

BEFORE THE COMPETITION COMMISSION OF INDIA

Suo Moto

Case No. 01 of 2010

(In Re. Sugar Mills)

Date of Order 30.11.2011



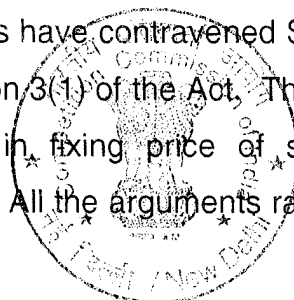
ORDER

As per R. Prasad (dissenting)

In this order of the Commission the majority view is that no case is made out and therefore the case is required to be closed. I have a different view and therefore I am passing a separate order in this case.

2. The case was started on suo-moto basis by the Commission. The Commission took cognisance of a report published in the Economic Times on 26.07.2010. In the said report in the Economic Times, it was reported that the President of Bombay Sugar Merchant Association had given a statement that between 24.07.2010 and 30.07.2010 the Indian Sugar Mills Association and the National Cooperative Sugar Mills Federation had held a meeting and decided to increase the ex-factory prices by 4 to 6% in order to prevent the sugar prices falling below the cost of production. According to the report the cooperative and private sugar mills had formed a cartel to boost the retail price of sugar just one month before the peak demand season started. A copy of the press release by the Sugar Mills Association showing price fixing was forwarded by the President of the Bombay Sugar Mills Merchant Association. On the basis of the said news items and the press release the Commission came to a conclusion that there existed a prima facie case of price-fixing and therefore the issue was referred to the Director General for investigation. The Director General made enquiries and came to the conclusion that the sugar mills and the associations of the states of Maharashtra, Karnataka, Tamil Nadu, Andhra Pradesh and Gujarat had held a meeting on 22.07.2010 at Shakhur Bhawan, Mumbai and had fixed the price so that no mill would sell sugar at a price which was below the minimum price fixed for those states. An earlier meeting had been held between the sugar manufacturers of Maharashtra and Karnataka on 25.06.2010 and in this meeting it was stated that the sugar mills of Tamil Nadu and Gujarat should also be included. By the decision taken on 22.07.2010 the mills fixed the minimum sale price of sugar. The Director General came to a conclusion that by fixing the minimum prices of sugar mills have contravened Sections 3(3)(a) & 3(3)(b) of the Competition Act read with Section 3(1) of the Act. The Commission then gave hearing to various parties involved in fixing price of sugar and came to the conclusion that there existed no case. All the arguments raised during the course of

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hearing have been reproduced in the main order and therefore there is no necessity to reproduce the same in this order.

3. The only issue to be decided is whether it is a case of price-fixing or not. Section 3(3) reads as under:

“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 provisions of services, which –

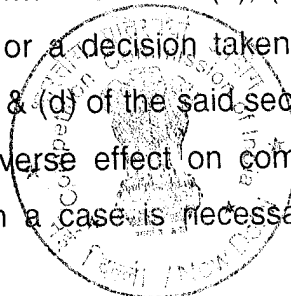
- (a) directly or indirectly determines purchase or sale prices;*
- (b) limits or controls production, supply, markets, technical-development investment or provision of services;*
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, 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:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. ”

4. Under the provisions of section 3(3)(b) of the Act any agreement or practice carried out or decision taken by any Association of enterprises or persons including cartels engaged identical or similar trade of goods provisions of services is covered provided any of the conditions laid down in clauses (a), (b), (c) & (d) are attracted. Thus if the agreement or a practice or a decision taken by some persons came within the ambit of clauses (a), (b), (c) & (d) of the said section then the presumption is that there was an appreciable adverse effect on competition. The question is whether a meeting of minds in such a case is necessary. The next question is

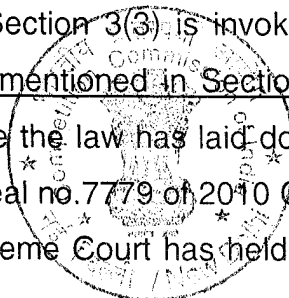
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whether the implementation of price-fixing is also necessary. The third question is whether such action causes any appreciable adverse effect on competition in India. The fourth question is as to whether it is necessary to examine the factors mentioned in section 19(3) of the Act.

5. Section 3(3) of the Competition Act is a fiction created by law and it leads to a presumption provided the conditions mentioned in clauses (a), (b), (c) and (d) are established. Further in this section agreements, practices and decisions taken though they are different items as defined in the Competition Act but for the purpose of presumption, the three of them are placed at par. For a fiction of law a strict interpretation has to be taken and what is not mentioned in the Act and in the section cannot be imported. Therefore meeting of minds is not a necessity for the purposes of section 3(3) of the Competition Act. Under the scheme of rebuttable presumption in the section, it is for the parties concerned to establish that there was no price-fixing as a result of the decision taken. It is also not a case of a cartel because cartel is defined in the Act in a different manner and for a different purpose. It is a pure and simple case of a decision taken by an association of sugar mills in the meeting held in Mumbai so that no sugar mill can sell sugar below the minimum floor price. Section 3(3) states that any decision taken which is hit by Section 3(3) shall be presumed to cause appreciable adverse effect (AAEC) on competition. The question which arises is as to whether the factors mentioned in section 19(3) of the Act have to be considered. As a fiction is created by the presumption under the section 3(3) of the Act it is not necessary to examine the provisions of section 19(3) of the Act. But even then the action of the association of sugar producers who participated in the meeting in Mumbai in July 2010 would lead to a situation which would be detrimental to the consumers. An argument can be raised that Section 3(3)(b) can only be applied after the event has happened. An Act has to be read as a whole. Therefore any decision taken which ultimately would be detrimental to the consumers though at a later date would be hit by the provisions of Section 3(3) of the Competition Act. It has therefore to be held that no meeting of minds is necessary for invoking Section 3(3) of the Act and that whenever Section 3(3) is invoked it is not necessary the Commission to consider the factors mentioned in Section 19(3) of the Act. In this connection it is necessary to examine the law has laid down the by the Honourable Supreme Court of India and civil appeal no.7779 of 2010 CCI vs. SAIL. In para 11 of the order dated 09.09.2010 the Supreme Court has held "that a court should apply

