

TATA ENGINEERING AND LOCOMOTIVE COMPANY LTD. A

v.

THE DIRECTOR (RESEARCH) FOR AND ON BEHALF OF
DEEPAK KHANNA & ORS.

(Civil Appeal No. 2069 of 2006) B

SEPTEMBER 7, 2015

[VIKRAMAJIT SEN AND SHIVA KIRTI SINGH, JJ.]

Monopolies and Restrictive Trade Practices Act, 1969 – C
ss. 36A(1)(i),(ii),(iv) and (vi) and 36D(1) – Complaints –
Against company engaged in manufacturing and selling of
automobiles – Alleging indulgence in unfair trade practice
by demanding excessive amount for booking of cars and by
including the likely taxes, cess and transportation cost – D
Preliminary Investigation Reports were submitted – Notice
of Enquiry issued alleging indulgence of the company in
unfair trade practices falling u/s. 36(1)(i),(ii),(iv) and (vi) –
Monopolies and Restrictive Trade Practices Commission
directed the company to cease and desist from continuing E
with the practices complained of – On appeal, held: The
allegations and materials against the company do not make
out a case of unfair trade practice – The Commission has
travelled beyond the specific allegations in the Notice of F
Enquiry, which is violative of the rules of fairness and natural
justice – It being flagrant violation of audi alteram partem rule,
renders the impugned order invalid and bad in law – Since
no case of any unfair trade practice is made out, there is no
scope of order u/s. 36D(1). G

Allowing the appeal, the Court

**HELD 1. The order of the Monopolies and Restrictive
Trade Practices Commission appears to be largely**

A influenced by a conclusion that the appellant should not
have asked for deposit of an amount above the basic
price, because in the opinion of the Commission it was
unfair for the appellants to keep excise and sales tax with
itself for any period of time. Such conclusion of the
B Commission is based only upon subjective
considerations of fairness and do not pass the objective
test of law as per precise definitions under Section 36A
of the Monopolies and Restrictive Trade Practices Act,
1969. [Para 13] [365-B-D]

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2. The Commission could not have travelled beyond
the specific allegations in the Notice of Enquiry because
such a course would violate rules of fairness and natural
justice. The scope of enquiry could have been enlarged
D only after serving further notice with necessary details
of allegations and supporting facts. This was clearly not
done by the Commission. It is a flagrant violation of *audi
alteram partem* rule. It renders the impugned order invalid
and bad in law. The order is also bad for non application
E of mind to requirement of law as stipulated in Section
36A(1) of the Act and the relevant facts. [Para 10] [383-G-
H; 384-A]

3. The enquiry, as per the notice, was to cover:- (a)
F whether the respondent has been indulging in the above
said unfair trade practice(s) and (b) whether the said
unfair trade practice(s) is/are prejudicial to public interest.
The Commission failed to keep in mind the precise
allegations against the appellant with a view to find out
G whether the facts could satisfy the definition of Unfair
Trade Practice(s) as alleged against the appellant in the
Notice of Enquiry. The Commission was apparently
misled by the Preliminary Investigation Report. [Paras
11 and 12] [384-D-F]

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4. The allegations and materials against the appellant

TELCO LTD. v. THE DIRECTOR (RESEARCH) FOR & ON 375
BEHALF OF DEEPAK KHANNA

do not make out a case of unfair trade practice against the appellant. Nor there is any scope to pass order under Section 36-D(1) of the Act when no case of any unfair trade practice is made out. [Para 14] [385-E] A

Rajasthan Housing Board vs. Parvati Devi (Smt) (2000) 6 SCC 104:2000 (3) SCR 934 ; *M/s Lakhanpal National Limited vs. M.R.T.P. Commission and Anr.* (1989) 3 SCC 251: 1989 (2) SCR 979 – referred to. B

Case Law Reference C

2000 (3) SCR 934 referred to. Para 7

1989 (2) SCR 979 referred to. Para 8 D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2069 of 2006.

From the Judgment and Order dated 28.02.2006 of Monopolies and Restrictive Trade Practices Commission New Delhi in U.T.P.E. No 86, 87 and 90 of 1999. E

Ashok H. Desai, Ravinder Narain, Kanika Gomber, Kishan Rawat, Sidharth Banthia, Rajan Narain for the Appellant.

A.K. Sanghi, Madhavi Diwan, Sadhana Sandhu, Sushma Suri, P. Parmeswaran, for the Respondents. F

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. This is an appeal under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 (for brevity hereinafter referred to as 'the Act'). The appellant is a company engaged in manufacture and sale of automobiles. It is aggrieved by the impugned order dated 28.2.2006 passed by the Monopolies and Restrictive Trade H

A Practices Commission (for brevity 'the Commission') in U.T.P. Enquiry nos. 86/99, 87/99 and 90/99 whereby the Commission has directed the appellant to cease and desist from continuing with the practices complained of and not to repeat the same in future.

