COMPETITION COMMISSION OF INDIA

Dated: 11.01.2012

Reference Case No. 01/2011

In Re.: Domestic Air Lines

Order under Section 27 of the Act

R. Prasad (dissenting)

This case is similar to the cases RTPE 05/2009 of MRTPC and suo moto case no. 02/2010. The issue involved in all the three cases is the increase in airfares by the different airlines either due to increase demand for seats during the holiday season or the shortage of supply of airline seats due to a strike by the official and staff of Air India. This case was referred to the Commission by the Ministry of Corporate Affairs. The Ministry also wanted that an interim order be passed by the Commission under Section 33 of the Act directing the airlines not to charge exorbitant fares from the consumers. The Commission on the basis of the reference made by the Ministry referred the matter under Section 26(1) of the Act for investigation by the Director General. Regarding proceedings under Section 33 of the Act, after hearing the different airlines came to the conclusion that no case under Section 33 of the Act is made out and for this reason no direction was given to the airlines for charging low prices. The D.G. after investigation found price parallelism and a practice of shifting seats to higher price buckets which amounts to control over the supply of seats and results in higher fares. D.G. had stated that there was a violation of Section 3(3) of the Act. The majority in the Commission felt that the findings of the D.G. are not correct and without giving an opportunity to the concerned airlines have closed the case.

2. I have a different view on the subject and am therefore passing a separate order.

3. Before proceeding with the case it is necessary to examine the legal provisions of the Competition Act as explained by the Supreme Court in the case of

CCI vs. SAIL Civil Appeal No. 7779 of 2010. In this case CCI had appealed to the Supreme Court against an order of the Competition Appellate Tribunal (COMPAT) – wherein the issue was whether an appeal would lie to COMPAT against an order issued by the CCI, when there was no provision for appeal in the Competition Act, 2002 against such an order. While deciding the issue in favour of CCI that no appeal would lie against a direction issued under Section 26(1), the Supreme Court examined the provisions of Sections 19, 26 and 53A of the Act. The Supreme Court while dealing with the interpretation of the Act on Page 32 of the order held as follows:

> *On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected to the court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.*

and on Page 35 as follows:-

> *A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is jus dicere, not jus dare. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. <u>The best norm would be to give literal construction keeping the legislative intent in mind.</u>*

and again on Page 37 as follows:-

> *"...If the words of the Statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in the*

provision. The question of construction arises only in the event of an ambiguity or the plain meeting of the words used in the Statute would be self defeating."

&

"Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions. "

In view of these propositions and as held by the Supreme Court in the SAIL case, appeal would lie only against orders passed under Section 26(2) and 26(6) of the Act. The Supreme Court also held that no appeal would lie against any directions for investigation and inquiry under Sections 26(1) and 26(7) of the Act [Page 39 of the order]. Similarly, no appeal would lie against an inquiry under Section 26(8) of the Act. In the Act there is no section i.e. when the D.G. finds a contravention of the Act under Section 3 or Section 4 of the Act, the proceedings can be dropped by the Commission. Something which is not provided – in the Act cannot be imported. The intention of the legislature is clear because the legislature has not provided an appeal under Section 53(1)(a) of the act against dropping of a case after the D.G. has found a contravention of the Act. The legislature never intended that after the D.G. found a contravention in a case, the case could be closed. Otherwise it would have provided for appeal under Section 53(1)(a) of the Act as it has provided for against orders under Section 26(2) and 26(6) of the Act.

4. The next issue is the procedure laid down in Section 26 of the Act. Though the Supreme Court in the SAIL case was not required to decide this issue, it gave an opinion on Section 26 which is reproduced as under (page 13 of the order):-

In terms of Section 26(3), the Director General is supposed to take up the investigation and submit the report in accordance with law and within the time stated by the Commission in the directive issued under Section 26(1). After the report is submitted, there is a requirement and in fact spesific duty on the Commission to issue notice to the affected parties to apply with regard to the details of the information and the report submitted by the Director General and

thereafter permits the parties to submit objections and suggestions to such documents. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no offence disclosed, it shall close the matter forthwith, communicating the said order to the person / authority as specified in terms of Section 26(6) of the Act. If there is contravention of any of the provision of the Act and in the opinion of the Commission, further inquiry is needed, then it shall conduct such further inquiry into the matter itself or direct the Director General to do so in accordance with the provisions of the Act.

