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Penalty on Chemists and Druggists Association of Baroda for Mandating NOCs for appointment of stockists and fixing of trade margin fixing for retailers and wholesalers

Price-fixing cartelization in the Dry Cell Batteries Market

Search without Seizure of Documents does not Serve Purpose of Investigation - SC

Kaff, RPM & Snapdeal: Online platforms are a part of Vertical Supply Chain



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Mere search of premises without seizure of documents by the DG during dawn –raid does not serve the purpose of investigation, holds Supreme Court

*Competition Commission of India vs JCB India Ltd. & Ors.*¹



In this case, a Special Leave Petition (“SLP”) was filed by the Competition Commission of India (“CCI”) challenging an interim order passed by a Single Judge Bench of the Delhi High Court in a writ petition filed by JCB India Ltd.. The writ petition was filed by JCB India Ltd. (“JCB”) challenging the CCI’s order of investigation against it. During the pendency of the writ petition, JCB had also moved an application for an interim relief that the CCI should not use and return back the documents seized by the Director General, CCI (“DG”) during a dawn-raid conducted at JCB’s premises. The Delhi High Court had allowed the interim prayer on the ground that the order of the Chief Metropolitan Magistrate, Delhi whose authorization is

statutorily required by the DG to carry out a search and seizure operation, did not authorize seizure of documents by the DG but only the search of the premises. Aggrieved by the decision of the Delhi High Court, the CCI moved an SLP to the Supreme Court.

In its decision, while relying on the provisions of Section 41(3) of the Competition Act, 2002 (“the Act”) and Section 240 and 240A of the Companies Act, 1956 which define the powers of the DG, held that unless the seizure were to be authorised, a mere search by itself will not be sufficient for the purposes of investigation. Accordingly, the Supreme Court vacated the interim order.

¹CRIMINAL APPEAL NO. 76-77 OF 2019 read with SLP(Cr.) 5899-5900 of 2018, order dated 15.01.209

CCI imposes penalty on Chemists and Druggists Association of Baroda for mandating NOC's for appointment of stockists and fixing of trade margin fixing for retailers and wholesalers

Vedanta Biosciences vs. Chemists and Druggists Association of Baroda²



produce a copy of the NOC issued by the association.

In this case, the main investigation was followed by a supplementary investigation by the DG. In its investigation report, the DG brought out certain evidence in the form of letters / notices issued by the association to the pharmaceutical companies mandating the requirement of NOC by a stockist. The DG also found out circulars setting the margins as 10% and 20% for wholesalers and retailers respectively for non-scheduled drugs.

Citing a number of cases wherein the CCI had penalised various associations of druggists and chemists for mandating NOC for a stockist to carry its business, the CCI opined that the practice leads to restriction of market access and is in violation of Section 3(3). The CCI further observed that fixation of trade margins amounted to price-setting and also contravened Section 3(3) of the Act. The CCI imposed a penalty of 10% of the average of the relevant income of the Association of the last three years and closed the matter.

An information was filed by Vedant Biosciences ("Informant"), a stockist of pharmaceutical drugs, before the CCI alleging that Chemists and Druggists Association of Baroda, an unregistered association of chemists and druggists, was indulging in anti-competitive practices of controlling supply/output of drugs as well as price fixing through two of its practices:

a. Mandating the requirement of a No

Objection Certificates ("NOC") prior to the appointment of stockist by pharmaceutical companies

b. fixing the trade margins for wholesalers and retailers

It was further alleged in the Information that in order to ensure that NOC was procured by a stockist, the association had directed pharmaceutical companies to not supply drugs to those stockists who could not

²Case No.C-87/2009/DGIR, order dated 15.01.2019

CCI finds price-fixing cartelization in the Dry Cell Batteries market

In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India²

In 2016, Panasonic Corporation, Japan ("Panasonic Japan") filed a Leniency Application on behalf of itself, its Indian subsidiary, Panasonic Energy India Co. Ltd. ("Panasonic India"), and their respective directors and other employees, before the CCI. As per the Leniency Application, all the major manufacturers of Dry Cell Batteries operating in the Indian market, viz. Panasonic India, Eveready Industries India Ltd. ("Eveready") and Indo National Limited

("Nippo") had formed a cartel for fixing and increasing the prices of Dry Cell Batteries in a coordinated manner in the Indian market. The CCI had directed investigation following which it found the aforesaid manufacturers guilty of cartel conduct. In the Leniency Application, Panasonic had also stated that in addition to the primary cartel between the three manufacturers, there existed an ancillary cartel between Panasonic and Godrej and Boyce Manufacturing Co. Ltd.

