(1998) 01 NCDRC CK 0057

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL (I And R) APPELLANT

Vs

MAHINDRA and MAHINDRA LTD. RESPONDENT

Date of Decision : 06-01-1998

Acts Referred:

Citation : 1998 1 CPJ 18

Hon'ble Judges : Sardar Ali Khan , S.Chakravarthy J.

Final Decision : Enquiry discharged

Judgement

1. THIS is an enquiry which has been initiated by an application filed by the Director General (Investigation and Registration) (DG for brief) under Section 10(a)(iii) of the MRTP Act, 1969. In his application, the DG has alleged that Mahindra and Mahindra Ltd. (respondent hereinafter) has indulged in certain restrictive trade practices within the meaning of Section 2(o) and Section 33(1) of the Act. The averments of the DG in his application are summarized hereinunder :

2. THE respondent is a Company engaged in the business of manufacture and sale of tractors, spare parts and implements. For the purpose of sale and distribution of the said products, the respondent appoints and has appointed dealers on certain terms and conditions in a standard agreement format. THE DG has alleged that the agreement between the respondent and the dealers contains certain clauses like Clauses 1, 10(a), and 10(b) which restrict the dealers to sell the products of the respondent only within an allocated territory thus attracting Section 33(1)(g) of the Act being a restrictive trade practice. Similarly, the DG submits that Clause 33(1)(c) of the agreement restricts the dealers to deal only in the spare parts supplied by the respondent and forbids them from dealing in spare parts not supplied by it, thus attracting Section 33(1)(c) of the Act being a restrictive trade practice. Based on the application of the DG, the Commission issued a Notice of Enquiry (NOE) on 30th March, 1988 charging the respondent of having indulged in the restrictive trade practices falling within the provisions of Section 33(1)(c), Section 33(1)(g) and Section 2(o) of the Act. It has been

mentioned categorically in the NOE that the impugned agreement had been submitted by the respondent to the DG for registration. Registration of agreements falling within one or more of the clauses of Section 33(1) of the Act, is compulsorily required under Section 33 read with Section 35 of the Act.

The respondent on being communicated with the NOE and a copy of the DG''s application submitted its detailed reply. A summary of the same is as under : (1) The NOE is "illegal, null and void" as the alleged trade practices do not constitute restrictive trade practices whose existence is a condition precedent to the exercise of jurisdiction by the Commission. (2) The NOE does not list the necessary ingredients in satisfaction of Section 2(o) of the Act. Nor does it set out the constituent facts. Nor does it set out how competition has been affected. (3) No preliminary enquiry has been held before coming to the conclusion that the respondent has indulged in the alleged restrictive trade practices. (4) The impugned clauses in the agreement have to be read alongwith the remaining provisions in the agreement and not in an isolated manner. The clauses in challenge are beneficial not only to the purchasers of the products but also to the dealers and the manufacturer. It is in the interest of all the parties involved that "each dealer deals exclusively with the products of one manufacturer and is assigned a territory" in order to ensure supply of genuine spare parts relating to tractors. (5) The dealership arrangement requires the dealer to make substantial investment to meet the needs of the products in the form of services, quality, etc. The reputation of the products is also involved. Tractor being a "service incentive product", the territorial franchise is effective and in the interest of the purchaser. The removal of the alleged trade practice is likely to deny the purchaser the advantage of proper services and supply of genuine spare parts from the dealers. (6) In any case, the respondent is entitled to gateways available in Clauses (a), (b), (g) and (h) of Section 38(1) of the Act, as the restrictions are reasonable having regard to the nature of the products. After the pleadings were completed the following issues were framed : (1) Has this Commission no jurisdiction to entertain and decide the application of the DG? (2) Did the respondent indulge in restrictive trade practices as alleged in the NOE read with the application of the DG? (3) If issue No. 2 is decided against the respondent, are the restrictive trade practices not restrictive to public interest ? (4) Relief. DG adduced only documentary evidence. He submitted the dealer agreement which was marked as Exhibit A 1. The respondent adduced the oral evidence of Shri Shashanka Sanyal, its Sr. Manager (Sales Administration). He was cross examined by the Advocate for the DG. The Commission directed on 11th October, 1993 that the evidence recorded in RTPE 178/88 may be read in this enquiry. It was further directed on that day that the two enquiries RTPE 176/88 (this enquiry) and RTPE 178/88 be consolidated.

