

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

Date of Decision: October 17, 2017

+ LPA 674/2017

UTTARAKHAND AGRICULTURAL PRODUCE MARKETING
BOARD & ORS. Appellants

Through: Mr. Avtar Singh Rawat, Senior
Advocate & Mr. Virender Rawat, Advocate

Versus

COMPETITION COMMISSION OF INDIA & ANR.

..... Respondents

Through: Mr. Sanjay Jain, ASG &
Mr. Zoheb Hussain, Mr. Ved Prakash &
Ms. Rehea, Advocate for respondent No.1
Mr. V.P. Singh, Mr. Raghav & Mr. Aishwarya
Modi, Advocate for respondent No.2

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

S. RAVINDRA BHAT, J. (OPEN COURT)

Caveat No.905/2017

Caveator/ respondent No.2 is represented through counsel.

Caveat is discharged.

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1. The Uttarakhand Agricultural Produce Marketing Board impugnes an order of the learned Single Judge rejecting its writ petition, challenging an order of the Competition Commission of India (CCI)

made under Section 26(1) of The Competition Act, 2002 (*hereinafter referred to as 'the Act'*) expressing *prima facie* opinion that the Board had restricted production by Indian Made Foreign Liquor (IMFL), resulting in denial of marketing access and thus, provisions of Section 4(2) of the Act were attracted. The CCI required the Director General to investigate into the matter and to report to it. The Single Judge was of the opinion that the order made under Section 26 of the Act was not adjudicated and merely an administrative one, in aid of investigation and that it did not entail any adverse consequences. The impugned judgment relied upon the Supreme Court's decision in *Competition Commission of India vs. Steel Authority of India Ltd. & anr.* (2010) 10 SCC 744 and also distinguished the decision in *Agricultural Produce Market Committee Vs. Ashok Harikuni & anr.* (2000) 8 SCC 61. The Single Judge repelled the contention that the liquor business conducted by the State was part of its sovereign functions and in doing so, he restricted the observations in *Ashok Harikuni (supra)* to the effect that even though the appellants were performing a function entrusted by the State, they were not discharging a sovereign function. The learned Single Judge further noticed the judgment in *Union of India v. Competition Commission of India & ors* (2012) 187 DLT 697 where the Railways was held to be amenable to the jurisdiction of the Competition Commission. Thereafter, the Single Judge delineated the functions of the CCI, in the context of arguments that the policy impugned before the Commissioner was upheld by the Uttarakhand High Court with the following observations:-

“17. Before I consider the submissions of the learned ASG in relation to the meaning of the expression 'enterprise'

contained in Section 2(h) of the Act, I may note that by referring to the various reliefs sought by respondent No. 2 before the Commission; the clauses of the agreement between the parties and by reference to the statutory Rules aforesaid, the petitioner is confusing the issue arising for determination, i.e., whether the petitioner is an 'enterprise' under Section 2(h) of the Act. These submissions of Mr. Parasaran, really, touch upon the merit of the complaint and proceedings before the Commission. They do not have a bearing on the issue of jurisdiction of the Commission to conduct an investigation and deal with the information furnished by respondent No. 2. These are all defences that the petitioner may raise before the Commission in support of its defence that it is not abusing its position of dominance or that its agreement with respondent No. 2 is not in contravention of the provisions of Section 3(1) of the Act.

18. *Section 2(h) of the Act defines the expression 'enterprise' in the following manner:*

"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."

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.

20. *The Commission has taken note of Section 54 of the Act, which provides that the Central Government may, by notification, exempt from the application of the Act, or any provision thereof, and for such period as it may specify in such notification, inter alia, "any enterprise which performs a sovereign function on behalf of the Central Government or a State Government" (See Section 54(c)). Pertinently, no notification has been issued by the Central Government in relation to the services rendered by the Indian Railways. Even in relation to an enterprise which is engaged in activity, including an activity relatable to the sovereign function of the Government, the Central Government may grant exemption only in respect of activity relatable to sovereign functions. Therefore, an enterprise may perform some sovereign functions, while other functions performed by it, and the activities undertaken by it, may not refer to sovereign functions. The exemption under Section 54 could be granted in relation to the activities relatable to sovereign functions of the Government, and not in relation to all the activities of such an enterprise. Pertinently; there is no notification issued under Section 54 either under Clause (c), or under the proviso. This clearly shows that the Central Government does not consider any of the activities of the petitioner as relatable to sovereign functions.*

