COMPETITION COMMISSION OF INDIA

Case No. 39 of 2012

Mr. Ramakant Kini **Informant**

And

M/s Dr. L H Hiranandani Hospital, **Opposite Party**

Per M.L. Tayal, Member **(Dissenting)**

1. I have had the advantage of reading the draft order prepared by my learned brethren. For the reasons recorded below, I regret my inability to lend concurrence with the view of the majority on the limited issue of interpreting section 3(1) in a manner that it would be enforceable *de-hors* section 3(3) and 3(4) of the Act. Therefore, I am writing this separate order.

BACKGROUND

2. The present information has been filed before the Commission by Mr. Ramakant Kini (hereinafter referred to as "the Informant") under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter referred to as "the Act"). The information relates to the alleged abuse of dominant position by M/s Dr. L H Hiranandani Hospital, Mumbai (hereinafter referred to as the "Opposite Party" or "OP") and its anti-competitive agreement with M/s Cryobanks, a stem cell banking company in India. The majority order discusses the details of the present information and for the sake of brevity, I do not repeat them in my present order.

3. I refer to my earlier opinion dated September 19, 2012 with respect to the present information (Case No. 39/2012) where I differed from the majority opinion of the Commission under section 26(1) of the Act and held that *prima*

facie no case is made out for making a reference under section 26 (1) of the Competition Act, 2002 ("Act") to the Director General (DG) for conducting investigation into the matter under the provisions of Section 3(4) and Section 4 of the Act.

4. In the above dated order, I particularly dealt with the allegation of the Informant that the exclusive tie-up between the Opposite Party and M/s Cryobanks for the services of stem cell banking is anti-competitive under Section 3(4) of the Act. I mentioned that the provisions of Section 3(4) of the Act is applicable only when there is an agreement between two undertakings operating at different stages or level of production chain in different markets in respect to production, supply, distribution, storage, sale or price of, or trade in goods or provision of services and that in my opinion *prima facie* OP is engaged in the provision of maternity services whereas M/s Cryobanks is engaged in the provision of stem cell banking services and they are not operating at different stages or level of the production chain because the business/activities of the OP not vertically related to the business/activities of M/s Cryobanks.

5. However, the opinion of the majority of the Commission in the present case, under section 27 of the Act, is premised on the understanding that section 3(1) of the Act is enforceable *de-hors* section 3(3) or section 3(4) of the Act and that sections 3(3) and 3(4) carve out only some area of section 3(1) of the Act. The majority has held that the anti-competitive relationship between the Opposite Party and M/s Cryobanks is covered by section 3(1) itself and the argument that in order to attract the prohibition of section 3 of the Act, the economic relationship between the Opposite Party and M/s Cryobanks needs to meet the requirements of section 3(4) is not valid. With respect, I beg to disagree with the above legal interpretation of section 3 of the Act, which necessitates the present opinion.

6. I would like to clarify that I did not have an opportunity to express my opinion on the above issue in my order under section 26(2), dated September

19, 2012 as neither the Informant nor the majority order of the Commission under section 26(1) of the Act, either alleged or discussed the issue of the possibility of section 3(1) to be enforceable independently of section 3(3) and section 3(4).

7. Rules of statutory interpretation require that all sections of legislation should be read holistically and that any section of legislation should not be read in a manner to render the interpretation of such provision to be divorced from the rest of the legislation. The same rule should apply while reading multiple clauses of a single provision, i.e., all the provisions should be read together and that a particular clause should not be interpreted in a manner to make the enforcement of the other clauses of the same provision in-fructuous.

8. The majority order in the present case holds that section 3(3) and section 3(4) give examples of certain species of agreements which are considered violative of section 3(1). Hence the majority is of the opinion that section 3(1) is enforceable independent of section 3(3) and 3(4) because the latter are expansion of section 3(1) but are not exhaustive of the scope of section 3(1). I disagree with the above interpretation of section 3(1). It is settled legal principle that if clauses containing specific prohibition follow clauses containing general ones, the general prohibition should embrace only things that are similar to those specifically enumerated. To interpret the general prohibition to be applicable *de-hors* the specific one, necessarily makes the specific prohibitions in-fructuous, since the expansive general prohibition clause would have covered the particular areas covered by the specific prohibitory clause, even in the absence of the latter.

