Director-general (i and R) Vs. Trustwel Inc.

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Jun-30-1997

Reported in : (1998)1CompLJ555MRTPC

Judge : S Ali, S Chakravarthy

Appellant : Director-general (i and R)

Respondent : Trustwel Inc.

Judgement :

1. Member This enquiry commenced on an application filed by the Director-General of Investigation and Registration ("DG" in brief) under Section 36B(c) of the Monopolies and Restrictive Trade Practices Act, 1969, charging Trustwel Inc. with having indulged in certain unfair trade practices within the meaning of Section 36A(1) of the Act.

The cause of action of enquiry is the same as in the two compensation applications filed, namely, C. A. No. 162 of 1990 and C. A. No. 179 of 1990, and, therefore, this order will govern the two compensation applications also, in respect of which we have given separate orders.

First, the averments of the DG in his complaint application : Trustwel Inc. (referred to as "the respondent" hereinafter) has its office in Bombay and is an undertaking engaged in providing capital and term loans to develop business and industry. The respondent is managed by one Shri I. M. Patel. The respondent, according to the DG, has used the expression "Inc." in its name so as to create the impression that it is a company incorporated under the company law of the U.K. or the U.S.A. The DG has contended that the respondent has done so in order to mislead or lure entrepreneurs who need finance for their projects.

2. The respondent issued an advertisement in the Taj Magazine (volume 16, No. 2, second quarterly, 1987) as well as the Swagat Magazine of the Indian Airlines making the following assertions : We can advance you term loans at easy rates of interest against mortgage of immovable property--land, buildings, factory and project finance.

3. A complaint was made by Ajanta Chemicals Pvt. Ltd. that the respondent failed to disburse the loan sanctioned by it of Rs. 50 lakhs and has been offering excuses. According to the complainant, Ajanta Chemicals Pvt. Ltd. had originally approached the respondent for a loan of Rs. 85 lakhs. The respondent issued a formal letter of intent on August 21, 1987, sanctioning a loan of Rs. 85 lakhs with a payback period of 12 years, with a moratorium of two years and with interest at the rate of 13 per cent. per annum on reducing balance basis. The respondent charged Rs. 85,000 as inspection fee and required the complainant to pay an amount of 8.4 per cent. of the sanctioned loan amount towards stamp duty, registration charges, legal fees and other miscellaneous expenses. At the request of the complainant, the sanctioned loan was reduced to Rs. 50 lakhs. In terms of the requirement of the respondent the complainant paid an amount of Rs. 4.2 lakhs being 8.4 per cent. of the sanctioned loan towards legal expenses, etc. The complainant was informed that the respondent would send the documents for execution by October 14, 1987. Despite complying with the

same, the respondent did not disburse the loan. On November 30, 1987, the respondent sent a letter raising an issue regarding the applicability of Section 58A of the Companies Act, 1956, and also requesting for the opinion of the chartered accountant of the complainant. This created suspicion about the conduct of the respondent.

4. The DG has commented that Section 58A of the Companies Act describes certain limits and conditions subject to which a non-banking non-financial company can accept deposits from the public. The statutory requirements in this regard are administered under the Companies (Acceptance of Deposits) Rules, 1975. The provisions of Section 58A of the Companies Act, 1956, apply to unsecured loans and deposits only. The loan sanctioned by the respondent to the complainant is a secured loan as a first charge has been created on the properly of the complainant. Therefore, according to the DG, Section 58A of the Companies Act is not applicable to the transaction in question. In any case, the conduct of the respondent, says the DG, runs contrary to the assertions made in the advertisement to the effect that it will provide ready capital as needed by the entrepreneurs. The DG has concluded that the assertions made by the respondent are false and misleading and have caused loss and injury to the complainant. The trade practice indulged in by the respondent is, therefore, a set of unfair trade practices, falling within the mischief of Section 36A(1)(ii). (iv), (vi) and (viii) of the Act. He has recommended an enquiry to be conducted into the charges against the respondent.

5. On the basis of the application of the DG, a notice of enquiry (NOE) was issued on 6th June, 1988, summarising the charges and calling upon the respondent to put in its appearance and defend itself against the charges.