21. *Dr. Singhvi has pointed out and, in my view, rightly so that the Supreme Court has clearly held in Sri Ladulal Jain (supra) that when the Government runs the Railways for providing quick and cheap transport for people and goods*

and for strategic reasons, it cannot be said that it is engaged in an activity of the State as a sovereign body. Paragraphs 10 & 11 from this decision read as follows:

“10. The fact that the Government runs the railways for providing quick and cheap transport for the people and goods and for strategic reasons will not convert what amounts to carrying on of a business into an activity of the State as a sovereign body.

11. Article 298 of the Constitution provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and cl. (6) of Art. 19 provides that nothing in sub-clause (g) of clause (1) of that Article shall prevent the State from making any law relating to the carrying on by the State or by a corporation owned-or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. These provisions clearly indicate that the State can carry on business and can even exclude citizens completely or partially from carrying on that business. Running of railways is a business. That is not denied. Private companies and individuals carried on the business of running railways, prior to the State taking them over. The only question then is whether the running of railways, ceases to be a business when they are run by Government. There appears to be no good reason to hold that it is so. It is the nature of the activity which defines its character. Running of railways is such an activity which comes within the expression ‘business’. The fact as to who runs it and with what motive cannot affect it.”

2. Learned Counsel urged that the Uttarakhand Government

procurement guidelines made by it and the rules formulated subsequently, were the result of a cabinet decision and that constitute a sovereign function. He urged that the Board was not a free agent with respect to procurement of brands of liquor, which was owned by agents before the Commission. He also urged that the Commission's order, virtually reopened the issue that was concluded by the Uttarakhand High Court.

3. This Court during the hearing observed that it is always open to the appellant, especially the Board to state its position in the course of the investigation proceedings initiated under Section 26(1) of the Act and that this liberty is nowhere curtailed by the Single Judge's order or for that matter the order of the Commission itself. This liberty is reserved. This Court is of the opinion that there is no infirmity in the observations and findings returned by the learned Single Judge. The judgment in *Competition Commission of India vs. Steel Authority (Supra)* states that an order under Section 26(1) of the Act is an administrative one and does not in any manner result in adverse consequences or determine the rights and obligations of the parties. The State of Uttarakhand formulated a policy and it is fashioned in such a manner that State officials, vested with exclusive powers of taking decisions to dictate as to what brands of liquor are to be procured and distributed to retailers and sold to the consumers. These functions cannot *per se* be called a sovereign function. The observations of the learned Single Judge with respect to what constituted a sovereign function by relying upon the judgment in *Banglore Water Supply and Sewerage Board v. A. Rajappa & ors.* 1978 AIR 548 and *Ashok Harikuni (Supra)*, are apt. When the State or its agency, who are vested with exclusive rights or monopoly rights,

conducts trade or business, *per se* such activity cannot fall within the description of or cannot be characterized as sovereign functions. It is only when activities, such as printing of notes, minting, production of other national security related services, articles or goods etc. are involved and are sought to be regulated, would it be an issue as to whether such trade or business are sovereign functions of the Government or State entity. In this regard, *The Competition Act, 2002* itself guides the discussion when it defines *enterprise*. It includes all manner of activities 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 Central Government dealing with atomic energy, currency, defence and space*”. The general explanation of sovereign functions, which to an extent amplifies with reference to the four excluded categories are discerned from those.

4. In the present case, the State of Uttarakhand, like all other States in the country, have created monopolies by canalizing liquor procurement. Therefore, the Government departments or other public agencies or entities that may be quasi public, cannot be described as engaged in sovereign functions.

5. So far as the assertion with respect to the policy having been upheld by the Uttarakhand High Court is concerned, this Court is of the opinion that the upholding of the policy was on an application of the parameters of judicial review. The wisdom of the policy or its impact with respect to position of domination or abuse thereof, could not have been the subject matter of Court’s jurisdiction under Article 226 of the Constitution. It is precisely to oversee those aspects that the Competition

Commission has been created.

6. In view of the above discussion, this Court finds no merit in the appeal. At the same time, it is open to the appellant to raise all contentions in defence available to it in the ongoing investigation by the Director General.

7. The appeal and pending applications are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

OCTOBER 17, 2017

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