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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Oct-31-1996

Judge : S Ali, Acting, S Chakravarthy

Appellant : Director-general

Respondent : Usha International Ltd. and anr.

Advocate for Def. : Shri. Ravinder Narain

Judgement :

1. This is an application filed by the Director-General (Investigation and Registration) (DG) under Section 36B(c) of the Monopolies and Restrictive Trade Practices Act, 1969, indicting the respondents named above, Usha International Ltd. and Jay Engineering Works Ltd. of having indulged in certain unfair trade practices attracting Sections 36A(3)(a) and (b) of the Act. The following is a summary of the Director-General's application : 2. Usha International Ltd. (respondent No. 1) is engaged in the business of marketing Usha fans manufactured by Jay Engineering Works Ltd. (respondent No. 2). For the purpose of promoting the use or supply of Usha fans, respondent No. 1 issued an advertisement in the "Indian Express", edition of date-line March 20, 1986, under the caption "Better Fans, Better Gifts!" The said advertisement announced a scheme of prizes in the form of Maruti cars, Vijai super scooters, tape-recorders, etc. All that a prospective customer had to do was to purchase an Usha fan to become eligible for participation in the scheme. The advertisement announced that the dealer from whom the fan was purchased would give the purchaser a sealed

envelope containing the name of the gift. The scheme commenced with effect from February 11, 1986. The Director-General after inspecting the records of one of the outlets of respondent No. 1, noted that the prices of various categories of fans had been increased simultaneously from the date of the commencement of the advertised scheme. In particular, the Director-General noted that the cost of the prizes was fully or partly covered by the increase in the price of the fans. In view of the nexus between the price-rise and the prize scheme, he has brought about a charge that both the respondents are severally and jointly liable for the unfair trade practices indulged in by them, attracting the provisions of Section 36A(5)(a) and (b) of the Monopolies and Restrictive Trade Practices Act, 1969.

3. Based on the application of the Director-General, a notice of enquiry was issued by the Commission on June 23, 1986, summarising the charge of unfair trade practices. In particular, the notice of enquiry (NOE) charges the respondents with having offered prizes free of charge whereas the cost of the prizes has been or was being recovered wholly or partly from the increased price of the fan, thus, creating an impression contrary to facts. Furthermore, the NOE charges the respondents'with offering prizes or gifts depending upon chance. While specifying that these two limbs of the charge constitute unfair trade practices falling under Section 36A(3)(a) and Section 36A(3)(b) of the Act respectively, the NOE further charges that the aforesaid unfair trade practices are prejudicial to public interest. Essentially, the synchronising of escalation in prices of the fans with the launching of the advertised scheme is central to the charge brought by the Director-General, besides the fact that any contest or scheme of this nature based on chance is ah unfair trade practice.

4. Both the respondents offered their detailed replies to the notice of enquiry. We summarise herein below their replies respondent-wise.

1. The NOE does not disclose any ground or cause of action to warrant the holding of the enquiry. The enquiry is not maintainable.

2. The alleged trade practices are not covered by the definition of unfair trade practice in Section 36A of the Act.

3. The alleged trade practices have not caused any loss or injury to the consumers.

4. The NOE does not even state as to how the alleged trade practices have prejudiced public interest.

5. No enquiry can be instituted for unfair trade practices without a preliminary investigation report of the Director-General.

6. Respondent No. 1 markets fans purchased from respondent No. 2 through dealers, who in turn supply fans to the public at large.

7. The prize scheme was effective from January 1, 1986, and there is no nexus between the prize scheme and the price increases made in .

the normal course of business.

8. There have been several price variations in the year 1986, during which, the impugned scheme was introduced. Price increases occur whenever the manufacturer (respondent No. 2) increases the prices.

9. All customers, irrespective of whether they got any prize under the scheme, got cash discounts on purchase of the fan.

10. The impugned scheme has been withdrawn with effect from June 20, 1986.

11. Price variations are done frequently as a normal feature of the fan trade, which is seasonal and they do not correspond to variations in the cost of production.

2. Fan trade is a seasonal trade and undergoes several price variations from time to time depending upon the season and the market conditions.

3. Price variations depend upon the conditions prevailing in the trade and have no direct relationship with the cost of production.

