

BEFORE THE
COMPETITION COMMISSION OF INDIA
CASE NO. 07/2010
DATE OF DECISION: ___ 3.2011

Informant: Mr Vijay Gupta

Opposite Parties:

1. M/s. Paper Merchants Association, Delhi
2. Ms. Shashi Jain (Prop.M/s Parasnath Associates)
3. Mr. Ramesh Jaina, arbitrator -----

Order

The informant, Mr. Vijay Gupta has filed the present information through his counsel Dr. A.N. Agarwala, Advocate on 11.02.2010 against M/s Paper Merchants Association, Delhi (PMAD), Ms. Shashi Jain, Prop. M/s. Parasnath Associates and Mr. Ramesh Jaina, arbitrator alleging that they have acted in a manner which violates section 3(1), 3(3) and section 4(1) of the Competition Act, 2002 (the Act). The matrix of facts, issues arising from them and decisions thereon are dealt with in detail in this order.

1. FACTS OF THE CASE

- 1.1 The informant, Mr. Vijay Gupta is one of the partners of M/s Triveni Adhesive Tapes and has been in business transactions with Ms. Shashi Jain, Prop. M/s. Parasnath Associates who is a member of the Paper Merchants

Association, Delhi. The informant is not a member of the said PMAD.

1.2 PMAD is an association of persons and firms, registered under Societies Registration Act. Its members are persons engaged in and related to paper trade, commerce and industry and are governed by the constitution and regulations of the association.

1.3 Subsequent to a dispute over non-payment of certain bills in the course of their business transactions between Mr. Vijay Gupta and Ms. Shashi Jain, one Mr. Ramesh Jaina was appointed the Sole arbitrator by the PMAD in terms of the constitution and regulations of the PMAD. This information has been filed in context of some terms and conditions in the regulation of the PMAD, which are allegedly creating anti-competitive effects.

1.4 As per the informant, Ms. Shashi Jain referred the dispute for arbitration before the said PMAD on the plea that she is a member of the said association and one of the regulations of the association stipulated that the

sale bills of all members must clearly mention the terms and conditions, as approved by the association, for resolution of any dispute relating to any item supplied through those sale bills. According to those conditions printed on the sale bills, the buyer has to resolve any dispute only through the arbitrator appointed by the executive committee of the PMAD. Further, the award given by the arbitrator shall be binding upon the parties. The informant submits that the sale bill itself is not an agreement and/or contract between the parties and the matter unilaterally printed on the sale bill cannot be termed to be an arbitration agreement in the eyes of law.

1.5 The informant further submits that the said PMAD has no authority to appoint an arbitrator against a person who is neither a member of the said association nor had ever consented to the appointment of the said arbitrator by the association.

1.6 The informant further submits that the PMAD and the arbitrator are not empowered to enforce illegal and

arbitrary agreements framed under the constitution and regulations of PMAD on non-members who are not governed by their constitution and regulations.

1.7 The informant stated that the PMAD had issued an award dated 14.12.2009 against the informant wherein members of the association were directed not to have any dealings with the informant.

1.8 The informant has prayed for the following reliefs:-

- (i). To order an enquiry and initiate action against the opposite parties no.1 and 2 for the abuse of their dominant position and for framing anti-competitive agreements
- (ii). To strike down Rules 1 & 3 (Rules for Arbitration Cases) and Rule 22(a) and (b) (Dispute and Quida Committee) as laid down in the *Constitution and Regulations* of opposite party no.1.
- (iii). To restrain the opposite party no.1 & 2 from taking any action under clause (a) and (b) of Rule 22 with respect to Dispute and Quida Committee as laid down in the *Constitution and Regulation* of opposite party no.1.

- (iv). To impose penalty upon the opposite parties as per the provisions of law.
- (v). To award cost of the complaint/information to the informant.
- (vi). To provide any other relief(s) that may be deemed fit and proper in the facts and circumstances of the case.

