

COMPETITION COMMISSION OF INDIA

[Case No. 70 / 2011]

Date: 27.08.2012

Informant: Shri Saurabh Bhargava, S/o Shri Shashank
Bhargava Civil Lines, Near Jalori Garden, Vidisha
(M.P.) - 464001

Opposite Parties: 1) Secretary, Ministry of Agriculture and Co-
operation, Krishi Bhawan, Delhi.
2) Agriculture Commissioner, Chairman of
the Registration Committee, Krishi
Bhawan, New Delhi
3) Secretary, Central Insecticide Board &
Registration Committee, NH-4, Faridabad

Order under Section 26(1) of the Competition Act, 2002

As per R.Prasad (Dissenting)

Present information has been filed u/s 19 by Shri Saurabh Bhargava (herein after referred to as the 'informant') alleging contravention of the section 3 & 4 of the Competition Act, 2002 (hereinafter referred to as the Act). The informant has brought to the notice of Commission the anti-competitive effects in the market due to the regulatory practices of the Opposite Parties under the Insecticides Act, 1968 for the import of the insecticides used for various purposes but largely for agriculture purpose in India. Informant has pointed out that due to such practices the level of competition is almost nil and insecticides are sold at prices many times more than the actual International price to the disadvantage of the ultimate consumer i.e. farmer.

Brief facts and allegations

- 1) For doing business in insecticide, either manufacturing or importing, can only be started after getting license under the 'Registration of insecticides' u/s 9 of the Insecticide Act, 1968. The relevant sections are S/ 9(3) and 9(4); Section 9(3) pertains to the first entrant whereas section 9(4) to the second entrant for



manufacturing or importing insecticides. Section 9(3) reads as under:

"Any person desiring to import or manufacture any insecticide may apply to the registration committee for the registration of such insecticide and there shall be separate application for each such insecticide. The registration committee may, have regard to the efficacy of the insecticide and safety to human beings and animals vary the conditions of granting the certificate."

Section 9(4) reads as,

"Notwithstanding anything containing in the section, where an insecticide has been registered on the application of any person, any other person desiring to import or manufacture the insecticide or engaged in the business of, import or manufacture thereof, shall make an application and on payment of prescribed fee be allotted a registration number and granted a certificate of registration in respect thereof on the same conditions on which the insecticide was originally registered."

- 2) The informant has mentioned that his case relates only to the import of insecticides in India. Opposite Party no. 2 i.e. Agriculture Commissioner, Chairman of the Registration Committee, issues registration certificate/license to import insecticide under section 9(3) to first importer and under section 9(4) to the second importer. Opposite party no. 3 i.e. Secretary, Central Insecticide Board makes policy and decides terms and conditions for registration in respect of insecticides in India.
- 3) The first registrant has to carry out all the required tests w.r.t. safety parameters, bio-efficacy etc. to establish the insecticide is worthy of getting registration certificate. For carrying out the requisite tests enormous expenditure is required and thus, same can only be done by big companies or MNCs. According to the Informant, the second and onward entrants are entitled to import the same insecticide under section 9(4) of the Act with reduced field trial parameters because ongoing testing has already been done on such insecticides.
- 4) According to informant, application made by it under section 9(4) of the Insecticide Act, 1968 for subsequent import was rejected by the Opposite Party No. 3 citing the reason that it has changed the rules and now all provisions of section 9(3) of the Insecticide



Act, 1968 have to be complied irrespective of whether it is first importer or the subsequent one. Accordingly, the second entry under section 9(4) has been suspended under the applicable rules.

- 5) According to the Informant, this denies the SSIs to access market of insecticides because of their inability to spend huge amounts on the trial as required under section 9(3) of the Insecticide Act. Thus, the very objective of enacting sections 9(3) and 9(4) to have a fair competition among the players and making available the insecticides for the protection of crops at reasonable rates is defeated. Since OPs 2 & 3 have the sole right to grant license and change terms and conditions as well, they are abusing their dominant position.
- 6) Informant has further mentioned that another condition was introduced by the OPs in 2010, which makes the market of insecticides nearly inaccessible to the new importers. As per this condition, the second importer has to get its product compared with that of the first one for the quality purpose. So, the second importer has to conduct trials on all crops on which the first importer had done the trials. If in the meantime first importer has expanded the tests on new crops, the second one is also required to carry out those tests on them. This condition, according to informant, means that no new company can obtain the license for manufacturing or importing insecticides and therefore, there is no competition at all in this market. All these lead to creation the monopoly in the relevant market and thus exorbitant prices to the consumers who are basically farmers. Informant has requested the commission to direct the OP 3 for granting license under section 9(4) instead of section 9(3) of the Insecticide Act, 1968.