4. On several occasions, prices have even been decreased during the off-season.

6. There has been no prejudice to public interest or loss or injury to the consumers.

7. After the Director-General filed his rejoinder to the replies of the two respondents, the following issues were framed : 1. Whether the NOE is not maintainable in view of the preliminary objections raised by the respondent in their reply to the NOE 2. Whether the respondent indulged in the trade practices as stated in the NOE and pointed out in the application under Section 36B(c) of the Monopolies and Restrictive Trade Practices Act, 1969 3. If the answer to issue No. 2 is in the affirmative then whether the said trade practice is an unfair trade practice under Section 36A(3)(a) and (b) of the Monopolies and Restrictive Trade Practices Act, 1969 4. Whether the said unfair trade practice is prejudicial to public interest or to the interest of consumers generally 8. The Director-General adduced the evidence of two witnesses, namely, Shri V. N. Seth, Assistant Director (Industries) on deputation to Jail Department, Hyderabad, who had made a complaint to the Director-General and Shri Manbir Singh Takshak, who had purchased an Usha fan. The respondents adduced the evidence of only one witness, namely, Shri Sunil Kumar Wadhwa, executive director of respondent No. 1.

9. We gave a hearing to Shri O. P. Dua, counsel for the Director-General and Shri Ravinder Narain, counsel for the respondents.

10. Shri O. P. Dua, counsel for the Director-General commencing his arguments drew our attention to paras. 5, 6 and 7 of the complaint application (amended application) and observed that the impugned scheme having commenced from February 11, 1986, the fact that there were increases in prices of different types of fans with effect from the same day, is a clear synchronisation of escalation in prices with the launching of the impugned scheme. Thus, the respondents have fully or partly covered the cost of the prizes by the price increases, in the bargain creating an impression among the customers that something is being given or offered free of charge, contrary to facts. Furthermore, the conduct of any contest based on chance attracts Section 36A(3)(b) of the Act. Quoting from Bouvier's Dictionary, he observed that lottery is a scheme for the distribution of prizes by

chance. The expression "lottery" embraces the elements of securing through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value. In terms of the impugned scheme, even though every purchaser of an Usha fan received a prize, the scheme itself provided for a bigger prize for those who won under the dispensation of chance. Shri Dua anticipated a possible argument of the respondents that in as much as every purchaser received a prize, there was no element of chance.

11. Shri Dua requested the Commission to draw an adverse inference against the respondents for not having satisfactorily answered the interrogatories served on them by the Director-General. For instance, the Director-General had sought information on the purchase prices of various types of fans and similarly, the selling prices during the period January, 1985, to June, 1986. But the respondents objected to the interrogatories as "being irrelevant".

12. Referring to the deposition of Shri V. N. Seth, witness of Director-General and also Assistant Director (Industries), Shri Dua pointed out that the witness has stated that he was supplied with a fan on a reduced price without the gift and that if he had wanted the gift, he would have had to pay a higher price. The witness quantified the discount of Rs. 30 as having been offered to him instead of the gift: On being questioned, the witness added that he was not informed by the dealer prior to the purchase that the latter was giving him a discount instead of the prize. When he insisted upon the prize, the dealer informed him that he was not entitled to it.

13. Shri Dua then referred to the deposition of Shri Manbir Singh Takshah, the second witness of the Director-General and pointed out that he had also categorically stated that the cash discount constituted the prize and nothing more. According to the witness, the dealer had told him that the gift coupons were of the value of Rs. 10 and nothing more. Taking a total view of the impugned scheme, Shri Dua styled it as a hoax.

14. Shri Dua referring to the prejudice caused to public interest by the impugned scheme tried to capture the elements central to public interest. He stated that public interest is an elusive abstraction meaning general social welfare or regard

for social good. He quoted Mr.

Justice Felix Frankfurter of the United States Supreme Court that the idea of public interest "is a vague, impalpable but all controlling consideration". Shri Dua added that public interest indicates a standard of goodness for judging private acts and conduct in the social context. Public interest is essentially a majoritarian ethic measured rather in terms of results or consequences than of interest or motive.

Any decision as to public interest should be based on the results or consequences that will follow.

15. Shri Dua applying this concept of public interest stated that the purchasers of Usha fans were taken for a ride by the lure of prizes, when in fact, most of them got only the cash discount, which in any case was available to every purchaser. Thus, public interest has been greatly prejudiced.

