

(2016) 01 DEL CK 0356

In the Delhi High Court

Case No : LPA 3/2016 & CM No. 186/2016

Financial Software and Systems Private Limited

APPELLANT

Vs

The Competition Commission of India and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Competition Act, 2002 — Section 19, Section 3, Section 3(1), Section 3(4), Section 33, Section 4, Section 4(2) (a) (i), Section 4(2) (b) (i), Section 53-N
Constitution of India, 1950 — Article 226

Citation : (2016) 3 ADDelhi 80 : (2016) 137 SCL 222

Hon'ble Judges : G. Rohini, C.J. and Jayant Nath, J.

Bench : Division Bench

Advocate : Amit Sibal, Sr. Adv., G.R. Bhatia, Deeksha Manchanda and Jahnvi Mitra, Advocates, for the Appellant;

Final Decision : Disposed off

Judgement

G. Rohini, C.J.

1. This appeal is preferred against the order dated 09.12.2015 in W.P.(C) No. 2957/2015 whereby the learned Single Judge while declining to continue the interim order granted on 09.04.2015, dismissed CM No. 5296/2015.

2. We have heard at length Shri Amit Sibal and Shri P. Chidambaram, the learned Senior Advocates appearing for the appellant and the respondents No. 2 to 4 herein respectively.

3. The appellant before us is the writ petitioner who filed a complaint under Section 19 of the Competition Act, 2002 (for short "the Act") before the Competition Commission of India (for short "CCI") alleging that the respondents No. 2 to 4 herein/respondents No. 2 to 4 in the writ petition had contravened Sections 3 and 4 of the Act. The CCI with a majority of four members to one held that there is no contravention of the provisions of the Act and passed an order to that effect on 13.01.2015.

4. The appellant herein, who is the informant, filed W.P.(C) No. 2957/2015 assailing the order of CCI dated 13.01.2015. On 09.04.2015, the learned Single Judge while directing the pleadings to be completed by all the parties to the writ petition by 08.07.2015, ordered that the respondents No. 2 to 4 herein in the meanwhile will not restrain the banks which are currently taking customization and integration services from the writ petitioner/informant qua the software BASE-24 owned by the respondents No. 2 to 4 herein. The intra court appeal being LPA No. 251/2015 filed by the respondent No. 2 herein against the said interim order dated 09.04.2015 was disposed of by judgment dated 27.04.2015 advancing the date of hearing of the writ petition and directing both the parties to complete the pleadings before that date.

5. Pursuant thereto, the writ petition was taken up on 21.05.2015 and after hearing the parties to some extent, the learned Single Judge with the consent of both the parties modified the interim order dated 09.04.2015 without prejudice to the rights and contentions of the parties as under:

"4...the petitioner will provide only customization/ modification services qua the following banks, in accordance with the stand taken by it in the affidavit filed in court today.

(i) Andhra Bank; (ii) Axis Bank; (iii) Canara Bank; (iv) HDFC Bank; (v) ICICI Bank; (vi) Punjab National Bank; (vii) State Bank of India; & (viii) Union Bank of India.

5. Interim order dated 09.04.2015, as modified today, will continue to operate till further orders."

6. The matter was further heard on 09.12.2015 upon which the learned Single Judge passed the order under appeal holding that no case is made out for continuation of the interim order. Thus, CM No. 5296/2015 was dismissed observing:

"20. Be that as it may, I am of the opinion that when a specialized body as the CCI has after detailed consideration and giving lengthy reasons has returned a finding of the respondents no.2 to 4 being not guilty of contravention, this Court in exercise of powers of judicial review would not without a case of evident error in the reasoning of the CCI being made out, grant interim order on the premise that the respondents are guilty of contravention. As aforesaid, in the event of the petitioner succeeding, the petitioner can always be compensated. The parameters and measures of compensation can always be gauged from the agreements which the petitioner has entered into with the banks and the financial benefit to the petitioner therefrom.

