

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.04.2018

DELIVERED ON : 23.07.2018

CORAM:

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
and
THE HON'BLE MR.JUSTICE RMT.TEEKAA RAMAN

W.A.No.340 of 2015

and

M.P.No.1 of 2015

Hyundai Motor India Limited,
rep. by Mr.R.Sethuraman,
Director,
SIPCOT, Irrungattukottai,
Sriperumbudur,
Kancheepuram - 602 117.

... Appellant/Petitioner

Vs

1. The Competition Commission of India
(Competition Act, 2002)
7th Floor, HT House,
18-12 K.G.Marg,
New Delhi 110 001.
2. The Director General,
The Competition Commission of India,
B Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.
3. Additional Director General,
The Competition Commission of India,
B Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.

... Respondents /Respondents

Prayer: Writ Appeal filed under Clause 15 of Letters Patent,
against the order dated 04.02.2015 made in W.P.Nos.31808 and
31809 of 2012.

W.P.Nos.31808 of 2012

Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of Prohibition Restraining the first respondent from continuing the impugned proceedings in Case No.03/2011 in File No.1(3)/ 2011-Sectt dated 26.4.2011 as against the petitioner and quash the same as the same is without jurisdiction without authority of law, illegal unconstitutional and in violation of principles of natural justice

W.P.Nos.31809 of 2012

Petition filed under Article 226 of the Constitution of India, to call for the records relating to the impugned Notice of the third respondent in File No.DG/CCI/ IW/1/ 74/2011 dated 4.5.2011 dated 04/05/2011 and quash the same as the same is without jurisdiction, unconstitutional, without authority of law illegal null and void and against the principles of natural justice and to direct the first respondent not to make use of the report if any submitted by the third respondent in so far as the petitioner is concerned.

For Appellant : Mr.Vijay Narayan, Senior Counsel
for Mr.A.R.Karunakaran
for M/s. IPN Associates

For Respondents: Mr.G.Rajagopalan,
Additional Solicitor General of India
Assisted by Mr.P.Mahadevan,
Central Government Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by
RMT. TEEKAA RAMAN,J.,)

The unsuccessful petitioner in W.P.Nos.31808 and 31809 of 2012 is the appellant herein.

2. Challenging the order of dismissal passed by the learned Single Judge of this Court in W.P.No.31808 of 2012, dated 04.02.2015, the petitioner viz., Hyundai Motor India Limited has preferred this writ appeal.

3. The prayer in W.P.No.31808 of 2012 is for issuance of a Writ of Prohibition restraining the first respondent from continuing the impugned proceedings in Case No.03/2011 in File No.1(3)/2011-Sectt., dated 26.04.2011 as against the writ petitioner/appellant herein and quash the same as without

jurisdiction, without authority of law, illegal, unconstitutional and in violation of the principles of natural justice.

4. The prayer in W.P.No.31809 of 2012 is for issuance of a writ of Certiorarified Mandamus to call for the records relating to the impugned Notice of the third respondent in File No.DG/CCI/IW/1/74/2011 dated 04.05.2011 and to quash the same as without jurisdiction, unconstitutional, without authority of law, illegal, null and void and against the principles of natural justice and to direct the first respondent not to make use of the report if any submitted by the third respondent in so far as the writ petitioner/appellant herein is concerned.

5. The brief facts of the case that are necessary for the disposal of this writ appeal are that one Mr.Shamsher Kataria of New Delhi lodged a complaint on 17.01.2011 with the Competition Commission of India, under Sections 3 and 4 read with Section 19 (1)(a) of the Competition Act, 2002, alleging abuse of dominant position and the practice of anti-competitive activities by three Automobile Manufacturers namely: (1) Honda Sael Cars India Limited; (2) Volkswagen India Private Limited; and (3) Fiat India Automobiles Limited. In the said complaint, the complainant Mr.Shamsher Kataria sought for the reliefs of (1) an enquiry into the trade practices of the respondents and/or any other vehicle manufacturer; (2) a restraint order against the respondents to cease and desist from restrictive, unfair and monopolistic trade practices and (iii) other appropriate directions. The complainant also filed a supplementary complaint on 27.01.2011.