16. Shri Ravinder Narain, counsel for the respondent, strongly refuted this line of argument by pointing out that there was a gift with every purchaser of Usha fan. There is no element of chance at all. Drawing attention to para. 7 of the affidavit of Shri Sunil Kumar Wadhwa, the only witness of the respondents, and executive director of respondent No. 1, Shri Ravinder Narain, pointed out that prize coupons were sent to the dealers who were required to ensure that every consumer got one prize. The dealers could give such discounts as they desired and a purchaser could always insist on receiving his gift as it had been clearly made known that at least one prize would be given for every fan.

17. Shri Ravinder Narain further argued that by introducing the impugned prize scheme, the respondents were promoting the Usha brand of fan, thus, increasing inter-brand competition.

18. Referring to prices of fan, Shri Ravinder Narain pointed out that respondent No. 1 reduced the prices with effect from January 3, 1986, the reduction for a fan ranging from Rs. 4.90 and Rs. 7.20 for different models of fans. The increase in prices from February 11, 1986, was made on account of the impending summer season at that point of time. There was a further increase in March, 1986, because

of the increase in excise duty. Counsel for the respondents prayed that paras.

8 and 9 of Shri Sunil Kumar Wadhwa's affidavit be perused in support of the above contentions.

19. Certain statements attributed to the dealer which were referred to by Shri Manbir Singh Takshah (Director-General's witness) should be struck out as hearsay, according to Shri Ravinder Narain.

20. Shri Ravinder Narain discredited the deposition of Shri V. N. Seth (Director-General's witness) by pointing out that at one place in the examination-in-chief, he had stated that he was lured by the prize scheme and at another in cross-examination that he purchased an Usha fan because he wanted to do so. In other words, Shri Seth was not lured by the impugned scheme but had desired to purchase an Usha fanj as perhaps, he was satisfied with its quality.

21. That there was severe competition in the fan trade has been borne testimony to, by the statement of Shri Sunil Kumar Wadhwa (witness of the respondents) to the effect that there was "fierce competition", that the sale of fans was "seasonal" and that the market was "extremely competitive" which no fan manufacturer could "afford to ignore".

22. Shri Wadhwa, during his cross-examination, had also deposed that the price fixation depended upon "severity of the competition".

23. Shri Ravinder Narain concluded his presentation of arguments by citing two case laws. The first is a decision of this Commission in Arora Contractors and Builders Pvt. Ltd., In re [1994] 2 CTJ 64, dated November 12, 1993, in which it has been observed that before a cease and desist order is passed under Section 36D(1) of the Act, it has to be affirmatively proved that the impugned trade practice is prejudicial to public interest or to the interest of any consumer or consumers generally. This is an independent requirement of law.

24. The other case cited is also a decision of this Commission in Disco Electronics Ltd., In re (U.T.P.E. No. 88 of 1986, dated December 2, 1991, in which it was ruled that even if a trade practice falls under Section 36A(3)(b) of the Act, the

Commission has to satisfy itself that the impugned practice is prejudicial to public interest before passing a cease or desist order.

25. We have given anxious consideration to the pleadings, depositions of the witness and arguments advanced by both the counsel. The law, as it stands in the Monopolies and Restrictive Trade Practices Act, 1969, defines the conduct of any contest, lottery, game of chance or skill for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest as an unfair trade practice. This is what Section 36A(3)(b) states. That the impugned scheme has an element of chance cannot be denied as the bigger prizes are predicated on chance rather than skill. A game in which chance rather than skill determines the outcome, is a game of chance (Kansas City. v. Caresio, Mo. 447, S.W. 2d 535, 537). Looking at it from the point of view of the definition of lottery in Bouvier's Dictionary (as Shri Dua pointed out), it also has an element of chance for a prize for a price. The essential elements of a lottery are consideration, prize and chance and any scheme by which a person for a consideration is permitted to receive a prize as may be determined predominantly by chance. In other words, the receipt of a prize in a game of chance is not a result of human reason, foresight, sagacity or design but is a result of chance (State v. Schwemler, 154 Or. 533, 60 P. 2d 938).

26. In the instant case, notwithstanding the contentions of the respondent, it is clear that the bigger prizes like Maruti Cars, Vijai Scooters, etc., were securable by purchasers only by chance, even though every purchaser had one small cash prize or discount.

Furthermore, the witness of the respondents, Shri Sunil Kumar Wadhwa in para. 7 of his affidavit, himself has stated that the introduction of the impugned scheme was to promote the Usha brand of fans and to increase inter-brand competition.