21. No case for grant of interim relief is made out."

7. Aggrieved by the same, the writ petitioner/informant filed the present appeal.

8. It is vehemently contended by Shri Amit Sibal, the learned Senior Counsel

appearing for the appellant that the order of CCI dated 13.01.2015 is ex-facie illegal being in contravention of the statutory scheme and therefore the learned Single Judge is not justified in discontinuing the interim order granted on 09.04.2015 as modified by order dated 21.05.2015. It is submitted by the learned Senior Counsel that in case CCI does not agree with the finding of the Director General that there is contravention of any of the provisions of the Act, the only course open to CCI is to direct further inquiry. Pointing out that the Director General in his report found the opposite parties (the respondents No. 2 to 4 herein) to be in a dominant position in the relevant market and that they had imposed unfair and discriminatory conditions on the banks which are using BASE-24 software in contravention of Section 4(2) (a) (i) and Section 4(2) (b) (i) of the Act and that the same had resulted in denial of market access to the appellant herein and other third party service providers, it is contended by the learned Senior Counsel that the CCI's order dated 13.01.2015 disregarding the findings of Director General and arriving at its own conclusion that no contravention of the provisions of the Act is established is without jurisdiction and suffered from an error apparent on the face of the record. At any rate, according to the learned Senior Counsel, there is no reason to interfere with the interim order which has been operating in favour of the appellant even during the proceedings before CCI. It is submitted by the learned Senior Counsel that the interim order in favour of the appellant came to be passed by CCI in exercise of the powers conferred under Section 33 of the Act having been satisfied that an act in contravention of Section 3(1) has been committed and that the said order was not disturbed even by the Appellate Tribunal on an appeal preferred by the respondents No. 2 to 4 herein. While submitting that there was no change in circumstances to justify interference with the interim relief, the learned Senior Counsel submitted that the learned Single Judge ought to have continued the same till the disposal of the writ petition. It is also sought to be explained by the learned Senior Counsel that grave injustice would be caused to the appellant as well as the banks which are using BASE-24 software if they are not permitted to take services from the appellant. It is further submitted that absolutely no case is made out to discontinue the interim order which merely protects the choice of the customers and gives freedom to the appellant to operate on the market pending determination of the anti- competitive conduct of the respondents No. 2 to 4.

9. Placing reliance upon *Dental College of India v. Subharti KKB Charitable Trust*; , (2001) 5 SCC 486, it is also submitted by the learned Senior Counsel that it is always open to this court in exercise of the jurisdiction under Article 226 of the Constitution of India to interfere even with the decision of an expert body where it is found that the expert body has indulged in arbitrary exercise of power for some ulterior purpose. Reliance has also been placed upon *Zenit Mataplast Private Limited v. State of Maharashtra and Others*; , (2009) 10 SCC 388 in support of his submission that the interim relief ought not to have been discontinued since it is not possible to adequately compensate the appellant

against the injury caused on account of the anti-competitive conduct of the respondents No. 2 to 4.

10. On the other hand, it is submitted by Shri P. Chidambaram, the learned Senior Counsel appearing for the respondents No. 2 to 4 that the well reasoned order passed by CCI does not suffer from any legal infirmity and that there is no substance in the contention that CCI has only been permitted under the statutory scheme to agree with the findings of the Director General. Having regard to the findings recorded by CCI that the alleged violations are not made out, the learned Senior Counsel submitted that the rights claimed by the appellant have no legal basis and therefore, the learned Single Judge has rightly concluded that there is no need to continue the interim protection. In support of his submission, the learned Senior Counsel relied upon *Wander Ltd. and Another v. Antox India P. Ltd.*; , 1990 (Supp.) SCC 727.

11. Pointing out that no appeal is provided under the Act against the order of CCI dated 13.01.2015, Sh.P.Chidambaram further submitted that in the light of the finality attached by the statute to the findings of fact recorded by CCI the learned Single Judge is justified in declining to continue the interim order. In the light of Section 53-N of the Act which provides for awarding compensation for any loss or damage in the event of a case of contravention being made out, the learned Senior Counsel further submitted that there is no substance in the contention of the appellant that the loss suffered cannot be compensated in damages in the absence of an interim protection pending the writ petition. Bringing to the notice of this court that there was no interim order in favour of the appellant for about three months after the order of CCI dated 13.01.2015 till the interim direction was granted by this court on 09.04.2015 and that the main petition now stands posted to 25.02.2016, the learned Senior Counsel submitted that it would be appropriate to direct to dispose of the main writ petition itself expeditiously.