6. An injunction application was also filed by the DG under Section 12A of the Act as large public interest was involved. After hearing the advocate for the DG, an ex parte injunction order was passed by the Commission on April 11, 1988, restraining the respondent from indulging in the alleged unfair trade practices of making false and misleading statements and promises of advancing loans either through advertisements or otherwise. The injunction order was made absolute on June 50, 1988.

7. A detailed reply was filed by the respondent to the NOE. The respondent has taken certain preliminary objections while making its defence on the merits- The reply is summarised hereinbelow : The respondent being a partnership firm is excluded from, the purview of the MRTP Act not being covered under the definition of "owner" as per Section 2(ja) of the Act.

2. As no undertaking is in existence and owned by an owner in terms of Section 2(ja) and Section 2(v) of the Act, the Commission has no jurisdiction (o enquire into the charges.

3. The respondent has ceased to exist with the partnership having been dissolved by a deed of dissolution dated April 1, 1988. This dissolution was before the ex parte injunction order was passed on April 11, 1988, and before the NOE was issued on June 6, 1988. The injunction against a non-existing respondent is, therefore, "illegal, inoperative and bad in law".

4. The unfair trade practice alleged must exist in presenti, As the firm has been dissolved, there cannot be any order of this Commission for ceasing and desisting from the alleged unfair trade practices.

5. The respondent denies that suffixing the word "Inc." to its name creates any impression that it is incorporated under the company law of the U.K. or the U.S.A. or misleads the entrepreneurs as alleged.

6. The partnership deed has not been registered and the respondent issued the impugned advertisement "in the normal course".

7. The letter dated November 30, 1987, purported to have been written by the respondent to the complainant seeking clarification on the applicability of Section 58A of the Companies Act, 1956, is not signed by either of the partners of the respondent. Nor the two letters dated February 1, 1988, and February 19, 1988, referred

to by the DG bear the signatures of either of the partners. (These two letters are purported to be replies of the respondent to the DG's letter).

8. The assertions in the impugned advertisements are neither false nor misleading.

8. After the pleadings were completed, the following issues were framed : 1. Is the application of the DG not legally maintainable as stated in the preliminary objections of the reply of the respondent 2. Did the respondent indulge in the unfair trade practices as alleged in the NOE read with the application of the DG 3. If issue number 2 is decided against the respondent, are the unfair trade practices prejudicial to public interest or interest of consumers generally or any consumer 9. The DG adduced documentary evidence by giving a notice for admission/denial of certain documents. 16 documents were admitted by the respondent which were marked exhibits A-l to A-1G on March 12, 15, 1990. In addition, the DG adduced the oral evidence of Shri Rajesh Gupta, director of the complainant, Ajanta Chemicals Pvt. Ltd., who was cross-examined by the advocate for the respondent.

10. For the respondent only one witness was examined, namely, Shri I.M. Patel, managing partner of the respondent, who was cross-examined by the advocate of the DG. In the compensation cases there was further evidence which has been discussed in the order in C. A. No. 162 of 1990 and G. A. No. 179 of 1990.

11. We gave a hearing to Shri O. P. Dua, advocate, for the DG and Shri M. L. Sachdev, advocate for the respondent.

12. We will take up the first issue on the maintainability of this enquiry, in the light of the preliminary objections taken by the respondent in its reply. Essentially, the preliminary objections taken by the respondents in its reply relate to the following : (b) The respondent-firm has already been dissolved on 1st April, 1988, even before the ex parte injunction was passed by this Commission on April 11, 1988, and before the NOE was issued on fune 6, 1988.

13. In so far as objection (a) is concerned, Shri M. L. Sachdev, advocate for the respondent, emphasised that in terms of Section 2(ja), an owner in relation to an undertaking means an individual or association of individuals who or which, owns or controls the undertaking and that in terms of Section 2(v) of the Act, an undertaking means an enterprise which is engaged in the production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind. He argued that reading Section 2(ja) and Section 2(v) of the Act, together and applying them to the instant case, the MRTP Commission has no jurisdiction to conduct this enquiry, as there is no undertaking in existence owned by any owner. In saying this, he contended that the expression "association of individuals" occurring in the definition of "owner" in Section 2(ja) of the Act cannot be the same as an "association of persons" and that if there is an "association of individuals", it would include only an association which has individuals as its members whereas in an "association of persons" not only individuals but other persons may be members or partners.