Findings

- (1) After carefully considering the entire material on record, I am of the view that there exists a prima facie case of anti-competitive effect due to the conduct of the OPs and there is a need on the part of the Commission to intervene to correct the situation for the welfare of the consumers. The majority order has concluded; firstly, that Opposite Parties are not 'Enterprises' as per the provisions of section 2(h) of the Act, and secondly, that the Commission has no jurisdiction to test the provisions of different



Acts, Rules & Regulations framed by these enterprises from competition angle and to declare these provisions null & void.

- (2) I entirely disagree with this view and, therefore, it is my duty to put forth my view on these aspects before delving into the anti-competitive conducts of the OPs. As the OPs are Government agencies constituted under an Act of Parliament, it is to be seen whether they fall under the definition of 'Enterprise' as defined under section 2(h) of the Act. "Enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to sovereign functions of the Government including all activities carried by the departments of the Central Government dealing with the atomic energy, currency, defense and space. Thus, unless the activities of the OPs are classified as "relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense & space", they cannot be exempted under Section 2(h) of the Act. Thus, the Commission gets its jurisdiction over the OPs.
- (3) Secondly, the definition of 'Enterprise' mentioned above explicitly includes a department of the Government. So, if a Government department is found to be abusing its dominant position or is a part of any anti-competitive agreement, it is well within the purview of the Act and is liable for penalty. The intention of the law maker is absolutely clear by including the Government department within the definition under section 2(h) of the Act and if a Government Department is indulged into any anti-competitive conduct it has to be prevented. Thus, the only point is to be seen as to whether Opposite Parties have been indulged into such activity which is anti-competitive. The word 'activity' has not been defined in the Act; thus, all activities which eliminate or lessen competition are included in the definition of activity. It is a fact that Central Insecticide Board and



Registration Committee are government departments but the real issue is that whether they perform sovereign functions as defined under the definition of section 2 (h) of the Act. The OPs are neither performing any sovereign function nor have they been exempted under section 54 of the Act where Central Government may, by way of notification, can exempt any enterprise from the application of Competition Law. This clearly shows that the OPs are 'enterprises' and well within the purview of competition law. Moreover, the activities performed by the Opposite Parties are related to manufacture, supply and distribution of Insecticides in India. Accordingly, the activities carried out by the Opposite Parties cannot be regarded as the sovereign functions of the Government. Thus, in the backdrop of the above analysis the Opposite Parties can be held to be enterprise according to the Competition Act, 2002.

- (4) On the second point that the Act does not envisage a role for the Commission to declare statutory rules and regulations as void, I am of the view that the Commission has a larger role to play in the economy to eliminate and prevent practices having adverse effect on competition, to promote and sustain competition in markets and to protect the interests of consumers among others keeping in view the economic development of the country. With that mandate the Commission cannot deny the Indian consumers the benefits of competition. According to me, if any provisions of an Act create any anti-competitive effect in the Indian market, the same has to be prevented within the provisions of competition law. It is imperative on the part of the Commission to correct such distortions in the market. The interest of the consumers has to be protected by all means and a competition authority cannot turn a blind eye on the pretext that such anti-competitive activity is being done by a government department. Section 18 of the Act casts duty on the Commission to eliminate practices having adverse effect on competition. So, if we are not doing so we are failing in our duties.
- (5) Further, to counter the claims of the OPs that they are performing various duties entrusted to them under an Act of parliament (The Insecticides Act, 1961), I have taken some extract from the Supreme Court decision in the case of Lucknow Development Authority vs. M.K. Gupta 1994 AIR 787 1994 SCC (1) 243, which is directly applicable to the present case. In this case the Supreme Court was deciding the issue of jurisdiction of the National Commission, the State Commission and the District Forum under the Consumer Protection Act, 1986. The Supreme



Court held that the legislation was a milestone in the history of socio-economic legislation and is directed towards achieving public benefit. What is inclusive definition has been explained in this Act. The definition of service and consumer in the Consumer Protection Act is similar to the definition in the Competition Act. The relevant extract from the judgment is reproduced as under:-

"This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function; therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objective of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for



it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society."

- (6) It was further held that the theoretical concept that King can do wrong has been abandoned in England itself and, the State is now held responsible for tortuous act of its servants. The court further held:

"Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is



empowered to entertain a complaint by the consumer for value of the goods or services and compensation."

- (7) Thus, judgment of the Hon'ble Supreme Court which is law of the land removes all shreds of doubt regarding the applicability of the Competition Act, 2002 on the Opposite parties which are bodies created under a statute i.e. the Insecticide Act, 1968. In this regard, it is also worth mentioning the role of Competition Authority envisaged in the modern competition laws (competition authority) in a paper available on UNCTAD website -

"Under the modern competition laws, competition authorities are given the task of advising the Government on competition matters to avoid the enactment of laws with unnecessarily anti-competitive side-effects".