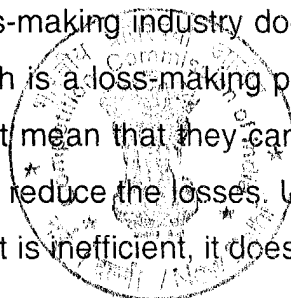
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plain rule of construction rather than try to read words into the statute which have been specifically omitted permitted by the latest legislature. Supreme Court also held that the provisions have to interpreted in such a manner that by applying the plain rule of construction and taking into account the intention of the legislature and that this has to be gathered from the language used and that attention should be paid to what has been said and also to what has not been said. The Supreme Court also held that the courts are also not entitled to read words into an Act unless a case for it is found within the four corners of the Act itself. Supreme Court also held that question of construction arises only when there is an ambiguity or the plain meaning of the words used in the statute would be self defeating. The Court also held that when there is no ambiguity and the intention of the legislature is clear, there is no scope for any court or anyone else for interpreting the Act as it suits him. The Court further held that if two views are possible then the one which falls in line with the legislative intent should be followed rather than one which defeats the object of the Act. The Apex court has also stated that the principles of natural justice in many provisions can be denied in larger public interest and for valid reasons. The Supreme Court further held that the Commission is expected to forward a copy of the report, invite objections and suggestions from the informants Central Government, State Government statutory authority or the parties concerned. Before arriving at any final conclusion under Sections 26(7) or 26(8) of the Act as the case may be, in view of these observations of the Apex court as there was no ambiguity in Section 3(3) of the Act the question of importing a collusive behaviour or applying Section 19(3) of the Act does not arise in this case.

6. In the light of the Supreme Court decision in the case of CCI vs. SAIL (supra) this issue has to be examined. Before the Commission the sugar mills argued that sugar industry is a controlled industry and that all the units are running at a loss. In this case, if the industry is incurring losses because it is controlled industry then there is no reason as to why the number of Sugar Mills has increased to 651 sugar mills from nearly 136 at the time of independence in 1947. Therefore the argument of the sugar mills that they are a loss-making industry does not hold good. Nobody could deal or invest in any item which is a loss-making proposition. Because some mills are running at a loss it does not mean that they cannot fix prices. Making loss has nothing to do with fixing prices to reduce the losses. Under the Competition Law, fixing prices is an offence and if a unit is inefficient, it does not entitle it to fix prices. It

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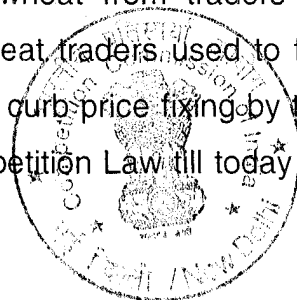


has normally been observed in various economic studies all over the world price-fixing is normally done when the industry is suffering a loss.

7. Another argument taken by the Sugar Mills is that the entire sugar industry is monitored under the Essential Commodities Act of 1955 and therefore the competition law is not applicable. Under the Competition Act no exemption is provided to industry from the application of any other Act. In fact as held by the Supreme Court while interpreting the construction of a statute that the simple meaning of the Statute should be taking and nothing has to be imported in the statute which does not exist in the Statute. It was for the Sugar Mills to establish that the EC Act makes it impossible for the Competition Act to work. The EC Act was passed in 1955 whereas this Competition Act is applicable from 20.05.2009. It is a later Act. In both the Acts it is mentioned that notwithstanding anything contained in any other Act the provisions of the Act will apply. The Competition Act came at a later date and it is a decided issue that the Act which comes later overrides the earlier Act if such a clause is mentioned in both the Acts. But section 62 of the Competition Act says that the Competition Act should be applied in such a manner that it does not put the other Act in a derogatory position. Therefore a constructive solution has to be found out. The EC Act is concerned with Essential Commodities and the subject matter of this Act is totally different from the Competition Act. It is not clear how the working of the EC Act would be unworkable with reference to Competition Act. Therefore the arguments of the mills are not correct. There is no material to hold that the application of the EC Act leads to the conclusion that Competition Act would not apply.

