

**SUPREME COURT OF INDIA**

Philips Medical Systems (Cleveland) Inc.

Vs.

Indian MRI Diagnostic & Research Ltd

C.A.No. 2461 of 2006

(Markandey Katju J.)

29.09.2008

**JUDGMENT**

**MARKANDEY KATJU, J.**

1. Leave granted.

2. These appeals have been filed against the judgment and final order dated 29.11.2005 passed by the Monopolies and Restrictive Trade Practices Commission, New Delhi in Restrictive Trade Practices Enquiry No. 172 of 1995 and Compensation Application No. 258 of 1994.

3. Heard learned counsel for the parties and perused the record.

4. The appellant is a company incorporated in accordance with the laws of the State of New York,

USA which is engaged in the business, inter alia, of manufacturing and selling of various medical diagnostic equipment, including whole body CT Scanner. Respondent No. 1 wanted to purchase a whole body Whole Body CT Scanner and held negotiations for the same with the appellant and respondent No. 3, M/s. UB Picker Ltd. It is alleged that on 10.4.1989, the appellant sent its proforma invoice No. PMS/S/CT/001/89 (hereinafter referred to as the 'First Offer') for the supply of a new CT Scanner (Picker Synerview 1200 SX Whole Body Computer Tomography Scanner, 4th Generation Stationary Detector Technology system) including spares and accessories at a price of US \$ 1,282,500.00 (US Dollar one million two hundred eighty two thousand five hundred only). This First Offer was a comprehensive and composite offer and couldnot be split and /or partly accepted.

5. The relevant terms of the First Offer were, inter-alia, as follows :-

"a) The system offered was 'Picker Synerview 1200 SX Whole Body CT Scanner 4th Generation Stationary Detector Technology' consisting of Module A, C, J3, K1, M, Q, 02, B, including spares/Savs System/B.M. Analysis Package/3D Package/Xenon Blood Flow Package/Dynamic Scanning/IOR-II.

a) The total System Price was US \$ 1, 282,500.00

b) The price quoted was CIF Madras;

c) The prices were valid for 90 days;

d) The payment was to be made in US Dollars by irrevocable and confirmed Letter of Credit (L/C) in favour of the appellant;

e) Delivery was to be within 3-4 months ex-factory after the receipt of confirmed order with irrevocable Letter of Credit.

6. It is alleged that respondent No. 1 neither communicated any acceptance of the First Offer nor opened an L/C for the sum of US \$ 1, 282,500.00 within the aforesaid validity period of 90 days. It is an admitted fact that respondent No. 1 never opened an L/C for the sum of US \$ 1,282,500.00. The appellant was required under the applicable US laws to obtain an export licence from the US

Authorities for exporting the equipment to India. In order to apply for the necessary export licence, the appellant was required to attach a copy of an import licence from the Indian Government. The said import licence was to be procured by respondent No. 1. The appellant could not apply for the export licence since respondent No. 1 did not forward the Indian Import licence to the appellant within the aforesaid validity period of 90 days. As a result, the First Offer dated 10.4.1989 lapsed without being accepted on the expiry of 90 days from 10.4.1989. Towards the end of 1989, respondent Nos. 1 and 2 began fresh discussions with the appellant for purchase of a refurbished CT Scanner. The appellant offered to sell to respondent Nos. 1 & 2 a refurbished CT Scanner Model 1200 SX Solid State CT System for US \$ 595,000.00 (US Dollar five hundred ninety five thousand only) vide its quotation No. QR/4896/90 dated 03.1.1990 (hereinafter referred to as the 'Second Quotation').

The relevant terms of the Second Quotation were, inter alia, as follows:

"a) The Second Quotation was for a refurbished 1200 SX Solid State CT System, including, inter alia, Split Operator/Viewing Console;

b) The lead time for supply of the system was to be 90 days after receipt of L/C. The lead time was also dependant upon the timely receipt of Indian Import Certificate and US Export licence and was likely to be extended if documentation of the Government of India or USA was not available within the time period.

c) The system was to be sent from USA to India by 'Ocean Freight'"

7. After negotiations, the Second Quotation was duly accepted by respondent No. 1 with the condition that the total system price would be US \$ 570,000.00 (US Dollar five hundred seventy thousand only) and this would include shipment of the system 'by Air' instead of by 'ocean freight', which was one of the terms of the Second Quotation. The break-up of the total system price was US \$ 560,000.00 (US Dollar five hundred sixty thousand only) for the system and US \$ 10,000.00 (US Dollar ten thousand only) towards the cost of the shipment 'by Air'. This was duly endorsed by respondent No. 2, on 16/23-01.1990. At the relevant time, respondent No. 2 was the Chairman of the Board of Directors of respondent No. 1. Respondent No. 1 opened an L/C dated 24.02.1990 in the amount of US \$ 700,000.00 (US Dollar seven hundred thousand only).