3. WE have separately pronounced our order in RTPE 178/88 which deals only with the allegation that the dealers are restricted to deal only in the spare parts supplied by the respondents and are forbidden from dealing with the spare parts not supplied by the respondent. This allegation is one of the two allegations in

this enquiry, namely, RTPE 176/ 88. (The two allegations relate to territorial restrictions and restrictions on the dealers from dealing in goods other than those of the respondent). As we have given our decision on one of the two allegations, namely, restrictions on the dealers from dealing in goods other man those of the respondents (which is common to both the enquiries), we direct that our decision in RTPE 178/88 shall be read in this enquiry and shall form a part of this order. This is in line with the Commission''s direction of date 11th October, 1993 that the two enquiries be consolidated and that the evidence in RTPE 178/88 be read in RTPE 176/88 (this enquiry).

4. AFTER this enquiry has commenced, during its pendency, the ruling of the Hon''ble Supreme Court on the scope of Section 33(1) of the Act became available. The ruling was in the case of Voltas Ltd. v. Union of India and Ors., 1995 (3) CTJ 19 (SC) 7th Feb., 1995). It is not disputed that the respondent had tendered the impugned agreement to the DG for registration under Section 35 of the Act. The Apex Court had ruled in the Voltas case (supra) as follows : "Section 37 contemplates and conceives enquiry in respect of any restrictive trade practice relating to an agreement which has been registered under Section 35 as well as an agreement which has not been so registered. As such persons who have got their agreements registered on their own in order to escape prosecution, although in such agreements there may not be any clause relating to restrictive trade practices, can not urge before the Commission, after having got the agreements registered, that they do not contain any clause relating to any restrictive trade practice..-.But once he gets the agreement registered, then he is debarred from questioning whether it contains any clause relating to a restrictive trade practice.......But once the agreement is registered, then such agreement can not be enquired into by the Commission, for the purpose as to whether it relates to any restrictive trade practice of course, in spite of registration of the agreement the person concerned can satisfy the Commission that such practice is not prejudicial to the public interest."

As the NOE itself refers to the registration of the agreement, the aforesaid ruling of the Hon''ble Supreme Court in the Voltas case (supra) will squarely apply. It is now no more open to the Commission to go into the question whether the impugned clauses in the agreement constitute restrictive trade practices. By the respondent tendering the agreement to the DG for registration, it has forfeited its right to defend itself against the charges of restrictive trade practices implicit in the impugned clauses of the agreement. The only right it has now, in terms of Hon''ble Supreme Court''s ruling in the Voltas case (supra), is to plead gateways and establish them. When we gave a hearing to Mr. B.B. Ahuja, Advocate for the DG and Mr. A.N. Haksar, Sr. Advocate for the respondent, the Hon''ble Supreme Court''s ruling referred to above was brought to their notice so that they could confine their presentations only to the gateways under Section 38(1) of the Act.

5. BEFORE discussing the gateways, we will dispose of the first issue on jurisdiction. There is no merit in the objections taken by the respondent on the

jurisdiction of the Commission, as the NOE as well as the DG''s application clearly sets out the charges in categorical and unambiguous terms. We are not able to appreciate the respondent''s contention that the notice does not set out the material facts and features of the case. A perusal of the NOE and the DG''s application shows that the impugned clauses have been extracted and the nature of restrictive trade practice narrated in clear terms. In any case, the jurisdiction aspect was not pressed or argued at the time of final arguments. We, therefore, decide the first issue in the negative against the respondent. The Commission has jurisdiction to entertain and adjudicate on the application of the DG.

6. THIS leads us to the second issue as to whether the respondent has indulged in the restrictive trade practices alleged in the NOE and the DG''s application. THIS need not detain us, as we have already noted, that in line with the Hon''ble Supreme Court''s ruling in the Voltas case(supra), there is no need for the Commission to enquire into and adjudicate on the question whether the impugned clauses in the agreement constitute restrictive trade practices. The second issue is, therefore, decided in the affirmative against the respondent. This leads us to the third issue as to whether the restrictive trade practices are not prejudicial to public interest. In other words, the question is whether the respondent is entitled to any one or more of the gateways available in Section 38(1) of the Act.

