(1997) 10 NCDRC CK 0002

In the National Consumer Disputes Redressal Commission

SEVANIVRIT KARAMCHARI EVAM UPBHOKTA SANRAKSHAN SAMITI — APPELLANT

Vs

TRANSELEKTRA DOMESTIC PRODUCTS PVT. LTD. — RESPONDENT

Date of Decision : 21-10-1997

Acts Referred:

Citation : 1998 1 CPJ 3

Hon'ble Judges : Sardar Ali Khan , S.Chakravarthy J.

Final Decision : Review Application dismissed

Judgement

1. THIS is a Review Application under Section 13(2) of the MRTP Act, 1969, preferred by Transelektra Domestic Products Private Limited (respondent in the main enquiry RTPE 68/92 and review applicant in the present case RA No. 2/96 hereinafter referred to as review applicant) against the order of this Commission dated 13th March, 1995. Originally, Sevanivrit Karamchari Evam Upbhokta Sanrakshan Sarrdti (complainant hereafter) had moved this Commission with a complaint application alleging that the review applicant had indulged in certain restrictive trade practices attracting Section 2(o) of the Act. The Commission''s impugned order held that the respondent had indulged in restrictive trade practices attracting Section 2(o)(ii) of the Act and that the said restrictive trade practices were manifestly against public interest. The Commission directed the review applicant to discontinue the restrictive trade practices and not to repeat the same in future. THIS is the order which is in challenge in this review application. Before proceeding with the review application, it is desirable to state the facts in brief which led to the impugned order.

2. THE complainant, a registered Society preferred a complaint on behalf of one Shri Satish Kumar Jain, the proprietor of a firm known as Paras Steel Emporium, Gonda (PSE for brief) Shri Jain is a member of the complainant. It is in the business of procuring and selling various items like aluminium, stainless steel and copper utensils, electrical appliances etc. THE review applicant is a Company which manufactures and markets mosquito repellants under the brand name

''Good Knight". Paras Steel Emporium became a distributor of the review applicant for the marketing of the afore said mosquito repellants. In due course, it started marketing the mosquito repellants, operated several transactions in the product and created a net work of retailers also. The review applicant opened a depot at Kanpur to streamline the marketing of its products. It convened a conference in Lona wala near Bombay between the 2nd and 4th November, 1987 to launch a new sister concern "Diapers India Limited" and issued shares for subscription in the new Company. Paras Steel Emporium did not attend the conference through any of its representatives. The review applicant in January, 88 sent a letter advising Paras Steel Emporium to send the duly filled in share application forms with a cheque or demand draft in the name of Diapers India Limited for taking shares in the new Company. PSE did not attend the Lona wala conference nor did it seek any shares in Diapers India Limited. The conference itself was postponed which fact was not informed by the review applicant to PSE which in any case did not subscribe for the shares in the newly floated Company Diapers India Limited. The complainant alleged that because PSE did not subscribe for the shares in Diapers India Limited, the review applicant got annoyed and started discriminating against it by not even sending its sales representative to PSE. It further discriminated against it by not supplying its product and ultimately terminated its distributorship on 2nd May, 1989. Despite a number of letters written by PSE, the review applicant did not restore its distributorship.

This complaint was covered by a Notice of Enquiry issued by the Commission on 29th April, 1992 requiring the review applicant to put in its appearance and to defend itself against the charges of restrictive trade practices. After receiving the reply of the review applicant, the Commission came to the conclusion that the conference at Lona wala was essentially intended to promote the interest of Diapers India Limited, a sister concern of the review applicant and noted that there has been no refutation by the review applicant of the letter written by Paras Steel Emporium to it, in which it was mentioned that the sales representative of the review applicant had informed Shri S.K. Jain, proprietor of PSE that its distributorship has been terminated as it had not subscribed for the shares in Diapers India Limited. The Commission further observed that (he review applicant itself had stated in its reply to the interrogatories that it had 72 distributors and stock sits who were holding 8455 shares in Diapers India Limited. The Commission concluded that the termination of distributorship of PSE had a nexus with its non- sub scription for shares in Diapers India Limited. Holding here view applicant guilty of restrictive trade practices, the impugned order was passed by this Commission on 13th March, 1995.

3. THE review applicant has challenged the said order of the Commission on the following grounds : 1. THE Commission has no jurisdiction to intervene between the manufacturer (review applicant) and the distributor (Paras Steel Emporium) and give a direction for restoration of the distributorship of the latter. 2. Anti-Trust Laws "are not designed to saddle manufacturers with somnolent

distributors". 3. Merely because the review applicant has dropped one distributor and replaced it with another, competition in the market cannot be regarded as changed. 4. Even an erroneous termination of distributorship cannot be regarded as anti-competitive. 5. Erroneous termination may be a breach of contract but not a restraint of trade.

Dealings between amanu factored and distributor may be arbitrary, unfair or lacking in good business judgment but they do not violate the MRTP Act.

