(1986) 01 KAR CK 0058

In the Karnataka High Court

Motor Industries Company Limited — APPELLANT

Vs

Monopolies and Restrictive Trade Practices Commission and another — RESPONDENT

Date of Decision : 20-01-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Monopolies and Restrictive Trade Practices Act, 1969 — Section 10 (a)

Citation : (1990) 67 CompCas 418

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : M.S. Subbarayappa, S. Rangarajan, for the Appellant; K. Shivashankar Bhat, Senior Standing Counsel for the Central Govt., for the Respondent

Judgement

K.A. Swami, J.—In this petition under articles 226 and 227 of the Constitution the petitioner has sought for the following reliefs

(i) To issue a writ of certiorari, quashing the order if the respondent in Restrictive Trade Practice Enquiry No.8 of 1982 on the petitioner''s application dated September 20, 1982 made under regulation 66 of the Monopolies and Restrictive Trade Practices Commission Regulations 1974.

(ii) To issue a writ of certiorari, quashing the notice bearing No.20(226) RTP/82 dated August 19, 1982, issued by the respondent etc. as para (i) of annexure - Q; in so far as it relates to :

(a) alleged discrimination in supplies of fuel injection equipment etc., as para (i) of annexure -Q

(b) paras (ii)(a), (b) and para (iv) of annexure - Q.

(iii) To issue a writ of mandamus, restraining the respondents from proceeding further with the enquiry in Enquiry No.8 of 1982 relating to the petitioner company in so far as the same relates to paras (i), (ii)(a) (b) and (iv) of the said notice dated October 19, 1982 (annexure -Q).

(iv) To grant such other writ, order, direction, reliefs including allowing this writ petition with costs.

2. There is also an application filed by Sri L D Sabharwal for being impleaded as additional respondent. That application has not been allowed. However, it has been directed to be brought up along with the main matter. Learned counsel appearing for Sri Sabharwal is also heard in the proceeding.

3. Before proceeding to consider the petition on merits, it is also necessary to dispose of this application. No doubt, Sri Sabharwal is a complainant and on the basis of his complaint, the first respondent has initiated the proceeding by issuing the impugned "notice of enquiry",. annexure -Q but the scheme of the Act does not provide for any relief to the complainant nor does it confer any right of hearing on him. As per section 10(a) of the Monopolies and Restrictive Trade Practices Act, 1969, it is open to the first respondent to enquire into any restrictive trade practice :

(i) upon receiving a complaint of facts which constitute such practice from any trade or consumers association having a membership of not less than twenty-five persons or from twenty- five or more consumers, or

(ii) upon a reference made to it by the Central Government or State Government, or

(iii) upon an application made to it by the Registrar, or

(iv) upon it own knowledge or information.

4. Sir L D Sabharwal does not fall in any one of the aforesaid classes of complainants. The first respondent appears to have treated the complaint of Sri L D Sabharwal was information received by it and has initiated the enquiry. Of course, even in the absence of the complaint by Sri L D Sabharwal it was and is open to the first respondent to gather information on its own and enquire into the matter. Therefore, it is not possible to hold that a person or an authority not falling in any one of the classes of complainants mentioned in section 10(a) (i) to (iii) of the Act, becomes entitled to participate in the proceeding as of right and as if he or it is a necessary party to the proceeding. Merely because he or it has supplied information to the first respondent to enable it to initiate an enquiry into the matter he or it does not become a party to the proceeding. The Act enumerates the complaints. An individual trader is not recognised for this purpose; therefore he can at the most become an informant or his complaint may be treated as an information u/s 10(a)(iv) of the as a party to the proceeding. Irrespective of this as it is already pointed out learned counsel appearing for Sri L D Sabharwal has been heard on the merits of the proceeding. With these observations the application filed by Sri L D Sabharwal is rejected.

