



Case No.39 of 2012

In Re:

Mr. Ramakant Kini

Informant

And

Dr. L.H. Hiranandani Hospital, Powai, Mumbai

Opposite Party

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. Justice (Retd.) S. N. Dhingra
Member

Mr. S.L. Bunker
Member

Present:

Informant: Mr. Ramji Srinivasan, Senior Advocate along with Dhall Law Chambers

Opposite Party: Ms. Pallavi Shroff, Amarchand & Mangaldas & Suresh A Shroff & Co

Order under section 27 of the Competition Act, 2002

Use of stem cells for curing diseases is a new science. A primary source of stem cells is umbilical cord of the new born child. Technology has been developed for preserving



stem cells for future for curing diseases and with this development, various stem cell banks have cropped up. This science attracted young people towards it and many young persons started approaching stem cell banks for preserving the stem cells of their newly born children. One Mrs. Jain entered into an agreement with M/s Life Cell India Pvt. Ltd. ('Life Cell') to avail its services for banking of stem cells. It is to be noted that stem cells blood has to be collected from the umbilical cord within 10 minutes of the birth of a child and preserved and put into the bank where it is stored at certain sub-zero temperature for next 21 years.

2. Mrs. Jain was registered with Dr. L.H. Hiranandani Hospital ('OP hospital') for maternity related services and for delivery of her child. As the time of delivery of the child drew near, Mrs. Jain requested OP hospital to allow Life Cell to collect the stem cells blood soon after her delivery *i.e.* within 10 minutes. The collection of umbilical cord blood can either be done by the hospital staff or by 'stem cell bank' staff, who is to collect the same from maternity ward of the hospital. The OP hospital refused to accede to the request of Mrs. Jain telling her that they would not allow Life Cell to enter its premises to collect stem cell blood. However, if she wanted to have her child's stem cell collected, she could avail the services of Cryobanks International India ('Cryobank') - another stem cell banking service provider in India. OP hospital told her that it had an exclusive agreement with Cryobank and only Cryobank would be permitted to collect the umbilical cord blood of the child of expecting mothers admitted in OP hospital for preserving stem cells of the child. Thus, the request of Mrs. Jain for collection of the stem cells by Life Cell fell on deaf ears. Rather, Life Cell was told not to book any client of OP hospital for stem cell banking as it would not allow entry of Life Cell into the hospital. It is an admitted fact that at the time of admission, Mrs. Jain was not informed by OP hospital that it had an arrangement with Cryobank and it does not allow other stem cell banks to enter the hospital. Because of this refusal by OP hospital to permit Life Cell to collect stem cells, Mrs. Jain had to shift from OP hospital and get her delivery done at Seven Hills Multi Super Speciality Hospital.



3. On the basis of above facts, informant approached the Competition Commission of India ('Commission') alleging violation of section 3(4) and 4(2)(a)(i) and 4(2)(c) of the Competition Act, 2002 ('the Act') by OP hospital. The informant alleged that OP hospital was in a position to affect competition in the relevant market due to its dominance in the area.

4. The Commission found that there was sufficient material to form a *prima facie* opinion about the violation of section 3 as well as section 4 of the Act and directed investigation by the Director General ('DG') into the matter *vide* its order dated 19.09.2012.

5. DG during investigation called the parties and collected relevant material from OP hospital and the informant. Oral and written submissions were made by the parties and DG came to the conclusion that OP hospital was a dominant player in the relevant market of provision of maternity services by super speciality hospital in the geographic market of 0-12 km from the Hiranandani Hospital covering S,L,N, K/E, T & P/S wards of Municipal Corporation of Greater Mumbai as per section 2(r) of the Act. The DG also came to conclusion that OP hospital, due to its dominance in the relevant market, was in a position to influence the consumers by imposing unfair conditions on expecting mothers coming to it for maternity services. The unfair condition was a result of arrangement between OP hospital and CryoBank. It also came to conclusion that the agreement entered into between OP hospital and CryoBank was a violation of section 3(4) and it had appreciable adverse effect on competition.

6. Copy of the report was sent to the parties and their responses were invited. The parties were also heard by the Commission on all aspects.

7. Before dealing with the issues involved in this case, it is necessary to consider the mandate given to the Commission under the Act. The preamble of the Act provides that the Commission was established to 'prevent practices having adverse effect on competition, to promote and sustain competition in the markets, **to protect the interest of consumers** and



to ensure **freedom of trade carried on by other participants in the markets in India** and matters connected therewith’.

