

COMPETITION COMMISSION OF INDIA
Case No. 57 of 2012

15thFebruary, 2013

In re:

Dr. AnoopBhagat

Informant

v.

1. M/s. Spectra Medical
System India Pvt. Ltd.

Opposite Party No.1

2. M/s. Solta Medicals, Inc., USA

Opposite Party No.2

Order under Section 26(2) of the Competition Act, 2002

The information has been filed by Dr. Anoop Bhagat (“the informant”) u/s 19(1)(a) of the Competition Act, 2002 (“the Act”) against M/s. Spectra Medical System (India) Pvt. Ltd. (OP-1) and M/s. Solta Medical Incorporation (OP-2) alleging contravention of sections 3 and 4 of the Act.

2. As per the information the informant was a reputed Doctor holding not only an MBBS Degree but also a diploma in Cosmetic Dermatology and was practicing at Delhi. The informant has alleged to be the first person who started cosmetology, Puva Therapy, Lasers and Chemical Peels in India. The said procedures relate to the practice of the beautification of the ‘skin, hair, or nails’.

3. Informant contended that, OP-1 was a distributor of medical equipments and related product to companies around the world. Further OP-1 was a distributor company which represented renowned medical laser and aesthetic equipments manufacturers around the world.

4. OP-2, as per the informant, was a company incorporated in the United States of America and was a global leader in the medical aesthetics market. On 23.12.2008 OP-2 acquired privately held Reliant Technologies Inc. and their Fraxel Product line of proprietary fractional laser technology, inter alia, Fraxel Laser Machine. The said machine is used mostly by the surgeons/ doctors specialist in skin treatment viz. for treating acne scars, wrinkles, melasma etc. The use of the rolling tip technology by the machines makes the machines unique *vis a vis* other laser technologies implying machines which carry out non-ablative treatment. OP-2 also had a registered trademark over Fraxel.

5. OP No.1 was the sole distributor selling Fraxel machines in India and since the informant was eager to buy a Fraxel Laser machine, he purchased one Fraxel Machine through sales executive of OP-1 in May, 2008. OP-1 remained in contact with the informant and catered to the requirements of the informant as and when the same was communicated to OP-1. However, the said machine stopped working in October, 2011. The informant thereafter communicated this fact to OP-1 and OP-2 through phone calls and e-mails and OP-1 offered the informant to take help of an alternate machine till the informant's machine was repaired. The informant who had promised this treatment to his clients had to take this offer and for this OP-1 charged him Rs.5,000/- per session.

6. That thereupon the informant kept on communicating through e-mails to OP-1 and OP-2 however, OP-1 and OP-2 initially gave cold responses and then OP-1 stopped taking informant's calls and informant was left without choice and clueless about the machine's repair.

7. That the informant alleged that OP-1 and OP-2 being monopolists colluded to sell the machine to the informant at a very high price and thereafter left the informant without a choice with regards to the machine and ancillary services related to it including the 'tips' and repair services.

8. It is further alleged that the distributorship agreement between the opposite parties that made OP-1 as the sole distributor for OP-2 in India was anti-competitive. It provided the OP-1 with a monopoly in the Indian market and was leaving the consumers with no-choice in the relevant market of *“fractional laser technology based machines for non-ablative skin treatment using the rolling tip technology”* and *“after sale services related to the machines including selling of consumables called ‘tips’, repair of the machines and spares”*. It is further averred that the OP-2 held a monopoly in above relevant markets because of the rolling tip technology, investments or sunk costs and initiative in the field of this unique laser technology which was only of the kind in itself with OP-2 having trademark over it. The monopolistic position also entailed from the fact that the after sale services related to the machines including tips, repair and spares are non-substitutable and the said machine being very expensive their accessories viz ‘tips’ and other things, repair and spares are not provided by anybody other than OP-2.

9. Aggrieved by the conduct of OP-1 and OP-2 of charging and demanding unfair prices, imposing unfair conditions on the consumers, limiting as well as restricting supply of goods and provision of services, and using monopoly in one market to affect another market, the informant filed this information and prayed investigation by the DG along with other reliefs for alleged contravention of the provisions of sections 3 and 4 of the Act.

10. The Commission has carefully perused the information and the documents filed therewith. The Commission also heard the informant’s oral submissions.

11. It is alleged that agreement between OP-1 and OP-2 making OP-1 as the sole distributor of the OP-2 in India in respect of Fraxel machines was an agreement in the nature of exclusive distribution agreement and therefore caused appreciable adverse effect on competition in India contravening section 3 (4) of the Act.

12. The agreements falling within the meaning of section 3(4)(c) of the Act are not presumed to be anti-competitive and the appreciable adverse effect on competition arising out of such agreements is required to be assessed in the light of the factors mentioned in section 19 (3) of the Act. From the averments and allegations made in

the information and other material on record, it is not established even *prima facie* as to how the agreement in question creates barriers to new entrants in the market or how the same forecloses competition by hindering entry into the market. Thus, no contravention of the provisions of section 3(4) read with section 3(1) of the Act is made out against the opposite parties.

13.Coming now to the informant's allegations regarding the abuse of dominant position by the OPs. As per the unique features of the machine as stated by the informant, it may be noted that '*sale of fractional laser machines which carry out non-ablative treatment using the rolling tip technology in India*' is the relevant market. As per the averments made, the OP-2 appears to be the sole manufacturer of the machines being a unique product and the OP-1 appears to be the sole distributor thereof in India. It may also be observed that the OP-1 is also responsible for all marketing, sales, installation, training and warranty services *etc.* for the products of the OP-2 in India.

14. In view of the above, it may be observed that the OP-2 (through the sole distributorship the OP-1) is in dominant position in the primary relevant market as defined and delineated *supra*. However, as per the Act, being dominant in itself does not constitute a violation of the provisions of this Act, what is to be seen is whether the dominance has been abused in terms of Section 4 (2) of the Act. It provides that there shall be an abuse of dominant position if an enterprise or a group limits or restricts production of goods or provision of services or market therefore; or technical or scientific development relating to goods or services to the prejudice of consumers; or indulges in practice or practices resulting in denial of market access in any manner; or makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or uses its dominant position in one relevant market to enter into, or protect, other relevant market.

15. On perusal of all the materials on record, the commission is of the view that even *prima facie* there is no violation of section 4 of the Act.

16. As no *prima facie* case made out on the basis of information available by the informant to act upon, the Commission is of opinion that the matter deserves to be closed forthwith under section 26(2) of the Act. It is ordered accordingly.

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

Sd/-
(H.C. Gupta)
Member

Sd/-
(R. Prasad)
Member

Sd/-
(GeetaGouri)
Member

Sd/-
(AnuragGoel)
Member

Sd/-
(M.L. Tayal)
Member

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

Sd/-
(Ashok Chawla)
Chairperson