5. On receipt of the impugned notice, annexure -Q dated August 19, 1982 the

petitioner has filed an application before the first respondent under regulation 66 of the Monopolies and Restrictive Trade Practice Commission Regulations 1974 (hereinafter referred to as "the Regulation") for separating the allegations contained in paragraphs 2(a) and (b) and first part of para 1 of the notice of enquiry dated February 18, 1982 and dropping paragraph 4 of the said notice. The first respondent after hearing the petitioner has rejected the application holding that para 4 cannot be dropped because it will have a bearing on the other allegations contained in the notice. As far as the separating of the allegations contained in the first part of para 1 and paragraph 2(a) and (b) of the notice of enquiry is concerned it is held that the same cannot at all be separated because they are closely connected with the other parts of the notice; and further that the prayer does not fall within the purview of regulation 66(1) (a) and (b) of the regulations. Accordingly, the Commission has rejected the application. No doubt, in this writ petition as per the prayers made, the petitioner has sought for quashing para 4 of the notice of enquiry in addition to the first part of para 1 and para 2(a) and (b) thereof. However during the course of arguments, Sri Rangarajan, learned counsel for the petitioner, has made it clear that the petitioner is not urging for quashing para 4 of the notice of enquiry and it may be treated as given up. In view of this submission, the prayer relating to quashing of para 4 of the notice of enquiry is not considered and it is treated as abandoned.

6. It is contended on behalf of the petitioner that the first part of para 1 and para 2(a) and (b) of the notice of enquiry do not at all contain the necessary ingredients of a "restrictive trade practice" ; therefore, the Commission has no jurisdiction to enquire into the allegations contained in the first part of para 1 and para 2(a) and (b) of the notice of enquiry. It is submitted that as far as the acceptance of resignation of Sri L D Sabharwala , proprietor of Modern Engineering Corporation, Lucknow to the dealership of the petitioner is concerned, the same is in accordance with the terms of the agreement entered into by him with the petitioner company and that agreement is approved by the first respondent u/s 37 of the Act ; therefore, the question of there being any restrictive trade practice does not arise. As far as Faizabad Diesels, of which Sri L D Sabharwala is the proprietor, is concerned the dealership has been terminated in terms of the contract, which is also approved by the first respondent. Thus it is submitted that when an act in done in terms of the agreement it cannot provide a ground for initiating a proceeding to enquire into the same under the camouflage of restrictive trade practice. It is also further submitted that if the necessary allegations are not contained in the notice of enquiry, the first respondent cannot go into the matter and hold an enquiry and decide the same'' that there is a threshold bar for the first respondent to go into it because the necessary allegations to enable exercise of jurisdiction under the Act, are neither before it nor has it collected any such material. Therefore it is submitted that inspite of the fact that in the ultimate analysis of the matter or in the ultimate order passed in the proceeding there is a right of appeal provided, it does not

come in the way of this court to exercise jurisdiction under article 226 of the Constitution since the matter is one of jurisdiction. In support of these submissions learned counsel has placed reliance on the decisions of the Supreme Court in Tata Engineering and Locomotive Co Ltd. v Registrar of Restrictive Trade Agreements [1977] 47 Comp Cas 520 ; Mahindra and Mahindra Ltd v. Union of India [1979] 49 Comp Cas 419 ; Anisminic Ltd v Foreign Compensation [1969] 2 AC (HL) ; USA v Colgate and Co. [1918] USSC 299 and B.V. Patankar and Others Vs. C.G. Sastry, .

7. It is also further submitted that if the respondent is permitted to go into the allegations made in paras 1 and 2 of the notice of enquiry the two suits filed by the petitioners against Sri L D Sabharwal will be affected inasmuch as the subject matter of the two suits relates to the question as to whether Sri L D Sabharwal can still be considered to be an authorised dealer of the petitioner company in spite of the fact that in one case his resignation has been accepted and in another case the contract of dealership itself has been terminated. Therefore, it is submitted that the first respondent brought to have separated the allegations contained in para 1 and 2 of the notice of enquiry from the other portions of the notice.