6. The said complaint was taken on file by the Competition Commission after observing the formalities under Section 26(1) of the Competition Act, 2002 (hereinafter called as the Act) and the Competition Commission has directed the Director General of Investigation to conduct an investigation into the matter and to file a report within the stipulated time. After observing the procedures therein, the Additional Director General has filed a report dated 19.04.2011 stating that the investigation made by him revealed that similar practices as alleged in the complaint are adopted by other car manufacturers in India in the areas of "after sales service" and "procurement of spare parts" and thus, the Additional Director General sought permission from the Competition Commission to expand the scope of the investigation to cover other car manufacturers not specifically mentioned in the complaint by Mr.Shamsher Kataria.

7. Based upon the said report of the Additional Director General, the first respondent/Competition Commission of India, by an order dated 26.04.2011, granted permission by approving

the request wherein it was actually indicated that whenever an investigation is ordered, it need not be confined to the parties mentioned in the information given by the above said Mr. Shamsher Kataria.

8. Thereafter, it appears that the Director General of Competition Commission, the second respondent herein has issued a notice dated 04.05.2011, to the appellant/Hyundai Motor India Limited, under Section 36(2) read with Section 41(2) of the Competition Act, 2002. On receipt of the said communication, the appellant appears to have sought for certain copies and subsequently, the appellant has filed the above two writ petitions viz., W.P.Nos.31808 and 31809 of 2012, challenging the order of the Competition Commission dated 26.04.2011 expanding the scope of the investigation over and above the three car manufacturing Companies and the notice issued by the Competition Commission to appear for investigation under Section 36(2) read with Section 41(2) of the Competition Act, 2002. Subsequently, yet another writ petition in W.P.No.26488 of 2013 was filed by yet another car manufacturer by name Nissan Motors India Private Limited, challenging the very same order of the Competition Commission dated 26.04.2011 passed in the very same Case No.03/2011, allowing the request of the Director General to expand the scope of the investigation. Therefore, the said writ petition was also tagged along with the two writ petitions filed by Hyundai Motor India Limited. After contest, by an order dated 30.06.2014, all the three writ petitions were dismissed, against which, one of the parties namely, Nissan Motors India Private Limited has preferred an Intra Court Appeal in W.A.No.1021 of 2014 which was allowed by a Division Bench of this Court by an order dated 06.08.2014, on the ground that as against the order expanding the scope of investigation passed by the Competition Commission, no appeal would lie to the Appellate Tribunal under Section 53-B of the Competition Act, 2002 and the Division Bench remitted the matter back to the learned Single Judge for disposal in accordance with law. But before the writ petition could be taken up for final disposal by the learned single Judge, in the interregnum period, it appears that the Competition Commission passed a final order dated 25.08.2014 as against 14 Car Manufacturing Companies including this appellant car company also.

9. It would be relevant to put forth here, the three points raised before the learned single Judge which reads thus:-

"(i) that the Director General of the Competition Commission has no suo motu power to initiate an investigation;

(ii) that even for the Commission to order an investigation, the formation of an opinion regarding the prima facie case is a sine quo non; and

(iii) that the Director General has overstepped the jurisdiction vested in him by law.

10. It appears from the records that the learned single Judge has re-framed the point for determination as to whether on the facts and circumstances of the case in hand, what was done by the Director General, the second respondent herein could amount to suo motu initiation of the investigation or not.

11. After discussing the complaint and also the findings therein and also taking note of the contents of the complaint given by Mr. Shamsher Kataria, the learned single Judge has held that in view of the clear terms contained in the complaint given by Mr. Shamsher Kataria, the investigation has to cover any other vehicle manufacturers. Therefore, the very contention of the main complaint was not only against three manufacturers. The learned single Judge, in respect of the first contention held that the permission to expand the scope of the enquiry cannot be construed as the initiation of investigation suo motu by the Director General.