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2. Since there is no dispute on facts, the case of the parties on facts is common and to the following effect:

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(i) The practice under scrutiny is of the year 1999 when the appellant was to begin the manufacture and delivery of newly introduced Tata Indica cars into the market with effect from February 1999, with the installed capacity of approximately 60,000 cars in a year. The appellant invited the prospective customers to book the car through dealers. The booking amount demanded by the appellant was quite high and close to the estimated price finally payable which would include excise duty, sales tax and transportation charges. The terms and conditions for booking of order for purchase of Tata Indica cars were mentioned in detail indicating the model wise price depending upon the city of booking. It was indicated that the price of vehicle as well as taxes, duties and cess will be as applicable on the date of delivery. Those making valid booking were to be supplied the vehicle as per priority numbers generated and allocated by a computerized technique, for the first 10,000 bookings only. The terms also provided that the payments against the remaining bookings will be refunded to the customers, without interest, at the earliest but in any case within a month from the closing of the booking. For refunds after a month, interest will be paid at the rate of 10% per annum. The order booking form mentioned in Clause 7 that the person concerned had carefully read the terms and conditions of the bookings and agreed to the same.

TELCO LTD. v. THE DIRECTOR (RESEARCH) FOR & ON 377
BEHALF OF DEEPAK KHANNA [SHIVA KIRTI SINGH, J.]

(ii) Although the initial allotment was confined only to 10,000 cars, the appellant received as many as 1,13,768 booking applications along with stipulated amount which aggregated to Rs.3,216.44 crores. The appellant gave an option to prospective customers to opt for a second phase of 50,000 vehicles likely to be delivered from April-May 1999 to March 2000. It refunded the balance amounts to those who desired for refund, along with interest as represented. No complaint was made to the Commission by any of the persons who made the booking and thereafter either purchased the car or withdrew the deposits with or without interest, as the case may be.

(iii) However three complaints were made before the Commission by persons who claimed that they had intentions to make the booking but were dissuaded by the high quantum of deposit required for the purpose. Their specific objection was that the demanded amount exceeded the basic price of the car if cess, taxes and transportation cost were left out. According to the complainants the appellant had indulged in Unfair Trade Practice (UTP) by demanding an excessive amount for bookings of Indica cars and by including the likely taxes, cess and transportation cost.

3. Since the defence taken by the appellant was also not disputed on facts, it would be relevant to note the same. When the Commission received the three complaints, it sent them to the Director (Research) for investigation. The Director submitted Preliminary Investigation Reports (PIR) in all the three matters and three cases were registered as per numbers noted earlier. The Notices of Enquiry under Sections 36-B (d), 37, 36-D of the Act and under Regulation 51 were issued to the appellant who contested the complaints. The appellant filed

A its reply to the Notice of Enquiry in which it also raised a preliminary objection that the allegations of the restrictive trade practice were vague and not permissible by law. Their further defence was that there are no facts and material to show that the alleged practice is prejudicial to the public interest requiring an enquiry under Section 37 of the Act and that no facts were disclosed in the Notice of Enquiry to show prejudice to the public interest. On merits some of the allegations were denied as incorrect. It was pointed out that none of the complainants had applied for the booking of Tata Indica vehicle and hence they lacked locus standi to file the complaints in the capacity of consumers. On merits the appellant also took the defence that there was no false and misleading statement made by the appellant for inviting booking of Tata Indica cars, the applicants made the bookings with open eyes being aware about the stipulation for payment of interest. According to appellant by letter dated 6.2.1999 the successful applicants were intimated of the priority number allotted to them and the unsuccessful applicants were also informed that they had an option to be considered for the second phase of 50,000 cars and such optees would be entitled to receive interest at the rate of 11% per annum with effect from 1.2.1999 till the date of delivery. Those who did not opt for the second phase deliveries were refunded their booking amounts along with 10% interest.

