

(2011) 01 DEL CK 0137

In the Delhi High Court

Case No : Writ Petition (C) 22 of 2011 and CM No. 33 of 2011 (for stay)

DLF Limited and Another

APPELLANT

Vs

Additional Director General Competition Commission of India
and Others

RESPONDENT

Date of Decision : 04-01-2011

Acts Referred:

Citation : (2011) 01 DEL CK 0137

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ashok H. Desai, Rajan Narain, Rajeshwari Shukla, Mallika Joshi, Shidharth Banthia and Amit Agarwal, for the Appellant; Parag P. Tripathi, ASG, Neil Hilderth, Samir Gandhi, Rahul Rai, Anuj Bhandari and Kishore Kunal for CCI., M.L. Lahoty, Praban K. Sharma and Gargi B. Bharali for R 2, for the Respondent

Judgement

S. Muralidhar, J.

CM Nos. 34 and 35/2011 (for exemptions) in W.P.(C) 22/2011

Exemption allowed subject to all just exceptions.

The applications are disposed of.

W.P.(C) 22/2011 & CM No. 33/2011 (for stay)

1. Notice. Mr. Neil Hilderth, Advocate accepts notice for Respondent No. 1 and Mr. M.L. Lahoty, Advocate accepts notice for Respondent No. 2. Respondent Nos. 3 and 4 are preformed parties. With the consent of the parties the petitions are finally heard.

2. The challenge in these writ petitions is to the order dated 20th May 2010 passed by the Competition Commission of India ("CCI") u/s 26(1) of the Competition Act, 2002 ("Act"), an order dated 20th September 2010 passed by the CCI u/s 33 of the Act and an order dated 2nd December 2010 passed by the CCI directing a further inquiry. The further relief is for quashing of the

investigation report dated 13th October 2010 of the Additional Director General ("ADG") of the CCI. An alternative prayer is for a direction to the CCI to decide the jurisdictional issues raised by the Petitioners as a preliminary objection in accordance with the principles of natural justice. A further alternative prayer is for a direction to the CCI not to proceed with the inquiry till all the documents are supplied to the Petitioners.

3. As regards the order dated 20th September 2010 passed by the CCI u/s 33 of the Act, the Petitioners have filed Appeal No. 8 of 2010 before the Competition Appellate Tribunal ("the Appellate Tribunal") which is stated to be listed for hearing on 17th January 2011. Inasmuch as the CCI has, in its order dated 20th September 2010, dealt with the preliminary objections raised by the Petitioners on the issue of jurisdiction, and the said order is the subject matter of the Appeal No. 8 of 2010 before the Appellate Tribunal, the said aspect need not be considered by this Court at this stage.

4. Mr. Desai, learned Senior counsel for the Petitioners assailed the order dated 20th May 2010 passed by the CCI u/s 26(1) of the Act principally on the ground that it did not contain sufficient reasons for forming a prima facie opinion that an inquiry must be initiated against the Petitioners under the Act. He submitted that this was contrary to the observations of the Supreme Court in Competition Commission of India Vs. Steel Authority of India Ltd. and Another, (hereinafter "the SAIL judgment").

5. Mr. Tripathi, learned ASG appearing for the CCI pointed out that the observations of the Supreme Court in the SAIL judgment made a distinction between the reasons to be given by the CCI while forming a prima facie opinion u/s 26(1) of the Act and the reasons it was expected to give while passing an order by way of adjudication, including an order u/s 33 of the Act.

6. This Court finds merit in the submissions made by Mr. Tripathi on this aspect. A perusal of the SAIL judgment would show that a distinction was indeed made by the Supreme Court between the order to be passed by the CCI while forming a prima facie opinion u/s 26(1) of the Act and other orders. It was clarified in para 31 of the judgment (at SCC page 763) that the CCI "is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others." It was further observed in para 31(5) (SCC page 763-764) that the CCI was expected to "record at least some reason even while forming a prima facie view." A distinction was drawn however between this and an adjudicatory speaking order which was to be passed by the CCI "upon due application of mind" by responding to "all contentions raised before it by the rival party". Further, in para 119 of the judgment (SCC Page 792), it was reiterated that while passing a reasoned order u/s 33 of the Act, the CCI had to record its satisfaction "(which has to be of much higher degree than formation of a prima facie view u/s 26(1) of the Act)." Clearly therefore the reason which the CCI is expected to give while forming a

prima facie view u/s 26(1) of the Act is of a lesser degree than that required in an order u/s 33 of the Act.