8. On the contrary, Sri K Shivashankar Bhat, learned senior standing counsel for Central Government appearing for respondents No. 1 and 2 submits that whether the petitioner is quality of restrictive trade practices or not is yet to be enquired into and it is the first respondent and the first respondent alone which has got jurisdiction to decide. Therefore it is not the stage at which inter fence is called for. It is also further submitted that the petitioner cannot expect the entire gamut of evidence to be put in the notice of enquiry and that the allegations contained in paras 1 and 2 of the notice of enquiry are sufficient to give jurisdiction to the first respondent and are sufficient to enable the petitioner to meet the same. After all it is submitted, the first respondent is discharging a public function in the interest of trade and commerce and in order to maintain the standard of trade and commerce and to see that monopolistic and restrictive trade practices are not practised so that trade and commerce can flourish without ay hamper. It is also further submitted that even if the first respondent holds against the petitioner the right of appeal is provided, and an appeal lies to the Supreme Court ; hence it is not a matter for interference at this stage. Shri Shivashankar Bhat, learned senior standing counsel for the Central Government further submits that the scope of enquiry under the Act, is quite different from the subject matter of the suit ; that the first respondent is required to go into whether there is any restrictive trade practice committed by the petitioner; whereas the subject matter of the suits is as to whether Sri L D Sabharwal continues to be the authorised dealer of the petitioner company. Therefore, it is submitted that the pendency of the suits has nothing to do with the present proceeding because neither the present proceeding is affected by the suits nor are the suits affected by the present proceeding ; therefore the first respondent is right in negativing this contention.

9. I may also mention here that learned counsel appearing for Sri L D Sabharwal has only adopt the arguments of learned senior standing counsel for the Central Government; and has further submitted that he has only brought to the notice of the Commission certain facts and it is for the Commission to enquire into the same.

10. Having regard to the aforesaid contentions, the points that arise for consideration are :

(i) Whether para 1 and 2 of the notice of enquiry dated August 19, 1982 (annexure -Q), contains the essential ingredients of a restrictive trade practice?

(ii) Whether it is a case for interference under article 226 or 227 of the Constitution?

(iii) Whether the impugned order requires to be quashed?

11. Point No.(1) - In order to appreciate the contentions bearing on this point, it is necessary to reproduce para 1 and 2 of the notice of enquiry annexure Q which are as follows :

"(1) Discrimination in supplies. - This respondent has discriminated in supplies of fuel injection equipment its spares and replacements to Modern Engineering Corporation and Faizabad Diesels, the authorised distributors of the respondent at Lucknow and Faizabad, respectively with other authorised distributors of Gorakhpur and Kanpur Divisions without having regard to the engine population in these areas. The respondent company has instead been making increased supplies to its favourite distributors. The distribution policy of the respondent has created artificial scarcity and caused a rise in prices in the market ;

"(ii) Refusal to supply deal. -(a) Modern Engineering Corporation lucknow is the oldest authorised distributor of the respondent and has been making repeated complaints to the respondent regarding maldistribution and malpractices in making the supplies by it, with no effect. The said distributor made a conditional offer of resignation on or about. Against 8, 1980, according to which it was pointed out to the respondent that if things cannot be done as requested by us, we cannot continue any longer to associate with MICO under such degrading and humiliating conditions we shall discontinue our association with effect from November 12, 1980''."

The respondent accepted the resignation without any reasonable cause on or about February 11, 1981 and in fact supplies were stopped in November, 1980. The said distributor placed an indent on 20th March 1982 but no supplies were made by the respondent.

(b) Faizabad Diesels Faizabad, were appointed as authorised distributors of the respondent at Faizabad (U.P) on or about 1st July 1979 and the said distributorship was terminated with effect from 15th December 1981, by the respondent in terms of clause 3 of the agreements dated June 1, 1979, without reasonable cause."