F 4. The appellant explained their practice by pleadings which are not controverted, that their past experience as automobile manufacturer was limited to heavy vehicles and hence in their initial venture into the car segment, they were not sure of public response and they had decided to plan their production schedule on the basis of reality test of car's demand in the market. For this speculative bookings were required to be discouraged and the same was sought to be achieved by demanding an amount closer to the anticipated price which the customer would be required to pay. According to

submissions, such practice could not have promoted the sale of their vehicle rather it was discouraging. The large response shows peoples' faith in the products of the appellant and also that the interest rate offered by the appellants was appreciable and fair. A

5. Learned Senior Counsel Mr. Ashok H. Desai highlighted the definition of Unfair Trade Practice as indicated in Section 36A of the Act. Since the Notice of Enquiry alleged that the appellant had indulged in unfair trade practices falling under Section 36A (1) (i), (ii), (iv) and (vi) of the Act, the aforesaid provisions need to be noticed. They read as follows: B C

“36A. Definition of unfair trade practice - In this Part, unless the context otherwise requires “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely :- D

(1) the practice of making any statement, whether orally or in writing or by visible representation which, - E

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or mode; F

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) xxxxxxxxx G

(iv) represents that the goods or services have sponsorships, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have; H

A (v) xxxxxxxxxxxx

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;"

B 6. According to Mr. Desai the allegations against the appellant do not attract any of the practices mentioned in the Notice of Enquiry and contained in the definition noted above.

C 7. The second limb of arguments also flows from the definition in Section 36A of the Act. By placing reliance upon judgment of this Court in the case of **Rajasthan Housing Board vs. Parvati Devi (Smt)** (2000) 6 SCC 104, it was contended that when supplier and consumer have entered into an agreement then the Commission, in order to hold the supplier guilty of unfair trade practice on the basis of allegations made against it, is required to go into the terms and conditions agreed between the parties for finding out whether there was unfair trade practice so as to require further action on the basis of complaints. In support of this proposition reliance was placed mainly on paragraph 14 of the judgment which is as follows:

F "14. For deciding such question, the Commission has to find out whether a particular act can be condemned as an unfair trade practice; whether representation contained a false statement and was misleading and what was the effect of such a representation made to the common man. The issue cannot be resolved by merely holding that representation was made to hand over the possession within the stipulated period and the same is not complied with or some lesser constructed area is given after the construction of the building. The Commission has to find out whether the representation, complained of, contains the element of misleading the buyer and whether buyers are misled or they are informed

in advance that there is likelihood of delay in delivering A
the possession of constructed building and also increase
in the cost. For this purpose, terms and conditions of the
agreement are required to be examined by the
Commission. Not only this, the Commission is required B
to consider whether the Board has adopted unfair method
or deceptive practice for the purpose of promoting the
sale, use or supply of any goods or for the provisions of
any services. Unless there is a finding on this issue, the
appellant Board cannot be penalised for unfair trade C
practice.”

8. On behalf of appellant reliance was also placed upon
judgment of this Court in the case of **M/s Lakanpal National
Limited vs. M.R.T.P. Commission and Another** (1989) 3 D
SCC 251, particularly paragraph 7 and 9 thereof. In paragraph
7 it was held that the definition of “Unfair Trade Practice” in
Section 36A is not inclusive or flexible, but specific and limited
in its contents. The Court also considered the object of this
provision with a view to resolve the issue as to whether E
particular acts can be condemned as unfair practice or not.
We are in full agreement with the view expressed by L. M.
Sharma, J., as he then was and hence it would be more
appropriate to extract para 7 which runs thus:

“7. However, the question in controversy has to be F
answered by construing the relevant provisions of the Act.
The definition of “unfair trade practice” in Section 36-A
mentioned above is not inclusive or flexible, but specific
and limited in its contents. The object is to bring honesty G
and truth in the relationship between the manufacturer
and the consumer. When a problem arises as to whether
a particular act can be condemned as an unfair trade
practice or not, the key to the solution would be to
examine whether it contains a false statement and is H
misleading and further what is the effect of such a

A representation made by the manufacturer on the common man? Does it lead a reasonable person in the position of a buyer to a wrong conclusion? The issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. A representation containing a statement apparently correct in the technical sense may have the effect of misleading the buyer by using tricky language. Similarly a statement, which may be inaccurate in the technical literal sense can convey the truth and sometimes more effectively than a literally correct statement. It is, therefore, necessary to examine whether the representation, complained of, contains the element of misleading the buyer. Does a reasonable man on reading the advertisement form a belief different from what the truth is? The position will have to be viewed with objectivity, in an impersonal manner. It is stated in Halsbury's *Laws of England* (4th Edn., paras 1044 and 1045) that a representation will be deemed to be false if it is false in substance and in fact; and the test by which the representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee. "Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation" and "that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, even though there may have been any number of inaccuracies in unimportant details. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true"; Let us examine the relevant facts of this case in this background."

TELCO LTD. v. THE DIRECTOR (RESEARCH) FOR & ON 383
BEHALF OF DEEPAK KHANNA [SHIVA KIRTI SINGH, J.]

