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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 10411/2016 and CM Nos. 40871/2016, 17613/2017 & 32079/2017**

UTTRAKHAND AGRICULTURAL PRODUCE
MARKETING BOARD & ORS

..... Petitioners

Through: Mr Virendra Rawat, Advocate.

versus

COMPETITION COMMISSION OF
INDIA & ANR

..... Respondents

Through: Mr Zoheb Hossain, Advocate for
CCI/R-1.
Mr V.P. Singh and Mr Raghav Seth,
Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
22.09.2017

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VIBHU BAKHRU, J

1. The petitioner no.1 is a body corporate which is entrusted with the functioning of developing and regulating 'Mandies' in the State of Uttarakhand. Petitioner nos. 2 & 3 are companies wholly owned by the Government of Uttarakhand and are, *inter alia*, charged with the function of developing tourism in the region of *Garhwal* and *Kumaon* respectively.

2. The petitioners have filed the present petition, *inter alia*, impugning an order dated 19.07.2016 (hereafter 'the impugned order') passed by the Competition Commission of India (hereafter 'CCI') in Case no. 2 of 2016, under Section 26 (1) of the Competition Act, 2002 (hereafter 'the Act'). The

petitioners also assail an order dated 31.08.2016 passed by the CCI rejecting the petitioners application for recall/review the impugned order.

3. The impugned order was passed on the basis of a complaint made by respondent no.2 (hereafter 'the respondent association') wherein it was alleged that petitioners had placed supply orders on alcoholic beverage manufacturers in an arbitrary and discriminatory manner, with no relation to the consumer demand in the market. It was alleged that the petitioners enjoyed complete monopoly in distribution of IMFL in the State of Uttarakhand and the actions of the petitioners had resulted in denial of market access to certain members of the respondent association. It was also alleged that in view of the discriminatory actions on the part of the petitioners, market share of the members of the respondent association in the State of Uttarakhand, had fallen significantly. On the basis of the said complaint - treated as information under Section 19(1) of the Act - the CCI formed a *prima facie* opinion that the petitioners had restricted production by Indian Made Foreign Liquor (hereafter 'IMFL') resulting in denial of market access in contravention of the provisions of Section (4)(2)(b)(i) and Section 4(2)(c) of the Act. Consequently, by the impugned order, the CCI has directed the Director General (hereafter 'the DG') to conduct an investigation in the matter.

4. The petitioners claim that the impugned order is without jurisdiction as the petitioners are administering the liquor policy of the State of Uttarakhand and, therefore, are not *enterprises* within the meaning of Section 2(h) of the Act. The petitioners further contend that the subject matter of complaint has already been adjudicated by the High Court of

Uttarakhand and, therefore, the proceedings before the CCI are barred by the principles of *res judicata*.

5. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

5.1 The State Government of Uttarakhand, by a notification dated 27.04.2015, notified the Liquor Wholesale Order containing its policy for procurement and distribution of liquor in the State of Uttarakhand. In terms of the said policy, petitioner no.1 was made the wholesale licensee of foreign liquor including IMFL and petitioner nos. 2 and 3 were sub-licensees for the districts falling within their respective regions (seven districts in Gharwal region and six districts in Kumaon region).

5.2 The Liquor Wholesale Order dated 27.04.2015 was challenged before the High Court of Uttarakhand in multiple petitions filed under Article 226 of the Constitution of India, *inter alia*, on the ground that it was outside the scope of the relevant statutes. The said petitions were disposed of by the Division Bench of the Uttarakhand High Court by a common judgment dated 06.08.2016 rendered in ***Gurvinder Singh Chadha v. Chief Secretary, State of Uttarakhand and others : W.P. (PIL) No. 73/2015*** and other connected matters; the high court rejected the challenge laid by the petitioners therein and upheld the Liquor Wholesale Order dated 27.04.2015. The Special Leave Petition (SLP (C) NO. 25297/2015) preferred to challenge the aforesaid judgement dated 06.08.2016 before the Supreme Court of India was also rejected by the Supreme Court by an order dated 01.03.2016.

5.3 The petitioners state that since they were assigned the task of

distribution of liquor for the first time, there were some teething problems in relation to placement of orders with the liquor manufacturers and adequate stocks of various brands of liquor were not sufficiently procured/distributed.

5.4 M/s United Spirits Ltd. (hereafter 'USL') and Pernod Recard India Pvt. Ltd. (hereafter 'Pernod') filed separate writ petitions in the High Court of Uttarakhand [W.P. No. 2932 of 2015 (M/S) and W.P. No. 2925 of 2015 (M/S)], *inter alia*, praying for direction to the Government of Uttarakhand / Excise Commissioner to lay down a detailed mechanism relating to procurement of liquor at all levels in the value chain, to ensure that the concerned parties act in an "*efficient, transparent, fair, reasonable and unbiased manner*". USL also not prayed that directions be issued to maintain the requisite stocks of liquor commensurate with the actual consumer demand. In the petition filed by USL it, *inter alia*, alleged that its market share had fallen from 3,56,106 cases during the month of August - October 2014 and 10,776 cases during the month of August-October 2015, thus, leading to a fall from 61% market share to 2% share. USL and Pernod also alleged that petitioner no.1 was acting in an arbitrary, whimsical manner to the prejudice of certain suppliers, retailers, consumers and the market as a whole.

