Director-general of Vs. Ub-mec Batteries Ltd.

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Jun-10-1996

Judge : S Chakravarthy, U Singh

Appellant : Director-general of

Respondent : Ub-mec Batteries Ltd.

Judgement :

1. Upon an application preferred by the Director-General of Investigation and Registration under Section 10(a)(iii) of the Monopolies and Restrictive Trade Practices Act, 1969, the Commission issued a notice of enquiry (NOE) on April 6, 1988, charging the respondent, UB-MEC Batteries Ltd., of having indulged in certain restrictive trade practices within the meaning of Section 2(o) and Section 33 of the Act. The facts of the case as reported by the Director-General of Investigation and Registration (DG) are summarised herein below : UB-MEC Batteries Ltd., the respondent company, is engaged in the business of automotive and traction batteries, train lighting and cells. The respondent-company as a part of its marketing arrangement introduced a "discount system" for its wholesalers. In terms of the system, a flat discount of 25% is allowed on the list price to all the wholesalers except to Economy Agencies, Bombay and Surat, which is allowed a discount of 30 per cent. The system offers a turnover discount of 2 per cent. on six monthly targets and an additional discount of 1 per cent., if the wholesalers achieve "both the six monthly targets". The Director-General stated that allowing target linked discounts and allowing different rates of discount to different parties are restrictive trade practices falling within the mischief of Clause (e) of Section 33(1) of the Act. He has also stated that the price Mst issued on February 16, 1987, by the respondent does not stipulate that the goods can be sold at prices lower than those stipulated therein, thus, attracting Clause (f) of Section 33(1) of the Act.

2. The application of the Director-General is the basis on which the notice of enquiry was issued to the respondent on April 6, 1988, indicting the respondent of having indulged in restrictive trade practices within the meaning of Section 2(o) and Section 33(1) of the Act.

3. The respondent on receipt of the notice of enquiry furnished its detailed reply in the Commission. It has made the following averments in its reply : (1) The discount system and price list referred to by the Director-General apply only to the wholesalers and not dealers and retailers. Thus, a mere declaration of discounts and prices applicable to the wholesalers without any obligation on the wholesalers to enforce the same on the dealers, retailers and consumers does not constitute any restrictive trade practice.

(2) The price list in footnote 7 permits the wholesalers/dealers to sell batteries at prices lower than the suggested maximum retail prices and, therefore, does not attract the MRTP Act.

(3) The application of the Director-General does not spell out the facts and features pertaining to the alleged restrictive trade practices and is, therefore, liable to be dismissed.

(4) The respondent-company has been subject to "acute financial difficulties" and has been facing liquidation. A scheme was devised to reconstruct the company and the Industrial Reconstruction Bank of India (IRBI) as

the lead institution provided financial assistance to meet its short-term working capital requirements and to tide over the "immediate and pressing difficulties", United Breweries Limited Company purchased the shares of the respondent. Thereupon, the company became a subsidiary of the United Breweries Ltd. (5) The company has been declared by the State Government as a relief undertaking.

(6) The company has been facing "stiff competition" from well established manufacturers of batteries like Chloride, Amco, Standard,. Willard, etc., and also from the small manufacturers in the unorganised sector.

(7) The discount scheme in question has resulted in improving the sale of the respondent's products considerably allowing it to make "marginal cash profits".

(8) Under the discount scheme, all the dealers are allowed a uniform discount of 25%. In addition, the scheme allows a turnover discount of 2% linked to six monthly targets and an additional discount of 1% on achieving "both the six monthly targets". Thus, all dealers who achieve the turnover are uniformly entitled to receive the turnover discount of 3%.

(9) Economy Agencies is allowed the additional 3% discount in advance since "the said dealer has been achieving the prescribed target in the past". However, if the said dealer, Economy Agencies fails to achieve the target, it will not be entitled to the additional discount.

(10) A further discount of 2% is allowed to Economy Agencies as the batteries are sent to the said dealer in an "unpacked condition".

