



COMPETITION COMMISSION OF INDIA

Case No. 79 of 2015

In Re:

1. **M/s Kyal Agencies Pvt. Ltd.**
Plot No. 7341/10158, Adimata Colony,
Near Sainik School, Bhubaneswar **Informant No. 1**
2. **M/s Kyal Agencies**
Old College Lane, Nimchouri, Cuttack, Odisha **Informant No. 2**
3. **Kyal Associates**
Old College Lane, Nimchouri, Cuttack, Odisha **Informant No. 3**

And

1. **Utkal Chemists and Druggists Association (UCDA)**
Plot No. 1, Bhouma Nagar, Unit-IV, Bhubaneswar **Opposite Party No. 1**
2. **Ch. Prabir Kumar Das**
General Secretary, Utkal Chemists and Druggists Association
Plot No. 1, Bhouma Nagar,
Unit-IV, Bhubaneswar **Opposite Party No. 2**
3. **Bhubaneswar Chemists & Druggists Association (BCDA)**
Atal Bhawan, Unit-III, Bhubaneswar **Opposite Party No. 3**
4. **Puri Chemists and Druggists Association (PCDA)**
Gajapati Nagar, Puri **Opposite Party No. 4**
5. **Odisha Sales Representatives' Union**
CITU Campus, VR-5/1, Kharabela Nagar,
Unit-III, Bhubaneswar **Opposite Party No. 5**



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6. Mr. Manoranjan Mishra

Proprietor, M/s Maa Pharmaceuticals

Shop No. 14, A/68, Unit-3,

Kharvel Nagar, Bhubaneswar

Opposite Party No. 6

7. Mr. Chittaranjan Mishra

Proprietor, M/s Maa Associates

Shop No. 14, A/68, Unit-3,

Kharvel Nagar, Bhubaneswar

Opposite Party No. 7

CORAM

Mr. Ashok Chawla

Chairperson

Mr. S. L. Bunker

Member

Mr. Sudhir Mital

Member

Mr. U. C. Nahta

Member

Mr. M. S. Sahoo

Member

Justice (Retd.) G. P. Mittal

Member

Appearances:

For the Informants: Shri Amit Gupta, Advocate for the Informant No. 1
along with Shri Shiv Kyal and Shri Ritesh Chanduka.

For the Opposite Parties: Ms Vandana Sehgal, Advocate and Shri Saurabh
Mishra, Joint Secretary of BCDA.



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

1. The present information has been filed by Kyal Agencies Pvt. Ltd. (hereinafter, the '**Informant No. 1**'), M/s Kyal Agencies (hereinafter, the '**Informant No. 2**') and Kyal Associates (hereinafter, the '**Informant No. 3**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the "**Act**") against Utkal Chemists and Druggists Association (hereinafter, '**OP 1**'/ '**UCDA**'), Ch. Prabir Kumar Das, General Secretary (hereinafter, '**OP 2**'), Bhubaneswar Chemists & Druggists Association (hereinafter, '**OP 3**'/ '**BCDA**'), Puri Chemists and Druggists Association (hereinafter, '**OP 4**'/ '**PCDA**'), Odisha Sales Representatives' Union (hereinafter, '**OP 5**'/ '**OSRU**'), Mr. Manoranjan Mishra of M/s Maa Pharmaceuticals (hereinafter, '**OP 6**') and Mr. Chittaranjan Mishra of M/s Maa Associates (hereinafter, '**OP 7**') [collectively hereinafter, '**OPs**'] alleging, *inter alia*, contravention of the provisions of sections 3 & 4 of the Act in the matter.
2. The Informant No. 1 is a private limited company holding a valid drug license in form 20B, 21B, 20G under Drugs and Cosmetics Rules ('**DCR**') and is engaged in activities such as sale, stock, and distribution of drugs. The Informant No. 2 and the Informant No. 3 are proprietorship firms holding valid drug license in form 20B, 20G, 21B and 21C under DCR on wholesale basis and are, *inter alia*, engaged in sale, stock, exhibit or offer for sale or distribution of drugs.
3. OP 1, UCDA, affiliated to All India Organisation of Chemists and Druggists ('**AIOCD**'), is an organization consisting of 18,000 members and has been controlling the entire drug delivery system in the State of Odisha. OP 2, as the General Secretary of OP 1, is stated to be in the helm of affairs of OP 1 and takes decisions regarding No Objection Certificate (**NOC**) to be issued to stockist and distributors in Odisha. OP 3 and OP 4 are associations affiliated to OP 1. OP 5 is an association of medical representatives and sales agents of pharmaceutical companies in Odisha. OP 6 and OP 7 are the proprietors of two medical stockist/ distributor firms located at Bhubaneswar in Odisha.