5.5 After examining the rival contentions, the Uttarakhand High Court held that the petitioners had made out a case of arbitrariness and issued directions to the Additional Excise Commissioner (Licensing) and District Collector to fix minimum stocks (brand wise) of foreign liquor, to be maintained at all times by petitioners on the basis of the orders placed by retailers and commensurate with the consumer demand. The court further held that till

the exercise was completed, orders would be placed on the USL and Pernod for the months of December 2015 and January 2016 corresponding to the sale period of December 2014 and January 2015 and so forth.

5.6 Thereafter, the Excise Department issued a notice dated 31.12.2015 laying down the criteria of placing orders. The petitioners claim that thereafter, the petitioners have been diligently following the order dated 23.12.2015, passed by the High Court of Uttarakhand and the directions issued in the Excise Department in the notice dated 31.12.2016.

5.7 On 07.01.2016, respondent no.2 filed an information under Section 19(1)(a) of the Act alleging that the petitioners were violating the provisions of Section 4 of the Act by not procuring, supplying and distributing IMFL in accordance with consumer demand.

5.8 The CCI acknowledged the receipt of the aforesaid information and issued a notice to the petitioner fixing a preliminary hearing on 07.04.2016. Subsequently, by an order dated 23.03.2016, the preliminary hearing scheduled on 07.04.2016 was deferred to 28.04.2016. The petitioner alleges that although their Advocate had filed a *vakalatnama* on 18.04.2016 before the CCI, but the change in the date of holding the preliminary conference to 28.04.2016 or the subsequent proceedings were not received by the petitioners.

5.9 The CCI after examining the information, passed the impugned order on 19.07.2016. Thereafter, the petitioners filed an application dated 16.08.2016 under Sections 36 and 38 of the Act for recalling the impugned order. However, that application was also dismissed by the order dated

31.08.2016 (which is also impugned in the present petition.)

Submissions

6. Mr Virendra Rawat, learned counsel appearing for the petitioners advanced contentions on two fronts. First, he submitted that the complaint being examined by the CCI had already been considered by the High Court of Uttarakhand in writ petitions filed by USL and Pernod and the court after examining the matter had issued directions for setting up mechanism for procurement and distribution of foreign liquor. He contended that since the issue had already been considered by the High court, the CCI could not proceed with the information on the principles of *res judicata*.

7. Second, he submitted that the petitioners were only acting as agents of the State of Uttarakhand and, thus, neither of them could be considered as an enterprise within the meaning of Section 2(h) of the Act.

8. Mr Zoheb Hossain, learned counsel appearing for CCI and Mr V.P. Singh, learned counsel appearing for respondent no.2 countered the submissions advanced on behalf of the petitioners. Mr V.P. Singh, learned counsel appearing for respondent no.2 referred to the decision of the Supreme Court in ***Competition Commission of India v. Steel Authority of India Ltd. and Anr.: (2010) 10 SCC 744*** and on the strength of the said decision contended that an order under Section 26(1) of the Act was only an administrative order and did not effectively determine any rights and obligations of the parties. He urged that under the scheme of the Act, such orders were not liable to be interfered with.

9. Next, he referred to the decision of the Supreme Court in ***Agricultural Produce Market Committee v. Ashok Harikuni and Anr: (2000) 8 SCC 61*** in support of his contention that even though the petitioners were performing a function entrusted by the State of Uttarakhand, the petitioners were not discharging any sovereign function and, therefore, fell within the scope of the term 'enterprise' as defined under Section 2(h) of the Act. Lastly, Mr Singh contended that the principles of *res judicata* did not apply. He referred to the prayers made in the writ petitions filed by USL and Pernod and the information provided by the respondent association to the CCI and pointed out that the reliefs sought in the two proceedings were entirely different.

Reasoning and Conclusion

10. The first and foremost question to be addressed is whether the petitioners are excluded from the scope of the term 'enterprise' as defined under Section 2(h) of the Act. Section 2(h) of the Act is set out below:-

"2(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

11. A plain reading of Section 2(h) of the Act indicates that an enterprise would also include a department of the Government, which is engaged in any activity relating to production, storage, supply, distribution, acquisition or control of articles or goods. Indisputably, the petitioners were charged with the function of supply and distribution of IMFL (the manner in which they conducted such business is the subject matter of information provided by respondent no.2). The activity carried on by the petitioners is clearly not relatable to any sovereign function of the State of Uttarakhand and, therefore, the petitioners are not excluded from the ambit of Section 2(h) of the Act. The activities of the Government which are relatable to sovereign functions of the Government including all activities carried on by the departments of Central Government dealing with atomic energy, currency, defence and space fall within the exclusionary provision of Section 2(h) of the Act. However, distribution of liquor cannot by stretch be considered as one of the activities falling within the above exclusionary provision.