8. It is alleged that the appellant was surprised to find that the L/C had been opened for a sum of US\$ 700,000.00(US Dollar seven hundred thousand only) instead of the agreed price of US \$ 570,000.00 (US Dollar five hundred seventy thousand only) and also that respondent No. 1 had referred to the old proforma invoice No. PMS/B/CT/001/89 dated April 10,1989 instead of the duly

accepted Second Quotation, being Quotation No. QR/4896/90 dated 03.01.1990.

9. It is alleged that the said L/C could not have related to the First Offer dated 10.04.1989 as the validity of the same had expired after 90 days of the date of the First Offer without the same having been accepted.

10. It is further alleged that the fact that the Second Quotation was duly accepted and was in contemplation of the parties is further borne out of the correspondence exchanged between the parties, and more particularly respondent No. 1's letter dated 11.04.1990, two letters both dated 20.04.1990 and appellant's letters dated 30.04.1990 and 01.05.1990.

11. The appellant alleged that it asked respondent No. 1 to amend the L/C so as to bring it in conformity with the Second Quotation. Respondent No. 2 refused to amend the L/C and wanted the appellant to falsify the shipping documents and show that a new CT Scanner was being supplied instead of a refurbished system. Respondent No. 2 wanted the appellant to draw down the entire amount of US \$700,00.00 and to repay the excess amount of US \$ 130,000.00( US Dollar one hundred thirty thousand only) to him in Malaysia. The appellant did not agree to any of the proposals of respondent No. 2.

12. Meanwhile, the production of the refurbished CT Scanner was also taking some time as there was some delay in procuring all the components required for producing the refurbished CT Scanner as the production of the same had been phased out in March, 1990. This fact was not known in January, 1990 when the parties had agreed on the terms and conditions of the Second Quotation dated 03.01.1990. However, it is alleged that respondent No. 1 in total breach of its obligations, refused, failed and neglected to amend the L/C to bring it in conformity with the Second Quotation. Respondent No. 1 did not obtain an Indian Import Certificate as per the terms of the Second Quotation, nor did it ever apply for the same as admitted in its evidence as recorded during cross-examination. The L/C was never encashed by the appellant and was returned to respondent No. 1. Respondent No. 1 was in breach of its obligations that were to be performed by respondent No. 1 before the appellant could perform or could be called upon to perform its obligations. Consequently, the occasion for supply of the CT Scanner by the appellant to respondent No. 1 never arose.

13. The respondent Nos. 1 & 2 filed a complaint before the MRTP Commission against the appellant and respondent Nos. 3 to 5, being RTP Enquiry No. 172 of 1995 making therein various allegations including the allegation that appellant and respondent Nos. 3 to 5 had falsely represented to respondent No. 1 about the production and quality of the goods and services and it induced respondent Nos. 1 & 2 into entering into an agreement with them, although they had knowledge that the CT Scanner ordered by respondent No. 1 was not in production.

14. It is alleged that in these circumstances, respondent Nos. 1 & 2 was left with no option but to procure the CT Scanner from Hitachi, Japan. It is also alleged that respondent Nos. 1 & 2 thereby suffered a huge loss of Rs. 32,31,885/-, which should be paid to them as damages.

15. On the aforesaid complaint, the MRTP Commission issued a notice dated 28.6.1995 to the appellant and respondent Nos. 3 to 5 calling upon them to file a reply. The appellant filed its reply on 6.2.1996 and submitted that no unfair and restrictive trade practice was committed by the appellant and the appellant is not liable to pay any compensation.

16. By the impugned judgment dated 29.11.2005, the MRTP Commission allowed the complaint and has held the appellant guilty of unfair trade practice. The Commission has passed an order restraining the appellant in indulging in the aforesaid alleged restrictive trade practice and directing it to pay compensation of Rs.5,71,439/- with interest @ 9% per annum to the respondent.

17. Several submissions have been made by Shri A.N. Haksar, learned senior counsel for the appellant, but it is not necessary to deal with all of them since we are of the opinion that these appeals deserve to be allowed on the first submission.

18. The legal question involved in the first submission is whether a party can be held guilty of unfair trade practice as referred to in Section 36A of the MRTP Act, although he did not supply any goods at all.

