

(2010) 10 DEL CK 0064

In the Delhi High Court

Case No : Writ Petition (C) 6805 of 2010 and CMs 13466-67 of 2010

Interglobe Aviation Limited

APPELLANT

Vs

The Secretary, Competition Commission of India and Others

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Companies Act, 1956 — Section 240, 240A
Competition Act, 2002 — Section 26(1), 36(2), 41, 43, 45
Consumer Protection Act, 1986 — Section 9
General Clauses Act, 1897 — Section 6
Monopolies and Restrictive Trade Practices Act, 1969 — Section 10, 11, 11(1), 11(2), 12B
Monopolies and Restrictive Trade Practices Commission Regulations, 1991 — Regulation 18

Citation : (2010) 173 DLT 581 : (2010) 119 DRJ 467

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

Bench : Single Bench

Advocate : N.K. Kaul, Amit Kapur, Amitesh Kumar, Ponnamm Verma and Manpreet Kaur, in W.P. C 6805/2010 and CMs 13466-67/2010 and Amit Kapur and Ponnamm Verma, in W.P. C 6808/2010 and CMs 13471-72/2010, for the Appellant; Maneesha Dhir and Preeti Dalal, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—Both writ petitions challenge an order dated 16th June 2010 passed by the Competition Commission of India ("CCI") u/s 26(1) of the Competition Act, 2002 ("CA").

2. The background to the present petitions is that by an order dated 13th February 2009, the Monopolies and Restrictive Trade Practices Commission ("MRTP Commission") took cognizance, u/s 11(1) of the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), of reports in the print and visual media that airline operators, including the Petitioners herein, had collectively increased air fares and withdrawn the promotional fares as a result of which additional costs were imposed on the consumer and competition in the

industry was reduced. The MRTP Commission formed a prima facie opinion that the alleged practice was a restrictive trade practice as defined u/s 33(1)(d) and 33(1)(j) of the MRTP Act. Consequently in exercise of its powers under Regulation 18 of the Monopolies and Restrictive Trade Practices Commission Regulations, 1991 ("MRTP Regulations"), the MRTP Commission ordered a preliminary investigation into the matter by the Director General (Investigation & Registration) ["DG(I&R)"] and further directed that the copy of the information/material collected should be submitted to the Commission within sixty days thereafter. The case was registered as "Restrictive Trade Practices Enquiry No. 5 of 2009" ("RTPE").

3. On 27th April 2009 the Office of the DG(I&R) sent letters to the Petitioners asking them to furnish information and documents to enable the DG(I&R) to undertake the necessary investigation. The subject matter of the said communication was "Restrictive Trade Practices - Investigation u/s 11(1) of the MRTP Act, 1969." The Petitioner Inter Globe Aviation Ltd. ("IAL") replied to the said letter on 29th May 2009 providing certain information. Likewise some of the other Petitioners also replied to the said notice.

4. On 28th August 2009 a notification was issued by the Ministry of Corporate Affairs, Government of India repealing the MRTP Act with effect from 1st September 2009. On 14th October 2009 the President promulgated the Competition (Amendment) Ordinance, 2009 amending Sections 66(1), 66(3), 66(4) and 66(5) of the CA. This later was enacted as the Competition (Amendment) Act, 1999 ("CAA 1999"). On 4th March 2010 the RTPE Case No. 5 of 2009 was transferred by the DG(I&R) to the CCI u/s 66(6) of the CA. Thereafter on 10th June 2010 the CCI passed the impugned order u/s 26(1) of the CA stating that the case had been received on transfer u/s 66(6) of the CA from the Office of the DG(I&R), MRTP Commission. The order recorded a summary of some of the responses received to the notice dated 24th April 2009. In para 26 of the impugned order it was observed that "at this stage the matter was transferred to the Commission" u/s 66(6) CA and was considered by the CCI at its meeting on 10th June 2010. The CCI then stated in its impugned order that "there exists a prima-facie case for making reference to DG to make an investigation into the matter. After completing the investigation, the DG shall submit his report within 90 days of the communication of the Commission's order."

5. On 19th July 2010, a notice was sent by the DG(I&R) u/s 41 read with Section 36(2) CA to the Petitioner seeking information. On 20th August 2010 the Petitioner IAL wrote to the Secretary, CCI requesting for copies of the information/documents as also the order passed by the CCI on the basis of which investigations were initiated. On 30th August 2010 the Petitioner IAL inspected the file of RTPE No. 5 of 2009 and requested the Secretary, CCI to provide copies of the inspected information/documents. This was provided on 6th September 2010 by the DG(I&R) stating that a reply must be filed by 10th September 2010.

Further time was granted by the CCI to the Petitioners on 13th September 2010 to file a reply failing which the Petitioners would face penal action u/s 43 read with Section 45 CA. On 15th September 2010 the IAL obtained a copy of the impugned order dated 16th June 2010 of the CCI. A further seven days time to file a reply was given by the CCI on 22nd September 2010. On 1st October 2010 the present petitions were filed in this Court.