8. Under the Essential Commodities Act of 1955 all eligible items are covered and a special case has been made for sugar. In fact the background of the Act is that most of the sugar mills were not making payment to the sugar cane growers. As a result of this fact, it led to a State intervention by different promulgations under the EC Act. In a similar situation in the USA and Canada where wheat farmers were not getting proper prices for their wheat from traders led to the enactment of the Competition Act. In fact the wheat traders used to form a Trust and give a lower price to the farmers. In order to curb price fixing by the Trusts, Sherman Act in the USA was enacted and the Competition Law till today is known as an Anti Trust Act.

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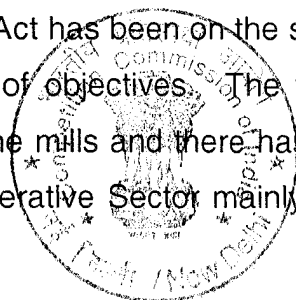


Thus on the same situation, in the USA it led to the Sherman Act and in India to the E.C. Act.

9. Presently as far as sugar industry is concerned the cane price is administered both by the State government and the Central government and the mills have to buy sugar cane at prices fixed by the government and if they do not make payment within 15 days the mill owners have to pay interest to the sugar cane growers. But in spite of this law the total outstanding of the sugar Mills to the sugarcane farmers are approx Rs. 2500 crores. This value is correct because none of the mills have disputed it. Out of the sugar produced 10% of the sugar goes towards levy sugar which is sold to persons below the poverty line of the country and the balance 90% is free sale sugar. The sugar mills realise not only the value of sugar sold but also the price of molasses, ethanol and bagasse. There is no material to hold that the sugar mills suffered losses because the levy sugar was sold at a price below the cost of production. In fact as far as free sale sugar is concerned the government does not regulate the prices and the mills can make good the losses suffered on account of the sale of levy sugar. As far as free sale sugar is concerned, the government allots quota for monthly sale to the sugar mills and this does not cause losses to the sugar mills as the prices of sugar are not fixed. But in the cost consideration the value of molasses, spirits, ethanol etc. also have to be taken into account because without taking into account the viability of the industry cannot be worked out. The fact is that against 136 mills in 1947 today there are 651 sugar mills in India. If this industry is suffering such a loss why would industry create 500 more mills. The argument of the industry that the application of EC Act to the sugar industry has led to losses suffered by the sugar industry is not correct. In fact most of the losses are in the cooperative sector where there is a case of mismanagement. On the other hand as far as a private sugar mills are concerned they are mostly have good profits, have good share value and some of them have acquired sugar plants abroad mainly from internal accruals. Therefore, the arguments of the industry that they are suffering losses and therefore the Competition Law would not apply does not hold good at all.

10. Though the Essential Commodities Act has been on the statute for the last 46 years, it has not led to the achievement of objectives. The farmers have still to recover more than Rs. 2500 crores from the mills and there has been large number of farmer suicides. The mills in the Cooperative Sector mainly in Maharashtra are

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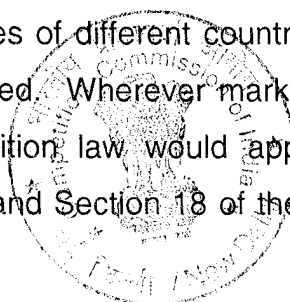
having huge losses. The yield of sugar from sugar cane grown the red soil in Maharashtra is higher than that of North India but still the mills are at a loss. The consumers have suffered because sugar prices are going up every year. Further, no analysis can be complete without taking into account the export and import policy of the government. Sugar is a seasonal product. Large numbers of farmers are involved in the farming of sugar cane. It has been observed that when sugar prices increase, the acreage for sugar cane cultivation increases and this depresses the prices of sugar in the local market. In the next season, the acreage under cultivation decreases and this leads to a shortage of sugar and price rise. In such cases, the govt. removes the restriction on the import of sugar. But the govt. decision is generally delayed and the consumers suffer and the mills make wind fall profits. In view of these facts, it is clear that demand and supply rules certainly work in the sugar industry and it would be wrong to conclude that demand and supply of the market do not apply in the sugar industry.

11. The mills have also argued that regulated mechanism interferes with the market behaviour. It was stated that the traders do not lift the sugar till the last date of the release order on the plea that the mills would sell at a loss or a lower price. It was argued that many times this leads to losses for the mills. But does it mean that the mills can sit together and fix prices when it is especially prohibited under law.

12. It has also been argued that especially in the State of Maharashtra the Board of Directors in different cooperative mills are appointed by govt., share capital is contributed by the government and the loans taken by cooperative mills are guaranteed by the govt. it was argued that for these reasons the competitive forces do not apply to the sugar industry. The assertion that competitive forces do not apply in the sugar industry is not correct. Further, there is no exemption provided under the Competition Act that in a loss making industry competition law is not applicable. But it does not absolve the mills from the charge of price fixing.

13. Another proposition which has been raised is that Competition Law would apply only in a free and liberalised economy. This is not correct as in many controlled and regulated economies of different countries the Competition Law has been enacted and is being enforced. Wherever markets exist and they exist in all types of economies, the competition law would apply. Further in view of the Preamble to the Competition Act and Section 18 of the Act, the Commission has to

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enforce the competition law so as to eliminate anticompetitive practices and bring greater consumer satisfaction. Therefore, considerations which are not in the Act cannot be imported to defeat the objectives of the Act. This would be contrary to the view of the Supreme Court in the SAIL case (supra).