19. Section 36A which was inserted in 1984 and amended in 1991 now reads as follows :-

### **"36A. DEFINITION OF UNFAIR TRADE PRACTICE.**

In this Part, unless the context otherwise requires "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:-

(1) The practice of making any statement, whether orally or in writing or by visible representation which,- (i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

- (ii) Falsely represents that the services are of a particular standard, quality or grade;
  
- (iii) Falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
  
- (iv) Represents that the goods or services have sponsorships, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
  
- (v) Represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
  
- (vi) Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
  
- (vii) Gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be --

- (i) a warranty or guarantee of a product or of any goods or services; or
  
- (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleading the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation : For the purposes of clause (1), a statement that is --

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation : For the purpose of clause (2), "bargain price" means -

(a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(b) a price that a person who reads, hears, or sees the advertisement, would reasonably understand to

be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(3) permits --

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole,

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale, or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services."

20. In this connection it may be mentioned that as originally enacted the MRTP Act 1969 was made with the object of ensuring that the operation of the economic system does not result in a concentration of economic power to the common detriment, for the control of monopolies, and for the prohibition of monopolistic and restrictive trade practices.

21. There was no provision like Section 36A in the original Act. However, it was later felt that there was need for some modification of the Act. In the original Act there was no specific provision for regulating unfair trade practices like misleading advertisements, bargain selling, etc. It was realized that the consumer needs to be protected not only from the effects of restrictive trade practices, but also from practices which are resorted to by certain unscrupulous businessmen who mislead or dupe the consumers. Hence, the MRTP Act was amended in 1984 and the Statement of Objects and Reasons of the amendment has given the reasons as to why this amendment was necessary.

22. The 1984 amendment was in pursuance of the recommendations of the Sachar Committee. This committee expressed the view that the Act contained no provision for the protection of the consumers from false or misleading advertisements or other similar unfair trade practices, and that the provisions of the Act directed against restrictive or monopolistic trade practices proceeded on the assumption that if the manufacturer, producers or dealer can be prevented from distorting competition, the consumer would automatically get a fair deal. Since this was found to be only partly true, the committee was of the opinion that the consumer need to be protected not only from the effects of restrictive trade practices, but also from the practices which are resorted to by some businessmen to mislead or dupe the consumers. The object of the amendment was broadly to prevent false or misleading advertisements, or false representations claiming that the goods sold are of a certain standard or have certain qualities, which, in fact, they do not possess.

23. Thus, the very object of the 1984 amendment was to ensure that the persons buying certain goods were not duped or misled by a representation or advertisement which stated that these goods have certain features or qualities which, in fact, they do not possess. Thus the amendment had nothing to do with a situation where goods are not sold at all.

24. In the original Section 36A which was introduced by 1984 amendment, it was necessary to attract the provision that some injury or the unfair trade practice should have caused some loss to the consumer. By the 1991 amendment to Section 36A, the requirement to establish loss or injury to the consumer has been deleted. Also, another change brought out by the 1991 amendment was that while the original Section 36A had adopted an exhaustive definition of unfair trade practice, the 1991 amendment has given an inclusive and not an exhaustive definition of unfair trade practice.

25. However, we are of the opinion that principles of *ejusdem generis* and *noscitur a sociis* will apply to the interpretation of Section 36A as amended in 1991. Applying these well-known principles of interpretation we are of the opinion that Section 36A does not apply in a situation where goods are not sold at all. It only applies where goods in fact are sold.

26. It is a settled principle of interpretation that when an amendment is made to an Act, or when a new enactment is made, Heydon's mischief rule is often utilized in interpreting the same. Applying this principle we are of the opinion that Section 36A was inserted in the MRTP Act because there was no provision therein for protection of consumers against false or misleading advertisement or other similar unfair trade practices. It is well-known that in a trade suppliers often have a dominant bargaining position, and the bargaining power in the market is often weighed against the consumer. In this situation, it was realized by Parliament in its wisdom when it inserted Section 36A that the public must be prevented from being made victims of false representations about the products sold, even though it may have no adverse effect on competition. The purpose of Section 36A was to prevent frauds against the consumers who may be falsely induced to buy goods which do not possess the qualities which they are given out to have by advertisement or other representations.

27. Taking the above object of Section 36A into account it is obvious that Section 36A was never meant to deal with a situation where goods are not sold at all. Section 36A was really meant to protect consumers against defective goods or goods sold which do not have features or qualities which they were represented to have. Since the appellant did not sell the CT Scanner at all to the respondent, we fail to understand how Section 36A was attracted at all.

28. No doubt by the 1991 amendment the definition of unfair trade practice was made inclusive and not exhaustive, but this does not mean that when interpreting the amended Section 36A we should disregard the object for which Section 36A was enacted. Thus in *Hemens (Valuation Officer) vs. Whitsbury Farm and Stud Ltd* (1988) 1 All ER 72 (HL), in construing Section 2(3) of the Rating Act, 1971 which defines 'Livestock' to include any mammal or bird kept for the production of food or wool or for the purpose of its use in the farming of land, the word livestock was not given the wide meaning (in contradiction to deadstock) to include any animal whatsoever and was held not to extend to thorough bred horses not kept for use in the farming of land.

