

(2014) 11 KAR CK 0284

In the Karnataka High Court

Case No : Writ Petition No. 19000/2013 (GM-RES)

Karnataka Film Chamber of Commerce

APPELLANT

Vs

Kannada Grahakara Koota

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Competition Act, 2002 — Section 16(1), 19, 19(1), 26, 26
Constitution of India, 1950 — Article 226

Citation : (2015) 1 AKR 769 : (2015) 125 CLA 65 : (2015) 129 SCL 357

Hon'ble Judges : A.N. Venugopal Gowda, J

Bench : Single Bench

Advocate : R. Anil Kumar, Advocate for Shanmukhappa, Advocate for the Appellant; Nalina Mayegowda, C.S. Srinivas, K. Chandra Mohan, C.S. Dwarakanath, Advocates and Krishna S. Dixit, A.S.G, Advocate for the Respondent

Judgement

A.N. Venugopal Gowda, J.—The subject matter of challenge in this petition is a direction dated 18.10.2012 issued under S. 26(1) of the Competition Act, 2002 (for short "the Act"), in Case No. 58/2012, by the Competition Commission of India (for short "the Commission"), for investigation into the allegations made by the informants i.e., respondent Nos. 1 and 2 herein, and for submission of report.

2. The background facts are that the respondent Nos. 1 and 2 having approached the respondent No. 8 - the Competition Commission of India, under Section 19(1) of the Act, to institute an enquiry against the petitioner and the respondent Nos. 3 to 7, by passing an order directing the respondent No. 9 - Director General of Investigation, Competition Commission of India, to carryout investigation into the cartel like behavior of the petitioner and respondent Nos. 3 to 7 and their members and submit report there on, for the purpose of taking further action and the Commission having issued a direction dated 18.10.2012, as at Annexure-A, in exercise of its power under S. 26(1) of the Act, this writ petition was filed on 24.04.2013, to quash the same.

3. The petitioner is an Association, registered under the provisions of the Karnataka Societies Registration Act, 1960. It has 7 categories of members i.e., film producers, film distributors, film exhibitors, Studio and laboratory and out door equipment hirer members, honorary members, affiliated members and temporary members. The objects with which the petitioner was established was to encourage and promote the film industry in the state of Karnataka and also to protect, conserve and promote Kannada, Konkani, Tulu and Kodava literature, culture and language and also to protect the welfare of the people who are involved in making Kannada, Konkani, Tulu and Kodava movies. According to the petitioner, it has 5000 members, who are engaged in the production, distribution of Kannada movies and it is concerned only with the film fraternity and is in no way concerned with the television association or its dependants.

4. Respondent No. 1 is a Registered Trust. Respondent Nos. 1 and 2 furnished the information under Sub-section (1) of S. 19 of the Act, vide Annexure-C, to the Commission and the same was registered as Case No. 58/2012 against the petitioner and the respondent Nos. 3 to 7 and the Order as at Annexure-A was issued.

5. Sri R. Anil Kumar, learned advocate, contended that the complaint filed by respondent Nos. 1 and 2 being vague and there being no specific plea as to which action of the petitioner and respondent Nos. 3 to 7 was in violation of the provisions of Ss. 3 and 4 of the Act and there being no prima facie case and the impugned direction being in violation of principles of natural justice i.e., Audi alteram partem, is arbitrary and illegal. He submitted that the writ petition was filed on 24.04.2013 and an interim order of stay of Annexure-A having been passed on 25.04.2013, the report in pursuance of the impugned direction, prepared on 26.04.2013, having been submitted on 30.04.2013, the same being illegal, be ordered to be discarded and action taken against respondent Nos. 8 and 9 for the disobedience.

6. Sri Krishna S. Dixit, learned Assistant Solicitor General of India, appearing for respondent Nos. 8 and 9, on the other hand, referred to the scope and object of the Act and by relying upon the decision rendered, in Competition Commission of India Vs. Steel Authority of India Ltd. and Another, , contended that the grievance sought to be put forth in the instant case being almost identical to the case decided by the Apex Court, the instant petition being devoid of merit is liable to be dismissed. Sri Krishna S. Dixit, also placed reliance on the judgment in South Asia LPG Company Private Limited vs. Competitions Commission of India and others, passed on 03.09.2014, in LPA No. 857/2013, by the High Court of Delhi. He submitted that there being no decision by the Commission and Annexure-A being only a direction for investigation into the information furnished in Annexure-C, this writ petition being untenable be dismissed.

