

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 19.08.2013
Judgment pronounced on : 02.09.2013

+ W.P.(C) 4602/2013 and CM No.10571/2013

SOUTH ASIA LPG COMPANY PRIVATE LIMITED... Petitioner

Through: Dr.Abhishek M.Singhvi, Senior
Advocate with Mr.Amitabh Kumar, Ms.Divya
Chaturvedi and Ms.Awantika Manohar,
Advocates.

versus

COMPETITION COMMISSION OF INDIA AND ORS

... Respondents

Through:Mr.Rajeev Saxena with Ms.Toshika
Katara, Advocates for R.1 and 2.

Mr.A.N.Haksar, Senior Advocate with
Mr.M.M. Sharma, Ms.Deepika Rajpal,
Mr.Abhijit Mittal, Ms.Chitra Y.Parande and
Mr.Shamik Narain, Advocates for R.3.

CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

V.K. JAIN, J.

The only issue involved in this petition is as to whether the Competition Commission of India (hereinafter referred to as 'the Commission') is required to give notice or hearing to the person against whom an information is given or a reference is made, in terms of Section 19 of the Competition Act, 2002 before the Commission directs further

investigation, in exercise of the powers conferred upon it by sub-section (7) of Section 26 of the Act.

Section 19(1) of the Act, to the extent it is relevant, empowers the Commission to enquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4. Such an enquiry can be initiated by the Commission either on its own or on receiving any information from any person or a reference made to it by the Central Government or the State Government or a statutory authority.

2. The respondent No. 3-East India Petroleum Private Limited was engaged in providing terminalling service at Vishakhapatnam Port which enabled it to handle imports and exports of bulk liquid products as well as liquefied gas fuels. The LPG/liquefied gases were unloaded from ships by an entity owned by HPCL and pumped by HPCL through a pipeline, part of which was owned by HPCL and part by respondent No. 3. On commissioning of underground cavern by the petitioner, the unloading services offered by HPCL were handed over to it in the year 2008 and gradually the unloading arm of HPCL was discontinued, whereafter all the products were unloaded only through the petitioner-company, which

had also installed blender facility for blending liquefied Butane and Propane. The respondent No.3 submitted an information petition to the Commission, alleging that the petitioner-company had created a dominant position in terminalling services and abused its dominance by setting up of blender facility by the informant and charging exorbitantly for the services being provided by it. It was also alleged that the petitioner before this Court was threatening to discontinue the terminalling as well as bypass services to respondent No. 3, unless exorbitant charges were paid to it. The Commission considered the matter in its meeting held on 28.12.2011 and decided to refer the matter to Director General for investigation. The findings submitted by the Director General, has re-produced in the impugned order dated 01.07.2013 were as under:-

“7. The findings of the DG are briefly given below:

(a) The relevant product market comprised of the upstream terminalling services and the downstream terminalling services. The relevant geographic market was the Vishakhapatnam Port. The relevant market under section 2(r) of the Act was stated to be the *‘upstream and downstream terminaling services at the Vishakhapatnam Port’*.

(b) The OP was the sole provider of upstream terminalling services at Vizag and held 100% market share in upstream terminaling services market and all OMCs were dependent on the services of OP.

(c) The entry barriers were not high, as substantiated by the fact that informant itself had applied for permission of Vishakhapatnam Port Trust for laying its dedicated pipeline from its jetty to its terminal in July 2010. Further, informant itself submitted that setting up of pipeline would not cost more than Rs 20 crore and therefore, the capital costs were not very high.

(d) The monopolistic position of OP was limited by the countervailing buying/bargaining power of its customers i.e. OMCs.

(e) The dominance of OP was not established as its ability to operate was constrained by several factors. Even though it enjoyed 100% market share, it could not dictate prices to OMCs as the same were being negotiated by the OMCs. It did not possess any power to prevent the entry of informant in the upstream terminalling service market. Furthermore, the OMCs could obtain imports from other ports and determine business volumes of OP.

(f) On the allegation of exorbitant pricing by OP, it was found that the provisional terminalling charge of Rs 1540/- per MT and bypass charges of Rs 200/- per MT and recommended by OMCs for approval of Ministry of Petroleum and Natural Gas. Further, the OMCs had been paying only 85% of the charges to OP since the rates were provisional. Therefore, OP was not found to be in contravention of sections 4(2)(a)(i) and 4(2)(a)(ii) of the Act.

8. On the allegation of informant regarding denial of access to informant for bypass of propane and butane blend, DG was of the opinion that OP furnished valid efficiency, technical and business justifications. Further, it was observed that the OP did not refuse access to any party including informant, but objected to piecemeal utilization of its infrastructure and raised legitimate concern of underutilization of carven facility. Therefore, OP was not found to be in contravention of any provisions of the Act.”