The cost of packing saved by the respondent is, thus, passed on to the said dealer. In respect of the other dealers, the batteries are sent in "packed condition".

(11) The respondent's share in the replacement battery market is only 1.45% in the organised sector according to the All India Automotive Batteries Market Survey for the year 1987-88. Its share in the organised as well as the unorganised sector is not more than 3%. Thus, the discount scheme is only to promote healthy competition and does not constitute a restrictive trade practice.

(12) If the discount system is discontinued, the dealers will find it uneconomical to deal with the respondent's products and the respondent is not in a position to take up direct sales as it does not have the "necessary infrastructure".

(13) There is a large work force with the respondent and unless the discount scheme is operated and the sales are good, the company cannot survive. Thus, the respondent is entitled to gateways provided in Section 38(1) (b) and (e) of the Act.

(14) The restrictive trade practice, if at all it exists, does not directly or indirectly affect competition to any material degree, thus entitling the respondent to the gateway under Section 38(1)(h) of the Act.

4. The respondent has prayed that on the grounds of preliminary objections (1, 2 and 3 above) and on its reply on the merits, the notice of enquiry may be discharged.

5. After the pleadings have been completed, the following issues were framed : (1) Whether the enquiry is not maintainable for the reasons given in paras 1 to 3 under the preliminary objections of the respondent, or (2) Whether the respondent is indulging in the restrictive trade practices as alleged in the application under Section 10(a)(iii) whereon notice of enquiry has been issued.

(3) If the answer to issue No. 2 is in the affirmative, then whether the said trade practices are not prejudicial to public interest within the meaning of Section 38 alleged in the reply to the notice of enquiry.

6. The Director-General filed only two documents by way of evidence, namely, the respondent's letter dated March 19, 1987, addressed to him and the respondent's price list effective from February 16, 1987, and closed

his evidence. The respondent furnished the affidavit of Shri S.Prabhakar Naidu, its manager (sales and administration), in evidence.

Shri Naidu was cross-examined by the Director-General.

7. We gave a hearing to Dr. K. S. Yadav, ADG, for Director-General and Shri S.S. Kumar, counsel for the respondent.

8. On October 9, 1989, during the proceedings in this Commission, the Director-General gave up one of the two charges in the notice of enquiry, namely, that relating to resale price maintenance falling within the meaning of Section 33(1)(f) of the Act. The said charge was based on the price list issued by the respondent effective from February 16, 1987. In footnote 7 of the price list, liberty has been given to wholesalers/dealers to sell batteries at prices lower than those suggested as maximum retail prices. The charge, therefore, under Section 33(1)(f) fails. The Director-General rightly gave up the said charge. What, therefore, survives is the charge relating to the discount system falling under Section 33(1)(e) of the Act. Before we take up the said charge for examination, we need to deal with an application filed by the respondent under Section 151 of the Code of Civil Procedure, 1908. The said application was filed in the Commission on July 8, 1991. In the said application, the respondent has stated that the Central Government has approved a merger of the respondent with Herbertsons Ltd. with effect from July 1, 1988, under Section 49(9) of the Industrial Reconstruction Bank of India Act, 1984, and has requested that the Commission may keep this in view, while passing an order in the enquiry.

9. Shri S.S. Kumar, counsel for the respondent, stated that in terms of the merger scheme, the respondent company stands dissolved without being wound up. He added that the dissolution of the respondent-company has followed the merger and that no action can lie against a dissolved company. Shri Kumar drew attention to Section 394(1)(iv) of the Companies Act, 1956, and observed that in sanctioning an arrangement for the purposes of a scheme for the reconstruction of a company or the amalgamation of the two companies, the court, under Section 391 of the Companies Act has the power to make a provision for the dissolution, without winding up of the transferor company. In the merger scheme formulated under Section 49 of the Industrial Reconstruction Bank of India Act, 1984, Clause (10) thereof categorically states that upon a scheme being sanctioned, the assisted industrial concern shall stand dissolved without being wound up. Inasmuch as, Shri Kumar argues, the Central Government approved the scheme of merger with effect from July 1, 1988, under Section 49(9) of the Industrial Reconstruction Bank of India Act, 1984, the respondent-company already stands dissolved.

