(1975) 10 CAL CK 0007

In the Calcutta High Court

Case No : C.R. No. 13638 (W) of 1975

Bengal Potteries Ltd. and Another — APPELLANT

Vs

M.R.T.P. Commission and Others — RESPONDENT

Date of Decision : 03-10-1975

Acts Referred:

Monopolies and Restrictive Trade Practices Act, 1969 — Section 16(2), 33, 35, 37, 37(2)

Citation : (1975) 45 CompCas 697

Hon'ble Judges : Amiya Kumar Mookerji, J

Bench : Single Bench

Advocate : Bijoy Kumar Bachawat and Sujit Kumar Sinha, for the Appellant; Satyabrata Mukherji and Samar Banerji, for the Respondent

Judgement

Amiya Kumar Mookerji, J.—This rule is directed against two orders dated July 18, 1974, and September 6, 1974, by which the Monopolies and Restrictive Trade Practices Commission adjourned the hearing of the petitioners'' application dated 11th March, 1974, and refused to raise preliminary issues Nos. 5 and 6.

2. Petitioner No. 1 is an existing company, incorporated under the Indian Companies Act, 1913. Since 1966, petitioner No. 2 carries on business as sole selling agent of the petitioner No. 1. By an agreement dated April 1, 1971, petitioner No. 2 was reappointed as sole selling agent for a further period of five years. On June 1, 1970, the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as " the said Act "), was brought into force. On 1st August, 1970, the Central Government established the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as "the Commission"). On 30th August, 1972, respondent No. 6, Registrar of Restrictive Trade Agreements filed an application, being Application No. 6 of 1972, u/s 10(a)(iii) of the said Act, alleging that the petitioners were indulging in various restrictive trade practices specified therein. On 6th September, 1972, the Commission issued a notice to the petitioners intimating that an enquiry u/s 37

of the Act was proposed to be held. On September 20, 1972, both the petitioners entered appearance. They filed their statement of cases on November 1, 1972, before the Commission. On November 13, 1973, the Commission framed, by consent of parties, ten preliminary issues. Thereafter, on February 16, 1974, the petitioners submitted before the Commission that they would hold a discussion with the respondent No. 6 with a view to find out modification to certain clauses of the said agreement dated 1st April, 1971. The Commission allowed time to hold discussion. The petitioners filed an application on March 11, 1974, by which they prayed to the Commission for directions for implementation of the proposed modification sought to be made in the said agreement. The Commission by its order dated July 18, 1974, adjourned the final disposal of the said application upon the view that that was not the proper stage for exercising powers u/s 37(2) of the Act. On 3rd of August, 1974, the petitioners filed another application praying for cancellation of the said agreement dated 1st April, 1971, and requested the Commission to take into consideration the said application, while giving decision regarding issues Nos. 5 and 6. By a memorandum dated August 20, 1944, the Secretary of the Commission intimated to the petitioners that the Commission had rejected the petitioners'' said application dated August 3, 1974. The Commission, thereafter, by its order, dated September 6, 1974, came to the conclusion that the said issues, namely, Nos. 5 and 6, did not arise.

3. The petitioner being aggrieved by the aforesaid two orders moved this court in an application under Article 226 of the Constitution and obtained the present rule.

4. Mr. Sinha, appearing on behalf of the petitioners in support of the rule, contends that u/s 5 of the Act, the Commission shall consist of a Chairman and not less than two and not more than eight other members to be appointed by the Central Government. The Commission could not be validly constituted under the Act with less than three members including the Chairman. In the instant case, only the Chairman and the other member conducted the proceedings and heard the matter to the exclusion of the other member. According to Mr. Sinha, the entire proceedings before the so-called Commission constituted by two members were illegal and without jurisdiction.

5. Reliance was placed upon the decision of the Supreme Court in the case of The United Commercial Bank Ltd. Vs. Their Workmen, and of the decision of the Division Bench of the Madras High Court in Kama Umi Isa Ammal Vs. Rama Kudumban and Others, .

6. Section 2(b) of the Act defines "Commission", which means the Monopolies and Restrictive Trade Practices Commission established u/s 5.

7. Establishment and constitution of the Commission are provided u/s 5. Section 5(1) reads that, for the purposes of this Act, the Central Government shall establish, by notification in the official Gazette, a Commission to be known as the Monopolies and Restrictive Trade Practices Commission which shall consist of a Chairman and not less than two and not more than eight other members, to be

appointed by the Central Government.

8. Section 6(4) says that no act or proceeding of the Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

9. Sub-section (6) of Section 6 provides that, in the case of a difference of opinion among the members of the Commission, the opinion of the majority shall prevail and the opinion or orders of the Commission shall be expressed in terms of the views of the majority.

10. Section 16(2) provides that the powers or functions of the Commission may be exercised or discharged by Benches formed by the Chairman of the Commission from among the members.

