(2016) 09 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (C).No. 22534 of 2016 (N)

B. Unnikrishnan APPELLANT

Vs

Competition Commission of India RESPONDENT

Date of Decision : 23-09-2016

Acts Referred:
Competition Act, 2002 — Section 19(1)(a), Section 26(1), Section 48

Citation : (2016) 4 KLT 395

Hon'ble Judges : Mr. P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : Sri. R. Lakshmi Narayan, Smt. R. Ranjini, Smt. S. Renjith and Sri. M. Ashok Kini, Advocates, for the Respondent No. 2; Sri. Bechu Kurian Thomas (Sr.) and Sri. Rony Jose, Advocates, for the Petitioners

Final Decision : Dismissed

Judgement

Mr. P.B. Suresh Kumar, J. - Exts.P2, P3 and P5 orders passed by the Competition Commission of India constituted under the Competition Act, 2002 (''the Act'' for short), are under challenge in this writ petition.

2. The second respondent is a person closely associated with the Malayalam film industry in different capacities. He lodged Ext.P1 complaint before the Competition Commission of India (''the Commission'' for short), alleging that the opposite parties, taking advantage of their dominant position in the industry, are indulging in anti-competitive practices to restrain him from carrying on his business. To be precise, the main allegation in Ext.P1 complaint is that a ban had been imposed against him by the second opposite party namely, the Film Employees Federation of Kerala and its affiliated trade unions.

3. On 24.2.2015, the Commission directed its Director General to cause an investigation into the allegations raised in the complaint. A report had been filed pursuant to the said direction by the Director General, on 18.11.2015. Ext.R2(a) is the report of the Director General. On a consideration of Ext.R2(a) report, as

per Ext.P2 order, the Commission decided to forward copies of the said report to the complainant and opposite parties 1, 2, 6 and 7. As per the said order, the Commission also decided to forward copies of the report to persons identified in the report as responsible for contravention of the provisions of the Act. Petitioners are six out of the eight persons named in Ext.P2 order as persons responsible for contravention of the provisions of the Act. They are some of the office bearers of the opposite parties 1, 2, 6 and 7 in the complaint. As per Ext.P2 order, the Commission directed opposite parties 1, 2, 6 and 7 as also the persons named therein including the petitioners to file their objections to the investigation report submitted by the Director General and appear for an oral hearing on the report of the Director General in person or through their duly authorised representatives on 3.2.2016. Opposite parties, 1, 2, 6 and 7 were also directed as per the said order to file their financial statements for the preceding three years. By Ext.P2 order, the Commission also directed the petitioners to file their income tax returns for the preceding three years. The petitioners did not appear in person before the Commission on 3.2.2016 nor did they file their income-tax returns as directed in Ext.P2 order. Since the opposite parties and others in the complaint to whom copies of the report of the Director General were forwarded as per Ext.P2 order sought time to file objections to the report, the hearing of the case was adjourned to 10.3.2016. The petitioners did not appear before the Commission on 10.3.2016 as well. The hearing proposed on the report of the Director General as per Ext.P2 order was, however, rescheduled to 21.4.2016. The petitioners did not appear before the Commission on 21.4.2016 also. In the circumstances, the parties who appeared before the Commission were heard in part on 21.4.2016 and the hearing was concluded on 27.4.2016. Ext.P3 is the order passed by the Commission on 27.4.2016. Since the petitioners did not appear on 27.4.2016 also, as per Ext.P3 order, the Commission directed that the proceedings will be continued against them as if they have nothing to say in the matter. On the same day, by a separate order, the Commission directed its Secretary to issue notice to the petitioners calling upon them to show cause why penalty under Section 43 of the Act shall not be imposed on them for non compliance of the direction issued by the Commission in Ext.P2 order to file their income tax returns. Ext.P5 is the order issued by the Commission in this connection. Pursuant to Ext.P5 order, notices have been issued by the Secretary of the Commission to the petitioners and the petitioners have submitted their reply to the notices. Ext.P6 is the notice issued to the first petitioner pursuant to Ext.P5 order and Ext.P7 is the reply sent by the first petitioner to Ext.P6 notice. It is stated by the petitioners in the writ petition that replies identical to Ext.P7 have been sent by the remaining petitioners also. Along with the replies, the petitioners have also forwarded their income tax returns. Final orders in this connection are yet to be passed by the Commission. The Commission has also not disposed of the complaint preferred by the second respondent. This writ petition is filed at that point of time, challenging Exts.P2, P3 and P5 orders.

4. A counter affidavit had been filed by the second respondent supporting Exts.P2, P3 and P5 orders of the Commission.

5. Heard the learned Senior Counsel for the petitioners as also the learned counsel for the respondents.

6. Section 3(1) of the Act prohibits the anti-competitive agreements defined therein. Section 4(1) of the Act provides that no enterprise or group shall abuse its dominant position. Section 19 of the Act confers power on the Commission to enquire into any alleged contravention of the provisions contained in Sections 3(1) and 4(1) of the Act either on its own motion or on receipt of complaints. Section 26 of the Act dealing with the procedure for enquiry under Section 19 of the Act provides that on receipt of information, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter. Section 48(1) of the Act provides that where a person committing contravention of any of the provisions of this Act or order made or direction issued thereunder is a company, every person, who at the time of the commission of contravention, was in charge of, and was responsible to the company for the conduct of his business, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against the punished accordingly. The proviso to Section 48(1) of the Act clarifies that nothing contained in Section 48(1) of the Act shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. Section 48 (2) of the Act provides that notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act, or of any rule, regulation, order made or direction issued thereunder had been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly. Explanation to Section 48 clarifies that the company means a body corporate and includes a firm or other association of individuals. In other words, if the provisions of the Act are contravened by an association, every person who at the time of commission of contravention was in charge of, and was responsible for the company for the conduct of its business shall be deemed to be guilty of the contravention and is liable to be punished.