12. Since the main petition is still pending, the scope of the appeal before us is limited to the extent as to whether it is necessary to continue the interim order dated 09.04.2015 as modified on 21.05.2015 till the disposal of the writ petition. Therefore, we do not wish to enter into the merits of the case and express any opinion regarding the validity of the order of CCI dated 13.01.2015 which is impugned in the writ petition. Since it is an issue which needs adjudication in the writ petition, we confine ourselves only to the issue whether the order of the learned Single Judge warrants interference in an intra court appeal.

13. The law is well settled that the appeals before the Division Bench under Letters Patent are against the exercise of discretion by the Single Bench and therefore it is impermissible to reassess the material and seek to reach a conclusion from the one reached by the Single Bench except where the exercise of discretion by the Single Bench has been shown to have been exercised arbitrarily or perversely or where the settled principles of law regulating grant or refusal of interim protection have been ignored.

14. In the present case, the respondents No. 2 to 4 were supplying software for electronic payment solutions (BASE-24) to several banks in India which enables the said banks to process transactions at ATMs or at the point of sale terminals of different stores since the software facilitates communication of transactions with the relevant bank's core banking network. The software is provided by the respondents No. 2 to 4 to the banks under a license agreement according to which customization of the software may be done by the banks either by asking the respondents No. 2 to 4 to do it or the bank itself could do it on its own. The banks were getting the customization of the said software done on their own by engaging the appellant herein on contractual basis with the consent of the respondents No. 2 to 4. In 2011, the respondents No. 2 to 4 objected to customization by the appellant and informed the banks that the professional services be taken either through the respondents No. 2 to 4 or through their authorized third party provider excluding the appellant and the same has led to the filing of complaint by the appellant before CCI.

15. While considering the appellant's application for interim protection under Section 33 of the Act, CCI was prima facie of the opinion that the fact that the respondents No. 2 to 4 had initially permitted the banks to engage services of an enterprise of their choice for customization and thereafter withdrew the consent and imposed a condition that the banks should not take services of the appellant shows that the respondents No. 2 to 4 wanted to kill the business of the existing competitor in the field of customization. The CCI was also of the opinion that no inconvenience would be caused to the respondents No. 2 to 4 in case the banks continue the customization services with the appellant and accordingly restrained the respondents No. 2 to 4 from implementing the condition that the banks should not take services of the appellant herein for customization of the software in question.

16. It is no doubt true that the said order was in operation till a final order came to be passed by CCI on 13.01.2015. However, a clear finding has been recorded by the majority members of CCI in the order dated 13.01.2015 that the alleged dominance of the respondents No. 2 to 4 in the relevant market has not been established and consequently the issue of abuse of dominant position does not arise. While arriving at the said conclusion, CCI has taken into consideration the entire factual matrix of the case and assigned detailed reasons. CCI has also recorded a clear finding that the contravention of Section 3(4) read with Section 3(1) of the Act as alleged by the informant/appellant herein has not been established.

17. In the light of the said findings recorded by CCI which is a specialized body, the learned Single Judge thought it fit that the interim order which enables the banks to take customization and integration services from the appellant qua the software owned by the respondents No. 2 to 4 herein cannot be continued any longer and accordingly the order under appeal came to be passed.

18. It may be true that the order under appeal would result in financial loss to

the appellant, however, it is not a case where the appellant cannot be compensated in monetary terms in case he succeeds in the writ petition on establishing that there is a contravention of the provisions of the Act. The mere fact that the interim relief has ensured continuous business operations for the appellant is not a valid ground for continuing the interim order. We are also unable to agree with the plea of the appellant that irreparable damage would be caused in the absence of the interim order. In the facts and circumstances of the case, the balance of convenience is not in favour of the appellant and therefore the discretion exercised by the learned Single Judge in discontinuing the interim relief cannot be held to be illegal or erroneous. Hence, the order under appeal warrants no interference on any ground whatsoever.

19. However, the learned Single Judge is requested to dispose of the main petition as expeditiously as possible by taking up the hearing on the date fixed. The writ petition may be decided on its own merits without having regard to any of the observations/findings recorded in this order or in the order under appeal.

20. The appeal is accordingly disposed of.