("Godrej"). Godrej was a reseller of Dry Cell Batteries which it used to buy from Panasonic and resale in the market under its brand name. As per the Leniency Application, being a member of the primary cartel, Panasonic had prior information about the near-future price increases which it used to pass onto Godrej to effectuate price increase in a coordinated manner.

Godrej refuted the allegation that it was a



part of the cartel on the ground that since its relationship with Panasonic was that of buyer and seller and not of independent competitors, it cannot be said to be a part of the cartel which essentially is between competitors. Godrej further contended that since Panasonic imposed a mutual obligation in the agreement with Godrej of not taking any steps detrimental to each other's market interests with respect to the prices of Dry Cell Batteries, Godrej was a victim and not an eager participant in the cartel. Had Godrej not effectuated the price increase which was mandated by Panasonic, its negotiations with Panasonic would have broken down. However, the CCI rejected Godrej's arguments on the following grounds:

- (i) While Godrej resold the Dry Cell Batteries after purchasing from Panasonic, it resold the batteries under its own brand name and from the perspective of the consumers (demand-side), the two were competitors;
- (ii) As per the agreement between Panasonic and Godrej, the relationship between both the parties was on a principal-to-principal basis and not that of a

manufacturer and distributor. Accordingly, it would not be correct to conclude that the parties were not horizontally situated;

(iii) Since during negotiations, Godrej did not object to the mutual obligation imposed by Panasonic of not taking any steps detrimental to each other's market interest with respect to the prices of Dry Cell Batteries, Godrej cannot be said to be a victim of the cartel but actively participated in it;

(iv) As Godrej used to complain to Panasonic whenever the prices of Dry Cell Batteries offered by Panasonic were lower than that of Godrej and also asked Panasonic to increase its prices, Godrej tried to benefit from such cartel.

The CCI further held that such anti-competitive arrangement between Panasonic and Godrej led to an increase in the prices of Dry Cell Batteries to a very high level causing loss to consumers, foreclosed competition in the market as consumer choice was compromised and did not result in accrual of any benefits to the

consumers or promotion of any technical, scientific or economic development. Accordingly, the CCI held Panasonic and Godrej to be guilty of price-fixing cartel which amounted to contravention of Section 3(3)(a) of the Act.

The CCI imposed a penalty to the tune of 1.5 times the profit for each year of the continuance of the cartel on Panasonic but granted a 100% reduction in the penalty on account of the Leniency Application filed by Panasonic.

Further, since Godrej had suffered losses during the cartel period and that it made a complaint of cartelization to the Director General Anti-Dumping and Allied Duties after the cartel ceased to function, the CCI decided to impose a lesser penalty to the tune of 4% of the turnover for each year of the continuance of the cartel.

Further, the CCI imposed a penalty to the tune of 10% of the average of the income for the three preceding financial years on the office bearers of Panasonic India and Godrej.

³Suo Motu Case No. 03 of 2017, order dated 15.01.2019

CCI does not find Kaff to have imposed RPM on Snapdeal and clarifies that online platforms are a part of vertical supply chain

*Jasper Infotech Private Limited (Snapdeal) vs. KAFF Appliances (India) Pvt. Ltd. (Kaff)*⁴

In this case, the CCI had directed an investigation against KAFF Appliances (India) Pvt. Ltd. ("Kaff"), a company engaged in the manufacture and sale of a wide variety of kitchen appliances which inter alia included electric chimneys, kitchen hobs, induction cookers, air purifiers, dishwashers, refrigerators, microwave, ovens and other apparatus for lighting, heating, etc. into the allegations of 'Resale Price Maintenance' (RPM) imposed by it on the online sales of its products on an e-commerce website – www.snapdeal.com ("Snapdeal") – run by Jasper Infotech India Pvt. Ltd. ("Jasper") on market place model, i.e. the goods were offered directly by various sellers through Snapdeal's platform and were not owned by Jasper. In the Information which was filed before the CCI, it was alleged by Jasper that Kaff was aggrieved by the fact that Kaff's products were being sold at discounted prices on Snapdeal which led to undercutting of sales and loss of revenue of other distributors of Kaff. Accordingly, Kaff displayed a Caution Notice on its website that it will not honour the warrant of its products sold through Snapdeal as such products were counterfeit, infringing its trademark, deceiving the public by trading on the goodwill of Kaff and were also undercutting the prices of authorised dealers. To substantiate the allegation, Jasper produced certain e-mails written by an employee of Kaff to Jasper wherein it was stated that the goods manufactured by it were sold at its exclusive chain of authorised retail outlets and at the listed prices only and any discounted scheme can be introduced only with the prior approval of Kaff. Kaff further threatened Jasper that it would not allow sell of its goods below the Minimum Operating Price (MOP) through Snapdeal either by authorized or un-authorized distributors / retailers.