In view of the reasoning given by the Supreme Court and the provisions of the Act, it is necessary to hear the parties, in cases where the D.G. has recommended closure, before closing the case under Section 26(6) of the Act. As this procedure has not been followed, I have no option but to disagree with the majority view. Another reason for disagreement with the majority is that the DG has nowhere in his report stated that there was no contravention of the Act. In fact, the D.G. has found price parallelism.

The D.G. has also found that the practices carried out by the airlines was hit by the provisions of Section 3(3) of the Act. Therefore in accordance with the provisions of Section 26(8) of the Act, further inquiry should have been carried out by the Commission by hearing the parties. This has not been done and is a procedural error.

5. As the Commission had not carried out inquiry under Section 26(8) of the Act, the majority relied on the submissions made in the proceedings under Section 33 of the Act in this case. I also no option but to rely on the submission made during the proceedings under Section 33 of the Act. Further the facts in this case are identical with those in case Nos. RTPE 05/2009 of MRTPC and case no. 2/2010. There is therefore no reason to reproduce the facts in this case. Some of the facts have also been discussed in the majority order. There is no reason to discuss the facts again.

6. The case has to be examined with reference to price parallelism and whether there is a contravention of Section 3(3) of the Competition Act. The issue in this case is of price parallelism. The Director General found that all the airlines were resorting to parallel pricing. In every business parallel pricing is necessary because when a

person starts a business his price of goods based on the price of the similar goods in the market. Subsequently all the operators in the market realize that they must have a similar price in order not to lose business and this brings an equilibrium in the market. If one of the operators thinks of having a different price and reduces the price then his sales increases at the cost of the other operators of similar goods in the market. In the consequence the other operators in the market would also reduce the price to bring it at par with that of the first operator. Sometimes in order to teach a lesson to the operator who lowered the price, the other operators reduce the prices to such an extent that the first operator starts incurring a loss and may ultimately go out of business. The economists on the basis of the game theory define price parallelism as a case of tacit collusion. But the different courts in the US and Europe have held that price parallelism itself is not violative of the Competition Act. I need not elaborate those decisions as they are many. The courts have held in the US and Europe that some plus factors with price parallelism are necessary to establish concerted price parallelism. Concerted price parallelism envisages a meeting of minds and without the meeting of minds there cannot be a violation of the Competition Act. But then the laws in the US and Europe are different from the Indian competition law. According to the legal provisions existing in the Sherman Act or Articles 81 and 82 of the European Commission there has to be an action in concert which has to be established by the competition authorities before any violation of the Competition Act can be found in those regimes. But concept of parallelism by itself does not show any conspiracy and it also cannot be classified as an agreement by any stretch of imagination. What is necessary is that it has to be established that competitors had knowledge of identical prices and that they had decided to whether to fix identical prices. But it is quite possible that parallel decisions may be independent and not inter dependent. The leading case on this issue is of American Tobacco Company vs. US where the prices of the products were identical for nearly 12 years. All three producers of cigarettes of then increased their prices at the same time by similar amounts. There was also material to show that they offered similar discounts to different distributors at different points of time. Though the companies took the plea that the price was fixed independently of each other, the other material showed that there were same plus factors. Such behaviour is possible when there is oligopoly situation where the sellers are very few. In the modern world the different operators in the market do not sit down together in a

smoke-filled room and come to an agreement that they will fix the price. In the modern times with the coming up of the computers decision of the fixing prices is immediate and information is also available through various modes and means and a meeting together is not at all necessary. Considering this fact decision taken can reflect anti-competitive behaviour without an actual agreement taking place. Persistent price stability in the case of general excess capacity indicates confidence on the part of each seller that competitors will hold the price line. Therefore what transpires is a tacit agreement and as price-fixing is involved such an agreement is unlawful. In such cases meeting of minds cannot be established but what can be established is an agreement of parallel pricing.

