(2021) 03 GUJ CK 0108

In the Gujarat High Court

Case No : R/Special Civil Application No. 5085 Of 2021

Oravel Stays Private Limited (Oyo) APPELLANT

Vs

Competition Commission Of India RESPONDENT

Date of Decision : 23-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Competition Act, 2002 — Section 3, 3(4), 4, 19(1)(a), 26, 26(1), 27, 33, 37, 53A

Citation : (2021) 03 GUJ CK 0108

Hon'ble Judges : Vipul M. Pancholi, J

Bench : Single Bench

Advocate : Mukul Rohatgi, Mihir Joshi, Munjaal Bhatt, Anuj Berry, Harman Singh Sandhu, Rohan Arora, Aman Singh Sethi, Anusha Ramesh, Sonali Charak, Aryan Agrawal, M R Bhatt, Samir Bansal, Kanva M Antani, Garima Malhotra, Saurabh Soparkar, Parth Shah, Lagna Panda, Ruchi Khann, Vishnu Suresh, Abir Roy, Jay S Shah, Ishaan Chakrabarty, Rajiv Nayar, Shashank Gautam, Amit Misha, Sreemoyee Deb, Varad Choudhary, Manjira Dasgupta, Maharshi Patel, HL Patel

Final Decision : Dismissed

Judgement

Vipul M. Pancholi, J

1. Draft amendment is allowed. Learned advocate for the petitioner to carry out the same forthwith.

2. In this petition, which is filed under Article 226 of the Constitution of India, petitioner has challenged the order dated 09.03.2021 passed by the Competition Commission of India - respondent No.1 herein.

3. Heard learned Senior Advocate Mr. Mukul Rohtagi and learned Senior Advocate Mr. Mihir Joshi assisted by learned advocate Mr. Munjal Bhatt for the petitioner, learned counsel Mr. Samar Bansal assisted by learned advocate Mr. K.M.Antani for respondent No.1, learned Senior Advocate Mr. Saurabh Soparkar assisted by learned advocate Mr. Parth Shah for respondent No.2, learned counsel Mr. Abir Roy assisted by learned advocate Mr. Jay Shah for respondent No.3 and learned

counsel Mr. Rajiv Nayar assisted by learned advocate Mr. Shashank Gautam for respondent Nos. 4 and 5.

4. Learned counsel Mr. Rohtagi for the petitioner, at the outset, referred to the averments made in the memo of the petition and submitted that petitioner company is incorporated under the Companies Act, 1956 having its registered office in Ahmedabad, Gujarat. That the petitioner is having tie-up with approximately 350 hotels situated in the State of Gujarat. It is further submitted that specially for hotels, the petitioner is empowering small and independent hotel owners/operators with the operational capabilities and technologies that enable them to compete better, achieve high occupancies and improve earnings. The respondent Nos. 4 and 5 are On- line Travel Agencies (OTAs) engaged in the business of providing travel and tourism related services in India. Respondent Nos. 4 and 5 merged together in the year 2017.

4.1.It is further submitted that on 05.04.2019, Information was filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the 'Act') by respondent No.6 against the petitioner and respondent Nos. 4 and 5 - MMT-Go alleging contravention of the provisions of Sections 3 and 4 of the Act, which was registered as Case No.14 of 2019. It is mainly alleged that the petitioner and MMT-Go were distorting the market price/predatory pricing and charging exorbitant commissions etc. In the said proceedings, petitioner is joined as opposite party. On 28.10.2019, the respondent No.1 passed an order under Section 26(1) of the Act and found that there exists a prima facie case for investigation against the petitioner and MMT-Go for the alleged violation of the provisions of Section 3(4) of the Act. The Director General, CCI ('DG') was directed to carry out a detailed investigation into the matter and to submit a report to the respondent No.1 within a period of 150 days. It is submitted that while passing the said order, the respondent No.1 did not grant any interim relief in favour of the concerned informant No.1.

4.2. At this stage, it is also pointed out that on 07.01.2020, another Information was filed under Section 19(1)(a) of the Act by respondent No.3 against the petitioner and MMT-Go alleging contravention of provisions of Sections 3 and 4 of the Act, which was registered as Case No.1 of 2020. In the said proceedings, an application for impleadment was filed by respondent No.2 which was allowed by respondent No.1 vide order dated 05.02.2020.

