COMPETITION COMMISSION OF INDIA

Case No. 01 of 2010

M/s GKB Hi Tech Lenses Pvt. Ltd. : Informant

Against

M/s Transitions Optical India Pvt. Ltd. : Opposite Party

Date of Order: 16.5.2012

As per R. Prasad (separate dissenting order)

Order under Section 27 of the Competition Act, 2002

I am not in agreement with the majority order in case of M/s GKB Hi-Tech Lenses Pvt. Ltd. In fact, I am in agreement with the orders passed by Hon’ble Member Shri M. L. Tayal, CCI. The facts of the case have been mentioned in that order and there is no need to discuss the facts again. Though the said order dealt with every issue but found no contravention of provisions of section 4(2)(a)(i) and 4(2)(c) of the Competition Act, 2002. However, according to my view one of the acts of the Opposite Party also attracts the provisions of Section 4(2)(a)(i) and 4(2)(c) of the Act. There are certain other issues which need to be considered along with the above mentioned one.

2. In the majority order, great reliance has been placed on the SWV report which was submitted before the Commission during the course of hearing. Confidentiality was claimed at the time of the hearing and arguments were advanced in the absence of the informant. The informant had no opportunity to examine the details so submitted and it amounts to a denial of natural justice. The Commission was not entitled to accept this evidence / material as it was not produced before the D.G.
The Commission if it wanted to take this material it had to record the reasons in writing. This has not been done and Regulation 43(1) has been violated. Even Regulation 43(4) has also been violated as the material was not furnished to the informant. Regulation 43 is reproduced as under

(1) The parties to the proceedings shall not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General during investigation under Section 26 or sub-section 1(A) of Section 29 of the Act, but if the Commission requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Director General has not given sufficient opportunity to the party to adduce evidence, the Commission, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

(2) Such document may be produced or such witness examined or such evidence adduced either before the Commission or before such authority as the Commission may direct.

(3) If the document is directed to be produced or witness examined or evidence adduced before any authority, he or she shall comply with the direction of the Commission and after compliance send the document, the record of the deposition of the witness or the record of the evidence adduced, to the Commission.

(4) Additional evidence/document shall be made available by the Commission to the parties to the proceedings other than the party adducing the evidence and they may be afforded an opportunity to rebut the contents of the said additional evidence.
Further the SWV report is erroneous as the imports of the informant of the goods purchased from Transitions in Singapore have not been accounted for. Further the sources from which the data has been taken has not been furnished. The report is therefore unreliable and its authenticity has not been tested. In any case as the Commission has not recorded any reason for admitting this material, no cognisance of this material can be taken. Otherwise the action of the Commission would be vitiated and illegal. In any case, the other details had been submitted by Transitions India and on the basis of these facts, dominance of transitions India in the PPL market in India is established. This has been dealt in the order of Shri Tayal.

3. One of the allegations of the informant was that it was obligated to sell the product of Transitions India on an exclusive basis and was not allowed to sell similar product of other manufacturers. It may be seen from the “Acclimates Lenses Purchase and Sale Agreement” entered into between the parent company of Opposite Party and the informant that “Customer agrees, on behalf of itself and its Affiliates, that it will discontinue sales in the Territory of photo chromatic lenses of other manufacturers, if any”.

4. It is pertinent here to state the findings of the DG w.r.t ‘Acclimates agreement’. DG has stated that the terms and conditions of the business agreement of the other caster partners i.e. Essilor India and Hoya India provided by Opposite Party were found to be in conformity with each other i.e. agreements of the three caster partners found to contain similar clauses.

5. During the course of investigation, it was noted by the DG that M/s Essilor India and M/s Hoya India exclusively dealt for the Opposite Party. The said allegation of the informant has also been supported by an email from the Opposite Party to informant wherein it was forcing or restricting GKB from selling or making the Sunglasses available to the two Mumbai
based dealers i.e. Eye Care and Sunayan. Accordingly, DG concluded that the Opposite Party tried to prevent or restrict its caster partners from dealing in the PPL of other competitive companies.

6. The Opposite Party in its submission on the DG report has stated that it has never insisted on exclusivity with GKB, Essilor India and/or Hoya Optical India. It is submitted that this clause has never been enforced against GKB either by the Opposite Party or TOI (Transitions Optical Inc.)

