

Competition Commission of India
Case 34/2011

Dated: 11.10.2011

Kshitij Ranjan

Informant

Indian Newspaper Society

Opposite Party

As per R. Prasad (Dissenting)

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

The case under consideration relates to information filed on 30.06.2011 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as "the Act") by Shri Kshitij Ranjan, Proprietor of Vistar Add.Com (hereinafter referred to as "Informant") against the India Newspaper Society – INS (hereinafter referred to as "Opposite Party" or OP).

2. The facts, in brief, as contained in the information are as under:
 - 2.1 The Informant is proprietor of Vistar Add.Com., which is an INS accredited advertisement agency, having its office at Dr. Mukherjee Nagar, Delhi. The Informant offers advertisement services and books space in various newspapers for the publication of advertisements as per the requirements of his clients.
 - 2.2 As per the Informant, the OP is a society registered within the meaning of Section 25 of the Companies Act, 1957 which has various publications (Newspapers) as its members. The OP also grants accreditation to the advertising agencies.
 - 2.3 The informant has submitted that in the month of October 2010 the OP granted him provisional accreditation. He complied with the requisite formalities and supplied all the documents required by the OP in that regard. He also deposited a bank guarantee amounting to Rs. 25 Lac (Rupees Twenty Five Lac only) issued by the Bank of India with the OP as well as furnished the list of assets for the purpose of executing the personal guarantee.



- 2.4 According to the Informant, the OP sought his personal guarantee, although it was not authorized to do so as per its rules and regulations. As per the Informant, the policy of the OP as regards the amount required under the personal guarantee is unclear and inexact.
- 2.5 The Informant has submitted that the office of the OP informed him that a personal guarantee equal to Rs. 25 Lac (Rupees Twenty Five Lac only) was required for which only his immovable asset would be considered. Thereafter, he furnished the details of the 'under-construction' flat at TDI, Kundli, Sonipat along with his other movable assets to the OP. However, the OP declined to consider his immovable property situated at TDI, Kundli Sonipat since the sale deed was not executed. The OP also did not consider his movable properties such as shares, jewellery and FDs for the purposes of personal guarantee, an act, which was discriminatory and unfair, as the OP had considered it favorably in other cases. As per the Informant, he submitted the details and documents of another property belonging to him at 'A' Block, Sant Nagar, Village Burari, Delhi, which too was not considered by the OP.
- 2.6 According to the Informant, since there was no relief in sight, he approached Mr. H.N Cama, Chairman, Advertisement Committee of INS via e-mail and explained all the difficulties he had been facing in getting the accreditation from the OP. Mr.Cama considered the said e- mail, though he also persisted that the personal guarantee was necessary. On his intervention, finally the OP agreed to consider the 'under construction' flat at TDI, Kundli, Sonipat in lieu of personal guarantee. Subsequently, the OP granted the provisional accreditation to the Informant and the Informant also executed an agreement. The OP granted a time of six months to the Informant to submit the sale deed of the property at TDI, Kundli, and Sonipat.
- 2.7 The Informant has further submitted that on 03.05.2011, the OP sent a letter to the Informant to submit the sale deed in respect of the property at TDI, Kundli, Sonipat. In reply to the said letter, the Informant requested the OP to grant some



more time for the submission of the sale deed as the developer had, not completed the construction.

Thereafter, the OP vide letter dated 20.06.2011 requested him to provide an additional bank guarantee of Rs. 25 lac (Rupees twenty five lakh) in lieu of the personal guarantee.

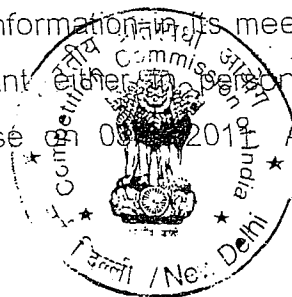
- 2.8 The Informant has alleged that the said letter is unfair, discriminatory and unsustainable in the eyes of law as the OP has no right to ask for personal guarantee from the Informant even as per its articles of association. The Informant has mentioned the INS Press Handbook 2010-11 containing the principles governing the policy of the OP relation to personal guarantee, which is as under:

"INS will have the right to ask for personal guarantee from defaulting agencies and from agencies, which have collected advertisement dues but not paid to member publications within the credit period."