12. In ***Agricultural Produce Marketing Committee v. Ashok Hariuni*** (*supra*), the Supreme Court had explained the meaning of sovereign function in the following words:-

"32. So, sovereign function in the new sense may have very wide ramification but essentially sovereign functions are primary inalienable functions which only State could exercise. Thus, various functions of the State, may be ramifications of 'sovereignty' but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain,

maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly of the State would not make any such enterprise sovereign in nature. Absence of profit making or mere quid pro would also not make such enterprise to be outside the ambit of "industry" as also in State of Bombay and Ors. case"

13. In *Union of India v. Competition Commission of India & Ors.*: 187 (2012) DLT 697, a Coordinate Bench of this Court had considered a similar issue raised by the Indian Railways. In that case, the CCI had rejected the contention of Ministry of Railways that it was not an enterprise within the meaning of Section 2(h) of the Act and had entertained complaint under Section 19(1) of the Act. Union of India through Ministry of Railways had assailed the order passed and challenged the decision of the CCI holding the Indian Railways to be an enterprise within the meaning of Section 2(h) of the Act. Rejecting the challenge of the Union of India, this Court had held as under:-

"19. It is not the petitioner's contention that it is not a department of the Government. It is also not the petitioner's contention that it is not engaged in an activity relating to provision of services, *inter alia*, of transportation of goods by rail road. Therefore, unless the petitioner's aforesaid activity can be classified as "relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence & space", it cannot avoid being classified as an 'enterprise' under Section 2(h) of the Act. If it is

an 'enterprise' under Section 2(h) of the Act, the Commission gets jurisdiction under Chapter IV of the Act."

14. In view of the above, the contention that the petitioners are not enterprises within the meaning of Section 2(h) of the Act is unmerited and is rejected as such.

15. The petitioners' contention that the proceedings before the CCI are not sustainable on the principles of *res judicata*, is also without merit.

16. First of all, the writ petitions [W.P.No. 2932 of 2015 (M/S) and W.P. No. 2925 of 2015 (M/S)] referred to by the petitioners were filed by two independent manufacturers - USL and Pernod - *inter alia*, complaining that the conduct of the petitioners was arbitrary and unreasonable. The information on the basis of which the CCI has passed the impugned order was filed by respondent no. 2, which is an association of manufacturers/dealers and thus, the parties in the two proceedings are not the same.

17. More importantly, the scope of the petitions filed before the Uttarakhand High Court and the matter brought before CCI are materially different. The Uttarakhand High Court was not concerned with an abuse of dominant position. Whereas the allegations before the court related to the arbitrary and unreasonable manner in which the petitioners and the State of Uttarakhand were administering the procurement of liquor; the scope of proceedings before the CCI relate to whether the conduct of the petitioners falls foul of certain provisions of section 4 of the Act.

18. At this stage it is also relevant to refer to section 62 of the Act, which reads as under :

“The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”

Thus, notwithstanding any other remedy availed of by the respondent or any of its constituent, the jurisdiction of CCI to proceed under the Act cannot be curtailed.

19. The scope of proceedings under the Act being materially different - and in addition to the provisions of other statutes - the same cannot be stated to be precluded on the principle of *res judicata*. It is also relevant to state that the findings of the Uttarakhand High Court are not contrary to the facts as asserted by the respondent association. Therefore, even if the respondent association was party to the petition before the Uttarakhand High Court (which it was not) the information provided by it to CCI or the proceedings commenced by the CCI pursuant thereto, are not hit by the principle of issue estoppel.

20. Merely because multiple remedies arise from a set of facts or multiple consequences arise from the same set of facts does not prevent recourse to more than one proceedings. Unless the proceedings are mutually destructive - which in this case they are not - recourse to multiple proceedings on the same set of facts is not barred (See: ***DCM Shriram Industries v H.B. Stock Holdings Ltd: 2014 (184) Comp Cases 275***).

21. This Court also does not find that the impugned order to be perverse

or wholly without jurisdiction and, thus, no interference is warranted in these proceedings. In *Steel Authority of India (supra)*, the Supreme Court had explained that the order passed under Section 26(1) of the Act does not effectively determine the rights and obligations of the party. The Court had also examined the scheme of the Act and held that the legislative intent was not to permit any appeal against the order passed under Section 26(1) of the Act.

22. In this view, this Court is not persuaded to interfere with the impugned order. The petition and the pending applications are, accordingly, dismissed.

SEPTEMBER 22, 2017
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VIBHU BAKHRU, J

