

COMPETITION COMMISSION OF INDIA

18.3.2010

Case No.08/2010

Shri Sanwar Mal Agarwal,
Prop.Jupiter Industries,
B-67 (B-1), Marudhar Industrial Area,
2nd Phase, Basni, Jodhpur (Rajasthan),
Pin-342005

... Informant

1. The Punjab National Bank,
Head Office 7, Bhikhaji Cama Place,
New Delhi-110066.
2. Punjab National Bank,
Branch at Ratanda Colony,
Jodhpur, Rajasthan.

... Opposite Parties

ORDER UNDER SECTION 26(2) OF COMPETITION ACT 2002

1. This information has been filed under section 19 of the Competition Act against the opposite parties on 9.2.2010 alleging abuse of dominant position by his banker, the Punjab National Bank, more specifically the branch at Ratanda Colony, Jodhpur by way of laxity in matters pertaining to Forward Markets in foreign exchange. In support of the application, the informant has filed material which is annexed in Vol.II of the record. Vide order dated 2.3.2010, the Commission directed the informant to explain and substantiate its case. In compliance to the notice of the Commission, Shri Sanjay Jhanwar, Advocate, appeared and argued the matter on behalf of the informant.

2. The relevant facts as culled out from the information and the material filed in support thereof, are being summarized as under :

- 2.1 The informant owns a small scale industrial undertaking which is engaged in the business of manufacturing and sale of steel utensils. It has been banking with the opposite party, Punjab National Bank (hereinafter referred to as PNB) for quite some years and PNB has granted various types of credit facilities to it. The bank is an authorized dealer of foreign exchange/foreign currencies and is entitled to deal in various foreign exchange products including the forward, option and derivative transactions.

- 2.2 The informant and PNB entered into several derivative transactions in the year 2007 against the export orders of the informant to hedge the risk of foreign exchange rate fluctuation. The maturity of these transactions was contracted as per the expected date of realization of export proceeds.
- 2.3 In the year 2008, the informant had to cancel various export orders on account of sudden levy of export duty by the Government of India and consequently informant required the premature cancellation of the derivative transaction. In premature cancellation the informant incurred some losses due to the adverse (upward) movement of US Dollar prices from July, 2008 onwards on account of the difference between USD price at the time of booking and at the time of such premature cancellation of forward contract. Therefore, the informant formally approached the Banker with the restructuring proposal to fund/finance the loss of Rs.1.40 crores arising out of such premature cancellation as per the prevailing banking guidelines during August, 2008.
- 2.4 The bank took substantial time for a decision and arbitrarily rejected the proposal on 1.10.2008 stating that the derivative losses are not related to the business of the informant and are also not on account of business activities of the informant. On rejection of the proposal the informant approached higher officers of bank and accordingly a term loan of Rs.625 lakhs was sanctioned in December, 2008 but by now, due to shoot up in the USD prices, the loss of Rs.1.40 crores escalated to Rs.10.25 crores in December, 2008.
- 2.5 The informant again approached PNB seeking compensation alleging that the losses increased due to inordinate delay on the part of PNB in sanctioning the restructuring proposal of informant. The informant submitted that the PNB is under obligation to compensate his losses under the policy of PNB as well as under RBI guidelines. The informant has alleged that PNB by abusing its dominant position not only rejected the informant's claim for compensation but also debited the losses to his account and declared his business unit as Non Performing Asset (NPA) and has declared informant's unit as sick.

3. On the basis of the above allegations the informant has alleged that the PNB has violated the provisions of section 4(1) and 4(2)(b) to (e) of the Competition Act, 2002 abusing its dominant position.

4. The informant has prayed for the following reliefs :-

- 4.1 To direct PNB to compensate the informant with an amount equivalent to the excess derivative losses exceeding Rs.1.40

crores along with interest thereon suffered by the informant on account of cancellation of derivative transactions due to failure in providing requisite services.

- 4.2 To direct PNB to compensate the informant for the business losses and other consequences suffered by the informant.
- 4.3 To direct PNB to compensate the informant for the cost of legal proceedings before the Competition Commission of India.
- 4.4 To direct PNB to compensate the informant with the estimated business loss of about Rs. 5 crores on account of curtailing its regular case credit limit by way of utilizing the same in payment of loss arising on cancellation on derivate transactions.

5. The informant has also sought relief under section 33 of the Competition Act and has prayed that the operation of demand letter dated 1.2.2010 may be stayed and PNB be directed to refrain from initiating any kind of recovery proceedings against him till the final disposal of the information.

6. The Commission has considered the material placed on the record and also the oral submissions made by the counsel on behalf of the informant.

7. At the very outset, it is noted that the alleged infringement of section 4 of the Competition Act by PNB has been indicated by the informant in a very cryptic and laconic manner. No concrete material has been placed by the informant before the Commission in order to enable it to infer that PNB is in a dominant position and any delay on its part to carry out the instructions of the informant amounted to abuse of dominance. The delay on the part of the opposite party in providing banking cover is alleged to have affected the informant with adverse financial consequences as the PNB failed to take decisions either regarding extending the credit limit or in cancelling the derivative future transactions entered into by the informant within a reasonable time frame. The unconscionable delay on the part of the PNB to the detriment of the informant by itself can not, however, lead to the conclusion that it has violated section 4 of the Act relating to the abuse of dominance. Such actions on the part of PNB may amount to deficiency in services but that is not equal to abuse of dominant position. Element of abuse of dominant position definitely stands at a higher and onerous position than the deficiency in services. For establishing the contravention of section 4 of the Competition Act, the informant is not only required to show or establish by reliable material or data that PNB was enjoying the dominant position in the relevant market but also that it has abused that position by indulging into acts or practices enumerated under section 4(a) to (e). In absence of any cogent material, only assertion of such abuse will not bring the action of the PNB within the purview of the infringement of said section.

8. The matter can be examined from a different angle also. As per the averments made in the information, the matter related to the transactions which arose from July-December, 2008. In any case, the period of cause of action cannot be stretched beyond the maturity of derivatives. As per submissions made on behalf of the informant, the bank accepted his restructuring proposal to finance its losses arising on account of cancellation of derivative transactions vide its letter dated 26/27th December, 2008. It is thus clear that the period when the cause of action arose is much prior to the date of coming into force of the relevant provisions of the Act i.e. 20.5.2009.

9. On going through the reliefs sought in para D of the information, it is found that main reliefs prayed are for awarding compensation to the informant for the excessive derivative losses, compensation for business losses, compensation for curtailing his regular cash credit limits and compensation of expenses incurred in the legal proceedings. The relief for seeking compensation is not maintainable before the Commission under the Competition Act. On this basis also, the information is not maintainable.

10. In view of the above, the information as filed before the Commission is not maintainable. On merits also, the informant has failed to establish the contravention of section 4 of the Competition Act by PNB. Therefore, the Commission is of the opinion that the informant has not been able to make out a prima facie case in support of the allegations leveled against the opposite party in the information. The necessary corollary to this finding is that there is no need to make reference to the Director General for conducting investigation into this matter under section 26(2) of the Act and the proceedings relating to this matter deserve to be closed.

11. In view of the above conclusion the present matter is hereby closed under section 26(2) of the Act.

12. As the informant has failed to establish a prima facie case the question of granting any interim relief does not arise. This prayer is also declined accordingly. Secretary is directed to inform the informant.

Sd/ -
Member (G)

Sd/ -
Member (R)

Sd/ -
Member (P)

Sd/ -
Member (GG)

Sd/ -
Member (AG)

Sd/ -
Member (T)

Sd/ -
Chairperson