7. The Opposite party has been found dominant by the DG (Investigation) as well as in the order of Hon’ble Member, M. L. Tayal and I agree with the investigation report and thus there is no need to re-establish that fact again. On the perusal of the relevant “agreement” attached with the DG report, there is no doubt that such restrictive term was there in the agreement and continued even after the notification of the section 3 & 4 of the Competition Act, 2002 by the Government. The incorporation of such type of restriction shows the intent of the Opposite party of limiting the competition and has the effect of preventing its caster partners from dealing in the PPL of other competitive brands. Such conduct by a dominant enterprise no doubt has the effect of restriction / limiting the competition in the market i.e. has caused adverse effect on competition e.g. creation of barriers to new entrants in the markets; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumer; promotion of technical, scientific and economic development by means of production or distribution of goods. This practice of introducing exclusivity clause thus violates the provision of section 4(2)(c) of the Competition Act, 2002 i.e. denial of market access.

8. The arguments of the Opposite Party that it had not enforced such term / condition, has no force as DG has found that the caster partners (M/s Essilor India and M/s Hoya India) exclusively dealt for the Opposite
Party only. In this regard, the opposite party had also put forward that the informant had sold lenses of other manufacturers who were the OP’s competitors. This constitutes imposition of unfair condition by the OP in accordance with section 4(2) (a) (i) of the Competition Act, 2002.

9. It is relevant to quote the words in the judgment Supreme Court in case Mahindra & Mahindra Vs. Union of India (UOI) and Anr [{1979} 49CompCas419 (SC)] "Where such restraint produces or is reasonably likely to produce the prohibited statutory effect-and that would depend on the various considerations referred to by us earlier-it would clearly constitute a restrictive trade practice and the clause would be bad. In such a case it would be no answer to say that the clause is not being enforced by the manufacturer or supplier. The very presence of the clause would have a restraining influence on the dealer, for the dealer would be expected to carry out his obligations under the clause and he would not know that the clause is not going to be enforced against him”.

10. Also in United Shoe Machinery Corporation v. United States 258 U.S. 708: 66 L. ed. 451 where the question was whether the restrictive-use, exclusive-use and additional-machinery clauses in certain lease agreements of shoe-machinery were struck by the provisions of Section 3 of the Clayton Act: "The power to enforce them", that is, the impugned clauses "is omnipresent and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor, in many instances, forbore to enforce these provisions, does not make them any less agreements within the condemnation of the Clayton Act”.

11. It is pertinent to mention here that conduct of entering into exclusive arrangements of the Transitions Optical Inc. (TOI, the parent company of the Opposite Party) was considered as an anti-competitive practice to maintain its monopoly in the market by the Federal Trade Commission of the United States (FTC). Though an investigation was
conducted and a show cause given, Transition Optical Inc. settled the case with the FTC.

12. Another issue which needs mention and has not been discussed in both majority as well as in Mr. Tayal’s Order is about reason for Transition’s dominance in the relevant market. It is discussed both in the DG’s report as well as in various submissions of the Informant and Transition that Transition has been undertaking the ‘imbibition process’ and ‘Trans bonding process’ for making the lenses photochromic. Both these processes are ‘proprietary technologies’ of the Transition and preferred over the others. DG in its report has concluded that Transition abuses its dominant position as it possesses the proprietary photochromic treatment technology. Though, the other proprietary processes have also been in use but as given in the DG report, the other players are not actively operating in the market e.g. Hoya etc. The reason for this has not been adequately dealt with in both the orders. But it proves that Transition had a technology which was better than that of the other operators in the market. To conserve and preserve this technology Transition had only five processing factories all over the world. But the business model followed by Transition was different from that of other processing units. Transition used to take the lenses as sale from its caster partners and this manner the proprietary rights of the caster partners were the lenses got extinguished. After the processing the lenses were sold to the caster partners. The caster partners such as Hoya and Essilor used to receive the processed products at Bangalore and a credit of 60 days was allowed to them. In the case of the informant the products were delivered by the Transitions at Singapore. The customs duty on the lenses of 90 days was allowed to the informant.

13. Another issue is that of discrimination against the informant. Essilor India Ltd. is a 100% subsidiary of Essilor International, an European Company. Essilor International with PPG Inv., another foreign company have formed two joint ventures having 49% and 51% phases
respectively. These joint ventures are known as Transition Optical Inc. and Transition Holdings BV, a Dutch Company. Transitions India is a 100% subsidiary of Transitions Optical Inc. This clearly shows that Essilor India and Transitions India come from a common percentage. Thus there was a tendency to discriminate between Essilor India and the other caster partners. This is clear from the order of Shri Tayal. Further in order to control the market in the downstream sector, on a pretext of non-payment which has been disputed by the informant, Transitions India cancelled the arrangement with the informant. This is the culmination of the effort to discriminate against the informant. In fact, the exit of the informant gives Essilor India the entire downstream market in the PPL market.

