SUPREME COURT OF INDIA

Bajaj Auto Ltd

Vs.

Director General (I &R)

C.A.No.1709 of 2001

(Tarun Chatterjee and Dalveer Bhandari JJ.)

12.05.2008

JUDGMENT

Dalveer Bhandari, J.

1. This appeal is directed against the judgment delivered by the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as the `Commission') in Restrictive Trade Practices Enquiry No.159 of 1996 dated 27th October, 2000.

2. Brief facts which are necessary to dispose of this appeal are recapitulated as under:- The Director General (Investigation & Registration) under Section 10 (a)(iii) of the *Monopolies & Restrictive Trade Practices Act, 1969* (hereinafter referred to as "the Act") sent an application that an enquiry be instituted against Bajaj Auto Limited (hereinafter referred to as the `appellant') for indulging in restrictive trade practice within the meaning of Section 33 of the Act.

3. The Notice of Enquiry was issued on 18.11.1996 in pursuance of which the appellant filed its reply refuting the allegations levelled against it. According to the appellant, the agreement between the appellant and the dealers contain certain clauses which are restrictive in nature, squarely falling under Section 33 of the Act. These relate to restrictions of the territory in which the dealer is to operate, the tie-up agreement by fixing targets and maintaining the resale price. The appointment letter of the dealer dated 11.5.1994 indicates that it is restricted to `Rajkot' alone which is restriction of an area within the terms of Section 33(1)(g) of the Act. Section 33 (1)(g) is reproduced as under:-

> "33. Registrable agreements relating to restrictive trade practices. - (1) Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely:-

xxx xxx xxx xxx

xxx xxx xxx xxx

(g) Any agreement to limit, restrict or withhold the output or supply of any goods or allocate any areas or market for the disposal of the goods;"

4. It is further alleged against the appellant that it fixed the sales targets in respect of various products and imposed a restriction on the dealer to purchase one or more products as a condition is covered under Section 33(1)(b) of the Act. Section 33(1)(b) is reproduced as under:-

"33.(1) xxxx xxxx xxxx

(b) Any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;"

5. It is further alleged that the fixation of prices of the products as per clause DD of letter dated 7.9.1994 brings the case within the purview of Section 33(1)(f) of the Act. Section

33(1)(f) is reproduced as under:-

"33.(1) xxxx xxxx xxxx

(f) Any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."

6. The appellant submitted a comprehensive reply denying all the charges levelled against it. It was submitted on behalf of the appellant as a preliminary objection that practices as alleged do not fall under Section 2(o) of the Act which is a pre- requisite condition before the action can be taken against the appellant. Section 2(o) of the Act reads as under:-

"2(o) "restrictive trade practice" means a trade practice which has, or may have the effect of preventing, distorting or restricting competition in any manner and in particular, __

(i) Which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;"

7. In reply, it was also contended that the dealers' appointment at Rajkot neither prescribes any territorial limit nor does it restrain it to sell goods outside Rajkot. In absence of any such restraint, the statement in the Preamble and the Appointment Letter cannot be construed to mean an agreement allocating area or market for disposal of goods in question. The identification of a place is for the purpose of establishing necessary facilities, infrastructure for after sales and maintenance of services. The relevant portion of the letter which has been sent to a dealer at Rajkot reads as under:-

> "We have pleasure in appointing you as our dealer at Rajkot"

8. In the reply, it was also contended that the product-wise and total sales targets for the year read with next para of the letter clarify that it is only indicative of expectation on the part of the appellant. It neither compels nor obliges the dealer to buy one or the other Bajaj products. Non achievement of targets in no way affects the dealership. As regards price fixation, clause DD of letter dated 7.9.1994 has to be read with clause Q of the dealership agreement. In the face of clear specification that the dealer is at liberty to sell the goods at lower than the recommended retail prices, question of invoking the provision of Section 33(1)(f) does not arise. These clauses in no way distort or impair the competition. Therefore, the Notice of Enquiry needs to be discharged.

9. The Commission framed the following issues:-

> "1. Whether the Notice of Enquiry (NOE) is not maintainable for the preliminary objection taken by the appellant in its reply to the NOE?
>
> 2. Whether the appellant has indulged in or is indulging in the alleged restrictive trade practices?
>
> 3. Whether the alleged restrictive trade practices are not prejudicial to public interest?
>
> 4. Relief"

10. Both the parties led documentary as well as oral evidence. The Commission did not find any merit in the preliminary objection taken by the appellant that Section 2(o) of the Act is not attracted.