7. On an examination of the order dated 20th May 2010 passed by the CCI u/s 26(1) of the Act, in light of the SAIL judgment, it appears to this Court that the reasons recorded therein for prima facie opinion formed are consistent with the requirement of the law. The challenge to the order dated 20th May 2010 of the CCI on the said ground is therefore negated.

8. As regards the order dated 2nd December 2010, the contention of Mr. Desai was that it was perhaps not consistent with the requirement of Regulation 21(7) read with Regulation 21(8) of the Competition Commission of India (General) Regulations, 2009 ("Regulations"). On the other hand, Mr. Tripathi pointed out that consistent with the requirement of Regulation 21(7) the investigation report of the ADG was sent to the Petitioners for its objections. These objections would be considered at the hearing fixed for 6th January 2011. It was further pointed out that the stage envisaged under Regulation 21(8) has not yet been reached.

9. In order to appreciate the above submissions, a reference may be made to Regulations 21(7) and 21(8) which reads as under:

21(7) If the report of the Director General mentioned under sub-regulation (1) finds contravention of any of the provisions of the Act, the Secretary shall obtain the orders of the Commission for inviting objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

21(8) On consideration of the objections or suggestions from the Central or the State Government or the statutory authority or the parties concerned, or the report of further investigation or further inquiries, as the case may be, if the Commission is of the opinion that further inquiry is called for, the Secretary shall fix the meeting of the Commission for consideration thereof, after issue of notice as per regulation 22, to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

The above Regulations are consistent with the requirement of Sections 26(4) to (8) of the Act.

10. By letter dated 2nd December 2010 a copy of the investigation report of the ADG was forwarded to the Petitioners inviting their objections thereto. This was consistent with the requirement of Regulation 21(7). Fixing a hearing for consideration of the objections cannot be said to be inconsistent with either Regulation 21(7) or Regulation 21(8). What can happen at the hearing before the CCI when the Petitioners' objections to the ADG's report would be considered cannot be anticipated at this stage. If the CCI upon consideration of the objections forms an opinion that a further inquiry is called for, then it would fix a further hearing in terms of Regulation 21(8). However, that stage is yet to be reached. Consequently, this Court finds no infirmity in the communication dated

2nd December 2010 issued by the CCI to the Petitioners.

11. The final submission of Mr. Desai concerns the non-supply of documents forming part of the ADG's investigation report. In response to a letter by the Petitioners requesting for copies of the documents, the office of the CCI wrote to the Petitioners stating that many of the documents were in the public domain and that the Petitioners would be allowed only an inspection of the records.

12. Mr. Tripathi, learned ASG, on instructions, states that copies of each and every document, as required by the Petitioners upon inspection of the records, will be provided to the Petitioners upon the Petitioners depositing the usual charges. It is further stated that if the charges are deposited either today or tomorrow, the copies will be made available to the Petitioners on or before 7th January 2011.

13. In view of the said statement, no further directions are called for in regard to the supply of documents to the Petitioners.

14. It is directed that upon the documents being provided to the Petitioners on or before 7th January 2011, the Petitioners will be granted two weeks' time thereafter to file their objections to the ADG's Investigation Report. In other words, the objections will be filed on or before 21st January 2011. The CCI will reschedule the hearing fixed for 6th January 2011 to 14th February 2011 or any other date as soon thereafter as may be convenient to the CCI. In view of the need for the proceedings before the CCI to be concluded expeditiously, as mandated by the SAIL judgment, it is directed that the said time schedule should be strictly adhered to by the parties.

15. With the above directions the writ petitions are disposed of. The pending applications are also disposed of.

16. Order dasti to the parties.