12. It is not necessary to notice the definition of "restrictive trade practice" as provided in section 2(o) of the Act, which reads thus :

"(o) `Restrictive trade practice'' means a trade practice which has or may have the effect of preventing distorting or restricting competition in any manner and in particular, -

(i) which tends to obstruct the flow of capital or resources into the stream of production or

(ii) which tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions ;"

13. From the aforesaid definition of "restrictive trade practice", it is clear that it is only trade practice which has the effect, actual or probable, of preventing distorting or restricting competition in any manner and in particular which tends to obstruct the flow of capital or resources into the stream of production or which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

14. The notice of enquiry issued u/s 10(a)(iv) and section 37 of the Act read with regulation 58 of the Regulations must contain the necessary facts which constitute the restrictive trade practice. Bald allegations cannot to held to furnish a ground for the Commission to enquire into the matter. The notice of enquiry must set out all the facts relating to the alleged trade practice and also state as to how having regard to the nature and history of the trade, it constitutes a restrictive trade practice in the context of the facts stated in the notice. The absence of all necessary facts and circumstances in the notice of enquiry, constituting the restrictive trade practice is a serious legal infirmity and it vitiates the notice of enquiry Regulation 58 also specifically states that "the proceedings under sub-section (1) of section 37 of the Act shall be initiated by a notice to the person or persons against whom allegations of restrictive trade practices are made stating that the Commission proposes to hold an inquiry into the alleged trade practices. "Thus the notice of enquiry must contain all the facts constituting the alleged trade practices. The notice of enquiry is in the nature of a complaint. As it is an condition must disclose prima face that a cognizable offence has been committed, so also for the Commission to enquire into the alleged restrictive trade practice on the information received by it, it must state in the notice of enquiry all the necessary facts constituting the restrictive trade practice alleged against a person or party to whom such notice of enquiry is issued. The rule laid down by the Supreme Court in State of West Bengal and Others Vs. Swapan Kumar Guha and Others, in relation to commencement of investigation u/s 457 of the Code of Criminal Procedure on receipt of the first information report must be made applicable to the proceeding initiated by the Commission for the alleged

restrictive trade practice on the information received by it u/s 10(a)(iv) of the Act, by issuing a notice of enquiry. The rule laid down by the Supreme Court in the aforesaid decision is as follows (at pages 129) :

"The position which emerges from these decisions and the other decisions which are discussed by brother. A N Sen is that the condition precedent to the commencement of investigation u/s 157 of the Code is that the FIR mist disclose prima facie that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation u/s 157 of the Code. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence and they cannot reasonably have reason so to suspect unless the FIR prima facie discloses the commission of such offence. If that condition is satisfied, the investigation must go on and the rule in AIR 1945 18 (Privy Council) will apply. The court has then no power of the police to investigate into cognizable offences. On the other hand if the FIR does not disclose the commission of a cognizable offence, the court would be justified in quashing the investigation on the basis of the information as laid or received."

15. In Mahindra and Mahindra Ltd. v. Union of India [1979] 49 Comp Cas 419 : AIR 1979 SC 798 in relation to the application made by the Registrar u/s 10(a)(iii) of the Act, it has been laid down that the application must contain facts which in the opinion of the Registrar constitute a restrictive trade practice. It has been further held that the application must set out facts or features to show or establish as to how the alleged clauses constitute restrictive trade practice in the context of facts. In this background, let me now consider the allegations contained in para 1 of the notice of enquiry in question. The allegation are to the effect that the petitioner has discriminated in supplying fuel injection equipment, its spares and replacements to Modern Engineering Corporation and Faizabad Diesels, authorised distributors of the petitioner at Lucknow and Faizabad respectively on the one hand, and to the other authorised distributors of the petitioner at Gorakhpur and Kanpur Divisions on the other, without having regard to the engine population in these areas ; inasmuch as it has been making increased supplies to its favourite distributors and this distribution policy of the petitioner has created artificial scarcity and caused rise in prices in the market. There is no allegation that having regard to the nature of the trade, as to in what manner it has actually resulted or is likely to result in preventing, distorting or restricting competition in any manner or how it tends to obstruct the flow of capital or resources into the stream of production or tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to supply of fuel injection equipment, its spares and replacements or has caused imposition on customers unjustified costs or restrictions. In the absence or necessary allegations, it is highly hazardous for the Commission to start an enquiry and at the same time, it places the petitioner at a great disadvantage. The very basis of a fair and proper enquiry consistent with the principles of natural justice is denied inasmuch as the necessary facts constituting the alleged restrictive trade practice are not disclosed to the