14. It is necessary to examine the contents of the Press Note in which the price was fixed.

PRESS RELEASE

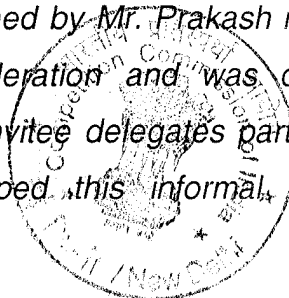
Sub: Inter-Sectorial interaction Meet on sugar Matters

Mumbai – 22.07.2010

“Today Select Captains of the Sugar Industry from Co-operative and Private Section from across the country met at Sakhar Bhawan, the Head Quarters of Maharashtra State Co-operative Sugar Factories Federation in Mumbai and had 3 hours Brain Storming Session on various urgent issues confronting the Sugar Industry. The meeting was chaired by Mr. Chandrashekhar Ghule Patil, the Chairman of the Maharashtra Sugar Federation and was attended by Mr. Ganpatrao Tidke, Vice Chairman of the Federation and senior Directors, viz Mr. Shivajrao Patil, Mr. Shankarrao Kolhe, Mr. Ankharshrao Tope, Mr. Shivajirao Nagawada, Mr. Appasaheb Patil, Mr. Balasaheb Patil, MR. Shahajirao Kakade, Mr. Sanjay Patil and Mr. Chandradip Narke while select senior Managing Directors from Maharashtra also attended Presidents and CEOs of the Sugar Federations in the State of Gujarat, Karnataka, Tamil Nadu, Andhra Pradesh also attended. The senior Directors of Federal Bodies, viz. SISMA, ISMA, WISMA were also present while the Private Sector was represented by Mr. B.B. Thombre, Mr. Nandan Yalgi and Mr. Rohit Pawar.

The deliberations dealt upon various subjects, viz. Sugar price stabilization, imposition of Import Duty on imported sugar, levy sugar, sugar packaging, Ethanol pricing, uniformity in can harvesting and transport and the Decontrol of Sugar Industry. Each subject was opened by Mr. Prakash naiknavare, Managing Director of the Maharashtra Sugar Federation and was deliberated and arrived at a consensus conclusion. All the invitee delegates participated in the discussion and shared their views, which helped this informal forum to arrive at following

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conclusions which are being forwarded for consideration to the concerned Ministries in the Government of India:-

1. *Price Stabilisation:*

It was decided to assess the sugarcane price, demand supply situation and arrive at a price acceptable to all. For this State-wise Core Group was established.

Minimum Floor Price (Benchmark) for 23 July to 31st August 2010:

(Rs. Per Qtt.)

| Grade & States | Maharashtra | North Karnataka | South Karnataka | Tamil Nadu | Andhra Pradesh | Gujarat |
|----------------|-------------|--------------------|--------------------|---------------|-------------------|---------|
| S-30 | 2700 | 2670 | 2700 | 2700 | 2700 | 2700 |
| Super S | 2725 | 2700 | 2725 | 2725 | 2725 | 2725 |
| M-30 | 2750 | 2725 | 2750 | 2750 | 2750 | 2750 |
| L-30 | 2800 | | | | 2800 | 2800 |

2. *Imposition of Import Duty on Import of Sugar:*

The Government should not allow import of either Raw or Refined Sugar or levy Import Duty: Imported Raw after refining should be Exported back and not to be sold in country.

3. *Export:*

Looking towards increase in Sugarcane area and sugar production, reasonable exports to be permitted.

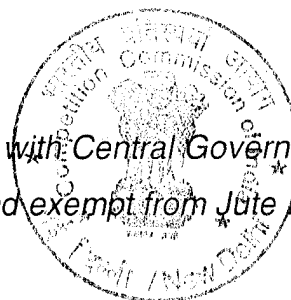
4. It has been decided to take up this issue with Government of India for increasing the levy sugar price as also transpiration cost of sugar. There was unanimity on conversion of levy sugar to free it is not lifted within 3 months.

5. *Packaging Sugar:*

It was decided to take up the issue with Central Government for allowing use of PP Bags for packaging of Sugar and exempt from Jute Packing.

6. *Ethanol Price:*

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It was decided to take up this issue with Ministry of Petroleum for issue of G. R. for making mandatory usage of Ethanol in Petrol.

7. *Uniformity in Harvesting & Transportation charges in Maharashtra, Andhra Pradesh, Karnataka and Gujarat to be observed.*
8. *Decontrol of Sugar Industry:*

It was unanimously decided to have decontrol of the Sugar Industry means scrapping of Essential Commodities Act, Release Mechanism, No Levy and maintaining Fair & Remunerative Price (FRP) for Sugarcane in the mutual interest of farmers and industry.