In its prima facie analysis, the CCI opined that imposition of a MOP on the distributors prevented the distributors to compete on prices. The CCI further opined that since Kaff enjoyed a market share of 28% in the



market of supply and distribution of kitchen appliances, imposition of an MOP was likely to cause an 'appreciable adverse effect on competition' (AAEC). Accordingly, the CCI directed the DG to conduct an investigation.

In its investigation report, the DG held as follows:

- (i) The case involved two 'relevant markets' as – one for 'Chimneys in India' and the other for 'Hobs in India' and found out that the markets were very competitive and that none of the player exerted any significant market power;
- (ii) The dealers and distributors of Kaff denied any imposition of MOP by Kaff;
- (iii) Despite the Caution Notice issued by Kaff on its website, the sale of chimneys and hobs increased manifolds through Snapdeal;
- (iv) Since the markets were very competitive with new players entering the market and no older players exiting, the barriers to entry were quite low. Further each player had numerous distributors and dealers. And none of the players got affected because of the Caution Notice issued by Kaff. Accordingly, there was no AAEC in the markets.

The DG further opined that since Jasper/Snapdeal was only a provider of online marketplace and not a reseller of Kaff's products, Kaff was not in a position to impose Resale Price Maintenance on it in terms of Section 3(4)(e) of the Act. However, the CCI held that online portals and platforms provide value added services,

such as, logistics, warehousing, marketing, and sales and in many ways these online portals act as a parallel distribution chain along with the off-line distribution channels. The customer/buyer also, when purchasing the products online, perceives the online portal as a valuable link between such customer and the seller. Further, since it is the prerogative of such online portal (Jasper in the present case) to decide the incentive/discount it wishes to offer to its customer, online portals form a part of the vertical/supply chain on whom the seller can impose various conditions such as Resale Price Maintenance.

In its defense, Kaff advanced the following justifications for issuing the Caution Notice on its website-

- (i) It had made considerable investments in building its brand reputation and therefore it did not want sale of spurious goods under its brand name through unverified sources on online portals, and
 - (ii) It had made considerable investment on creating its dealership network. Its dealers set-up the showroom, spend investments. Allowing discounting strategy of the online portal has the potential of adversely affecting the dealership network
- Kaff further contended that while it had issued the Caution Notice, it did not act on it and accordingly, there was no adverse impact on the business of Jasper.

The CCI found the justifications advanced by Jasper to be valid and stated, "A right of the manufacturer to choose the most efficient distribution channel ought not to be interfered with, unless the said choice leads to anti-competitive effects. The Commission finds merit in the justifications offered by [Kaff]. Further, the Commission observes that the evidence on record does not demonstrate that the conduct/practice of [Kaff] led to any AAEC."

Accordingly, the CCI did not find Kaff guilty of contravention of the provisions of the Act and closed the matter.

⁴Case No. 61 of 2014, order dated 15.01.2019

CCI does not find Royal Western Turf Club India Ltd. to hold a dominant position in the Market for organization of horse races by turf clubs in India

Mr. Habib Rajmohamad Patel vs. Chairman/Secretary, Royal Western Turf Club India Ltd. (RWITC)⁵



conditions of the Horse Jockey License Form are unfair and discriminatory in nature. According to the Information, such conditions amounted to abuse of dominant position by RWITC.

The CCI delineated the relevant product market as 'Market for organisation of horse races by turf clubs'. The CCI further observed that since there were seven turf clubs in India and since punters/general public, horse owners who register their horses for derby/races, and the trainers and jockeys consider these turf clubs as substitutable, the relevant geographic market comprised of the territory of India. Accordingly, the CCI delineated the relevant market as, 'Market for organization of horse races by turf clubs in India.'

The CCI further observed that since RWITC is not the major turf club in India and organises only 23% of the major racing events, it cannot be said to hold a dominant position. Since RWITC did not hold a dominant position, the question of its abuse does not arise. Accordingly, the CCI closed the matter upon a prima facie consideration and refused to direct an investigation.