4.3. Learned counsel Mr. Rohtagi thereafter submits that on 24.02.2020, the respondent No.1 passed an order directing the DG to investigate the allegations raised by respondent No.3. In the said proceedings also the petitioner is an identified opposite party. By way of the said order the respondent No.1 directed that Case No.1 of 2020 and Case No.14 of 2019 be clubbed together. At this stage also no interim relief was sought for by any party.

4.4. At this stage, it is pointed out that the DG has been conducting the investigation and the respondent No.1 has granted third extension to the DG and thereby granted time to submit the report up to 31.03.2021.

4.5. In the aforesaid background of the case, now learned counsel Mr. Rohtagi would submit that the respondent Nos. 2 and 3 filed separate applications under Section 33 of the Act seeking interim direction against the MMT-Go for re-listing of inventories of the respondent Nos. 2 and 3 on MMT-Go's portal. In the said proceedings, the respondent No.1 issued notice to MMT-Go. However, no notice was issued to the petitioner and thereafter, vide impugned order dated 9th March, 2021, the respondent No.1 had interfered with the contractual commercial arrangement arrived at between the petitioner and MMT-Go by directing MMT-Go to list the inventories associated with the respondent Nos. 2 and 3 on MMT-Go platforms. Petitioner has, therefore, filed the present petition.

4.6. Learned counsel Mr. Rohtagi appearing for the petitioner would refer to and rely upon the provisions contained in Section 33 of the Act and thereafter contend that the respondent No.1 is empowered to grant temporary injunction against any party until the conclusion of inquiry or until further orders. It is submitted that the respondent No.1 can pass prohibitory injunction but not mandatory. The impugned interim mandatory order passed by the respondent No.1 is, therefore, ultra vires to the provisions of Section 33 of the Act. Learned counsel has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of Competition Commission of India v. Steel Authority of India Ltd. and another, reported in (2010) 10 SCC 744, and more particularly, the observations made in paragraph Nos. 117 to 123 of the said decision.

4.7. It is further submitted that interim mandatory order can be passed in exceptional cases, however, present case does not fall under the category of exceptional case. Learned counsel has placed reliance upon the decision of Hon'ble Supreme Court in the case of Samir Narain Bhojwani v. Aurora Properties and Investments and another, reported in (2018) 17 SCC 203.

4.8. Learned counsel Mr. Rohtagi also submitted that the respondent No.1 ought not to have granted final relief at interim stage. Learned counsel has referred to and relied upon the decision rendered by the Hon'ble Supreme Court in the case of Super Cassettes Industries Ltd. v. Music Broadcast Private Ltd., reported in (2012) 5 SCC 488.

4.9. Learned counsel would further submit that the impugned order came to be passed by the respondent No.1 without affording an opportunity of hearing to the petitioner, which is affected party. Thus, the impugned order is in violation of principles of natural justice and void. At this stage, it is submitted that it is well settled that if there is violation of principles of natural justice, the High Court can exercise the powers under Article 226 of the Constitution of India though alternative remedy is available. It is further submitted that as held by the Hon'ble Supreme Court in the case of S.L.Kapoor v. Jagmohan and others, reported in (1980) 4 SCC 379, if there is violation of principles of natural justice, it is not necessary to show the prejudice caused to the party. At this stage, it is also pointed out that the petitioner has filed an application for review/recall of the order dated 09.03.2021 before the respondent No.1 and the said application is pending. It is, therefore, urged that the issue involved in the present petition requires consideration and therefore this Court may issue notice to the respondents and stay the impugned order.