8. It is settled law that the preamble informs and has a subtle effect on the interpretation of the provisions of the Act. The statutory intention did not stop in the Act at the preamble and section 18 of the Act was enacted to further provide ‘it was the duty of the Commission to eliminate practices having adverse effect on the competition, promote and sustain competition, **protect the interest of consumers and ensure freedom of trade carried on by other participants** in the markets in India’.

9. One of the avowed objectives of the Act is to promote consumers’ welfare by preventing market distortions caused by such actions and agreements of the enterprises which militate against the competition and consumers’ interest. The competition law by its very nature envisages that there are situations where the Commission has a role and has to control behaviour of the enterprises in the market place in order to achieve consumer welfare. Section 3(1) of the Act provides that the firms should not enter into an agreement in respect of ‘production.... provisions of services which cause or is likely to cause adverse effect on competition within India’. Section 3(2) provides that an agreement entered into in contravention of the provision contained in sub section (1) shall be void. Sections 3(3) & 3(4) give two categories of agreements. Section 3(3) categories are examples of agreements which are considered violative of section 3(1) and the Commission, under law, has to presume that these agreements have an appreciable adverse effect on competition. If an enterprise wants the Commission to believe that the agreement covered under section 3(3) did not have adverse effect on the competition in the markets, the onus would lie on such enterprise to rebut the presumption created by law under this section.

10. Section 3(4) gives few examples of such agreements which are considered by the statute to be in contravention of section 3(1), if such agreements cause or are likely to cause appreciable adverse effect on competition within India. Thus, in case of an agreement of the nature under section 3(4), it has to be shown that an agreement covered under section 3(4) has or is likely to cause an appreciable adverse effect on competition in India.



11. While section 3(3) gives an exhaustive categories of agreements presumed to have appreciable adverse effect on competition and does not leave it to the Commission to include any other category of agreement under section 3(3), section 3(4) is illustrative of the agreements among enterprises at different stages or levels of production chain which are considered anti-competitive, if they cause or are likely to cause appreciable adverse effect on competition in India. Section 3(3) and section 3(4) are expansion of section 3(1) but are not exhaustive of the scope of section 3(1). There can be various kinds of agreements among enterprises which may fall under section 3(1) including agreements which are against the interests of consumers, affect freedom of trade and cause or are likely to cause appreciable adverse effect on competition in India. Section 3(3) carves out only an area of section 3(1). The scope of section 3(1) is thus vast and has to be considered keeping in view the aims and objects of the Act *i.e.* freedom of trade, consumer welfare *etc.* by ensuring that the markets are not distorted and made anti-competitive by such agreements of the enterprises which appreciably adversely affect the market or are likely to adversely affect the market. It is also evident from a reading of section 19(1) and section 33 that both these sections also talk of violation of section 3(1) and not section 3(3) & 3(4). This makes it abundantly clear that scope of section 3(1) is independent of provision of section 3(3) & 3(4). Sections 3(3) & 3(4) do not limit the scope of section 3(1). Also, for the purpose of section 3, the Commission is not supposed to enter into a discussion of market dominance, which exercise is necessarily to be done in respect of violation of section 4.

12. The Commission has to look into the freedom of trade, consumer welfare aspects and adverse effect on competition of the agreement entered into between OP hospital and Cryobank. For this, it is necessary to inquire into why the agreement was entered into and what was the nature of agreement between Cryobank and OP hospital.

The relevant clause of agreement reads as under:

‘Operational Issues:



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Fair Competition
For Greater Good

- All Gynecologists on Dr. L.H. HIRANANDANI HOSPITAL will be informed of the Cryobanks International India – DR. L.H. HIRANANDANI HOSPITAL tie up for providing the Stem cell bank services to its patients.
- Dr. L.H. HIRANANDANI HOSPITAL will offer exclusively Cryobanks International India stem cell banking services for its patients for a period for one year.
- At no point during the time of agreement period with Cryobank Internatinal India recommend any other Hospital to DR L.H. HIRANANDANI HOSPITAL clients patients and DR. L.H. HIRANANDANI HOSPITAL will not recommend any other stem cell banking service to its patients.
- Data for the obstetrics patients will be provided by DR L.H. HIRANANDANI HOSPITAL administration to Cryobanks International India.
- A suitable place/room for the counseling of DR L.H. HIRANANDANI HOSPITAL patients will be provided by DR L.H. HIRANANDANI HOSPITAL.
- Support fee to be paid in favour of DR L.H. HIRANANDANI HOSPITAL.
- This Agreement will be with effect from 1st September, 2011.'

