

(2001) 08 NCDRC CK 0044

In the National Consumer Disputes Redressal Commission

DIRECTOR GENERAL (INVESTIGATION AND REGISTRATION)	APPELLANT
Vs	
COLGATE PALMOLIVE (I) LTD.	RESPONDENT

Date of Decision : 29-08-2001

Acts Referred:

Citation : 2002 3 CPJ 35

Hon'ble Judges : C.M.Nayar , R.L.Sudhir J.

Final Decision : Complaint disposed of

Judgement

1. A Notice of Enquiry was issued to the respondent in this case on 29.1.1988 wherein it was alleged that the respondent had indulged in the following trade practices : (1) Bigger size of Colgate Dental Cream especially 200 gms. are artificially kept in scarcity while smaller sizes are manufactured in greater number so as to manipulate higher prices and also effect the flow of the supplies of bigger sizes in the market in such a manner as to impose unjustified costs or restrictions on the consumers. (2) There is tie-up of various articles with the Colgate Dental Powder and Dental Cream with a view to promote the sale of slow moving items.

2. THE above practices were stated to be restrictive trade practices within the meaning of Sections 2(o)(ii) and 33(1)(b) of the Monopolies and Restrictive Trade Practices Act, 1969. We have heard learned Counsel for the parties and perused the records as well as the evidence. The position of law is well settled now as held by the Supreme Court in the judgment reported as I (2001) SLT 529=2001 CTJ 41 (Supreme Court) in the matter of Hindustan Lever Limited v. Director General (I&R). Paragraphs 11 and 12 of this judgment may be reproduced as below : "11. As the plain reading of the said definition itself discloses, and also as rightly understood by the Commission in issuing the notice, there are two parts to the definition - one is which relates to carrying on of such trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and secondly the carrying on of such trade practice which inter alia has the effect of imposing unjustified costs or restrictions on the

consumers.

12. The charge which the appellant was called upon to meet was that its trade practices resulted in preventing, distorting or restricting competition among the dealers and may have the effect of imposing unjustified costs or restrictions on the consumers. Even though oral evidence had been led, the order of the Commission does not record any categorical finding to the effect that the trade practice alleged to have been carried on by the appellant had resulted in preventing, distorting or restricting competition amongst the dealers. We need not go into the question whether terminating the agreements of the dealers would result in the attraction of the provisions of Section 2(o), but what we have to see is as to whether the appellant has been guilty of preventing, distorting and restricting competition amongst the dealers which was the allegation levelled against it. In the absence of such a finding and there not being even a whisper in the order that any action of the appellant had the effect of imposing unjustified costs or restrictions on the consumers, the Commission fell in error in passing the order against the appellant."

Similar view was taken in the judgment of the Supreme Court reported as III (2000) CPJ 9 (SC)=VII (2000) SLT 50=2001 CTJ 165 (Supreme Court) in the matter of Rajasthan Housing Board v. Smt. Parvati Devi. The following paragraphs may be referred to as below : "8. Contention "A" The learned Counsel for the appellant submitted that the finding given by the Commission that the Board indulged in restrictive trade practice as defined under Section 2(o) (ii) of the MRTP Act is, on the face of it, illegal and erroneous. It is apparent that the act of the respondent cannot be termed as restrictive trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner. Section 2(o) reads thus : "Section 2(o) "restrictive trade practice" means a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in particular- (i) which tends to obstruct the flow of resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions." 9. It appears that Commission has considered that the acts of the Board would be covered by Clause (ii) particularly last portion of the said clause namely, "services in such manner as to impose on the consumers unjustified costs". In our view, the Commission ought to have read the said part along with the main ingredient which requires that a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner would be restrictive trade practice and in particular which inter alia tends to bring about manipulation of "services in such manner as to impose on the consumers unjustified costs". For this purpose no case is made out by the respondents that the Board has prevented or restricted competition in any manner which affects the services in such a manner as to impose on consumers unjustified cost or restrictions. Section 2(o) will not be applicable in case where a trade practice has

no effect actual or probable of preventing, distorting or restricting competition in any manner. 10. This question is considered in detail by this Court in *Mahindra and Mahindra Ltd. v. Union of India*, (1979) 2 SCC 529. In this case the Court observed (in para 14) that :

"It is now settled law as a result of the decision of the Court in the *Telco case* (*Tata Engineering & Locomotive Co. Ltd., Bombay v. Registrar of the Restrictive Trade Agreement, New Delhi*, (1977) 2 SCC 55, that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in Section 2(o) is a pragmatic and result-oriented definition. It defines "restrictive trade practice" to mean a trade practice which has or may have the effect on preventing, distorting or restricting competition in any manner and in Clauses (i) and (ii) particularises two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be to some extent in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect on preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuo but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice."

11. The Court further observed (in para 15) that : "It is possible that a trade practice which may prevent or diminish competition in a given constellation of economic facts and circumstances may, in a different constellation of economic facts and circumstances be found to promote competition. It cannot be said that every restraint imposed by a trade practice necessarily prevents, distorts or restricts competition and is, therefore, a restrictive trade practice. ...There may be trade practices which are such that by their inherent nature and inevitable effect they necessarily impair competition and in case of such trade practice, it would not be necessary to consider any other facts or circumstances for they would be per se restrictive trade practices. Such would be the position in case of those trade practices which of necessity produce the prohibited effect in such an overwhelming proportion of cases that minute inquiry in every instance would be wasteful of judicial and administrative resources."

(Emphasis supplied) 13. In the present case, there is no allegation or evidence to hold that the appellant has indulged in restrictive trade practice. In this view of the matter learned Counsel for the respondents were not in a position to support the said finding. Hence, the direction given by the Commission that the appellant shall discontinue alleged restrictive trade practices and not repeat the same in future and shall file an affidavit in compliance within six weeks from the date of the order passed in both the matters requires to be set aside."

3. IN view of the above we find force in the contention of the learned Counsel for the respondent that existence of a restrictive trade practice is a condition precedent to the exercise of jurisdiction by this Commission and the trade practice alleged by it, cannot constitute restrictive trade practice within the meaning of Section 2(o) of the Act. The averments made against the respondent as set out in the Notice of Enquiry and the subsequent evidence which have been led by the parties do not indicate any restrictive trade practice or the alleged restriction of competition and alleged imposition of unjustified cost on consumers. The enquiry does not establish any restrictive trade practice which can be termed as prejudicial to public interest in terms of Section 37 of the MRTP Act. Moreover, the present complaint is pending since 1986 and the Notice of Enquiry was issued as back as on 29th January, 1988. It will also not be necessary to adjudicate the matter in view of the change of scenario in sale and purchase of the goods. IN view of the facts and circumstances of the case the present complaint is disposed of and Notice of Enquiry stands dismissed. Complaint disposed of.