6. The Court has heard the submissions of Mr. N.K. Kaul, the learned Senior Counsel as well as Mr. Amit Kapur, learned Counsel appearing for the Petitioners.

7. The first submission is that the CCI had no jurisdiction whatsoever to deal with RTPE No. 05 of 2009 because this was a matter pending before the erstwhile MRTPE Commission. It is submitted that u/s 66(3) CA all matters which were pending before the MRTPE Commission have to be transferred to the Competition Appellate Tribunal ("CAT") whereas in the instant case the matter was erroneously transferred by the DG(I&R) to the CCI u/s 66(6) CA. The submission is that since the MRTPE Commission had suo motu taken cognizance of the alleged restrictive trade practice u/s 11(1) of the MRTPE Act, and further directed the DG(I&R) to investigate and submit a report to it, this was a matter pending before the MRTPE Commission. Therefore, even if the investigation by the DG(I&R) was incomplete on the date of the repeal of the MRTPE Act followed by the notification of the amended Section 66 of the CA, the matter had to be necessarily placed before the CAT for further directions to the DG(I&R).

8. In order to appreciate the above submission, a reference may be made to Section 11 of the MRTPE Act as well as Section 66 of the CA. These provisions read as under:

Section 11 MRTPE Act

11. Investigation by Director General before issue of process in certain cases. The Commission may, before issuing any process requiring the attendance of the person against whom an inquiry (other than an inquiry upon an application by the Director General) may be made u/s 10, by an order, require the Director General to make, or cause to be made, a preliminary investigation in such manner as it may direct and submit a report to the Commission to enable it to satisfy itself as to whether or not the matter requires to be inquired into.

(2) The Director General may, upon his own knowledge or information or on a complaint made to him, make, or cause to be made, a preliminary investigation in such manner as he may think fit to enable him to satisfy himself as to whether or not an application should be made by him to the Commission under [***] Section 10.

(3) For the purpose of conducting the preliminary investigation under Sub-section (1), or Sub-section (2), as the case may be, the Director General or any other person making the investigation shall have the same powers as may be exercised by an Inspector under Sub-section (2) of Section 44.

(4) Any order or requisition made by a person making an investigation under Sub-section (1), or Sub-section (2), shall be enforced in the same manner as if it were an order or requisition made by an Inspector appointed u/s 240 or Section 240A of the Companies Act, 1956 (1 of 1956), and any contravention of such order or requisition shall be punishable in the same manner as if it were an order or requisition made by an Inspector appointed under the said Section 240 or Section 240.

Section 66 CA

66. Repeal and saving. (1) The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under Sub-section (1) of Section 5 of the said Act (hereafter referred to as the repealed Act) shall stand dissolved:

[***]

(1A) The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

(a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or

(c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or

(d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

(2) On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other, person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on

deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors-General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be:

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing, on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in, the

Competition Commission of India or the Appellate Tribunal, as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

(3) All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009, stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

Explanation.- For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, Sub-section (4) and Sub-section (5) shall be deemed to include all applications made for the losses or damages u/s 12B of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) as it stood before its repeal;

(4) Subject to the provisions of Sub-section (3), all cases pertaining to unfair trade practices other than those referred to in Clause (x) of Sub-section (1) of Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission immediately before the commencement of the Competition (Amendment) Act, 2009, shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established u/s 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

Provided further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

(5) All cases pertaining to unfair trade practices referred to in Clause (x) of Sub-section (1) of Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009, stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under

that Act.

(6) All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(7) All investigations or proceedings, relating to unfair trade practices, other than those referred to in Clause (x) of Sub-section (1) of Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

Provided that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(8) All investigations or proceedings relating to unfair trade practices referred to in Clause (x) of Sub-section (1) of Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

(9) Save as otherwise provided under Sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

(10) The mention of the particular matters referred to in Sub-sections (3) to (8) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

9. The order dated 30th August 2009 passed by the MRTP Commission is traceable to Section 11(1) of the MRTP Act. Indeed the MRTP Commission took notice of the reports and directed the DG(I&R) to make a preliminary investigation and submit a report. To that extent, the learned Counsel for the Petitioners are right that in the impugned order dated 16th June 2010 the CCI has erroneously observed that the DG(I&R) MRTP Commission undertook the investigation u/s 11(2) of the MRTP Act. Nothing much however turns on this.

10. Once the MRTTP Commission directed the DG(I&R) to undertake investigations, the matter could no longer be said to be pending before the MRTTP Commission. The investigation undertaken by the DG(I&R) was obviously incomplete and there was no occasion for the DG(I&R) to place any report of investigation before the MRTTP Commission in terms of Section 11(1) of the MRTTP Act.