11. u/s 5, a Commission is to be constituted with the Chairman and not less than two members. It is not disputed that originally the Commission was validly constituted in terms of Section 5 of the Act. Sri A. Alagiriswami resigned from the office of the Chairman of the Commission from October 16, 1972, as he was appointed a judge of the Supreme Court. Thereafter, on July 23, 1973, Sri J. L. Nain, judge of the Bombay High Court, was appointed as the Chairman of the Commission. On August 30, 1972, the Registrar of Restrictive Trade Agreements made the application against the petitioners before the Commission. At that time there were three members in the Commission. On November 13, 1973, when the Commission framed the preliminary issues the other member, Sri D. Subramaniam, relinquished his post as member of the Commission on November 3, 1973. As such, there was a casual vacancy and that vacancy was filled up on May 14, 1974, when Sri H.M. Jhala was appointed as the other member of the Commission.

12. When the issues were framed on November 13, 1973, there were two members--the Chairman and the other member. There was a casual vacancy as the third member, Sri Subramaniam, relinquished his office on November 3, 1973. That proceeding of formation of issues became valid in view of Section 6(4) of the Act. It appears that on 18th July, 1974, an order was passed by the Chairman u/s 16(2) of the Act forming a Bench constituting the Chairman and the other member, Sri H. K. Pranjape. u/s 16(2) the powers or functions of the Commission can be exercised by a Bench formed by the Chairman Therefore, the Chairman may form a Bench even with less than three members. Sub-section (6) of Section 6 will come into play only if there is difference of opinion among the members. In case there is a difference of opinion, obviously, the matter may be referred to a third member. Powers of forming a Bench by the Chairman u/s 16(2) of the Act is not dependent or controlled by provisions of Sub-section (6) of Section 6 because those provisions are contingent and it depends upon happening of difference of opinion among the members. Accordingly, in my opinion, there is no statutory bar for conducting a proceeding or hearing a matter by a Bench formed by the Chairman and one member of the Commission.

13. The The United Commercial Bank Ltd. Vs. Their Workmen, , as referred to by the petitioner, in my view, has got no application to the present case. The question before the Supreme Court was that, in respect of a Tribunal when the services of a member other than the Chairman have ceased to be available, whether the rest of themselves had the right to act as the Tribunal without the Government reconstituting the Tribunal as a Tribunal with the remaining members. The Supreme Court held that where the services of one member have ceased to be available he cannot sit again with the other member to form the Tribunal in the absence of a notification u/s 7 of the Industrial Disputes Act, 1947. In the Industrial Disputes Act, 1947, there is no such provision similar to Section 6(6) or 16(2) of the Monopolies and Restrictive Trade Practices Act, 1969. So, the principles as laid down by the Supreme Court in the United Commercial Bank''s case1 as regards the formation of the Tribunal has got no application to the formation of the Restrictive Trade Practices Commission or its powers or functions under the said Act.

14. I am unable to follow how the decision of the Madras High Court in Kama Umi Isa Ammal Vs. Rama Kudumban and Others, would be of any assistance to the petitioner. Under the Madras Estates (Abolition and Conversion into Ryotwari) Act, a Tribunal was constituted. " Tribunal " has been defined in Section 8(2) of the Act. It is expressly provided therein that each Tribunal shall consist of three members. The rules framed under the Act provide that two members of the Tribunal may dispose of the matters of the Tribunal. The Supreme Court held that the said rules were ultra vires because they were contrary to the provisions of the Act itself.

15. It is well-settled that rules cannot override the provisions of the statute. So, that decision has got no bearing on the facts and circumstances of the present case.

16. It is contended that the Commission illegally refused to exercise its jurisdiction to determine and dispose of the petitioners'' application u/s 37(2) of the Act, dated 11th March, 1974, and by its order dated 18th July, 1974, adjourned the hearing of the said application along with the complaint made by the Registrar. It is submitted that if the Commission heard and disposed of the said application, in that case, there would have been no necessity of holding the protracted enquiry u/s 37 of the Act. The Commission on a previous occasion decided a similar application of Cadbury Fry (India) Pvt. Ltd., Bombay.

17. In the application filed by the petitioners on the 11th March, 1974, a copy of the agreement incorporating certain modifications proposed to be made has been annexed. It is stated in the said application that the revised agreement comes within the scope of Section 294 of the Companies Act and it would be necessary to get the same approved at the next general meeting of the petitioners'' company. The petitioner prayed for a direction from the Commission for implementation of the proposed modification sought to be made in the agreement dated 1st April, 1971. The Commission was of opinion that Section

37(2) arose only after the enquiry into the existence of a restrictive trade practice had been made and the restrictive trade practice had been established and was considered prejudicial to the public interest. At that stage, instead of making an order contemplated by Clauses (a) and (b) of Sub-section (1) of Section 37, the Commission might act under Sub-section (2) of that section.