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'Financial terms:

- For enrollments generated and completed by Dr. L.H. HIRANANDANI an enrollment support fee as per the details given below for all those which are banked will be paid.
- DR. L.H. HIRANANDANI will send the invoice once a month for all the collections done for the month and Life Cell to send the cheque within 7 working days.
- In case, after the collection the sample is rejected and is not banked then a debit note will be raised for refund of the payment made for such a collection.

Enrollments Per Month: Rs.18,000/- (10% tax will be deducted) per enrollment (including Cord Blood and Cord Tissue).'

13. For the next year, the only change in the terms was that Cryobank was to pay Rs.20000/- per enrollment to OP hospital

14. It is argued on behalf of OP hospital that section 3 does not cover normal commercial agreements. In order to cover an agreement under section 3(4), the agreement must be between two undertakings operating at different stages or levels of production chain



in different markets in respect of production, supply, distribution, storage, sale or price or trade in goods or provision of services. It is submitted that the agreement between Cryobank and OP hospital was not covered as provision of maternity services by OP hospital and providing stem cell banking services by Cryobank were altogether two different markets. OP hospital and Cryobank were not operating at different stages or levels of same production chain because the business activities of OP hospital were not vertically or horizontally related to business activities of Cryobank. It is contended that different stages of production means if one party was a manufacturer, the other was a stockiest or if one was stockist and the other was a retailer, *etc.* It is argued that there could be no existence of relationship of this nature where the products/ services provided by two enterprises were different from each other and both the enterprises entered into a commercial agreement. It is contended that allegations of anti-competitive agreement under section 3(4) can be examined only if there was a vertical agreement as envisaged in section 3(4) between the parties in the same production chain.

15. The Commission considers the argument as misconceived. Section 3(1) prohibits any agreement in respect of provision of services which causes or is likely to cause appreciable adverse effect on competition within India. All agreements as described in sections 3(3) and 3(4) of the Act alone cannot be the only agreements covered under section 3(1) of the Act. As already stated, section 3(3) enumerates certain species of agreements having legal presumption of adverse effect on competition and section 3(4) gives some examples of another species of agreements where there is no such legal presumption. The Commission can consider the impact of any agreement which falls within the four walls of section 3(1) and assess if the agreement has an appreciable adverse effect on competition. The Commission has therefore to consider whether the impugned agreement causes or is likely to cause appreciable adverse effect on competition within India or not and for considering this, the Commission has to keep in mind the purpose for which the Act was enacted, i.e. *inter alia* freedom of trade and consumers' interest must be protected.



16. The OP hospital contended that the agreement with Cryobank was only for one year and OP hospital adopted a clear, transparent and documented process for choosing the stem cell bank wherein all interested umbilical cord stem cell banks were invited to submit proposals for providing umbilical cord stem cell banking service at OP hospital. During this process, OP hospital considered several factors which allegedly encouraged competition for the stem cell banking services market. OP hospital quoted a United States District Court judgment of *Sundar Nilavar v. Mercy Health (494 F. Supp. 2d 604)* ('Sundar Nilavar case') to support its argument that replacement of once exclusive contractor with another did not amount to a violation of anti-trust laws.

17. Firstly, it may be noted that the facts of the cited case are altogether different from the facts of the present case. The US District Court assessed the anti-trust injury in that case caused by the exclusive contract between the Mercy Hospital Diagnostic Imaging Associates of Ohio (DIA), Inc. for providing diagnostic radiology services. The Court opined that the evidence established that DIA was chosen to be an exclusive service provider for radiology services at the conclusion of a competitive process. Therefore, plaintiff lost the right to practice at Mercy Hospital as a result of a 'reshuffling of competitors'. These facts cannot be applied to the present case as in the cited case agreement was for providing services to the hospital, while in the present case the hospital forced a service provider on its patients. Service provider was not to provide any maternity related service to the hospital. Although the OP hospital contended that its tie up with Cryobanks was based on objective assessment of proposals submitted by different stem cell banks, the documents furnished by OP hospital indicated a different story. A collective reading of the successive tie-up agreements (between Life Cell and OP hospital from 2009-2011 and between Cryobanks and OP hospital from 2011 onwards) shows that commission paid by the stem cell banking company to OP hospital was the sole and important criteria in selecting the stem cell banking company. Though Life Cell was paying Rs. 8000/- per enrolment for 2009-10 and Rs. 10,000/- per enrolment in 2010-11, Cryobank offered Rs.18000/- per enrolment in 2011-12 and Rs.20,000/- in 2012-13. It is also evident from e-mail attached to Annexure 6 of the written submissions filed by the OP hospital in support