14. This contention has no force at all, as two individuals, namely, Shri I. M. Patel and Shri M. M. Patel, were partners of the respondent firm and in terms of the definition of an "owner" in Section 2(ja) of the Act, an association of individuals, whether incorporated or not, will constitute an owner. Inasmuch as these two individuals had complete control over the affairs of the firm, the firm as well as the two individuals will constitute an owner for the purpose of this Act.

The firm is also an enterprise undoubtedly in terms of Section 2(v) of the Act. We have no hesitation in rejecting this contention of Shri M.L. Sachdev, advocate for the respondent.

15. Furthermore, Section 2(ja) of the Act, in defining an owner includes within its ambit, any associated person who is a constituent of a group. A group includes "associated persons" in terms of Section 2(ef) of the Act. Explanation II to Section 2(ef) of the Act includes in the definition of "associated persons" a relative of a partner and any other partner of a firm. Reading all these definitional sections together, there is no doubt at

all, that a firm of the kind involved in this case as the respondent, is covered within the provisions of the MRTP Act.

16. Shri O. P. Dua, advocate for the DG, during his oral arguments, observed that if one were to peruse Section 3 of the Act which has excluded certain undertakings, in particular those owned by the Government, from the provisions of the MRTP Act with the caveat that if the Government notified such undertakings, they would be covered by the MRTP Act, it is clear that a firm does not figure in the list of undertakings and bodies listed in the said section. We agree with this conclusion that a firm is not excluded from the operation of the MRTP Act and that the provisions of the said Act will apply to firms.

17. The preliminary objection listed at (a) above has no force. We now turn to the preliminary objection listed at (b) above.

18. Shri M. L. Sachdev pointed out that the partnership ceased to exist when it was dissolved with effect from April 1, 1988. He drew our attention to the dissolution deed of date April 1, 1988, signed by both the partners, namely, Shri I. M. Patel and Shri M. M. Patel, to the effect that the parties had decided to dissolve the respondent-firm on and from March 31, 1988. It is also recorded in the said deed that "in case any sum is determined and be payable by the firm for the period up to the date of dissolution as aforesaid, it will be paid in equal shares by the parties aforesaid". There is also a certificate of a chartered accountant, Prakash H. Shah and Co., to the effect that the respondent has closed down its business operations with effect from April 1, 1988. This certificate dated May 5, 1988, was furnished by the respondent along with its reply to the NOE.19. Shri M. L. Sachdev, advocate for the respondent, advanced a plea that as the respondent firm has been dissolved, the unfair trade practice, if any, does not exist "in presenti" and that it is futile for the Commission to enter upon an enquiry at this stage. He cited the observation of this Commission in Hill Hardware Co., In re (RTPE No.7376-24-24978) that "the practice must necessarily relate to the practitioner and if the practitioner ceased to exist the practices could not possibly continue like the grin without the cat". He referred to another ruling of this Commission in Tan India Wattle Extracts Co.

Ltd. (RTPE No. 4886-3-2-1987). He read out the following observations of the Commission therein : "In this case, the order that can be passed is that the alleged restrictive trade practice should be discontinued and should not be repeated. This is clear from Section 37 of the MRTP Act. When the company which had indulged in the restrictive trade practice has ceased to exist, there is no question of passing such an order because that company is incapable of repeating any restrictive trade practice." 20. Yet another decision cited by the advocate for the respondent is the Commission's order in Director-General (I & R) v. J. B. Enterprises (RTPE No. 552/87--15-7-1991) to the effect that when a partnership firm has ceased to exist the enquiry cannot proceed and will have to be dropped.

21. Shri O. P. Dim, advocate for the DG, at the outset, pointed out that the complaint application of the DG was filed on March 25, 1988, prior to the date of dissolution of the firm. Inasmuch as action has been initiated before the dissolution of the firm, he submits that the enquiry is eminently maintainable.