11. In the impugned judgment, pertaining to the charge of territorial restriction, the Commission came to the conclusion that the preamble read with the appointment letter speaks of the dealership at "Rajkot". Apparently, the use of the word `at' as against `for' is capable of bringing two constructions. It can refer to place from where the activities are carried on or the territory to which it confines to. Intention of the parties has not been clearly conveyed by the `unhappy expression' used both in the dealership agreement as well as in the letter of appointment. If there is any oral understanding that the dealer is free to sell the goods outside the territory, the same has not been shown either by direct or circumstantial evidence. Absence of transparency in the clause can lead to manipulation of clause at the end

of the parties. Such practices of territorial restrictions impair the competition in the market as it limits the choice of the consumer to a particular dealer who may not indulge in unfair dealings. This is certainly not in public interest.

12. According to the Commission, the alleged restrictive trade practice is covered under Section 33(1)(g) of the Act and as such being prejudicial to public interest. The Commission directed appellant no. 1 to cease the aforesaid practice if continued at present and desist from repeating the same in future.

13. Regarding fixation of sales target, the Commission observed that the quantity of product to be purchased not by reason of market demand but on account of target fixed by the appellant would certainly amount to tie-up of one product with another attracting clause (b) of Section 33(1) of the Act.

14. Regarding dealership agreement, the Commission observed that it fairly laid down that the dealer is free to sell at a lower price than the recommended retail price. Clause DD, on the other hand, refers to the revised prices which have been made effective from 1.10.1994. As per this clause, the vehicles already in stock as on 1.10.1994 are to be sold at the old prices. This is clearly beneficial to the consumer or consumers at large and is in public interest. It refers to fair dealing on the part of the appellant and prevents any unjustified cost being imposed on the consumer. In the circumstances, we are of the considered view that the charge as levelled does not fall under clause (f) of Section 33(1) of the Act.

15. While disposing of the complaint, the Commission directed the appellant to give effect to this order within six weeks from the date of receipt of the order and file an affidavit of compliance within four weeks thereafter.

16. The appellant (who was the respondent before the Commission) filed a comprehensive reply. In the reply, it was mentioned that the MRTP Act is a result oriented Act. It is designed to be applied to practical situation, and, therefore, unless all the facts and circumstances including the facts constituting restrict trade practice within the meaning of Section 33(1)(b), (f) and (g) read with Section 2(o) of the MRTP Act, particularly the fact as to how the competition is prevented, distorted or restricted and in particular which tends to, inter-alia, bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods in question in such a manner as to impose on the consumers unjustified cost or restriction, are set out in the notice and the application, neither the notice nor the application meets the aforesaid requirement of law and in view thereof the notice is without jurisdiction and not maintainable in law.

17. The appellant asserted before the Commission that the existence of a restrictive trade practice as defined under Section 2(o) of the MRTP Act is a condition precedent to the exercise of the jurisdiction by the Commission. v The appellant submitted that none of the trade practices alleged in the notice, as would be evident from the facts set out hereinafter, constitute restrictive trade practice and, therefore, the notice is misconceived and not maintainable in law.

18. It is incorporated in the reply that the jurisdictional facts for applicability of Section 33(1)(b) (f) and (g) of the MRTP Act are lacking on the facts set out in the notice and the application and, therefore, the application is not maintainable and the notice is liable to be set aside.

19. It is also incorporated in the reply that the appointment letter only states that the appointment is a Dealer at Rajkot. It neither prescribes any territory nor does it restrict in any way the dealer to any territory or area for disposal of goods in question and, therefore, in the absence of any such restraint, the statement in the preamble in the appointment letter cannot be construed or interpreted as an agreement allocating area or market for disposal of the goods in question. It was further submitted on behalf of the appellant that it is pre- requisite for and an essential ingredient of the restrictive trade practice referred in Section 33(1(g) of the Act, the jurisdictional facts for applicability are not present and, therefore, Section 33(1)(g) of the MRTP Act has no application. The purpose of indicating `at Rajkot' only means the identification of place which is necessary as the dealer has to establish at Rajkot necessary facilities and infrastructure for after-sales maintenance and service including warranty services of the scooters and other vehicles. In the reply, it was further submitted that the jurisdictional facts for application of Section 33(1)(b) are lacking inasmuch as the said letter dated 11.5.1994 neither obliges nor compels the dealer to purchase all the goods as a condition of purchase of other goods nor does it oblige the dealer as a condition of purchaser of any of them to purchase any other goods. The said letter only sets targets, requesting the dealer to "gear up" for "their achievement" and answering their expectation and, therefore, the jurisdictional facts for application of Section 33(1)(b) of the MRTP Act are lacking and both the notice and the application are not maintainable in this behalf.