29. Similarly, in *South Gujarat Roofing Tile Manufacturers Association vs. State of Gujarat* AIR 1977 SC 90 (vide pp 93-94) and *Hindustan Aluminium Corporation vs. State of U.P.* AIR 1981 SC 1649, the inclusive definition was given a restrictive meaning. As observed by Wanchoo, J. in *Vanguard Fire and General Insurance Co. Ltd., Madras vs. Fraser & Ross* AIR 1960 SC 971, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. No doubt, because of the inclusive definition the meaning of the expression 'unfair trade practice' goes beyond the specific clauses mentioned in Section 36A, but that does not mean that the meaning will go beyond the very object of Section 36A.

30. In view of the above discussion, we are of the opinion that the impugned judgment and order dated 29.11.2005 passed by the MRTP Commission cannot be sustained and it is hereby set aside. The appeals are allowed. There shall be no order as to costs.

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C.A.No.2461 of 2006

(Altamas Kabir J.)

29.9.2008

### **JUDGMENT**

**ALTAMAS KABIR, J.**

1. Having had an opportunity of going through the draft judgment prepared by my learned brother, while I generally agree with the same, I would like to add a few words of my own with regard to the interpretation of Section 36-A of the Monopolies and Restrictive Trade Practices Act, 1969, (hereinafter referred to as 'the 1969 Act') which has been introduced in the Act by way of amendment in 1984 and further amendment in 1991.

2. As was submitted by Mr. A.N. Haksar, learned Senior Advocate for the appellant, the 1969 Act, as originally enacted, lacked definition of the term 'unfair trade practice'. While 'trade practice' was defined in Section 2(u) of the original enactment in the following terms:

"2. Definitions-In this Act, unless the context otherwise requires,- (u) "trade practice" means any practice relating to the carrying on of any trade, and includes -

(i) Anything done by any person which controls or affects the price charge by, or the method of trading of, any trader or any class of traders.

(ii) A single or isolated action of any person in relation to any trade." the term 'restrictive trade practice' was also defined in Section 2(o) in the following terms:

"2. Definitions-In this Act, unless the context otherwise requires,-

(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;

(iii) "Retailer," in relation to the sale of any goods, includes every person other than a wholesaler, who sells the goods to any other person, and in respect of the sale of goods by a wholesaler, to any person for any purpose other than re- sale, includes that wholesaler."

3. The expression "unfair trade practice" was not defined in the 1969 Act, as originally enacted. The said defining was removed by the amendment effected in 1984 by introducing Section 36-A which has been fully reproduced by my learned brother in his judgment. In paragraph 18 of the judgment my learned brother has formulated the following question:

"The legal question involved in the first submission is whether a party can be held guilty of unfair trade practice as referred to in Section 36A of the MRTP Act, although he did not supply any goods at all."

4. My learned brother has interpreted the provisions of Section 36-A of the 1969 Act as amended in the context of the question formulated by him. After having analysed the object and reasons for the enactment of the 1969 Act, my learned brother has indicated that the very object of the 1991 Amendment was to prevent a person from doing certain acts such as publishing false or misleading advertisements, or false representations, claiming that the goods sold are of a certain standard or have certain qualities, which, in fact, they do not possess. My learned brother, therefore, was of the

view that the Amendment had nothing to do in a situation where goods were not sold at all. While also observing that by the 1991 amendment Section 36-A was given an inclusive and not an exhaustive definition of unfair trade practice, my learned brother was also of the opinion that the principles of ejusdem generis and noscitur a sociis will apply to Section 36-A as amended in 1991 and applying the said principles the High Court was of the opinion that Section 36-A would not apply in a situation where goods are not sold at all.

5. The said view has been reiterated throughout the latter part of my learned brother's judgment, but I am of the view that such an interpretation is too rigid and situations may arise, which though falling under the wider concept of unfair trade practice, may not strictly be covered by Section 36-A of the 1969 Act. In my view, there may be situations where a promise to supply a particular good, which the supplier knew that he was in no position to supply, with a motive of promoting of some other model, as has happened in the instant case, could occur. In such a case a customer may be forced to obtain the same material from some other party and suffer losses in the process. In my view, even without actual sale of goods, such an act on the part of the supplier could also amount to 'unfair trade practice' and Section 36-A cannot in absolute terms be said not to apply to a situation where goods may not have been sold at all. In fact, such a situation may also be covered even by the provisions of Sub-clause (ii) or (vi) of sub-section (1) of Section 36-A of the above Act.

6. I, however, agree with my learned brother that the judgment of the MRTP Commission cannot be sustained and is required to be set aside. I would, therefore, also allow the appeal, but without any order as to costs.