

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPETITION APPEAL (AT) NO.84 OF 2018****In the matter of:**

Uttarakhand Agricultural Produce Marketing Board
Mandi Bhavan, Near Collectorate Campus,
Rudrapur, Udham Singh Nagar,
Uttarakhand 263153

Appellant

Vs

1. Competition Commission of India,
9th Floor, Office Block 1
Kidwai Nagar(East), Opposite Ring Road
New Delhi-110023.
2. International Spirits and Wines Association of India
Room No.403, Vivanta by Taj,
Sujan Singh Park, Subramania Bharti Marg,
New Delhi-110003
3. Garhwal Mandal Vikas Nigam Ltd.,
74/1 Rajpur Road, Dehra Dun, Uttarakhand 248001
4. Kumaon Mandal Vikas Nigam Ltd,
Oak Part House, Mallital,
Nainital, Uttarakhand 263002

Respondents

For Appellants: Mr. Krishnan Venugopal, Sr. Advocate with Mr. Shivender Singh, Ms Shruthi Rao and Ms Deepanshi Ishar, Advocates.

For Respondents: Mr. Zoheb Hossain, Mr Sampurna Sanyal, and Mr. Piyush Goyal, Advocates for R1.

Dr. Abhishek Manu Singhvi, Sr. Advocate alongwith Mr. Amit Sibhal, Sr. Advocate with Ms Nisha Kaur Oberoi, Mr Gautam Chawla and Ms Shravani Shekhar, Mr Mathew George, Ms Aishwarya Nabh, Ms Samali Vermai, Mr Amit Bhandare, Mr Saksham Dhingra, Advocates for R2.

Ms Lagna Panda, Mr Salman Quereshi, Advocate for R4.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J**

On the basis of an information filed under Section 19(1)(a) of the Competition Act, 2002 by the International Spirits and Wines Association of

India (“Informant”), the case No.02/2016 was instituted by the Competition Commission of India against the M/s Uttarakhand Agricultural Produce Marketing Board (Opposite Party No.1 therein/appellant herein), Garhwal Mandal Vikas Nigam Ltd (Opposite Party No.2 therein/Respondent No.3 herein) and Kumaun Mandal Vikas Nigam Ltd (Opposite Party No.3 therein/Respondent No.4 herein) collectively. The Informant alleged that the opposite parties including appellant herein had abused their dominant position in contravention of the provisions of Section 4 of the Act and further alleged that the opposite parties including the appellant herein took advantage of their monopoly and abused their dominance, *inter alia*, in the following manner:-

- a) The Ops were placing orders with alcoholic beverage manufacturers for supply of IMFL, in an arbitrary and discriminatory manner, with no relation in the consumer demand, for certain brands of beverages in the market.
- b) The Ops were not procuring alcoholic beverages of certain brands, despite demonstrably high consumer demand for such alcoholic beverages and thereby discriminating against certain manufacturers of these beverages.
- c) The Ops were not maintaining, minimum stock levels and were not supplying IMFL brands in accordance with the retailers’ demand, despite express stipulation in Clauses 10 and 11 of the Liquor Wholesale Order.

2. The Commission, after forming a prima facie opinion, vide its order dated 19.07.2016 passed order under Section 26(1) of the Act, directed the Director General (DG) to cause an investigation into the matter and submit Investigation Report.

3. DG in its report submitted that regarding the relevant market, while placing reliance on the Liquor Wholesale Order, delineated the relevant markets as (a) market for wholesale procurement of branded alcoholic beverages in the State of Uttarakhand, (b) market for distribution of branded alcoholic beverages in the licensed area of OP-2/3rd respondent herein in the State of Uttarakhand; and (c) market for distribution of branded alcoholic beverages in the licensed area of OP-3/4th respondent herein in the State of Uttarakhand.

4. On the issue of dominance of the Ops in the relevant market, the DG reported that the Ops were in a monopolistic position and were enjoying 100 percent share of the relevant markets in their respective areas of operations, as OP-1/appellant herein had exclusive and sole rights of procurement of branded alcoholic beverages on wholesale basis; and OP-2 and OP3 had exclusive and sole rights of distribution of branded alcoholic beverages to retailers in their licensed area of operations as clearly mentioned in the Liquor Wholesale Order. This created entry barriers for any other entity to carry on activities pertaining to procurement, supply and distribution of branded alcoholic beverages in the relevant markets. Further, the DG noted that owing to the monopolistic position and sound financial position, as reflected in the financial statements, Ops enjoyed exclusive economic power and commercial

advantages, which allowed them to operate independently of the market forces. Moreover, there was also complete absence of any countervailing buying power with the consumers. After analysing the factors, enumerated under Section 19(4) of the Act, the DG concluded that Ops were in a dominant position in the respective relevant markets.