12. In respect of the second contention that even if the Commission is to order for an investigation, there must be a "formation of an opinion" regarding the existence of a prima facie case, Section 26(1) of the Act requires the Commission to direct the second respondent/Director General to investigate into the matter, and for the same, it has to record reasons for the formation of opinion, which is a sine qua non. Hence, the second contention was re-framed as to whether the impugned order dated 26.04.2011 is not in accordance with the procedures prescribed by Section 26 (1) of the Act.

13. The learned single Judge, after taking note of the amendment of proviso inserted under sub Section 1 of Section 26 in the Competition Amendment Act and applying the same to the facts and circumstances of the case, held that the same cannot be considered as not in accordance with Section 26(1) of the Act and thus, the learned single Judge has considered the information furnished by Mr. Shamsher Kataria on 17.01.2011 and the supplementary complaint given on 27.01.2011 and the memo dated 19.04.2011 placed by the second respondent/Director General as an additional information before the Commission.

14. In respect of the contention as to whether the second respondent/Director General has to confine his report only to

the allegations made in the information or the reference received by the Commission and that he is not entitled to travel outside the scope of the same, the learned single Judge, after referring to the decision of the Delhi High Court in the case of Grasim Industries Limited Vs. Competition Commission of India reported in [2014 (124) SCL 79 (Delhi)], came to the conclusion that the Director General, the second respondent herein cannot initiate an investigation suo motu and held that the Act does not enable the second respondent/Director General to initiate an investigation suo motu for the reasons recorded in the impugned order, under challenge, also rejected the third contention.

15. Challenging the correctness of the above said findings, the writ petitioner has preferred the writ appeal and the very same three points were re-agitated by Mr.Vijay Narayan, learned Senior Counsel appearing for the appellant and Mr.G.Rajagopalan, assisted by Mr.P.Mahadevan, learned Central Government Standing Counsel.

16. Heard Mr.Vijay Narayan, learned Senior Counsel appearing for the appellant and Mr.R.Gajagopalan, learned Additional Solicitor General of India assisted by Mr.P.Mahadevan, learned Central Government Standing Counsel appearing for the respondents.

17. At the risk of repetition, however for the sake of clarity, we are again address these three points urged by the appellant as under:-

[i] the genesis to the present writ appeal is a complaint dated 17.01.2011 filed by one Mr.Shamsher Kataria, before the Competition Commission of India alleging violation of Sections 3 and 4 of the Competition Act, 2002 by named three car manufacturing companies, viz., (i) Fiat (ii) Volkswagen (iii) Honda and/or any other vehicle manufacturer (un-named).

[ii] It was alleged that the activities of the said companies were anti competitive and there was clear abuse of dominant position by them.

[iii] The complainant, on 27.01.2011, filed supplementary information with the first respondent Competition Commission of India. The complaint and the additional information were taken on the file of CCI as Case No.03/2011 and on 24.02.2011, an order under Section 26(1) of Competition Act, 2002 was passed by the first respondent/Competition Commission of India directing the second respondent/Director General to carry out investigation and to file a report.

[iv] The second respondent/Director General filed a memo to the first respondent/Competition Commission of India suggesting for expansion of the investigation against all car companies in connection with the alleged anti competition practices adopted by all car companies in the areas of "After sales service and procurement of spare parts."

[v] Acting on the memo filed by the second respondent/Director General, the first respondent/Commission has ordered for expanding the scope of the investigation to cover all the car manufacturers on 26.04.2011.

[vi] On the strength of the order dated 26.04.2011, the second respondent/Director General, in exercise of the powers under Section 36(2) r/w. Section 41(2) issued notice to the appellant to produce certain documents on 04.05.2011.