1.9 The informant had also filed application under section 33 of the Act seeking following reliefs:

- (i).To restrain opposite party no. 1 not to circulate to its members the copy of award /order dated 14.12.2009 passed by opposite party no.2.
- (ii).To restrain the opposite party no.1 from notifying its members not to have any dealing with the informant till the disposal of the information.
- (iii).To pass any other or further orders as may be deemed fit and proper in the circumstances of the case.

1.10 The informant has filed following documents in support of contentions raised by it in the information:-

- (i) Copy of *Constitution and Regulations* (as amended upto 06.12.2003) of PMAD
- (ii) Statement of account of opposite party no.3
- (iii) Notice of arbitrator and copy of claim
- (iv) Informant's reply dated 23.06.2009 to notice of arbitrator
- (v) Legal notice of the informant to the opposite parties dated 09.07.2009
- (vi) Impugned Arbitration Award dated 14.12.2009

1.11 The Commission took cognizance of the matter under section 19 of the Competition Act, 2002 and upon forming an opinion under section 26(1) of the Act that there exists a prima facie case, it referred the matter to the Director General for investigation vide its order dated 18.03.2010.

1.12 The Commission vide its order dated 08.04.2010 under section 33 of the Act disposed of the application of the informant for interim relief by restraining the opposite

party no.1 - PMAD from issuing any notice to its members to prohibit any business dealings with the informant till the next date of hearing.

2. Findings of the Director General

2.1 The Director General (DG) after receiving the direction from the Commission had the matter investigated through the Additional Director General.

2.2 After completion of investigation the DG submitted his report to the Commission on 03.09.2010.

Summary of replies filed before the DG:-

2.3 The opposite party no.1 - PMAD and opposite party no.2 - the arbitrator submitted their replies before the DG. Their contentions are summarized as below:

- i. The dispute as disclosed by the informant does not fall within the scope of the Competition Act, 2002.
- ii. The PMAD is a voluntary organization of paper traders and its affairs are governed by its registered constitution and regulations. It is not a commercial organization which is apparent from its aims and objects contained in its constitution or bylaws.
- iii. The arbitration award was given for non- payment against bills by virtue of the “arbitration clause” printed on the said bills against which the informant had purchased the material. The arbitration proceedings are in accordance with the provisions of the Arbitration and Conciliation Act and the informant had deliberately failed to appear before the arbitrator.
- iv. The award dated 14.12.2009 passed by the arbitrator is not illegal, arbitrary or without jurisdiction; neither it has been passed by abusing dominant position. There is no case of irreparable loss or injury to the informant.

- v. The informant has already filed objections against the aforesaid award in the appropriate forum.
- vi. The PMAD and Mr. Ramesh Jaina have not issued or circulated any notice notifying its members not to have business transactions with the informant.

2.4 The opposite party no.3 - Ms. Shashi Jain, Prop. M/s. Parasnath Associates in the reply filed before the DG submitted as below:

- i. The present information is not maintainable as the informant has already given himself to the appropriate jurisdiction by filing objections against the alleged ex parte award.
- ii. In terms of various judgments by Hon'ble Supreme Court and various High Courts it is an established fact that the goods supplied against accepted terms and conditions printed on the bills amounts to a written contract between the parties.

iii. The PMAD is authorized to consider all issues connected with the paper trade, commerce and industry and initiate action against its members as well as outsiders, particularly in those cases which are referred to the arbitrator duly appointed by the PMAD.

2.5 DG's findings:

The findings in the DG report can be summarized as under:

(A) Determination of dominance and its abuse

2.5.1 Being a non commercial organization, PMAD cannot be considered an enterprise within the meaning of section 2(h) of the Act and also not a group within the meaning of section 4 read with section 5 of the Act.

2.5.2 Mr. Ramesh Jaina, arbitrator is one of the 1400 odd members of the PMAD and he does not deal in the relevant market of BOPP films and adhesive tapes. Thus he does not fall within the definition of section 4 of the act.

2.5.3 Ms. Shashi Jain. Prop. of Parasnath Associates is one of the 1400 odd traders of PMAD. There are other members of PMAD who deal in BOPP films. There are also a number of other enterprises who deal in BOPP films but are not the member of the PMAD. The informant in his statement recorded before the DG office has also stated that he is getting supplies from other manufacturers directly. Thus Ms. Shashi Jain can also not be said to be a dominant player in BOPP films. She is also not a dominant player in the adhesive tape market as she mainly deals in paper and paper boards. As per definition of dominance provided in explanation (a) to section 4 read with section 19(4), Ms. Shashi Jain cannot be said to be a dominant player in the market of adhesive tapes or BOPP films.

