRTP Act. (vi) Respondent Nos. 2 and 3 have further indulged in charging Indian customers over and above the inflated prices with "Parts Service charge", "impose charge", etc., when their published terms and conditions clearly state that the prices indicated are FOB parts distribution centres. Whilst the petitioner does not dispute a seller to charge for special services not covered in the price of an article, respondent Nos. 2 and 3 have been making such service charges for no apparent services rendered, or even contemplated to be rendered, or at all. This manifestly is a prohibited unfair trade practice within the meaning of the MRTP Act. As evidence of discrimination of such higher prices charged to Indian customers contrary to prohibition of anti-trust laws, the petitioner annexes hereto as Exhibit A true copy of an invoices

established by respondent No. 2 in respect of direct shipment to an Indian independent importer, super-imposed with corresponding prices of each item as appearing in the then applicable price list of Caterpillar Americas Co. This document, inter alia, high lights the price-discrimination perpetuated by the respondents through separate price-lists from Far East-base by Caterpillar Fareast Ltd., Singapore, and from U.S.A. by Caterpillar Americas Co. Documents showing the variation in prices in the two lists are being enclosed as Annexure C-1 colly. THE original price list of the respondent No. 1 effective February 1, 1988 which is applicable to the period of invoice is not being enclosed as the same is quite voluminous and the complainant seeks leave of this Hon''ble Commission to refer to the same and to produce the same at the time of arguments."

THE complainant has further submitted in paragraph 7 as follows : "It is established beyond doubt from the recent decision rendered in 1994 (71) ELT 106 (Tribunal) in the case of Collector of Customs and Central Excise, Madras v. General Marketing and Manufacturing Co. Ltd., (respondent No. 3) that there is mutuality of interest between respondent Nos. 2 and 3 as exhibited by the special stipulations in the nature of restraint/control in the sale and service agreement, and the fact that respondent No. 3 by the conditions of agreement is wholly controlled by respondent No. 2 since the manpower, the finance, the accounts, the inventories, the associates, etc. are all decided in consultation of with the consent of respondent No. 2. THEse stipulations and control clearly establish that they are indulging undisputedly in monopolistic and restrictive trade practices prohibited under the MRTP Act, as well as under the anti-trust laws of U.S.A. and prejudicial to public interest. Photocopy of the order of CEGAT, Special Bench ''C'', New Delhi is being enclosed as Annexure ''C-2''."

In view of above the complainant has prayed that a detailed investigation into the monopolistic trade practice carried on by the respondent be taken up and detailed investigation into the cost-structure of respondents be done with a view to prevent them from indulging in such acts or trade practice which result in elimination or lessening competition. The complainant has submitted that respondent Nos. 1 and 2 procure nearly 80% or thereabout of components that go into the assemblage of their engines and equipments from outside vendors or adopt components marked by vendors as opposed to in-house manufacture of components. The respondents have filed their separate replies.

Respondents 1 and 2 have maintained that there is an inherent lack of jurisdiction of this Commission as the said respondents are based outside India and the pleas against them are fully untenable and liable to be dismissed. It is next submitted that the complainant is a habitual litigant, inasmuch as a complaint was filed earlier also which was disposed of by its order dated 12.9.1991. This complaint was materially the same as the present one. Respondents 3 and 4 have also filed their respective replies who have also taken the plea that the present complaint is materially the same which was disposed of by this Commission vide its order dated 12.9.1991. Reference is made to the order passed by the Commission in C.A. No. 158/1993 vide order dated 28.1.1994 which may be reproduced as under : "The applicant argued the matter in person. He does not dispute that the present complaint is materially the same as the one which was disposed of earlier by the Commission by its order dated 12.9.1991. It is apparent that the Commission has no jurisdiction to pass any order on the same complaint. It is, however, open to the applicant to apply for review of the said order if he so desire. The copy of the earlier order passed by the Commission may be made available to the applicant today. With these observations, the present compensation application is disposed of as incompetent for the reasons stated above."

3. NOTICE of Enquiry was issued by an order made on 4.1.2001. The respondents have broadly taken the following pleas : The complainant is a ''Trader'' and not a ''Trade Association'' or a ''Consumer'' or a ''Consumer Association''. The complainant alleging for unfair or restrictive trade practices under Section 10(a)(i) or Section 36B respectively of the Act can be made either by a Trade Association or a Consumer Association having atleast 25 members or more. As per the provisions of Section 10(a)(i), it is provided that : "10. Inquiry into monopolies or restrictive trade practices by Commission-The Commission may enquire into,- (a) any restrictive trade practice- (i) upon receiving a complaint of facts which constitute such practice from any trade association or from any consumer or a registered consumers'' association whether such consumer is a member of that consumer''s association or not, or... ... ..."

4. THEREFORE, it is stated by the respondents that as per the provisions of the Act, the requirement is that to allege unfair or restrictive trade practices, the complainant should be either a consumer or a Trade Association or a Consumer Association. It has been held by the Hon''ble Delhi High Court in the matter of Ballarpur Industries v. D.G. (I&R), (1988) 64 CC 884, that individual traders of any number cannot file a complaint. Similarly, it has been held by this Hon''ble Commission in the matter of Modern Motors & Ors. v. LML Ltd. & Ors., II (2000) CPJ 91 (MRTP)=2000 (3) CPR 60 (MRTP), that where a complainant is a trader and not a consumer, the complaint is not miantainable. Further, relying upon the judgment of Balarpur Industries v. D.G. (supra), it was held that the definition of ''Consumer'' for the purpose of MRTP Act, 1969 will be the same as contained in the Consumer Protection Act, 1986. In the present case, the petitioner Mr. A.S. Narayana is the Sole Proprietor of M/s. Spares Corporation and has himself stated that he is engaged in the import of spare parts for Caterpillar Engine. As per the statement made by him in his complaint, his function is as an Indenting Agent for few foreign companies and shippers. He used to obtain spare parts for Caterpillar Engines from his American Shippers for his own account and account of individual customers and these Caterpillar Engine parts are sold to fishing vessels engaged in fishing operations. This clearly shows that the petitioner is not a ''consumer'' as he is obtaining goods not for his own consumption but for the purpose of resale. The present petition is not maintainable on the ground of