4. The investigation report was sent by the Commission to respondent No.3 which submitted an application under Regulation 4(5) of Competition Commission of India (General) Regulations, 2009 seeking to

cross-examine the witnesses whose evidence was recorded by Director General. On being required by the Commission, the respondent No. 2 submitted interrogatories and also sought discovery and production of certain documents from the petitioner and other witnesses examined during investigation by the Director General. The Commission noted that the witnesses of the petitioner had given testimony in respect of several technical and safety concern aspects, but the respondent No. 3 was not granted an opportunity to cross-examine those witnesses and, therefore, the testimonies of these witnesses and submissions made by the petitioner regarding several aspects had gone unrebutted. The Commission was of the view that informant/respondent No. 3 should have been allowed to cross-examine the witnesses so that a complete picture was available in respect of the safety and technical aspects raised by the petitioner. The Commission felt that cross-examination would have brought out the genuineness of the concerns and would also have given an opportunity to respondent No. 3 to show as to whether the concerns expressed by Director General in his report were real or false or exploded out of proportion. The Commission was also of the opinion that the informant/respondent No.3 should have been given an

opportunity to test the veracity of the witnesses so as to bring out the truth. The Commission accordingly referred the matter back to DG under Section 26(7) of the Act, for allowing the informant/respondent No. 3 to cross-examine the witnesses of the petitioner. The Director General was, however, directed to ensure that during cross-examination, the respondent No. 3 would ask only those questions which are relevant and germane to the issue raised in the matter and unnecessary questions shall not be allowed. Being aggrieved from the aforesaid order passed by the Commission, the petitioner is before this court by way of this writ petition.

5. It was contended by the learned senior counsel for the petitioner that the order directing further investigation in terms of sub-section (7) of Section 26, without giving opportunity of hearing to the petitioner, being in contravention of the principles of natural justice, the impugned order passed by the Commission is liable to be set aside and the matter should be remanded back to the Commission for hearing, not only respondent No.3, but also the petitioner, before the Commission takes a view on the report submitted by the Director General. This was also the contention of the learned senior counsel for the petitioner that he was not challenging

either the jurisdiction of the Commission to direct further investigation or allow cross-examination of witnesses by the opposite party, but, no such order could have been passed, without giving opportunity of hearing to the petitioner.

6. Section 26(1) of the Act, to the extent it is relevant, provides that on receipt, a reference or information under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter. Sub-section (2) of the said Section provides that the Director General shall, on receipt of direction for investigation, submit a report to the Commission on his finding. Sub-section (4), (5) and (7) of Section 26 reads as under:-

“4. The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.

5. If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director General.

7. If, after hearing the complainant, the Commission is of the opinion that

further inquiry is called for, it shall direct the complainant to proceed with the complaint.”

It would thus be seen that neither sub-section (1) provides for any opportunity of hearing to the person against whom the reference is made or information in terms of Section 19 is received nor does sub-section (7) provides for any such hearing to such a person, before further investigation is directed by the Commission. The learned senior counsel appearing for the petitioner, however, contended that since sub-section (5) requires the Commission to invite objections or suggestion from ‘the parties concerned’, it would be necessary for the Commission to invite objections or suggestions in respect of the report of the Director General where it is recommended that there was no contravention of the provisions of the Act, not only from the informant, but also from the person against whom the information was given to the Commission. In this regard, he also drew my attention to Regulation 2(i) of the Competition Commission of India (General) Regulations, 2009, which define the expression ‘party’ to include an enterprise against whom any enquiry or proceeding is instituted. Per contra, the learned counsel for the respondents contended that no notice to the person against whom the information is received is envisaged before directing further investigation

and the definition given to the expression 'party' in Regulation (2)(i) of the Competition Commission of India (General) Regulations, 2009 cannot be applied for the purpose of the sub-section (7) of Section 26.

7. A careful analysis of sub-section (5) of Section 26 clearly indicates that no notice to the person against whom a reference is made or information is provided to the Commission is envisaged, before the Commission considers the report of the Director General recommending that there was no contravention of the provisions of the Act. The expression 'Central Government', 'State Government', 'Statutory Authority' and 'the parties concerned' have been used disjunctively in the sub-section. The word 'or' and not the word 'and' has been used between the expression 'Statutory Authority' and 'the parties'. Had the Legislature intended inviting objections or suggestions even from the person against whom the complaint is made, the word 'and' and not the word 'or' would have been used between the expression 'Statutory Authority' or 'the parties'. It can hardly be disputed that in case investigation is ordered on receipt of a reference from the Central Government or the State Government or a Statutory Authority and the Director General recommends that there is no contravention of provisions

of the Act, the Commission will have to invite objections or suggestions from the Central Government or the State Government or the Statutory Authority, as the case may be, before it takes a view on such report. Had the intention of the Legislature been that, in such a case, besides hearing the Central Government, State Government or the Statutory Authority, as the case may be, the Commission should also hear the person against whom the reference is made, it would not have used the word 'or' and would have used the word 'and' between the expressions 'Statutory Authority' and 'the parties'. Therefore, on a fair reading of sub-section (5) of Section 26, I cannot accept the contention that the said sub-section envisages notice not only to informant, but also to the person against whom the information is given or reference is made. The definition of the expression 'party' given in Competition Commission of India (General) Regulations, 2009, therefore, cannot be used for the purpose of interpreting sub-section (5) of Section 26 of the Act.