2.5.4 Based upon above, it is obvious that dominance of opposite parties has not been found. The allegations against them regarding abuse of their position of dominance remain unsubstantiated within the meaning

of dominance and abuse thereof as has been prescribed in the Act.

2.5.5 The questions regarding the legality of arbitration proceedings shall be the subject of the decision by the appropriate forum i.e. ADJ Civil Court, Tis Hazari which is again open to appeal arising out of the order.

(B) Determination of infringement of other provisions of the Act

2.5.6 A plain reading of the clauses in the *Constitution and Regulations* of the PMAD objected to by the informant suggests that they deal with settlement of disputes and arbitration in respect of all disputes including non-payment between the members and outsiders. All the above said clauses may not raise anti competitive concern. However, rules for arbitration cases (in part XXX of the *Constitution and Regulations*), conditions for arbitration to be printed on sale bill based on these rules (clause 2 of part XXX) and clause 22 of part XVI of the *Constitution and Regulations* regarding powers of

their executive committee and Quida committee appear to be restrictive.

2.5.7 Clause 22 of part XVI of *Constitution and Regulations* of the PMAD empowers the Quida Committee to notify all members not to have any dealing with such persons who fail to comply with any directions or instructions of the executive committee. This is in violation of section 3(3)(b) of the Act since it is tantamount to restricting the supply of material in the market through collective intent and decision. Such arbitrary and unilateral imposition of collective decision of the association invokes presumption of appreciable adverse effect on competition under section 3 (3).

2.5.8 When seen under the lens of section 19 (3) of the Act these conditions/clauses do not appear to attract any efficiency defence. Similarly, these conditions/clauses do not favour intermediate consumers or the end consumers either.

2.5.9 The PMAD has also got powers to punish the members like imposition of monetary penalty and

suspension/expulsion from the membership. Thus, it has authority to regulate entry and exit. Clause 22 of rules/regulations XVI of *Constitution and Regulations* of the PMAD appears to be anticompetitive and the association must not carry these or any such restrictive clauses in their regulations since they ultimately impede competition in the market.

Proceedings before the Commission

3. The DG report was forwarded to the parties for filing their reply / objections vide Commission's order dated 22.09.2010.

3.1 The opposite parties no.1 and 2 submitted their objections through their counsel Shri R.S. Chaggar, Advocate, on 08.10.2010 as summarized below:

(i).It was submitted that by virtue of the provisions relating to resolution of disputes through arbitration as

incorporated in its constitution/bye-laws, the PMAD neither seeks to give any unfair or undue advantage to its members nor it directly or indirectly imposes any unfair or discriminatory condition on any purchase, sale of goods or services including prices in purchase or sale, limit or restrict production of goods or provisions or market thereof nor denies market access to any individual or entity in any manner whatsoever and the same cannot by any stretch of imagination be considered as anticompetitive or having/causing any appreciable adverse effect on competition in paper trade.

(ii).Further, merely because the opposite party no.2 had conducted arbitration proceedings between the informant and the opposite party no.3 in accordance with provisions of Arbitration & Conciliation Act and passed an award dated 14.12.2009 in his quasi judicial capacity as arbitrator, it cannot be said that the opposite party no.2 was placed in a dominant position in any manner whatsoever vis a vis the informant and that

opposite party no.2 had directly or indirectly acted in any anticompetitive manner or had imposed any unfair or discriminatory condition on the informant or on any purchase, sale of goods or services including prices in purchase or sale, limit or restrict production of goods or provisions or market thereof or deny market access to the any individual or entity including the informant in any manner whatsoever.

(iii).It is a settled law that a separate arbitration agreement is not a “sine qua non” for existence of a valid, mutually agreed and binding contract for resolution of disputes through arbitration.