11. Turning to Section 66 of the CA, which is a repeal and savings clause, it appears that the opening words of Section 66(3) is "all cases" pending before the MRTTP Commission shall, on the commencement of the CAA 2009 stand transferred to the CAT, and "shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed." It is plain that only "cases" which were pending before the MRTTP Commission for "adjudication" as on the date of the repeal of the MRTTP Act and the commencement of the CAA 2009 would stand transferred to the CAT for "adjudication". The word "cases" and the word "adjudication" are indicative of the types of matters pending before the MRTTP Commission which were meant to be transferred to the CAT.

12. Under the MRTTP Act, the MRTTP Commission combined in itself both the inquisitorial as well as adversarial/adjudicatory functions. In its inquisitorial role, the MRTTP Commission was empowered to refer matters of investigation to the DG(I&R) which was, in a sense, its extended arm. At this stage it was meant to be a fact or information gathering exercise. If on the basis of such information gathered and placed before it by the DG(I&R), the MRTTP Commission came to a prima facie view that there was restrictive trade practice or unfair trade practice, as the case may be, then it can proceed further in the matter. It was at that stage, after forming the prima facie view, that the matter can proceed to get crystallized into a case" it is possible that on the report of the DG(I&R), the MRTTP Commission forms an opinion that there is no need to proceed further. In that event there will be no "case".

13. In the considered view of this Court, as far as the present Petitioners are concerned, the investigations against them by the DG(I&R) remained incomplete and the matter did not crystallize into a "case" before the MRTTP Commission, which could be stated to be pending as on the date of the CAA. Consequently there is no merit in the contention that as far as the Petitioners are concerned, it was incumbent on the DG(I&R) of the CCI to transfer the cases straight to the CAT and not to the CCI.

14. A comparison of Section 66(3) CA with Section 66(6) CA shows the contrast between the kinds of matters before the MRTTP Commission and the DG(I&R). While Section 66(3) CA talks of "cases" pending before the MRTTP Commission, Section 66(6) CA talks of "all investigations or proceedings" pending before the DG(I&R). The expression "all investigations or proceedings" is meant to encompass even investigations and proceedings before the DG(I&R) which remained incomplete as of the date of the CAA 1999.

15. It was sought to be urged by Mr. Kaul that Section 66(6) CA was meant to cover only such cases where the DG(I&R) took suo motu notice u/s 11(2) of the MRTTP Act and investigations were incomplete at the time of the CAA 2009. There is nothing in the language of Section 66(6) CA to suggest this. The resultant position is that all investigations and proceedings which were pending before the DG(I&R), MRTTP Commission as on the date of CAA 2009, whether by way of a reference made to it by the MRTTP Commission u/s 11(1) or taken up by the DG(I&R) suo motu u/s 11(2) of the MRTTP Act, would stand transferred to the CCI in terms of Section 66(6) of the CA. That is what has happened in the present case. There is, therefore, no illegality in the action of the DG, CCI in transferring the investigation pending before the DG(I&R), MRTTP Commission to the CCI.

16. Before concluding this part, it may be observed that the organizational structure which was envisaged under the MRTTP Act with the MRTTP Commission combining in itself both the inquisitorial and adversarial functions has undergone a significant change in the CA. There is now a two-tier structure with the CCI performing a partly inquisitorial function and a partly quasi-adjudicatory function. The CAT, however, performs an appellate adjudicatory function. The interpretation placed on the provisions by this Court is in light of this altered structure under the CA.

17. It was urged that the CCI was acting unreasonably in declining to provide the Petitioners with the information sought for the purposes of filing replies. A reference was made to a communication dated 1st October 2010 received from the Assistant Director General of CCI by the IAL stating that IAL's insistence on obtaining complete information/documents from the CCI for responding to the queries raised was not justified and that it should file its reply within five days failing which penal action would be initiated.

18. This Court only wishes to observe that it will be open to the Petitioners to file replies before the CCI, within the time granted by the CCI, on the basis of whatever information is available with them. If any of the Petitioners suffer any prejudice on account of the non-furnishing of any information to them by the CCI, they could well raise such a contention before the CCI which will then deal with such contention and pass orders thereon before proceeding to take any action in terms of Section 43 read with Section 45 CA. In any event, for any alleged violation of the procedure by the CCI it is not as if the Petitioners would be without a remedy. Such a situation is taken care of within the four corners of the CA itself.

19. It was finally urged that the Petitioners should be granted some more time to file replies to the show cause notice of the CCI. It is for the Petitioners to make that request to the CCI which will consider such request on its merits before proceeding to take any further action under Sections 43 read with Section 45 CA.

20. This Court finds no ground having been made out by the Petitioners for interdicting the proceedings before the CCI.

21. The writ petitions are dismissed with the above observations but in the circumstances with no orders as to costs.