8. Sub-Section (1) of Section 26, which enables the Commission to direct investigation by Director General on its finding a prima facie case, came to be considered by Supreme Court in **Competition Commission of**

India vs. Steel Authority of India and Another (2010) 10 SCC 744 and

the following view taken by the Apex Court in this regard is relevant:-

“When such information is received, the Commission is expected to satisfy itself and express its opinion that a prima facie case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any 'such person', for rendering assistance or produce such records, as the Commission may consider appropriate.”

9. During the course of arguments, relying upon the following observations made in **Smt. Maneka Gandhi versus Union of India and another** [AIR 1978 SC 597)], the learned counsel for the petitioner contended that the requirement of giving hearing, which is a facet of the principles of natural justice, is otherwise implicit in sub section (7) of section 26 and in the absence of such hearing, the procedure adopted by the Commission would be unreasonable and unfair thereby violating Article 14 of the Constitution:

“56....The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 14 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

57....Now, it is true that there is no express provision in the Passports Act, 1967 which requires that the *audi alteram partem* rule should be followed before impounding a passport, but that is not conclusive of the question, if the statute makes itself clear on this point, then no more question arises. But even when the statute is silent the law may in a given cases make an implication and apply the principle stated by Byles, J., in *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. N.S. 180. “A long course of decisions, beginning with *Dr. Bentley’s case* (1723) 1 Str 557 and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature”. The principle of *audi alteram partem* which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, *Nemo Judex in Sua Causa* and *audi alteram partem*.”

10. As indicated earlier, the Supreme Court clearly held in *Steel Authority of India* (supra), that no notice is required to be given to the informant or the affected party before the Commission forms an opinion as to whether a *prima facie* case exists from the record produced before it or not. If the law does not mandate issue of notice to the affected party before directing investigation to be made by the Director General, there would be no reason to imply such a notice before directing further

investigation in exercise of the powers conferred upon the Commission under sub section (7) of the said Section. As far as the affected party is concerned, there is no difference between direction for investigation or direction for further investigation, since any further investigation by the Director General would only be in continuation of the investigation carried out earlier by it.

11. Though, the principles of natural justice do necessitates hearing the affected party before a quasi-judicial or even an administrative decision which adversely affects his interest is taken, the order directing further investigation cannot be said to be an order prejudicially affecting the person against whom information is provided or a reference is made to the Commission. An order of this nature does not visit the person against whom information is provided or a reference is made to the Commission, with any civil consequences nor does it in any manner impair any legal right of such a person. Therefore, the principles of *audi alteram partem* would have no application at this stage. I find no merit in the contention that the procedure adopted by the Commission would be rendered unfair or unreasonableness or arbitrary in case no notice or hearing to the affected party is given before directing further investigation under sub

section (7) of section 26 of the Act. In fact, even an accused in a criminal case is not entitled to a hearing before a Magistrate passes an order for further investigation in exercise of the powers conferred upon him by sub section (8) of section 173 of Code of Criminal Procedure. The person against whom an information is given or a reference is made to the Commission in terms of section 19 of the Act cannot be placed on a footing higher than that of an accused in a criminal trial.

12. For the reasons stated hereinabove, I find no merit in the contention that the Commission, before directing further investigation by the Director General, in exercise of the powers conferred upon it by sub section (7) of Section 26 of the Act, it was required to give a notice or hearing to the petitioner.

13. Regulation 41(5) of the Competition Commission of India (General) Regulation, 2009 confers upon the Commission or the Director General, to direct evidence by a party to be led by way of oral submissions and if deemed necessary or expedient grant an opportunity to other party or parties, as the case may be, to cross examine the person giving evidence. Thus, the opportunity to cross examine the witness is to be given to the opposite party when a party before the Commission or the

Director General is allowed to lead evidence by way of oral submissions. I find that the Commission has permitted the informant to cross examine only the witness of the petitioner and the cross examination has been restricted to the questions which are relevant and germane to the issue raised in the matter. Obviously, such cross examination can take place only if further investigation is directed by the Commission.

I find no merit in the writ petition and the same is hereby dismissed. No orders as to costs.

V.K.JAIN, J

SEPTEMBER 02, 2013
BG/RD