7. Going by the scheme of the Act, the Commission is empowered to initiate proceedings under the Act against any person for contravention of the provisions of the Act either on its own motion or on receipt of information or on a reference by the Central or State Governments or a statutory authority. A complaint filed under Section 19(1) (a) of the Act is only a mode by which the Commission is informed about the contravention of the provisions of the Act. As noted above,

Section 26 of the Act confers power on the Commission to direct the Director General to cause an investigation to be made into any matter, if the Commission is of the opinion that there exists a prima facie case. It is, therefore, evident that if it is revealed in the course of investigation made pursuant to an order passed by the Commission under Section 26(1) of the Act that persons who are not parties to the complaint have contravened the provisions of the Act, the Commission is well within its powers to initiate action against them also under the Act. It is seen that in Ext.R2(a) report, the Director General has stated that the petitioners are also responsible for contravention of the provisions of the Act in their capacity as persons in charge of and responsible to opposite parties 2, 6 and 7 for the conduct of their business. True, the said finding of the Director General is not final and conclusive, but, if the Commission finds that a prima facie case has been made out against any person in the report, the Commission will have to decide the correctness of the findings rendered therein, after affording the parties concerned an opportunity to file objections against the report and after affording them an opportunity for hearing. It is seen that it is since the Commission found from the report of the Director General that a prima facie case against the petitioners had been made out, notices have been issued to the petitioners as well as per Ext.P2 order with a view to proceed against them for having contravened the provisions of the Act. Ext.P2 order of the Commission is, therefore, perfectly in order and the same does not affect the rights of the petitioners in any manner.

8. The fact that the petitioners have neither filed objections to the report submitted by the Director General nor did not appear before the Commission for the hearing proposed on the report, is not in dispute. It is seen that in the notices issued to the petitioners dated 23.12.2015, it was categorically mentioned that in case the petitioners do not file their objections against the report, it will be presumed that they have nothing to say in the matter and the Commission will proceed with the complaint on that basis, indicating clearly that if they do not establish that the report of the Commission as against them is incorrect, proceedings will be continued against them also as if they have contravened the provisions of the Act. The direction of the Commission in Ext.P3 that the proceedings before the Commission will be continued as if the petitioners have nothing to say in the matter is also, therefore, in order.

9. Section 43 of the Act provides that if any person fails to comply, without reasonable cause, with a direction given by the Commission under Section 36 of the Act, such person shall be punished with fine. The fact that the Commission has directed the petitioners to produce their income tax returns for the preceding three years is not in dispute. The fact that the petitioners have not complied with the said direction of the Commission is also not in dispute. Ext.P5 order of the Commission directing the Secretary to issue notices to the petitioners directing them to show cause why proceedings under Section 43 of the Act shall not be initiated against them for non compliance of the direction contained in Ext.P2 order as regards the production of the income tax returns is intended to

ascertain whether the failure is on account of any reasonable cause. In the light of the provision contained in Section 43 of the Act, on the admitted facts, I do not find any irregularity or illegality in Ext.P5 order also.

10. The materials on record indicate that the proceedings commenced pursuant to the complaint preferred by the second respondent is yet to be over. A final decision on the issue as to whether the opposite parties in the complaint have contravened the provisions of the Act will be rendered by the Commission only when it disposes of the complaint. If only the Commission finds that the opposite parties in the complaint have contravened the provisions of the Act and that the petitioners were in charge of, and were responsible to opposite parties 2, 6 and 7 for the conduct of their business at the relevant time, they are liable to be proceeded and punished under the Act. There is, therefore, absolutely no reason for the petitioners to be aggrieved by Exts.P2, P3 and P5 orders at this point of time. The contention of the petitioners that proceedings against the office bearers of the opposite parties in the complaint can be initiated only if it is established that the opposite parties have contravened the provisions of the Act is also without any basis. True, even if it is found that the opposite parties have contravened the provisions of the Act, the petitioners can be proceeded against only if it is found that they were in charge of and were responsible for the conduct of the business of the opposite parties at the relevant time. But, that does not mean that proceedings against the petitioners can be initiated only after the conclusion of the proceedings in the complaint. The scheme of the Act does not contemplate two separate proceedings against the opposite parties as also against the office bearers of the opposite parties who are liable to be proceeded under Section 48 of the Act. The proceedings under the Act, going by its scheme, is a composite one. As such, the guilt, if any, of the persons who come under Section 48 of the Act also needs to be examined simultaneous to the guilt of the opposite parties.

In the aforesaid facts and circumstances of the case, there is no merit in the writ petition and the same is, accordingly, dismissed.