4. THERE are precedent judgments of the Commission which have held the view that the relationship between a manufacturer and distributor cannot be the subject matter under the MRTP Act. No order can be passed without recording the finding that a restrictive trade practice has been indulged in by the review applicant and that it is prejudicial to public interest. The gateways have to be discussed by the Commission on the strength of the Hon''ble Supreme Court''s ruling in Voltas Ltd. v. Union of India and Others, dated 7th February, 1995 (1995-3-CTJ 49 SC). The finding that the distributorship of PSE was terminated on the ground of its non-sub scribing to the shares in Diapers India Limited is factually incorrect. 6. The complainant submitted its detailed reply to the review application with a copy to the other side. We gave a hearing to Dr. V.K. Aggarwal, Advocate for the complainant and Mr. O.P. Dua, Advocate for the review applicant who was assisted by Mr. Abhijit Puri and Ms. T. Rajkumari, Advocates. 7. An argument advanced by Dr. Aggarwal, Advocate for the complainant at the outset, is that the power of the Commission for review under Section 13(2) of the Act does not permit of a rehearing of the case, on the same material, without anything more, with a view to showing that the impugned order is wrong on facts. He drew our attention to the ruling of the Hon''ble Supreme Court in Mahindra and Mahindra Ltd. v. Union of India, AIR 1979 Supreme Court 798, in support of his contention. 8. We have gone through the said ruling of the Hon''ble Supreme Court and agree with Dr. Aggarwal, Advocate for the complainant that on the same facts and circumstances, there cannot be a rehearing of the case. Those grounds which were advanced by the review applicant which are based on the same facts and circumstances, which have been dealt with, at the time the impugned order was passed, cannot therefore, be advanced for a rehearing of the case. We have gone through the grounds advanced by the review applicant and hold that in line with the ruling of the Hon''ble Supreme Court v Mahindra and Mahindra case supra, we would not be in a position to entertain this review application in respect of the same facts which were agitated by the review applicant during the main enquiry leading to the impugned order. For instance, we have given our finding that the termination of distributorship of Paras Steel Emporium has a nexus with the non-subscription by the distributor for the shares in Diapers India Limited. It does not lie within the right of the review applicant to challenge this conclusion without any new or additional material. All that the review applicant has done now is to enclose to its review application, photo copies of letters of four distributors who have stated that their distributorship had remained unaffected despite the fact that they did

not subscribe to the shares in Diapers India Limited. Some of these four letters - photo copies - are neither in English nor in Hindi, the languages which are permitted in the pleadings and documents in the Commission. Other wise translations will have to be provided in English or Hindi. But we are not taking a technical view of this matter and overlooking the said infirmity, we are constrained to note that we have nowhere stated in the impugned order that all the distributors are holding shares in Diapers India Limited. In para 23 of the impugned order we have categorically stated that the statement made by the review applicant that the non-subscription for the shares in Diapers India Limited has nothing to do with the termination of distributorship is false, as according to its own reply to the interrogatories, it had gone on record that 72 distributors and stock ists are holding 8455 shares in that Company namely Diapers India Limited. We have also referred to Exhibits A2, A16 and A18 which on a combined reading with the pleadings of the review applicant and its reply to the interrogatories, gave a conclusion that the termination of distributorship of Paras Steel Emporium has a nexus with its non-subscription for the shares in Diapers India Limited. If the review applicant is aggrieved by this conclusion of ours, it is well within its right to move the Hon''ble Supreme Court under Section 55 of the MRTP Act in appeal. In line with the Hon''ble Supreme Court''s ruling in Mahindra and Mahindra case supra, it is not possible for us to entertain the review application on the same facts and material for rehearing. We, therefore, reject this argument of the review applicant. The fact that four distributors did not take shares in Diapers India Limited but are continuing with their distributorship is no argument against our conclusion, as we have nowhere stated that all distributors and stockiest were required to hold shares in that Company. But in the case of Paras Steel Emporium because of the pointers available in Exs. A2, A16 and A18 and pleadings and reply to interrogatories, we arrived at the said conclusion of nexus in so far as Paras Steel Emporium is concerned. 9. It is an averment of the review applicant that in the impugned order, we have given a direction for restoration of distributorship of PSR. We are unable to see any such conclusion or direction anywhere in the order.

5. THE next important contention of the review applicant is that the manufacturer - in this case the review applicant - has the right to drop one distributor and replace it with another and that competition in the market will not be affected by such a change. Also contends Mr. O.P. Dua, Advocate for the review applicant, that the manufacturer has every right to conduct its marketing strategies in the manner it wishes to, in the interest of business and the Commission cannot intervene in such an arrangement.

6. MR. O.P. Dua, Advocate for the review applicant cited a decision of this Commission in Bombay Footwear (P) Limited and Another, RTPE 1/84 dated 19th March, 1985 reported in 1986 Tax L.R. 1683, in which it was held that a manufacturer can devise its market policy and modus operandi, in such a way as to be able to compete effectively with other manufacturers and that, therefore, it may not be in its interest to supply the goods to whosoever wants in the capacity

of a wholesaler or retailer, the result of which may be that in the long run it should lose its market in competion with other brands. Another decision cited by Mr. O.P. Dua, Advocate, for the review applicant, is again a decision of this Commission in Kota Nagar Pan Vikreta Sangh, Kota v. Godfrey Philips India Limited Bombay, RTPE 14/80 dated 18th November, 1983 reported in 1985 Tax L.R. 2001, in which it was observed that the practice of cigarette manufacturers appointing wholesale purchasers is widely prevalent in this kind of trade and finds its rationale in economic and practical considerations and does not really restrict trade or competition.