(iv).Informant has already challenged the aforesaid ex-parte award dated 14.12.2009 by way of filing objection/application under section 34 of the Arbitration & Conciliation Act in the appropriate forum i.e. a regular court. Since the matter is sub-judice before the Court, it would not be in the fitness of things to comment on merits of the case/dispute.

(v).Irrespective of the factual and legal position explained above, the PMA through its President has already made a statement during the course of investigation before the Id. Director General on 16.08.2010 that the PMA is ready and prepared to carry out necessary amendments or to delete Sub-Rule 2 of Rule XXX relating to “Rules for Arbitration cases” and Sub-Rule 22 of Rule 16 relating to Dispute and Qaida Committee in its Constitution/Bye-laws.

3.2 The opposite party no.3 – Ms. Shashi Jain filed objection to the DG report on 11.10.2010 through Shri Lokesh Kumar Agarwal, Advocate. Reiterating the reply filed before the DG, the opposite party no.3 submitted the following:

- i.The informant is guilty not only of *suppressio vari* but also of *suggestio falsi* as the petitioner has concealed various material facts from the Commission.
- ii.The information is not maintainable as the informant is trying to sail in two boats at the same time. At one place he has filed objection against the alleged *ex parte*

order passed by the arbitrator and on the other hand he has filed the present information.

iii. The informant is trying to confuse the Commission by putting a clever misinterpretation about the Constitution and Regulation of the PMAD by totally deviating the focus from the aims, motives and intentions behind incorporation of the PMAD.

4. ISSUES

On the basis of the contentions, DG's report, replies of the parties and the material on record the following issues, relevant for deciding the matter, emerge for determination:

1. Whether the Regulations and Constitution of Paper Merchant Association infringe the provisions of section 3?
2. Whether Paper Merchant Association is in dominant position in the context of section 4 of the Competition Act, 2002 and, if so, whether it has abused this position?

Determination of issue No.1

4.1 As discussed above in para 2.7.1 the DG report has pointed out certain rules/clauses of the *Constitution and Regulations* of PMAD, particularly clauses 1 and 2 of part XXX relating to rules of arbitration cases framed by the Executive Committee and clause 22 of part XVI, as restrictive and anticompetitive.

4.2 It may be pertinent to look at what exactly these controversial clauses of the *Constitution and Regulations* of PMAD are. They may be summarized as below:

Clause 22 of part XVI – This clause states that it is mandatory for all members and non-members (dealing with any member) to comply with any instructions and directions of the Executive Committee of PMAD. Otherwise, the defaulters would be reported to the “Quida Committee” (a disciplinary committee of PMAD) who may instruct all members of PMAD not to deal with the defaulter/s.

Clauses 1 and 2 of part XXX – *Clause 1* states that any dispute relating to non-payment of bills between members

or between a member and non-member shall be decided by an arbitrator appointed by PMAD and the Award of the arbitrator shall be binding on the parties.

Clause 2 states that the above condition shall be stamped or printed on any bill raised to a non-member, who shall be bound to the terms.

4.3 The import of the above clauses and their effect on players in the market has to be examined. Disputes over payment of bills are a common and inherent aspect of any business. They may occur due to defects in the goods supplied, disputes relating to the actual quantity supplied or the rates applied, delivery schedules, damage to goods in-transit or a host of other reasons. All such business disputes are essentially between buyers and sellers and must be resolved mutually. If any enterprise has a dispute with its customer, there are a number of legal recourses that may be resorted to. Threat to or boycott of the customer by all other sellers belonging to any association very clearly would be a joint decision taken by that association of enterprises and would amount to limiting

supply to the disputing buyer. Such threat or boycott would limit supply in the market in contravention of clause (b) of sub-section (3) of section 3 of the Competition Act, 2002. Section 3(3) of the Competition Act, 2002 treats such acts as something that is “presumed to have an appreciable adverse effect on competition”. *Clause 22 of part XVI* of the *Constitution and Regulations* of PMAD as discussed above, stipulates exactly such a collective boycott by a set of buyers/sellers in the event of a dispute – either amongst members or with a non-member.