7. Keeping in view the submissions made, the following points arise for consideration:

1) Whether the opinion formed by the Commission with regard to the existence of a prima facie case, to direct the Director-General to cause an investigation into the matter, calls for interference?

2) Whether the reference made by the Commission to the Director-General for Investigation vide the impugned order is bad, as being violative of Audi alteram partem?

8. To decide the said points, it is apposite to set out Ss. 19(1) and 26 of the Act, in its entirety. They read as follows:

"19. Inquiry into certain agreements and dominant position of enterprise. - (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on-

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

26. Procedure for inquiry under section 19. - (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director-General to cause an investigation to be made into the matter:

Provided that if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exist no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director-General, shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub-section (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on a

reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director-General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director-General.

(6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director-General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director-General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director-General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act."

9. With regard to the scope and object of the Act, in the case of SAIL (supra), Apex Court, has held as follows:

"8. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body namely, "the Competition Commission of India" (for short, "the Commission") which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

9. The various provisions of the Act deal with the establishment, powers and

functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed regulations called The Competition Commission of India (General) Regulations, 2009 (for short, "the Regulations").

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

12. Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. Thus, while dealing with respective contentions raised in the present appeal and determining the impact of the findings recorded by the Tribunal, it is necessary for us to keep these objects and background in mind."

(emphasis supplied)

10. The information furnished by respondent Nos. 1 and 2, vide Annexure-C, was registered as Case No. 58/2012 and was considered in the meeting held on 18.10.2012. The Commission being of the opinion that there exists a prima facie case, on account of the petitioner and respondent Nos. 3 to 7 alleged to have indulged in violation of Ss. 3 and 4 of the Act, a direction was issued to the Director-General to initiate investigation into the allegations made by the informants and submit report within 60 days.

11. S. 7 of the Act provides for the Establishment of the Commission. S. 8 is with regard to the Composition of the Commission. S. 9 is with regard to the Selection Committee for Chairperson and Members of Commission. It is evident from S. 8, that from a panel of names recommended by the Selection Committee, mentioned in S. 9 of the Act, the Chairperson and every other member, who shall be the persons of ability, integrity and standing and who have special knowledge of and such professional experience of not less than 15 years in, international trade, economics, business, commerce, law, finance, accountancy, management,

industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission, shall be appointed by the Central Government by issue of a notification, to be called as "Competition Commission of India". The Chairperson and the Members of the Commission, thus, are persons of abundant expertise, experience, special skill required to deal with cases that come before the Commission. Their opinion with regard to the existence of a prima facie case, on the information received etc., which find reference in S. 19 of the Act, would be that of an expert body and should not be lightly interfered with, as was held by the Apex Court, in B.C. Mylarappa @ Dr. Chikkamylarappa Vs. Dr. R. Venkatasubbaiah and Others, .

12. "Prima-facie case" with reference to sub-section (1) of S. 26 of the Act, means no more than that the Commission is satisfied that the case is not frivolous or vexatious and that there is a serious question to be investigated. In American Cyanamid Co. vs. Ethicon Ltd. reported in ILR 1976 (1) KAR 426, with regard to the use of expression "prima facie case", in the context of exercise of discretionary power to grant an interlocutory injunction, it was held as follows:

"The Court, no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

(emphasis supplied)

Prima facie case means that, "a case which has proceeded upon sufficient proof to that stage, where it would support finding, if the evidence to the contrary is disregarded". It means an arguable case and does not mean a foolproof case. In other words, a case which fairly needs an enquiry. A prima facie case can be interfered with in exercise of writ jurisdiction, only on the ground that the finding is perverse or based on no materials.