22. Controverting the contentions of Shri M. L. Sachdev, advocate for the respondent, Shri Dua, advocate for the DG, argued that the ruling cited in Hill Hardware Co., In re (RTPE No. 7376-24-2-1978) is based on the decision of a single judge of the Allahabad High Court in J. K.Synthetics Ltd. v. R. D. Saxena [1977] 47 Comp Cas 323 but that the said decision of the Allahabad High Court was reversed by a Division Bench reported in RTPs in India, volume III, page 478. What has been submitted by Shri Dua is true and with the reversal of the decision of the single judge of the Allahabad High Court, the ruling in Hill Hardware Co.'s case (RTPE No. 7376--24-2-1978) cannot support the respondent's case.

23. Referring to Tan India Wattle Extracts Co. Ltd.'s case (RTPE No.4886--3-2-1987), Shri Dua distinguished that case from the instant case, that in the former a company was involved whereas in the latter, a firm is involved. He added that in the case of a company, dissolution follows winding up but in the case of a firm, winding up follows dissolution. In the instant case, he pointed out that the firm has been dissolved but not wound up and

that, therefore, the decision in Tan India Wattle Extracts Co. Ltd.'s case (RTPE No. 4886-3-2-1987) will not apply.

24. Referring to the ruling cited by Shri Sachdev in J. B. Enterprises' case (RTPE No. 552/87--July 15, 1991), he pointed out that the enquiry was dropped not only on the ground of dissolution of the firm but also on the ground that a party to the agreement, namely, Voltas Ltd., was not added as a necessary party. In that view of the matter that enquiry was dropped and that ruling cannot be taken as relevant for the instant case.

25. We have gone through the rulings above and entirely agree with Shri Dua on his arguments. In our considered view, none of the rulings cited by Shri Sachdev, advocate, for the respondent will apply to the instant case.

26. Shri Dua, on the other hand, brought to our notice a few rulings which we present below : 1. American Furnishing House v. Udai Ram Bhurji, AIR 1968 Delhi 163 (dated April 11, 1959) (headnote) ; "Though nominally the firm is the plaintiff, it is the partners of that firm who are the plaintiffs, enforcing their claim. There cannot beany objection to all the partners of the dissolved firm joining together and filing a suit for the enforcement of any claim with reference to which the cause of action arose when the firm was in existence.

Where in a suit filed in the name of a dissolved firm, the names and places of residence of the partners who constituted the firm are supplied on demand by the defendant under Order XXX, Rule 2(1), the consequences contemplated by Order XXX, Rule 2(3) follow. The suit shall proceed in the same manner and the same consequences in all respects shall follow as if the same partners had been named in the plaint". (Order XXX, referred to is that of the Code of Civil Procedure, 1908).

2. Jaunt Ram and Sons- v. L. Bodhraj, AIR 1979 NOC 133 (J & K) (dated December 21, 1978) : "Each partner gets an individual right to put in a defence on behalf of the firm by filing a written statement on behalf of the firm, no matter that the same is even inconsistent with the one taken by another partner . . . This is the logical inference to be drawn from the expression 'but all subsequent proceedings shall, nevertheless, continue in the name of the firm' used in the rule." (The rule referred to in the extract above, is Order XXX, Rule 6 of the Code of Civil Procedure, 1908).

3. Ram Swarup Maru v. State of Bihar, AIR 1969 Pat 340, 344 (dated May 20, 1963) : "Nonetheless, the argument put forward in the court below as also here, that no decree could be passed against a dissolved firm or against one of the partners of the firm must be rejected. It is well-settled that a suit can be filed against a firm even after its dissolution in the name of the firm .....

'Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.' Undoubtedly, the suit relates to realisation of the plaintiff's claims in respect of all acts of the partnership firm done while defendant No. 2 was a partner of that firm. He was, therefore, liable jointly with all other partners and also severally for the satisfaction of the claims, if any. That being so, I do not find any defect in the frame of the suit, when it has been filed against the firm as also against defendant No. 2 even though he was one of the partners and the firm stood dissolved on the date of the institution of the suit." 4. Rajindra Prasad Sinha v. Karam Chand Thapar and Co. (Coal Sales) Ltd., AIR 1975 Pat 265 (dated February 11, 1975) (headnote) : "It is not always necessary that on the death of a partner, a firm must be dissolved. It is settled that if the cause of action has already accrued in favour of a person before the dissolution of a firm, such person can institute a suit in the name of the firm and prosecute it against such firm, although it might have been dissolved in the meantime." 5. Firm Vijay Nipani Tobacco House v. Sarwan Kumar, AIR 1974 Pat 117 (dated June 18, 1969) (headnote) : "Order XXX, Rules 1, 3 and 10 makes it clear that when a suit is filed in the name of the firm as defendant, the name of the firm is merely an assumed collective name representing all the partners in a case where there is a partnership or as provided in Rule 10, it is the name and style under which a person is carrying on a business.