7. The Indian competition law is different. Under Section 3(3) of the Competition Act 2002 and an agreement or a or a decision taken by an association or a practice followed are treated as agreement though they are different items provided the conditions in clauses (a) to (d) of Section 3(3) are satisfied. In the European law or the American law such a situation does not exist. Under those jurisdictions the competition authorities have to establish that there was a conspiracy. Under the Indian Competition Act a fiction has been created and according to this fiction if the conditions in clauses (a) to (d) are established then an enterprise has to discharge the onus that it had not resorted of price-fixing. The first fact is that practice has been put on par with agreement and the second aspect in this case is that the onus has been shifted on the enterprise to establish that it had not resorted to price-fixing. The onus is rebuttable and when it is discharged, the enterprise can get out of clutches of Section 3(3) of the Act.

8. In this particular case the parallel behaviour over a long period of time by the different airlines amounts to a practice carried out by them. Practice has been defined under Section 2(m) of the Act in an inclusive manner and a defined as follows:-

> *"Practice" includes any practice relating to the carrying on of any trade by a person or an enterprise.*

9. Therefore price parallelism can be regarded as a practice in the case of airlines. It was for the airlines to establish by bringing material on record that they

have not indulged in price-fixing. This onus has not been discharged by the airlines either before the DG or before the Commission. There is no material to hold that there has been conspiracy or there was an agreement but for the practice carried out it is necessary for the parties to establish that they have not indulged in price-fixing. Under the provisions of Section 3(3) of the Competition Act it is not necessary for the Commission to establish adverse effect on competition (AAEC). But if the factors mentioned in Section 19(3) are looked into then by having price parallelism there is no accrual of benefits to consumers in and in fact the consumers are put to a loss. Even there is no improvement in production or distribution of goods or the provision of services. Therefore the provisions of Section 19(3) are applicable.

10. Price parallelism in this case is established. It has to be examined whether there are plus factors in this case to establish contravention of the Act. The business model is that each airline has a number of fare buckets. The number of seats in each bucket is known only to the airline and not to the consumer. When the demand increases at the time of festive season or when there is a strike and the supply of airline seats decreases, the airlines move the seats from the lower buckets to the buckets having higher prices. Thus the consumer has to buy tickets which are costlier. Further some of the LCCs are now flying to foreign countries but they have not opted for Global Distribution System (GDS). The reason for not having interface with GDS has not been given by the airlines. Further, all forecasting of seasonal fares is based on historical data but before the D.G. the airlines have stated that they do not maintain historical data of fares. Such an explanation is not acceptable. The airlines have not given any data on the cost of operations and their relationship with the prices of tickets. Further, it is seen that the Air Fuel surcharge levied by the airlines are found to be same for number of routes and same among the airlines for those routes. This clearly shows information sharing among the airlines and may be a reason for parallel pricing. Another important fact to be noted is that when Air India did not fall in line with the other airlines as far as pricing of tickets was concerned, all these airlines complained to the Ministry of Civil Aviation that Air India was resorting to predatory pricing. This also shown a concerted action on part of the airlines. In fact there is no reason as to why all these airlines are having the same price for the same city pair. In fact, there is no evidence to support an alternative explanation.

Thus, the plus factors exist in this case which shows a concerted behaviour and leads to price parallelism.

11. To sum up, under the Indian Competition Law, it is not necessary for practice to have a meeting of minds. The onus was on the airlines to discharge the fact that they have not resorted to price parallelism and price fixing. There are also plus factors in this case which shows concerted behaviour leading to price parallelism. The airlines Indigo, Jet Airways, Kingfisher, Spice Jet and Go Air by resorting to price parallelism have therefore contravened the provisions of Section 3(3)(a) of the Competition Act, 2002.

12. Therefore under the provisions of Section 27 of the Act the following directions are issued to these airlines.

(a) They should cease and desist from price fixing through price parallelism and price fixing

(b) The number of seats in each price bucket should be indicated to DGCA and should also be indicated on their website.

(c) They may consider introduction of the bid process in the purchase of their air tickets.

(d) A proper rationale for fuel surcharge should be followed.

(e) A further penalty of Rs.1 crore each is levied in the case of Indigo, Jet Airways, Kingfisher, Spice Jet and Go Air. The penalty is much below 10% of the turnover of each of the airlines.

13. The Secretary is directed to issue a copy of the order to each airline as discussed above.

Sd/-
Member (R)

Certified True Copy

P. GAHLAUT
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi