(1991) 10 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No. 3039 of 1991

Milton Plastics APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 22-10-1991

Acts Referred:

Monopolies and Restrictive Trade Practices Act, 1969 — Section 12A

Citation : (1992) 2 BomCR 363 : (1992) 94 BOMLR 9 : (1994) 79 CompCas 366 : (1991) 1 MhLj 1531 : (1991) MhLj 1531

Hon'ble Judges : Sujata V. Manohar, J;S.H. Kapadia, J

Bench : Division Bench

Advocate : Aspi Chinoy, for the Appellant; B.J. Rele and ors., for the Respondent

Judgement

Mrs. Sujata Manohar, J.—The rule, returnable forthwith by consent.

2. The respondents waive service.

3. This petition pertains to an ex parte ad interim order dated September 23, 1991, issued by the Monopolies and Restrictive Trade Practices Commission u/s 12A of the Monopolies and Restrictive Trade Practices Act, 1969. The order is in respect of a contest for sales promotion, the details of which are set out in exhibit "A" to the petition. It requires, inter alia, the competitors to annex a purchase coupon for the purpose of entering the context. The purchase coupon can be obtained by purchasing Milton products worth Rs. 150. The scheme for sales promotion commenced from September 15, 1991. The petitioners have stated that in respect of the scheme, expenditure worth approximately Rs. 45 lakhs has already been incurred by the petitioners by way of insertion of advertisements and projection and distribution of other sales promotion material. The petitioners have also pointed out that under the scheme as many as 60 advertisements were scheduled to be published in newspapers throughout the country within the next 9 days (from the date of filing of the petition). The petitioners had, before implementing their scheme, by their letter dated September 6, 1991, addressed to the Director-General of Monopolies and

Restrictive Trade Practices Commission, New Delhi, intimated to him that they proposed to launch the scheme from September 15, 1991, onwards. In the letter the petitioners stated that they had been advised that their scheme will not amount to a restrictive or unfair trade practices under the Monopolies and Restrictive Trade Practices Act, 1969. They stated that in case they did not hear from the respondents, they would presume that the scheme was not hit by the provisions of the Monopolies and Restrictive Trade Practices Act.

4. The petitioners did not receive any reply to this letter. According to the petitioners, they learnt from press reports appearing on September 25, 1991, that an parte ad interim order had been passed by the second respondent restraining the petitioners from proceedings with the scheme. Thereupon, the petitioners wrote to the respondents on September 26, 1991, enquiring about such an order. The letter was hand-delivered to the respondents on September 27, 1991. Thereafter, only on September 30, 1991, were the petitioners served with the impugned order which has been passed on September 23, 1991. The petitioners have also pointed out that on the date of the order, they had filed a caveat mentioning that an order should not be passed against them u/s 12A or any other provisions of the Monopolies and Restrictive Trade Practices Act without notice to them. In fact, this is set out in the impugned order in paragraph 4. Yet no notice was given to the petitioners.

5. The petitioners have challenged this order of September 23, 1991. The petitioners have relied upon the provisions of section 12A of the Monopolies and Restrictive Trade Practices Act, 1969. u/s 12A(1) "Where, during an inquiry before the Commission, it is proved, whether by the complainant, Director-General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on, or is about to carry on, ... restrictive, or unfair, trade practice and ... such restrictive or unfair trade practice is likely to affect prejudicially the public interest or the interest .... of any consumer or consumers generally, the Commission may, for the purposes of staying or preventing the undertaking ... from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any ... restrictive or unfair, trade practice until the conclusion of such inquiry or until further orders."

6. Sub-section (2) of section 12A provides,

"(2) The provisions of rules 2A and 5 (both inclusive) of Order XXIX of the First Schedule to the Code of Civil Procedure, 1908, shall, as far as may be, apply to a temporary injunction issued by the Commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to an inquiry before the Commission."

7. It is pointed out by Mr. A. Chinoy, learned counsel for the petitioners, that a temporary injunction u/s 12A can be issued only during an enquiry before the

Commission and not prior to the commencement of any enquiry before the Commission. Section 36B provides that the Commission may inquire into any unfair trade practice - (a) upon receiving a complaint, (b) upon a reference made to it by the Government, (c) upon an application of the Director-General, or (d) upon its own knowledge or information. There are similar provisions for inquiring into a restrictive trade practice u/s 10(a). Under regulation 50 of the Monopolies and Restrictive Trade Practices Commission Regulations, 1991, if on receipt of a complaint, reference or application or information under clause (a) of section 10 of the Act, and on consideration of any evidence on record or a preliminary investigation report, if any, the Commission is of the opinion that there are sufficient grounds to issue a process, such a process shall be issued and it will be called notice of enquiry. The enquiry before the Commission, thus begins with the issue of a notice of enquiry.

8. In the present case, no notice of enquiry was issued to the petitioner before the impugned order was passed. In fact, in the order itself, it has been stated that a notice of enquiry will be issued to the respondents therein for the unfair trade practices falling u/s 36A(3)(b) of the Monopolies and Restrictive Trade Practices Act, returnable on November 20, 1991. The notice of enquiry has been subsequently served on the petitioners on October 11, 1991. The enquiry, therefore, had not commenced on the date of the ex parte ad interim injunction. In view of section 12A, the Commission could not have issued such a temporary injunction prior to the commencement of enquiry.

9. Mr. Chinoy has also drawn our attention to the orders of this High Court in Writ Petition No. 3516 of 1987, in the case of Eagle Flasks Pvt. Ltd. v. Union of India dated November 18, 1987 (R. A. Jahagirdar and Sugla JJ.). In this writ petition, regulation 58 which was then in force, was relied upon. Under the old regulation 58, proceedings under sub-section (1) of section 37 of the Act dealing with enquiry into restrictive trade practices shall be initiated by a notice of enquiry to the person or persons against whom allegations of resorting to restrictive trade practices are made; stating that the Commission proposes to hold an enquiry into the alleged restrictive trade practices. The Division Bench set aside an order of ad interim injunction passed by the Commission before the issuance of a notice of enquiry.

10. The provisions of new regulation 50 also deal with issue of process by a notice of enquiry. Therefore, a notice of enquiry is a condition precedent to the exercise of powers u/s 12A, on a plain reading of that section. Since the present order is passed before issuing a notice of enquiry and, therefore, before the commencement of an enquiry as contemplated under the Act, the impugned order is without jurisdiction.

11. Mr. Chinoy also drew our attention to section 12A(2) which extends the provisions of Order 39, rules 2A to 5 of the CPC to a temporary injunction granted by the Commission and points out that these rules are also not complied with. In view of our findings above, we need not examine this issue.

12. In the premises the rule is made absolute in terms of prayer (a).

13. We may add that the petitioners had made an application before us for amendment of the petition in order to challenge the validity of Ordinance VIII of 1991 in so far as it amends the provision of section 36A(3)(b) of the said Act. The petitioners have, however, not pressed for this amendment since the petition is only to challenge the ex parte ad interim injunction, which challenge we have upheld. In the event, however, of the respondents passing any order u/s 12A after giving a hearing to the petitioners, which may prejudicially affect the petitioners, the order is not to operate for a period of 2 weeks from the date of the receipt of the order by the petitioner.

14. Certified copy expedited.

