COMPETITION COMMISSION OF INDIA

Dated : 22.06.2011

Case No. 10 of 2010

M/s Pankaj Gas Cylinders Ltd. Informant

Vs.

Indian Oil Corporation Limited Opposite Parties

Per R. Prasad, Member (dissenting):

In this case a complaint was submitted by Pankaj Gas Cylinders Ltd. against Indian Oil Corporation Ltd. for the abuse of dominance. The facts have been discussed in the order of the majority and need not be discussed in this order. In the majority order it has been held that Indian Oil Corporation is a dominant player in the relevant market of the procurement of 14.2kg LPG Cylinders. But in the majority order there is a finding that there was no abuse of dominance.

2. On the other hand, the D.G. has recorded a finding that in the relevant market of the procurement of 14.2kg. cylinders, as the entire market was controlled by the three Oil Marketing Companies (OMCs), if one of the OMC holiday listed any of the suppliers and the other two OMCs holidaylisted the supplier on the basis of the first holiday listing, then the supplier was barred from the entire market. BPCL had holiday listed the information provider (I.P.) for one year and if on the basis of this holiday listing, IOC debarred the I.P. from bidding for one year then the I.P. was restricted from 70% of the market. Further, according to the terms of holiday listing, after the period of holiday listing, the unit could supply only 50,000 cylinders in the subsequent year as the unit would be treated as a new unit. This would cause damage and denial of market access to the said blacklisted unit. Incidentally in this case the I.P. was holiday listed by BPCL for the period 18.08.2009 to 18.08.2010 but it kept on supplying cylinders and valves even during the period 18.08.2009 to 18.08.2010 on the basis of the earlier orders. Further IOC for the first time in its tender document introduced the disqualification on the basis of holiday listing by some other OMC. In the case of the I.P., BPCL had holiday listed it because it failed to supply cylinders as per the letter of intent. BPCL follows e-procurement for

cylinders and for some reason the rates quoted to the BPCL were recorded by the computers of BPCL, much below the cost of production of the cylinders and for this reason, the I.P. refused to supply the cylinders to BPCL and the I.P. was holiday listed. The D.G. has stated that the tender conditions laid down by the I.O.C. in respect of holiday listing would debar many persons like the I.P. to enter the market of the procurement of 14.2 kg cylinders. In his view, the condition in the tender amounts to a restraint of trade. It was also his view that the conditions are discriminatory and unfair and are therefore violative of Section 4(2)(a) of the Competition Act. In his view, as there was a denial of market access, the provisions of Section 4(2)(c) of the Competition Act were violated.

3. On the other hand, after hearing the parties, the majority view was that there was nothing unfair or discriminatory in the purchase of goods in this case. It has been treated as a reasonable business practice followed by the I.O.C. and as there was no discrimination between the bidders it cannot be regarded as discriminatory. It was also held that market access was not denied to any supplier. There was a feeling that if a party had made any default in supply to a procurer oil marketing company then the I.O.C. was entitled to deal in such a manner with such a defaulting company. It was also held that the I.P. could supply cylinder of other dimensions to other buyers. It was therefore, held that the clause in the tender documents cannot be stated to be an abuse under Section 4 of the Competition Act. Therefore the matter was closed.

4. In this particular case it has to be borne in mind that IOC is not the agency before whom the IP had committed a default. The holiday listing was by BPCL and the debarring the I.P. was also not correct because no such default was made by the IP before the IOC. The entire market of 14.2 Kg cylinders was controlled by the three OMCs and the gas was supplied in cylinders. The entire hundred percent procurement of 14.2 kg cylinders was made by the OMCs. There is material to hold that three OMCs are acting together and therefore there is a feeling of the existence of a cartel. Therefore any cylinder supplier blacklisted by other two OMCs is i.e. BPCL and HPCL would be debarred from the supply of cylinders to IOC. An argument has been raised that this holiday listing was in public interest. But no material has been brought on record to establish as to how the holiday listing was in public interest. No material has also been brought on record to establish that IOC

has suffered because of the I.P. In fact due to the practice carried out by the IOC there has been a denial of market access not only to the IP but to all those suppliers who had been holiday listed by the other two OMCs. As 50% of the market is controlled by the IOC denial of market access to the IP results in loss of business to the I.P. as well as similar placed suppliers. The practice followed by IOC is not only unfair but it is also discriminatory and it discriminates against the person who had created no harm or IOC. In fact the I.P. has been put in a position different from that of the other suppliers for no reason as far as IOC is concerned. If this is not discriminatory then I do not know what would be considered discriminatory. Therefore I agree with the DG that the action of IOC is violative of Sections 4(2)(a)(i) and 4(2)(c) of the Competition Act. Therefore I differ with the majority on this issue.