4.4 There is no denying that dispute resolution can be done effectively and speedily through arbitration and conciliation rather than dragging matters to a civil court. The Arbitration and Conciliation Act, 1996 provides the legal framework for such arbitration. *Clauses 1 and 2 of part XXX* seeks to impose upon anyone who deals with members of PMAD as a buyer or seller the condition that the arbitrator shall be decided by PMAD and his decision shall be binding. If a member does not follow, he shall expose himself to the charge of not following of instructions of PMAD and to any

retaliatory/punitive measures that the “Quida Committee” of PMAD may take against him. Even if a member of the PMAD is willing to negotiate with the buyer on any other terms, that member is restricted from doing so as he too is bound to follow the diktat of the PMAD. Ignoring those clauses would, therefore, evoke punitive measures of the “Quida Committee” of PMAD and result in boycott of the concerned party by all the members of the PMAD. These clauses are indisputably an act of controlling supply in the market and are in contravention of clause (b) of sub-section (3) of section 3 of the Competition Act, 2002 and hence are presumed to have appreciable adverse effect on competition.

4.5 In this case, the informant clearly falls within the definition of a “consumer” provided in section 2(f) of the Competition Act. The above discussion shows how the impugned clauses of the *Constitution and Regulations* of PMAD put him (and other consumers like him) at a tremendous disadvantage when it comes to dealing with any member of the PMAD. The said clauses deprive

“consumers” of members of PMAD the normal rights that any buyer has in terms of ability to freely negotiate with the seller in the event of any dispute. Deprivation of such rights is a clear indicator of appreciable adverse effect on competition under section 3, in terms of section 19(3)(d) of the Act.

4.6 It is a fact that all associations have their own constitution, bye-laws and regulations to run the affairs of the association. These bye-laws and regulations etc. are binding upon the members of the association. To ensure the compliance of such regulations etc. appropriate deterrent clauses are often put in place. However, due care must always be taken by trade associations to ensure that their regulations do not restrict freedom of trade for its members or amount to joint decisions about controlling prices, supply or any aspect of trade in that market.

4.7 A bare reading of the abovementioned rules and clauses of *Constitution and Regulations* of PMAD indicates that though they may have been made to regulate the conduct of its members in the course of their business, its

impact would result into limiting and controlling of supply in the relevant market, in infringement of provisions of Section 3(3)(b) of the Act.

4.8 In this case the fact that anti-competitive clauses exist in the regulations of the PMAD is amply established through our discussion in paras 5.2 to 5.5 *supra*. Section 3(3) brings within the ambit of “presumed” anti-competitive agreements any action in concert or jointly taken decisions that may seek to limit or restrict supply in any market. All members of the PMAD are jointly and severally responsible for adopting the anti-competitive terms in their regulations. In effect, these regulations not only take away freedom of trade for the members of PMAD but blatantly make anti-competitive acts such as boycott, refusal to deal or denial of market access to disputing buyers as intrinsic part of the joint decisions of members of PMAD. It is further observed that sub section (1) of section 3 proscribes any agreement “which causes or is likely to cause” appreciable adverse effect on competition in India. Therefore, the aforesaid clauses in the regulations of the PMAD would fall within the

mischief of sub section (3) of section 3 of the Act *not only* if they are put into effect but the very existence of such clauses is against the very spirit of section 3 because they are *likely to* cause appreciable adverse effect on competition. Alluding to Greek mythology, the dreaded sword hung by a single horse hair above Damocles did not have to actually fall for him to be intimidated. The mere awareness of the sword hanging above his head was damaging enough.

4.9 However, this Commission is not in agreement with the observation of the DG that this contravention is established by the absence of factors mentioned under section 19(3)(d) to (e). Mere absence of factors given in section 19(3)(d), (e) or(f) in this case are not sufficient to establish appreciable adverse effect on competition in India. Essentially clauses (d)/(e)/(f) can be used for defense, whereas clauses (a),(b) and (c) are to be used for establishing offence. For example, there could be many cases which may not result into accrual of benefit to consumers or technical developments but are also not causing any effect on

competition i.e., they are competition neutral. What has to be seen is not the absence of “accrual of benefits to consumers” but obstruction to accrual of benefits to consumers for examining any adverse effect under clause (d) of section 19(3). Similarly, what has to be seen is hampering improvements in production or distribution of goods or hampering promotion of technical, scientific and economic development if clauses (e) or (f) of section 19(3) have to be examined.