18. Mr.Vijay Narayan, learned Senior Counsel and the counsel on record have re-agitated the very same points that are agitated before the learned single Judge as extracted above.

19. Mr.G.Rajagopalan, learned Additional Solicitor General of India Assisted by Mr.P.Mahadevan, learned Central Government Standing Counsel made submissions in support of the impugned order.

Contention : I :

20. After hearing both the parties, the Additional Solicitor General of India Mr.G.Rajagopalan appearing for the first respondent whose arguments were adopted in respect of the respondents 2 and 3, relied upon the decision reported in 2017 (8) SCC 47 [Excel Crop Care Ltd., Vs. Competition Commission of India]. After hearing both the parties and after going through the impugned order passed, we find that the second respondent Director General did not initiate suo motu enquiry and it was based upon the direction of the Competition Commission dated 26.04.2011 wherein, investigation was ordered against the appellant herein. On enquiry/investigation under Section 19(1) (a) of the Act with regard to the receipt of information from any person, the Competition Commission of India can act. The word 'person' has been defined under Section 2(1) of the Act, stating under a sub-clause that it is 'artificial jurisdiction person' not falling within any of the preceding sub clause, which would clearly indicate that the second respondent Director General falls under that sub clause.

21. In the instant case, since the second respondent, during

the course of enquiry, found that other car manufacturers including the appellant were involved in such practices, sent a report to the first respondent Competition Commission. Accordingly, investigation was proceeded after getting the approval from the Competition Commission.

22. In this regard, it is significant to refer to the amendment made under the Competition (Amendment) Act, 2007 by which the expression "complaint" as found in Section 19(1)(a) was actually modified as "information". This is why Section 26 (1) which did not talk about complaint but talked only about "knowledge" and "information", was also amended to incorporate the Proviso under sub-section (1). The Statement of Objects and Reasons for the Competition (Amendment) Bill, 2007 shows that it was intended to enlarge the powers of the Competition Commission.

23. Hence, on a combined reading of Section 2(1) (x) along with Section 19(1)(a) of the Act and applying the said provision to the facts of the present case, the first contention of the learned counsel for the appellant that the Director General of the Competition Commission has no suo motu power to initiate an investigation does not deserve any consideration.

24. Considering the object of the Act, it is the duty of the first respondent Competition Commission to investigate into the matter by giving notice to the concerned Car Manufacturers so that a consolidated decision will be arrived at, after giving an opportunity to both the parties and hence, the contention of the learned counsel for the appellant that the Director General suo motu expanded the proceedings to other Car Manufacturers including that of the appellant is factually incorrect. However, it is found that based upon the additional information given by the second respondent Director General which has been already spoken to by the original informant Mr. Shamsher Kataria, the first respondent/Competition Commission has ordered for roping all the car manufacturing company. Hence, we have no hesitation to hold that the first contention raised by the learned counsel for the appellant has no merit and the same is hereby negated.

25. The next limb of the argument is that the second respondent/Director General has no suo motu power. No doubt it is true that the second respondent has no suo motu power to investigate, however, based upon the additional information given by the original complainant Mr. Shamsher Kataria and the memo filed by the second respondent with the first respondent, the first respondent has acted in accordance with Section 26(1) of the Act.

26. Section 26(1) reads as follows:-

"26. Procedure for inquiry under Section 19.-
(1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge 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.

Provided that if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information"

27. Applying the proviso to Section 26(1) which regulates the enquiry under Section 19(1), to the facts and circumstances of the case, we are satisfied ourselves that the procedure adopted by the respondents 1 and 2 cannot be termed as violation of the provisions as mandated under the Act. In this regard, the Hon'ble Supreme Court has considered the scope of the Competition Act, 2002 in an identical issue in the judgment reported in 2017 (8) SCC 47 in the case of Excel Crop Care Ltd., Vs. Competition Commission of India, and held in Paragraph No.45 of the said judgment as under:-

"45. If the contention of the appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said

initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the appellants as well touching upon the jurisdiction of the DG."