9. In reply Mr. A.K. Sanghi, Senior Advocate defended the impugned order of the respondent Commission. According to him the Commission acted fairly in entertaining the complaints from three persons who found the booking amount very high and therefore did not deposit the same. According to him once a Preliminary Investigation Report dated 15.2.2000 was available with conclusion and recommendation to the effect that only the basic price of the car ought to have been collected from the public and not further amount which can cover only excise duties and sales tax that goes to the Government and that such amount should not have been retained by manufacturing units for a long period of time, the Commission although did not find the appellant guilty of any of the four specific provisions of Section 36-A (1) but still it felt compelled to conclude against the appellant and resultantly pass a cease and desist order under powers conferred upon the Commission by Section 36-D (1) (a) of the Act.

10. Mr. Sanghi also sought to support the finding of the Commission on issue number one that the appellant has indulged in unfair trade practice by referring to certain narratives in the Preliminary Investigation Report (PIR). As per his submission the Commission had not only communicated the precise allegations in terms of Section 36-A but had also enclosed with the Notice of Enquiry a copy of PIR and therefore findings cannot be criticized on the ground that the allegations were not precisely communicated through the Notice of Enquiry. We find no merit in these contentions. The Commission could not have travelled beyond the specific allegations in the Notice of Enquiry because such a course would violate rules of fairness and natural justice. The scope of enquiry could have been enlarged only after serving further notice with necessary details of allegations and supporting facts. This was clearly not done by the Commission. It is a flagrant violation of audi alteram partem rule. It renders the impugned order invalid and

- A bad in law. The order is also bad for non application of mind to requirement of law as stipulated in Section 36A(1) of the Act and the relevant facts.

11. We have gone through the Preliminary Investigation Report, the Notice of Enquiry as well as the Order under appeal. We do not find any material or even allegation in the PIR which could satisfy any of the four unfair trade practices covered by various Clauses such as Clause (i), (ii), (iv) and (vi) of Section 36-A(1) of the Act. A careful perusal of the Notice of Enquiry dated 25.9.2000 reveals that no doubt a copy of the PIR was enclosed but the notice made it clear itself that the Commission came to a considered opinion that the Director (Research) had found the appellant indulging in unfair trade practices falling precisely and only under clauses (i), (ii), (iv) and (vi) of Section 36A(1) of the Act. The enquiry, as per the notice, was to cover:- (a) whether the respondent has been indulging in the above said unfair trade practice(s) and (b) whether the said unfair trade practice(s) is/are prejudicial to public interest.

12. A scrutiny of the judgment under appeal discloses that the Commission failed to keep in mind the precise allegations against the appellant with a view to find out whether the facts could satisfy the definition of Unfair Trade Practice(s) as alleged against the appellant in the Notice of Enquiry. The Commission was apparently misled by the Preliminary Investigation Report also which claimed to deal with reply received from the appellant in course of the preliminary enquiry but patently failed even to notice the stipulation as regards payment of interest on the booking amount although this fact was obvious from the terms and conditions of the booking and was reportedly relied upon by the appellant in its reply even at the stage of preliminary investigation. The Commission noticed the relevant facts including provision for interest while narrating the facts, but failed to take note of this crucial aspect while discussing

**TELCO LTD. v. THE DIRECTOR (RESEARCH) FOR & ON 385
BEHALF OF DEEPAK KHANNA [SHIVA KIRTI SINGH, J.]**

the relevant materials for the purpose of arriving at its conclusions. Such consideration and discussion begins from paragraph 32 onwards but without ever indicating that the booking amounts had to be refunded within a short time or else it was to carry interest at the rate of 10% per annum. A

13. The order of the Commission appears to be largely influenced by a conclusion that the appellant should not have asked for deposit of an amount above the basic price because in the opinion of the Commission it was unfair for the appellants to keep excise and sales tax with itself for any period of time. Such conclusion of the Commission is based only upon subjective considerations of fairness and do not pass the objective test of law as per precise definitions under Section 36A of the Act. The submissions and contentions of Mr. Desai merit acceptance. B C D

14. Even after stretching the allegations and facts to a considerable extent in favour of respondent Commission, we are unable to sustain the Commission's conclusions that the allegations and materials against the appellant make out a case of unfair trade practice against the appellant. Nor there is any scope to pass order under Section 36-D(1) of the Act when no case of any unfair trade practice is made out. Hence, we are left with no option but to set aside the order under appeal. We order accordingly. As a result the appeal stands allowed. However, there shall be no order as to costs. E F

Kaipana K. Tripathy

Appeal allowed.