4.10 The Opposite Parties have not rebutted either the existence of the aforementioned clauses or the inherent presumption that those clauses would result in harm to consumers like the informant or any other consumer/s of members of PMAD in terms of section 19(3) (d). The Opposite Parties have also not given any justifications under sub-sections (e) or (f) of section 19 of the Act that would mitigate the adverse effect of their regulations. Therefore, the infringement of provisions of section 3(3)(b) of the Act gets established in this case.

Determination of Issue No. 2

5.1 Mr. Vijay Gupta purchases BOPP film (Bi-axially Oriented Poly Propylene) from members of PMAD and after putting adhesive materials on the films sells it in the open market. The adhesive tapes are used for the purpose of packaging. Companies producing BOPP film are Flex Industries Ltd., Max India Ltd., Jindal Polyfilm Ltd., Cosmo Film Ltd. There are other BOPP film manufacturers/dealers in Delhi and other places in the country. Therefore, the relevant market in the present case would be the market of BOPP films and adhesive tapes made from BOPP films in the National Capital Region of Delhi, in view of the area of operation of PMAD as well as the product in which the Informant deals.

5.2 This Commission notes that Ms. Shashi Jain. Prop. of Parasnath Associates is one of the 1400 odd traders of

PMAD. There are other members of PMAD who deal in BOPP films. There are also a number of enterprises who deal in BOPP films but are not the member of the PMAD. The informant, in his statement recorded before the DG office, has also stated that he is getting supplies from other manufacturers directly. All these facts clearly show that applying the definition of dominance provide in explanation (a) to section 4 read with section 19(4), Ms. Shashi Jain cannot be considered to be a dominant player in the relevant market.

5.3 The same principles of determination of dominance under section 4 would apply to the Mr. Ramesh Jaina, the arbitrator appointed by the PMAD. Therefore, Mr. Jaina can also not be considered as dominant.

5.4 This Commission also observes that for the examination of the questionable action of PMAD as an association of enterprises in terms of the Competition Act, 2002, the determination of dominance of any of the opposite parties or of PMAD is in fact not relevant. Therefore, in this case, the Commission does not find it necessary to discuss

or comment upon the general observations of the DG regarding the concept of dominance.

Commission's findings and directions

6.1 It is pertinent to deal first with the contention of the Opposite Party that the case/dispute is *sub-judice* before the Court under section 34 of the Arbitration & Conciliation Act and hence it would not be in the fitness of things to comment on merits of the case/dispute. In this regard, reference is made to section 62 of the Competition Act, 2002 which provides that the provisions of the Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

6.2 From the foregoing analysis and taking into account the above determination of the issues, the Commission is of the considered opinion that clauses 1 and 2 of part XXX relating to "Rules for Arbitration Cases" framed by the Executive Committee and clause 22 of part XVI of the *Constitution and Regulation* of the Paper

of section 27. The ends of justice will be sufficiently served by the remedies provided below.

6.4 By the powers vested in under subsections (a), (d) and (e) of section 27 of the Competition Act, 2002 the opposite party no.1 is hereby directed to take steps to delete/suitably modify clauses 1 and 2 of part XXX relating to “Rules for Arbitration Cases” framed by the Executive Committee and clause 22 of part XVI of the *Constitution and Regulation* of the Paper Merchants Association, Delhi within 60 days of communication of this order and till then discontinue the observance of the said clauses. The opposite party no.1 is further directed to file the copy of the modified clauses within 90 days communication of this order, failing which appropriate action under the Act shall be taken against the opposite party no.1.

6.5 The Secretary is directed to communicate this order to the parties concerned. The matter shall be placed before the Commission for consideration after filing the modified clauses

by the opposite party No.1 within 90 days communication of this order.

Member (G)

Member (R)

Member (P)

Member (GG)

Member (AG)

Member (T)

Chairperson