In both cases, the defendants or the defendant, as the case may be, can be sued in the name of the firm and

when so sued, the firm includes and represents defendants/defendant in their respective personal names. Therefore, the question of non-joinder of a proprietor or partner by his name does not arise when the suit is against the firm". (The order and rules referred to here are of the Code of Civil Procedure, 1908).

6. Shew Karan Agarwalla v. Satyanarain Mansinka, AIR 1978 Cal 495 (dated June 9, 1978) : "The partnership firm under the provisions of the Partnership Act is the collective name of all the partners so that a contract between a partnership firm in the firm's name with a third party is, in law, a contract between the partners of the firm as its partners with such third party, even though the partnership by itself is not a legal entity or corporate body. Accordingly, the notice on the partnership firm in the firm's name determining the tenancy which was in the name of the firm duly served is valid . . .

Order XXX, Rule 1, makes it permissible to file a suit by or to be sued in the firm's name, not as a distinct legal entity but as a convenient mode of describing the partners at the time of accrual of the cause of action and the firm, as a party to the suit is merely a collective name of its partners and is really against all partners of the firm at the time of the cause of action though for institution of a suit by or on behalf of a firm, the firm must be registered under the Partnership Act, 1932." (Order and rule referred to in this extract are those in the Civil Procedure Code, 1908).

27. We agree with the argument advanced by Shri O. P. Dua that in terms of Order XXX, Rule 2(3) of the Civil Procedure Code and in the light of the rulings supra of the various High Courts of Delhi, Jammu and Kashmir, Patna and Calcutta, there is no doubt at all that the firm (respondent) and its partners are liable for acts done during the existence of the firm and that the liability of the firm and its partners is co-extensive. In the instant case, it is an admitted fact that Shri I. M. Patel and Shri M. M. Patel were partners of the respondent firm when the cause of action arose. Therefore, this enquiry has to proceed in the same manner and the same consequences in all respects shall follow as if the partners had been named as the respondents in this enquiry in terms of Order XXX, Rule 2(3) of the Civil Procedure Code.

28. In the light of our analysis above, the first issue is decided in the negative against the respondent. The enquiry is eminently maintainable.

29. We now turn to the second issue as to whether the respondent indulged in the unfair trade practices alleged by the DG and listed in the NOE.30. Shri M. L. Sachdev, advocate for the respondent, pointed out a few admissions on the part of Shri Rajesh Gupta, director of Ajanta Chemicals Pvt. Ltd., the complainant, and argued that he did not own any immovable property and failed to complete certain formalities like executing the mortgage, as a consequence of which the respondent could not disburse the loan. In particular, he pointed out exhibit AW-1/R-1 (the balance-sheet of the complainant company as at March 31, 1987), exhibit AW-1/R-2 (application for financial assistance) and exhibit AW-1/R-3 (declaration dated November 24, 1987) in support of his argument.

31. In his affidavit dated March 21, 1991, filed in C. A. No. 179 of 1990, Shri Rajesh Gupta, director, Ajanta Chemicals Pvt. Ltd., the complainant has stated that he had completed all the formalities for the disbursement of the loan as desired by the respondent. In support, he has annexed to his affidavit a letter written by him of date November 24, 1987, addressed to the respondent to the effect that the necessary documents had been forwarded by him to the respondent (annexure XX to the affidavit). While acknowledging this letter, the respondent raised the issue of the applicability of Section 58A of the Companies Act, 1956, to the transaction in question. This is contained in the respondent's letter dated September 30, 1987, addressed to the complainant (annexure XXI of Shri Rajesh Gupta's affidavit). This clearly splices the argument of the respondent that it could not disburse the loan on account of laches and non-compliance with formalities on the part of the complainant company. No other relevant defence has been advanced by the respondent or its advocate regarding the allegation that the respondent did not disburse the loan despite having given a rosy picture about its capacity to render financial assistance to needy industrialists and businessmen.