petitioner, nevertheless it is required to meet the charge of alleged restrictive trade practice. Thus, I am of the view that para 1 of the notice of enquiry is a very bald one. The Commission cannot be permitted to proceeds with the enquiry without disclosing the necessary facts constituting the restrictive trade practice.

16. As far as the allegations contained in paras (ii) (a) and (b) are concerned, they relate to the resignation submitted by Sri. L. D. Sabharwal as proprietor of Modern Engineering Corporation, Lucknow, from the authorised dealership of the petitioner company. The said resignation has been accepted. thereafter, the authorised dealership of Sri. L. D. Sabharwal of the petitioner company in relation to Faizabad Diesels has been terminated by the petitioner company with effect from December 15, 1981. Both these acts are done in terms of the agreements. It is not disputed that the terms of the two agreements are approved by the Commission under the provisions of the Act. Therefore, there is no question of examining them as to whether the same contain a clause which is likely to result in "restrictive trade practice". It is an established position of law that it is open to a trader to select his own dealer, USA v. Colgate and Co. [1918] USSC 299. In the absence of any purpose to create or maintain a monopoly, the Act does not restrict the long recognised right of a trader or manufacturer to engage in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal and to announce, in advance, circumstances under which he will refuse to sell. In one case, the authorised dealership is terminated and in another the resignation of the authorized dealership tendered by L. D. Sabharwal is accepted in exercise of the power vested in the petitioner under the terms of the contract. Therefore, it is not possible to hold that such exercise of power attracts the charge of "restrictive trade practice". Therefore, para (ii) (a) and (b) of the notice of enquiry cannot also be held to contain the necessary ingredients of restrictive trade practice.

17. In view of the conclusions reached by me, it is not possible to accept the submissions made by learned senior standing counsel for the Central Government appearing for respondents Nos. 1 and 2 that the commission is entitled to go into the allegations contained in paras 1 and 2 of the notice of enquiry. Accordingly, Point no. 1 is answered in the negative.

18. Point No. 2.- The next question is as to whether it is a case for exercising jurisdiction under article 226 or 227 of the Constitution. This has to be examined in the background that the case is at the initial stage before the Commission and as against the ultimate decision in the case, an aggrieved person or party has a right of appeal to the Supreme Court. No doubt, normally, interference is not called for at this stage as the Commission is empowered to enquire into the allegations of restrictive trade practice. But, in a case like this, where the condition precedent for exercise of jurisdiction, in other words, for holding an enquiry by the Commission into the alleged restrictive trade practices is not satisfied inasmuch as necessary allegations are not contained in the notice of enquiry regarding the alleged restrictive trade practice, to enable the petitioner