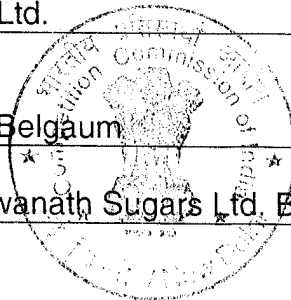
15. The list of persons who attended the meeting is as follows:-

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| 1. | Shri Chandrashekhar Ghule Patil Chairman, Sakhar Sangh, Mumbai |
| 2. | Shri Ganpatrao Tidke Vice-Chairman, Sakhar Sangh, Mumbai |
| 3. | Shri Shivajirao Patil Vice President, Vasantdada Sugar Institute, Pune |
| 4. | Shri Shankarrao Kolhe Director, sanjivani SSK Ltd. |
| 5. | Shri Shivajirao Nagawade Chairman, Shrigonda SSK Ltd. |
| 6. | Shri ankushrao Tope Chairman, Samarth SSK Ltd. |
| 7. | Shri Appasaheb (S.R.) Patil Chairman, Datta Shetkari SSK Ltd., Shirol |
| 8. | Shri Balasaheb Patil Chairman, Sahyadri SSK Ltd. |
| 9. | Shri Shahajirao Kakade Chairman, Someshwar SSK Ltd. |
| 10. | Shri P. G. Medhe Managing Director, Chatrapati Rajaram SSK Ltd. |
| 11. | Shri C. B. Rananaware S. M. Shankarrao Mohite Patil SSK Ltd., Akulj |
| 12. | Shri B.B. Thombare Chairman & Managing Director, Natural Sugar & Allied Industries Ltd., Osmanabad |
| 13. | Shri Narendra Murkumbhj & Shri Nandan Yalgi – Rp. Managing Director, Renuka Sugars Ltd., Mumbai |
| 14. | Shri Rohit Pawar Executive Director, Baramati Agro Ltd., Dist. Pune |
| 15. | Vice President Gujarat Sugar Federation Ltd., Gandhinagar, Gujarat |

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| 16. | Shri Ketan Bhatt Managing Director Gujarat Sugar Federation Ltd., Gandhinagar, Gujarat |
| 17. | Managing Director Karnataka State Sugar Federation Ltd., Bangalore |
| 18. | Shri Jagadesh Gudagunti President, SISMA, Karnataka |
| 19. | Vice President SISMA, Karnataka |
| 20. | Shri K. N. Rathore Vice President, SISMA, Tamilnadu, Chennai |
| 21. | Shri G. Srinivasan Managing Director, SISMA, Tamilnadu, Chennai |
| 22. | Shri Prakash Naiknavare Managing Director, Sakhar Sangh, Mumbai |
| 23. | Vice President (S&M) BHL (Bajaj) |
| 24. | R. S. Bhateran Secretary, SISMA, Andhra Pradesh |
| 25. | Shri P. C. Sovadi Karnataka State Federation, Bangalore |
| 26. | Shri S. D. Nandesh Director, Karnataka State Federation, Bangalore |
| 27. | Shri N. Shyaokar Vice President, Ugar Sugar Works |
| 28. | Shri O. P. Gupta Jt. Vice President, DSCL Sugar |
| 29. | Shri Satish Kamed Vice President Mawana Sugars Ltd. |
| 30. | Gopendra Singh Dalmia Chini Hills |
| 31. | CMD Shri Gurudatt Sugar Ltd. |
| 32. | Chairman Ramesh H Batti |
| 33. | V. V. Joshi Godavari Refinery Ltd. |
| 34. | B. R. Balekunda Chairman, someshwar SSKV |
| 35. | Ashok A Pan, Director National Federation |
| 36. | Prakash H. Saviat Yogeshwari Sugar India Ltd. |
| 37. | Nikhil U. Katti Chairman Vishwanath Sugars Ltd. Belgaum |
| 38. | Mukesh Kumar Executive Director, Vishwanath Sugars Ltd. Belgaum |

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| 39. | R. S. Talkwad Chairman, RSSK, Ranna nagar |
| 40. | M. G. Yash Managing Director Jawahar SSSK |
| 41. | Shri Vaibhav Naik, Hutatma Sangh |
| 42. | Chairman, Ahir Aashajan SSK Ltd. |
| 43. | Shri G. Raj Gopal, ED Shri Ambika Sugars LTd. |
| 44. | Shri H. M. Veerabhamal, Secretary Natioal Co.Op. Sugar Fed. KTK. |
| 45. | Shri S. B. Patil |
| 46. | Shri S. D. Korade, GM (C&P), Rajor. SSK Ltd. |
| 47. | Shri Sanjay Patil |
| 48. | Shri Chandradeep Narvane |
| 49. | The Krishna SSK Niyamit, Athani |
| 50. | Nandi SSK Niyamit, Karnataka |
| 51. | Shri Hiranayakshi SSK Ltd. |
| 52. | Maharashtra Rajya SSK Ltd. |
| 53. | Bhaorao Chavan SSK Ltd. |
| 54. | EID-PARRY (India) Ltd. |
| 55. | Khumbhi Kasari SSK Ltd. |
| 56. | Tasgaon Taluka SS Ltd. |

16. Arguments were advanced that no cartel existed in the sugar industry and that no element of profiteering was present when the price was fixed. This is a case of decision taken by different entities in the sugar industry and it has led to price fixing. What the Commission has to look into is not profiteering but price fixing. If the Commission starts looking at profiteering it would amount to importing a new concept in the Competition Law as it does not exist there. Further the mills have argued that they were selling free sale sugar at a loss. No material has been brought on record to establish the losses. The onus has therefore not been discharged.