32. The issue raised by the respondent about the applicability of Section 58A of the Companies Act has absolutely no relevance. It is not in dispute that Section 58A of the Companies Act, 1956, is a regulatory provision prescribing the limits, periods and the conditions subject to which a non-banking non-financial company can accept deposits from the public. The statutory requirements are administered under the Companies (Acceptance of Deposits) Rules, 1975. A reading of the statutory provision and statutory rules makes it amply clear, that the said provision and rules apply to unsecured loans deposits. The loan sanctioned by the respondent to the complainant, Ajanta Chemicals Pvt.

Ltd., is a secured loan, as the first charge has been created on the property of the complainant. This is clear from item 1 of the terms and conditions of the respondent's letter dated]uly 20, 1987, and item 4 of the respondent's letter dated August 21, 1987 (annexures "IV" and "X" of the affidavit of Shri Rajesh Gupta). The DG has correctly stated in his complaint application that the plea raised by the respondent about the applicability of Section 58A of the Companies Act, 1956, has cast "suspicions about the intentions of the respondent to disburse the loan amount of Rs. 50 lakhs to the complainant". Obviously, the respondent had no intention to honour its commitment and thereby failed to disburse the loan to the complainant.

33. The offence stands more pronounced, if one takes into account tbe fact that Ajanta Chemicals Pvt. Ltd. had paid the inspection fee of Rs. 85,000 and an amount of Rs. 4,20,000 (constituting 8.4 per cent. of the sanctioned loan) towards stamp duty, registration charges, legal fees, miscellaneous expenses, etc. Having pocketed this aggregate amount of Rs. 5,05,000 the respondent caxised financial loss and injury to Ajanta Chemicals Pvt. Ltd. by not disbursing the loan.

34. Furthermore, by the use of the word "Inc." in its name, the respondent has created a false impression that it is a company incorporated under the company laws of U.K. or U.S.A. The respondent has merely denied this allegation but has not established its innocence in any manner. All that Shri Sachdev, advocate for the respondent, observed at the time of arguments was that the expression "Inc." is neither a foreign brand name nor a foreign trademark. We are not impressed by this argument as use of the expression "Inc." certainly tends to mislead the readers of the advertisement that the respondent is incorporated under the U.K. or the U.S.A. company law.

35. We are convinced that the impugned advertisement categorically misled the prospective borrowers and in particular the complainant, Ajanta Chemicals Pvt. Ltd., that the respondent's services are of a particular standard or quality, and that they have uses or benefits which they do not have. Furthermore, the respondent has made a false and misleading representation concerning the usefulness of its services of advancing loans to industrialists and businessmen. The impugned advertisement offers a further representation purporting to be a guarantee in respect of the respondent's services of advancing loans which guarantee has been materially misleading and false. The respondent has caused loss and damage to the complainant and similarly placed borrowers. We, therefore, conclude that the respondent and its two partners, Shri I. M. Pate! and Shri M. M. Patel, have indulged in unfair trade practices attracting the provisions of Section 36A(1)(ii), (iv), (vi) and (viii) of the Act. The second issue is, therefore, decided in the affirmative against the respondent.

36. There is no doubt at all that after pocketing the money of the complainant of Rs. 5,05,000 and similar amounts from other borrowers, the respondent by indulging in the unfair trade practices aforesaid has caused severe prejudice to public interest. The third issue is decided in the affirmative, against the respondent.

37. In the premises, we direct the two erstwhile partners of the respondent-firm, namely, Shri I. M. Patel and Shri M. M. Patel not to indulge in the aforesaid unfair trade practices in future. As the firm has been dissolved, we are not passing any order against it, But our order is directed against the two erstwhile partners leaning on Order XXX, Rule 2(3) of the Civil Procedure Code. The said two erstwhile partners shall file an affidavit of compliance with the above direction within four weeks from today.

38. Separate orders are passed in the connected two compensation cases, namely, C. A. No. 162 of 1990 and

C. A. No. 179 of 1990.