5. Another issue to be discussed is the power of the Commission under Section 26 of the Competition Act. When an information is furnished to the Commission and the Commission finds that there was no case of competition then the Commission may not take cognizance of the same and pass an order under Section 26(2) of the Competition Act dismissing the complaint. There can be cases where the Commission on the basis of information came to a conclusion that a case of anticompetitive behaviour was made out and therefore under Section 26(1) it can order the Director General to investigate the case. Therefore whenever such a direction is issued, the Commission had formed a prima facie belief that competition issues are involved. The DG thereafter submits an investigation report to the Commission under Section 26(3) of the Competition Act. In view of Section 26(4) of the Act the Commission is required to forward a copy of the report to the parties concerned. If the Director General had recommended that he found no contravention of the provision of the Competition Act then after hearing the objections of the Central government or the State Government or the parties concerned the Commission comes to finding that there was no case then it can close the matter and pass such orders under Section 26(6) of the Competition Act. If after considering the objections and suggestions of the concerned parties where the DG had found no contravention, the Commission feels that further enquiries were required then it can either carry out enquiries on its own or ask the Director General to further investigate the case. This is in accordance with Section 26(7) of the Competition Act. If contravention of the provision of the Competition Act are found by the Director

General, then the Commission is required to carry out further inquiries regarding the contravention in accordance with the provisions of the Act. This is as per the provisions of Section 26(8) of the Competition Act. Section 27 talks about the orders to be passed by the Commission after an inquiry under Section 26 has been carried out. Section 27 reads as follows:-

> *Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely:-*
>
> *(a) Direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;*
>
> *(b) Impose such penalty, as it may deem fit which shall be not more that ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse;*
>
> *(c) [Omitted by Competition (Amendment) Act, 2007]*
>
> *(d) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission.;*
>
> *(e) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;*
>
> *(f) [Omitted by Competition (Amendment) Act, 2007]*
>
> *(g) Pass such other [order or issue such directions] as it may deem fit.*

A reading of Section 27 would show that an order under this Section can be passed only when there was a contravention of Section 3 or Section 4 of the Competition Act. The question is as to what would happen if the Commission finds that there no case is made out after the DG finds a contravention. Such a situation is not provided in the Act. This is due to the fact that once the Commission had formed a prima facie opinion under Section 26(1) of the Competition Act then it cannot revisit its opinion again and drop the case. If the DG's investigation has confirmed the prima facie

view of the Commission by finding contravention of the Act then the Commission cannot close the case in view of its prima facie view. For dropping a case provisions have to be provided in law. If such a provision does not exist then the Commission cannot import the provision in the Act. Therefore after the Commission has formed the prima facie view and the DG has found contravention then only view left to the Commission is to pass an order under Section 27 of the Competition Act. Under Section 27 of the Act, an order can only be passed when a contravention is established. Therefore dropping of case after DG has found a contravention is not authorised under the Competition Act of 2002. This proposition is further strengthened by the fact that appeals are provided against orders under Sections 26(2) and 26(6) of the Act. An order of dropping is an order and such an order cannot be passed in the absence of provisions. Further an order of non admission of a case or closure of case after the DG finds no contravention can be appealed against, it does not appear to be logical to hold that no appeal would be provided against an order of closure where the Commission had formed a prima facie view under Section 26(1) of the Act and the DG had found contravention. The Legislature had not envisaged such a situation as in such a case the logical course would be an order under Section 27 of the Act. Incidentally, no order of closure can be passed under Section 27 of the Act.

6. To sum up, in this case as contravention has been established and as no penalty can be levied because the majority view holds that no contravention exists, I have no option but to pass orders directing the IOC to cease and desist from the practices carried by it in respect of holiday listing of the suppliers on the basis of holiday listing by the other OMCs. IOC should therefore amend its tender notice accordingly and should not resort to such practices in future.

Certified True Copy

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member (R)

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