17. It was argued before the Commission that the sugar mills had taken loans from banks on the valuation of sugar at Rs.3600 per quintal. But as prices fell to 2900 per quintal the banks started recalling the loans. It was also argued that due to the enhanced production the price of sugar had come down to Rs.2400 per quintal in

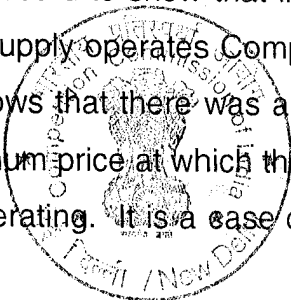
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the month of June 2010 and against Rs. 3600 per quintal in January 2010. It was argued that the prices had fallen below the cost of production leading to losses. It was argued that the meeting in July 22, 2010 was not with reference to fixing sugar prices but to reduce the losses suffered by the mills. It was also argued that in the said meeting a large number of items were discussed. It was therefore stated that no adverse inference should be drawn. But the fact is that the law of supply and demand was working in the market as because of large supply of sugar the prices started falling. This means that the market forces were working as far as the sugar prices were concerned in respect of free sale sugar. This has also been admitted by many of the sugar mills.

18. It was argued that the industry wanted minimum floor price to be fixed as the industry was suffering a loss. It was further argued that if the mills sold at the loss then they would suffer and if they did not sell the sugar then the unsold sugar would be converted in the levy sugar by the government. For this reason it was argued that the minimum floor price was necessary. It was also argued that it was not a case of cartelisation otherwise the press release would not have been issued. It was further argued that the price of imported sugar was much below even the cost of domestic sugar and therefore it led to cash loss for the sugar mills. A view has been held that fixing of the minimum ex-mills floor price was to ensure that the sale price does not go below the cost of production. But no material to show that the sale price was below the cost of production was furnished. Even the details of the cost of production by each of the sugar mills were not submitted and therefore the onus cast on the mills has not been discharged.

19. The DG in his report has stated that the decision taken to fix a minimum ex-mills price could not be sustained for long and that it did not last for more than a day or two. One of the reasons advanced for this position was that the mills were in need of funds and they did not have sufficient sustaining power. It was further argued that in a regulated or controlled market of sugar there cannot be any price cartelisation but no material has brought on record to show that in a controlled commodity when the normal law of demand and supply operates Competition Act has no role to play. In fact the discussion clearly shows that there was an element of price-fixing by the various mills regarding the minimum price at which the sugar was required to be sold. This is not a case of a cartel operating. It is a case of decision taking in the form of

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price-fixing. The main purpose for the price fixing was to reduce the losses being suffered by the mills. In the states of Andhra Pradesh and Gujarat the minimum price could rise only till Rs.2650 per quintal which is much below the price fixed by the association in the meeting held on 22.07.2010. Even in Karnataka and Maharashtra spots sales price of sugar per quintal was well below Rs.2500/- at a price which was fixed in the meeting. It was therefore argued that though the prices were fixed the mills never adhered to the decision taken in the meeting on 22.07.2010. The question which arises is as to whether when prices are fixed but the decision taken is not acted upon by the mills, could be mills are absolved of the concept of price-fixing. It was argued that the decision taken in the meeting on 22.07.2010 did not give any benefit to any of the sugar mills either directly or indirectly. It was stated that though the minimum floor price was fixed the same cannot be implemented by any of the mills. The next question is as to whether Section 3(3) of the Competition Act leaves any scope for discretion to the Commission to hold that some forms of price-fixing is not anti-competitive at all and that it does not fall within the mischief of the act. Section 3(3)(a) would apply but it is a case of rebuttable presumption. The only issue to be seen as to whether the explanation furnished by the parties concerned can be treated as reasonable cause for price-fixing. The Act says if there is a case of price-fixing then there is deemed to be an appreciable adverse effect to competition. The majority view is that even when there is deemed AAEC the factors mentioned in Section 19(3) of the act would need to be looked into. The majority view is that there is a reason for price-fixing and that the main reason was that the mills were suffering a loss. It was also the majority view that one of the characteristics of a cartel is profiteering. But the question is as to whether there was a cartel and whether profiteering is necessary for the purpose of price-fixing as it exists in the Act. Another issue raised was that the sale price of sugar was fixed by the co-operative mills through tender process and that as there was no manipulation in the tender process, no adverse inference could be drawn. The majority therefore held that as it is a case of rebuttable presumption and as the rebuttal was satisfactory, no case was made out. It was further been stated that the DG had not analysed Section 19(3) of the Act for the purpose of working of AAEC. The fact is that under law it is duty of the Commission and not the DG to work out whether Section 19(3) is applicable to any case or not. Another issue which has been raised is that the mills have not acted in concert and therefore the provisions of Section 3(3)(b) would not apply. The

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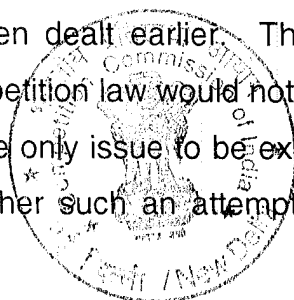
majority of the Commission therefore held that there was no violation of Sections 3(3)(a) and 3(3)(b) of the Competition Act and for this reason the case is required to be closed.