5. Learned Senior Advocate Mr. Mihir Joshi, who is also appearing for the petitioner, has supported the submissions canvassed by learned Senior Advocate Mr. Mukul Rohtagi. Learned counsel Mr. Joshi further submits that the proceedings were initiated by the concerned respondents before the respondent No.1 in October, 2019 and in January, 2020. The respondent No.1 passed an order under Section 26(1) of the Act and DG was asked to investigate the issue and submit the report and till date three extensions are granted to the DG. By way of third extension, DG is asked to submit the report before 31.03.2021. In this background, it is submitted that the concerned respondent filed an application under Section 33 of the Act on 04.11.2020 for interim relief in which the petitioner is not joined as a party though the petitioner is party in the main proceedings. Similarly, another respondent filed similar type of application under Section 33 of the Act on 23.11.2020 in which the petitioner is joined as a party. However, surprisingly and shockingly, no notice was issued to the petitioner by respondent No.1 and now the impugned mandatory order has been passed by the respondent No.1 without giving an opportunity of hearing to the petitioner.

5.1. At this stage, learned counsel Mr. Joshi has referred to the provisions contained in Sections 26 and 27 of the Act and thereafter contended that by way of impugned order the respondent No.1 has indirectly modified the contract entered into between the petitioner and MMT-Go and thereby the respondent Nos. 2 and 3 are brought back on the platform of MMT- Go. It is submitted that the concerned respondent Nos. 2 and 3 have been excluded/delisted from the platform of MMT-Go since the year 2018-2019 and therefore there was a delay in filing the application under Section 33 of the Act by the concerned respondent Nos.2 and 3 before the respondent No.1. Thus, looking to the said delay there was no urgency to grant mandatory interim injunction in favour of the respondent Nos. 2 and 3 by the respondent No.1.

5.2. Learned counsel Mr. Joshi would further submit that the registered office of the petitioner company is situated in the State of Gujarat. Petitioner is having tie-up with more than 350 hotels within the State of Gujarat. The part of cause of action has arisen in the State of Gujarat and the impact and consequence of the impugned order is felt in the State of Gujarat and therefore this Court has jurisdiction to consider the issue involved in the present petition.

6. On the other hand, learned counsel Mr. Samar Bansal appearing for the respondent No.1 has mainly contended that impugned order passed under Section 33 of the Act is appealable and petitioner is having alternative statutory remedy to file an appeal under Section 53A of the Act before the National Company Law Appellate Tribunal (NCLAT for short). It is, therefore, urged that

this Court may not entertain this petition only on this ground.

6.1. Learned counsel Mr. Bansal has referred the provisions contained in Section 3(4) of the Act as well as preamble of the Act and thereafter submitted that because of the agreement entered into between MMT-Go and the petitioner, the competitors of the petitioner are delisted from the platform of MMT-Go and therefore the consumers are the sufferer. It is submitted that looking to the fact of the present case, respondent No.1 has issued direction to the respondent Nos. 4 and 5 - MMT-Go to re-list the inventories of the respondent Nos. 2 and 3 on their platform. Thus, no error is committed by respondent No.1.

6.2. It is further submitted that Section 37 of the Act has been repealed and power of review has been taken away. Thus, the application filed by the petitioner for review/recall of the impugned order before the respondent no.1 is not maintainable.

6.3. It is also contended that the petitioner has carried out the inspection of the case on 22nd and 29th January, 2021 as well as 7th February, 2021. However, the said fact is not disclosed. It is also submitted that petitioner must be aware about the filing of the application under Section 33 of the Act by the concerned respondents before the respondent No.1. It is submitted that no notice is required to be issued to the petitioner under Section 33 of the Act. He, therefore, urged that this petition be dismissed.

7. Learned Senior Advocate Mr. Saurabh Soparkar for respondent No.2 also contended that petitioner is having alternative statutory remedy of filing an appeal before the NCLAT under Section 53A of the Act and therefore this Court may not exercise extraordinary jurisdiction vested in it under Article 226 of the Constitution of India. It is also submitted that all the respondents are stationed at Delhi and therefore petitioner can file proceedings before the Delhi High Court.

7.1. Learned counsel has also referred the preamble of the Act and contended that the object of enactment of the Act is to prevent practices having adverse effect on competition, to promote and sustain competition in markets and to protect the interests of consumers. At this stage, it is submitted that the hotels of respondent Nos. 2 and 3 have been delisted and the hotels of the petitioner are listed on the platform of MMT-Go. Thus, because of the agreement entered into between the petitioner and MMT-Go, competition is eliminated between the petitioner and private respondents and therefore ultimately the consumers would be sufferer.