of it contention regarding fair and transparent technical process for selection of stem cell banker. The covering e-mail dated 30.08.2012, an internal communication of OP hospital, clearly mentions that OP hospital had an exclusive tie up with Cryobank in 2011-12 pursuant to which they have received enrolment fees of Rs. 32,04,000/- and sponsorship for organising International Biologic Orthopedic Meet (IBOM) of Rs. 4,90,000/-.It is also interesting to note that in 2011-12 when Cryobanks was first appointed by OP hospital as an exclusive stem cell banker for its patients, the enrolment fee offered by Cryobank was the highest among all those who submitted proposals. Therefore, the contention of OP hospital that they chose Cryobanks on merits of technology is not true. In 2012-13, along with enrolment fee, the sponsorship fee was also considered, which seems to have superseded the fee/ commission offered by other stem cell banking companies. The justification proffered by OP hospital for choosing Cryobanks on basis of technology used, was neither mentioned in the summarised proposals of the companies nor in the covering e-mail sent along with the summary of proposals. Thus, the plea of OP hospital appears to be an afterthought and the Commission has no hesitation in concluding that the decision of OP hospital, for choosing Cryobank, was purely actuated by financial considerations and in utter disregard of the effects of the agreement on competition in the markets and consumer welfare.

18. The main advantages of a competitive market considered by the competition authorities world over is that there is a continuous pressure on producers to use raw material and human capital in a manner that keeps costs down without compromising with quality *i.e.* to maintain productive efficiency to favour customers. The other benefit is dynamic efficiency *i.e.* to invest in research and development and to innovate, leading to survival and growth of such companies which keep consumer preference at the top of agenda. While considering impact of an agreement on competition, the potential of damaging competition is also to be seen from the angle of consumer welfare.

19. The assessment of anti-competitive effects of the exclusive contract between OP hospital and Cryobank has also to be done on the basis of factors laid down under section 19(3) of the Act which is reproduced below.



Section 19 (3): The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

- (a) creation of barriers to new entrants in the market;*
- (b) driving existing competitors out of the market;*
- (c) foreclosure of competition by hindering entry into the market;*
- (d) accrual of benefits to consumers;*
- (e) improvements in production or distribution of goods or provision of services;*
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.*

20. Stem cell banking services sector is at nascent stage in India. It is a small market with very few players providing this service. Although, the DG report and OP hospital's submissions talk of 13 players in this market, the respective market share scenario of the players shows that Life Cell and Cryobanks are the two major players, collectively holding around 67% of the market share in stem cell collection in Mumbai. The exclusive contracts between a hospital and stem cell bank has a tendency of distorting market mechanism altogether. The development and competition in stem cell service industry is bound to be hindered because of such exclusive arrangement between OP hospital & Cryobank as each player, instead of competing with other players for efficiency and competitive price, would endeavour to pay commission to different hospitals and mop up clients. The adverse effect on competition is much more telling in this particular market because of the total dependence of the expecting mothers on the maternity service providers to get access to the stem cell/ cord blood from newly born children born in the hospital. Consumer may further suffer in the long run when the tied up stem cell banker, due to inefficiency *vis-a-vis* other competitors or otherwise, exits or the level of services provided by him falls. In such a scenario, exclusive arrangements like the one in question in this case would result in total



failure of service for consumer who wanted stem cells of the child to be preserved for future use. Though the enterprises may choose their business models which suit their respective requirements, in the peculiar facts and circumstances of the present case, the Commission is of the opinion that the agreement between OP hospital with Cryobank has adversely affected the growth of the stem cell banking market. Given the peculiar nature of the service like long term association resulting in tying in of the consumer for 21 years and the nascent stage of the market, such agreements foreclose the competition in the stem cell banking market and create entry barriers for competitors depriving the final consumers of not only the quality or price of services offered but also the choice of which service provider they would like to contract with. Further, by limiting consumer choice, it may result in permanent moulding of consumer preferences in the long run, thereby distorting the market mechanism completely.