9. It needs to be appreciated that the majority decision of the Commission in ICICI Bank, Citibank and others (MRTP Cases 15/28, 6/28, 13/28, 12/28, 2/28, 11/28) ("ICICI Case"), held that section 3(1) of the Act should not be invoked independently. The relevant portions of para 19.4 and 19.5 are reproduced below:

Para 19.4: For applicability of section 3(1) of the Act the agreement should be between existing or potential competitors or between enterprises up-stream/downstream in any production chain. There could be a case of Appreciable Adverse Effect on Competition (AAEC) only if enterprises conspire either horizontally or vertically in form of some agreement/concerted action/understanding/joint decision etc., to gather undue market power.

Para 19.5: The Commission is of the view that Section 3(1) of the Act should not be evoked independently. The philosophy of competition is concerned primarily with ensuring free competition between existing or potential competitors because competition results in allocative and productive efficiencies that result in consumer welfare. Imposition of switching costs cannot be per se anti-competitive in absence of vertical or horizontal agreements.

In my view decision of the Commission in the ICICI case is the correct interpretation of section 3. A liberal interpretation of section 3(1) would make the prohibition of that section applicable to even a scenario where there is no such relationship between the contracting parties as envisaged under section 3(3) and 3(4).

10. The preamble read with section 18 of the Act, empowers the Act to eliminate practices having adverse effect on competition and to promote and sustain competition. In that spirit section 3, dealing with anti-competitive agreement, curbs anti-competitive practices between firms, (A) engaged in dealing with identical goods or services who join hands to reduce or eliminate competition amongst themselves or (B) between a upstream and a downstream player where either of such party uses its unfair bargaining power *inter alia*: (i) to deter entry or access to such up-stream or downstream market and/or (ii) use its undue market power in the up-stream/downstream market to dictate unfair price or terms upon the other. Both the situations above, deal with

parties who are engaged in an economic relationship and uses anti-competitive means to exploit or exclude other economic players to the detriment of consumers. However, to interpret section 3(1) *de-hors* section 3(3) and 3(4) would make the provisions of the Act applicable even in scenarios where the parties are not tied together in any economic relationship.

11. Please note, that this ethos that the Act should regulate anti-competitive agreements between commercial firms which are economic players in a vertical or a horizontal economic relationship has been considered by the Parliamentary Standing Committee on Home Affairs, presenting the Ninety Third report on the Competition Bill, 2001, dated August 2002 (the "Report"). The relevant portions of the Report are re-produced below:

> *Para 3.1: Competition is basically an economic rivalry amongst enterprises to control greater market power.*
> *Para 3.2: Competition amongst enterprises is divided into following two categories: (A) price-competition and non-price competition.*
> *Para 4.3.1: Anti-competitive agreements amongst enterprises are of two type: (a) horizontal and vertical.*

12. The intention of the parliament as evidenced from the above passages of the report is clear. Firstly, the provisions of the Act should be implemented to curb anti-competitive measures between firms which share an economic relationship and is able to impose price and non-price restrictions on each other and secondly, the two type of agreements that the Act specifically deals with are vertical and horizontal agreements. Therefore, to interpret the provisions of section 3 of the Act, in a manner to implement its restrictions between firms that do not share a vertical or a horizontal economic relationship, would be contrary to the intent of the parliament.

13. To allow the prohibition of section 3(1) to be applicable independently, it would defeat the purpose of the legislature to provide for the specific prohibition under section 3(3) and section 3(4), respectively. If section 3(1)

can be interpreted to mean that any anti-competitive agreement with an enterprise, irrespective of the relationship between the contractual party and the enterprise would be void, the legislative purpose of providing specific prohibitions contained in section 3(3) and 3(4) of the Act is rendered meaningless. If the legislature intended section 3(1) to be a panacea for all anti-competitive agreements, it would have not provided the specific prohibitions under section 3(3) and 3(4) since the former would have anyway covered the prohibitions contained in the latter. The fact that the legislature did not do so, only emphasize the fact that it intended the prohibition of section 3(1) to be enforced specifically in the context of a "horizontal contractual relationship" (as under section 3(3)) and "vertical contractual relationship" (as under section 3(4)). The general term 'any agreement' under section 3(1) needs to be embrace and should be interpreted to the 'type of agreements' specifically enumerated under section 3(3) or 3(4) of the Act.

14. Therefore, in my opinion, section 3(1) cannot be interpreted *de-hors* of section 3(3) and section 3(4) of the Act and to that extent I differ from the opinion of the majority of the Commission under section 27 of the Act, as applicable to the present case.

15. The Secretary is directed to inform the parties accordingly.

Sd/-
(M. L. Tayal)
Member

New Delhi
Date: 24/02/2014