The present information was filed by Mr. Habib Rajmohamad Patel ("Informant"), against the Chairman/Secretary of Royal Western Turf Club India Ltd. ("RWITC"), a horse-racing club based in Mumbai and Pune. As per the Information, RWITC had around 600 approved Horse Owners, 46 licensed Horse Trainers, and around 80 licensed Jockeys. It had 3 committees namely, Management Committee, Stewards of the Club, and the Board of Appeal, which

used to manage the overall functioning of RWITCL.

It was alleged in the Information that the membership of the 3 committees comprised of race horse owners, stud farm owners, and breeders who had a direct interest in horse races, and the members were imposing unfair and discriminatory conditions on horse races to get results in their favour. The Informant has also averred that the

⁵Case No. 40 of 2018, order dated 15.01.2019

CCI refuses to initiate investigation against NSE into the allegations of unfair and discriminatory conduct in the market of 'co-location' services

Advocate Jitesh Maheshwari vs. National Stock Exchange of India Ltd.⁶

The CCI refrained from launching investigation against the National Stock Exchange of India Ltd ("NSE") on the basis of an Information filed by Adv. Jitesh Maheshwari ("Informant") alleging abuse of dominant position by NSE in the market of provision of 'co-location' services. The trading members who had subscribed for the co-location service of NSE were provided access to information about traded

prices of shares ahead of other traders, which made a huge difference to the proprietary and high-frequency traders. The fees levied by NSE for providing the co-location services was same for all the trading members availing such services, and accordingly the trading members availing the co-location services were supposed to be kept on equal footing and were supposed to have equal access to the price



MATTERS CLOSED BY THE CCI POST-INVESTIGATION

feeds vis-à-vis each other. It was alleged in the Information that by giving unfair and preferential access of its co-location services to some trading members, NSE had limited and restricted the provision of services to other trading members which amounted to unfair treatment and 'denial of market access'. While carrying out a prima facie analysis, the CCI noted that the Securities and Exchange

Board of India ("SEBI") was already carrying out an investigation into the aforesaid allegation and the role of NSE. The CCI observed that discriminatory and abusive conduct which falls foul of the provisions of the Act falls within the jurisdiction of the CCI and can be independently examined by the CCI based on cogent facts and evidence. However, the allegations against NSE were

yet to be established in an appropriate proceeding and also there was not sufficient information and data about the role attributable to NSE, in the provision of discriminatory co-location services qua certain trading members. Accordingly, in the absence of cogent material against NSE, the CCI refused to order an investigation and closed the matter.

⁶Case No. 47 of 2018, order dated 07.01.2019

COMBINATION CASES BEFORE THE CCI

• CCI approves acquisition of 0.12% of equity shares of Indialdeas.com Limited by Claymore Investments (Mauritius) Pte. Ltd which was already holding 8.75% of its equity shares. ⁷

• CCI approves acquisition of 13.12% of total equity share capital of Indialdeas.com Limited by Visa International.⁸

• CCI approves acquisition of EPC Construction India Ltd. by Royale Partners Investment Fund Ltd. By way of the combination, Royale Partners proposes to indirectly acquire EPC Constructions by amalgamating the special purpose vehicle, a proposed wholly owned subsidiary of Royale Partners in India, with EPC Constructions. Pursuant to the amalgamation, EPC Constructions will be the surviving entity and will be under the sole control of Royale Partners. ⁹

• CCI approves acquisition of 75.01% of the total paid-up equity share capital and 270 million optionally convertible redeemable preference shares of Prayagraj Power Generation Company Limited by Renascent Power Ventures Pvt. Ltd. The CCI further observed that the activities of the parties overlapped in market for power generation at broader level and more narrowly, in power generation from non-renewable sources. Further, the activities of parties were also vertically placed with respect to power generation (upstream) and its transmission (downstream). Since, based on installed



capacity, combined market shares of the parties was in the range of [5-10] % and the incremental market share as a result of the Proposed Combination was less than a percent, the CCI opined that the Combination did not have the potential to cause an appreciable adverse effect on competition. Consequentially, the CCI approved the acquisition. ¹⁰

⁷Combination Registration No. C-2018/12/623

⁸Combination Registration No. C-2018/12/620

⁹Combination Registration No. C-2019/01/632

¹⁰Combination Registration No. C-2018/11/616



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