5. The DG further noted that the Liquor Wholesale Order remained valid in the State of Uttarakhand for the period 27.04.2015 to 19.04.2016, which was considered as the relevant period in the instant case during which period OP-1, OP-2 and OP-3, were involved in the exclusive activities pertaining to procurement, supply and distribution of alcoholic beverages in the State of Uttarakhand. The DG also noted that prior to operation of the Liquor Wholesale Order, USL and Pernod, members of the Informant, were amongst the major suppliers of alcoholic beverages in the State of Uttarakhand, based on the respective sales volume of their brands. The DG also observed, based on sales data, that the sales volume of USL and Pernod dropped significantly during the financial year 2015-16, whereas the sales volume of other suppliers increased significantly during that period. The DG also noted based on sales data that such significant growth in the sales volume of IMFL of other suppliers during the period May 2015 to April 2016 was not there in the subsequent period i.e. from May 2016 onwards i.e. post issuance of new Excise Order. Thus during the period of May 2016 onwards, the sales volume of IMFL of other suppliers dropped drastically.

6. The DG noted that OP-1/appellant herein being the sole procurer of alcoholic beverages in the State of Uttarakhand, having 100 percent market

share and having undisputed dominance, deliberately ignored the relevance of different brands of alcoholic beverages. Further it was noted by the DG that OP-1/appellant herein was not maintaining the minimum stock of all brands of IMFL as per the Liquor Wholesale Order. It was also noted that OP-1/appellant herein disregarded the mechanism of procurement of different brands of alcoholic beverages, as per the Liquor Wholesale Order and Order of Additional Commissioner, Excise. As per the Investigation Report, OP-1's/appellant herein arbitrary approach in placing orders for alcoholic beverages resulted in gross decline in procurement of alcoholic beverages from USL and Pernod. Based on the aforesaid, the DG in its report concluded that OP-1/appellant herein has contravened the provisions of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act.

7. The DG, however, stated that it did not find the acts of OP-2 and OP-3/3rd and 4th Respondent herein in contravention of Section 4(2)(c) read with Section 4(2)(b)(i) of the Act, as the investigation brought out that OP-2/3rd Respondent and OP-3/4th Respondent totally dependent on OP-1/appellant for supply, having no independent authority to procure alcoholic beverages on their own. Further, despite the requisitions of different brands of alcoholic beverages raised by the OP-2 and OP-3, OP-1 was not following the same while procuring alcoholic beverages from the manufacturers. Further, OP-2 and OP-3 had no inter-se agreement, whatsoever, with the manufacturers/suppliers of alcoholic beverages and were not getting any direct supplies from them. Hence no finding against them was given.

8. After receiving the Investigation Report, the same was forwarded to the parties for filing of their respective suggestions/objections thereto, if any. Pursuant to the receipt of objections to the Investigation Report by the Parties, the Commission heard the parties on 7.8.2018 and 13.8.2018 on the DG report.

9. In view of the aforesaid position, the Commission after detailed discussions with regard to the relevant facts including the popular alcoholic brands maintained by the opposite parties formed opinion and issued show cause notice with the following observations:-

i) The Commission observes that OP-2 and OP-3 have failed to discharge their responsibilities under the Liquor Wholesale Order, as dominant suppliers in their respective relevant market. Thus, the Commission hereby issues notice to OP-2 and OP-3 to show cause as to why the conduct of the said Ops should not be held to be in contravention of the provisions of Section 4(2)(b)(i) and 4(2)(c) read with Section 4(1) of the Act.

ii) It is, however, made clear that nothing stated herein shall tantamount to a final expression of opinion on the merits of the case and the observations made above are tentative in nature. The final view would be taken after considering the replies and arguments of the parties and the material on record.

iii) The Parties are directed to file their replies to the observations of the Commission as contained in the present order within four weeks of the receipt of the order

iv) The Secretary is directed to inform the concerned parties, accordingly.