7.2. Learned counsel Mr. Soparkar has also referred the reasoning recorded by respondent No.1 while passing the impugned order and it is contended that respondent No.1 has taken into consideration all the relevant aspects while passing the impugned order and therefore this Court may not interfere with the same.

7.3. Learned counsel Mr. Soparkar would further submit that respondent No.1

has issued interim mandatory direction to MMT-Go i.e. respondent No.4 herein. However, respondent No.4 has not challenged the said order before this Court. It is also submitted that no direction has been issued to the petitioner and therefore this petition would not lie at the hands of the petitioner. In the facts of the present case, hearing was not required to be given to the petitioner and therefore no error is committed by the respondent No.1

7.4. After referring to the provisions contained in Section 33 of the Act, learned counsel contends that the respondent No.1 is empowered to pass interim order which includes prohibitory as well as mandatory order and in the facts of the present case, interim order of mandatory in nature is permissible.

7.5. With regard to the contention raised by the petitioner about irreparable loss caused to the petitioner, learned counsel Mr. Soparkar would submit that because of the impugned direction issued by the respondent No.1 to the respondent No.4 - MMT-Go, it would not cause any prejudice to the petitioner because the inventories owned by the respondent Nos. 2 and 3 would be approximately 1100, whereas the respondent No.4 - MMT-Go is managing inventories of approximately 72000. Thus, the competition of approximately one and half percent would be increased.

7.6. Thereafter, it is submitted that respondent No.1 has opened small window of competition in the market by passing the impugned order and the same cannot be termed as modifying the contract entered into between the petitioner and MMT-Go. It is, therefore, urged that this petition may not be entertained.

8. Learned counsel Mr. Abir Roy appearing for the respondent No.3 has, at the outset, contended that the present petition is not maintainable and this Court has no territorial jurisdiction to entertain the present petition. It is submitted that the impugned order has been passed by respondent No.1, which is stationed in Delhi. Further, the matter has been investigated by the Director General which is also stationed in Delhi. The Appellate Authority i.e. NCLAT is also stationed in New Delhi. Moreover, even the petitioner has filed an application for review/recall of the order in Delhi. Thus, the entire cause of action arose in Delhi and therefore this Court has no territorial jurisdiction to entertain this petition. It is further submitted that without prejudice, even if it is accepted that some part of the cause of action arose within the territorial jurisdiction of this Court, on account of doctrine of Forum Conveniens, this Court may not entertain the present petition. In support of the same, learned counsel has placed reliance upon the following decisions.

(i) In the case of Nevil Vishnubhai Patel v. Medical Council of India - SCA No.13958 of 2018.

(ii) In S.S.Jain & Co. & Anr. v. Union of India & Ors.. 1993 SCC Online Cal 306 (para 19 and 20)

(iii)In Kusum Ignots & Alloys Limited v. Union of India & Anr. (2004) 6 SCC 254

(para 30)

8.1. It is also contended that mere existence of the registered office of the petitioner in Gujarat is insufficient to bring the petition within the jurisdiction of this Court. In support of the said contention, learned counsel has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of National Textile Corporation Ltd. v. Haribox Swalram, reported in (2004) 9 SCC 786 and in the case of ONGC v. Utpal Kumar Basu, reported in (1994) 4 SCC 711.

8.2. Learned counsel would thereafter submit that on one hand, the petitioner has filed the present petition on 17.03.2021 before this Court and on the other hand, petitioner has also filed an application seeking review/recall of the impugned order before the respondent No.1 on 15.03.2021. Thus, it is not open for the petitioner to file the present petition. Learned counsel has, at this stage, placed reliance upon the decision in the case of Delhi Gate Auto Service Station v. Bharat Petroleum Corporation Limited Agra, reported in (2009) 16 SCC 766.

8.3. Learned counsel would thereafter submit that the impugned order is appealable before the NCLAT under Section 53A of the Act and therefore this Court may not exercise jurisdiction under Article 226 of the Constitution of India. Learned counsel has referred to and rely upon the decision rendered in the case of Cicily Kallarackal v. Vehicle Factory, reported in (2012) 8 SCC 524.