- 2.9 According to the Informant, it does not fall into any of the category mentioned in the above quoted provision. The Informant has also stated that the Monthly Review and Verification (MRV) report maintained and circulated by the OP shows that he has never defaulted in making the payments to the members of the OP.

- 2.10 The Informant has alleged that the action of the OP in seeking personal guarantee from the informant is arbitrary and discriminatory. Further, deed of guarantee in lieu of the personal guarantee executed between the informant and the OP is non-est and has no validity in the eyes of law. The informant has also alleged that the agreement (deed of guarantee in lieu of personal guarantee) is illegal and is like to cause an appreciable adverse effect on competition (AAEC) within India. Further, the demand of the OP in asking to furnish the bank guarantee in lieu of the personal guarantee is restrictive of the freedom of trade and profession as enshrined in the Constitution of India.

- 3 The Commission considered the information in its meeting held on 12.07.2011 and decided to call the Informant either in person or through authorised representative to explain the case on 08.08.2011. Accordingly, Mr. Naveen



Kumar Raheja, Advocate appeared along with the Informant on 03.08.2011 and made oral submissions.

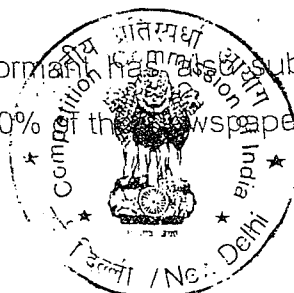
4 The Informant later on also filed written submissions dated 16.08.2011 in order to substantiate his case. In his written submissions, the Informant has inter-alia alleged the following:

4.1 That the OP has abused its dominant position in the relevant market pertaining to the Print Media. The OP enjoys position of dominance in Print Media as approximately 100% of the recognized/leading daily, weekly, fortnightly and monthly newspapers and magazines are its members. The business practices between the different advertisement agencies and the members of the OP are regulated and controlled by the OP in India.

4.2 That different advertisement agencies including the Informant, carry out business transactions on commission basis with the members of the OP. The advertisement agencies book space for their clients for publishing the advertisement in the different newspapers i.e. members of the OP. The member newspapers grant certain benefits in their business transactions to those advertisement agencies which have been granted accreditation by the OP. For example, INS accredited advertisement agencies are entitled for a benefit of a credit period by the member newspapers in lieu of the services availed by the advertisement agencies on behalf of their clients. As per the credit period, the advertisement agencies book the space and get the advertisement published in the newspapers and thereafter get another 50 days to make the payment to the newspapers in lieu of the same. Further, government organisations engage only those advertisement agencies for the purpose of publication of their advertisement which are accredited by the OP i.e. the INS.

4.3 That due to the above facts, only those advertisement agencies that are granted accreditation by the OP can survive competition in the market in India pertaining to Print Media.

5 In his written submissions, the informant has also submitted that the OP has made a cartel by making almost 100% of the newspapers as its members and is



also abusing its dominant position by adopting pick and choose method in granting the accreditation to the different advertisement agencies.

- 5.1. The informant has also submitted that the OP binds the advertisement agencies to enter into an agreement before granting the accreditation and also to submit the bank guarantee amounting to Rs 25 lac and also the personal guarantee or the bank guarantee in lieu of personal guarantee amounting to another Rs.25 lac in case of the grant of the provisional accreditation. It has further been alleged that the rules pertaining to the assets (whether movable or immovable) being considered for the personal guarantee are unclear and are no where defined in the rules and by-laws of the OP.
- 5.2 The Informant has further submitted that he has been illegally asked by the OP to furnish the sale deed of an immovable asset and his other personal assets such as gold and fixed deposits have not been considered. According to the informant, he has been treated in a selective manner as the OP has not asked for the similar kind of compliance from all the advertisement agencies to whom it has granted the accreditation.
- 5.3 The informant has alleged that such kind of agreements are anti- competitive agreement as contemplated under Section 3(1) of the Act which are likely to cause AAEC within India. It has been alleged by the Informant that the OP has formed cartel and directly and indirectly determines the business relations between the advertisement agencies and its member newspapers. By virtue of such an agreement, the OP is creating barriers to the new entrants in the market and driving the existing competitors out of the market. Further, the fact that 100% of the newspapers are members of the OP makes it dominant in the market.
- 5.4 The informant has also alleged that even otherwise as per the by-laws and regulations and as per articles of association, the OP can seek personal guarantee only from those advertisement agencies which have either defaulted or have collected advertisement dues but not paid to member publications within the credit period. The informant does not fall into any of these categories.
6. The informant based upon above facts and allegations has prayed that the Commission may pass an order declaring the deed of guarantee (personal