13. In the instant case, the Commission having found from the information furnished in Annexure-C, has opined as follows:

"5. The Commission has considered the facts disclosed by the informant. The plea under Section 3 of the Act regarding anticompetitive agreements and cartel like behavior vis-?-vis OP No. 1 is supported by the Article of Association of the OP No. 1 whereby the various unfair conditions and sanctions are imposed on the members. The conduct of other opposite parties also appears to be anti-competitive to the extent that they restrict the exhibition of non-regional films, ban non-members from releasing films, withhold the payment of distributors' share for non-compliance of its directions, ban broadcasting of dubbed TV shows etc. These acts prima facie seem to be in violation of section 3 of the Act.

7. As far as violation of section 4 is concerned, the Commission has to devolve upon the relevant market. To consider relevant market, the Commission has to consider relevant product/service market and the relevant geographic market.

The informant in this case has clubbed two markets (i) exhibition of films at theatres in State of Karnataka and (ii) the market of broadcast of TV shows. The two service markets are different markets. However, the geographic market for these two service markets would be State of Karnataka since the denial of exhibition of films and TV shows dubbed in Kannada language has been there within the State of Karnataka. The Opposite Party Associations are active in two different markets while OP No. 1 is active in the market of film exhibition; OP No. 2 is active in the market of broadcasting of TV shows. The dominance of Opposite Parties in these two markets is a matter of investigation, although abuse of the strength of Opposite Parties seems to be obvious as the Opposite Parties being Associations of Producers/Directors, etc. had been giving directions to the Members against exhibiting dubbed programmes and dubbed films. Prima facie, the Opposite Parties being Associations in these two markets have hold over the Members.....

8. In view of the above discussion, the Commission finds that prima facie, Opposite Parties seem to be indulging in violation of sections 3 & 4 and it is a fit case for investigation by the DG. The Commission, therefore, hereby directs to initiate investigation into the allegations made by the informant and submit a report to this Commission within 60 days."

From the above, it is clear that the Commission having deliberated, found that there exists a prima facie case and directed the investigation by the Director-General. The finding in Annexure-A being only for the limited purpose of directing investigation into the allegations made in Annexure C, by the Director-General, shall have no bearing either on the investigator or even on the Commission, at a subsequent stage. When once report of investigation is received, the matter shall have to proceed in accordance with Sub-sections (4) to (8) of S. 26 of the Act. Annexure-A having made reference to certain aspects, cannot be said to be perverse or is without any basis and thus, arbitrary to warrant interference under Article 226 of the Constitution.

14. With regard to the grievance of not providing an opportunity of hearing while issuing the direction, as at Annexure-A and the ground urged that there is violation of principles of natural justice, it is necessary to notice the enunciation of law in the case of SAIL (supra), by Apex Court, which reads as follows:

"77. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to

issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

78. Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion.

79. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non-compliance therewith, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above-noticed principles.

83. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass ex parte ad interim injunction orders immediately in terms of Section 33 of the Act, while granting post-decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice.

91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director

General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act.

93. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word "direction" to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission."

(emphasis supplied)

From the above, it is clear that, both the points raised for consideration has no merit and should fail.

15. The direction as at Annexure-A, was issued on 18.10.2012 and this writ petition was filed on 24.04.2013. Respondent No. 9 has submitted a report dated 26.04.2013 on 30.04.2013, to the Commission. Copy of the said report was circulated to the petitioner and others concerned. The petitioner and other aggrieved persons, have got a statutory right of appeal under Chapter VIII-A under S. 53-B of the Act, if at all, the said report is accepted by the Commission. On the said aspect, in the case of SAIL (supra), Apex Court has held as follows:

"37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very-threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section" 53-A"of the Act."

(emphasis supplied)

16. Since the petitioner has further opportunity to raise its objections as against the said report before the Commission, order passed on 23.09.2014, on the memo filed and submissions made by Sri Krishna S. Dixit, that the report dated 30.04.2013 of respondent No. 9 shall be kept in abeyance and not to act upon the same, until further orders, is hereby recalled.

In view of the foregoing discussion and as both the legal points raised by the petitioner are covered by the Judgment referred to hereinbefore, this writ petition being devoid of merit is dismissed. Liberty is reserved to the petitioner to file its objections to the report dated 26.04.2013, in view of Sub-section (6) of S. 26 of the Act. The Commission shall take note of the objections of the petitioner, if filed, within a period of four weeks from today and deal with the matter, in accordance with law.

No costs.