28. After going through the definition under Section 2(1) (x) of the Act and the reasons assigned by the learned single Judge to hold that the Director General is a person under Section 2(1) (x) of the Act, we are of the considered view that the said finding does not call for any interference at this appellate stage.

29. With regard to the next contention as projected by the learned counsel for the appellant, the reply given by the learned Additional Solicitor General of India in this regard after perusing the impugned order of the first respondent dated 26.04.2011 along with the communication of the Director General dated 08.03.2011 and the order of the Competition Commission, the first respondent dated 26.04.2011 clearly indicates that there are several materials on the file of the first respondent Competition Commission to include all the car manufacturers for enquiry coupled with the proviso to Section 26(1) of the Act which clearly envisages that if what is required is an "information" which is substantially the same or covered by any "previous information" received, then the new information can be clubbed with the previous information and thus, the proviso to Section 26(1) of the Act enables clubbing of new information with that of the previous information. When such being the case, in view of the clubbing provision provided under the proviso to Section 26(1) of the Act, the question of again recording any subjective satisfaction over the existing material or with the new information, does not arise and therefore formation of separate opinion and recording of the subjective satisfaction as pleaded by the appellant, does not stand to reason, in view of proviso to Section 26(1) of the Act.

30. The learned Additional Solicitor General of India further submitted that after disposal of the writ petitions, however pending writ appeal, the first respondent Competition Commission of India has passed final orders on 27.07.2015 imposing penalty of Rs.420.2605 Crores against the appellant Hyundai Motor India Limited. However, in view of the pendency, execution or giving effect to of the said order is kept in

abeyance.

31. The third contention of the learned counsel for the appellant that the second respondent/Director General has overstepped the jurisdiction vested with him in law, is also negatived by the learned single Judge.

32. But in this case, the action of filing a memo on 19.04.2011 by the Director General cannot be termed as exceeding the jurisdiction that was conferred upon him by the order of the Commission dated 24.02.2011 coupled with Section 41(3). Hence, filing of a memo is not bad in law and accordingly, this contention is also rejected.

33. Therefore, the Director General merely placed an additional information before the Commission in his memo dated 19.04.2011. If the Commission had not issued a direction on 26.04.2011, the Director General could not have proceeded against all other car manufacturers. The direction issued by the Commission on 26.04.2011 would tantamount to a direction under Section 41(1) of the Act. Therefore, in our considered view, the question of overstepping of jurisdiction does not arise and finally that contention also stands rejected for the above said reason. Thus, we find that the finding of the learned single Judge that the memo filed by the second respondent is only an information already available in the complaint lodged by the individual and as such, it was an additional information that has been taken into account as per second proviso, is hereby confirmed as the Commission has already formed a prima facie opinion regarding three named car manufactures.

34. Therefore, it is totally unnecessary for the first respondent Commission to redo the exercise of recording a separate reason therefor. It remains to be stated that the first respondent Commission did not arrive at any conclusion with regard to the writ petitioners on the basis of any special pleadings as against them. The decision of the first respondent Commission was only to expand the scope of investigation. Therefore, the second respondent/Director General has not overstepped its jurisdiction defined in this Act.

35. As stated supra, the learned single Judge has held that the second respondent/Director General is a person coming under Section 2(1) of the Competition Act and memo/information provided by the Director General is an information under Section 19 (1) (a) of the Act and that the second respondent/Director General could fall under the definition of "artificial jurisdictional person" and the information given by the second respondent to the first respondent Competition Commission is a supplementary information which does not require recording of

subjective satisfaction. Accordingly, it has been held that the formation of opinion of Commission is not mandatory which, according to us, is well founded and does not call for any interference.