20. I do not subscribe to the views of the majority of the Commission. Price fixing is a serious offence and for this reason the Parliament has shifted the onus on the party against whom the allegation is made to establish that the concerned party has not indulged in price fixing. In fact Section 3(3) of the Competition Act states that if anyone indulges in price fixing, then it is presumed that there was an appreciable adverse effect on competition in India and the Commission was not required to examine the parameters set out in Section 19(3) of the Act.

21. The D.G. in this case has alleged violation of Section 3(3)(a) and Section 3(3)(b) talks about limiting or controlling production, supply, markets, technical development, investment or provision of services. In this case there was no material to hold that the sugar producers by the decision taken attempted to limit or control production, supply, markets, technical development, investment or provision of services. The provision of services under Section 3(3)(b) are not attracted. But by the decision taken the sugar producers wanted fix the minimum sale price of sugar. Thus the provisions of Section 3(3)(a) would clearly apply in this case.

22. The next question is whether the persons who were involved in fixing the minimum sale price of sugar have discharged the onus of establishing that they had not resorted to price fixing. In fact some of the sugar producers have stated that no such meeting to fix prices took place. But the D.G. has gathered sufficient evidence to establish that a meeting took place and the press release of the meeting clearly shows price fixing. Further the sugar producers have taken the plea that (i) Sugar industry is covered by the Essential Commodities Act and therefore the Competition Act would not apply. (ii) The sugar mills wanted to reduce their losses and for this reason they wanted to fix a minimum price. (iii) The prices fixed were not acted upon and therefore there is no contravention of the Act. (iv) There is no element of profiteering for fixing prices and therefore the competition law would not apply. All these issues have been dealt earlier. The arguments advanced were merely to establish that the competition law would not apply to the sugar industry. This is a far fetched argument. The only issue to be examined is whether an attempt was made to fix prices and whether such an attempt to fix prices was for valid reason. As

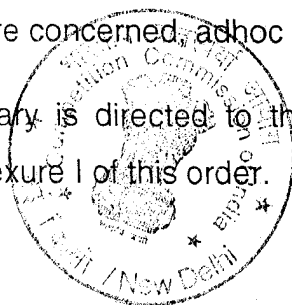
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already discussed above, the law of supply and demand applies even in a controlled commodity as sugar. Further the onus would have been discharged if the sugar mill producers had advanced material to establish that no price fixing had taken place. This onus has not been discharged. There is therefore material to hold that the sugar mills on 22.07.2010 in Sakhar Bhawan, Mumbai had taken a decision to fix prices and that the onus on the mills to disprove this fact has not been discharged. Therefore the violation of Section 3(3)(a) of the I.T. Act has been clearly been established.

23. As a contravention under Section 3(3)(a) of the Competition Act has been established, it is necessary to pass orders under Section 27 of the Act. Under clause (a) of Section 27 the sugar producers who participated in the meeting on 22.07.2010 to fix prices of free sale sugar are directed to cease and desist from fixing prices in future. In future if these sugar producers fix prices the Commission would take a very serious view because price fixing is a pernicious form of anticompetitive behaviour. Under clause (b) of Section 27, monetary penalty has to be levied on the mills which participated in price fixing. According to the decision taken, the price fixing was to be operative in the states of Maharashtra, Karnataka, Andhra Pradesh and Tamilnadu. But the representatives of some sugar companies of U.P. were present when the meeting of the price fixing took place. These mills are equally guilty of price fixing and liable for penalty. But considering the fact that many sugar mills are running in losses and the fact that the price fixing was operational only for a few days, a penalty of 1% of the turnover would be sufficient for this purpose. The penalties levied on the different entities are enclosed in Annexure I to this order. Some of the enterprises have not submitted the details of their turnover. Therefore in their case on adhoc basis penalties are levied. Such cases are mentioned at Sl. Nos. 17, 18, 23, 29 and 32 of Annexure I. Serial Nos. 17, 18 and 23 are trade associations on whom an adhoc penalty of Rs. 2 lakhs is levied. As far Sl. Nos. 29 & 32 are concerned, adhoc penalty of Rs.15 lakhs is levied.