8.4. On merit, learned counsel for respondent No.3 would submit that no notice was required to be issued to the petitioner for the purpose of proceedings under Section 33 of the Act. Under the scheme of the Act, it is sufficient compliance with the principles of natural justice if the respondent no.1 gives notice under Regulation 31(2) of the Competition Commission of India (General) Regulations, 2009 to the party restrained by the order after passing its decision. It is, thus, contended that notice as contemplated under Section 33 read with Regulation 31 is to be issued only to such party against whom relief is sought. In the present case, the relief was sought against the respondent Nos. 4 and 5 herein - MMT-Go and not against the petitioner and therefore it cannot be said that the respondent No.1 has violated the principles of natural justice. In support of the said contention, learned counsel has placed reliance upon the decision rendered in the case of Steel Authority of India Limited (supra).

8.5. At this stage it is also submitted that the Hon'ble Supreme Court, while interpreting Section 33 of the Act, has recognized the aspect of post decisional hearing and it is held that the post decisional hearing would satisfy the principles of natural justice. Learned counsel has, therefore, urged that this petition may not be entertained.

9. Learned counsel Mr. Rajiv Nayar appearing for the respondent Nos. 4 and 5 has supported the submissions canvassed by learned Senior Advocate Mr. Mukul Rohtagi and learned Senior Advocate Mr. Mihir Joshi for the petitioner. It is further contended that in the facts of the present case, respondent No.1 could not have issued interim mandatory direction to the respondent Nos. 4 and 5. It is

also submitted that there is violation of principles of natural justice as the petitioner was not heard. Therefore, the exercise carried out by the respondent No.1 is without jurisdiction.

10. Having heard the learned advocates appearing for the parties and having gone through the material placed on record, following issues are required to be examined by this Court in the present petition.

(i) Whether this Court has territorial jurisdiction to entertain the present petition? Whether relying on the principle of Forum Conveniens, petitioner can be relegated to the Delhi High Court?

(ii) Whether the present petition is required to be dismissed on the ground that the petitioner is having alternative statutory remedy of filing an appeal before the NCLAT?

(iii)Whether the respondent No.1 has violated the principles of natural justice at the time of passing the impugned order?

(iv)Whether the respondent No.1 is justified in granting interim mandatory injunction in favour of the respondent Nos. 2 and 3 in the facts of the present case?

11. It is the specific case of the petitioner and it also reveals from the record that the Registered Office of the petitioner is situated in the State of Gujarat and petitioner is having tie-up with more than 375 hotels in the State of Gujarat which are listed on the platform of MMT-Go. The effect of the impugned order would be directly on the petitioner and the inventories situated in the State of Gujarat and therefore this Court is prima facie of the view that this Court is having territorial jurisdiction to entertain the present petition.

11.1. So far as the issue of Forum Conveniens is concerned, in the case of M/S. Kusum Ingots & Alloys Ltd (supra), the Hon'ble Supreme Court has in para 30 held that in appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of Forum Conveniens. The Division Bench of this Court has also observed that the convenience would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also required to be taken into consideration. In the present case, as observed hereinabove, the Registered Office of the petitioner is in the State of Gujarat. Respondent No.3 stationed at Bangalore, whereas respondent Nos. 4 and 5 also stationed at Haryana. Thus, this Court is, prima facie, of the view that it is open for the petitioner to choose more convenient forum. Thus, prima facie, on the ground of Forum Conveniens, this petition cannot be dismissed relegating the petitioner to Delhi High Court.