- (8) It follows from the above that the competition authority should notify the anti-competitive effects arising out of various provisions of Laws, Statutes, Acts, etc. to the Government and sensitize them to take suitable measures to remove, amend or modify those provisions in order to promote competition. In the present case also there is a need to sensitize the Opposite parties and Government to take suitable remedial measure to correct the situation keeping in view overall public interest.
- (9) Now let's deal with the competition concerns emanating due to the operation of the Act. There are basically two abuses alleged by the informant -

Firstly, the second importer from a new source is required to comply all the requirements which are required to be met by the first importer. However, if the source for both the importers i.e. first and second is same, in that case the requirements are less rigorous for second one. Informant, thus, has alleged that this creates monopoly situation in the market for that insecticide.

Secondly, the second importer has to get its product compared with that of the first one for the quality. For this has to be done on all the crops on which first one had done the tests. Technically this is termed as 'labeling'. If in the meantime first



importer has expanded the tests on new crops, the second one is also required to carry out tests on those crops.

- (10) To deal with the first issue, it is pertinent to produce the relevant sections of the Insecticide Act, 1968 –

Section 9(3) reads as, *"Any person desiring to import or manufacture any insecticide may apply to the registration committee for the registration of such insecticide and there shall be separate application for each such insecticide. The registration committee may, have regard to the efficacy of the insecticide and safety to human beings and animals vary the conditions of granting the certificate."*

Section 9(4) reads as, *"Notwithstanding anything containing in the section, where an insecticide has been registered on the application of any person, any other person desiring to import or manufacture the insecticide or engaged in the business of, import or manufacture thereof, shall make an application and on payment of prescribed fee be allotted a registration number and granted a certificate of registration in respect thereof on the same conditions on which the insecticide was originally registered."*

- (11) Section 9(3) thus relates to the first importer and section 9(4) to the second one. Prior to 1997, the import by the second importer was less restrictive and had to comply lesser terms and conditions than the first one. However later on the requirements for import from a new source were made at par with that of the first importer. This way the first importer remains the only player and entry for the second player is restricted and delayed considerably. Till that time the first importer enjoys monopoly position by charging exorbitant prices from the consumers in India. Moreover, according to the submissions of the Opposite party, less restrictive terms are only applicable to the second importer if the import is made from an already registered source. This does not alter the situation of monopoly rather promotes it. Now, there is no difference between the second importer from new source and the first importer. The interpretation of the provisions of the Insecticide Act in this manner, thus stifle and restrict the competition. Moreover, the whole purpose of the introduction of section 9(4) meant for the second registrant gets defeated if



the same is interpreted the way the Opposite parties have been interpreting. In that case there was no need for the law framers to introduce the section 9(4).

- (12) The submissions of the Opposite party that earlier the terms were less rigorous for second importer indicates that system earlier operated with less rigorous terms and procedure and that prices of the insecticides might be competitive at that time. According to informant, this was terminated due to some instances of some spurious insecticides in to India. However, the same can be proved with the full scale investigation only.
- (13) The second allegation that subsequent importer from new source are obligated to carry out test etc. not only for those crops for which first registrant carried out tests but also for those crops that may be added by him before submission of the data to Opposite parties by the second importer. If this allegation is true, competition in the market suffers as this procedure will delay the entry of the second importer from new source. It is absolutely clear that it's only the second importer from new sources that poses the competition to the first one. The Opposite party has mentioned that in late 2010, this was changed and when a second registrant decides to apply for registration, the labels of the first registrant available as on that date alone would have to be done by the second registrant for trial for data comparison. Since the requirement was unfair, it was thus later on amended by the opposite party sensing that it might be restricting competition. Had this been taken care of and removed at an earlier date, this would have improved the competition for many insecticides and thus increased consumer choice, reduced costs and benefits to the economy in the form of lesser foreign exchange outgo.
- (14) The anti-competitive situation is arising due to the interpretation of the relevant section of the Insecticides Act, 1968. So unless activities of opposite parties, giving rise to the killing of competition, are set right, the market will not see benefits of competition.
- (15) The opposite parties are occupying dominant position by virtue of their creation under the Insecticides Act, 1968. The analysis made out above suggests the adverse effect on competition in form of (i) the consumer (farmer) tend to pay more, (ii)



foreclosure of competition and creation of artificial barriers to new entrants (iii) the level playing field gets disturbed for a longer period, (iv) obstacles in the freedom of trade carried on by participants in the market and (v) it also discourages the technical and scientific development.

- (16) In view of the above, I am of the opinion that there exists a prima facie case in the matter and deserve to be sent for investigation by the DG.
- (17) Secretary is directed to inform all concerned accordingly.

sd/ ✓
(R. Prasad)
Member

Certified True



P. GAHLAUT
Assistant Director
Competition Commission of India
New Delhi