20. The appellant submitted that the jurisdictional facts for applicability of Section 33(1)(f) are lacking inasmuch as the letter dated 7.9.1994 cannot be read in isolation but has to be read with the appointment letter. The relevant portion of Clause `Q' of the Dealership Agreement reads as under:

> "You shall not sell our vehicles at higher than our recommended retail prices. You will, however, be free to sell at lower than the recommended retail prices. Taxes and Octroi whenever applicable may be charged extra."(Emphasis supplied)

21. The appellant, Bajaj Auto Ltd. on its own initiative for a fair and wide geographical distribution of Bajaj products and availability of adequate after-sales-service appointed dealers for its products all over the country so as to ensure that Bajaj products and adequate after-sales-service are available throughout the country. It is submitted on behalf of the appellant that there is no territorial restriction or restraint on allocation of geographical area to the dealer. The appointment of dealer at a specific geographical location is to ensure that their services are made available to the consumers.

22. It was also submitted on behalf of the appellant that if the dealer is not appointed at a specific geographical location, the dealer would not be obliged to have in that geographical

area the showroom, workshop, service facility and stock of spares. The absence of such facilities etc. would not be and is not in public interest. Appointing a dealer at a geographical location in no way restricts, prevents or distorts competition in any manner, as a customer has a choice of buying any makes he likes or going to any person he likes for servicing or repair of his vehicle. Such appointment also ensures that the dealer who is selling the Bajaj products in a particular geographical location is responsible for adequate after-sales-services to the customers of the vehicle sold by it and to keep them running and in good condition.

23. The appellant also submitted before the Commission that to motivate the dealers for increasing sales, the appellant fixes sales target for the year. Fixing of sales targets do not and cannot mean that the dealer is required or compelled to buy one or the other Bajaj products. The appellant submitted that the setting of target as outlined in the said letter dated 11.5.1994 is not a process of performance appraisal, but is a condition imposed in the agreement, the gateway laid down in clause h of Section 38(1) of the MRTP Act is squarely applicable as the condition does not directly or indirectly restrict or discourage competition in the two and three wheeler market to any extent at all.

24. It is submitted that, by no stretch of imagination, the appellant has indulged in restrictive trade practice and the provisions of clauses (b), (f) and (g) of Section 33(1) of the MRTP Act are not attracted.

25. The appellant company placed reliance on the case of *Mahindra and Mahindra Ltd. v. Union of India*[1], wherein it was held that it is only where a trade practice has the effect, actual or probable, or restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice and in order to arrive at a decision that a trade practice is a restrictive trade practice, the same cannot be decided on any theoretical or a prior reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition.

26. Reliance has also been placed on the case of *Paras Brothers*[2], wherein it was held that a restrictive trade practice must have the following elements:

> "i. It should be a trade practice defined in section 2(o) of the Act.
>
> ii. It should have an actual or probable effect of preventing, distorting or restricting competition in some manner.
>
> iii. The competition necessarily envisages the same or a similar situation.
>
> iv. There should be manipulation of prices.
>
> v. There should be unjustified costs or restriction as a result of such manipulation."

27. Reliance has also been placed on the case of *L. C. Malhotra v. Rahul Bajaj*[3], in which it was held that even isolated acts should be viewed in the context of the practice of the

respondent in relation to the question as to whether the respondent had manipulated the conditions of delivery.

28. In the instant case, neither the notice nor the application even allege that the appellant has ever indulged in or that the alleged trade practice has or may have the effect of preventing, distorting or restricting competition in any manner and in particular it, inter-alia, tends to obstruct the flow of capital or resource into the stream of production or tends to bring about manipulation of prices or conditions of delivery or to affect flow of supplies into the market in such a manner so as to impose unjustified costs and/or restrictions on the consumers of goods in question and therefore ex facie neither notice nor the application are maintainable.

29. Before parting with this case, we deem it appropriate to observe that the Commission must be extremely careful before issuing notices to the parties because it has serious consequences on the reputation and credibility to the activities of those parties. Frivolous notices breed long drawn avoidable litigation before various forums.

30. Consequently, the appeal filed by the appellant is allowed with costs and the impugned judgment passed by the Monopolies and Restrictive Trade Practices Commission in RTP Enquiry No.159 of 1996 dated 27th October, 2000 is set aside.

[1]*(1979) 2 SCC 529*
[2]*[(1994) 4 Comp. Law Journal 395]*
[3]*(1995) 1 Comp. Law Journal 421*