10. Dr. Yadav, ADG, for the Director-General observed that dissolution without winding up implies that the respondent-company still exists and that, therefore, the charge in this enquiry can be adjudicated upon.

11. The legal position is clear. The respondent-company has lost its identity with the dissolution.

12. On a perusal of the scheme of amalgamation, it is clear that with effect from the transfer date (close of business hours on June 30, 1988), the undertaking of the respondent shall be deemed to have been transferred to and vested in the transferee industrial concern, namely, Herbert-sons Ltd. (clause 2 of the scheme). Furthermore, the scheme stipulates that the undertaking of the respondent shall include all its business, properties, assets and liabilities (clause 3 of the scheme).

There is a further stipulation that all suits, appeals or other proceedings of whatever nature that may be pending by or against the respondent shall not abate or be discontinued (Clause 4 of the scheme).

The present enquiry commenced with the issuance of the notice of enquiry on April 6, 1988, which, therefore, is before the transfer date which is the close of business hours on June 30, 1988.

"The transfer and vesting of the property and liabilities and the continuance of the legal proceedings by or against the transferee industrial concern shall not affect any transactions or proceedings already concluded

by the assisted industrial concern in the ordinary course of business on or after the transfer date and to that end and intent the transferee industrial concern would accept on behalf of itself all acts, deeds and things done lawfully and executed by the assisted industrial concern." 14. A combined reading of the aforementioned clauses in the amalgamation scheme reveals that the pending proceedings as on the transfer date will have to be continued against the transferee industrial concern, namely, Herbertsons Ltd., "in the same manner and to the same extent as they would or might have been continued" against the respondent-company, if the merger scheme had not been made.

15. This, therefore, warrants substituting the respondent-company with Herbertsons Ltd. for the continuance of the proceedings.

16. But we are against continuing the proceedings for a specific reason. If the proceedings were to continue, we will have to look at the scenario as existed on the relevant date pertaining to this enquiry. The notice of enquiry is based on the respondent's letter dated March 19, 1987, in which the impugned discount system has been described. Thus, the scenario as in the year 1987-88 would appear to be relevant for the purpose of this enquiry.

17. Even if we were to come to a conclusion that the respondent had indulged in restrictive trade practices alleged in the notice of enquiry at the relevant period, the fact that the respondent's market share in the replacement battery market was just 1.45% in the organised sector according to the All India Automotive Batteries Market Survey for the year 1987-88 will show that the alleged restrictive trade practices would not have directly or indirectly restricted or discouraged competition to any material degree in the relevant trade or industry, namely, that of the battery market. The gateway under Section 38(1)(h) would be available to the respondent, in view of the principle of de minimis, that the alleged restrictive trade practices would not have affected competition to any material degree. This is brought out in para 10 of the reply of the respondent and supported by para 11 of the affidavit in evidence of Shri S. Prabhakar Naidu, manager . (sales and administration), of the respondent-company. Even if the organised and unorganised sectors are taken into consideration together, the market share of the respondent was not more than 3% in 1987-88, again immaterial for any possible affectation of competition.

18. In the premises, we have no hesitation in discharging the notice of enquiry. We will only like to advise the transferee-company, Herbertsons Ltd., to have a close look at the discount system and take necessary corrective action to ensure that nothing in the said system constitutes restrictive trade practices. There are many decisions of this Commission which may provide a guidance in this regard. We would like to specifically mention the cases of Arora Contractors and Builders, In re (UTPE No. 197 of 1986, dated November 12, 1993), Saraikella Glass Works (Pvt.) Ltd., In re (RTPE No. 32 of 1985, dated May 10, 1993) reported in [1993] 3 Comp LJ 385 (MRTPC) and Director-General (I & R) v. Rajashree Cement (RTPE No. 124 of 1988, dated May 31, 1994, reported in [1995] 83 Comp Cas 712 (MRTPC)) in this regard. There shall be no order as to costs.