12. From the material placed on record, it would emerge that the petitioner entered into an agreement with the respondent No.4 - MMT-Go on the basis of

which inventories of the petitioner are listed on the platform of MMT-Go. It is not in dispute that the inventories of the respondent Nos. 2 and 3 have been delisted from the platform of MMT-Go in the year 2018-2019. It is also not in dispute that the concerned respondent filed Case No.14 of 2019 on 05.04.2019 and respondent No.3 filed Case No.1 of 2020 on 07.01.2020 before the respondent No.1. It is further revealed that order under Section 26(1) of the Act has been passed and DG was asked to investigate and submit the report within stipulated time. By way of third extension, DG is asked to submit the report on or before 31.03.2021. Two separate applications are also filed by the concerned respondents under Section 33 of the Act in November, 2020. It is pertinent to note that petitioner is joined as party in the main proceedings filed by the concerned respondents. It further transpires that in the application filed under Section 33 of the Act, one of the respondents has joined the petitioner as party opponent, whereas in another application, the concerned respondent did not join the petitioner as respondent. It is also not in dispute that the impugned order has been passed by the respondent No.1 without giving an opportunity of hearing to the petitioner. Thus, this Court is, prima facie, of the view that the respondent No.1 has violated the principles of natural justice at the time of passing of the impugned order and this Court is, prima facie, of the view that the petitioner is an affected party.

13. In the case of S. L. Kapoor (supra), the Hon'ble Supreme Court has specifically observed that non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. Thus, this Court is, prima facie, of the view that though alternative remedy of filing an appeal before the NCLAT is available to the petitioner, the present petition is maintainable and this Court can exercise the jurisdiction vested in it under Article 226 of the Constitution of India in the facts of the present case.

14. This Court has also gone through the impugned order passed by the respondent No.1 and this Court is, prima facie, of the view that by giving interim mandatory direction to the respondent No.4, rights of the petitioner are affected. It is the specific case of the petitioner that an agreement is entered into between the petitioner and respondent No.4 by which the inventories of the respondent No.3 are delisted and inventories of the petitioner are listed on the platform of respondent No.4 - MMT-Go. It is the specific case of the petitioner that because of the interim mandatory direction issued by respondent No.1 to respondent No.4, the inventories of the respondent Nos. 2 and 3 are required to be re-listed on the platform of MMT-Go. Thus, prima facie, it appears that it amounts to modification of the contract and agreement entered into between the petitioner and MMT-Go. Further, the respondent Nos. 2 and 3 have been delisted from the platform of MMT-Go somewhere in the year 2019, whereas in November, 2020, for the first time, two separate applications under Section 33 of the Act have been filed. Third extension was given to the DG to submit report before 31.03.2021 and at that stage, now on 09.03.2021, the interim mandatory order

has been passed by respondent No.1. Thus, whether respondent No.1 is justified in granting interim mandatory order in the facts of the present case and that too without giving an opportunity of hearing to the petitioner, which is party in the main proceedings and which is also a party in one of the applications filed under Section 33 of the Act are the issues which are required to be examined in detailed.

15. Further, the argument is canvassed by learned counsel Mr. Bansal for the respondent No.1 that Section 37 of the Act has been repealed and therefore application for review/recall filed by the present petitioner before the respondent No.1 is not maintainable. Thus, on one hand, learned counsel appearing for respondent No.1 has contended that the application for review/recall of the impugned order is not maintainable and on the other hand, learned counsel appearing for the respondent No.3 has contended that the present petition may not be entertained as the petitioner has filed review application before the respondent No.1. Thus, this issue is also required to be heard in detailed at the time of hearing of the petition.

16. Thus, in view of the aforesaid discussion, this Court is, prima facie, of the view that the issue involved in the present petition requires consideration and this petition cannot be dismissed at the threshold. Hence, issue Notice to the respondents returnable on 26th April, 2021. Learned advocate Mr. K.M.Antani waives service of notice for respondent No.1, learned advocate Mr.Parth Shah waives service of notice for respondent No.2, learned advocate Mr. Jay Shah waives service of notice for respondent No.3 and learned advocate Mr.Shashank Gautam waives service of notice for respondent Nos. 4 and 5. The petitioner is having prima facie case in its favour, balance of convenience is also in favour of the petitioner and if the interim relief as prayed for is not granted, petitioner will suffer irreparable loss. Hence, till the final disposal of the petition, impugned order dated 09.03.2021 passed by the respondent No.1 is hereby stayed.

17. It is clarified that as the learned counsels appearing for the parties have argued the matter on the very first day of hearing at length, this Court has recorded prima facie and tentative observations for grant of interim relief. However, all the issues raised in the present petition are kept open and shall be considered at the time of further hearing of this petition.