21. Such exclusive arrangements do not accrue any benefit to the consumer and are rather at the cost of consumer. Further, OP hospital has also not been able to show any justification with regard to its agreement with Cryobank leading to any improvements in production or distribution of goods or provision of services or resulting in the promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. Neither has it been shown that any benefit would accrue to the consumer due to such agreements. The Commission notes that such agreement pre-closes market for new entrants. A new entrant instead of meeting productive and dynamic efficiency has to meet an efficiency in giving commissions to trick the customers to itself. This actually kills all competition replacing competition culture by commission culture.

22. A perusal of website of OP hospital shows that the hospital gives following assurance to its patients:

The department of Obstetrics and Gynecology is very vibrant. Equipment in the department is the latest and the technology is the cutting edge in this field. We cater to all the obstetric women and have a special High Risk Obstetric clinic. Fetal monitoring is done by 4D ultrasound machines that are the flagship models of the company.



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The department has the very latest suites for child birth such as the single room birthing complex or LDRP (Labour Delivery Recovery and Puerperium) suites. The suite helps the family to be with the laboring mother, till delivery. This helps in family bonding.

23. The collection of umbilical cord blood by staff of the hospital or the staff of any stem cell bank did not involve any technical process and it was a mere physical process of collection and preservation by the bank into a specially brought kit. The hospital had assured every patient as noted above that family of expecting mother shall remain in the delivery/ child birthing room till delivery. There could be no issue in allowing staff of stem cell banks to collect umbilical cord blood. However, OP hospital to protect its Rs.20, 000/- commission sacrificed the interest of its patients.

24. It is a well known fact that an expecting mother has to repeatedly consult her gynaecologists for various problems which she faces during 8-9 months period. No expecting mother, particularly at advanced stage of pregnancy, would like to change the doctor or the hospital as she develops a trust in the treatment of a hospital. When at the last stage of pregnancy, the woman is told, if she wants stem cell banking of her choice, she has either to change the hospital or to engage the Cryobank with whom OP hospital had agreement, no woman admitted in a super speciality hospital, to save few rupees will change the hospital. Mrs. Jain probably changed the hospital because she had already paid money to Life Cell for her child's stem cell banking. This, however, is not indicative of patients switching and migrating to other maternity hospitals without any cost or inconvenience. This aspect has been further accentuated by the fact that OP hospital did not inform Mrs. Jain and other patients during that time about its exclusive tie-up for stem cell banking with Cryobank. Thus, the argument of OP hospital that the patients were free to leave the hospital is a flimsy argument, not worth any weight.

25. It must be kept in mind that for the purpose of section 3, the Commission is not required to identify the relevant market but has to see if the agreement has anti-competitive effect in any market and this market may be the market of the product/ service of any party entering into the agreement. In the present case, it is the market of stem cell banking in



which competition was being adversely affected among stem cell bankers and the free trade was not being allowed and the patients were being fleeced of not only choice but also money.

26. From the above discussion, the Commission concludes that the agreement between OP hospital and Cryobank was an anti-competitive agreement in contravention of section 3(1) of the Act.

27. The second issue is about the dominance of OP hospital and abuse of dominance. For the purpose of section 4 of the Act, DG identified '*provision of maternity services by Super Speciality Hospitals*' as the relevant product market and '*area within a distance of 0-12 km from O.P. hospital*' as the relevant geographic market. DG carried out the patient inflow analysis from different wards to the hospitals and found that 63.70% of the maternity patients in the hospital were coming from wards S, L, N and K/E. The DG also found that two more wards T & P/S contributing 7.5% which had common boundaries with ward 'S' to be covered within the relevant geographic market. On the other hand, OP hospital has relied upon a report of economic consultant engaged by it viz. Genesis Economic Consultant Pvt. Ltd. for assessment of relevant geographic market and this economic consultant has suggested that relevant geographic market should not be bound to 12 km distance travelled but should include a catchment area, where the patient has to travel 16 to 20 km or roughly 12 km crow flight (straight line). Considering 12 km of actual distance travelled as more appropriate geographic area in view of the time consumed in travelling, DG came to conclusion that the OP hospital was dominant in relevant market of super specialty hospital within a distance of 0-12 km from OP hospital covering wards S,L, N,K/E, T&P/S. It found the condition put by OP hospital on its patients that in case one had to avail stem cell banking system, it will have only to avail services of Cryobank, as abusive and violative of section 4 of the Act.