We are not disputing the ratio of the above decisions about the right of a manu factored to appoint its distributors or dealers. Nowhere, in the impugned order has any disputatious observation to this effect been made. Mr. O.P. Dua, Advocate, for the review applicant, however, points out that if the ratio in the above decision is in tact, then any change of a distributor should not be held to be anti-competitive in character. He referred to the observations in the book authored by Posner Easter Brook entitled ''Anti-Trust'' (Anti-Trust - second edition, page 747) wherein it has been mentioned that "The anti-trust laws are not designed to saddle manufacturers with somnolent distributors. When a manufacturer drops one distributor and replaces it with another, the one-for-one swap leaves competition in the market unchanged (except to the extent that the new distributor may be more effective than the departed one)".

7. WE are unable to see the relevance of the rulings cited above, by the Advocate for the review applicant, as well as the passage extracted from Posner''s book. Nowhere in the impugned order is anything mentioned about the abridgement of the right of a manufacturer to appoint a distributor of its choice. WE have mentioned in para 23 of the impugned order that the termination of distributorship has a nexus with the non-subscription by Paras Steel Emporium for the shares in Diapers India Limited. Even this conclusion, we have arrived at, on the basis of our evaluation of the evidence and in particular Exs. A2, A16 and A18. WE have concluded in the impugned order in the case of Paras Steel Emporium, there has been wrongful termination of distributorship on the ground of non-satisfaction of the desire of the review applicant that the said distributor namely PSE should take shares in Diapers India Limited. It may be noted that in the impugned order, after analysing the agenda items for the Lonawala conference, we came to the conclusion that the conference was intended to promote the interest of Diapers India Limited, a sister concern of the respondent. After a perusal of me records and the contentions of both the parties in the present review application, we reaffirm our view that there was no provocation for including in the agenda for the conference of dealers, an item to promote the interest of Diapers India Limited, a sister concern of the review applicant. Dealers are expected to deal with the products of the manufacturer and not promote the interest of a sister concern of the manufacturer. An argument was advanced by Ms. Raj Kumari, Advocate on record for the review applicant that Diapers India Limited is no more a sister concern of her client namely, the review

appli cant. At the relevant period of time. Diapers India Limited was a sister concern of the review applicant and the subsequent developments are not germane to determine the controversy. The ruling of the Delhi High Court in Classic Motors Ltd. v. Maruti Udyog Limited, (S. No. 2544 of 1994 dated 13th December, 1996 reported in 65 (1997) Delhi Law Times 166, was cited by Mr. O.P. Dua, Advocate for the review applicant at the time of arguments. The said ruling dealt with the manufacturer-distributor relationship. As mentioned above earlier, we are not concerned with the right of a manufacturer to appoint its distributor but with the termination of distributorship for reasons other than commercial considerations between the two parties. We have specifically indicated in the impugned order that on an evaluation of the evidence on record, there is a nexus between the termination and the non-subscription by Paras Steel Emporium for the shares in Diapers India Ltd. We consider this an unjustifiable tie-up in the commercial relationship and transactions between the manufacturer and Hie distributor.

8. ANOTHER ground advanced by the review applicant is that the Commission cannot pass an order of cease and desist unless it records a finding that there is a restrictive trade practice indulged in and that such a practice is prejudicial to public interest. On a careful reading of the impugned order, one cannot but note that there is a specific finding recorded that the review applicant has indulged in restrictive trade practices attracting Section 2(o)(ii) of the Act. In so far as prejudice to public interest is concerned, Section 38 of the MRTP Act has created a legal fiction, that every restrictive trade practice is pre-se prejudicial to public interest. But the law permits the charged party to plead and invoke gateways provided in Section 38(1) of the Act to avoid a cease and desist'' order. Mr. O.P. Dua, Advocate for the review applicant drew our attention to the ruling of the Hon''ble Supreme Court in Voltas Limited, Bombay v. Union of India and Others, (1995-3- CTJ 49 b.C.) that the Commission has to be satisfied on the existence and availability of gateways mentioned in Section 38 to his client. In line with the ruling of the Apex Court in the Voltas case supra, we have examined the restrictive trade practices in this case with reference to the gateways listed in Section 38(1) of the Act. We are unable to see after going deeply into the matter, that any gateway is even remotely available to the review applicant. The tie-up between subscription for shares in the sister concern and distributorship, in our opinion, is repugnant to ordinary, prudent, rational and commercial considerations. We are of the view that none of the gateway is available to the review applicant to resist a "cease and desist" order against it. In sum, we dismiss the review application. No order as to costs. Review Application dismissed.