to know the case alleged against it, it is not just and proper to allow the Commission to make a roving enquiry. In a case like this, if the commission is allowed to go ahead with the enquiry which will necessarily subject the petitioner to a lengthy proceeding and unnecessary harassment, it will be nothing but allowing the Commission to clutch at the jurisdiction. The Commission does not enjoy unlimited jurisdiction. It is a tribunal of limited jurisdiction. It has no right or jurisdiction to enquire into the the allegations of restrictive trade practice upon its own knowledge or information (section 10(a)(iv) of the Act), unless it is possessed of all the necessary facts and circumstances which go to establish the alleged restrictive trade practices and states the same in the notice of enquiry. It is a condition precedent of exercise of jurisdiction to start the proceeding. In the instant case, as pointed above, it cannot be held to exist. It is necessary to state in the notice of enquiry all the facts and circumstances resulting in the alleged restrictive trade practice to enable the person or party to whom such notice of enquiry is issued, to know the nature and the scope of the proceeding initiated against him or it ; as otherwise, it will be nothing but an arbitrary exercise of power to make a roving enquiry which our jurisprudence does not permit. No authority, whether it be administrative or executive, much less an authority clothed with judicial power, can exercise its power or jurisdiction arbitrarily. It is more so in the case of tribunals with limited jurisdiction. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, with reference ot section 34 of the Income Tax Act, it is held that before the Income Tax Officer has jurisdiction ot start a proceeding u/s 34 of the Income Tax Act after the expiry or four years, he must have reason to believe that there has been underassessment and, further, reason to believe that such underassessment has resulted from non-disclosure of material facts. It is further held that in proceedings under article 226 of the constitution, the High Court can investigate the existence of one of those two conditions and if it is found that the conditions precedent do not exist, the High Court, in exercise of its jurisdiction under article 226 of the constitution, can issue high prerogative writs prohibiting the action under the notice issued u/s 34 of the Income Tax Act. It is also further held that the High Court has power to issue, in a fit case, a writ of prohibition or certiorari where an action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassments to prevent such consequences. It is more so in the case of a tribunal exercising quasi-judicial power.

19. In Rex v. Shoreditch Assessment Commitee, Ex parte Morgan [1990]2 KB 859 (CA) the Court of Appeal, while issuing a mandamus to the Committee, held thus :

"...it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure-such a tribunal would be autocratic, not limited-and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non- existence of its own jurisdiction is founded on law or fact".

20. In Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 Ac 147 (HL), Lord Pearce observed thus (at pages 194 and 195) :

"such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from a general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament.

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it ahs no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice ; or it may ask itself wrong questions ; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction ... the courts'' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself wrong questions (that is, questions other than those which Parliament directed ti to ask itself). But, if it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have the wrong answer, provided that this is an answer that lies within its jurisdiction".

21. In the instant case also, as it is already pointed out, the conditions precedent for initiating a proceeding by issuing a notice of enquiry u/s 10(a)(iv) and section 37 of the Act read with regulation 58 of the Regulations are not satisfied. In other words, the same do not exist. Therefore, the Commission cannot be permitted to act in excess of its jurisdiction. In addition to this, it is the case of the petitioner that the roving enquiry embarked upon by the Commission subjects it to a lengthy proceeding and unnecessary harassment. The Act does not contemplate any such motu jurisdiction only on satisfying the conditions precedent, as mentioned earlier, Hence, I am of the view that it is a fit and proper case for exercise of jurisdiction under article 226 or 227 of the Constitution, to prevent the arbitrary exercise of jurisdiction which is nothing but negation of rule of law. Accordingly, point No. 2 is answered in the affirmative.

22. Point no. 3. - In view of the conclusions reached on points Nos. 1 and 2, it follows that the impugned order (annexure-S) in so far it relates to paras 1 and 2 of the notice of enquiry dated August 19, 1982 (annexure-Q), and paras 1 and 2 of the said notice of enquiry, are liable to be quashed. Point No. 3 is answered accordingly.

23. For the reasons stated above, this writ petition is allowed in the following terms :

The allegations contained in paras 1 and 2 of the notice of enquiry, date August

19, 1982, issued by the first respondent, produced as annexure-Q ; and the impugned order dated October 12, 1982, passed by the first respondent in Restrictive Trade Practices Enquiry No. 8 of 1982, produced as annexure-S, in so far it relates to paras 1 and 2 of the notice of enquiry referred above, are hereby quashed.

24. It is made clear that the first respondent is at liberty to proceed to enquire into the allegations contained in paras 3 and 4 of the notice of enquiry dated August 19, 1982, issued by the first respondent, produced as annexure-Q.