10. When the matter was taken up, this Appellate Tribunal asked the counsel for the appellant, in the first instance, to address with regard to maintainability of appeal, keeping in mind the observations made in para 23 and 24 of the impugned order.

11. The appellant subsequently filed an Intaerlocutory Application No.138/2018 seeking an ad interim stay on the proceedings of the Case No.02 of 2016 pending before the Competition Commission of India, besides, to put on hold the impugned orders dated 30th August, 2018, 1st November, 2018 which was passed subsequently. Since the issue with regard to the maintainability of the Appeal was yet to be determined, the Commission was directed to keep further proceedings on hold till the next date of hearing.

12. Subsequently, the representatives of the appellant and other similarly placed persons, including concerned Respondents were allowed to appear before the Commission and were asked to file their respective reply. Liberty was given to the Commission to give hearing to parties including appellant and other similarly placed persons. Appellant and other similarly situated persons were allowed to raise all the objections and take plea before the Commission and the Commission was directed to consider the same in accordance with law. However, the Commission shall not pass any final order till next date. It was made clear that if the appellant and others fail to file their reply, the interim order shall stand vacated.

13. The case was heard on both maintainability and on merit.

14. Learned counsel appearing for the appellant submitted that the order dated 26.04.2018 is a composite order passed under Section 26(4) read with Section 26(5) of the Act in so far as 2nd Respondent and 3rd respondents are concerned. Counsel for the appellant submit that the impugned order is a final order passed under Section 27 of the Act.

15. Section 27 of the Act empowers the Commission to arrive at a finding of contravention by an enterprise and to pass appropriate orders as under:-

“27. Orders by Commission after inquiry into agreements or abuse of dominant position- *Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant petition, is in contravention of section 3 or section 4, as the case may be it may pass all or any of the following orders, namely.....-*

16. In the present case we find that no penal order has been passed by the Commission in terms of Section 27 or any of the clauses of Section 27 of the Act 2002.

17. Section 53A relate to establishment of Appellate Tribunal which can hear and dispose off the appeal against order passed under sub-section (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act, as quoted below:-

“53A. appellate Tribunal: *The National Company Law Appellate Tribunal constituted under Section 410 of the Companies Act, 2013 (18 of 2013 shall, on and from the commencement of Part XIV of*

Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall-

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

18. Section 53B of the Act allows an enterprise aggrieved by any direction, decision or order referred to in clause (a) of Section 53A to prefer an appeal to the Appellate Tribunal. Section 53B is quoted below:-

“53B Appeal to Appellate Tribunal. —(1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause(a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State

Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

19. From the impugned order dated 30th August, 2018 it is clear that the Commission issued show cause notices to opposite parties i.e. Garhwal Mandal Vikas Nigam Ltd(3rd Respondent herein) and Kumaon Mandal Vikas Nigam Ltd (4th Respondent herein) to show cause as to why the conduct of the 3rd and 4th Respondents should not be held to be in contravention of the provisions of Section 4(2)(b)(i) and 4(2)(c) read with Section 4(1) of the Act. No specific finding has been given against the opposite party No.1 i.e. appellant, Uttarakhand Agricultural Produce Marketing Board.

20. In paragraph 24 of the impugned order dated 30th August, 2018 the Commission made it clear that nothing stated herein shall tantamount to a final expression of the opinion on the merits of the case and the observations made are tentative in nature and the final view would be taken after considering the replies and arguments of the parties and the allegation made by the International Spirits and Wines Association of India and the report of the Director General.

21. In view of the aforesaid fact we hold that the impugned order dated 30th August, 2018 does not amount to passing of an order under Section 27 of the Act, 2002 and thereby the appeal under Section 53B read with Section 53A is not maintainable.

22. Further the parties against whom certain observations have been made i.e. Garhwal Mandal Vikas Nigma Ltd and Kumaon Mandal Vikas Nigam Ltd are not appellants in the present case and have not challenged the impugned order. In the circumstances while the appeal fails, we allow the Commission to pass appropriate orders after hearing the parties in accordance with law. The appeal is dismissed with the aforesaid observations. Liberty is given to Commission to pass appropriate final order in accordance with law. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

Dated:12 -3-2020
New Delhi

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