14. Though Transitions India denies that it did not stop any of the caster partners from exporting their goods purchased from Transitions, during the course of the hearing it was conceded that the caster partners were prevented from exporting the goods. The reasons furnished were that the goods of Transitions were costlier in Europe and cheaper in India and for this reason Transitions stopped the informant from the exporting its goods to Europe. This is again a discriminatory practice carried out by Transitions. Further the lenses in question were the proprietary goods of the caster partners and the restriction of Transitions group to restrict the exports to Europe was essentially due to the technology which Transitions possessed. This certainly an abuse of dominance.

15. Next issue to be discussed is the power of the Commission under Section 26 of the Competition Act, 2002. When information is furnished to the Commission and the Commission finds that there was no case of competition then the Commission may not take cognizance of the same and pass an order under Section 26(2) of the Competition Act dismissing the complaint. There can be cases where the Commission on the basis of information came to a conclusion that a case of anticompetitive behaviour was made out and therefore under Section 26(1) it can order the Director
General to investigate the case. Therefore whenever such a direction is issued, the Commission had formed a prima facie belief that competition issues are involved. The DG thereafter submits an investigation report to the Commission under Section 26(3) of the Competition Act. In view of Section 26(4) of the Act the Commission is required to forward a copy of the report to the parties concerned. If the Director General had recommended that he found no contravention of the provision of the Competition Act then after hearing the objections of the Central government or the State Government or the parties concerned the Commission comes to finding that there was no case then it can close the matter and pass such orders under Section 26(6) of the Competition Act. If after considering the objections and suggestions of the concerned parties where the DG had found no contravention, the Commission feels that further enquiries were required then it can either carry out enquiries on its own or ask the Director General to further investigate the case. This is in accordance with Section 26(7) of the Competition Act. If contravention of the provision of the Competition Act are found by the Director General, then the Commission is required to carry out further inquiries regarding the contravention in accordance with the provisions of the Act. This is as per the provisions of Section 26(8) of the Competition Act. Section 27 talks about the orders to be passed by the Commission after an inquiry under Section 26 has been carried out. Section 27 reads as follows:

Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, 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:

(a) Direct any enterprise or association of enterprises or person or association of persons as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and
not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) Impose such penalty, as it may deem fit which shall be not more that ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse;

(c) [Omitted by Competition (Amendment) Act, 2007]

(d) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission.

(e) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) [Omitted by Competition (Amendment) Act, 2007]

(g) Pass such other [order or issue such directions] as it may deem fit.

16. A reading of Section 27 would show that an order under this Section can be passed only when there was a contravention of Section 3 or Section 4 of the Competition Act. The question is as to what would happen if the Commission finds that there no case is made out after the DG finds a contravention. Such a situation is not provided in the Act. This is due to the fact that once the Commission had formed a prima facie opinion under Section 26(1) of the Competition Act then it cannot revisit its opinion again and drop the case. If the DG’s investigation has confirmed the prima facie view of the Commission by finding contravention of the Act then the Commission cannot close the case in view of its prima facie view. For dropping a case provisions have to be provided in law. If such a provision does not exist then the Commission cannot import the provision in the Act. Therefore after the Commission has formed the prima facie view and the DG has found contravention then only view left to the Commission is to pass an order under Section 27 of
the Competition Act. Under Section 27 of the Act, an order can only be passed when a contravention is established. Therefore dropping of case after DG has found a contravention is not authorised under the Competition Act of 2002. This proposition is further strengthened by the fact that appeals are provided against orders under Sections 26(2) and 26(6) of the Act. An order of dropping is an order and such an order cannot be passed in the absence of provisions. Further an order of non admission of a case or closure of case after the DG finds no contravention can be appealed against, it does not appear to be logical to hold that no appeal would be provided against an order of closure where the Commission had formed a prima facie view under Section 26(1) of the Act and the DG had found contravention. The Legislature had not envisaged such a situation as in such a case the logical course would be an order under Section 27 of the Act. Incidentally, no order of closure can be passed under Section 27 of the Act.

17. To sum up I agree with the Shri Tayal that there was a violation of Section 4 of the Competition Act as detailed in that order. There were also contravention of Section 4(2)(a)(i) and 4(2)(c) of the Competition Act due to the term contained in the impugned agreement entered in by Opposite Party with the informant.

18. Further in view of the provisions of section 48(1) of the Competition Act, the Commission has to proceed against the directors of the opposite party. These would be separate proceedings which the Commission needs to initiate after following the necessary procedure.

19. The secretary is directed to serve this order on the concerned parties.

Certified True Copy

(R. Prasad)
Member, CCI