Guarantee) executed between the informant and the respondent as null and void being violative of Section 3 (1) of the Competition Act, 2002 and/or order the OP to modify the deed of guarantee (personal guarantee) to include the movable assets to be considered for the purpose of personal guarantee.

7. The informant also filed an application under Section 33 of the Act for passing an interim ex-parte order to restrain the OP from issuing any direction to its member publications which may cause an adverse impact upon the business/reputation of the informant, more specifically to restrain the OP from issuing any communication to its member publications in regard to the withdrawal of accreditation of the informant.
- 8 I have carefully considered the facts of the case and has also examined the relevant materials available on record.
- 8.1. Section 3(3) of the Competition Act reads as:

"Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

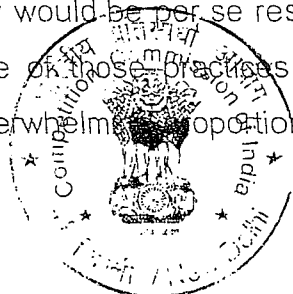
- (a) directly or indirectly determines purchase or sale prices;
 - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
 - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
 - (d) directly or indirectly results in bid rigging or collusive bidding,
- shall be presumed to have an appreciable adverse effect on competition."

- 8.2. Thus, as per the provisions of section 3 (3) of the Act there are three categories, viz., agreement entered into, practices carried on, and/or decision taken by an enterprise or enterprises or a person or persons or between enterprises or between a person or persons which have resulted into price fixing or other terms



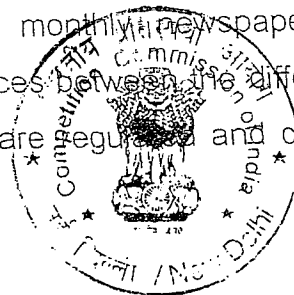
or conditions of sale, limiting and restricting production or output or provision of services or involving collusion in other areas, such as market and customer allocation, or involving in bid rigging or collusive bidding , as defined under section (a) to (d) of section 3 of the Act are ab initio or per se anti-competitive.

9. Competition law is a very recent Act in India and, thus, we do not have precedence by way of judicial decisions but elsewhere the courts have interpreted per se illegal practices as those, which are inherently anti-competitive that they will be judged illegal prima facie and no rule of reason would be applied to the same. Per se illegal agreements are those, which are found unreasonable and are anti-competitive that they are deemed illegal without any possible justification. It has been stated that per se illegal as those that have such predictable and pernicious anti-competitive effects and have limited potential for pro-competitive effect. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions, which have a high potential of negative effects on competition that is unnecessary to demonstrate any actual effects on the market. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to misallocation of resources, because the goods and services as demanded by the consumers are not produced. They also lead to a reduction in consumer welfare, because the consumers will have to pay higher price for the goods and services in question.
10. Under the competition law regime, competition should be the law of the trade and any agreement, practice or collusion formed or followed with the effect of raising, depressing, fixing, pegging, or stabilizing price of commodity is illegal per se. In Mahindra and Mahindra Limited v Union of India, AIR 1979 SC 798 the Supreme Court has stated that there may be trade practices which are such that by their inherent nature and inevitable effect, they necessarily impair competition and in case of such trade practices, it would not be necessary to consider any other facts or circumstances for they would be per se restrictive trade practices. Such would be the position in case of those practices which of necessity produce prohibited effect in such an overwhelming proportion of cases that minute enquiry



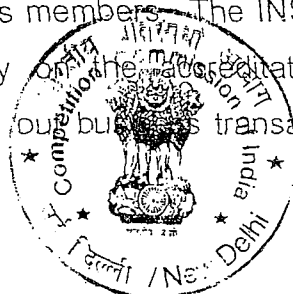
in every instance would be a wasteful of judicial and administrative process. Hence in the light of the same, a statutory fiction was created by virtue of which if any practice carried on by any enterprise falling within that categories as mentioned in section 3(3) (a) to (d), it shall be considered restrictive.