18. It is urged that the Commission has power to make an order permitting the parties to modify the agreement and direct that that portion of the agreement which have been complained of by the Registrar in his complaint to be deleted or modified even before the termination of the proceedings u/s 37 of the Act or coming to any finding by the Commission.

19. Section 37(2) of the Act reads as follows :

" 37. (2) The Commission may, instead of making any order under this section, permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in this behalf by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest, and, in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in respect of that trade practice."

20. Sub-section (2) of Section 37 conferred discretion upon the Commission that instead of making an order u/s 37(1), it may permit the party to any restrictive trade practices, if he applies, to take steps within a specified time that trade practices would no longer be prejudicial to the public interest and if the Commission is satisfied that necessary steps have been taken within a specified time, in that case the Commission may not pass an order under Sub-section (1) of Section 37.

21. In my opinion, that permission can be granted only to the party to a restrictive trade practice. Before exercising any discretion under Sub-section (2) of Section 37, the Commission must come to the conclusion that the applicant is a party to any restrictive trade practice or the applicant admits before the Commission that he has indulged in restrictive trade practices. The Commission cannot exercise its discretion u/s 37(2) unless it is found that the applicant is a party to the restrictive trade practices. The finding can be arrived at only at the termination of the enquiry. In the instant case, the petitioners did not make any admission before the Commission that they indulged in restrictive trade practices. That being so, until the enquiry u/s 37 is completed and the Commission forms its opinion that the practice indulged in by the petitioner is prejudicial to the public interest, no order can be passed u/s 37(2) of the Act.

22. In the Cadbury Fry''s case, a complaint was made by the Registrar and a notice was issued to the company on the 19th May, 1972. The company by its letter, dated 2nd June, 1972, requested for time to enable it to consider the revision of the terms in the agreement complained of by the Registrar. The revised terms were submitted on 3rd July, 1972, before the Commission and, in

terms of Section 37(2), the Commission found that the company had removed the clauses which were restrictive in nature and, thereupon, the Commission decided not to make any order u/s 37 in respect of the trade practices complained of by the Registrar.

23. In the aforesaid case, the company admitted that there was a restrictive trade practice in the agreement and at the earliest stage of the enquiry made an application u/s 37(2) for modification. The Commission passed an order under that section instead of making any enquiry u/s 37(1),

24. In my opinion, the facts and circumstances of the present case are entirely different from that of the Cadbury Fry''s case and as such it cannot be said that the Commission should have passed a similar order in the instant case as it had passed in Cadbury Fry''s case.

25. It is contended by Mr. Sinha that by an order dated September 6, 1974, the Commission illegally exercised its jurisdiction in refusing to raise the preliminary issues No. 5 and 6.

26. Issues Nos. 5 and 6 are as follows:

" 5. Whether the agreement dated 1st April, 1971, does not require registration u/s 35 read with Section 33 of the said Act ?

6. Whether the Commission has jurisdiction to determine issue No. 5 ? "

27. The Commission observed :

" The agreement dated 1st of April, 1971, has been voluntarily submitted by the petitioner for registration to the Registrar and has been duly registered. Implicit in the act of sending the agreement for registration is an admission that it requires registration. However, we are not at the moment dealing with any application for deregistration nor have we jurisdiction to entertain such application as there is no provision in the Act empowering us to deal with such application. In our opinion issues No. 5 and 6 do not arise."

28. Chapter V of the Act deals with the registration of agreements relating to restrictive trade practices. Section 33 lays down what are registrable agreements relating to restrictive trade practices. Chapter VI deals with control of certain restrictive trade practices. Investigation into restrictive trade practices by the Commission has been provided u/s 37. Every agreement falling within Section 33 shall become registrable under the Act.

29. So, considering the provisions of the Act, in my view, in an enquiry u/s 37, the Commission has got no jurisdiction to decide whether an agreement requires registration u/s 35 read with Section 33 of the Act,

30. In the instant case, the petitioners were of opinion that the agreement, dated 1st April, 1971, fell within Section 33 and, accordingly, they got it registered with the Registrar. The Commission in an enquiry u/s 37 is not at all

concerned about registration of an agreement. As such, it cannot pass any order with respect to issues Nos. 5 and 6. In my opinion, the Commission has rightly decided that in an enquiry u/s 37 of the Act those two issues, namely, Nos. 5 and 6, did not arise.

31. Considering the facts and circumstances of this case, in my opinion, the Commission has rightly refused to entertain the petitioners'' application u/s 37(2) of the Act before the termination of the enquiry and decided to dispose of the same along with the complaint. I find no reason to interfere with the impugned order of adjournment and the Commission''s refusal to hear issues Nos. 5 and 6.

32. In the result, this rule is discharged, but there will be no order for costs.