24. The Secretary is directed to issue this order to all the enterprises as mentioned in Annexure I of this order.



ANNEXURE - I

| Sl. No. | Name of the Co-operative / Company | Turnover (In Crs.) | | | | Penalty (In Crs.) | | |
|---------|--|--------------------|---------|----------|-----------------|-------------------|-------------------|------------|
| | | Financial Year | | | | Total | Avg. | 1% of Avg. |
| | | 2007-08 | 2008-09 | 2009-10 | Total | | | |
| 1 | South Indian sugar Mills Association (Karnataka), Bangalore | 0.29 | 0.34 | 0.25 | 0.88 | 0.29 | 0.002941 | |
| 2 | The Karnataka State Federation of Co-operative sugar Factories Ltd., Bangalore | - | 0.40 | 0.62 | 1.01 | 0.34 | 0.003377 | |
| 3 | Shree Renuka sugar Limited | 1815.09 | 2239.81 | - | 4054.90 | 1351.63 | 13.516340 | |
| 4 | The Ugar sugar Works Limited | 435.33 | 422.75 | 448.88 | 1306.96 | 435.65 | 4.356536 | |
| 5 | Vishwanath sugars Limited | 99.52 | 152.20 | 335.97 | 587.69 | 195.90 | 1.958982 | |
| 6 | The Krishna SSK Niyamit, Athani | - | 112.00 | 189.10 | 301.09 | 100.36 | 1.003648 | |
| 7 | Shree Someshwar SSK Niyamit | - | 58.00 | 63.89 | 121.89 | 40.63 | 0.406304 | |
| 8 | Mawana Sugar Ltd. | 1054.32 | 692.94 | 1686.03 | 3433.29 | 1144.43 | 11.444297 | |
| 9 | DCM Shriram Consolidated Ltd. | 2524.34 | 3439.21 | 3448.69 | 9412.24 | 3137.41 | 31.374133 | |
| 10 | Maharashtra Rajya Sahkari Sakhar Karkhane Sangh Ltd. | - | 6.85 | 6.76 | 13.61 | 4.54 | 0.045380 | |
| 11 | Bhaorao Chavan Sahakari Sakhar Karkhane Ltd. | - | 192.00 | 225.05 | 417.05 | 139.02 | 1.390162 | |
| 12 | Vasant Dada Sugar Institute | - | 15.54 | 20.30 | 35.84 | 11.95 | 0.119457 | |
| 13 | Shrigonda SSK Ltd. | - | - | 200.711 | 200.71 | 66.90 | 0.669037 | |
| 14 | Shri Someshwar Sahkari Sakhar Karkhane Ltd. | 125.20 | 153.56 | 196.62 | 475.38 | 158.46 | 1.584595 | |
| 15 | Sahayadri Sahkari Sakhar Karkhane Ltd. | 207.69 | 331.11 | 326.0248 | 864.82 | 288.27 | 2.882745 | |
| 16 | Samarth Sahkari Sakhar Karkhane Ltd. | 136.26 | 160.95 | 209.5865 | 506.79 | 168.93 | 1.689309 | |
| 17 | Jawahar Shetkari Sahakari Sakhar Karkhane Ltd. | - | - | - | 0.00 | 0.00 | 0.000000 | |
| 18 | South Indian sugar Mills Association (Tamilnadu), Chennai | - | - | - | 0.00 | 0.00 | 0.000000 | |
| 19 | EID - Perry (India) Limited - Murugappa group | 719.51 | 1677.72 | 1296.82 | 3694.05 | 1231.35 | 12.313500 | |
| 20 | Shree Ambika Sugar | 472.90 | 717.78 | 782.49 | 1973.16 | 657.72 | 6.577196 | |
| 21 | Dalmia Chini Mills - Located in UP only. | - | 300.16 | 515.85 | 816.00 | 272.00 | 2.720008 | |
| 22 | Bajaj Hindustan Ltd. | 1814.89 | 1802.87 | 1766.66 | 5384.42 | 1794.81 | 17.948067 | |
| 23 | South Indian Sugar Mills Association - AP | - | - | - | 0.00 | 0.00 | 0.000000 | |
| 24 | The Gujarat State Federation of Co-operative Sugar Factories Ltd. | - | 0.73 | 0.70 | 1.43 | 0.48 | 0.004774 | |
| 25 | S M Shankarrao Mohite Patil SSK Ltd. | 149.27 | 198.88 | 191.98 | 540.13 | 180.04 | 1.800434 | |
| 26 | Sanjivani SSK Ltd. | 145.59 | 142.82 | 143.64 | 432.05 | 144.02 | 1.440156 | |
| 27 | Hutatma Kisan Ahir Sahakari Sakhar Karkhane Ltd. | 110.85 | 171.97 | 239.54 | 522.37 | 174.12 | 1.741223 | |
| 28 | Chhatrapati Rajaram Sahakari Sakhar Karkhane Ltd. | 72.40 | 80.83 | 125.14 | 278.36 | 92.79 | 0.927872 | |
| 29 | Baramati Agro Ltd. Pune | - | - | - | 0.00 | 0.00 | 0.150000 | |
| 30 | Natural Sugar and Allied Industries, Osmanabad | - | 260.85 | 247.01 | 507.86 | 169.29 | 1.692852 | |
| 31 | Godavari Sugar Mills Pvt. Ltd. | - | 0.10 | 0.5936 | 0.69 | 0.23 | 0.002311 | |
| 32 | Shri Gurudatt Sugar Ltd. | - | - | - | 0.00 | 0.00 | 0.150000 | |
| 33 | Rajaram Bapu SSK Ltd. | 345.29 | 462.41 | 624.7311 | 1432.43 | 477.48 | 4.774762 | |
| 34 | Kumbhi Kasari SSK Ltd. | 117.56 | 150.93 | 205.4315 | 473.93 | 157.98 | 1.579750 | |
| 35 | Tasgaon Taluka S Ltd. | 4.09 | 10.88 | 9.59 | 24.56 | 8.19 | 0.081863 | |
| | Total | | | | 34327.75 | | 126.412009 | |

Notes: 1) Few companies / Cooperatives admitted in their submissions that they attended the meeting and thus included in the accounts in all the years required for the purpose of this report.
 2) Some Associations / companies / Cooperatives have not submitted the accounts in all the years required for the purpose of this report.
 3) Mills in the UP, those participated in the meeting, have been included.
 4) Figures of some companies are for 18 months.
 5) Companies have followed different accounting years.



Sd/-
Member (R)