11. In the instant case what has happened is that the OP has required the Informant to furnish a personal guarantee of Rs.25 lac which is otherwise not mentioned in any Rule or Regulations of the Company or in the contract agreement. Thus, this act of the OP is nothing but a "practice carried on" by it which fall into one of the categories mentioned above. Thus, the act of the OP, prima facie appears to be anti-competitive.
12. In order to examine whether there is an appreciable adverse effect on competition, it is provided under section 19(3) of the Competition Act 2002 that while determining whether an agreement has an appreciable adverse impact on competition or not, the Commission has to look at the following factors:
 - (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 in 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.
13. When the present case is put to test to above factors, it is found that by putting the extraneous condition of furnishing a personal security of Rs.25 lacs, the competition is foreclosed as entry barrier is created for the new entrant, i.e. the Informant.
14. The Informant has also alleged that the OP has abused its dominant position in the relevant market pertaining to the Print Media. The OP enjoys position of dominance in Print Media as approximately 100% of the recognized/leading daily, weekly, fortnightly and monthly newspapers and magazines are its members. The business practices between the different advertisement agencies and the members of the OP are regulated and controlled by the OP in India.



Those different advertisement agencies including the Informant carry out business transactions on commission basis with the members of the OP. The advertisement agencies book space for their clients for publishing the advertisement in the different newspapers i.e. members of the OP. The member newspapers grant certain benefits in their business transactions to those advertisement agencies which have been granted accreditation by the OP. For example, INS accredited advertisement agencies are entitled for a benefit of a credit period by the member newspapers in lieu of the services availed by the advertisement agencies on behalf of their clients. As per the credit period, the advertisement agencies book the space and get the advertisement published in the newspapers and thereafter get another 50 days to make the payment to the newspapers in lieu of the same. Further, government organizations engage only those advertisement agencies for the purpose of publication of their advertisement which are accredited by the OP i.e. the INS.

15. That due to the above facts, only those advertisement agencies that are granted accreditation by the OP can survive competition in the market in India pertaining to Print Media. The informant, therefore, has alleged that the OP has made a cartel by making almost 100% of the Newspapers as its members and is also abusing its dominant position by adopting pick and choose method in granting the accreditation to the different advertisement agencies.
16. I have carefully considered the facts of the case and the submissions made by the Informant. Before examining whether the OP has abused its dominant position, it is necessary to determine the relevant market consisting of the relevant product market and the relevant geographical market. In the present case it is found that the Indian Newspaper Society (INS) is a society registered within the meaning of Section 25 of the Companies Act, 1957 which has various publications (newspaper) and its members. The INS grants accreditation to the advertising agencies and only on the accreditation given by the INS the advertising agencies can carry out business transactions with the members of



INS. So the relevant market in the present case would be "the accreditation of advertising agencies in the print media in India."

17. It is found that in the relevant market as determined above, the OP enjoys position of dominance in Print Media as approximately 100% of the recognized/leading daily, weekly, fortnightly and monthly newspapers and magazines are its members. The business practices between the different advertisement agencies and its members are regulated and controlled by of the Indian Newspaper Society. Since the advertisement agencies carry out business transactions on commission basis with the members of the OP, the members grant certain benefits to those advertisement agencies which have been granted accreditation by the INS. This is the reason why advertisement agencies get accreditation from the INS because they have to survive in the market of print media. As per explanation (a) of section 4 the OP is in a position of strength as without accreditation of the INS no advertisement agency can do business of giving advertisement in print media. Thus, by putting extraneous condition of personal security, the OP has imposed unfair and discriminatory condition in granting accreditation to the informant. Prima facie it appears to be a case of abuse of dominance as this alleged behavior of INS by limiting and restricting the market by denying market access to the Informant is in contravention of the provision of section 4 of the Act.
18. In view of the facts stated above and considering the submissions in the information with material on record, I am of the view that there exists a prima facie case to order the Director General to cause an investigation into the matter.

Sd/-
Member (R)

Certified True



OP Gahlaut
20/11/2011
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New Delhi