4. It is stated in the information that Apollo Hospitals Enterprise Limited ('**AHEL**') wanted an independent supply house to be set up at Bhubaneswar, as its hospital based pharmacies (**HBP**s) and 50% of their standalone pharmacies (**SAP**s) are located at Bhubaneswar. Accordingly, it was decided by AHEL to incorporate an independent company for the said purpose. In this regard, on 08.08.2013, AHEL entered into an agreement with the Informant No. 1 and appointed the Informant No. 1 as its preferred and main distributor of pharmaceutical products in respect of HBP and SAP in the state of Odisha from 01.09.2013 to 31.08.2015. Subsequently, on 31.08.2013 the Informant No. 1 got a license to sell, stock and distribute drugs in form 20B, 21B, 20G under DCR with a validity from 31.08.2013 to 30.08.2018.
5. It is stated that the aforementioned agreement was not received favorably by OP 1 and OP 2, and they tried to prevent the supply of pharmaceutical products to Informant No. 1 so that it would not be able to fulfill its obligations to AHEL as per the terms of the agreement. It is alleged that all the leading distributors/ companies of Bhubaneswar were instructed by OP 1 and OP 2 to stop supplies to the Informant No. 1.
6. As per the information, an email was sent by AHEL to a pharmaceutical company *i.e.*, Fresenius Kabi India Pvt. Ltd. (**Fresenius**) on 31.10.2013 for supply of Kabimol 100 ml to Chennai (300 bot), Kolkata (200 bot), Ludhiana (200 bot) and Bhubaneswar (1000 bot), stating specifically that for Bhubaneswar the supply must be made through the Informant No. 1. In reply, Fresenius, *vide* its email dated 06.11.2013, informed that the stocks have been supplied everywhere except Bhubaneswar due to Pharma Trade Unions who are objecting on supply of the stocks to the Informant No. 1 unless it takes NOC from them. It is stated that the Informant No. 1 was not provided with any supply of pharmaceutical products by Fresenius except restrictive supply *i.e.*, from volume therapy division and nephrology division.
7. It is further stated that the Informant No. 1 had placed an order dated 30.09.2013 with M/s Glenmark Pharmaceuticals Ltd. ('**Glenmark**') for supply



of pharmaceutical products for AHEL. Since OP 1 and OP 3 were not willing to allow the Informant No. 1 to be formally appointed as distributor of Glenmark, they refused to allow the Informant No. 1 to get supplies directly from Glenmark. In order to avoid boycott of Glenmark's products by OP 1 and OP 3, the Informant No. 1 was managed to get the supplies through its sister concern the Informant No. 2, who is also an authorized distributor of Glenmark. But, when it came to the notice of OP 1 and OP 3 that the Informant No. 1 is getting supplies from Glenmark through the Informant No. 2, they again started boycotting Glenmark's products. It is pertinent to mention that OP 1 and OP 3 had boycotted the products of Glenmark during the 1st week of October, 2013 for three days.

8. Further, it is stated that the Informant No. 1 had also got the offer from Mankind Pharma Ltd. ('**Mankind**') for being appointed as distributor of its drugs *vide* letters dated 15.12.2014 and 20.04.2015. But, due to requirement of NOC, the Informant No. 1 has not been appointed as a distributor of Mankind. It is alleged that the products of Mankind were boycotted in Odisha at the behest of OP 1 and OP 2 for its failure to pay Product Information Services ('**PIS**') charges to the OPs during the period January, 2015 to March, 2015. Various other companies such as Rochee Products India Pvt. Ltd., IPCA, Torrent Pharmaceuticals Ltd, Sun Pharmaceutical Industries Ltd. *etc.* have also offered their distributorship to the Informant No. 1 for supplying medicines to pharmacies run by Apollo group. It is pertinent to mention that AHEL had informed all companies about the appointment of the Informant No. 1 and requested them to supply drugs directly to the Informant No. 1 so that it can further supply the same to Apollo pharmacies. However, OP 1 to OP 4 refused to grant NOC regarding the same.

9. It is alleged that on the agreement between the Informant No. 1 and AHEL was coming for renewal OPs started exerting pressure and giving threats to AHEL for not renewing the said agreement. Further, it is alleged that the sole objective of the threat was to dictate on a consumer as to who would be its preferred supplier and distributor. In this regard, it is submitted that on 10.10.2014 Apollo Pharmacy, Bhubaneswar had received a complaint from



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200 chemists belonging to Angul town through a email from Angul District Chemists & Druggists Association (ADCDA). The officials from Apollo Pharmacy were asked to meet the officials of ADCDA within 72 hours to avoid the consequences. It is further alleged that on 02.06.2015, OP 5 had sent a letter to AHEL on behalf of the Sales Promotion Employees (SPEs)/ Medical Representatives falsely stating that they are suffering for the past two years due to the Informant No. 1. On 16.06.2015, OP 1 sent a letter to AHEL along with a copy of letter dated 02.06.2015 sent by OP 5 for purchase of medicines by AHEL from the local distributors at Bhubaneswar. It is stated that AHEL has been procuring medicines only from the Informant No. 1 whereas previously many distributors were supplying drugs to Apollo Pharmacy.