28. The Commission considered the submissions of the parties and findings of the DG on this issue. The gamut of evidence collected by the DG focused mainly on the market share of OP hospital and the conclusions were consequently derived on that basis. At the



outset, it may be clarified that market share of an enterprise is only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance. Also, the Act has not prescribed any market share threshold for determining dominance of an enterprise in the relevant market. In the present case, the Commission has reservations in accepting DG's findings on dominant position of OP hospital. The DG has relied on the list of hospitals submitted by OP hospital as being the 'similarly competent hospitals' and further analysis was based on the data submitted by these hospitals. The DG observed that OP hospital has got the highest price in grade 5 for normal delivery and C-section delivery. However, the price structures for some of the hospitals in the data collected by DG appears comparable to OP hospital *i.e.* not much difference could be seen to indicate conclusively that OP hospital was dominant. Further, the DG's finding that OP hospital had commercial advantage over its competitors was not backed by any evidence.

29. In view of the foregoing, the Commission is of the opinion that it is not established that the OP hospital is dominant in the relevant market of *'provision of maternity services by Super Specialty/high-end Hospitals within a distance of 0-12 km from the Hiranandani Hospital covering S, L, N, K/E, T & P/S wards of Municipal Corporation of Greater Mumbai'*.

30. It is, however, clarified that notwithstanding the findings of the Commission on the dominance of the OP hospital in the relevant market due to inadequate data, the impugned agreement entered into by and between the OP hospital and Cryobank is anti-competitive being in contravention of the provisions of section 3(1) of the Act as it had caused appreciable adverse effect on competition in the market of stem cell banking.

Order

31. In view of the above discussion, the Commission holds that the impugned agreement was in contravention of the provisions of section 3(1) of the Act and had adverse effect on



competition. Accordingly, the Commission under section 27 of the Act passes following order:

(a) The agreement of OP hospital with Cryobank for the years 2011-12 & 2012-13 are declared null & void.

(b) The OP hospital shall not enter into a similar agreement with any stem cell bank in future.

32. While imposing penalty on OP hospital, the Commission has to keep in mind the mitigating and aggravating factors. In this case, OP hospital is a leading super speciality hospital of Bombay providing Five Star stay amenities to the patients apart from top class medical services for quite high fee.

33. The counsel for the hospital argued that a lenient view should be taken as the hospital was not compelling its patient to go for stem cell banking. It was the freedom of patients to avail stem cell services or not.

34. The plea advanced by the counsel is misconceived in as much as it is not the case of OP hospital that the patients were free to avail the services of any stem cell bank. The OP hospital's only argument is that if a patient was not willing to take services of Cryobank, the patient was free to leave the hospital and avail maternity services of another hospital. In fact, this is not a mitigating factor rather it is another aggravating factor. The hospital knew the difficulty of a patient in leaving the hospital where the patient had all along been taking services of maternity consultant and had developed a bond with the consultant. In fact, most of such patients are afraid of going to another consultant and resign to the fate.

35. Accordingly, the Commission notes that there was no mitigating factor except that maternity service was only a part, though not small, of overall services being provided by OP hospital. Keeping in view that the hospital was providing services for various other ailments and no similar arrangement in respect of other services has been reported, the



Commission considers that a penalty of 4% of the average turnover of last 3 years would be appropriate to meet the ends of justice. The turnover of OP hospital is tabulated below:

Year	Turnover (in rupees)
2009-10	768548819.4
2010-11	964481539.6
2011-12	1128842377
Total	2861872736
Average	953957579

36. Resultantly, a penalty of Rs. 3,81,58,303/- (Rupees three crores eighty one lakh fifty eight thousand and three hundred three only)— calculated at the rate of 4% of the average turnover of OP hospital— is imposed on the OP hospital.

37. The directions contained in para 31 above must be complied with immediate effect and OP hospital is also directed to file undertakings to this effect within a period of 30 days from the date of receipt of this order.

38. The Commission also directs the OP hospital to deposit the penalty amount within 60 days of receipt of this order.

39. Before parting with this order, the Commission is constrained to observe that despite the hospitals functioning like an industry, there is an onerous responsibility of the hospitals to behave ethically like any professional service towards the patients. The Commission considers that such similar arrangements as brought before the Commission in the present case with different market players fall foul of Act. Hospitals should refrain from entering into such agreements with stem cell banks which are anti-competitive being in contravention of the provisions of the Act as such agreements not only affect the competition adversely



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but are also against the spirit of health services and affect free trade besides being anti-consumers.

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

New Delhi

Dated: 05-02-2014

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Anurag Goel)
Member

Sd/-
(Justice S.N. Dhingra {Retd.})
Member

Sd/-
(S.L. Bunker)
Member