27. All these therefore clearly point out that the impugned scheme was a game of chance intended to promote the sale of Usha fans. Attraction of Section 36A(3)(b) is not in doubt.

28. Nor is it in doubt that there was synchronisation of the impugned scheme with the escalation in prices during the currency of the scheme.

On the very first day of the scheme, the prices of Usha fans were increased. While price increases can be considered as a part of normal course of business, it is intriguing to note that price increases were brought about simultaneous with the launching of the contest scheme.

There is, therefore, an inference that the cost of the prizes were partly or fully covered by the price increases announced by the company, simultaneous with the launching of the scheme. Section 36A(3)(a) is also therefore clearly attracted.

29. This leaves us with only one aspect to be examined. That aspect is whether public interest has been prejudiced. Very correctly, it is pointed out by Shri Ravinder Narain that the Commission has to independently examine prejudice to public interest before a cease and desist order is passed. Arora Contractors and Builders Pvt. Ltd., In re [1994] 2 CTJ 64 and Disco Electronics Ltd., In re (U.T.P.E. No. 88 of 1986, dated December 2, 1991), lend support to his contention.

30. Both the witnesses of the Director-General have stated that they got the cash discount at the time of purchase of the fan. One of the witnesses, Shri V. N. Seth has categorically stated that he was given a cash discount and not the prize. He was told by the dealer that the prize would be available to him if he paid a higher price for the fan.

Much was made by Shri Ravinder Narain to discredit this witness as he had stated in his cross-examination that he wanted to purchase an Usha fan and that he purchased one and as he had stated in the examination-in-chief that he was lured by the scheme. Merely because the witness had desired to purchase an Usha fan, it does not disentitle him to participate in the gift scheme. We have no reason to hold that Shri V. N. Seth is an untrustworthy witness because of the statement that he had desired to purchase an Usha fan. On the other hand, the witness had deposed that when he insisted upon the prize, the dealer had told him that he was not entitled to it. He was asked during the cross-examination as to why he did not approach any other dealer and his answer was that he had purchased the Usha

fan and when he was refused the gift, he thought he would take action as permissible.

That's the reason why he had complained to the Director-General (Investigation and Registration).

31. Similarly, the second witness, Shri Manbir Singh Takshah (AW-2), categorically stated during the examination-in-chief that at the time of purchase, he was given to understand that cash discount and nothing more would be given and interestingly, he also stated that the dealer had, at the time of purchase, informed him that the price of the fan had been increased by Rs. 12 on account of the impugned prize scheme.

But for this allurement of the prize, the witness said he would not have purchased an Usha fan.

32. We consider these depositions adequate in support of the charge that the price of the fans had been increased synchronising with the launch of the impugned prize scheme. We note that the main complainant (AW-1) and one more witness (AW-2) had been lured by the prize scheme and that they were offered the regular cash discounts which were represented to them as prizes under the scheme. There is, therefore, prejudice to the interest of the said consumers (purchasers). Many others similarly placed would have had a similar experience. The respondents did not produce any witnesses to counter the experience suffered by the two witnesses of the Director-General of whom one is the complainant. The said complainant is also a senior official of the Government and we have no reason to disbelieve his statement.

34. Finally, we would like to note that the preliminary objections relating to maintainability stated in the reply of respondent No. 1 were neither pressed nor covered during the arguments of Shri Ravinder Narain, counsel for the respondents. Be that as it may, the enquiry is eminently maintainable, as the alleged trade practices do fall within the mischief of Sections 36A(3)(a) and (b) of the Act. Furthermore, the notice of enquiry as well as the application of the Director-General disclose all relevant grounds and material in support of the

charge of unfair trade practices. There is, therefore, no basis for the preliminary objections raised by respondent No. 1 in its reply to the notice of enquiry.

35. In the premises, the first issue is decided in the negative against the respondents. The second and third issues are answered in the affirmative against the respondents. The fourth issue is also answered in the affirmative against the respondents. We hold that the respondents have indulged in unfair trade practices falling within the provisions of Sections 36A(3)(a) and (b) of the Act which are prejudicial to public interest and to the interest of consumers. As the impugned trade practices have been already discontinued, we direct the respondents not to repeat the same in future. The respondents shall file an affidavit of compliance within four weeks of the date of this order.

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