36. For the reasons stated in the preceding paragraphs wherein we have rejected all the three legal points raised by the learned counsel for the appellant, we hold that the second respondent/Director General is also a person defined under Section 2(1)(x) of the Act and the information given by him was only an additional information and in view of the clubbing provision under proviso to sub Section 1 of Section 26, no further recording of subjective satisfaction be recorded, since it is only clubbing of new information with the previous information, as laid down by the Hon'ble Apex Court in the above referred decision. Hence, we do not find any irregularity or infirmity in the order passed by the second respondent and accordingly, the writ appeal is devoid of merits and it is liable to be rejected.

37. In the result, the Writ Appeal is dismissed by confirming the order passed by the learned Single Judge in W.P.Nos.31808 and 31809 of 2012, dated 04.02.2015. The connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

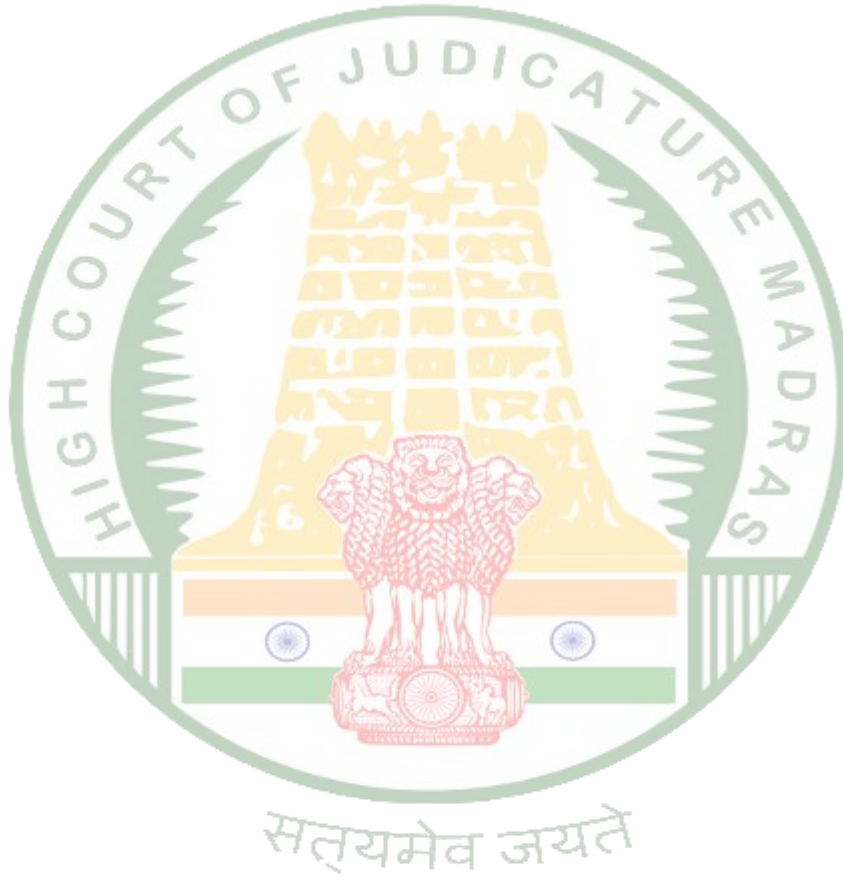
To

1. The Competition Commission of India
(Competition Act, 2002)
7th Floor, HT House,
18-12 K.G.Marg,
New Delhi 110 001.
2. The Director General,
The Competition Commission of India,
B Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.
3. Additional Director General,
The Competition Commission of India,
B Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.

+1cc to Mr.P.Mahaadevan, Advocate, S.R.No.49453
+1cc to Mr.IPN Associates, Advocate, S.R.No.49209
+2cc to Mr.G.Guruprasath, Advocate, S.R.No.49019 (20/08/2018)

W.A.No.340 of 2015

BR (CO)
GSP (10/08/2018)



WEB COPY