The respondent has pleaded in its reply, gateways under Clauses (a), (b), (g) and (h) of Section 38(1) of the Act. It has to be stated here that the only charge relevant to be considered in the context of gateways is territorial restriction falling under Section 33(l)(c) of the Act (the other charge relating to restriction on the dealers from dealing in the products of other suppliers and manufacturers stands disposed of in RTPE 178/ 88 and that order will govern the same charge in this enquiry, namely, RTPE 176/88).

7. MR. Shashanka Sanyal, Sr. Manager (Sales Admn.) filed his affidavit on behalf of the respondent, in which he has dealt with the gateways under Clauses (a), (b), (g) and (h) of Section 38(1) of the Act. Of particular relevance are paras 12 to 15 of his affidavit. Mr. Sanyal referring to Clause (a) of Section 38(1) of the Act, has deposed that territorial restriction is necessary in view of the obligations of the dealers to provide effective services and to supply genuine spare parts. He produced during his cross examination the operator''s manual (Exhibit RW 1/1) in which there is a stipulation that after the dealer has sold the tractor, he is legally obliged to give free service to the purchaser. Mr. A.N. Haksar, Sr. Advocate for the respondent, argued that by imposing the territorial restriction, the respondent will be able to ensure through appropriate monitoring and supervision that the dealer provides effective service to the purchaser. Mr. B.B. Ahuja, Advocate for the DG, counter argued that the statement of the witness Mr. Sanyal is not evidence but a bald declaration.

8. CERTAIN decisions were cited by Mr. A.N. Haksar Sr. Advocate for the respondent in support of territorial restriction. The first relates to the case

Director General of Investigation and Registration v. India Cements Ltd. 62 CC 382 dated 8th April, 1986) in which the Commission has held that territorial restriction is necessary to ensure the maintenance of supply of cement to the entire community including the people living in far flung and remotely situated rural areas. In that case, cement being a commodity used in not only the urban areas but in semi-urban areas and rural areas, has consumers all over. In that view of the matter, the said ruling of the Commission has to be understood. In the instant case, the goods in question are tractors and their spare parts. The consumers of these products will be in certain pockets having large agricultural hinterland wherein use of tractors has become an accepted practice. The Commission''s logic and ruling in the India Cements case can not be applied in the instant case. Another decision cited by Mr. A.N. Haksar Sr. Advocate of the respondent is that of the Hon''ble Supreme Court in Tata Engineering & Locomotive Company Ltd. v. The Registrar of the Restrictive Trade Agreement, AIR 1977 Supreme Court 973 dated 21st Jan., 1977, in which territorial restriction came up for consideration. In that case, buses and truck chassis, were the goods in question. The Hon''ble Supreme Court observed that in the special facts and circumstances of that case, the territorial restriction imposed on the sellers not to sell vehicles outside their territories is not a restrictive trade practice. The Apex Court observed as follows : "The question of competition can not be considered in vacuo or in a doctrinaire spirit. The concept of competition has to be understood in a commercial sense. Territorial restriction will promote competition whereas the removal of territorial restriction would reduce competition. As a result of territorial restriction, there is in each part of India open competition among the manufacturers. If the territorial restriction is removed there will be pockets without any competition in certain parts of India."

It is Shri Haksar''s argument that what obtained in the Tata Engineering and Locomotive Company Ltd. case (supra) obtains in the instant case of Mahindra and Mahindra Ltd, He argues that in the former case, it was buses and trucks and in the latter tractors. We are convinced that for providing effective services and supplying genuine spare parts to tractors, which have a specific and limited clientele, the territorial restriction will be in their interest. The gateway provided in Clause (a) of Section 38(1) is available to the respondent. We also note that the removal of the territorial restriction will deny the consumers, the benefits or advantages that will be available to them from the dealers. If the dealers are not restricted to a territory, they may be inclined to deal in tractors only in areas where there is a great demand and a market and consequently there is handsome profit. Thus, the gateway provided in Clause (b) of Section 38(1) is also available to the respondent.

9. WE are unable to see any logic in the stand taken by the respondent that it is entitled to the gateways under Clauses (g) and (h) of the Clause 38(1) of the Act.

10. IN view of the aforesaid discussion, we are of the view that the respondent is entitled to the gateways in Clauses (a) and (b) of Section 38(1) of the Act. The

third issue is, therefore, decided in the negative, in favour of the respondent. In the premises, we direct that the NOE shall stand discharged. No order as to costs. Enquiry discharged.