

STATE OF UTTAR PRADESH

v.

GIR PRASAD AND ORS.

FEBRUARY 25, 2004

[RUMA PAL AND P. VENKATARAMA REDDI, JJ.]

*Monopolies and Restrictive Trade Practices Act, 1969—Sections 2(o) and 10—Complaint of restrictive trade practice against State—Element of competition between the State and any other party not alleged—Jurisdiction of Restrictive Trade Practices Commission to entertain the complaint—Held: For restrictive trade practice, element of commercial competition is necessary—In the present case ‘service’ provided by the State not having element of competition, there was no restrictive trade practice—Hence Commission did not have jurisdiction to entertain the complaint.*

Appellant-State introduced an irrigation programme in respect of certain lands including that of the respondent-complainant. Respondent filed a complaint under Monopolies and Restrictive Trade Practices Act, 1969 charging the appellant with having manipulated the conditions of delivery of service of supplying irrigation water and having indulged in restrictive trade practices within the meaning of the Act. Appellant questioned the jurisdiction of the Commission to entertain the complaint. The Commission held that it had the jurisdiction as Government Departments which render “service” in terms of Section 2 of the Act, are covered by the provisions of the Act. Hence the present appeal.

Allowing the appeal, the Court

**HELD:** 1. Unless there is a “restrictive trade practice” as defined in Section 2(o) of Monopolies and Restrictive Trade Practices Act, 1969, the Commission would not have the power to entertain the complaint. The jurisdictional facts as prescribed under Section 2(o) are (i) that there is a trade practice and (ii) that the trade practice has, or may have the effect of preventing, distorting or restricting competition in any manner. The two instances which have been particularized as clauses (i) and (ii) of Section 2(o) do not narrow down the definition of restrictive trade practice nor do they exclude the necessity of establishing the prevention, distortion or restriction

A of competition. [639-G-H]

*Hindusthan Lever Ltd. v. Director General*, [2001] 2 SCC 474, referred to.

B 2. The element of competition must be present before the question of any restrictive trade practice would arise and that the concept of competition is to be understood in a commercial sense. [640-B]

*Tata Engineering and Locomotive Co. Ltd., Bombay v. The Registrar of the Restrictive Trade Agreement, New Delhi*, [1977] 2 SCC 55 and *Mahindra and Mahindra Ltd. v. Union of India and Anr.*, [1979] 2 SCC 529, relied on.

C 3. In the present case, it has not been alleged that there is any element of competition involved between the State and any other party. Even if one were to assume that the State was an undertaking as defined in Section 2(v) and that the activity of arranging for the supply of water is a "service" as contemplated under the Act, in the absence of this vital element of competition, the Commission could not have held that there was any restrictive trade practice within the meaning of Section 10 of the Act giving it the jurisdiction to entertain the complaint. [640-H; 641-A]

E *Voltas Limited, Bombay v. Union of India and Ors.*, [1985] Supp. 2 SCC 498, referred to.

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F From the Judgment and Order dated 1.7.96 of the M.R.T.P. Commission, New Delhi in R.T.P.E. No. 241 of 1995.

N.S. Gahlot and Jatinder Kr. Bhatia, for the Appellants.

Jeevan Prakash and K.B. Sounder Rajan for the Respondents.

G The Judgment of the Court was delivered by

H RUMA PAL, J. The question to be decided in this appeal is whether the Monopolies & Restrictive Trade Practices Commission had the jurisdiction to entertain a complaint filed by the respondent No. 1 relating to an irrigation programme sought to be implemented by the appellant-State. According to the appellants, the irrigation programme or "Warbandi" had been introduced

w.e.f. 19th August 1995 in respect of certain lands including that of the respondent-complainant. The allegation in the complaint was that by the irrigation programme, the complainant's agricultural crops would be affected. The complaint charged the appellants with "having manipulated the conditions of delivery of service of supplying irrigation water" and having indulged in restrictive trade practices within the meaning of the Monopolies and Restrictive Trade Practices Act, 1969 (referred to as 'the Act')

The appellant questioned the jurisdiction of the Commission to entertain the complaint. The Commission negatived the preliminary objection raised by the appellant holding that Government Departments which render "service" in terms of Section 2 of the Act are covered by the provisions of the Act. It was found as a matter of fact that the State was rendering a "service". The Commission, therefore, issued a notice of inquiry against the appellant. The proceedings before the Commission were stayed by this Court on the special leave petition filed by the appellants.

We are unable to sustain the decision of the Commission. The Commission's jurisdiction with regard to alleged restrictive trade practices has been provided for under Section 10 of the Act. A restrictive trade practice has been defined in Section 2 (o) as meaning:

"a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular:-

- (i) which tends to obstruct the flow of capital or resources into the stream of production, or
- (ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;"

Unless there is a "restrictive trade practice" as defined in Section 2(o), the commission would not have the power to entertain the complaint. The jurisdictional facts as prescribed under Section 2(o) are (i) that there is a trade practice and (ii) that the trade practice has, or may have, the effect of preventing, distorting or restricting competition in any manner. The two instances which have been particularised as clauses (i) and (ii) of Section 2(o) do not narrow down the definition of restrictive trade practice nor do they exclude the necessity of establishing the prevention, distortion or restriction of competition. (See *Hindusthan Lever Ltd. v. Director General*,

A [2001] 2 SCC 474,478, para 11.)

B Section 2(o) has also been construed by this Court in *Tata Engineering & Locomotive Co. Ltd., Bombay v. The Registrar of the Restrictive Trade Agreement, New Delhi*, [1977] 2 SCC 55 and *Mahindra and Mahindra Ltd. v. Union of India and Anr.*, [1979] (2) SCC 529. Both decisions have held that the element of competition must be present before the question of any restrictive trade practice would arise and that the concept of competition is to be understood in a commercial sense.

C The law was summed up in *Mahindra and Mahindra* (supra) where it was said:

D "It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition."

E The amendment to Section 33(1) of the Act in 1984 has, subsequent to the decisions noted earlier, introduced a deeming clause by which agreements in named categories would be treated for the purpose of the Act to be agreements relating to restrictive trade practice. It was made clear by this Court in *Voltas Limited, Bombay v. Union of India and Ors.*, [1985] Supp. 2 SCC 498, 508 that in respect of the agreements so specified under Section 33(1) after the 1984 amendment, the Commission/Court cannot hold that the trade practices enumerated are not restrictive trade practices for the purpose of the Act with reference to Section 2(o).

F The present case does not involve any agreement of the kind specified in Section 33. It will, therefore, have to come under the definition of Section 2(o) to be a restrictive trade practice at all. It has not been alleged by learned counsel appearing on behalf of the respondents that there is any element of competition involved between the State and any other party. Even if one were to assume that the State was an undertaking as defined in Section 2 (v)

and that the activity of arranging for the supply of water is a “service” as contemplated under the Act in the absence of this vital element of competition, the Commission could not have held that there was any restrictive trade practice within the meaning of Section 10 of the Act giving it the jurisdiction to entertain the respondent No. 1’s complaint. A

In the aforesaid circumstances, we set aside the decision of the Commission, reject the complaint as not maintainable and allow this appeal. There will be no order as to costs. B

K.K.T.

Appeal allowed.