res judicata and laches. The present petition is the same as the one which was filed by the complainant earlier being No. 30(7132)/UTP/91. The said petition was dismissed by this Hon''ble Commission on merits as prima facie no case was made out by the complainant of either unfair or restrictive trade practice. Further, the petitioner is a habitual litigant inasmuch as the complaint filed by him earlier (which was similar to the present complaint) was disposed of by this Commission vide order dated 6.11.1991. The said order was final order against which no review was maintainable. However, the petitioner filed a review petition (present petition) after the expiry of almost three years from the passing of the order dated 6.11.1991. Besides, it is submitted that the review petition under Section 13(2) should be filed within a reasonable period of time and the filing of a petition after about three years under no circumstances can be considered a reasonable and deserves to be rejected. In this regard, the judgment of Supreme Court reported as AIR 1979 SC 789, In the matter of Mahindra and Mahindra is very clear which says that although the powers of this Commission are very wide under Section 13(2) of the MRTP Act, but this does not permit a re-hearing on the same material without anything more, with a view to showing that order is wrong on facts in the present case. The petitioner has himself admitted and this fact has also been recorded in the order of the Commission dated 28.1.1994 that "the present complaint is materially the same as the one which was disposed of earlier". In the light of the above facts, the respondents have pleaded that the present petition is not maintainable on the ground of res judicata and is badly suffering from laches.

5. WE have heard learned Counsels for the parties at length. It is not in dispute that the complainant had earlier approached this Commission and the following order was passed on 12.9.1991 : "I have read the application along with its annexures. I have also perused the note prepared by the office. I am not convinced that this is a matter where the burden of investigation should be put on the DG (I&R). The averments made in the application are somewhat vague and the complainant is not sure of the provisions of law under which action is desired to be taken by this Commission. Making allowance for the fact that the complainant may not be fully conversant with the specific provisions of law, I am still of the opinion that enough material has not been mentioned in the complaint or in the annexure thereto to enable the Commission to decide whether action should be for RTP or UTP. The complainant''s averments seem to suggest that the respondents have violated the laws of the United States, I do not see anything which spells out an unfair trade practice under our law. It is also noticed that the complainant has not annexed a copy of his letter dated 3.11.1990, addressed to Caterpillars of Hong Kong. That letter seems to be of some importance. If we call upon the complainant to appear in support of his complaint, we may at that time request him to bring this letter also. 2. In these circumstances, it would be better if we hear the complainant on the complaint and then decide whether an inquiry should be ordered or the complaint should be dismissed in limine. This is my view placed before M-I for his opinion."

6. SIMILARLY another order was passed on 28.1.1994 which has already been produced above holding the Compensation Application as disposed of as incompetent. We may also deal with the question of jurisdiction. In this regard it may be relevant to refer to following order which was passed by this Commission on 1.5.2001 : "Since the Notice of Enquiry has been issued, it will be appropriate for the respondents to file a reply thereto, raising their objection with regard to the jurisdiction of the Commission to entertain the present complaint petition and also whether the complainant, who is not a consumer, can file the present complaint petition in view of the order passed by the Hon''ble High Court of Delhi in the case of Ballarpur Industries v. The Director General (Investigation and Registration), wherein the definition of a consumer as contained in the Consumer Protection Act, 1986 has been held to be applicable to the MRTP Act, 1969. Learned Advocate for the respondent, accordingly, does not press the review application which is disposed of as not pressed. He also undertakes to file a reply to the Notice of Enquiry within six weeks with a copy thereof, to the applicant/ complainant through the Advocate. The case is adjourned to 24th August, 2001 for consideration and/or for directions."

The complaint is liable to be non suited on the basis of judgment of High Court a reported as (1988) 64 Com. Cases 884 in the matter of Ballarpur Industries v. Director General of Investigation and Registration. It may also be interesting to refer to one communication dated 3rd November, 1990 which the complainant addressed to one Mr. Joginder Singh which will indicate that the complainant is only a rival in the trade and the purpose of filing the present complaint is to acquire agency of the respondents 1 and 2.

Notice of Enquiry has been issued on the basis of strong allegations of restrictive and unfair trade practices levelled against the respondents in the amended complaint. In response thereto, no evidence has been filed by the complainant in support of the main allegations of duality of price and inflated prices charged from Indian customers. On the other hand they have been strongly refuted specifically by respondent No. 3 who contends his relationship with respondent No. 1 and respondent No. 2 to be ''On Principal to Principal Basis''. Though the prices paid by the Indian dealers to Caterpillar dealers are to be on net prices, agents are stated to be free to sell parts at whatever prices they choose to do so. The difference in prices is stated to be on account of charges for transportation, insurance, handling charges, banking duties, warehousing and other incidental expenses not coming within the purview of price lit as published by the Principal. These submissions have not been refuted by the complainant by way of any material placed on record. Explanation has also been rendered in respect of Clauses 2(a) and 3(b) of Sales and Service Agreement by the respondents. Coupled with the other facts as listed above, no useful purpose will be served in continuing the inquiry in the present case. In view of the above reasons we do not find any ground to continue with the present proceedings. The same are accordingly dismissed. Notice of Enquiry deserves and is directed to be discharged. N.O.E. discharged.