10. OP 5 *vide* its letter dated 01.07.2015 sent a reminder to AHEL and threatened to approach the Commission against the alleged anti-competitive practices adopted by AHEL. It is alleged that such a letter extending frivolous threats was a ploy to impose extraneous considerations in purchase of the drugs by a consumer. Similar kind of letter was sent by OP 1 and OP 2 dated 03.07.2015 threatening AHEL. On 07.08.2015, OP 1 and OP 2 sent a letter to AHEL asking them to establish Key-Med at Bhubaneswar along the lines of those existing in other cities. OPs also asked AHEL to take the necessary steps in 72 hours in order to avoid consequences. Again, on 11.08.2015, OP 5 sent a letter to AHEL, reminding it to comply with the demands of OPs. It is further alleged that both OP 1 and OP 2 had sent threatening emails to senior management of the Apollo Group so as to intimidate them from not signing any further agreement with the Informant No. 1.

11. It is alleged that OP 1 is abusing its dominant position by imposing unfair and discriminatory conditions which has the effect of limiting/ denying market access to genuine stockists, distributors such as the Informants herein unless they submit to the dictates and mandate of OP 1 to OP 4. It is, further, alleged that OP 1 to OP 4 are imposing conditions which have the effect of creating barriers to new entrants and foreclosing competition by hindering entry into the market. It is furthermore alleged that the threats extended by OPs on



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AHEL by way of limiting and controlling the supply of the pharmaceutical products is presumed to have an appreciable adverse affect on competition. As per the Informants, the conditions imposed by OP 1 to OP 4 whereby no agreement can be entered into by a drug manufacturing company with a stockist or a distributor unless they have a NOC from them is anti-competitive in contravention of the provisions of sections 3 and 4 of the Act.

12. The Commission has perused the information, additional submissions and other materials on record. The Commission takes note of the fact that the Informants are primarily aggrieved by the fact that OPs have allegedly threatened AHEL not to buy products only from the Informant No. 1 and instead purchase it through other local sources. Further, the Informants are also aggrieved by the insistence of OP 1 on mandatory requirement of NOC for the stockists of pharmaceutical companies which is alleged to be in contravention of the provisions of sections 3 and 4 of the Act.

13. With regard to the allegation of abuse of dominance by OP 1 under section 4 of the Act, the first and foremost requirement is to establish that OP 1 is an enterprise in terms of section 2(h) of the Act. As per section 2(h), 'enterprise' means:

"A person or a department of 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 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, defence and space".



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14. Thus, for any person or association of persons or association or associations to be an enterprise, it is essential that it/ they is/ are engaged in any of the above mentioned commercial or economic activities. Further, OP 1 in the present case, by the very nature, is only an association of members who are performing commercial functions but the association itself is not engaged in any commercial or economic function as such. Therefore, OP 1 is not an enterprise in terms of section 2(h) of the Act. Since, OP 1 is not an enterprise in terms of the provision of section 2(h) of the Act, the alleged abusive conduct of OP 1 need not be examined under section 4 of the Act.
15. With regard to the allegations pertaining to the section 3, the Informants have alleged that the mandatory requirement of NOC from OP 1 is in contravention of section 3(3)(b) read with section 3(1) of the Act. In this regard it is pertinent to mention that earlier in many cases against Chemists Druggists Associations, the Commission has held the view that the mandatory requirement of NOC and PIS charges amounts to creating of barriers to entry for new entrants into the market and foreclosure of competition by hindering entry into the market and therefore anti-competitive in terms of section 3(3)(b) of the Act and the Commission has also brought numerous public notices in this regard.
16. However, in the present matter, the allegations of the Informants does not reveal the same. On a careful perusal of the documents submitted, the Commission observes that AHEL has entered into an agreement with the Informant No. 1 making it the preferred vendor for supplying medicines to its hospital. In this regard, OP 1 in its letter dated 7.8.2015 has stated that AHEL must withstand from following the single vendor system and abandon the practice in *toto*. Taking this into account, the Commission is of the view that the entry of new players in the market will enhance competition and therefore, the allegations of the Informants regarding section 3(3)(b) stands negated. Further, the Commission also observes that the Informants have not submitted any cogent material and evidences to substantiate any allegations with regard to contravention of section 3(3) of the Act. Moreover, as per the admissions of the Informants, the aforesaid renewal of the agreement between the Informant



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No. 1 and AHEL has already been operationalized. In view of this, the Commission observes that under the changed circumstances, there is no basis for the allegation regarding NOC. Therefore, Commission is of the opinion that the impugned conduct of OP 1 to OP 4 is not in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act.

17. In the light of the above analysis, the Commission finds that no case of contravention of the provisions of either section 3 or section 4 of the Act is made out against OPs in the instant matter. Accordingly, the matter is closed under the provisions of section 26(2) of the Act.

18. The Secretary is directed to inform all the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

Sd/-
(Justice (Retd.) G. P. Mittal)
Member

New Delhi
Dated: 17.11.2015